[redacted]

SPRAGGINS *v.* JEFFRIES.

5-856 287 S. W. 2d 576

Opinion delivered March 5, 1956.

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

No brief for appellee.

LEE SEAMSTER, Chief Justice. This appeal is from a judgment of the Saline Circuit Court dismissing appellants' complaint against the appellee for rent.

The parties entered into a sales contract January 15, 1953, and on April 27, 1954, the appellants notified the appellee, by letter, that he was behind with payments on the contract and unless the payments were brought up to date by May 15, 1954, the appellants would rescind the sales contract and collect rent from appellee. Appellee moved out and delivered possession of the premises to appellants on May 11, 1954.

The sole issue in this case is the legal effect of the following paragraph in the contract, to-wit:

"3. Time is the essence of this AGREEMENT, and if BUYER defaults in the payment of any installment of principal and interest for a period of 30 days, or fails to pay any taxes, assessments or insurance premiums when due, SELLER, at its option, may either declare the entire debt with interest due and payable, or rescind this AGREEMENT, and in the event of rescission all moneys paid by BUYER shall be taken and retained by SELLER, not as a penalty, but as rent of the property and the relation of the parties thereafter shall be that of landlord and tenant at the rental of $60.00 per month; and thereupon SELLER, after notice, may demand possession of the property, and BUYER agrees to surrender immediately *peacable* possession. No delay in the exercise of any of the options herein shall be construed as a waiver of such right, but same may be exercised at any subsequent time. Any notices required herein may be made by ordinary mail addressed to BUYER at Benton, Arkansas, unless SELLER be notified in writing of a subsequent change of address."

The appellants contend for a reversal of the judgment that they are entitled to collect rent at the rate of $60.00 per month from the date of the contract until appellee delivered possession of the premises. To maintain this position appellants cite, among other cases, the cases of *Thomas* v. *Johnston,* 78 Ark. 574, 95 S. W. 468; *Bunting* v. *Rollins,* 189 Ark. 12, 70 S. W. 2d 40; *Murphy* v. *Myar,* 95 Ark. 32, 128 S. W. 359. In the above cases the court properly construed the contracts under consideration in the respective cases.

The vital part of the contract under consideration reads as follows:

"* * * In the event of rescission all moneys paid by buyer shall be taken and retained by seller, not as a penalty, but as rent of the property and the relation of the parties thereafter shall be that of landlord and tenant at the rental of $60.00 per month; * * *."

Under the plain language of the contract the rental at $60.00 per month would be applicable after the rescis-

sion date set by appellants, as of May 15, 1954. The appellee moved from the premises before that date and would not be liable for rent.

Finding no error, the judgment is affirmed.

Justice J. S. HOLT not participating.

SHUFFIELD *v.* RANEY.

852 287 S. W. 2d 588

Opinion delivered March 5, 1956.

Bailey, Warren & Bullion, for appellant.

Rex W. Perkins, Neill Reed and *E. J. Ball,* for appellee.

J. SEABORN HOLT, Associate Justice. September 1, 1954, appellant, Dr. Joe F. Shuffield, filed the present suit "to remove cloud on title" to the following real estate: "The West 35 acres of even width, or all of the Southwest Quarter of the Southeast Quarter, except the East Half of the East Half of the East Half of said Southwest Quarter of Southeast Quarter of Section 13, Town-

ship 12 North, Range 9 West, 35 acres more or less with all appurtenances thereto belonging."

There is little if any dispute as to material facts. On January 6, 1953, appellees, Raneys, for valuable consideration executed a mortgage covering the above real estate and in addition "all fixtures and appliances now used and being a part of the drug business operated under the trade name of Griffin Drug Company, now owned by grantors as the same now located in the Cleburne County Bank Building, Heber Springs, Arkansas, except fixtures of Yarnell Ice Cream Company." This mortgage was given by the Raneys to secure a loan of $15,000 from Dr. Shuffield and was evidenced by a note of even date. There has been paid on the note $2,500.

March 18, 1954, the Raneys and Ira Fullerton, Trustee, entered into an agreement to dispose of the real estate herein involved, upon which Dr. Shuffield held a mortgage,—by means of a lottery. This agreement contained this recital: "Parties of the first part, being desirous of disposing of real estate hereinafter more fully described, to the lucky purchaser of a numbered ticket of tickets to be sold at one dollar per ticket as a chance on being the winner of the real estate more fully hereinafter described, and in furtherance of the desire of the parties of the first part to sell said tickets through the sponsorship of the Leonard Stark Post No. 3543, Veterans of Foreign Wars, Heber Springs, Arkansas as their sponsors, and whereas the sponsors of said sale, the Leonard Stark Post No. 3543, Veterans of Foreign Wars, is to receive five per cent on the sale of each and every ticket, and whereas other salesmen agreed upon and designated by the parties of the first part and the Trustee, Ira Fullerton, are to receive fifteen per cent on the sale of each ticket, and whereas the parties of the first part are to receive the remaining eighty per cent of each ticket sold, parties of the first part simultaneously with the execution of this agreement have delivered to the said Ira Fullerton, as Trustee for the winner of the lucky ticket, a warranty deed free of all incumbrances, (except that all

liens, mortgages or debts, if any, will be satisfied in full before August 1, 1954) to the following described real estate, located in Cleburne County, Arkansas, to-wit: . . . who in turn, as Trustee for the holder of the lucky ticket shall immediately upon the announcement of the holder of the lucky ticket at the drawing to be held at the Band Shell in Heber Springs, Arkansas, at the Annual Reunion on August 7, 1954, execute to said holder of the lucky ticket a trustee deed conveying the above described property." This agreement was signed by the Raneys and Fullerton, Trustee. On the same day (March 18, 1954) a deed was made by the Raneys to Fullerton, Trustee, containing this provision: "That we, Wayne Raney and Lois (or Loys) Raney, his wife, for and in consideration of one dollar and other considerations hereinafter stated and agreed upon, to us in hand paid by Ira Fullerton, Trustee, do hereby grant, bargain, sell and convey unto the said Ira Fullerton, Trustee for the holder of the lucky ticket as expressly understood by an agreement this day entered into by and between the grantors and the trustee herein, and unto his successors and assigns, the following described lands lying in the State of Arkansas and County of Cleburne, to-wit: . . ." (describing lands here involved).

Following the execution of these instruments, tickets, or chances, were sold for $1.00 each. A drawing was had August 7, 1954, and appellee, Walter Thomas, drew the lucky number, or ticket, and a deed was made to him by the Trustee, Ira Fullerton, which contained this provision: ". . . for and in consideration of one dollar and other considerations as expressed in said deed and contract, And, whereas Ira Fullerton acquired and holds the title to said lands as trustee without declaration, and it being the desired and expressed purpose by the grantors of said lands and property to the said trustee, and it being the purpose of this trust, that the winner or holder of what is known as the lucky ticket drawn from the sale of tickets and sponsored by the Leonard Stark Post No. 3543, Veterans of Foreign Wars, Heber Springs, Arkansas, have of and receive from the said Ira Fullerton, as

trustee, the lands hereinafter described, and that the terms thereof be entered and the conveyance as executed in conformity thereto, Now, therefore, I, Ira Fullerton, Trustee, do hereby declare and covenant that the title to the lands herein described was acquired for the purpose of conveying the same to the winner or holder of the lucky ticket in fee simple title, and for said purposes and none other whatever was the title to said lands acquired by me as such trustee. And, in consideration of the premises and of the trust reposed in me, I, Ira Fullerton, as trustee aforesaid, do hereby grant, bargain, sell and convey unto the said Walter Thomas, and unto his or her heirs and assigns forever, the following real estate, lying in the County of Cleburne, and State of Arkansas, to-wit: . . ." (describing land here involved).

When the above agreement and two deeds were executed Dr. Shuffield's mortgage had not been recorded.

Trial resulted in a decree in favor of appellees and this appeal followed.

For reversal appellant insists that: "I. The defendants, Ira Fullerton and Walter Thomas, are not bona fide purchasers. II. The plaintiff, mortgagee, is entitled to affirmative relief."

Our rule is well settled that an unrecorded mortgage is valid as between the parties and good except as to subsequent purchasers for value. "But an unrecorded mortgage is still good and binding between the parties. It constitutes a valid lien on the property, except as to the legal rights of third parties," *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78. On the record presented we have concluded that the trial court erred in holding in effect that Dr. Shuffield's mortgage was not superior to the rights of appellees. Dr. Shuffield was not a party to the plan or scheme of appellees that resulted in appellee, Thomas, securing a deed to the property in question for the consideration of a $1.00 lottery ticket. This consideration was illegal and amounted to no consideration at all, made so by Article 19, Section 14, of the Constitution of the State of Arkansas, which pro-

vides in short plain language: "Lotteries Prohibited.—No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed." We have accepted the following definition of the word lottery: "A lottery is a species of gaming, which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize," *Longstreth* v. *Cook, Sec. Ark. Racing Comm.,* 215 Ark. 72, 220 S. W. 2d 433, and in comment we said: "It appears therefore that to constitute a lottery it is essential not only that the element of chance is present, but also that it controls and determines the award of the prize whatever it may be."

One who gives an illegal consideration cannot be accorded the status of a bona fide, or innocent, purchaser. See *Gerdes, et al.* v. *Reynolds,* 28 N. Y. S. 2d 622. Since appellees, Wayne and Lois (or Loys) Raney and Fullerton, Trustee, entered into, planned and carried out the scheme to dispose of the property involved, and the Raneys and Fullerton, Trustee, received full value for the property, they, therefore, risked nothing by the lottery and appellee Thomas, although the consideration, $1.00, which he paid was illegal, acquired title to the property. The principle of law announced in *Carey* v. *Watkins,* 97 Ark. 153, 133 S. W. 1016, applies here. We there said: ". . . a person cannot be said to have lost his property when he receives its value in exchange for its possession. Carey received the value he placed upon his wagon, and did not risk anything on the lottery." Appellee Thomas' title, however, is subject to the lien of Dr. Shuffield's mortgage. Inasmuch as Thomas' title is good as against the Raneys, Dr. Shuffield is not entitled to all the relief sought by his complaint, which asks that the deeds to Fullerton and Thomas be declared void and canceled. Dr. Shuffield is, however, entitled to a decree establishing the priority of his mortgage lien, to the end that his rights may be protected against the possibility of a later sale by Thomas to a bona fide purchaser. The question of marshalling the various properties covered by the mort-

gage need not be discussed at present, as that issue will not arise unless a foreclosure of the mortgage is sought.

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

Chief Justice SEAMSTER and Justice MCFADDIN dissent.

ED. F. MCFADDIN, Associate Justice (dissenting). I agree with all that the majority opinion says about the condemnation of lotteries and the fact that the Courts of this State will not aid anyone to prevail through a lottery; but the problem in this case cannot be solved by such pronouncements. As I understand our cases, the rule is that, when a party asks the Courts to aid him, he must prove that he and those through whom he claims are clear of the stigma of lottery in the transaction in which he is asking the courts to help him. Such rule is the basis of my dissent.

Here, Dr. Shuffield is entirely clear and innocent of participating in any lottery, but the person through whom he claims title—Mr. Raney—was not clear of such participation; and Raney's participation affects the claim of Shuffield *because Shuffield's mortgage was not recorded until after Thomas had recorded his deed* and taken actual possession of the property. I emphasize that Thomas recorded his deed and went into actual possession of the property *before* Dr. Shuffield recorded his mortgage; and that Dr. Shuffield brought this suit, and not Thomas.

Because of the wording of our mortgage recording Statute (§ 51-1002, Ark. Stats.),[1] the matter of a *bona fide* holder does not enter into this case. An unrecorded mortgage is good only between the parties. If Thomas had known all about Raney's mortgage to Shuffield and had paid Raney a valuable consideration for the property

[1] Section 51-1002, Ark. Stats., reads: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the Recorder's Office for record and not before; which filing shall be notice to all persons of the existence of such mortgage."

before the Shuffield mortgage was recorded, then Thomas would have received a title superior to the Shuffield mortgage. An unrecorded mortgage is not binding upon a third person, though such person may have actual notice of its existence. *Fry* v. *Martin,* 33 Ark. 203; *Dodd* v. *Parker,* 40 Ark. 536; *Merchants & Farmers Bank* v. *Citizens Bank,* 125 Ark. 131, 187 S. W. 650; *Bridges* v. *Haney,* 132 Ark. 166, 200 S. W. 788; *Simpson* v. *First Nat. Bank,* 173 Ark. 284, 292 S. W. 138; *Polster* v. *Langley,* 201 Ark. 396, 144 S. W. 2d 1063.

Since his mortgage was not recorded prior to Thomas' possession, Shuffield's right to recover the property is the same as Raney's right to recover would have been. The question, then, is: could Raney have recovered the property herein from Thomas? The answer is NO; and *Carey* v. *Watkins,* 97 Ark. 153, 133 S. W. 1016, is directly in point.[2] Carey owned a wagon and raffled it off for $45.00, intending for the winner to have it. The raffle was held. It was declared that Watkins was the winner and Watkins' father went to Carey's house and got the wagon, with Carey present and making no objections. Later, Carey sought to recover the wagon on the claim that Watkins did not win it. This Court held that Carey had no right to recover, saying:

"... the illegal contract having been executed, the law leaves the parties where they placed themselves and affords no relief to either."[3]

---

[2] There are several other Arkansas cases involving lotteries: see *Martin* v. *Hodge,* 47 Ark. 378, 1 S. W. 694; *Grant* v. *Owens,* 55 Ark. 49, 17 S. W. 338; *Burks* v. *Harris,* 91 Ark. 205, 120 S. W. 979; *Watkins* v. *Curry,* 103 Ark. 414, 147 S. W. 43; and *Simpson* v. *Brooks,* 208 Ark. 1093, 189 S. W. 2d 364.

[3] The majority opinion quotes *Carey* v. *Watkins* to this effect: "A person cannot be said to have lost his property when he receives its value in exchange for its possession. Carey received the value he placed upon his wagon and did not risk anything on the lottery." That quotation emphasizes the point I am trying to make. The evidence here shows that from the proceeds of the raffle Raney received somewhere between $2,500.00 and $15,000.00 for the property. Certainly that was substantial and, since he could not recover, neither should Shuffield; because his rights could be no greater than Raney's, due to the failure to record the mortgage before Thomas acquired actual possession.

So here: Raney executed the deed to Fullerton and Fullerton to Thomas and Thomas went into possession; so certainly Raney could not have recovered if he had brought the suit. Since Thomas' possession occurred prior to the time Shuffield recorded his mortgage, Shuffield stands only in the shoes of Raney, and, since Raney could not recover, neither can Shuffield, because " . . . the law leaves the parties where they placed themselves and affords no relief to either."

Now if Shuffield had been in possession of the property and Thomas had brought this suit, then Thomas could not have recovered, because ". . . the law leaves the parties where they placed themselves." Therefore, since Shuffield is in the shoes of Raney, and since Raney could not have recovered, I think we should apply the rule stated in *Carey* v. *Watkins (supra)*: ". . . the law leaves the parties where they placed themselves."

Therefore, I dissent from the majority holding.

JACKSON *v.* SMITH.

5-861 287 S. W. 2d 571

Opinion delivered March 5, 1956.

[redacted]

Wiley W. Bean and *D. B. Bartlett,* for appellant.

Richard Mobley, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit by appellants, Mrs. Collins and Mrs. Jackson, to set aside —on the grounds of fraud and imposition—a deed they executed and delivered to the appellees, Smith and Norvell. The Chancery Court denied the appellants the prayed relief and this appeal resulted.

Mr. James A. Poteet lived in Clarksville and had four sisters, two of whom are the appellants, Mrs. Collins and Mrs. Jackson. The other two sisters predeceased Mr. Poteet, and each left children, one child being the appellee, Mr. Bernice Smith, and another being the appellee, Mrs. Luther Norvell. When Mr. Poteet suffered a stroke, Mrs. Collins and Mrs. Jackson were promptly notified at their homes in California. They came to Clarksville in an automobile, accompanied by Mrs. Collins' husband and Mrs. Jackson's son; and arrived on Tuesday, February 23, 1954, a day before Mr. Poteet died. The Collins stayed in the Smith home, and the Jacksons in the Norvell home. Mr. Poteet was buried on Thursday, February 25th. He died intestate, and his estate consisted of an automobile and thirty acres of land.

On Friday morning, February 26th, Mrs. Collins and her nephew, Mr. Bernice Smith, had a conversation in which it was agreed that Mrs. Collins and Mrs. Jackson would convey to Mr. Bernice Smith and Mr. Luther Norvell (husband of Mrs. Luther Norvell) all interest in the estate of Mr. Poteet, and, in return, Mr. Smith and Mr. Norvell would pay all debts of the Poteet estate. Mrs. Jackson and Mr. Norvell also agreed to this arrangement. These conversations were on Friday. On Sunday the Collins and the Jacksons drove to Fort Smith to see some other relatives. Then on Monday, March 1st, the Collins, Jacksons, Smiths and Norvells went to an attorney in Clarksville, who advised all parties as to procedure,

administration, heirship, etc. The next day (Tuesday, March 2nd) a deed[1] was prepared wherein all the heirs of Mr. Poteet were to convey all interest in the estate to Mr. Smith and Mr. Norvell, in consideration that the grantees assumed and agreed to pay all debts of the estate of Mr. Poteet. The deed was duly signed and acknowledged by Mrs. Collins and Mrs. Jackson on Tuesday, March 2nd; and taken by them to the other grantors to likewise sign and acknowledge. The appellants took the deed to California and obtained its execution by a number of the nieces and nephews, and returned it to Mr. Smith and Mr. Norvell.

Several weeks after March 2nd, Mrs. Collins' son, J. M. Walton, went to Clarksville from California, and learned that the Poteet thirty-acre tract had a value estimated from $7,500.00 to $12,500.00; and this suit was filed by Mrs. Collins and Mrs. Jackson to set aside the deed they had executed;[2] and they claimed that they had been defrauded and imposed on by Mr. Smith and Mr. Norvell. As aforesaid, the Chancery decree was adverse to Mrs. Collins and Mrs. Jackson; and they have appealed, claiming: (a) that the deed is not within the "family settle-

[1] The deed read in part as follows: "We, Nora Poteet Collins, Nellie Poteet Jackson" (and other named heirs of James A. Poteet, deceased) "for and in consideration of the sum of ONE DOLLAR ($1.00) to us paid in hand, and to each of us, the receipt of which is hereby acknowledged by LUTHER NORVELL and H. B. Smith, and, the assumption by the said LUTHER NORVELL and H. B. SMITH of the indebtedness existing on account of a promissory note heretofore executed by the said James A. Poteet, deceased, in favor of Mrs. May Kavatum, for the sum of Three Thousand Dollars, with interest at the rate of Ten per cent per annum (10%), and said note being secured by a Realty Mortgage upon a portion of the lands herein conveyed, duly recorded, in Book 32 at Page 440 of the deed records of Johnson County, Arkansas, AND, the further assumption by the said LUTHER NORVELL and H. B. SMITH of all other indebtedness of the said James A. Poteet, deceased, including expense of last sickness, funeral, burial, and any and all claims and demands against the estate of the said James A. Poteet, deceased, DO HEREBY GRANT, SELL AND QUIT-CLAIM unto the said LUTHER NORVELL and H. B. SMITH, and unto their heirs and assigns forever, the following described land, situated in the County of Johnson, State of Arkansas, to-wit: . . ." (Here follows description of the land—approximately thirty acres—and the 1949 Chevrolet car.)

[2] None of the other grantors in the deed has joined with Mrs. Collins and Mrs. Jackson in this suit.

ment'' rule;[3] (b) that, even if the deed be a ''family settlement,'' it should be set aside because of fraud and imposition;[4] (c) that the appellants were not required to investigate the value of the property;[5] and (d) that the appellants have proved fraud and imposition practiced on them by Mr. Smith and Mr. Norvell.[6]

That the deed from Mrs. Collins and Mrs. Jackson to Mr. Smith and Mr. Norvell is within the ''family settlement'' rule is too clear to admit of doubt. *Pfaff* v. *Clement,* 213 Ark. 852, 213 S. W. 2d 356, is complete authority for such conclusion. But, even as a ''family settlement,'' the deed cannot be upheld if the evidence shows that either fraud or imposition was practiced. In *Pfaff* v. *Clement* (*supra*), we quoted the language of Mr. Justice FRAUENTHAL in *Martin* v. *Martin,* 98 Ark. 93, 135 S. W. 348:

''The courts of equity have uniformly upheld and sustained family arrangements in reference to property *where no fraud or imposition was practiced.*'' (Italics our own.)

So the real question in the Trial Court was whether Mrs. Collins and Mrs. Jackson established that either fraud or imposition was practiced on them; and the question on appeal in this Court is whether the decision of the Chancellor is against the preponderance of the evidence.

In looking at all of the facts and circumstances, the following matters are impressive:

(1) The evidence shows that neither Mr. Smith nor Mr. Norvell knew the value of the thirty acres of land. Mr. Smith was a tractor mechanic and Mr. Norvell was a carpenter and bricklayer. Although they had both

---

[3] On this point they cite *Million* v. *Taylor,* 38 Ark. 428; and *Richards* v. *Sutter,* 94 Ark. 621, 125 S. W. 1018 (the full text of the opinion may be found only in the Southwestern Reporter); and seek to distinguish the case at bar from *Pfaff* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356.

[4] On this point they cite *Faulkner* v. *Faulkner,* 222 Ark. 121, 257 S. W. 2d 570.

[5] On this point they cite *Evatt* v. *Hudson,* 97 Ark. 265, 133 S. W. 1023.

[6] On this point they cite *Stewart* v. *Clark,* 195 Ark. 943, 115 S. W. 2d 887; and *Barner* v. *Handy,* 207 Ark. 833, 183 S. W. 2d 49.

lived in Clarksville many years, neither had ever been engaged in the real estate business. The last real estate transaction of either of them was in 1946 when Mr. Smith bought a lot on West Main Street in Clarksville. Furthermore, in all the conversations with Mrs. Collins and Mrs. Jackson, neither Mr. Smith nor Mr. Norvell undertook to claim any knowledge of the value of the property. So there were certainly no misrepresentations knowingly made.

(2) While Mrs. Collins and Mrs. Jackson were in Clarksville, they viewed the thirty acres of property here involved; and they had ample opportunity to consult anyone they desired regarding the value of the property.

(3) At the time of the original conversation between Mr. Smith and Mrs. Norvell on Friday morning, February 26th, the parties had been of the impression that Mrs. Collins and Mrs. Jackson owned all of the interest, since they were the only two surviving sisters of Mr. Poteet. When the parties went up to the attorney's office on Monday, March 1st, he correctly told them that the heirs of the two deceased sisters had interests in the property; and Mrs. Collins and Mrs. Jackson both agreed to get these other heirs to sign the deed.

(4) Mr. Smith and Mr. Norvell told Mrs. Collins and Mrs. Jackson about the $3,000.00 mortgage on the land; about the approximate amount of the hospital and nurses' bills; and they all knew the funeral expenses. Mr. Smith and Mr. Norvell had personally guaranteed the hospital and nurses' bills, and Mr. Smith was not positive but what he and Mr. Norvell would lose money in making the deal with Mrs. Collins and Mrs. Jackson. One witness, who was an aunt of Mrs. Luther Norvell, said that Mrs. Collins, in discussing the matter with this witness on Tuesday night, March 2nd, said that she (Mrs. Collins) was glad that Smith and Norvell had taken the deed and "she hoped they made good on it and she said she wouldn't mind if they would make a million dollars." Another witness, who talked to Mrs. Collins after she had signed the deed and before she went back to California, said that

Mrs. Collins said she was happy and relieved that Mr. Smith and Mr. Norvell had taken over the property; and Mr. Collins was there at the time of the conversation.

(5) Mrs. Collins and Mrs. Jackson left Clarksville Wednesday morning, March 3rd, to return to California. They took the deed with them and got most of the other heirs to execute it, and then later returned it to Mr. Smith and Mr. Norvell. Just when the deed was mailed from California is not shown; but one of the acknowledgments is dated April 3, 1954; so the deed must have been in the possession of the appellants for over a month after they left Clarksville; and that is significant, in view of the next matter to be mentioned.

(6) It was some time before March 27th that Mrs. Collins' son, Mr. Walton, went from California to Clarksville to investigate the value of the Poteet thirty acres; and on that trip, Mr. Walton offered Mr. Smith and Mr. Norvell $1,000.00 to rescind the deed.[7] Mr. Walton's trip to Clarksville was on March 27th and he announced he was going to call his mother that night and stop the deed. Yet, on April 7th, Mrs. Collins wrote the Norvells that as far as she was concerned the deed was valid.[8] Thus, even

[7] That Mr. Walton used little or no tact or diplomacy in his conversations with Mr. Smith and Mr. Norvell, and antagonized them to such an extent that they would not have dealt with him on any basis, is probably reflected from Mr. Norvell's testimony at the time of the trial. Mr. Walton, in testifying of his visit with Mr. Norvell, quoted himself as using this language to Norvell: "Why don't you just be fair about this thing—the way I see it you're going to make some money —and let's destroy those papers that have been signed and I will compensate you to the amount of five hundred dollars." And in talking to Mr. Smith in the March visit, Mr. Walton testified at the trial that he said this to Mr. Smith: "You live in a small town. I don't see how you can afford a case of fraud thrown at you."

[8] Mrs. Collins' letter read in part: "I guess I ought to have answered your letter sooner, Luther. I knew Merle had gone to Arkansas. He wrote me from Denver and said he was going to Tulsa, Oklahoma and was going on to Clarksville. I don't want you or Bernice to worry about papers. I signed them, and as for my part, my signature will still be on the papers, and I hope Lillian and the three boys will sign. I am not going back on my word. Merle thinks we should have something out of it, and maybe we could if Jim had made a will; but the way he left things, I could not see anything there for me or any of us. If we were living there we would have taken it and tried to do something about it, but I felt that we would only be bringing trouble to ourselves, and I am not young any more. It would worry me just too much and I hope and pray that everything will come out all right for you and Bernice."

after Mr. Walton had investigated the value of the property, his mother, Mrs. Collins, still wrote that she did not desire to rescind. It was not until August 6th that Mrs. Collins decided to attempt rescission; and this suit was filed on August 17, 1954.

There are many other salient facts in the record, which is over four hundred pages. The Chancellor heard the witnesses testify and then took the case under advisement, and rendered a 27-page memorandum opinion which shows study and learning regarding both the facts and the law. The real question before us is whether the findings of the Chancery Court are against the preponderance of the evidence. When we consider that neither Smith nor Norvell was posted on real estate values; that they never attempted to represent the value of this property to the appellants; that the appellants viewed the land; that Mrs. Collins' husband was with her and Mrs. Jackson's son was with her; that the matter was not a "hurry-up" deal but was discussed from Friday until Tuesday; that no attempted rescission was made for several months, and then only after Mr. Walton had antagonized and threatened the appellees—when we consider all these matters and the other facts and circumstances in the record—we cannot say that the Chancellor's findings are against the preponderance of the evidence.

Affirmed.

SOUTHWEST CASUALTY INSURANCE COMPANY *v.* WESSON.

5-921 287 S. W. 2d 575

Opinion delivered March 5, 1956.

Rex W. Perkins, A. James Linder and *E. J. Ball,* for appellant.

Ovid T. Switzer and *W. P. Switzer,* for appellee.

ED. F. MCFADDIN, Associate Justice. This case comes to us on a motion for rule on the clerk[1] to require him to file the transcript, which he refused because tendered too late. The record here reflects this sequence of events:

(a) On March 25, 1955, appellees, Wesson and wife, obtained judgment against appellant, Southwest Casualty Insurance Company, in the Ashley Circuit Court.

(b) The appellant casualty company gave notice of appeal on April 2, 1955.

(c) No extension of time was requested for filing the record on appeal until July 9, 1955, when an order was made giving appellant the full period, of seven months from the date of the judgment, to file the record on appeal.

(d) The record was tendered in this Court on October 24, 1955, and its filing was refused as tendered too late.

(e) Then the motion for rule on the clerk was filed.

From the foregoing it will be observed that the notice of appeal was filed on April 2nd and that the 90 days, allowed by Sec. 20 of Act 555 of 1953, had expired before July 9th, when the order of extension was granted. In other words, no request for extension of time to file the record on appeal was made or granted within the 90 days from the filing of the notice of appeal, as provided in

[1] For such procedure, see Rule No. 5 of this Court, in the Rules issued in January, 1954.

Sec. 20 of Act 555 of 1953. Under our holding in the case of *West* v. *Smith,* 224 Ark. 651, 278 S. W. 2d 126, the Circuit Court of Ashley County was without authority to make the extension order on July 9th; because the time for such extension order lapsed 90 days from April 2, 1955. *West* v. *Smith* is directly in point. We are asked to overrule that case; but this we refuse to do. The case was carefully considered, and we adhere to it.

Next the appellant claims that the delay in obtaining the extension order was due to no fault of appellant's attorneys because: (1) they relied on the promise of the court reporter that he would obtain the extension within the proper time; and (2) the court reporter thought the time did not expire until after July 9th. We cannot sustain the appellant in this claim. The order for the extension must be obtained from the Court, and not from the court reporter. Appellant's counsel had no right to rely on the court reporter to get the order of extension. No amount of local custom can vary the Statute, which requires that the extension order be granted by the Court.

Finally, appellant says that, even under *West* v. *Smith* (*supra*), the rule should issue against the clerk because of an unavoidable casualty. Appellant points out that in *West* v. *Smith* we said that we had the inherent constitutional power, in an exceptional case, to allow a record to be filed after the time fixed; and appellant says that this is such an exceptional case. We cannot sustain appellant in this claim because appellant has entirely failed to show any unavoidable casualty that prevented the obtaining of a proper order of extension. The fact that one of the attorneys for appellant was out of the State for a time, and that the same attorney later was ill —such fact—did not prevent the other attorney for the appellant from attending to the matter of the extension. Both attorneys participated in the trial of the cause and both are interested in the case on appeal. Our cases, in regard to continuances because of absence of counsel, hold that, where there are two attorneys representing a party, the absence or illness of one does not prevent the other

from acting for the client. See *El Dorado & B. R. Co.* v. *Knox,* 90 Ark. 1, 117 S. W. 779; *Reliance Life Ins. Co.* v. *Hardy,* 144 Ark. 190, 222 S. W. 12; *Mo. & North Ark. Rd. Co.* v. *Robinson,* 188 Ark. 334, 65 S. W. 2d 546.

Therefore, the rule on the clerk is denied.

Chief Justice SEAMSTER and Justices GEORGE ROSE SMITH and ROBINSON dissent.

HARRIS *v.* GILLIHAN.

5-867 287 S. W. 2d 569

Opinion delivered March 5, 1956.

Barrett, Wheatley, Smith & Deacon, M. P. Watkins and *Frank Sloan,* for appellant.

James E. McDaniel and *W. B. Howard,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant and appellee were married in Poinsett County in 1946 and two sons were born to them who are now six and eight years of age. Appellant has been a professional soldier in the U. S. Army since 1940 and stationed in Japan for

the past several years. When appellee indicated that she intended to secure a divorce in March, 1952, appellant obtained an emergency leave from the army in Japan and returned to Poinsett County where he filed suit for divorce and custody of the two children. Appellee entered her appearance in the suit which she did not contest and a decree was entered May 7, 1952, granting appellant a divorce on the ground of general indignities and awarding him custody of the children with the understanding that they were to be left with appellant's stepmother, Mrs. L. F. Collins, at Harrisburg, Arkansas. A week later appellee married L. B. Gillihan, her present husband, who was divorced from his first wife on May 6, 1952.

Appellant married a Japanese national, whom he had known for about a year, in November, 1953, and they have since resided in a Japanese section of Tokyo. In May, 1955, appellee learned that appellant was about to take the children to Japan to live and filed a petition to restrain such action and to modify the divorce decree, alleging changed conditions since the rendition of the decree which rendered it for the best interest of the children that she be given their custody. This appeal is from a decree granting appellee's petition.

At the beginning of the hearing on the petition for modification of the original decree it was stipulated that appellant intended to take the children to Japan to live for approximately a year and the pleadings and much of the testimony were directed to that issue. However, at the conclusion of the testimony appellant abandoned this request and asked that the children be left in the care of his stepmother.

According to the proof, appellee resided with her present husband in Missouri, where he was stationed as a soldier, for nearly two years after their marriage. She gave this as the primary reason for her rather infrequent visits with the children, which were rendered somewhat difficult and unsatisfactory by directions of appellant to Mrs. Collins. While there was circumstantial evidence of an illicit relationship between appellee and her present

husband prior to her divorce, there was no evidence of promiscuity and appellant frankly conceded she was a good mother to their children.

There was some corroboration of appellee's testimony to the effect that she was ill and unable to work and properly care for the children at the time of the original decree and for a year thereafter. At the time of the instant hearing she resided on an 80-acre farm near Jonesboro with her present husband who has sufficient income to properly support the children and is anxious to do so. Appellee has also regained her health and ability to work and care for the children. Although Mrs. Collins stated that she would be glad to continue caring for the children, whose support was being paid for by government allotments, she approved of the father taking them to Japan to live and there is little evidence of that strong bond of mutual affection that is frequently shown to have developed between children and natural grandparents who have had their custody for a considerable period of time.

The rule is that a decree fixing the custody of a child is final on conditions then existing and should not be changed afterwards unless on altered conditions since the decree was rendered or on material facts existing at the time of the decree, but unknown to the court, and then only for the welfare of the child. *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450; *Phelps* v. *Phelps,* 209 Ark. 44, 189 S. W. 2d 617. The chief concern in all custody cases is, of course, the welfare and best interest of the child. Where a child of tender years is involved courts are also ordinarily reluctant to deprive a mother of custody, unless it clearly appears that she is not a fit person to rear the child. We are unwilling to lay down the inflexible rule that the acts of indiscretion by a wife with a man she soon married after she was divorced forever brands her as a person unfit to have the custody of a young child where there is no evidence of promiscuity. We have held in several cases that a mother will not be denied custody of a child of tender years solely because of her infidelity to her husband where there are other circumstances which render such action detrimental to the child's wel-

fare. *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41; *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807; *Thompson* v. *Thompson,* 209 Ark. 734, 192 S. W. 2d 223.

We have repeatedly pointed out that since all these custody cases present a different factual situation none of them represents a direct precedent which is absolutely controlling in another. In his contentions that appellee failed to prove any material change in circumstances that justify modification of the original decree and that she has forfeited her right to custody, appellant relies heavily on the recent case of *Johnston* v. *Widener,* 225 Ark. 453, 283 S. W. 2d 151, but in that case strong ties of affection had developed between the three children and their natural grandparents over a five-year period. Also, conditions surrounding the mother's new home in another state were unsatisfactory and the advisability of separating the children by permitting the mother to take the youngest into the other state was a primary consideration.

While courts are always apprehensive as to the appropriate order to make in cases of this kind, we think a preponderance of the evidence supports the chancellor's conclusion that changed conditions since the original divorce decree affecting the welfare of these young children warranted a restoration of their custody to the mother.

Affirmed.

MORRILTON HOMES, INC. *v.* SEWER IMPROVEMENT DISTRICT NO. 4.

5-868 287 S. W. 2d 581

Opinion delivered March 5, 1956.

Phillip H. Loh, for appellant.

Townsend & Townsend, for appellee.

George Rose Smith, J. This is a suit by a municipal sewer district to recover connection charges assertedly due by reason of the appellant's unauthorized use of the district's sanitary sewer lines. The complaint also asks that the appellant be enjoined from making additional connections without first paying a fee of $50 for each connection. The chancellor fixed the connection charge at $30. The decree gave the district a judgment for $630, representing the charges for twenty-one dwellings being served by the district, and enjoined the appellant from making future connections without paying a similar fee. An appeal and cross-appeal bring the whole case up for review.

The district was organized in 1924 and sold bonds to pay for the improvement. The unpaid bonds are in default, and it does not appear that the sewer system has been turned over to the city by the district. In 1949 the appellant bought fifty lots lying outside the district and began developing the property as a residential area. The corporation laid sewer lines to service its lots and provided an outlet by connecting its system to the district's outfall, which leads to the disposal plant. Although the

appellant's utilization of the district's line was approved by the state's resident sanitarian, the weight of the evidence shows that the district's commissioners did not authorize or consent to the connection.

There can be no question about the district's right to impose a charge for the use of its facilities. Such a charge has been upheld in a number of cases, for an outsider can fairly be required to pay for the privilege of using a system constructed at the expense of the district's taxpayers. See *Peay* v. *Kinsworthy,* 126 Ark. 323, 190 S. W. 565, and *Sloss* v. *Turner,* 175 Ark. 994, 1 S. W. 2d 993. In 1941 the principle was embodied in a statute. The act reads in part: "The Commissioners of the district shall have the right to consent to or refuse to allow such connections within their discretion, and such connections shall be made on such terms as the Commissioners may dictate, provided, however, that no lands outside of the district shall be permitted to connect with the sewer line of the district except upon payment to the district of a sum equal to the charge made against similarly benefited lands within the district." Ark. Stats. 1947, § 20-333. It will be seen that by its terms the statute imposes a duty on the commissioners to make the charge when, as here, the land to be served is outside the district.

The chancellor is not shown to have been in error in fixing the connection charge at $30 for each lot. The appellant contends that this amount is excessive; the district thinks it inadequate. It is shown that the district's assessment of benefits averaged $100 or more per lot. The appellant, however, laid its own mains and is utilizing the district's system only as an outlet; so a fair connection charge should be less than the amount paid by the district's landowners. We cannot say that the chancellor's conclusion, based upon conflicting testimony, is against the preponderance of the evidence.

The district's claim, however, is barred in part by the three-year statute of limitations. Ark. Stats., § 37-206. The appellant joined its system to the district's line in March, 1950, and this suit was not filed until June, 1954.

The commissioners did not learn of the connection until 1953, but ignorance of the existence of a cause of action does not suspend the running of the statute in the absence of fraudulent concealment by the defendant. *Hibben* v. *Malone,* 85 Ark. 584, 109 S. W. 1008. It is neither alleged nor proved that the appellant acted surreptitiously in making the connection in 1950. Rather the opposite, the corporation seems to have proceeded openly in the belief that it had a right to utilize the existing lines. There is no reason to think that the connection could not have been readily discovered by the exercise of ordinary diligence.

Although the appellant's main lines were joined to the district's outfall in 1950, the appellee's entire cause of action did not necessarily accrue at once. The statute is explicit in committing the matter of connection charges to the discretion of the commissioners. We perceive no manifest abuse of discretion in the commissioners' decision to make a separate charge as each newly built house is added to the sewer system. The original 1950 connection was intended to serve an indeterminate number of dwellings to be constructed in the future. It could not then be known how many homes would eventually be placed on the fifty lots, nor what the ultimate burden upon the district's drainage lines would be. The practice of accepting new connections individually rather than in mass would enable the district to prevent its facilities from becoming overloaded and cannot be regarded as an unreasonable exercise of the commissioners' discretion.

Of the twenty-one connections for which the district was given judgment below, thirteen appear to have been made more than three years before suit was filed. In holding that the recovery of these connection charges is barred by limitations we do not imply that the unauthorized use of the district's lines has given rise to a vested right that would prevent the district from refusing to continue the service in the future. That issue is not presented by this case.

The decree is modified to reduce the money judgment to $240. In other respects the decree is affirmed, the costs to be taxed equally.

HOLT and WARD, JJ., would affirm the decree.

PAUL WARD, Associate Justice (dissenting). It seems to me that the majority opinion fails to take cognizance of some vital aspects of this case. It makes the arbitrary finding that the connection charges for some of the houses in the Morrilton Homes Addition are barred by the three years statute of limitation without discussing the evidence showing when the District knew of the connections. I am loathe to believe the majority mean to announce, as a matter of law, that a person can secretly and unlawfully connect his home with a sewer system and thereby start the statute of limitations running in his favor. The *Hibben* case, cited by the majority, certainly does not justify such a principle of law. It seems to me that this case merely holds that ignorance of an existing legal right or obligation does not prevent the statute from running.

The important question in this case, I believe, is: Did the Sewer District know when the earlier connections were made? The evidence on this point was not discussed by the majority, so I shall refer to it.

The chancellor discussed the testimony on this point in detail and found that the Sewer District did not know when the connections were made. I submit the chancellor's finding on this point was not against the weight of the testimony.

First, the act of appellant in making the main connection with the appellee district should not be confused with the later connections made by the individual home owners. Most of the testimony is about the former, and even that is not clear. Mr. Morgan, one of the organizers of Morrilton Homes, [according to appellant's abstract] talked with the City Attorney in 1950 and told him they would either connect with the appellee district or they would build a septic tank. Later he talked with a Mr. Dilling, one of the sewer commissioners, about connect-

ing, and Mr. Dilling "didn't say he would not let us connect." One commissioner was quoted as giving permission to connect, but he denied it. At any rate, the important issue in this case is not whether the district knew about the main line connection in 1950 but whether they knew when each of the individual houses were connected. I find no positive testimony in appellant's abstract showing that the sewer district knew when the houses were individually connected. On the other hand, Mr. Reynolds, one of the district commissioners, testified that he first knew about the connection about a year before the suit was brought. Mr. Hawkins, one of the commissioners, said he never knew about the connections till he heard it on the streets, and that he had never been asked by Mr. Morgan or Mr. Loh for permission to connect. As stated by appellant, the commissioners contended that "they had no knowledge [of the connections] until after the survey in 1953 and that immediately thereafter they made demand for connection charges."

In view of the above state of the record, I submit that the decree of the trial court should be affirmed.

HORN *v.* HORN, ADMINISTRATOR.

5-869 287 S. W. 2d 586

Opinion delivered March 5, 1956.

Melvin T. Chambers, for appellant.

Henry B. Whitley and *Wendell Utley,* for appellee.

PAUL WARD, Associate Justice. This appeal calls for a construction of Section 64, Act 140 of 1949, which act is often referred to as the New Probate Code. Said section is now Ark. Stats. (Supp.) § 62-2125 and it provides the time limit in which a will may be probated.

Appellant, Alpha Horn, is the widow of Dr. W. H. Horn and appellee, Claude H. Horn (administrator), is his son. Dr. Horn was first married to Bertie Lee Horn and of that union were born four children including appellee. In 1938 Dr. Horn and Bertie Lee Horn each executed a will leaving all property to the other. Bertie Lee Horn died October 3, 1940, and in 1942 Dr. Horn married appellant. On September 14, 1954, Dr. Horn died, leaving no children by his second wife.

According to appellant's statement Bertie Lee Horn owned several head of cattle and other property at the time of her death, and Dr. Horn took charge of the same and treated them at all times as his own property.

On September 25, 1954, Claude H. Horn was appointed administrator of his mother's estate, and as such administrator he took charge of all of the livestock and other property claiming the same belonged to the estate of his mother, Bertie Lee Horn. Some time thereafter appellant discovered among the papers of her husband the will of Bertie Lee Horn, and on March 24, 1955, she filed a petition seeking to have said will probated. To the above petition Claude H. Horn, as administrator of his mother's estate, filed a demurrer on the ground that five years had passed since the enactment of Act 140 of 1949, and thus pled the five year limitation as a bar to the probation of the will. The pertinent section of said Act 140 is the one mentioned above, and it reads as follows:

"No will shall be admitted to probate and no administration shall be granted unless application is made to the court for the same within five years from the death

of the decedent; this section shall not affect the availability of appropriate equitable relief against a person who has fraudulently concealed or participated in the concealment of a will."

The trial court sustained appellee's demurrer, and appellant has appealed.

Appellant states, and appellee admits, that prior to the passage of said Act 140 there was no limit to the time in which a will might be probated. It is appellant's contention that the statute above quoted is not retroactive and that, therefore, she had the right under the old law to probate the will of Bertie Lee Horn. In support of this argument appellant cites and quotes from *Hudson* v. *Hudson,* 219 Ark. 211, 242 S. W. 2d 154. In the cited case, the court, after referring to said Act 140, among other things, stated: ". . . the statute in that respect is not retroactive in effect." The court also stated: "The Probate Code provision on limitation can operate prospectively only." Notwithstanding the above quoted excerpts apparently, to some extent, support appellant's contention, yet the opinion as a whole is far from conclusive. In the cited case, the will was admitted to probate notwithstanding the fact that the testator had died some fifteen years previously. The will was correctly offered for probate, however, less than five years after the effective date of said Act 140. The court, in the cited case, had no occasion to pass upon the exact question here presented. Other decisions of this court impel the conclusion that appellant had no right to probate the will in question since her petition was filed more than five years after the effective date of Act 140 of 1949.

In the case of *Trapnall, et al.* v. *Burton, et al.,* 24 Ark. 371, the court had occasion to construe a recently enacted statute limiting the time requisite to create a bar to the recovery of real estate to seven years. Previously thereto the time limit had been fixed by statute at ten years. It was there held that the new limitation statute would apply to old causes of action which had not expired on the date the new statute became effective. In speaking of the new

statute the court said: "It applies to old cases, but not till the expiration of the fixed time from and after it takes effect." "If there was a cause of action existing, not barred by the old statute, but to which the new one applied, it could be pleaded." At page 388 the court summed the matter up in these words: "The former law governs until the time fixed by the new law expires, after its passage, and then the new law applies to all cases not then barred by the old law."

In the case of *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600, the court was dealing with a statute limiting the time to enforce certain liens. There the court, in considering a question similar to the one here presented and in referring to another decision, made this statement on page 498 of the Arkansas Reports:

"'A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage.' And it was there held that, in the absence of a contrary provision, the period of limitation fixed by the statute would be computed as to causes of action existing when it was passed, from the time when they are first subjected to its operation."

Appellant cannot be heard to say that she had a vested right under the old probate law to an unlimited time in which to file a petition to probate the will. The right she had under the old law was not one which could not be changed or limited by a new act of the legislature. This rule was clearly stated in the case of *Johnson* v. *Beede,* 186 Ark. 588, 54 S. W. 2d 413. There appellant filed a petition to be exempt from a stock law, contending he had six months to do so under an old law. The court held that his time was fixed by a new act [Act 44 of 1931] which limited the time to three months. In speaking of appellant's contention the court said:

"This argument would be sound if amendatory Act 44 of 1931 swept away any contractual obligation or title, legal or equitable, to the enjoyment of property. The

amendatory act operated upon a remedy only by changing the time from six to three months in which appellants might file petitions to exempt their townships from the provisions of the general stock law from the date of the adoption thereof. One does not have a vested right in remedies or matters of procedure."

We do not know, and need not be concerned in this case, upon what grounds the probate court allowed appellee to take out letters of administration upon the estate of Bertie Lee Horn. It will be noted that the Ark. Stats. (Supp.) § 62-2125, copied above, not only limits to five years the time in which a will may be admitted to probate but it also limits to five years the time in which letters of administration may be granted.

It follows from what we have said above that the trial court was correct in sustaining appellee's demurrer.

Affirmed.

WHITTECAR *v.* CHEATHAM.

5-870 287 S. W. 2d 578

Opinion delivered March 5, 1956.

Cole & Epperson, for appellant.

McMillan & McMillan and *Otis H. Turner,* for appellee.

SAM ROBINSON, Associate Justice. Robert C. Whittecar, Jr., a minor, was injured while riding in an automobile driven by appellee, Bernard Cheatham. Young Whittecar, by his father, filed this suit, alleging that Cheatham had negligently operated the automobile, and that such negligence resulted in Whittecar's injuries. After Whittecar had completed the introduction of his testimony in chief, the defendant Cheatham moved for a directed verdict; the court granted the motion. It is apparent the motion was granted on the theory that Whittecar was a guest in Cheatham's automobile, and, because of our guest statute, he could not recover. Ark. Stats., §§ 75-913-14-15.

The sole issue here is whether, according to the undisputed evidence, Robert Whittecar, Jr., was a guest in Cheatham's automobile within the meaning of our statutes. At the time he was injured, Robert was fifteen years of age; he attends school at Magnet Cove; he was in the seventh grade, and was a member of the Junior basketball team. The appellee, Mr. Cheatham, was basketball coach, and he taught "Junior and Senior High history." He taught Robert history as well as coaching him in basketball. During basketball practice between 11:00 A. M. and 12:00 noon on the day Robert was injured, Mr. Cheatham told him there would be a basketball game that afternoon at Benton.

Robert testified:

"Q. Where did he tell you to meet?

A. He told us to meet him down at the gym after school was over."

* * * * *

"Q. When you got down to the gym after school was out that afternoon, what kind of transportation was there for you?

A. We didn't — Mr. Cheatham told us we was to all go in his car."

* * * * *

"Q. Did Mr. Cheatham have anything to do or say about the seating arrangements; where the boys sat?

A. Yes, sir, he moved one other big boy in front and one other middle sized boy in front. They were sitting in the back seat.

Q. How many people were in the front seat when you first got into it?

A. There were three.

Q. Three boys or three, all told?

A. Three all told, and then he moved one more boy up there."

There were ten boys in the car altogether; they went to Benton and played a game of basketball; Robert participated in the game, and Mr. Cheatham coached. On the way back to Magnet Cove after the game, Mr. Cheatham was driving the automobile when he had a head-on collision with another car, and Robert was injured. According to the undisputed facts, can it be said that Robert was a guest of Mr. Cheatham within the meaning of our statutes? The guest statutes are in derogation of the common law and should not be extended beyond a correction of the evil which induced their enactment. *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30. And in that case, it is also said: "One important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person or persons advantaged by the carriage. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes; but, if his carriage tends to the promotion of mutual interests of both himself and the driver and operator for their common benefit, or if it is primarily for the attainment of some objective or purpose of the operator, he is not a guest within the meaning of such enactments. Of course, a passenger for hire is not within their operation, regardless of whether the passenger or someone else pays or promises to pay for the transportation."

Ordinarily, the issue of whether one is a guest is a question of fact. *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906. This rule applies where there is a dispute as to the facts, as in *Corruthers* v. *Mason,* 224 Ark. 929, 277 S. W. 2d 60. But, where there is no dispute as to the facts, it becomes a question of law as to whether one is a guest within the meaning of the statutes. *Arkansas Valley Cooperative Rural Electric Company* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538; *Payne, Administratrix* v. *Fayetteville Mercantile Company,* 202 Ark. 274, 150 S. W. 2d 966; *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30. In the case at bar, at this point, there is no dispute as to the facts. Robert was a student in school; Mr. Cheatham, his teacher in history and coach in basketball, instructed him as to making the trip to Benton. In directing Robert as to the trip to Benton, it does not appear that Mr. Cheatham was acting beyond the scope of his authority as basketball coach. Robert was told by the coach what car to enter and where to sit in the automobile. It does not appear that Robert had any choice as to whether he would go to Benton to play basketball; had he refused without some good excuse, he probably would have been guilty of insubordination and subject to being expelled from the team. Such a consequence would have been very harmful to him, as it cannot be said a fifteen year old boy's physical education is unimportant.

Appellee cites a number of cases to sustain his contention that Robert was a guest. Although some of the cases cited are authority for the proposition that certain undisputed facts show that the relationship of guests existed, according to those particular facts, none are in point with the facts in the case at bar with the exception of *Casper* v. *Higgins,* 54 Ohio App. 21, 6 N. E. 2d 3. That case appears to be closely in point. A student who was a member of a debating team was riding with his instructor; they had been to a debate and were on the way home when the mishap occurred, while the instructor was driving. If anything, the evidence in that case was much stronger as proving that the student was not a guest of the instructor, but, nevertheless, the court held that the

relationship of guest existed. The case was decided by the *Court of Appeals of Ohio, Butler County,* in 1935, but not a single authority is cited in support of the view there expressed. Later, in the case of *Vest* v. *Kramer,* 158 Ohio St. 78, 107 N. E. 2d 105, decided by the *Supreme Court of Ohio* in June 1952, it was held that a Boy Scout, while on a trip with the Scoutmaster, was not a guest. *Casper* v. *Higgins* was not mentioned.

It will be recalled that, at the time the court directed a verdict in the case at bar, appellant's evidence was undisputed. It shows that Robert, in making the trip, was acting on instructions of his coach who, in turn, was acting within his authority as coach. It was Robert's duty as a student to comply with the reasonable directions of his coach. It cannot be said that, in the circumstances shown here, Robert was the guest of the coach within the meaning of our guest statute.

Reversed, and remanded for new trial.

Mr. Justice McFaddin concurs.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the result reached in this case—i. e., that the judgment should be reversed and the cause remanded for a new trial. But the majority opinion contains this language near the conclusion:

"It was Robert's duty as a student to comply with the reasonable directions of his coach. It cannot be said that, in the circumstances shown here, Robert was the guest of the coach within the meaning of our guest statute."

The only thing this Court was asked to do was to hold that the Trial Court was wrong in declaring Robert Whittecar to be a guest. But the majority has swung to the other extreme and has stated that, as a matter of law—under the facts here—Robert Whittecar was not a guest. I think that, even under the facts here, it was a question for the jury to decide as to whether Robert Whittecar was a guest or a mere occupant-under-orders in the car.

Even where the evidence is undisputed, inferences and conclusions to be drawn from such evidence are still matters for the jury. We have many times so declared. In *Grand Lodge* v. *Banister,* 80 Ark. 190, 96 S. W. 742, we said:

". . . for if the facts are such that men of reasonable intelligence may honestly draw therefrom different conclusions on the question in dispute, then they were properly submitted to the jury for determination. Judges should not, under that state of the case, substitute their judgment for that of the jury. *St. L., I. M. & S. Ry.* v. *Martin,* 61 Ark. 549."

A score of cases on the rule, that it is for the jury to draw the inferences from the evidence, are abstracted and quoted in West's Arkansas Digest, "Trial," Key No. 142.

So here, I conclude that the status of Robert Whittecar is a question for the jury to decide. Of course, on a new trial, the facts may be somewhat different from those in the present record and the case may be submitted to the jury. My only purpose in registering this concurring opinion is to continue to express my view that it is for the jury to draw inferences from the evidence.

WARGO *v.* WARGO.

5-873 289 S. W. 2d 879

Opinion delivered March 12, 1956.

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

James M. Smith, E. E. Hopson, Jr., and *DuVal L. Purkins,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal from a decree of the Desha Chancery Court, which dismissed the appellants' complaint.

On December 11, 1952 the appellants, Percy Wargo and Andrew Wargo, Jr., filed this suit against their brother, Timothy Wargo, his wife and their mother, Victoria Wargo. Mrs. Victoria Wargo is the widow of Andrew Wargo, Sr., and the appellants and Timothy Wargo are the sons and only heirs at law of Andy Wargo, Sr., deceased.

The appellants in their complaint allege that they are the owners, in possession and that they have held such possession adversely for more than seven years of six separate designated tracts of real estate, located in Desha County, Arkansas. They also claim that they are entitled to have their title to the lands quieted and confirmed in them. They also allege that they are the owners of certain farm machinery and cattle located on the premises and ask that their title to such personal property be quieted in them.

They further allege that their father, Andrew Wargo, Sr., died June 10, 1952, and that the record title to all of said property was held by him at the time of his death.

On January 1, 1952 the appellants also filed in said court their petition for an injunction against appellee, Timothy Wargo. They alleged that Timothy Wargo had filed a petition in Desha Probate Court to have an instrument in writing probated as the last will and testament of Andrew Wargo, Sr., deceased. A copy of this instrument was attached to the petition and as pointed out therein, the purported will disposed of all the prop-

erty claimed by the appellants in this suit, as well as other property.

They further alleged that if the will was probated it would cast a cloud upon all the property claimed in said suit by the appellants.

The probate and chancery cases were tried before the court and both matters were disposed of on the same date. The two cases are here for decision and the probate case is today decided in a separate opinion.

The appellants contend, for reversal of the trial court's decree, that the appellants acquired title to the land in question by reason of a resulting trust, created by them purchasing the lands in the name of their father, entirely out of money supplied by them. The evidence on the part of the appellants is to the effect that in the fall of 1935, at a time when the appellants were young men in their early twenties, their father made them a proposition. He said, "If you boys want to stay here and take care of mother and me, clear the rest of this land and take care of the herd of cattle, you can have everything you make above the operating expenses and maintenance of the home." The appellants contend that they accepted the proposition and that they have carried it out up until the time of the suit. Their testimony was corroborated by their mother, Victoria Wargo. They contend that they did business in their father's name.

The proof on the other hand is that their father, the deceased, continued to operate his property in the same manner that he had always done. He was the head of the family and if the family needed money he would go to the bank and borrow it on his own note. In other words, he proceeded to finance and supervise the operation of the farm. Over a period from about August, 1936 until the year 1944 the deceased bought each of the six tracts of land claimed by the appellants. The ones he paid cash for, he took a deed in his own name, and wrote a check on his own bank account and paid therefor. Some of the land was bought on credit. He, alone, signed the contracts of purchase, made the down

payment out of his money, and made the other payments by check from his account in the bank, and took the title to the real estate in his own name.

The last tract that he bought, in 1944, he purchased from Mrs. Zellner. He had a law suit about this tract of land in 1948. Two of his sons, Timothy and Percy Wargo, were witnesses in the trial of this case and Mr. Wargo established the fact that he had purchased said land, by a valid contract, from Mrs. Zellner and the court held in his favor.

There is other evidence that, at the time the deceased bought the first tracts of land, he acquired the money to pay therefor, by selling timber from land he owned on an island situated in the Arkansas River. He also sold timber off of the land claimed by the appellants herein, and entered into written contracts and signed timber deeds for the sale of said timber and collected the money therefrom. He also made oil and gas leases on this land during his lifetime and collected the proceeds from said leases.

On September 5, 1946 the deceased made a will, and in that will he gave to his two grandsons, Timothy Wargo, Jr., and Andrew Wargo, III, who are the sons of Timothy Wargo, a 160 acre tract of land in Section 16, which is now claimed by the appellants.

On December 31, 1949 the deceased made the will that has been probated by the lower court and in that will he gave the grandsons the same tract of land he had given them in the 1946 will, together with a remainder interest in a part of the home place. In the 1949 will he gave to his son, Timothy, land in Section 16 and land in Section 15, the two tracts in said sections which are now claimed by the appellants, in this suit. This suit was filed after the 1949 will was offered for probate. It is evident that the appellants were disappointed in the way their father disposed of his estate by his will.

The appellant, Andrew Wargo, Jr., since the year 1941 had his own separate bank account. He had a herd of cattle that he branded with his own private brand,

which was different from his father's brand, and also different from Timothy's cattle brand, as Timothy also had a separate herd of cattle.

At the time the deceased made his 1949 will he had 388 head of cattle which carried his separate brand. It is generally agreed that the widow, Mrs. Victoria Wargo owned 75 head of these cattle, which she claimed all along belonged to her, even though they carried the same brand as her husband's cattle.

The appellee, Timothy Wargo, built a home in 1935 about 40 feet from the family home, on land belonging to the deceased. He lived in his home, except for a few months during a period of two or three years when he was away hauling logs. From 1941 to 1947 he lived, with his family, in the family home and his youngest son was born while he was living with the rest of the family.

Percy and Andrew Wargo, Jr., have lived in the family home at all times, except for a three year period when Andrew Wargo, Jr., was in the armed services. During that time Timothy looked after Andrew Wargo, Jr.'s, hogs and cattle and from the sale of such stock he deposited $2,000 to Andrew, Jr.'s credit in his separate bank account.

As the family operations expanded the deceased bought additional farm machinery and he bought a bulldozer which he purchased in person and paid for by check out of his bank account, and Timothy also bought considerable farm machinery, two tractors, a corn picker, power saws and other equipment which he used on his property and which was also used on the home place. In fact, the family used each other's property when convenient and they hired considerable help in the operation of the farm. Over a period of some three or four years Timothy Wargo's wife weighed the cotton during the cotton picking season and kept the records for the family at a time when they would have as many as a hundred cotton pickers at one time.

Late in the year 1948 or early 1949 a disagreement arose between Timothy and the appellants, which, in fact,

was very trivial, but has resulted in a further breach by reason of this law suit.

There is no doubt but what the deceased in the provisions of his will attempted to keep the family together. He made a provision for his widow and three sons each to have a life estate in the three acre tract set off for them. This was the land on which his home was built, Timothy's home was built, three barns and other outbuildings and cattle lots were constructed. He also very carefully kept a road open on the farm from his home place and between the lands given to Timothy and to Percy and Andrew, Jr., so that there would always be an open roadway from the home place to all parts of the farm. He gave to the appellants, 1,040 acres of land in a body. He gave to his two grandsons 288 acres of land, 128 acres of which, were subject to a life estate in his widow. He gave to Timothy 447 acres of land, making a connected farm not only of Timothy's tract, but Timothy's children's land was also connected with their father's tract of land.

Among other things, the widow was willed all of the cattle, the land on the island, and all other property the deceased owned and not specifically devised, which included $1,300 worth of stock in a feed mill and a life insurance policy for $2,000. The appellants received all the farm machinery belonging to the deceased, with the exception that Timothy was given a one-third interest in the bulldozer and sawmill, and the right to use the shop-tools in the blacksmith shop.

The deceased, in his will, designated all of this property as his property. Until the time of his death, he assessed all this property in his name, and had personally paid the taxes thereon until the year he died.

The evidence falls short of creating a resulting trust in appellants to any of this land owned by the deceased. Oral testimony of an agreement to create a trust falls within the statute of frauds, and where a trust is not manifested by any writing and no fraud has been practiced in obtaining the title, a resulting trust can only

arise from the payment of the purchase price at the time of the purchase. It can never arise out of an agreement. See *Bland* v. *Talley,* 50 Ark. 71, 6 S. W. 234; *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Pumphrey* v. *Furlow,* 144 Ark. 219, 222 S. W. 31, and *Castleberry* v. *Castleberry,* 202 Ark. 1039, 155 S. W. 2d 44.

Since the deceased owned the legal title to all the property involved and the record shows he paid for it out of his own bank account, oral evidence of a separate agreement under such conditions would not be admissible to attach an express trust in favor of the appellants to said land. *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848.

Oral evidence is admissible to establish even an express trust in personal property. The appellants in this case have failed to show by clear and convincing evidence, the right to have a trust declared in their favor in the personal property owned by the deceased.

It is agreed by all the parties and witnesses that the deceased was a just and honorable man. He was always careful to live up to and meet all of his obligations. He had a great affection for all of his family. He provided, to the best of his ability, and as he saw it, for each and all of them in his will.

Finding no error, the judgment is affirmed.

Justice George Rose Smith not participating.

WARGO *v.* WARGO.

5-895 287 S. W. 2d 882

Opinion delivered March 12, 1956.

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

DuVal L. Purkins, for appellee.

LEE SEAMSTER, Chief Justice. On June 10, 1952, Andrew Wargo, Sr., died testate survived by his widow, Victoria Wargo, and Timothy, Percy and Andrew, Jr., his three adult sons and his sole heirs at law. Until their father's death, Percy and Andrew, Jr., were unmarried. Timothy was married and had two minor sons, Timothy Wargo, Jr., and Andrew Wargo, III. Bessie Ann McCreary Bryan was a niece of Mrs. Victoria Wargo and she had lived in the home of Mr. and Mrs. Andrew Wargo, Sr.

Prior to his death, Andrew Wargo, Sr., executed his last will and testament on December 31, 1949, in the presence of Judge James M. Smith, and his son, Robert M. Smith, both attorneys at law. E. E. Hopson, another attorney at law, assisted Judge James Smith in the preparation of Wargo's will. After its execution by Wargo, the will was placed in a sealed envelope, endorsed: "Last Will and Testament of Andy Wargo." Thereafter, at Wargo's request, Judge Smith delivered this instrument to the probate clerk of Desha County for deposit. The clerk accepted the instrument and gave a receipt for it. Two carbon copies of this will, that had been duly executed by Wargo, were retained by Judge Smith and E. E. Hopson.

Shortly after Wargo's death, the probate clerk notified the widow and each of the heirs and beneficiaries that the will was in his custody. Within 30 days there-

after, the widow, three sons and niece of Andrew Wargo, Sr., met with attorneys, Judge James Smith and E. E. Hopson, in a room adjoining the office of the probate clerk. The probate clerk opened the envelope containing the will and Attorney Hopson read the context of the instrument to all parties present. At this time, the two carbon copies of the will that had been duly executed by Wargo were produced by the two attorneys, and were given to members of the Wargo family during the reading. After the will was read, the probate clerk was asked to return to the room, the will was replaced in its envelope and the clerk was instructed to retain the will in his custody until further notice, where the will was retained until the trial of this case.

On October 16, 1952, Timothy Wargo filed the will for probate. Thereafter, on December 15, 1952, Percy and Andrew Wargo, Jr., filed objection to the probation of the will. The will was duly admitted to probate as the Last Will and Testament of Andrew Wargo, Sr., on June 28, 1955. From the order probating the will is this appeal.

For reversal, the appellants set out the following points:

I

Andrew Wargo's will resulted from the undue influence exercised by Timothy Wargo and is, therefore, invalid.

II

Andrew Wargo was incompetent at the time he made the will in question and the will, therefore, is invalid.

III

The integrity of the purported will in question was destroyed and the will, therefore, was not entitled to probate.

(a) The envelope containing the will deposited with the Probate Clerk shows conclusively on its face that the will offered for probate was not the will originally deposited with the Clerk.

(b) The envelope containing the will was not opened by the Probate Court, as required by statute.

(c) Deposit of a will is not required by statute, but if compliance with the statute is attempted, then the statute must be strictly followed.

(d) The will bears evidence on its face that it is not in the form which the testator finally understood that he was signing.

The evidence reveals that Judge James Smith prepared a will for Andrew Wargo, Sr., on September 5, 1946, in which Wargo devised the following: To his widow he left all of his cattle; to his two grandchildren, Timothy, Jr., and Andrew III, he left 160 acres of land in Section 16; to his wife's niece, Bessie Bryan, he left $500 in cash; to his three sons, Percy, Andrew, Jr., and Timothy, he left the residue of his estate, both real and personal, share and share alike. Wargo also directed that his estate be held in trust for a period of ten years after the death of his wife and also directed that the farming operations on his property be continued as therebefore conducted and the earnings or losses be shared on an annual basis, among his three sons.

The 1949 will provides in substance as follows:

First. Directs the payment of debts.

Second. Devises to his wife, Victoria Wargo, a life estate in the S 1/2 of the S 1/2 of Section 14, Township 10 South, Range 1 West, west of the river and north of the section line road, with the remainder to Andrew Wargo, III, and Timothy Wargo, Jr., with the direction that the land be not sold, pledged or mortgaged until the younger shall have arrived at the age of 35 years.

Further bequeaths to his wife all his cattle and the proceeds of a life insurance policy of $2,000.

Third. Devises to Tim Wargo the N 1/2 of the N 1/2 of Section 23, Township 10 South, Range 1 West, west of the river and south of the section line road, subject to a life estate in a tract of land 300 feet north and south by 450 feet east and west in his widow and three sons.

Further devises to Tim Wargo the N 1/2 of the S 1/2 of Section 16, Township 1 South, Range 1 West, and the SE 1/4 of Section 15, west of the section line road.

Fourth. Devises to Andrew Wargo, III, and Timothy Wargo, Jr., equally, the S 1/2 of the S 1/2 of Section 16, to be held intact until the younger one is of lawful age.

Fifth. Devises to Andrew Wargo, Jr. and Percy Wargo, equally, the SW 1/4, the S 1/2 of the NW 1/4 of Section 10, Township 10 South, Range 1 West; the SE 1/4, the S 1/2 of the NE 1/4 of Section 9, Township 10 South, Range 1 west; the NE 1/4, the E 1/2 of the NW 1/4 of Section 16, Township 10 South, Range 1 West; the NE 1/4 of Section 15 north of the section line road; and the NW 1/4 of Section 15, Township 10 South, Range 1 West.

Sixth. Gave to Tim, Andrew and Percy equally the bulldozer and its equipment and a sawmill located on the SE 1/4 of Section 15, Township 10 South, Range 1 West.

Seventh. Gave to Andrew and Percy equally all farm implements and machinery, except as above given, including all tractors and other farm machinery and equipment, except that the shop and blacksmith shop equipment should be available equally to all sons and to his widow.

Eighth. Gave a life estate to the three sons and to his widow in a tract of land 300 feet north and south by 450 feet east and west in the N 1/2 of the N 1/2 of Section 23, Township 10 South, Range 1 West, in the building, shop and repair equipment thereon.

Ninth. Devises to Andrew Wargo, III, and Timothy Wargo, Jr., subject to the life estate of his widow, and S 1/2 of the S 1/2 of Section 14, Township 10 South, Range 1 West, west of the river and north of the section line road, with the direction that it be not sold, pledged or mortgaged until the youngest shall have arrived at the age of 35 years.

Tenth. Gave to Bessie Anne Bryan the sum of $500.

Eleventh. Gave residue to his widow.

Twelfth. Nominated his widow executrix without bond, and in the alternative, his sons as joint executors.

Executed by Andy Wargo on December 31, 1949, with the regular attestation clause signed by Robert M. Smith and James M. Smith, as witnesses.

There was no testimony in the record to show that Timothy Wargo had exercised any undue influence upon the deceased, in regard to the preparation of the will, or that he had any knowledge of its contents until it was opened by the probate clerk and was read to the family. Due to the lack of evidence, we cannot say that Timothy exercised undue influence upon the deceased to procure the execution of the will.

In regard to appellants' second point, that the deceased was incompetent at the time he made the will in question, there was not sufficient evidence of record to support the appellants' allegations. In fact the preponderance of the evidence shows that the deceased was of clear mind, mentally alert, had a knowledge of his properties and a concern for the deserts of his loved ones. The burden of showing lack of mental capacity and undue influence in making the will rests upon the appellants. They failed to do so in this case. *Werbe* v. *Holt,* 218 Ark. 476, 237 S. W. 2d 478; *Simpson* v. *Burge,* 216 Ark. 132, 224 S. W. 2d 830.

Finally, we can find no merit in appellants' third point. The testimony shows that the deceased, after long deliberation and consultation with his attorneys, executed this will by signing all of its pages and showed his approval to all of the terms and conditions of the will. Judge James Smith testified that at the direction of the deceased, he deposited this will with the probate clerk sometime in the early part of January of 1950 and he paid the clerk one dollar and received a receipt for the will. This receipt was delivered to the deceased. The probate clerk testified that Judge Smith deposited

this will with him on or about the eleventh day of January, 1950. The clerk also testified that he wrote on the envelope containing the will these words, "Delivered by Judge James Smith, July 18, 1949." The clerk offered as explanation for inserting the wrong date on the envelope, the fact that he had in his vault at that time the will of another party, upon which he had endorsed the same date, July 18, 1949. The proof conclusively shows that the will in question was filed with the probate clerk sometime in January, 1950.

The proof shows that the probate clerk opened this will in the presence of the parties. After the reading of the will by the attorneys, the will was replaced in the envelope and custody was retained by the probate clerk until introduced in evidence.

Section 60-415, Ark. Stats. 1947, pp., provides that the probate clerk, who is the custodian of the probate records, shall act as a depository for anyone who may wish to leave his will with him for safe keeping. Should the clerk and the parties comply with all the provisions of this section of the probate code, it would, no doubt, be helpful in establishing the validity and integrity of a will so deposited with the clerk. The failure of the clerk or the parties to comply strictly with all the provisions of this section in handling the will would not necessarily destroy its integrity.

In this case two duly executed carbon copies of the will in question were furnished to the parties at the time the will was opened by the clerk and read to the parties by one of the two attorneys who had prepared the will for the deceased. Due proof of the execution of the will was made by the subscribing witnesses, and the evidence of the attorneys who prepared the will and who also deposited it with the probate clerk establishes the validity and integrity of the will beyond doubt.

We find that the probate court properly admitted the will to probate. The case is affirmed.

Justice George Rose Smith not participating.

DONLEY *v.* STATE, EX REL. LEWIS.

5-846 287 S. W. 2d 886

Opinion delivered March 12, 1956.

Martin, Dodds & Kidd, for appellant.

Frank Holt and *Jack Holt, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. The question for our decision is when the time for appeal begins to run in a case like this one. The appellant, L. C. Donley, was charged with being the father of an illegitimate child. The proceedings were under § 34-701 *et seq.* Ark. Stats. There was a hearing in the Pulaski County Court on January 7, 1955; and, at the conclusion of the hearing, the Court announced that the petition would be granted. But this statement was entirely oral: the Court made no written order or notation of any kind. The attorney for the mother prepared an order and took it to the County Judge, who signed it and had it entered on *January 20, 1955,* at which time it was entered *nunc pro tunc* for January 7th.

On January 27, 1955, Donley duly prayed an appeal,[1] which was granted. The County Court transcript was duly filed in the Circuit Court on February 8, 1955. A motion to dismiss the appeal was filed by the State on the ground that the County Court judgment was on *January 7th* and the appeal was not filed until after the expiration of the thirty days allowed for appeal, as held in the cases of *Epperson* v. *Sharp,* 222 Ark. 456, 261 S. W. 2d 267; and *Howard* v. *State,* 223 Ark. 634, 267

[1] He filed petition, affidavit and bond on that date, all in accordance with our two recent cases: *Epperson* v. *Sharp,* 222 Ark. 456, 261 S. W. 2d 267; and *Howard* v. *State,* 223 Ark. 634, 267 S. W. 2d 763.

S. W. 2d 763. From the Circuit Court order dismissing the appeal from the County Court, Donley has brought the case to this Court.

We hold that the thirty days allowed for appeal began on *January 20, 1955*—the first day there was filed in the County Court any written order or judgment, or notation as to a judgment. The situation here is similar to that in *Poe* v. *Walker,* 183 Ark. 659, 37 S. W. 2d 866. There the Chancery Court had a hearing on February 17, 1930, and made a finding of fact; but no notation thereof in writing was made upon any Court record until May 9, 1930, at which time a decree was entered conforming to the previous finding. The transcript on appeal was filed in this Court on November 8, 1930. The law then allowed six months for appeal. If the time for appeal had been dated from the oral finding of February 17, 1930, then the appeal was filed too late. We held that the time for appeal should date from May 9, 1930, when the first written notation was made. Mr. Justice FRANK SMITH used this language:

"While it does appear that the cause was submitted to and heard by the court on February 17, 1930, at which time the court's finding on the facts was indicated, yet it also appears that no memorandum was made in the order book or judge's docket or on any other record of the Pulaski Chancery Court showing a final disposition of the case and the relief granted until May 9, 1930, when the decree to be entered was approved by the presiding judge and entered of record.

"It is required by § 2140, Crawford & Moses' Digest, that appeals and writs of error shall be prosecuted within six months next after the rendition of the judgment, order or decree sought to be reviewed, and this statute was construed in the case of *Chatfield* v. *Jarrett,* 108 Ark. 523, 158 S. W. 146, to mean that the time for appeal begins to run from the date of the rendition or pronouncement of the judgment, order or decree, and not from the entry thereof upon the records of the Court. But by § 6276 Crawford & Moses' Digest, it is provided that 'the judgment must be entered on the order book,

and specify clearly the relief granted or other determination of the action.' In the recent case of *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44, we said that: 'There are authorities to the contrary, but we hold that, when a decision has been reached, announced by the court and sufficient memorandum on the chancery docket to show a final settlement of the case, it is a final judgment although it has not been spread in full upon the record.' Here the first written memorandum prepared or authorized by the presiding judge was written May 9, 1930, and, as the appeal was perfected within six months of that date, we hold that it was taken within the time required by § 2140, Crawford & Moses' Digest.''

The appellee relies on *Chatfield* v. *Jarratt,* 108 Ark. 523, 158 S. W. 146, but if there be any possible conflict between that case and *Poe* v. *Walker* (*supra*), then the latter case must control.

Section 2 of Act 555 of 1953 says that in all civil cases in circuit, chancery and probate courts a notice of appeal must be given ''. . . within thirty days from the entry of the judgment or decree appealed from, unless a shorter time is provided by law.'' The filing of the judgment commences the running of the 30-day period. In the case at bar, nothing was filed until January 20th, and the time for appeal must begin on that date. Of course, the County Court, sitting in bastardy cases, is not governed by the Act 555 of 1953; but that Statute is cited only to show that *Poe* v. *Walker* points the way to the Legislative intent shown in Act 555.

The judgment of the Circuit Court dismissing the appeal from the County Court is reversed and the cause is remanded to the Circuit Court with directions to reinstate the appeal of Donley and for further proceedings not inconsistent with this opinion.

WOOD *v.* WOOD.

5-876 287 S. W. 2d 902

Opinion delivered March 12, 1956.

[redacted]

Thorp Thomas, for appellant.

Harry C. Robinson, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from a child custody case between the parents of a little 6-year old boy. In January, 1954, the Pulaski Chancery Court awarded Mrs. Wood (present appellant) a divorce; the custody of her son, Don Randall Wood, then four years of age; and support money for him of $75.00 per month. The decree expressly gave Mr. Wood (present appellee) the right of visitation. On April 27, 1955, Mr. Wood filed petition to obtain custody of his son, and alleged a change in conditions. The Chancery Court heard appellee's petition on July 15, 1955; and made a temporary order directing Mrs. Wood to return the child to the jurisdiction of the Pulaski Chancery Court and to the temporary custody of Mr. Wood until the future custody could be determined. From that temporary order of July 15, 1955, Mrs. Wood brings this appeal.

I. *Appealability.* We hold that the order for temporary custody is appealable.[1] In *Walker* v. *Eldridge,* 219 Ark. 35, 240 S. W. 2d 43, we held that any decree awarding or changing the custody of a child is sufficiently final to permit an appeal. So, even though the order in this case was expressly stated to be temporary, nevertheless it was appealable.

11. *Notice Of Hearing.* Mrs. Wood claims that she did not receive due and timely notice of the hearing of July 15th and, therefore, she asks that the order for temporary custody be reversed. The record reflects that Mr. Wood filed his petition on April 27th; that, without permission of the Pulaski Chancery Court, Mrs. Wood took the boy to Missouri, where she still had him; that a letter was sent to Mrs. Wood on July 6th, advising her of a hearing to be held on July 12th; that Mrs. Wood's attorney was notified on July 7th that a hearing would be held on July 12th; that on July 12th Mrs. Wood's attorney appeared for her in the Pulaski Chancery Court and questioned the sufficiency of the notice of hearing and *also asked for a continuance*[2]; and that the Court continued the hearing from July 12th to July 15th, and heard the matter on the last mentioned date.

We have repeatedly held that a request for continuance is an entry of appearance. *Sager* v. *Jung & Sons Co.,* 143 Ark. 506, 220 S. W. 801; *J. C. Engleman, Inc.* v. *Briscoe,* 172 Ark. 1088, 291 S. W. 795; *Chapman & Dewey Lumber Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. 2d 80; and *Auto Sales Co.* v. *Mays,* 191 Ark. 884, 88 S. W. 2d 330. Here, the request for continuance by Mrs. Wood's attorney entered her appearance, and it was certainly proper

[1] The decree from whence comes this appeal reads in part: "It is Therefore Considered, ordered and decreed that custody of Don Randall Wood, the minor child of the parties hereto, is hereby temporarily given to his father, James D. Wood, that the award heretofore given by this Court for the care and maintenance of said child is hereby set aside; that the plaintiff, Elizabeth V. Wood, is hereby ordered and directed to return the person of the said Don Randall Wood to the jurisdiction of this Court within fifteen days after receiving a true copy of this order."

[2] The prayer of the pleading filed by Mrs. Wood's attorney prayed that the ". . . petition be dismissed because of lack of notice, and, in the alternative, there shall be allowed a continuance of sixty days in which to prepare a defense of this action."

for the Court to direct her to return the child in accordance with the temporary order here made. Mrs. Wood was before the Court by her attorney because of the motion for continuance. Her claim, that she did not have sufficient time to prepare her defense, need not be considered because the only order the Court made on July 15th was a temporary order.[3]

III. *Other Questions.* Since the main purpose of the order here involved was to obtain return of the child to the jurisdiction of the Court, after which there would be a hearing on the matter of future custody, we see no need to mention the other matters discussed in the briefs. The question of who shall have the future custody of the child is still for determination by the Chancery Court.

Affirmed.

Mr. Justice ROBINSON not participating.

---

[3] It was shown that Mrs. Wood's aunt and uncle agreed with Mr. Wood and the Court that they would keep the little boy until the custody matter was fully heard. It was shown that the boy had been with this uncle and aunt most of the time since the divorce decree; and Mr. Wood's attorney asked these questions of the uncle:

"Q. (Mr. Robinson continuing): If the Court in his wisdom should see fit to award custody, temporary custody of this child, to you until the matter can be completely litigated, do you feel you can furnish it a Christian home and put the child in school and attend to it for the best interests of the child?

"A. I would.

"Q. Would you like to do that?

"A. Yes."

HOLLINGSWORTH & FRAZIER *v.* BARNETT.

5-881 287 S. W. 2d 888

Opinion delivered March 12, 1956.

Hardin, Barton, Hardin & Garner, for appellant.

Jeptha A. Evans, for appellee.

MINOR W. MILLWEE, Associate Justice. On May 4, 1954, appellee, John T. Barnett, Jr., was driving a loaded log truck to Nebo Lumber Co. at Dardanelle, Arkansas, over State Highway No. 28, when a wooden bridge collapsed resulting in injuries for which he sought compensation before the Arkansas Workmen's Compensation Commission. His claim against appellant, James Frazier, doing business as Hollingsworth & Frazier, and the insurance carrier, was controverted on the ground that appellee was an independent contractor and not an employee of appellant Frazier at the time of injury. Hearings before one commissioner and the full commission resulted in an award in appellee's favor which was affirmed by the circuit court. The issue here is whether there is any substantial evidence to support the commission's finding that appellee was an employee of appellant at the time of his injury.

Appellant had a contract with Nebo Lumber Co. to cut, haul and deliver timber from certain tracts to the

lumber company's mill at Dardanelle in 1954. Appellee was 18 years old in January, 1954, when his father was engaged in skidding and hauling logs for appellant and the man doing the skidding quit. James Frazier approached appellee about taking the skidder's place, which was done, and appellee was carried on appellant's books as an employee and paid by checks made directly to him. Frazier testified that, subsequently, when operations were begun on another unit of timber, he had an oral agreement with appellee's father whereby the latter was to haul and skid logs at $18.50 per thousand feet under the same arrangement that appellant made with all other haulers and skidders. Frazier knew that appellee was working with his father and that the two jointly owned the truck and two horses used in the work and divided equally the net income after payment of maintenance and fuel costs of the truck and the bill for horse feed. Under this arrangement which existed at the time of the injury all checks in payment of the work were made to appellee's father. Appellant made no deductions for social security or income taxes on any of the men employed by him but had a policy of workmen's compensation insurance covering his "logging and lumbering" operations anywhere in Arkansas.

Frazier also testified that appellee and his father were hired under an oral agreement to skid and haul the logs at so much per thousand feet; that he was in the log woods practically every day supervising the work of the several cutters, skidders and haulers; that the logs would be located at different places and he would tell the skidders and haulers where to get the logs and what sizes to get; that he assigned certain areas for separate skidders and haulers and considered them his employees; and that he walked over the woods daily checking for the primary purpose of seeing that the skidders and haulers kept up with the cutters. In answer to leading questions he stated that he never told the men how to do the work but he further said he would have done so if it had been necessary to insure that the job was done in a workmanlike manner. When asked whether he cared whether the haulers used one or four trucks, he stated that it de-

pended upon whether they were staying behind or up with the cutters.

Insofar as the record discloses, the oral agreement under which appellee and his father worked ran for no specified time and appellant could have terminated the employment relationship at any time without liability. While it was testified that all the workmen could begin and quit work when they chose, it is undisputed that they went to work about 7 a. m. and did not quit until they had done a day's work.

We have repeatedly said that no hard and fast rule can be formulated to determine whether a person undertaking to do work for another is an employee or an independent contractor, and that each case must be determined on its own peculiar facts. While there are many well recognized and fairly typical *indicia* of the status of the relationship, the presence of one or more of them in a case is not necessarily conclusive of this status. However, such *indicia* are important as guides to the broader and primary question of whether the worker is in fact independent, or subject to the control of the employer, in performing the work. *Parker Stave Company* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620; 27 Am. Jur., Independent Contractors, Sec. 5; 75 A. L. R. 726; 134 A. L. R. 1029.

Another settled rule of this court is that, in determining whether one is an employee or an independent 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 764; *Feazell* v. *Summers,* 218 Ark. 136, 234 S. W. 2d 765. The power of an employer to terminate the employment at any time without liability is incompatible with the full control of the work which is usually enjoyed by an independent contractor and is a strong circumstance tending to show the subserviency of the workman. *Irvan* v. *Bounds,* supra.

The facts that the employment contract was for no specified time and could be terminated at will by appellant without liability, and that he reserved the right to

make suggestions as to how the work should be done, are indicative of the relationship of employer-employee between appellant and appellee. The commission also might have wondered why appellant should have bothered about compensation insurance if he really thought he would not be responsible for any loss due to injuries of any of the workmen connected with his logging operations. In our opinion the commission's finding that appellee was the appellant's employee at the time of injury is supported by substantial evidence. We also agree with the circuit court's determination that the fact that appellee and his father were partners in carrying on the work did not preclude a finding of the employer-employee relationship. In reaching this conclusion, the court correctly relied upon the holding in *Hiebert* v. *Howell,* 59 Idaho 591, 85 P. 2d 699, 120 A. L. R. 388. In that case the Idaho Court, under a similar state of facts, held the fact that the persons engaged in skidding and hauling the logs with equipment owned by them jointly were, as between themselves, partners did not prevent them from becoming ordinary employees of one who hires them to skid and haul timber for him.

The judgment is affirmed.

SELF *v.* WISENER.

5-851 287 S. W. 2d 890

Opinion delivered March 12, 1956.

Bailey, Warren & Bullion, for appellant.

No brief, for appellee.

George Rose Smith, J. This is a suit by the appellee to enjoin picketing by Local No. 700, International Brotherhood of Electrical Workers. The complaint alleges that the union has picketed Wisener for the unlawful purpose of forcing him to compel his employees to join the union. Ark. Const., Amendment 34; Ark. Stats. 1947, § § 81-201—81-205. The union denies this charge and asserts that the picketing is for the single purpose of protesting the fact that Wisener pays substandard wages to his employees. The chancellor found the issues in favor of the plaintiff and permanently enjoined the union from picketing the plaintiff in any manner whatever.

There is little conflict in the testimony. Wisener had been a member of the union for eight years when he went in business for himself in 1949. For the next two years Wisener continued his membership and conducted his shop under a union contract. In 1951 a dispute arose between Wisener and the local, the details of which are unimportant in this case, and the contract was terminated. When this suit was filed in 1954 Wisener had three employees, none of whom had ever been a member of the union.

The prevailing union wage for electricians in Fort Smith is $2.625 an hour. Wisener pays one of his men $2.00 an hour and the other two $1.50 an hour. In addition he gives them a bonus at the end of each year, this bonus having amounted in 1953 to less than five cents an hour. Wisener also provides certain medical and hospital benefits. Although the value of these benefits is not shown, it is clear that Wisener's wage scale is substantially below the established union rate.

Before the present controversy arose the union's representative, T. F. Self, had requested several business concerns not to employ Wisener for their electri-

cal work. Self testified that he told these concerns that he would appreciate their "using our members and our people and particularly the people that paid the recognized wage rate — fair wage rates." In most instances the firms complied with Self's request and discontinued Wisener's employment. Such a protest was ineffective, however, with reference to work upon a building that was being constructed in Fort Smith, and the union picketed the job.

The picketing was entirely peaceful. There is no suggestion that it was accompanied by threats, intimidation, violence, or other unlawful conduct. Hence the trial court's decree can be sustained only if the picketing was for an illegal purpose. Although the appellee has not filed a brief in this court, there appear to be two possible arguments against the legality of the appellants' conduct.

First, the complaint alleges, and the chancellor found, that the purpose of the picketing was to force Wisener's men to join the union. The weight of the evidence does not support this charge. There is no testimony having a direct tendency to establish the allegations of the complaint. Wisener merely testifies that, since the pickets' signs charged unfairness to the union, he supposed that the union wanted his employees to become members. Wisener does not base his supposition on anything except the bare fact that a picket line existed. He and his three employees all state that there was never any request that the men join the union. The defense testimony is to the same effect. Unless the union's illegal purpose can somehow be deduced from the naked fact of picketing, there is no proof affirmatively establishing the allegations of the complaint.

On the other hand, there is positive proof supporting the appellants' contention that the picketing was a protest against the payment of low wages. Self testified that when he first came to Fort Smith the wage scale was 87.5 cents an hour. Over a period of years the pay has risen to its present level of $2.625. It cannot be doubted that the efforts of organized labor have been

partly responsible for the increase or that the union members have a direct interest in maintaining the wage level. It is shown that from time to time the United States Department of Labor ascertains the prevailing wage scale in every area. Federal construction contracts require that this prevailing wage be paid by the contractor, and a similar provision is sometimes inserted in private building contracts. Wisener admits that his wage payments are reported to the Department of Labor; presumably they are considered in the determination of the prevailing wage for the locality. Thus every electrical worker has a pecuniary interest in the matter. This is the situation in which the appellants elected to call the public's attention to the appellee's wage scale. When the appellants' affirmative proof is contrasted with the appellee's failure to produce affirmative proof it cannot be said that the asserted violation of the state constitution and statutes has been established by a preponderance of the evidence.

Second, it might be argued that picketing as a protest against the payment of substandard wages is illegal in Arkansas. We do not regard such an argument as sound. The legislature has not attempted to forbid such picketing. In the absence of statute the judiciary may announce the state's public policy in accordance with the common law, *Sheet Metal Workers Int. Ass'n* v. *E. W. Daniels etc. Co.,* 223 Ark. 48, 264 S. W. 2d 597, but we are aware of no common law principle that condemns picketing of the kind involved in this case. The fact that no labor dispute existed between Wisener and his employees does not in itself render the picketing unlawful. *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154. When it is realized that the appellants were financially affected by the comparatively low wages being paid by Wisener, there is no valid reason for branding as unlawful the appellants' desire to publicize their grievance.

Reversed.

4831 287 S. W. 2d 892

Opinion delivered March 12, 1956.

[redacted]

Eugene Coffelt, for appellant.

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

PAUL WARD, Associate Justice. Appellant, Maud Rawlins Slavens, was charged with the illegal possession of intoxicating liquor for the purpose of sale in dry territory, and was convicted after a jury trial.

For a reversal appellant sets forth six separate assignments of error, but these assignments may be grouped and are argued by appellant under two headings, viz: (a) there is no substantial evidence to support the verdict of the jury, and (b) the court erred in permitting the state to prove prior convictions for like offenses.

Testimony on the part of the state: On June 24, 1955 the sheriff and a city officer searched appellant's home and found 12 or 13 half pints of liquor. The sheriff first found 2 bottles and then appellant went into another room and returned with the other bottles saying "This is all I've got. To save you time in searching, this is all I've got here," but when the sheriff told her he was going to arrest her for the possession of liquor for sale appellant said the liquor belonged to her husband; The city officer, who was with the sheriff when appellant's

home was searched on June 24, 1955, stated that in September of 1954 he searched her home and found 15 half pints of liquor; A state policeman testified that on August 4, 1954 he searched appellant's home and found some 40 or 50 half pints of liquor; The Mayor of Siloam Springs testified that appellant was convicted on December 1, 1950, for possessing more than one gallon of liquor for sale; A police officer of Siloam Springs testified that on September 15, 1954 he searched appellant's car and found one gallon of liquor in half pint containers, and that in January 1955 he searched appellant's car and found 8 half pints of liquor; The manager of a grocery store in Siloam Springs, located a block and a half from appellant's home, stated that he had seen people going in and out of her home; The Circuit Clerk testified that appellant pleaded guilty on September 17, 1951 to the possession of untaxed liquor for sale in dry territory, and that she pleaded guilty to three liquor charges on April 3, 1951, and; Several witnesses testified that appellant had the reputation of dealing in the illicit sale of liquor. Appellant's husband testified that the liquor which was found on June 24, 1955 belonged to him, and several witnesses testified that appellant had a good reputation.

(a) The above testimony, we think, constituted substantial evidence to support the verdict of the jury. This same conclusion was reached, on somewhat similar facts, in *Freeman* v. *State,* 214 Ark. 359, 216 S. W. 2d 864, and *Huffman* v. *State,* 222 Ark. 319, 259 S. W. 2d 509.

(b) The court did not commit error in allowing the state to prove that appellant had been previously convicted for similar offenses. This point is fully covered and is controlled by the opinion in *Thompson* v. *State,* 225 Ark. 1059, 287 S. W. 2d 465, and the cases cited therein.

Affirmed.

FOREST PARK CANNING COMPANY *v.* COLER.

5-860 287 S. W. 2d 899

Opinion delivered March 12, 1956.

[redacted]

Rex W. Perkins and *Jeff Duty,* for appellant.

Eugene Coffelt and *Vol T. Lindsey,* for appellee.

SAM ROBINSON, Associate Justice. Appellant Forest Park Canning Company filed suit against appellee M. C. Coler, a farmer, seeking a judgment in the sum of $3,462.84 alleged to be due on an open account for seed beans and fertilizer sold by appellant to appellee; there was a judgment for Coler. At the trial, it was admitted by Coler that he obtained seed beans and fertilizer of the value stated in the complaint, but it was contended that he had an agreement with Cecil Nail, agent of the canning company, that the beans and fertilizer were to be paid for out of the bean crop only; that Coler was liable for the purchase price only to the extent of the value of the bean crop. Two crops of beans were planted, but due to a prolonged drouth neither crop matured and no beans were gathered or sold. The canning com-

pany denies that Coler's liability for the purchase price was contingent on the production of a bean crop. Without abstracting the testimony here, suffice it to say that the evidence is sufficient to give rise to a question of fact as to the terms agreed upon when the merchandise was sold; it was an issue of fact to be resolved by the jury.

The appellant canning company complains of Instruction No. 6 given by the court. This instruction must be read in connection with Instruction No. 5 which, along with a colloquy between a member of the jury and the court, is as follows:

INSTRUCTION NO. 5

"The merchandise was received and it is not a question. It is all or nothing. That's the testimony in this case. Nine or more concurring can return a verdict. If unanimous, just one of you sign it as foreman. If it is not unanimous but nine of you concurring must each individually sign the verdict. Any other instructions?

Juror Hefner: Judge, can the jury decide that Nail is agent of the canning company without your giving us the law of agency?

The Court: I can give you one.

Mr. Hefner: I would like to have it.

The Court: I am going to change that. I don't believe the question of agency is a question of fact in this case. I will direct you that agency has been alleged and stated and I don't believe that there is any proof to the effect that there wasn't an agency relationship. So I'll take that question away from you.

Mr. Hefner: In other words, we are not to determine the question of agency?

The Court: That is correct. I am saying that that is not to be determined, that agency has been established sufficiently, so the only question is what the understanding was in the sale of the merchandise."

The appellant objected to the giving of Instruction No. 5, and over appellant's objection, the court then gave

Instruction No. 6, as follows: "It is further stated here that the plaintiff is responsible for the acts of his agent, any action on the part of the agent is within the scope of his authority carries over to the plaintiff." This instruction was erroneous; by it the jury were told, in effect, that, as a matter of law, the principal was responsible for the acts of the agent; notwithstanding, such acts may not have been within the authority, or apparent authority, of the agent.

Nail was not just an ordinary employee of the canning company; the seed beans were bought in St. Louis and charged to Nail; in fact, he has paid for the merchandise, and the canning company, in turn, owes him. The canning company has actually paid out only $650.00 on merchandise valued at more than $3,000.00; Nail paid the balance to the St. Louis people from whom the merchandise was purchased. There was testimony to the effect that Nail was to get a commission from the canning company for buying the matured beans from Coler, and, also, he was going to make a profit out of hauling the beans. Mr. Goff, president of the canning company, testified that Nail had no authority to make a contract on behalf of the company which required Coler to pay for the beans only in the event he made a crop sufficient to pay the account.

In view of the evidence, it cannot be said that, as a matter of law, the agreement which Coler contends Nail made was within the scope, or apparent scope, of Nail's authority as agent; in the circumstances, it was a question of fact for the jury to decide. This court said, in *Firemen's Fund Insurance Company* v. *Leftwich,* 192 Ark. 159, 90 S. W. 2d 497: "In an unbroken line of opinions we have consistently held that the question of agency, and the extent of its power and authority is always a question of fact to be determined from the testimony adduced." See also *Bradley Adv., Inc.,* v. *Froug Stores, Inc.,* 193 Ark. 639, 101 S. W. 2d 789, and *Thompson* v. *Hollis & Company,* 194 Ark. 1, 104 S. W. 2d 1065.

Appellee contends that appellant cannot take advantage of the alleged error in the giving of Instruction

No. 6 because all the instructions are not abstracted. Prior to January 10, 1954, when Rule No. 9 adopted by this court became effective, we had held that an alleged error in the instructions would not be considered unless all the instructions were abstracted. *Hall* v. *Stover,* 215 Ark. 485, 221 S. W. 2d 41. But now, Rule No. 9(d) prevails; it provides: "The appellant's abstract or abridgment of the record should 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 . . ." (e) ". . . If the appellee considers the appellant's abstract to be defective, he may, at his option, submit with his brief a supplemental abstract. When the case is considered on its merits the court may impose or withhold cost to compensate either party for the other party's noncompliance with this rule." If the appellee is of the opinion that an error in the giving of an instruction, or failure to give a requested instruction, is cured by the giving of other instructions, it is the duty of appellee to point out such other instructions to the court. Here, there is no other instruction that cures the error in Instruction No. 6.

Appellant also maintains that the court erred in refusing to admit, as evidence, proffered testimony of trade usage in the community pertaining to the making of contracts for the sale of seed and fertilizer, and cites as sustaining the point *Sharpenstein* v. *Pearce,* 219 Ark. 916, 245 S. W. 2d 385. In the case at bar, the proffered evidence related only to transactions made by Nail with others, and not to a trade usage in the community; hence, the evidence does not justify the application of the trade usage rule discussed in the *Sharpenstein* case.

For the error in the giving of Instruction No. 6, the cause is reversed and remanded for a new trial.

Mr. Justice MILLWEE dissents.

4827 288 S. W. 2d 34

Opinion delivered March 19, 1956.

[redacted]

Kenneth C. Coffelt, for appellant.

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

LEE SEAMSTER, Chief Justice. The appellant, Keith Dale Rhea, was charged by information July 2, 1955, with the crime of grand larceny. He was tried in the Saline Circuit Court, convicted and his punishment was assessed at one year in the State Penitentiary.

For reversal, the appellant contends that "The Court erred in refusing to instruct the jury as a matter of law, that State's witness, Johnnie Smith, was an accomplice to the alleged crime, and in permitting the jury under instructions to make a finding of fact on this question." The appellant, Keith Dale Rhea, is 19 years of age and did not testify in the trial of this case.

The witness, Johnnie Smith, testified to the following effect, that he was 16 years of age, a resident of Benton, Arkansas, and knew appellant; that at approximately 5 p. m., on June 18, 1955, he left his place of work and accidentally met the appellant at the Country Club Drive-In at Benton, Arkansas; that appellant was driving a green 1955 Ford car at this time.

He further testified that about 8 p. m. that night they stopped on River Street and got some gas from a tractor and traveled through Hot Springs to Mt. Ida, whereby, they sold the spare tire for $6.40; that the appellant told him that he (appellant) took the automobile off of Edmondson's car lot in Benton, Arkansas and he knew that appellant did not own a car; that they traveled to Walla Walla, Washington, where they removed the radio from the car and he sold it; that they returned to Arkansas whereby, the left front tire on the car blew out near Lonsdale, Arkansas, and they drove on the rim for about 8 miles and abandoned the car on a side road, arriving home about 12 o'clock on Wednesday night.

The evidence reveals that Johnnie Smith informed the Sheriff of Saline County about the car and took him to the place where the car had been abandoned. He also showed the Sheriff where he and appellant had stowed the items that they had removed from the car, including a siphon hose, a gas can and some clothing.

The Sheriff of Saline County, James Steed, testified that the witness, Johnnie Smith, and his mother came to his office on Monday between 12 and 1 p. m. The evidence is not clear on this point, but we presume this was the Monday after the witness returned home on Wednesday night. The Sheriff testified that Rufus Edmondson identified the abandoned car as the one that was stolen from his lot.

The evidence in this case is undisputed and we think that it is sufficient to make the witness, Johnnie Smith, an accomplice as a matter of law to the crime with which appellant was charged. *Mankey* v. *State,* 192 Ark. 901, 96 S. W. 2d 463.

Over the objection of the appellant, the court submitted the question to the jury as to whether the witness, Johnnie Smith, was an accomplice in the case. This court has held that an accomplice is one who in any manner participates in the criminality of an act, whether he is considered, in strict legal propriety, as a principal or merely as an accessory before or after the fact.

This court has also held that where there is a question of fact as to whether the witness is an accomplice, the fact should be submitted to the jury unless it is shown, as a matter of law, that he is an accomplice. *Jackson* v. *State,* 193 Ark. 776, 102 S. W. 2d 546; *Redd* v. *State,* 63 Ark. 457, 40 S. W. 374.

The appellant objected to the instruction as given by the court and saved his exceptions thereto. The appellant also offered the following instruction: "You are instructed that the witness, Smith, under the law and facts as developed in this case is an accomplice." In a case almost identical to the one at bar, *Smith* v. *State,* 144 S. W. 2d 896, the Court of Criminal Appeals of Texas held that it was reversible error to refuse to instruct a jury that a witness was an accomplice as a matter of law, where the evidence shows that such witness was, in fact, an accomplice to the crime charged.

There are other errors complained of by the appellant, but we think that they would be avoided by the court on a retrial of this case. We hold that it was reversible error for the court to refuse to instruct the jury, as requested by the appellant, that witness Smith was an accomplice to the crime charged against appellant, as a matter of law, and in submitting an instruction to the jury, leaving this question for the jury to determine.

The case is reversed and remanded.

NORWOOD *v.* NORWOOD.

5-844 288 S. W. 2d 39

Opinion delivered March 19, 1956.

Rex W. Perkins and *E. J. Ball,* for appellant.

Price Dickson, W. B. Putman and *Suzanne Chalfant Lighton,* for appellee.

J. Seaborn Holt, Associate Justice. This appeal involves the right of a second mortgage holder, who was a constructively summoned non-resident defendant, to set aside a foreclosure decree, within the two-year period [§ 27-1907 Ark. Stats. 1947].

Appellee, Mae E. Norwood, held a first mortgage on land in Washington County to secure an indebtedness of $4,725.16. C. C. Norwood, appellant, held a second mortgage to secure an indebtedness of $4,500.00. February 14, 1954, Mae Norwood filed suit to foreclose against Bryan Norwood, Mortgagor, personally. She later amended her complaint making C. C. Norwood a party, defendant. He was a non-resident of Arkansas and service was had upon him by publication. Bryan Norwood and C. C. Norwood did not appear in the cause and a default decree of foreclosure was entered against them August 16, 1954. Sale of the property was had September 17, 1954, and Mae Norwood purchased the property for $3,500.00. The sale was subsequently confirmed. Thereafter, December 17, 1954, C. C. Norwood filed petition to set aside the foreclosure decree above and sought the right to redeem the property, alleging, in effect, that while the foreclosure proceedings were pending Mae Norwood (appellee) agreed with them: ". . . not (to) pursue further her complaint for fore-

closure . . . and that the said Mae E. Norwood, Bryan Norwood and C. C. Norwood would endeavor to sell the premises subject to the first mortgage of Mae E. Norwood and the second mortgage of petitioner, and that from the said proceeds of the sale of said premises Mae A. Norwood would be paid in full for his claim, and that the balance, if any, would be paid to Bryan Norwood . . . Petitioner further states that he is ready, willing and able to pay the claims due and owing to Mae E. Norwood, and that he tenders into Court the sum of $5,140.97 to cover all of said claim. (Tr. 41) . . . that the sum of $342.56 should be disallowed as a claim of the said Mae E. Norwood for the reason that she is not entitled to an allowance for attorney's fees; that the sum of $306.56 be disallowed for the reason that said sum was not expended on the property described in said foreclosure proceeding."

He further alleged that appellee's actions were in effect a fraud on the court and he had a meritorious defense. From a decree of March 4, 1955, dismissing appellant's petition for want of equity, is this appeal. For reversal appellant argues the one point that: "The foreclosure decree should be set aside under Arkansas Statute 1947 (Sec. 27-1907). The trial court erred in holding to the contrary."

It appears undisputed, as indicated, that Mae Norwood procured a default foreclosure decree, the sale of the real property in question under that decree and the confirmation thereof. It is also not disputed that C. C. Norwood, the second mortgagee, was constructively summoned, and that the foreclosure proceedings were had in default of his appearance in said case. It also appears that appellant's petition to set aside the default decree was filed approximately 44 days after it was rendered.

Section 27-1907 Ark. Stats. 1947 provides: "New trial where defendant constructively summoned—Time —Power of court on new trial. —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; Provided the provisions of this section shall not apply to judgments granting a divorce except so far as related to alimony."

In construing the effects of this section of the statute in *Wright* v. *Burlison,* 198 Ark. 187, 128 S. W. 2d 238, we used this language: "It is true, as appellant contends that she had the right under the above section of the statute, to come in within the two-year period, ask the court to set aside the decree of foreclosure rendered on constructive service against her, and make her defense upon giving the bond for costs required. It was not necessary for her to first show a meritorious defense, nor should she have been required to assume the burden of proof . . . They have no right, however, to have the former judgment, meanwhile, vacated on motion. It remains until the case is re-tried, to be then confirmed, modified or set aside. Nevertheless, if the court should refuse to admit a defendant to make defense, and the answer which he proposes to file should not disclose any substantial right, the error would not be so prejudicial to him as to require correction. If the defense is incorporated with the motion, it may be considered to include all the defendant means to stand upon."

The record here reflects that appellant, C. C. Norwood, was permitted to plead all defenses on which he elected to stand and to present the testimony of a great many witnesses claimed to be in support thereof. In the circumstances he has had the retrial vouchsafed to him under the above statute and after a review of all the testimony presented by all the parties to this litigation we are unable to say that the findings and decree of the chancellor, were against the preponderance of the evidence. Appellant has failed to show any defense to the foreclosure decree, after, as indicated, he was given a full opportunity so to do, and we, therefore, hold that the decree must remain in full force and effect.

We also hold that there was no right of redemption accorded to appellant under the above section, § 27-1907, from the foreclosure sale. We said in *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905, "The statute [§ 27-1907] provides that a defendant constructively summoned, and who does not appear, may at any time within two years, and not thereafter, after the rendition of the judgment appear in open court and move to have the action retried. In such cases there is no right of redemption from the sale of the mortgaged property, and the only remedy for the defendant is that afforded by the statute, to have a retrial of the cause and, if successful, to obtain an order on the plaintiff for a restitution of the proceeds of the sale of the property. *Gleason* v. *Boone,* 123 Ark. 523 . . . mere inadequacy of price is no ground for setting aside a judicial sale unless it is so gross as to raise a presumption of fraud or unfairness." *See Hughes—Arkansas Mortgages*—Sec. 458.

The rule announced in *Horn* v. *Hull, supra,* that a defendant constructively summoned does not have a right of redemption during the two-year period, is manifestly sound. If such a right of redemption were permitted it is clear that no one would be willing to bid the full value of the mortgaged property at the foreclosure sale, for the purchaser would not be free to improve or sell the property until the expiration of two years. The non-resident defendant would thus be given an opportunity to speculate, without risk, upon the possibility that

the property might increase in value. Moreover, every mortgagor would have the power to obtain a two-year extension of the time for payment by merely recording a quitclaim deed to a nonresident friend or relative. It would then be necessary to join the non-resident grantee as a defendant when suit was brought to foreclose, and the equity of redemption would be automatically extended for two years. In the case at bar C. C. Norwood was granted a retrial of the case and has failed to show any error in the original proceedings. That is all the relief that he is entitled to under the statute.

Affirmed.

Chief Justice SEAMSTER not participating.

BLALOCK *v.* BLALOCK.

5-888 288 S. W. 2d 327

Opinion delivered March 19, 1956.

[Rehearing denied April 16, 1956.]

McCourtney, Brinton, Gibbons & Segars, for appellant.

Penix & Penix, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellee, J. A. Blalock, filed this suit against the appellant, R. L. Blalock, seeking to recover judgment for the balance due on a note of $3,000, dated November 2, 1950. Trial in the Chancery Court resulted in a decree for the plaintiff for $1,363.62, with interest at 5% from the date of the note. R. L. Blalock has appealed and presents here the issues now to be discussed.

I. *Usury.* The original note, that the appellant signed, read:

"$3,000.00 Jonesboro, Arkansas, November 2, 1950. At $150.00 per month beginning Dec. 1, 1950, consecutively after date for value received, I, we, or either of us promise to pay to the order of J. A. Blalock Three Thousand and no/100 Dollars at Jonesboro, Ark. with interest at 5 per cent per annum from date until paid. If the interest be not paid when due, to become as principal and the sum thereof to bear interest at the rate of .....per cent per annum. The makers and endorsers of this note hereby severally waive presentment for payment, notice of non-payment, protest, and consent that time of payment may be extended without notice thereof.

"(Signed) R. L. Blalock."

As security for the note, appellant executed a chattel mortgage on a truck and trailer and, in the chattel mortgage, the indebtedness was described as follows:

"Whereas, the said party of the first part is indebted to the party of the second part in the sum of Three Thousand Dollars as is evidenced by a promissory note of even date herewith, due and payable in 24 equal monthly installments of $150.00 per month beginning December 1, 1950, and consecutively and continuously thereafter for 23 months on 1st day of each month *at 6% per annum.*"[1]

[1] These words are emphasized because they are discussed in Topic II, *infra.*

If the description in the mortgage controls as to the indebtedness, rather than the provisions of the note, then the transaction is usurious; because twenty-four monthly payments of $150.00 per month in two years time is more than a repayment of a debt of $3,000.00 with 10% interest thereon.[2] It is on the theory that the description of the debt *in the mortgage* controls rather than the note itself, that the appellant presents this point of usury. But the law is clear that the note sued on controls over the recitals of the indebtedness as contained in the mortgage. In *Sugg* v. *Utley,* 186 Ark. 560, 54 S. W. 2d 413, there was a conflict between the recitals in the note and those in the mortgage, and we said:

"The provisions of the note would control as against the recital in the mortgage, which is only a security and incident to the debt. 1 Jones on Mortgages (7th ed.), page 484; *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865."

In the case of *Indiana etc. Ry. Co.* v. *Sprague,* 103 U. S. 756, 26 Law Edition 554, the Supreme Court of the United States had before it a case in which the bond (i. e., note) contained one provision and the mortgage another; and the Supreme Court of the United States said:

"The bond being the principal thing containing the obligation of the Company, and the mortgage a mere security to ensure the performance of that obligation, the terms of the bond should control."

In 10 C. J. S. 485, cases from many jurisdictions are cited to sustain the general rule:

"Where the note and the mortgage contain conflicting and irreconcilable provisions as to the character or terms of the debt, or the time for its payment, the note will govern as being the principal obligation."

[2] For some of our more recent cases on usury, see: *Strickler* v. *State Auto Finance Co.,* 220 Ark. 565, 249 S. W. 2d 307; *Winston* v. *Personal Finance Co.,* 220 Ark. 580, 249 S. W. 2d 315; and *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973. The note here involved was executed prior to these cases.

In the case at bar, the note recites that the indebtedness is $3,000.00 with interest at 5% from date and that the payments are to be $150.00 per month and the number of monthly payments is not stated. Therefore, the description of the indebtedness in the mortgage must yield to the actual note itself; and the note and evidence do not show a usurious contract. Both the appellant and the appellee admitted that neither of them read the mortgage when it was executed. They were both in the attorney's office when the papers were prepared and thought that the note would be correctly described in the mortgage. The attorney who prepared the note and mortgage frankly admitted that he made a mistake in his mental arithmetic in calculating the number of monthly payments. The frank admission of the attorney substantiates the parties. Usury consists in contracting for payment of interest greater than the law allows. Usury is not to be inferred when neither the borrower promised to pay a greater rate of interest than the law permits, nor the lender knowingly entered into a usurious contract. *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S. W. 2d 1009. All the evidence shows that the instant transaction was not usurious; so the appellant's plea of usury must fail.

II. *Alteration Of The Instrument.* In this assignment the appellant refers to an addition that the attorney made in the description of the indebtedness in the chattel mortgage after the appellant and appellee had left his office and before the mortgage was filed in the courthouse. We have already copied the indebtedness clause as it was contained in the mortgage, so we will not recopy it; but we point out that the words at the close of the indebtedness clause — "at 6% per annum" — were added by the attorney in pen and ink after the parties had left his office. All of the other description of the indebtedness was either printed or typewritten. The attorney who made the addition frankly says that it was done to try to straighten out the attorney's mistake in mental arithmetic. If we had before us some question about the foreclosure of the mortgage, then the question of whether the alteration was material might

be a vital issue. But, in this case, the uncontradicted proof shows the mortgagor (appellant) disposed of the mortgaged property and paid the mortgagee (appellee) some of the proceeds of the sale; and the Chancery decree, herein involved, has no provision regarding foreclosure of the mortgage. Therefore, any question about an alteration in the mortgage passes out of this case because the mortgage is not being foreclosed. The note is the sole basis of the decree here involved.

III. *"Clean Hands" Doctrine.*[3] The appellant says that a court of equity should not award a judgment to the appellee because the appellant was executing the mortgage to the appellee to hinder and delay other creditors of the appellant in the collection of their indebtedness. But this, like the question of the alteration of the mortgage, seems to us immaterial. A great amount of testimony was taken, showing both previous and subsequent transactions between the parties, to establish that the indebtedness of $3,000.00 was actually due and owing at the date of the note, and that certain payments had been made thereafter. The indebtedness and the payments and the amount of the balance due are not even questioned by the appellant on this appeal. Since there was a valid indebtedness, the appellee had a right to have it evidenced by a note, and there was nothing fraudulent in that act. The appellant[4] frankly conceded that he executed the mortgage to the appellee in order to prefer him over his other creditors, but the truck and trailer have been disposed of, so the matter of "clean hands" as regards the mortgage has likewise passed out of the case.

Affirmed.

---

[3] On page 3 of his brief, the appellant says: "For the purpose of this appeal there are but two issues: Usury and alteration of the instrument"; but, in the argument, appellant also discusses a third point, that is, the "clean hands" doctrine.

[4] On this question of "clean hands," it is interesting to note that the Chancellor observed that the appellant's claim, that he was trying to defraud his creditors, did not prejudice the appellee, but could be considered in deciding the credibility to be given the appellant's testimony.

5-884 288 S. W. 2d 589

Opinion delivered March 19, 1956.

[Rehearing denied April 23, 1956.]

[redacted]

McMath, Leatherman & Woods and *William J. Isaacson,* for appellant.

Shaver & Shaver, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee, Rainfair, Inc., is engaged in the manufacture of men's slacks in its plant at Wynne, Arkansas, where it employed approximately one hundred women and seven men in April, 1955. None of the employees were members of a labor union at that time but some of them had signed membership application cards with appellant, Amalgamated Clothing Workers of America, C. I. O., hereinafter called "Union." On Monday, May 2, 1955, twenty-nine employees failed to return to work and a picket line was established by the Union. Appellee's plant manager notified said employees by registered mail that it would be assumed that they were quitting their jobs if they did not return to work in three or four days. Three employees returned to work but twenty-six remained on strike and the picketing was continued un-

til May 19, 1955, when the pickets were withdrawn and the strikers applied for reinstatement. In the meantime appellee had hired thirteen new employees and immediate reinstatement of the strikers was declined.

On June 17, 1955, the strikers met with several staff members of the Union at Forrest City, Arkansas, and voted to re-establish the picket line. In the meantime the Union filed alleged unfair labor practice charges against appellee before the National Labor Relations Board which were still pending at the time of the hearing in the instant case. The picket line was re-established about 6:00 a. m. on Monday, June 20, 1955, and on June 24 appellee filed the instant suit against the Union and certain staff members and strikers, as a class, to enjoin them from picketing and the commission of certain acts of intimidation, violence, threats, abuse, insults and breaches of the peace allegedly committed by appellants along the picket line and upon Union premises directly across the street from appellee's plant.

On June 30 appellants filed a motion to vacate a temporary injunction issued on the date suit was filed. At the hearing held on said motion on July 1, it was agreed that the testimony there adduced would be considered on appellee's application for a permanent injunction. A citation for contempt against certain persons for violation of the temporary injunction was dismissed after a hearing on July 27. The chancellor took the case under advisement and this appeal is from a decree entered September 15, 1955, making the temporary injunction permanent.

Appellants contend the decree violates their rights of free speech and assembly under the U. S. and Arkansas Constitutions; that there was no showing that the picketing resulted in violence, breaches of the peace or other unlawful acts; that the language used by the strikers along the picket line is common in all labor disputes; and that the regulation of the subject matter of the suit is exclusively reserved to the National Labor Relations Board. In the light of these and other con-

tentions we proceed to an examination of the evidence which is for the most part undisputed.

While the pleadings and testimony were directed primarily to incidents which occurred during the second picketing, there was evidence that some of them were merely a resumption of the pattern set in the first picketing. The plant manager was followed by the strikers every time he left the plant in his car. One of the pickets told him she was going to wipe the sidewalks clean with him and send him back to Wisconsin. He had so many anonymous telephone calls at his home after 9:00 p. m. that he had to have the phone disconnected. Nails and roofing tacks were strewn over the parking area of appellee's plant and the driveways at the homes of the plant manager and twelve of the women employees.

When the picketing was resumed on June 20, 1955, the Union rented a vacant lot directly across Rowena Street from the main entrance to appellee's plant. The street runs north and south and is about twenty feet wide. Appellants placed a tent on the lot in which they installed a telephone, tables, benches and chairs and the lot was used as headquarters for the strikers. One of appellee's employees, Mrs. Jewell Newby, lived in a trailer next to the Union lot and within a few feet of their tent. About 12:30 a. m. on June 20, she observed two women strikers driving up and down Rowena Street who had previously threatened to move her trailer and whip her. The strikers then parked their truck near the trailer and punctured two tires on an automobile belonging to Mrs. Newby's daughter who was visiting her at the time. The two strikers were arrested and convicted on criminal charges preferred by Mrs. Newby. About five o'clock on the same morning a window of appellee's plant was found to have been broken and a black snake about five feet long was found coiled inside the plant under the broken window.

The picketing was resumed about 6:00 a. m. on June 20 with usually one or two carrying signs up and down Rowena Street in front of the plant. Other Union staff

members, strikers and their sympathizers would assemble under and around the tent in groups estimated at different times from eight to thirty-seven. As the employees would go to and from work at the plant, or go to lunch, or take a recess, the strikers would congregate along the west edge of their lot and sometimes in Rowena Street and engage in loud and offensive name calling, singing or shouting directed at the workers. They would call the workers "scabs," "dirty scabs," "fat scabs," "yellow scabs," "crazy scabs," "cotton patch scabs," "pony tailed scabs," "fuzzy headed scabs," "fools," "cotton picking fools," and other similar names. This took place every time an employee left or entered the plant. It was done by the strikers individually, in couples or by the entire group and in a loud and boisterous manner. One witness described it as "just bedlam" when more than a dozen joined in the shouting. Particular names or remarks were reserved for individual workers. One pregnant worker was greeted with, "Get the hot water ready," or, "I am coming to make another payment on the baby, call Dr. Beaton," or, "Why, you can work another hour until you go to the delivery room." This worker and another drove to a filling station for gasoline when two of the strikers drove up and told the attendant not to wait on "these scabs" before he waited on the strikers.

One worker said the strikers always called her "fat scab," and that individual pickets and strikers made fun of her clothing and asked her if "Pete," the plant manager, still liked her "low-cut dresses and earrings." This made the employee so angry she invited the picket to come over and "make it some of her business." This worker thought she had a right to work without being molested and insulted because she had two boys to support. On one occasion two strikers drove by a house where two workers were visiting and one of the strikers shouted, "You gals better check your sheets tonight. There might be a snake in them."

The strikers sang songs with improvised lyrics to the tune of certain popular ballads and religious and Union songs. "When the Saints Go Marching In" be-

came "When the Scabs Go Marching In" and the ballad, "Davy Crockett," began, "Born in a cotton patch in Arkansas, the greenest gals we ever saw . . ."

The women pickets would stand in the street or sit near the plant and shout ugly names, stick out their tongues, hold their noses and make a variety of indecent gestures while pointing at the workers in the plant. Several workers testified the continuous name calling and boisterous conduct of the strikers made them afraid, angry, ill or nervous and had an adverse effect on their ability to properly do their work. Some of the workers would talk back to the strikers while others remained silent. The Chief of Police of Wynne testified there was more tension during the second picketing than the first and that he was fearful there was going to be trouble during the second picketing and so informed Union staff members. One staff member called him once when trouble seemed imminent and wanted to "go on record" as having requested the presence of the officer.

The Assistant Regional Director of the Union testified that the purpose of the second picketing was to exert "moral pressure" on the workers and because of certain unfair labor practices of appellee. While the Union had an action pending before the National Labor Relations Board on account of such alleged practices, he expressed an unwillingness to await the Board's action before proceeding with the trial of the instant suit. The principal complaint was asserted to be appellee's refusal to recognize Union's offer of proof of majority status, but it was admitted that Union was unwilling to go into an election and had withdrawn its request therefor at the time of the hearing. The assistant director and other staff members considered it insulting to be called a "scab" but they felt that others might look upon it as a "badge of honor."

In support of their numerous contentions that the decree appealed from is in violation of their constitutional rights, and that the picketing involved here was legal and peaceable, appellants rely upon such cases

as *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *Carlson* v. *California,* 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104; *Cafeteria Employees* v. *Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58; *Bakery & Pastry Drivers* v. *Wohl,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178; *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154; and *Boyd* v. *Dodge,* 217 Ark. 919, 234 S. W. 2d 204. In urging the opposite view, appellee cites and relies upon *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154; *Hughes* v. *Superior Court of California,* 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985; *Local Union No. 313* v. *Stathakis,* 135 Ark. 86, 205 S. W. 450; *Riggs* v. *Tucker Duck & Rubber Company,* 196 Ark. 571, 119 S. W. 2d 507; and *Smith* v. *F & C Enginering Company,* 225 Ark. 688, 285 S. W. 2d 100. It would serve no useful purpose to differentiate the factual situation presented in the instant case from any of the cases cited above. The whole issue here would seem to boil down to whether the appellants were engaged in peaceful picketing. If so, the court wrongfully issued the injunction. If not, the decree should be affirmed. All the cases seem to agree that workers have the constitutional right to engage in peaceful picketing, unattended with violent conduct, but that picketing carried on with intimidation, threats, violence, coercion or other unlawful means is illegal and may be enjoined.

A constitutional right to abuse, insult, slander or intimidate others is simply nonexistent in this country. Freedom of speech does not mean freedom of vituperation nor does it mean freedom of a person to insult, revile or intimidate others. As the court said in *Chaplinsky* v. *State of New Hampshire,* 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of

which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut,* 310 U. S. 296, 309, 310, 60 S. Ct. 900, 906, 84 L. Ed. 1213, 128 A. L. R. 1352." It has long been a violation of the criminal laws of this state for any person to ". . . make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault . . ." Ark. Stats. Sec. 41-1412.

The words of Judge Eder in *Lilly Dache, Inc.* v. *Rose,* 28 N. Y. S. 2d 303 are peculiarly applicable here: "There is nothing mysterious in the term 'peaceable picketing.' To picket is to post a watcher to observe; as applied to a labor dispute it means the stationing of one or more persons to observe and to attempt to persuade; peaceable picketing means simply, tranquil conduct, conduct devoid of noise or tumult, the absence of a quarrelsome demeanor, a course of conduct that does not violate or disturb the public peace; this is but a common-sense definition. As a necessary corollary, boisterous conduct, the use of vile language, bellicose demeanor, threats, violence, coercion, intimidation, shouting, and interference with the use of the premises or impeding the public highway, as by mass picketing, which is the use of a large number of pickets, is not peaceable picketing, but is illegal picketing."

It is true that an injunction prohibiting all picketing may not be based upon isolated and episodic acts of violence or other unlawful conduct. Even if it be conceded that the acts of violence involved here fall in that category, there was nothing isolated nor infrequent about the persistent abuse, insults and epithets along the picket line. Many jurisdictions have authorized such injunctions where the strikers' acts and conduct have been so entangled with violence and other illegal conduct that future excesses might reasonably be anticipated in the light of what was previously done. See cases collected in 132 A. L. R. 1218. According to the undisputed evidence here, the whole pattern of conduct along the picket line discloses a clear design on the part of the appellants to intimidate and coerce their former fellow workers by persistent abuse, insults and conduct calculated to cause breaches of the peace and other unlawful results. It is difficult to understand how any court could classify such conduct as "peaceful picketing."

While the question of jurisdiction was not raised below and appellants expressed an unwillingness to await the action of the National Labor Relations Board on their charges of unfair labor practices against appellee before proceeding with the trial of the instant case, it is now earnestly contended that the chancery court lacked jurisdiction which is exclusively reserved to the N. L. R. B. under federal statutes. Appellants rely on *Garner* v. *Teamsters Local* 776, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228, and *Weber* v. *Anheuser-Busch,* 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546. The facts in these cases bear little similarity to those involved here, and we find nothing to indicate an intention to supplant or overrule the doctrine of *Allen-Bradley Local* v. *Wisconsin Employment Relations Board, supra,* where it was held that the state may still exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. In the *Garner* case the court was careful to point out that the activity there enjoined did not threaten a probable breach of the state's peace. In *International Union U. A. W.* v. *Wisconsin Employment Relations*

Board, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, the court said: "While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal — even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states." See also, *Amalgamated Clothing Workers of America, et al.* v. *The Rickman Brothers,* 348 U. S. 511, 75 S. Ct. 452, 99 L. Ed. 600; *National Labor Relations Board* v. *Longview Furniture Company,* 4 Cir., 206 Fed. 2d 274.

We realize that the U. S. Supreme Court is the final arbiter as to the extent the different federal acts have affected the traditional state jurisdiction to enjoin picketing by unlawful means or for illegal purposes. So far the state courts have been unanimous in holding that the National Labor Relations Act does not preclude them from granting injunctive relief against picketing in a manner that is unlawful under state law. See cases collected in 36 A. L. R. 2d 1037. Until otherwise told, we shall assume that it was not the purpose of the federal act to deprive a state court of its ancient jurisdiction in such matters.

The decree is affirmed.

ADAMS *v.* MERCHANTS & PLANTERS BANK & TRUST CO.

5-882 288 S. W. 2d 35

Opinion delivered March 19, 1956.

W. H. Glover, Lawson E. Glover and *John H. Wright,* for appellant.

McMillan & McMillan, for appellee.

George Rose Smith, J. In 1954 the appellee, with the approval of the city council, erected a permanent structure, called a curb teller, on the sidewalk in front of its bank building in Arkadelphia. Suits to require the removal of this structure were brought by Mrs. J. J. Adams, who owns three buildings fronting on Main Street just east of the bank, and by Mr. and Mrs. Bryan Allen, who rent from Mrs. Adams the store building next door to the bank. The cases were consolidated for trial. The chancellor awarded the Allens a judgment for $500 as damages suffered by them during the construction of the curb teller, but in other respects the complaints were dismissed upon the ground that the plaintiffs had failed to prove special injuries not suffered by the public in general. Both the plaintiffs and the defendant have appealed.

The original sidewalk in the block in question is almost twelve feet wide. The teller is a rectangular concrete building that extends along the curbing for ten feet and that is about seven feet in width, leaving a five-foot passageway for pedestrians. This passageway is covered by a roof connecting the teller with the main bank building. During business hours the structure is occupied by a bank employee, who does busi-

ness with motorists by means of a window at the curbing and with pedestrians by means of a window at the end of the curb teller.

It is conceded that the governing law has long been settled. The city holds the streets and sidewalks as a trustee and cannot permanently divert them to a public or private use foreign to the purpose of the original dedication. Nevertheless the city has power to permit an encroachment — temporary in the sense that the city's permission may be withdrawn — which does not necessarily interfere with the public's use of the thoroughfare. Such an encroachment, however, may be abated upon complaint by anyone suffering special damages not common to the public at large. *Packet Co.* v. *Sorrels,* 50 Ark. 466, 8 S. W. 683; *Osceola* v. *Haynie,* 147 Ark. 290, 227 S. W. 407; *State ex rel. Latta* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301. The controlling issue here is whether the appellants have been peculiarly hurt by the presence of the curb teller.

The evidence on this point preponderates in favor of the plaintiffs. Mr. and Mrs. Allen run an automobile supply store in the building they rent from Mrs. Adams. Their records show that after the construction of the teller was begun in August, 1954, their volume of sales declined as compared to the corresponding months of the year before. The Allens increased their advertising and began selling television sets in an unsuccessful effort to improve their sales. They both testify that if the curb teller remains they will be forced to find a new location unless their rent is reduced.

M. C. Elliott, who was formerly Mrs. Adams' tenant in the store next to the Allens, has already moved to a new location. Elliott's dry goods business declined when work began on the teller. He countered by expanding his piece-goods department, but that was the only one of his five departments that did not show a loss as compared to the preceding year. After the curb teller was installed Elliott abandoned negotiations for a renewal of his lease with Mrs. Adams and moved elsewhere, at an estimated expense of $3,500. There were

admittedly other factors that influenced his decision, but there is no reason to doubt his assertion that the presence of the teller was "a prime reason" for his departure.

It is admitted by all the informed witnesses that the rental value of a retail store site is directly related to the volume of pedestrian traffic passing by the premises. Both the Allens testify that such traffic has fallen off noticeably since the construction of the teller; people prefer to walk on the other side of the street. This view is strongly confirmed by the photographs in the record. The teller and its roof have reduced the sidewalk to what is in substance a tunnel five feet in width. When couples coming from opposite directions meet in this narrow lane they must pass in single file instead of abreast. The chancellor regarded this testimony as conjectural and suggested that a traffic count would be needed to prove the exact volume of foot traffic. The trouble is that such a count would be useless in the absence of a similar enumeration taken before the teller was built. The Allens' observations were competent testimony, and they should not be penalized for their failure to obtain more precise proof before a cause of action was known to exist.

We need not detail all the evidence offered by the appellants. Two expert witnesses testified that the teller has depreciated the value of Mrs. Adams' property by a fourth; similar witnesses for the defense thought the value to be unaffected. There is some slight evidence that the teller obstructs the passage of light and air and tends to obscure the view of the Allens' window displays. Another grievance is that street space formerly used as a bus-stop is now reserved for the bank's vehicular customers.

The appellee's proof falls decidedly short of overcoming the persuasive case made by the plaintiffs. The evidence of reduced pedestrian traffic is practically uncontradicted. Much of the defendant's testimony is devoted to showing that in 1954 there was a general decline in business conditions in Arkadelphia, as the result

of a drought and of the completion of a large construction project in the vicinity. It is doubtless true that depressed business conditions contributed to the predicament of Mrs. Adams' tenants, but the evidence indicates that the existence of the curb teller was also a definite factor.

By the nature of the case it is impossible either to prove or to disprove the extent of the appellants' damage with mathematical exactness. That, however, is not the basic issue; the question is whether the appellants have suffered an injury not shared by the general public. It is of course not contended that the obstruction of more than half the sidewalk in a business district is beneficial to neighboring retailers. In view of the proof that the pedestrian traffic has declined, that real estate values have been adversely affected, that the volume of sales has decreased, that Mrs. Adams has already lost one tenant and risks the loss of another, we cannot conscientiously say that the appellants have been no more affected than anyone else by the appellee's use of the public sidewalk for private profit.

On the cross appeal the appellee contends that the proof does not support the chancellor's finding of fact that the Allens were pecuniarily damaged by the almost complete obstruction of the sidewalk during the months that the teller was being built. We do not think the chancellor's conclusion on this issue of fact to be against the weight of the evidence.

Reversed on direct appeal and remanded for the entry of a decree requiring the removal of the curb teller; affirmed on cross appeal.

5-839 288 S. W. 2d 38

Opinion delivered March 19, 1956.

R. C. Waldron, Jack Holt and *John F. Park,* for appellant.

James A. Robb, for appellee.

GEORGE ROSE SMITH, J. Upon the reversal of the trial court's decree in this case the costs were assessed against the appellees pursuant to the usual practice under Supreme Court Rule 24 (b). The appellees have filed a motion to retax the costs, contending that the appellants needlessly enlarged the record by designating for inclusion therein all the testimony taken below. The motion presents, as a matter of first impression, a point involving Act 555 of 1953.

That statute reads in part: "Section 12. *Record to be Abbreviated.* All matters not essential to the decision of the questions presented by the appeal shall be omitted . . . For any infraction of this rule . . . the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require." Ark. Stats. 1947, § 27-2127.6. In revising our rules in 1954 we stated in Rule 24 (e) that "the court will impose or withhold costs in accordance with Section 12 of Act 555 of 1953."

In the case at bar the appellants designated for inclusion in the record not only the pleadings and decree

but also "all the evidence, exhibits and proceedings" in the trial court. As a result of this designation the record contains 138 typewritten pages of transcribed testimony and exhibits. None of this testimony was abstracted in either brief, for the appellants' statement of the case narrowed the issue to a jurisdictional question raised by demurrer to the amended complaint. This court's decision was reached without reference to the testimony, which comprises more than three fourths of the record.

The appellants were right in not abstracting the testimony, as Rule 9 (d) requires that the abstract be limited to those matters that are necessary to an understanding of the questions presented to this court for decision. But the issue raised by the motion to retax the costs is whether the testimony should have been in the record at all. We think its inclusion was contrary to the purpose of § 12 of Act 555. It is the clear intention of that section to reduce the expense of litigation by encouraging the omission of matter irrelevant to the questions presented by the appeal. Doubtless there are situations in which there may fairly be a difference of opinion as to whether certain proceedings should be designated for inclusion in the record. But in this case the appellants in effect admitted by their opening statement that the transcribed testimony had no bearing upon the issues brought up for review. In these circumstances the statute contemplates that the appellees will be relieved from liability for the expense attributable to the unnecessary portions of the record. The motion to retax the costs is granted, the appellants to bear the cost of the reporter's transcription of the testimony.

HOLT, J., not participating.

5-883 288 S. W. 2d 602

Opinion delivered March 19, 1956.

Wade & McAllister, for appellant.

Rex W. Perkins, E. J. Ball, Price Dickson and *W. B. Putman,* for appellee.

PAUL WARD, Associate Justice. On April 23, 1954 an accident involving three automobiles occurred on

Highway No. 16 a short distance west of the city limits of Fayetteville, Arkansas. Joe Mundy was driving his automobile east along said highway, and he had in the automobile with him La Wana Mundy, Betty Ann Mundy, and Rodney Mundy, a minor. Mrs. Marjory Holt Rudolph was driving her husband's automobile west on said highway, and just behind her, going in the same direction, was an automobile in which Mrs. Florence D. Cassidy was riding. When Mrs. Rudolph had reached a point on the highway where her home was situated just south of the highway, she [allegedly] carelessly and without giving any warning turned her car to the left in order to enter the driveway to her home. At this instant the automobile driven by Joe Mundy struck Mrs. Rudolph's automobile and then struck the automobile in which Mrs. Cassidy was riding. There is no contention by any one that Mrs. Cassidy was guilty of any negligence.

As a result of the collision Mrs. Cassidy was severely injured, Joe Mundy and the above named occupants of his car were injured, Mrs. Rudolph received a shock, and all three of the automobiles were damaged. Three separate and distinct suits were filed and docketed as set out below.

Suit No. 2362. Joe Mundy filed suit against E. L. Rudolph and Marjory Holt Rudolph alleging negligence on the part of Marjory Holt Rudolph [driver of the automobile] in making a left turn across the highway without giving any signal and prayed for $1,250 damage to his automobile and for $2,500 for injury to himself. The Rudolphs entered a general denial and pleaded contributory negligence on the part of Joe Mundy. They also filed a cross-complaint against Joe Mundy alleging that he was negligent in driving at an excessive rate of speed and in failing to yield the right of way and that the automobile in which they were riding, belonging to Mr. Rudolph, was thereby damaged to the extent of $500. A jury verdict resulted in a judgment against Mrs. Rudolph in favor of Joe Mundy in the

amount of $2,500. The jury failed to return any verdict in favor of Mrs. Rudolph.

Suit No. 2364. La Wana Mundy, Betty Ann Mundy and Rodney Mundy, a minor by next of friend, who were riding in the automobile with Mr. Joe Mundy at the time of the accident, filed suit against Mr. and Mrs. Rudolph making substantially the same allegations of negligence on the part of Mrs. Rudolph, asking for damages for injuries to the first two occupants in the amount of $2,500 and $1,000 for the minor. The Rudolphs made the same denial and plea of contributory negligence and filed the same cross-complaint as in the above case with the exception that they alleged that Joe Mundy and the other occupants of his car were on a joint mission. The jury returned a verdict against Mrs. Rudolph in favor of the minor in the sum of $100 and for $250 in favor of each of the other two, and rendered no judgment in favor of Mrs. Rudolph on her cross-complaint.

Suit No. 2418. Mrs. Florence D. Cassidy filed suit against Mrs. Rudolph setting forth the alleged acts of negligence on the part of Mrs. Rudolph, praying for damages for personal injuries in the amount of $50,000. To the above complaint Mrs. Rudolph entered a general denial, pleaded contributory negligence on the part of Mrs. Cassidy [this allegation of contributory negligence was later abandoned], and filed a cross-complaint. In this cross-complaint Mrs. Rudolph alleged that Joe Mundy's negligence caused or contributed to the accident, alleging that she received injuries in the nature of a shock as a result thereof, asking that Joe Mundy be made a party defendant, and prayed for judgment against Joe Mundy in the sum of $500. On this cross-complaint summons was issued and served on Joe Mundy. On April 19, 1955 Joe Mundy filed an answer to the above cross-complaint containing a general denial of negligence and stated that the collision was the result of the negligence of Mrs. Rudolph, asking that the said cross-complaint be dismissed.

On June 25, 1955 Mrs. Rudolph filed an "Amended Answer and Cross-Complaint," denying the allegations of negligence, pleading contributory negligence, and by way of amended cross-complaint against Joe Mundy alleged in substance; the injuries sustained by the plaintiff, Mrs. Cassidy, were solely caused by the reason of the negligence of Joe Mundy in the operation of his automobile at the time of the collision [setting out several alleged acts of negligence on the part of Joe Mundy], and that in the event Mrs. Cassidy should recover any judgment against her [Mrs. Rudolph] because of the alleged injuries, then and in that event, Mrs. Rudolph will be entitled to judgment against Joe Mundy for contribution to the amount of one-half the amount of damages and costs that might be awarded to Mrs. Cassidy. The trial court, in effect, refused to allow Mrs. Rudolph to present her claim for contribution against Joe Mundy under the above amended cross-complaint. A jury returned a verdict against Mrs. Rudolph in the amount of $30,000, and made no allowance to Mrs. Rudolph on her claim against Joe Mundy for the shock which she is alleged to have received.

The above mentioned three suits were consolidated for the purpose of trial.

Appellant, Mrs. Rudolph, makes two principal contentions on this appeal, viz: (a) The judgment of the lower court should be reversed because she was not allowed to prosecute her claim against Joe Mundy for contribution, and (b) The judgments rendered against her are excessive.

(a) In support of her right to present her claim against Joe Mundy for contribution in this action, appellant relies on the provisions of Act 315 of 1941. Section 7(1) of said act provides that when a defendant, such as Mrs. Rudolph here, desires to have contribution against a joint tort-feasor who is not a party to the suit he must have a summons issued for and served on the joint tort-feasor. It is admitted here that no such summons was issued or served on Joe Mundy after

Mrs. Rudolph filed her cross-complaint in Suit No. 2418 against Joe Mundy.

It is contended however by appellant that under the facts of this case it was not necessary to have a summons issued and served on Joe Mundy. The reason for this, says appellant, is that, as stated above, Mrs. Rudolph had theretofore filed a cross-complaint against Joe Mundy to recover injuries for the shock she received and had caused a summons to be issued and served on Joe Mundy, and Joe Mundy had entered his appearance and filed an answer to that cross-complaint. Therefore, appellant says, since Joe Mundy was already made a party to Suit No. 2418 and had entered his appearance, it was not necessary that service should be again issued against him in connection with the cross-complaint asking for contribution.

We cannot agree that this case must be reversed for the reason above assigned. In the first place, the right of Mrs. Rudolph to have contribution against Joe Mundy in this action under the provisions of said Act 315 is a permissive right and it does not exclude her right to seek contribution in a separate suit if she so desires. We think this interpretation of the Act is clear from the wording of the Act itself. The first sentence in Section 7(1) says that a defendant "*may move. . . for leave*" to file a complaint upon a joint tort-feasor not a party to the action in order to effect contribution. The first words in the sentence that follows begin with "*If the motion is granted* and the summons and complaint are served . . ." the joint tort-feasor shall make a defense, etc. From this language we conclude that Act 315 meant to give the trial court a certain measure of discretion in allowing or disallowing the kind of procedure appellant seeks here to invoke. The trial court in this instance was invested with that discretion even though it be conceded for the purpose of this opinion that no further service on Joe Mundy was necessary in this case.

Nor can we say that the trial court abused its discretion in refusing to allow Mrs. Rudolph to prosecute

her claim in this particular case for contribution against Joe Mundy. As noted above, three separate suits had been consolidated for trial, and the question which appellant raises here was not brought to the attention of the trial court until the attorneys were making their opening statements in the cases. Since the trials were already under way and since appellant had not previously sought the court's permission to have Joe Mundy made a party to case No. 2418, we feel that the court was justified in ruling as it did, and especially so since appellant lost no substantive right by the adverse ruling.

Subsection (1) of Section 7 of said Act 315 is distinguished from subsection (3) of said Section as it applies to this case. Under the latter subsection, if Joe Mundy had been made a party defendant by Mrs. Cassidy, then Mrs. Rudolph would have been compelled to prosecute her claim for contribution in Suit No. 2418 or she would have lost it.

We cannot agree with appellees' contention that, as a matter of law, Mrs. Rudolph's right to ask for contribution against Joe Mundy was cut off by the verdicts of the jury in the several consolidated cases. It is true that in case No. 2362 Mrs. Rudolph pleaded contributory negligence on the part of Joe Mundy and that the jury rendered a verdict in favor of Mundy. It is also true that such a verdict can be explained only on the assumption that the jury found no negligence on the part of Joe Mundy. However we cannot say, as a matter of law, that this finding precludes a finding by the jury that Joe Mundy's negligence might have caused or contributed to the injuries received by Mrs. Cassidy. It is not illogical to say that Joe Mundy was guilty of no negligence in colliding with Mrs. Rudolph's automobile but might have been negligent in colliding with the automobile in which Mrs. Cassidy was riding, or at least in injuring Mrs. Cassidy to the extent that she was injured. Mrs. Rudolph alleges that Joe Mundy negligently failed to maintain proper brakes on his automobile; that he negligently failed to apply said brakes when he should have done so; that Joe Mundy was driving in a thickly populated residential section at an unlawful, ex-

cessive, and highly dangerous rate of speed under the conditions then existing — 65 miles per hour; that he negligently failed to keep a proper lookout for other automobiles, and; that Joe Mundy negligently failed to use ordinary care to keep his automobile under proper control. It appears to us that a jury would not necessarily be inconsistent in finding that Joe Mundy's negligence caused or contributed to the injuries [or the extent thereof] suffered by Mrs. Cassidy and at the same time find that Mrs. Rudolph's negligence [in turning suddenly across the highway in front of Joe Mundy] was the sole and proximate cause of Joe Mundy's injuries and that his negligence in no way contributed to his collision with Mrs. Rudolph's car. Not only so but this court has held that in such instances a jury's verdict need not be consistent. In the case of *Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 64, three automobiles were involved in an accident. In a suit by automobile No. 1 against automobile No. 2, in which No. 2 pleaded contributory negligence, the jury rendered a verdict for No. 1. Then automobile No. 3 sued and recovered judgment against both automobile No. 1 and automobile No. 2. On appeal to this court appellant insisted that the jury's verdict was inconsistent, and this court said: "The answer to this argument must be that the law imposes no requirement of consistency upon jurors hearing separate cases which are consolidated for purposes of trial. If such separate cases were being tried separately, by different juries, there would be no assurance of consistency in the verdicts, and no greater assurance of consistency is insisted upon when one jury tries both cases together."

(b) It is earnestly insisted by appellant that the jury's verdict in the amount of $30,000 in favor of Mrs. Cassidy is excessive and should be reduced by this court. Mrs. Cassidy was 54 years of age when she was injured. She was confined in a hospital as a bed patient for a period of 56 days, at the end of which time she was able to walk on crutches. The hospital bill amounted to $1,-132.15 and her doctor bills amounted to $922, not counting smaller amounts for anesthetic, ambulance and drugs.

Since leaving the hospital she has expended approximately $12.50 each month for drugs. Her life expectancy was 18.48 years at the time of the collision.

She suffered a compound fracture of the right femur and a fracture of the left knee, and she suffered cuts and bruises about her face, forehead and body. The testimony shows that bone fragments were in the knee joints and wrist, resulting in arthritis in the joints. It is further shown that she suffered much pain. It was necessary to place a nail through the tibia of the right leg to which a 20 pound weight was attached for most of the time she was in the hospital. It was necessary for Mrs. Cassidy to return to the hospital the second time for a period of 9 days for the purpose of removing the bone fragments from her right knee, resulting in the knee becoming enlarged and stiff. Medical testimony indicated that Mrs. Cassidy had approximately 50% partial permanent disability to the right knee, 5% partial permanent disability to the left knee, and 21% partial permanent disability to the body as a whole. It is possible that her healing period has ended and medical testimony indicates that she may improve or may get worse.

It is never possible in this kind of a case for any one to say with complete satisfaction to what extent compensation should be allowed. In this instance the jury heard all the testimony and had ample opportunity to observe Mrs. Cassidy, and we cannot confidently say that the judgment is excessive. As was said in the case of *Coca-Cola Bottling Co. of Arkansas* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771, a claimant "is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are unsusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury . . ." We also said in *Arkansas Motor Coaches, Ltd.* v. *Williams,* 196 Ark. 48, 116 S. W. 2d 585, that: "There is no rule by which we can measure damages for pain and suffering."

In connection with the contention that the jury's verdict was excessive, appellant says that certain testimony regarding Mrs. Cassidy's earning capacity was improperly introduced. We do not think the record supports appellant's contention in this matter. After Mrs. Cassidy had testified that she had a top rating with the Soil Conservation Service as senior secretary, she was asked if she had recently had an offer from that agency. Appellant objected to this question on the ground that it was self serving. Mrs. Cassidy then stated she had a letter from her immediate boss offering her a job. Appellant objected on the ground that the letter was the best evidence. Following this the letter was offered in evidence and marked Exhibit 6, though it does not appear in the record. This was not a self serving declaration on the part of Mrs. Cassidy and her testimony was properly introduced.

In addition to the above appellant contends that it was error for the trial court to refuse her request for a special verdict. We do not agree with this contention.

Just before the jury was ready to retire appellant presented to the court a special verdict. This special verdict called for the jury to answer 25 specific questions. The trial judge, in refusing to submit these questions to the jury, made this statement: "The jury is ready to retire now and we don't have time to go over them." Under the circumstances and under the statute providing for special verdicts we cannot say the court abused its discretion. Special verdicts are provided for by Act 336 of 1953. Section 2 of the Act states: "A court may require a jury in a civil action to return only a special verdict in the form of a special written finding upon each issue of fact." In the same section it is provided that: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." In the case of *Robertson* v. *Universal C. I. T. Credit Corp.*, 224 Ark. 293, 272 S. W. 2d 825, this court, in applying the above mentioned Act, stated: "The Act 336 still leaves discretion

to the Trial Judge as to whether to submit the case to the Jury on a general verdict or on a special verdict or interrogatories."

Affirmed.

Justices McFaddin and Robinson concur.

Chief Justice Seamster not participating.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the result reached in this case; but I cannot and do not agree with some of the language contained in the majority opinion. To me it seems clear that Mrs. Rudolph's right to ask for contribution against Joe Mundy has been cut off by the verdicts of the Jury in the several consolidated cases; and, that being so, I think it is unnecessary for the opinion to contain any discussion about Mrs. Rudolph's right to still ask contribution against Mundy in a separate suit if she so desires.

This latter point—"contribution in a separate suit if she so desires"—is a most dangerous doctrine. Our Statute on joinder and consolidation of actions contemplates that all possible causes of action growing out of the affair in controversy, and all possible defenses, should be asserted in one suit. In this case Mrs. Rudolph cross-complained against Mundy and brought him into this action. With him in the case on her cross-complaint, the burden was on her to assert her claim for contribution as well as all other claims arising from this collision. The majority opinion, in saying that Mrs. Rudolph may still "seek contribution in a separate suit if she so desires," is entirely at variance with the spirit of our Statute (§ 27-1301, Ark. Stats.).

But, notwithstanding all of the above, I concur with the result reached in this case because it is my considered opinion that the verdict of the Jury forecloses any claim of contribution by Mrs. Rudolph against Mundy. The majority opinion takes the allegations in Mrs. Rudolph's pleadings as evidence and from such builds a hypothetical case that Mundy was driving in a thickly populated residential district at 65 miles an hour. I find no evidence to

support all this hypothetical theory, and evidently the Jury also took a different viewpoint of the matter, when the verdict said that Mrs. Rudolph was not entitled to any judgment against Mundy. When the Jury found that Mrs. Rudolph was not entitled to a judgment against Mundy, then certainly the Jury found that Mrs. Rudolph was not entitled to any contribution against Mundy.

Finally, let it be remembered that this case arose prior to our new Comparative Negligence Statute.

LEE-PHILLIPS DRAINAGE DISTRICT *v.* BEAVER BAYOU DRAINAGE DISTRICT.

5-904 289 S. W. 2d 192

Opinion delivered March 26, 1956.

[Rehearing denied April 30, 1956.]

Daggett & Daggett, for appellant.

Charles B. Roscopf and *Burke, Moore & Burke,* for appellee.

LEE SEAMSTER, Chief Justice. On June 9, 1953, the Commissioners of the Beaver Bayou Drainage District filed the instant suit against the Lee-Phillips Drainage

District in the Phillips Chancery Court. The petition asked that Lee-Phillips Drainage District be enjoined from pursuing a plan of improving its drainage district until and unless Lick Creek Canal of the Beaver Bayou Drainage District is cleaned out, widened and deepened; that Lee-Phillips Drainage District should share in the cost of cleaning said canal in proportion to the number of acres drained in each district, or in the alternative, by mandatory injunction the Commissioners of Lee-Phillips Drainage District be directed to take the necessary steps to have the lands in the Lick Creek Canal area of Beaver Bayou Drainage District annexed and made a part of the Lee-Phillips Drainage District.

In order to facilitate an understanding of the issues, we will set out a brief history of the two drainage districts, as disclosed by the record.

The Beaver Bayou Drainage District was created by Act 92 of the Acts of 1907. One of its canals is what is known as Lick Creek Canal, extending from a point where the same intersects the southern boundary of the Lee-Phillips Drainage District to its terminus or outlet into Big Creek, a distance of approximately five and three-fourths miles. The area embraced within Beaver Bayou Drainage District is approximately 50,000 acres — all in Phillips County, Arkansas. Of the total acreage, only approximately 3,500 acres drain into Lick Creek Canal.

The Lee-Phillips Drainage District was subsequently organized and created in 1917 under the General Drainage Laws of this State. This District was organized by proceedings in the Circuit Court of Phillips County, as it embraced lands in more than one county. 46,500 acres of land are embraced in the Lee-Phillips Drainage District — all of which acreage drains into the Lick Creek Canal in the Beaver Bayou Drainage District.

Lick Creek Canal has a total mileage of twenty miles — five and three-fourths miles are situated in the Beaver Bayou Drainage District and approximately fourteen and one-half miles in the Lee-Phillips Drainage Dis-

trict, with laterals added there is a total of 29.90 miles to be improved in Lee-Phillips Drainage District. The source of Lick Creek is about three miles south of Marianna, Arkansas, and runs in a southerly or southeasterly direction through Lee and Phillips Counties to a point where the same crosses State Highway No. 20, between West Helena and Barton, Arkansas. At this point it turns southerly and southwestwardly and finally runs into Big Creek in Phillips County, Arkansas. The Lick Creek Canal has a fall of about three and one-fourth feet per mile in the Lee-Phillips Drainage District and that portion in the Beaver Bayou Drainage District has a fall of about two feet per mile.

During the year 1910 the appellee district constructed an artificial canal, straightening out that part of Lick Creek that was within its boundaries. In 1917 the appellant district was created and during the years 1921 and 1922 work was done for the purpose of straightening Lick Creek and improving the drainage within its confines. To have an outlet for its surface waters, it became necessary to use the Lick Creek Canal in the appellee's district.

On June 17, 1952, the appellant district filed a petition in Phillips Circuit Court, under the maintenance statute (Ark. Stats. § 21-533) seeking an order levying a tax to defray the costs of cleaning out and rehabilitating its ditches. The appellee district intervened asking substantially the same relief here prayed for and the trial court dismissed the intervention for want of jurisdiction and granted the petition. On appeal, this court affirmed the decision of the trial court, stating that appellee district would have to institute a plenary suit in a court of competent jurisdiction. (*Beaver Bayou Drainage Dist.* v. *Lee-Phillips Drainage Dist.,* 221 Ark. 550, 254 S. W. 2d 465).

Upon trial of the instant suit, the trial court rendered a decree enjoining the appellant district from proceeding with its proposed improvement or any part or portion thereof unless and until it pays ninety-three per cent (93%) of the cost of cleaning out the five and three-

fourths miles of Lick Creek located in appellee's district. This appeal follows.

For reversal, the appellant cites the following points: (1) That the action is barred by the statute of limitations; (2) that appellant has acquired by purchase as well as by prescription a permanent easement to discharge the waters of Lee-Phillips Drainage District into said Lick Creek Canal of Beaver Bayou Drainage District; (3) that the Lee-Phillips Drainage District as well as the Lick Creek Canal of Beaver Bayou Drainage District is a natural waterway; that there is no diversion of water into said canal by Lee-Phillips and that the right exists as a matter of law for Lee-Phillips to empty into said canal; and, (4) that the injunction of the trial court prevents it from doing any maintenance work whatever although that obligation and right is bestowed on it by Ark. Stats. § 21-407.

Lick Creek served as the natural drain for all the property located in the Lee-Phillips Drainage District. By improving its district some thirty years ago, the appellant caused the surface waters to be drained into the north portion of the Lick Creek Canal, which Canal had been previously constructed by the Beaver Bayou Drainage District to protect its lands from an overflowage of water. The appellant as consideration for the connection of its drainage ditch with the north portion of the Lick Creek Canal located in appellee drainage district, dredged about one mile of the canal and cleaned out the growing timber in the remainder of said ditch, to a point of the natural outlet in Big Creek. This action was taken to compensate for the increased flow of water from the Lee-Phillips Drainage District, occasioned by the improvement of the natural drain. The appellant had the right to perform this work to provide an outlet for the surface waters. *Lesser-Goldman Cotton Company* v. *Cache River Drainage District,* 174 Ark. 160, 294 S. W. 711.

The Statute of Limitations is not applicable to the facts in the instant case. The appellant has a right to

continue the connection of the drainage districts, which connection has existed for a period of thirty years. However, we feel that this right should be limited by the provisions that are hereafter set out.

It is the contention of the appellant that Lick Creek is the natural drain of all its district and its improvement by straightening and ditching Lick Creek does not change it from a natural drain to an artificial drain. Citing the case of *Boone* v. *Wilson,* 125 Ark. 364, 188 S. W. 1160. Appellant contends further that since Lick Creek is a natural drain, its right to use the creek for drainage purposes is unrestricted. Citing, *Board of Drainage Commissioners of Drainage District No. 10 of Bolivar County, et al.* v. *Board of Drainage Commissioners of Washington County, et al.,* 130 Miss. 764; 95 So. 75; 28 A. L. R. 1280.

The general rule of law relied upon by the appellant, to the effect that a riparian owner or owners have the right to drain their surface waters into a natural watercourse, has many qualifications and exceptions. This court has followed the general rule of law which limits and restricts the rights of a dominant owner to cast his surface waters upon the owner of servient lands. In the draining of one's land of surface water it is not permissible to direct the flow of the water upon the adjoining lands, or to increase the volume of the flow by the construction of a drain or ditch. See *Missouri Pacific R. Co.* v. *Parker,* 167 Ark. 42, 266 S. W. 959; *Leader* v. *Mathews,* 192 Ark. 1049, 95 S. W. 2d 1138.

The purpose for which the appellant and appellee drainage districts were created is basically of a public nature. The design is for the benefit, not the injury, to land owners in the respective drainage districts. The upper district has the right to allow the natural flow of waters from its lands to follow the natural drain into the lower district, without obstruction. The lower district has the burden of protecting its land owners from this natural flow of water, without damage to the land owners in the upper district. However, the upper dis-

trict, the appellant, should be required to furnish the additional facilities to dispose of the extra flow of water into the appellee district, that would be caused by the proposed improvement.

We find that the trial court erred in its method of arriving at the respective cost to the parties on an acreage basis. The result under this method would require the appellant district to pay 93% of the cost of cleaning out the five and three-fourths miles of Lick Creek located in the appellee drainage district. The appellee district should be responsible for the costs of providing drainage for the natural flow of water through the Lick Creek Canal and the appellant district should be responsible for the costs that would be necessary for providing additional drainage for the extra flow of water through the canal that would be caused by the proposed improvement of its drainage district.

The trial court will permit the parties to take additional evidence so that the cost to the parties may be pro-rated in accordance with the provisions set out in this opinion.

Reversed and remanded for further proceedings.

JONES *v.* LAWLESS.

5-898 288 S. W. 2d 324

Opinion delivered March 26, 1956.

Gordon B. Carlton, for appellant.

Geo. E. Steel, for appellee.

J. Seaborn Holt, Associate Justice. A petition signed by 63 qualified electors was filed in the Pike County Court for a special election in Pike County School District No. 1 "for electing one member to the County Board of Education in Zone 4 Pike County, § 80-3020 Ark. Stats. 1947." On March 30, 1955, this petition was granted by the County Court and an election was ordered to be held on April 30, 1955, at such place or places as the Board of Election Commissioners might designate. In apt time Pike County School District No. 1 published notice setting out that one of its purposes was "to elect one County Board Member from Zone 4 for a regular term of 5 years." Kirby School District No. 32 had caused to be published a similar notice for the same purpose. Following these notices the special election was held in accordance with the County Court order. Appellant says in his brief, "The Special election was held in School District No. 1 and Zone 4 of Pike County pursuant to the order of the County Court." The Board of Election Commissioners on April 4, 1955, designated the Langley School House Building as the polling place in Pike County School District No. 1 and Zone 4, for the special election to be held on April 30, 1955. Thereafter, (April 15, 1955) the Board of Directors of Kirby School District No. 32 gave notice that a special election would be held in Zone 4, School District 32, on April 30, 1955, and the Daisy School Building was designated as the polling place. The election was held and appellant Jones received a majority of the votes cast at the Langley box and appellee Lawless received a majority of the votes cast at the Daisy box. It is conceded that Lawless received a majority of the combined votes cast at Langley and Daisy boxes.

Pike County, in April 1941, was divided into four zones under Act 327 of 1941, and in that zoning order Kirby School District 32 was placed in Zone 3 and Daisy School District in Zone 4. In an order of the County

Board of Education, February 28, 1949, Daisy School District 37 was dissolved and its territory annexed to Kirby School District 32 in Pike County.

In due course the Pike County Board of Election Commissioners, on May 4, 1955, filed with the Clerk of the County Court a report and certificate of the result of said election: that appellee Lawless had received 95 votes and Jones 66 votes in the special election, and that Lawless had been elected County Board Member for the regular term of five years from Zone 4. Thereafter on May 10, 1955, the County Court entered an order which contained this recital: "This Court, after a careful analysis of the result, from a canvass of the returns, and from an examination of the Zoning Order of 12th of April, 1941 for Pike County, Arkansas, made from an examination of certain order of the County Board of Education made and entered on the 28th day of February, 1949, dissolving Daisy School District No. 37 of Pike County and annexing the territory thereof to Kirby School District No. 32 of Pike County; and from an examination of a Rezoning Order made by the County School Re-Districting Committee of Pike County on the 4th day of April, 1955, in accordance with Act 229 of the Acts of the General Assembly for 1953 and from other facts and records examined and construed, is of the opinion, and so finds, that the territory which, prior to the dissolution of the Daisy School District under the orders of the County Board of Education, together with the property, funds and obligations of every nature of said district were annexed to Kirby School District No. 32, and said territory has continuously since 1949 been a part of the Kirby School District, and by reason of the Kirby School District having been placed in Zone 3 of Pike County, became a part of said Zone 3. The Court further finds that, since the re-zoning action of the County School Re-districting Committee on the 30th day of April, 1955, without regard to other acts and orders of the Zoning and Re-Districting Committee, of the County Board of Education, or of the Board of Election Commissioners for Pike County, all of the territory embraced in the old Daisy School District of

Pike County became a part of Zone 3 and that as a result of said Re-Zoning Order, without regard to other orders or facts, the electors of the old Daisy School District were without right to legally cast their votes at the special election of April 30, 1955, for the County Board Member to be elected for Zone 4, and that the election so held at the Daisy Schoolhouse was void and the votes there polled and counted and certified to the clerk of this court by the Board of Election Commissioners for Pike County cannot be legally counted or considered in determining the results of the election called and held on the 30th day of April, 1955, for the purpose of electing a County Board Member for Zone 4; that said box should be expunged from the record of the said election and that A. M. Jones, having received a majority of the votes cast and counted at the Langley box in District No. 1 of Pike County, which embraces the identical territory as Zone 4 of Pike County, should be declared the duly elected County Board Member for Pike County for the five-year term for which said election was called and held," and declared Jones to be the duly elected County Board member from Zone 4.

An appeal from County Court Order was duly prosecuted by appellee Lawless to the Circuit Court. It was stipulated between the parties that Henry Lawless, appellee, received the larger number of votes tabulated in the Langley and Daisy boxes. On a hearing in the Circuit Court the court found that the purpose and effect of the appeal from the County Court could only be to test the correctness of the County Court's tabulation of the election returns and certifying the results, and " . . . that in order to go behind the returns and test the validity of the votes it must be done in proper time and by direct action or original action in the Circuit Court. This was not attempted by the intervenor, A. M. Jones, and if attempted was not accomplished in proper time." The order of the County Court, accordingly, was reversed with directions to the County Court to declare Henry Lawless duly elected and further that the purported re-zoning order of April 4, 1955, by the County Board of Education, should be set aside and

declared void, in order to re-zone in a manner more equal in area and school attendance.

This appeal followed. For reversal appellant relies on the following points: "1. The territory, which prior to 1949 comprised the Daisy School District, upon being annexed to Kirby District No. 32, became not only a part of the Kirby District but a part of Zone 3 of Pike County, and the electors residing therein could not legally vote a board member from Zone 4. 2. An election could not be legally held under the petition, the order of the court and the notice of election given pursuant thereto, except within District No. 1 of Pike County. 3. District 1 and Zone No. 4 being synonymous, the board member who was elected was elected by the votes cast at the Langley School House Box, which was the only election held in said district and zone on April 30, 1955. 4. The judgment of the County Court has become final by reason of the fact that no direct contest was instituted by the appellee in the Circuit Court of Pike County, contesting said election and the judgment of said court, within twenty days from the date of the election. 5. In the alternative, if the electors residing in that part of Kirby School District No. 32, which prior to 1949 comprised and constituted the Daisy School District, were entitled to vote in the special election of April 30, then and in that event, there was no legal election for board member from Zone 4 for the obvious reason that no opportunity was afforded the electors residing in the territory, which prior to 1949 comprised the New Hope District, to participate in that election."

We have concluded, in the circumstances here, that the judgment of the Circuit Court is correct and must be affirmed. Obviously, appellant here was attempting to contest a school election in the County Court, which has no jurisdiction in an election contest. The jurisdiction for such contest is lodged in the Circuit Court and not the County Court. " . . . with respect to school elections the county courts were vested with but two powers; canvassing returns and certifying results. . . . That court merely canvasses the returns and

declares the result, its order constituting a permanent record of the outcome of the election. An appeal from that order would merely test the correctness of the court's tabulation of the returns. An election contest, on the other hand, involves the matter of going behind the returns and inquiring into the qualifications of the electors and other matters affecting the validity of the ballots. Jurisdiction of such a contest was conferred upon the circuit court by Act 366, and we have no reason to think that the Legislature did not intend for that jurisdiction to be exclusive." *Parsons* v. *Mason,* 223 Ark. 281, 265 S. W. 2d 526. Since it is stipulated, or admitted, in the present case that appellee Lawless received a majority of the votes cast at the two polling places in the special election, the only power and duty vested in the County Court was merely to canvass these returns and certify the results. It could not go behind the returns and inquire into the qualifications of the electors and other matters that might affect the validity of the ballots cast. *Guthrie* v. *Baker,* 224 Ark. 752, 276 S. W. 2d 54, "Head Note No. 2. 'Proffered testimony relating to votes cast at an illegal voting place held not admissible in Circuit Court on an appeal under Act 403 of 1951 from an order of the County Court declaring the results of an election for membership to County Board of Education.' "

Our conclusion makes it unnecessary to discuss the points raised by appellant which, in effect, would be proper in an election contest properly brought in the Circuit Court. Judgment affirmed.

WILLIAMS *v.* HARRELL.

5-866 288 S. W. 2d 321

Opinion delivered March 26, 1956.

Tompkins, McKenzie & McRae, for appellant.

Denman & Denman, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit to recover a promissory note and other items of personal property.[1] Equity jurisdiction was invoked so that Herman Bonds, the maker of the note, could be enjoined from making direct payments until the conclusion of the litigation.

Appellant, Mrs. Clara Williams, brought the suit against appellee, Mrs. Nell Harrell, alleging: that appellant was the owner of the personal property and the $2,000.00 promissory note dated May 6, 1954, signed by Herman Bonds, and payable to Mrs. Williams; that Mrs. Williams left the note and property in her apartment in Prescott, Arkansas, and went to Texas on a trip; that, due to illness, she was unable to promptly return to Prescott; that in a long distance telephone conversation on June 6, 1954, she requested L. J. Harrell (husband of appellee, Mrs. Nell Harrell) to take charge of the note and other property for her as her bailee; that Mr. Harrell complied with Mrs. Williams' request and then died[2] while still having in his possession the note and some of the property; and that the appellee, Mrs. Nell Harrell, had possession of the note and property and refused to return any of it to Mrs. Williams. In her answer Mrs. Harrell admitted that she held the note

[1] Included were a television, an electric refrigerator, a lawn mower and other articles, but the most of the evidence concerned the promissory note.

[2] The date of Mr. Harrell's death was August 11, 1954.

and some of the articles of personal property, but claimed that by the will of her husband, L. J. Harrell, she was given all of his property in fee simple, and that L. J. Harrell became the owner of the note and property in a final settlement between himself and Mrs. Williams.

A large portion of the evidence was directed to the affairs and business dealings between Mr. Harrell and Mrs. Williams. It was stipulated that on July 16, 1953, Mr. Harrell had sold his interest in the tourist court business to Mrs. Williams; but, even so, the evidence showed that Mrs. Williams continued to have various business and personal transactions with Mr. Harrell. Letters she wrote to him in June and July, 1954, substantiated the fact that she was getting money from him at those times.[3] Mrs. Williams testified that she drew a check on May 12, 1954, to "cash" for $350.00 and paid Mr. Harrell all that she then owed him. The check bore the notation: "To Lynne for city bills"; but after the photostatic records of the bank had been checked, it was finally stipulated that the quoted notation was *not* on the check when it went through the bank.

Mrs. Williams testified, just as her complaint alleged, that Harrell got the note out of her apartment on June 6, 1954, and was keeping the note for her and that she had never endorsed it. She claimed that she and Mr. Harrell had a final settlement out in the park in Texarkana[4] on the 28th of June, 1954, and that he had

[3] In one letter of July 16, 1954, Mrs. Williams thanked Mr. Harrell for $5.00 that he had just sent her and thanked him for paying certain bills for her in Prescott and also said that, if she went back to housekeeping, she wanted to use his refrigerator. In another letter, Mrs. Williams requested Mr. Harrell to make the monthly payment for her on her car; and it was shown that this payment was $150.00. In the same letter she referred to the refrigerator as being his. In another letter, Mrs. Williams said to Mr. Harrell: "You keep a statement or an account of what you have paid of mine. . . . I want to know how much I owe you."

[4] These questions were asked of Mrs. Williams: "Q. When you paid him up in Texarkana you paid him in cash out in the park? A. Yes. . . . Q. Now you testified still later on the 28th of June you had a settlement with Mr. Harrell and where did that occur? A. In the park at Texarkana. Q. And did I understand you to say that he had the clipboard there at that time? A. Yes. Q. Was that the same clipboard that had the note and other miscellaneous bills on it? A. Yes, the note was not on there. Q. Did you have any conversation about the note, any discussion about the note at that time? A. The note hadn't entered my mind. . . ."

there the clipboard — on which she left the note in her apartment — and that the note was not then on the clipboard. She said she entirely failed to think about the note or get it back from Harrell. Her testimony, that she was able to repay Harrell on June 28th, is at variance with the letters that she wrote him wherein she said she was without funds. Mrs. Williams relied strongly on the fact that she had never endorsed the note; and contended that Harrell was a good business man and would have obtained her endorsement on the note if he had received it in any final settlement.

It had been shown that when the tourist court was sold to Mr. Herman Bonds, he paid $3,000.00 in cash and executed the note for $2,000.00. Mrs. Harrell and her witnesses testified that they heard a conversation between Mrs. Williams and Mr. Harrell at his place of business in Prescott the latter part of May or the 1st of June, 1954, in which Harrell said to Mrs. Williams: "I will take this note and you take the money and pay the bills." Also it was testified that on Mr. Harrell's books, under "Accounts Receivable," he had written in his own handwriting this notation: "1954, May, Note Herman Bonds, $2,000.00."

Thus the Chancery Court had to decide whether Mrs. Williams had surrendered the note to Harrell on June 1, 1954, or whether Mrs. Williams had left the note in her apartment, as she testified, and that Harrell got the note as her agent on June 6, 1954. The evidence was in hopeless conflict and there are many inconsistencies on each side. We omit many details, the recital of which would add nothing favorable to the reputation of the litigants. The Chancellor awarded the note and some of the personal property to Mrs. Harrell. Each side has appealed. We discuss, first, Mrs. Williams' direct appeal, in which are argued two assignments.

I. The appellant says:

"The finding of the Chancellor is not only against the preponderance of the evidence. It is contrary to the stipulation filed in the case."

It was stipulated that L. J. Harrell had sold all his interest in the tourist court and cafe to Mrs. Williams by bill of sale dated July 16, 1953; and " . . . it is further stipulated and agreed that there will be no evidence introduced at the trial of this cause, oral or documentary, relating in point of time prior to July 16, 1953 . . . for the purpose of proving any indebtedness owing by Clara Williams to L. J. Harrell or by L. J. Harrell to Clara Williams."

Appellant says that the Chancellor's memorandum opinion shows that in reaching his findings in this case he considered business dealings and relationships between L. J. Harrell and Mrs. Williams prior to July 16, 1953. It is true that the Chancellor mentioned earlier dealings and relationships, but these were not mentioned ". . . for the purpose of proving any indebtedness owing . . . ," which is the language of the stipulation. The references, that the Chancellor made to earlier dealings of the parties, were by way of recitals only, and were not determinative of his findings and conclusions. He was careful to point out that he based his findings on the credibility of the witnesses.

The fact that Mrs. Williams and Mr. Harrell had a financial settlement on July 16, 1953, did not alter the fact that they had many subsequent transactions and business dealings. Mrs. Williams' letters showed that she asked Mr. Harrell to make financial payments for her; and she admitted owing him money as late as her letters of July, 1954. The fact that Mrs. Williams insisted that a final settlement had occurred between her and Mr. Harrell in the park in Texarkana on July 26, 1954, shows that financial transactions arose after July 16, 1953. If she had a financial settlement with Mr. Harrell on July 28, 1954, why did she not get the note at that time? That is the question that Mrs. Williams was unable to answer. She brought this suit and had the burden that any plaintiff has in a replevin action, that is, to prove that the plaintiff is the owner and entitled to the possession of the items in litigation.[5] The Chan-

[5] See § 34-2101 et seq. Ark. Stats. and cases there cited.

cellor found that Mrs. Williams had not proved her right to prevail; and, in reaching that conclusion, he did not make any finding violative of the stipulation, and did not go contrary to the stipulation.

II. Appellant says:

"The note was not transferred, but if it were transferred, it was not transferred for value."

If Mrs. Harrell's witnesses are right — and the Chancellor so found — then the note was transferred by Mrs. Williams to Mr. Harrell on the first of June, 1954, when Mrs. Williams and Mr. Harrell had the conversation testified to by four witnesses; and Mrs. Williams' admission of a settlement in the park in Texarkana on the night of July 28, 1954, and her failure to demand the note at that time, support the conclusion that Harrell had received the note as his own in the settlement on the 1st of June, 1954.

The fact that Mrs. Williams had not endorsed the note does not prevent it from having been transferred. Sec. 68-149 Ark. Stats. provides:

"Where the holder of an instrument payable to his order, transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferror had . . ."

Some of our cases on that provision of the negotiable instruments law are: *Cureton* v. *Farmers State Bank,* 147 Ark. 312, 227 S. W. 423; and *McDonald* v. *Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325.

Conclusion: As previously stated, the decision in this case turns on the credibility of the witnesses. The Chancellor saw the witnesses and heard them testify. We are asked to say that his findings are against the preponderance of the evidence; but a careful study of the entire record does not convince us that he was wrong in any respect. Therefore we affirm the decree both on direct appeal and cross appeal.

CROW *v.* RUSSELL.

5-893 289 S. W. 2d 195

Opinion delivered March 26, 1956.

[Rehearing denied April 30, 1956.]

George M. Booth and *Coleman & Mayes,* for appellant.

No brief for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant, S. L. Crow, brought an action of unlawful detainer against appellees, Josiah E. Russell and wife, in which he sought possession of a certain dining room and damages for its alleged unlawful detention in the sum of $1,550.00. A writ of possession was issued upon the posting of the statutory bond by appellant but appellees filed a cross-complaint in which they sought judgment for loss of prospective profits allegedly suffered by them in the sum of $1,130.00 because of appellant's breach of an oral lease contract under which appellees operated the dining room for three months as tenants of the appellant.

At the conclusion of all the evidence the trial court found, as a matter of law, that appellees' eviction was wrongful because no notice to terminate the tenancy had been given them and a verdict was directed in their favor upon appellant's complaint. Appellant concedes the correctness of this ruling but contends the court erred in overruling his motion for a directed verdict upon

appellees' cross-complaint because the evidence is insufficient to sustain the verdict in favor of appellees in the sum of $200.00 for loss of prospective profits sustained by reason of appellant's breach of the contract.

There is little dispute in the evidence which discloses that appellant had the Randolph Hotel in Pocahontas, Arkansas, under lease from the owner in December, 1954, when it was orally agreed that appellees would take over operation of the dining room until August 1, 1955, when appellant's lease expired and there would be further negotiations as to a written lease. The appellant was inexperienced in the hotel business and had been operating the dining room at a loss. Mrs. Russell was an experienced operator of eating establishments. It was also agreed that for the term of January 1 to August 1, 1955, appellees would furnish meals to appellant and one hotel employee and pay one half of the hotel utility bills and for $87.00 worth of groceries on hand, when profits permitted, as consideration for the oral lease of the dining room and equipment.

Appellees took over the dining room January 1, 1955 and operated it until shortly after the filing of the instant action on March 26, 1955. According to appellees' records, the receipts of the business for the months of January, February and March, respectively, were in the amounts of $404.02, $410.66 and $551.44. The total business disbursements for the same respective months were $409.35, $384.86 and $409.15, resulting in a net loss of $5.33 for January and net gains of $25.80 and $142.29, respectively, for February and March. In addition appellees and their two children received all their meals which were valued at approximately $135.00 per month.

A banquet hall was added to the premises in January and appellees acquired the business of serving luncheons to two civic clubs and had made arrangements to serve another club at an estimated additional profit of $10.00 weekly at the time of eviction. When appellees first took over the project very few guests of the hotel were taking their meals there but nearly all of

them were doing so when this suit was filed. Mrs. Russell estimated they would have realized a cash profit of $175.00 monthly besides the meals for her family for the four months unexpired term of the oral lease if it had not been breached by appellant. She advised appellant in February that they would begin paying on the utility bills in March. Appellant asked her to pay $35.00 as appellees' part of the utility bills to date shortly after March 1st. At that time appellant owed appellees $68.30 for meals furnished two of his guests and Mrs. Russell told him to bring the utility bills and they would have a settlement, but he refused to do so.

The rule applicable in cases like this was clearly stated by Judge Hart, speaking for the court, in *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439, as follows: "The principle touching the question of profits as an element of damages is well settled. The rule is that where one party to a contract is prevented from performing the same by the fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made, had the other party carried out his contract. The rule that damages which are uncertain or contingent can not be recovered, does not apply to uncertainty as to the value of the benefits to be derived from performance, but to uncertainty as to whether any benefit would be derived at all. If it is reasonably certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover. *Straudle* v. *LeRoy,* 122 Ark. 189, and *Harmon* v. *Frye,* 103 Ark. 584." Other cases to the same effect are: *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336, 93 S. W. 985; *Beekman Lumber Co.* v. *Kittrell,* 80 Ark. 228, 96 S. W. 988; *Blumenthal* v. *Bridges,* 91 Ark. 212, 120 S. W. 974; *Harrell* v. *Davis,* 210 Ark. 939, 198 S. W. 2d 180.

In arguing that the evidence of prospective profits was too speculative and conjectural, appellant relies on such cases as *Beasley* v. *Boren,* 210 Ark. 608, 197 S. W. 2d 287, and *Sumlin* v. *Woodson,* 211 Ark. 214, 199 S. W. 2d 936. In the *Beasley* case Judge Robins pointed out

that no records or data were introduced in support of plaintiffs' theory of loss of anticipated profits at a new and untried business location. Similar conditions existed in the *Sumlin* case where plaintiff was relying primarily upon the experience of a prior operator in the absence of any showing that plaintiff's ability as a merchandiser approached that of his predecessor.

When considered in the light most favorable to appellees, we conclude that the evidence was sufficient to sustain the verdict of $200.00 for loss of prospective profits. In our opinion the evidence meets the test of reasonable certainty and is not too speculative or conjectural to be considered as the proximate result of appellant's breach of the oral lease contract.

Affirmed.

TWIN CITY LINES, INC. *v.* HOUCK.

5-872 289 S. W. 2d 198

Opinion delivered March 26, 1956.

[Rehearing denied April 30, 1956.]

Harper, Harper & Young and *Theron Agee,* for appellant.

Ralph W. Robinson and *Hardin, Barton, Hardin & Garner,* for appellee.

George Rose Smith, J. This is an action brought by Gertrude Houck and her husband for damages resulting from a traffic collision in which Mrs. Houck was injured. The jury awarded Mrs. Houck $18,000 in damages and awarded her husband $1,500. The appellant's principal contentions are that Mrs. Houck was guilty of contributory negligence as a matter of law and that the larger verdict is excessive.

The accident occurred on a one-way street leading from Fort Smith to Van Buren. Mrs. Houck, driving alone, had parked her car on the right-hand side of the street and was about to alight on the street side. Without looking back for oncoming traffic she released the door lock with her left hand, allowing the door to open not more than two inches. While still holding the door handle she reached forward with her right hand to turn off the ignition. At that moment the appellant's bus, traveling very close to the cars parked on the right, struck the door, bending it outward in a U-shaped curve. The plaintiffs' proof is to the effect that Mrs. Houck was jerked so violently by the impact that her neck was broken. She also sustained a comparatively minor leg injury.

The operator of the bus, traveling at some distance behind Mrs. Houck, had seen her park her car. He says that as he approached the parked car a motorist in the other traffic lane honked his horn and began to pass the bus. The two lanes are somewhat crowded when cars are parked on both sides of the street. The jury were warranted in finding that the bus driver, without reducing his speed, drove extremely near the cars parked on his right and in doing so struck Mrs. Houck's door, which was open an inch or two. The bus driver testified that he did not sound his horn, that if necessary he drives within an inch of parked cars, and that he understands it to be against the law for a person "to open the door against traffic," as Mrs. Houck did.

The proof does not show that Mrs. Houck was contributorily negligent as a matter of law. The question is whether a reasonably prudent person would, in Mrs.

Houck's circumstances, release the door catch and allow the door to swing slightly ajar without first looking to the rear. No doubt such conduct takes place daily; it is for the jury to say whether it amounts to carelessness. The only Arkansas decision cited by the appellant on this issue, *Ponder* v. *Carroll,* 193 Ark. 1120, 105 S. W. 2d 72, is readily distinguishable. There the plaintiff alighted from a wagon and, apparently without looking for danger, walked into the stream of traffic. That such reckless conduct was held to be negligence is not controlling with respect to the altogether different facts now before us. It cannot be said that Mrs. Houck's actions would be regarded as carelessness by all fair-minded men.

We do not consider the $18,000 verdict to be too liberal. Before her injuries Mrs. Houck had earned more than $5,000 a year from the operation of a beauty shop and a cafe. There is evidence to show that she is permanently disabled as the result of a fractured vertebra in her neck and that she may have to wear a rigid brace for the rest of her life. The verdict can hardly be declared excessive if her present condition is due solely to the collision. The appellant insists, however, that such a conclusion is not supported by substantial evidence.

On this issue the conflicting testimony presented a question for the jury. Physicians who testified for the appellant believe that Mrs. Houck suffers from a congenital defect caused by the failure of certain neck bones to fuse during her childhood. But two of these doctors had originally diagnosed Mrs. Houck's injury as a fractured vertebra, and that opinion was expressed by a medical witness called by the plaintiffs. It is argued that the latter view is based upon the assumption that Mrs. Houck suffered a "whiplash" strain and that there is no proof to support such an assumption. Mrs. Houck testified, however, that she experienced a violent jerk at the moment of the collision. The jury were justified in believing that this testimony, couched in layman's language, satisfied the medical requirement that a severe

flexion must have occurred. In reaching their conclusion the jury may well have considered the fact that the defect, if congenital, had apparently never manifested itself in any way before the collision occurred.

We find no merit in the appellant's remaining contentions, that the verdict in favor of Mr. Houck is excessive and that two instructions given by the court were abstract.

Affirmed.

HARRIS *v.* STARR.

5-907 288 S. W. 2d 332

Opinion delivered March 26, 1956.

Shaw & Spencer, for appellant.

Shaver, Tackett & Jones, for appellee.

PAUL WARD, Associate Justice. On April 29, 1951 the wife of appellant, R. A. Harris, was killed in an automobile collision on Highway 71. On May 18, 1951 Harris filed a complaint against appellee, Joe Starr, d/b/a Oklahoma Exposition Shows, J. F. Brown, S. K. Clark and Floyd Brown, alleging negligence on the part of Floyd Brown who was driving a truck attached to a carnival cook shack, and alleging that said Brown was operating the truck under the control and management of Starr. Personal service was had on all of the defendants except Starr and service was apparently attempted on him by serving the Secretary of State under Ark. Stats. § 27-340 or § 27-341 as more fully set out hereafter.

None of the above named defendants appeared for trial and on October 16, 1951 a default judgment was taken against all and each of them in the total amount of $16,495. There were in fact three suits filed against appellee and the other defendants growing out of the same accident. One was by R. A. Harris, an individual; one by R. A. Harris, as administrator, and; one by R. A. Harris, as next friend of his minor child. These suits were all consolidated for trial, and for the purpose of this opinion we will treat them as if they were one cause of action.

Joe Starr was in 1951 and at all times since a resident of Oklahoma, and it appears that most of his time is given to managing or conducting a traveling carnival show. In the early part of August 1955 Starr appeared with a show in Howard County and on the 6th of August the sheriff levied an execution on certain rides and equipment supposedly belonging to Starr, in an effort to collect the judgments above mentioned. A few days thereafter Starr, appearing specially, filed a "MOTION TO SET ASIDE JUDGMENT AND QUASH EXECUTION." In this motion Starr stated that he had never been served with any process in the above mentioned cases. It was further stated that service was attempted upon him under the Arkansas Non-Resident Motor Vehicle Act by having the sheriff of Pulaski County serve the Secretary of State, but that

he did not receive notice from any source that such process had been served upon the Secretary of State, and that he in fact knew nothing of the judgments until the 6th of August 1955. Starr further stated that he had never been notified that the complaints had been lodged against him and that he was represented by no attorney concerning the matter, and had no knowledge of the pending litigation. In the motion it was further stated that said judgments should be set aside for want of service of process upon him, and for fraud practiced upon him and the court. It will be noted that this motion contained no allegations with respect to a meritorious defense.

Upon the above motion both sides presented testimony to the court on the question of whether or not Starr had been properly served or whether he had been represented by an attorney, and both sides rested. The trial judge took the matter under consideration and it was agreed that he would announce his decision within five or six days, after the attorneys on each side had presented briefs.

Previous to the day on which the court was to render its decision Starr filed an amendment to the above mentioned motion in which he set out the facts purporting to show a meritorious defense to the original action. Among other things it was stated that the truck which was driven by Floyd Brown was the property and under the control of J. F. Brown and that Floyd Brown was the agent of J. F. Brown; that Floyd Brown was in no wise connected or associated with him [Joe Starr] or the Oklahoma Exposition Shows; that S. K. Clark owned the cook shack involved in the collision and that he was not an agent, servant or employee of Starr or the Oklahoma Exposition Shows, and; that neither he nor the Oklahoma Exposition Shows nor any of their agents, servants or employees had control of the aforesaid vehicles at the time of the accident.

The trial court, over the objections of appellant, allowed Starr to amend his motion, and to introduce his testimony in support thereof. Appellant saved his

exceptions and refused to cross examine Starr or to introduce testimony. Thereupon the trial court set aside the judgment against Starr and quashed the execution.

Appellant makes no contention that the testimony, taken over his objections, does not show a meritorious defense. So, the questions presented for our determination are: (a) Was it error for the court to permit appellee to amend his motion?; (b) Was appellee properly served in the original suit? and, if not; (c) Was appellee bound by the knowledge of his purported attorney?, and; (d) Did the court err in quashing the execution?

(a) Notwithstanding both parties had introduced testimony on appellee's original motion [which contained no allegations of a meritorious defense], had rested and agreed to submit briefs, and the court had stated it would announce its decision on a day certain, we think the court did not abuse the discretion it had in the matter in allowing appellee to amend his motion, before decision day, to plead a meritorious defense. Ark. Stats. § 27-1160 provides, in substance, that the court may, at any time, in the furtherance of justice, allow a pleading to be amended by inserting material allegations so long as the amendment does not change substantially the claim or defense. This court has many times held that the trial court has wide discretion in allowing pleadings to be amended. In *St. Louis, Iron Mountain & Southern Railway Company* v. *Power,* 67 Ark. 142, 53 S. W. 572, it was held not error for plaintiff to amend his complaint by inserting new matter after the issues were joined and the jury impaneled, but defendant was entitled to a continuance. In *Kempner* v. *Dooley,* 60 Ark. 526, 31 S. W. 145, we said: "It was in the sound discretion of the circuit court to permit or refuse to permit the amendment offered by the appellee, Dooley, to be made at the time it was offered, and the court is of the opinion that the circuit court did not abuse its discretion in refusing to allow the amendment to Dooley's answer, after the cause had been heard upon the pleadings and evidence."

During the trial in *Biddle et al., Receivers* v. *Riley,* 118 Ark. 206, 176 S. W. 134, plaintiff offered evidence of future loss or damages when it was discovered the complaint contained no such allegation. The trial court permitted plaintiff to amend the complaint over objections. This court in sustaining the trial court said: "The court had the right to permit an amendment at any stage of the proceedings which would not operate to the prejudice of the defendants in their preparation for the trial, and it was not suggested to the court that this introduced new matter which would render it necessary for defendants to have additional time in which to meet the issue."

In *Smith-Arkansas Traveler Company* v. *General Tire & Rubber Company,* 182 Ark. 818, 33 S. W. 2d 712, the court said, at page 822 of the Arkansas Reports, "The fact that appellee attempted an erroneous theory did not disentitle it to amend under a correct theory."

In *Missouri Pacific Transportation Company* v. *Williams,* 194 Ark. 852, 109 S. W. 2d 924, after the trial had begun, plaintiff filed an amendment to his complaint, alleging wrongful conduct on the part of the driver of the bus. The court allowed this amendment over the objections of the defendant, and it was contended in this court that this constituted reversible error. In disallowing this contention the court said: "We do not agree with this contention, the plaintiff had a right to amend his pleadings at any time, even after progress of the trial had commenced, however, within the sound discretion of the court. If such amendment was of the nature or kind as to cause surprise to the defendant to not reasonably be prepared to meet, it would have been proper, upon motion, to have continued the cause . . ."

In *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S. W. 2d 654, it is stated: "We have repeatedly stated that the trial court is invested with broad discretion in allowing amendments to pleadings under Ark. Stats. § 27-1160 in order to effectuate the manifest purpose of the statute to permit the trial of litigation upon its merits."

It is noted that appellant did not ask for a continuance when the court permitted the amendment to be made.

Also, the record shows that appellee informed the court that if he were not allowed to amend he would take a non-suit, and the court could have allowed him to do so since no counter-claim had been filed. See: *Carpenter* v. *Dressler,* 76 Ark. 400, 89 S. W. 89; *Watts* v. *Watts,* 179 Ark. 367, 15 S. W. 2d 997; *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358, and; *Raymond* v. *Young*, 211 Ark. 577, 201 S. W. 2d 583.

(b) Apparently an attempt was made to serve Starr originally pursuant to the provisions of Ark. Stats. § 27-340 or § 27-341. The former applies generally to a non-resident doing business in this state and the latter to a non-resident owner or driver of a vehicle on the highways of this state. Both require service of process on the Secretary of State and that a copy be registered to the defendant at his last known address. Here, however, there is no contention that the last requirement was complied with.

(c) Appellant ably contends that Jack Bradley, a licensed attorney, represented Starr as his attorney in the original proceeding. Bradley and Starr both deny the relationship. There is no direct proof that such relationship existed although there is considerable testimony indicating that it did. This presented a fact question to the trial judge and we cannot say he committed reversible error in reaching the conclusion he did.

Certain letters were introduced in evidence showing that Bradley had at one time represented S. K. Clark, J. F. Brown and Floyd Brown. In one letter Bradley wrote appellant's attorney that he was withdrawing from the other cases and that later he might withdraw from Starr's case. Bradley, who was at the time an attorney but is now a county judge in Oklahoma, explained this statement in this way. He said that he had been a friend of Starr for several years but at the time he received the registered letter containing copy of the complaint he did not know where Starr was and had not

talked to him but thought that if Starr should hire him in the case he might represent him or he might not. Starr testified that he did not know that suit had been filed against him and that judgment had been rendered against him until the execution was served in August 1955. The clerk of the circuit court in 1951 entered Bradley's name on the docket as attorney for Starr but she admits that neither Starr nor Bradley had told her to do so and that she was merely presuming. It is not contended that Bradley ever filed any pleading on behalf of Starr or that he took any part or steps in the original trial.

(d) Appellant makes the contention that the trial court erred in quashing the execution, and in support thereof cites Ark. Stats. § 29-509 and § 30-311. We conclude that no error is shown upon the part of the trial court. The first cited statute applies, in this connection, only to judgments that have been *modified.* The other section provides for the giving of a bond or security for the stay of an execution or order of sale pending a hearing on whether the execution shall be stayed or quashed by the trial court. The section does not apply to the facts in this case because here the trial court did not quash the execution until after he had heard all of the testimony and had set the judgment aside.

Affirmed.

Justice MILLWEE dissents.

WILBOURN *v.* DAVIS.

5-913 288 S. W. 2d 331

Opinion delivered March 26, 1956.

Melvin T. Chambers, for appellant.

Keith & Clegg, for appellee.

PAUL WARD, Associate Justice. Some time prior to 1954 Mrs. Margaret Wilbourn died leaving a will, one paragraph of which reads as follows:

"SIXTH: My daughter, Mrs. Verda W. Davis, with my consent has spent on my home on North Washington Street, Magnolia, Arkansas, some money for improvements and repairs. My daughter agreed to live in my home with me and help me for at least awhile. It is my will that for any expenses heretofore incurred in the making of any repairs and improvements to my said home or which she may hereafter make, not to exceed TWO THOUSAND DOLLARS ($2,000.00), and that is the limit which I have placed for such repairs and improvements, and I direct that she be paid, not to exceed the sum of TWO THOUSAND DOLLARS ($2,000.00) for any repairs or improvements heretofore made or which she may hereafter make to my home as aforesaid."

The above will was admitted to probate on January 5, 1954 and on January 11, 18, and 25, 1954 the statutory Notice was published directing all persons having claims against the estate to file the same within six months.

On March 31, 1955 appellee, the daughter of Mrs. Wilbourn mentioned in the portion of her will above copied, filed an itemized statement of the amount she had been out for improvements and repairs on her mother's home, showing said amount to be $1,950.37.

Appellant, Ira Wilbourn, an heir of the deceased and a beneficiary under the will, contested the above

claim of appellee on three grounds. First, that the claim was barred by the Statute of Limitations, it being more than three years since appellee had made the repairs and improvements. Second, that more than six months had elapsed since the date of the publication of Notice until the filing of the claim as is required under Ark. Stats. Supp. § 62-2601. Third, that the claim was not verified as required by statute.

No testimony was introduced by either side, and the Probate Judge on the pleadings, ordered the executor of the will to pay appellee the sum above mentioned.

We have concluded that the action of the trial judge was proper. Under the wording of Mrs. Margaret Wilbourn's will it appears clearly to us that appellee was a legatee under the will and not a creditor of the estate. Mrs. Wilbourn could of course will her property to whom she pleased. Here she chose to leave some of it to her daughter because, apparently, she appreciated what her daughter had done, and not because she felt or was in fact under a legal obligation to do so. This being true it was not even proper for the executor to pay appellee until after all debts of the estate had been presented and paid. This is a complete answer to all of the grounds relied on by appellant.

Since appellee was a legatee and her claim is not based on a contract the Statute of Limitations has no application. This is specifically recognized in 34 C. J. S. page 133 under the subheading of "Effect of testamentary provisions" where we find " . . . a direction to the executor to pay a specified debt is clearly a recognition of the debt, and an expression of an intention that it shall be paid regardless of the Statute." Also in 21 Am. Jur. page 649 we find, in this connection, the following statement: "Statutes limiting the time within which actions may be brought on claims against the estate of a decedent have been held inapplicable to actions for the recovery of legacies . . ." The sentence following the above quotation answers appellant's second contention that the claim should have been filed

within six months. It reads: "Statutes of non-claim have likewise been held inapplicable to such actions."

The above announcements and conclusions are in no way in conflict with this court's opinion in the case of *Kaufman* v. *Redwine,* 97 Ark. 546, 134 S. W. 1193, where it was said: "The direction in the will for the executor to pay all just debts does not mean that he shall pay them without probate." In the case under consideration we are not dealing with a debt but with a legacy.

Affirmed.

FIVE LAKES OUTING CLUB, INC. *v.*
HORSESHOE LAKE PROTECTIVE ASSOCIATION.

5-889 288 S. W. 2d 942

Opinion delivered March 26, 1956.

[Rehearing denied April 30, 1956.]

Daggett & Daggett, for appellant.

Davis & Davis, Nance & Nance and *Hale & Fogleman,* for appellee.

SAM ROBINSON, Associate Justice. Beginning in the year 1903, the appellant Five Lakes Outing Club bought about 3,000 acres of land on the peninsula of Horseshoe Lake in Crittenden County, Arkansas. There are four small lakes on the peninsula purchased by the club:

Mud, Cleaver, Goose and Brushy Lakes; Porter Lake is also in that vicinity. In 1954, the club constructed a levee across Mud Lake at its west end, near the point where it joins Horseshoe Lake, and a levee across Cleaver Lake at its east end, near the point where it joins Horseshoe. The appellees filed this suit, asking that the Five Lakes Club be required to remove the levees. The chancellor held that the levees must be removed, and Five Lakes Club has appealed.

On appeal, appellant argues six points, but by reason of the conclusion we have reached, it is only necessary to discuss the issue of *res judicata,* and the issues of whether Horseshoe Lake is a navigable stream and whether Mud and Cleaver Lakes are a part of Horseshoe Lake.

Horseshoe Lake is about seven miles long, and is shaped as its name implies. It is close to the Mississippi River and, prior to the year 1905, drained into the river from one end through a stream known as Lost River; later, this stream was called Buck Bayou. The north end of the peninsula of Horseshoe Lake is known as Happy Jack.

In 1905, the Mississippi River levee was constructed across Buck Bayou, thereby blocking the drainage from Horseshoe Lake and causing the lake to rise about five feet. This rise in the level of the lake inundated the end of the peninsula consisting of the area known as Happy Jack. About 1914, the Five Lakes Outing Club attempted to enclose Happy Jack with a fence, although at the time, there was water on it to a depth of several feet caused by the five foot rise of Horseshoe Lake. In the case of *State Ex Rel. Thompson* v. *Parker,* 132 Ark. 316, 200 S. W. 1014, this court held that, by reason of the fact that the waters of Horseshoe Lake had covered the land known as Happy Jack for a period of more than seven years, the State had acquired it by prescription.

In the late twenties, J. O. E. Beck and other riparian owners of land adjacent to Horseshoe Lake dug a ditch which was calculated to lower the level of the lake to

the level existing prior to the construction of the levee across Buck Bayou. This court held that Beck and the others had the right to lower the lake to its former level, but the court was of the opinion that the ditch would not actually lower the lake more than three feet. ***Beck* v.** *State ex rel. Attorney General,* 179 Ark. 102, 14 S. W. 2d 1101.

As heretofore mentioned, there are four small lakes on the land purchased by the Five Lakes Club; all of these lakes connect with Horseshoe Lake in some manner; Cleaver Lake connects with Horseshoe on the east side of the peninsula, and Mud Lake connects with Horseshoe on the west side of the peninsula. It appears that in the rainy seasons, Horseshoe runs into Goose Lake and Brushy Lake, and Horseshoe is connected directly with Porter's Lake by Mosquito Bayou.

First is the question of whether the principle of *res judicata* applies. Appellees contend that the court held, in *Thompson* v. *Parker,* that the State had acquired Mud and Cleaver Lakes by prescription. There, it was stoutly contended by those seeking to establish State ownership by prescription that not only had the State acquired the area known as Happy Jack, but had also acquired Mud and Cleaver Lakes. This court held only that the State had acquired Happy Jack. Although those contending for State ownership maintained that the State had acquired Mud and Cleaver Lakes, as well as Happy Jack, there was no contention on the part of any one that Cleaver Lake and Mud Lake were a part of Happy Jack. It is perfectly clear that Cleaver Lake and Mud Lake were considered to be separate and apart from Happy Jack, and the opinion in *Thompson* v. *Parker* deals only with Happy Jack; hence, the issue of whether the State has acquired Mud and Cleaver Lakes by prescription is not *res judicata.*

Appellant next contends that Horseshoe is not a navigable stream, and, therefore, even if Mud and Cleaver Lakes should be considered a part of Horseshoe, appellants would own all of Mud and Cleaver since they own the land on both sides of those lakes. In *Barboro* v.

Boyle, 119 Ark. 377, 178 S. W. 378, we held that Horseshoe Lake is a navigable stream. Once navigable does not mean always navigable. *Parker, Commissioner of Revenues* v. *Moore,* 222 Ark. 811, 262 S. W. 2d 891. But here, there has been no change in the character of the lake from the standpoint of navigability since the *Barboro* case was decided in 1915, hence we cannot now say that Horseshoe Lake is non-navigable.

Last is the question of whether Mud and Cleaver Lakes are a part of the bed of Horseshoe Lake. According to the evidence, Horseshoe Lake was just about at its normal level on May 21, 1955, and the water in Mud and Cleaver Lakes ranged in depth from 3 feet at the point where Mud joins Horseshoe Lake to 1.8 feet where Cleaver Lake joins Horseshoe; there are trees, stumps, and water lilies in both Mud and Cleaver Lakes. Occasionally, both of these lakes have gone dry for considerable periods, even since the dam was built across Buck Bayou. When Horseshoe is at its normal level, which appears to be at the elevation of 191.2 feet, it joins with both Mud and Cleaver Lakes, and undoubtedly the water is at an equal level in Brushy Lake, Goose Lake, and Porter's Lake; in fact, one of the maps shows the level of the water to be 191.2 feet in both Porter's Lake and Mosquito Bayou at the same time water is at 191.2 feet in Horseshoe Lake.

There would not be much more reason for saying that Mud and Cleaver Lakes are part of Horseshoe Lake than there would be for saying Porter's Lake is part of Horseshoe. Horseshoe and Porter Lakes are connected by Mosquito Bayou. Obviously, the water level in Porter's Lake is influenced by the water level in Horseshoe Lake, the same as the water level in Mud and Cleaver Lakes is influenced by the water in Horseshoe. In *Medlock* v. *Galbreath,* 208 Ark. 681, 187 S. W. 2d 545, this court held that Portia Bay, a stream 125 yards wide and 3½ miles long, was non-navigable, and although connected with Black River by a running stream, it was not a part of the river.

There is no doubt about Mud Lake having existed for many years prior to the construction of the levee across Buck Bayou in 1905. One of the maps introduced in evidence is a contour map prepared by the United States Engineers in 1890 from a survey made in 1878 and 1879. The map shows Mud Lake, and at that time, the elevation of its south bank was 205 feet and this was also the elevation of the north bank, which is pretty much the same as the condition existing today. Photographs in the record made for the purpose of the trial of this case show well-defined banks on Mud Lake, the top of the bank being about ten feet above the water level. The elevation of the bed of Mud Lake is not shown in the 1878 contour map, but it is apparent from the map that the bed of the lake was covered with water at that time. The depth of Horseshoe Lake is shown in detail by cross-sections from one end to the other, but the depth of Mud Lake is not shown; neither is the depth shown as to Brushy Lake and Goose Lake, but the depth of Porter's Lake is shown by cross-sections. The map shows the confluence of Mud Lake with Horseshoe Lake. Horseshoe is meandered, but Mud Lake is not.

When the levee was constructed across Buck Bayou in 1905, it caused the flooding of Happy Jack and raised the water level in Mud and Cleaver Lakes, as well as in Goose Lake, Brushy Lake, Porter's Lake, Mosquito Bayou and Buck Bayou. No doubt, Mud Lake and Cleaver Lake have been dry, from time to time in dry seasons, but Mud Lake was not dry in 1878, when the contour map, above referred to, was made; most of the time following the construction of the levee across Buck Bayou, they have not been dry. But, they were dry in 1954; there is a picture in the record, taken that year, showing a tractor plowing in the bed of Mud Lake.

What we have here are two small lakes joining with a larger lake, and although the smaller lakes join with the larger, they are not a part of the larger. And a rise of the water in the larger lake, causing a rise in the smaller lakes, in no way affects the ownership of the smaller lakes. "It is said to be a universal rule govern-

ing the measurement of waters that where a water of a larger dimension is intersected by a water of a smaller dimension, the line of measurement of the first crosses the latter at the points of junction from headland to headland, and the existence of tidelands in the intersecting water in no respect affects the result.'' 56 Am. Jur. 495.

The Five Lakes Outing Club owns title to the bed of Mud and Cleaver Lakes and, therefore, had the right to build levees across these lakes. *Medlock* v. *Galbreath, supra.*

Justices HOLT, MILLWEE and WARD dissent.

PAUL WARD, Associate Justice (dissenting). I agree with the majority that the opinion in the *Parker* case is not *res judicata,* in favor of appellee of the issue in this case. Having established the above fact, it seems to me that the majority have made the fundamental mistake of attaching no further significance to the decision in the *Parker* case as it relates to the facts in this case. It should be obvious to anyone that the opinion in the *Parker* case should control the opinion in this case, aside from the question of *res judicata,* if the facts in the two cases cannot be definitely and logically distinguished. This distinction has not been made by the majority. It appears to me that practically every argument employed by the majority in this case could have been urged, and most of them were urged, in the *Parker* case.

The majority being unable to agree with the principal argument made by appellants in this case that the *Parker* case should be overruled, and by further admitting that Horseshoe Lake is navigable at this time they have thereby assumed but not discharged the obligation of demonstrating that the material facts in this case are different from the facts in the *Parker* case. In fact, I find nowhere in the majority opinion an attempt to make this distinction. If there is anything in the majority opinion which approaches such an attempt it appears to be the matters which I shall now mention but which, as I shall attempt to point out, are far from convincing.

(a) The majority point out that there are two other lakes on the peninsula [Goose Lake and Brushy Lake] in addition to the two lakes here involved and state that they are all connected with Horseshoe Lake "in some manner." Just what bearing that fact has on the issue in this case is not explained. Certainly the status of Goose Lake and Brushy Lake could have no more bearing on the title to the bed of Mud and Cleaver Lakes in this case than the status of Mud and Cleaver Lakes had on the title to the bed of Happy Jack Lake in the *Parker* case, and it seems to me the majority opinion admits that there was no significant bearing in the latter instance.

(b) It is noted by the majority that on May 21, 1955, that the water in Mud and Cleaver Lakes ranged in depth from three feet to 1.8 feet while "Horseshoe Lake was just about at its normal level." Apparently this was an attempt on the part of the majority to show that Mud and Cleaver Lakes are not navigable and therefore not a part of Horseshoe Lake, but this fact is not a paramount issue here. In the first place, under the *Parker* opinion, it is not necessary to show that the two lakes are navigable but merely to show that they are a continuation or a part of Horseshoe Lake which is conceded to be navigable. In the second place, under the *Parker* opinion the banks of Horseshoe Lake extend to the normal *highwater mark* and not to the "normal level."

(c) The following statements appear in the majority opinion: "What we have here are two small lakes joining with a larger lake, and although the smaller lakes join with the larger, they are not a part of the larger. And a rise of the water in the larger lake, causing a rise in the smaller lakes, in no way affects the ownership of the smaller lakes." The authority for the conclusion reached in the last sentence above quoted, taken from Am. Jur., may or may not be good law under some circumstances but it cannot be accepted here because the ruling in the *Parker* case [which the majority are unwilling to overrule] is just to the contrary under the facts in this case.

Justices HOLT and MILLWEE concur in this dissent.

JAY M. ROWLAND *v.*
THE BAR RULES COMMITTEE OF ARKANSAS.

5-878 288 S. W. 2d 330

Opinion delivered March 26, 1956.

Harry E. Meek, A. F. Triplett, J. H. Lookadoo, Harry T. Wooldridge, Cooper B. Land, Eugene A. Matthews and *John Harris Jones,* for petitioner.

John P. Woods, Howard Cockrill, John D. Eldridge, Jr., J. B. Daggett, A. L. Smith, O. A. Graves and *Abner McGehee,* for respondent.

PER CURIAM. The petition by Jay M. Rowland for reinstatement, as an attorney, is denied. This denial is based on the following record: Affirmance by this court on June 28, 1948 of petitioner's conviction of a felony in the case of *Rowland* v. *State,* 213 Ark. 780, 213 S. W. 2d 370 — reference is made to that case for a full statement of facts on which the opinion was based — the denial of Petition for Certiorari by the Supreme Court of the United States on March 4, 1949, and a subsequent denial of a similar Petition by the United States District Court for the Western District of Arkansas; the Bar Rules Committee's Petition for Disbarment filed on May 2, 1949; this court's Order of Permanent Disbarment on June 27, 1949; Petitioner's application for Reinstatement and this court's subsequent denial thereof on February 18, 1952; and the present Application for Reinstatement filed November 4, 1955.

It could serve no useful purpose to spread again on the records of this court the facts leading up to and bringing about petitioner's permanent disbarment on June 27, 1949. In that order we said: "The clerk of this Court is directed to enter an order of permanent disbarment of Jay M. Rowland, under authority of 3 Ark. Stats. Secs. 25-401, et seq, and Amendment No. 28 to the Constitution. See *Rowland* v. *State,* 213 Ark. 780, 213

S. W. 2d 370. Order effective as of this date. Mr. Justice MILLWEE dissents from that part of the order making the disbarment permanent."

We now decline to modify or change that order in any respect.

Justices MILLWEE and ROBINSON dissent.

Justice GEORGE ROSE SMITH not participating.

BARNARD *v.* FIRST METHODIST CHURCH OF MENA.

5-900 288 S. W. 2d 595

Opinion delivered April 2, 1956.

James D. Stoker, Donn G. Allison and *W. C. Benton,* for appellant.

Nabors Shaw, for appellee.

LEE SEAMSTER, Chief Justice. Mrs. E. Maria Barnard McKee died February 12, 1955. The appellee offered for probate as her holographic will the following instrument.

"To the Methodist Church of Mena, Arkansas.

"I, E. Maria McKee being of sound mind I give to this church for the purpose of educating youth to Christ

— *all* my possessions to be disposed or used as the Board of Stewards and the Minister sees fit.

"Signed—

"Mrs. E. Maria Barnard McKee
1010 Janssen Ave.
Mena, Arkansas
"My hand and seal
Dec. 29th, 1947"

The Polk Probate Court ordered the instrument admitted to probate as the last will and testament of Mrs. McKee. This appeal is from that order.

The appellants are the brothers, sisters and a niece of the deceased, her next of kin. The appellants contend that the instrument, so probated as the decedent's holographic will, is not testamentary in character and the court erred in considering extrinsic evidence to supply the *animus testandi* which was not apparent in the writing.

The will was found in Mrs. McKee's strong box, in an envelope which also contained a will dated 1945. The previous will gave all of her property to her husband. The husband had died several months before the will here in question was written.

The phrase "being of sound mind" is one usually used in writing wills; she disposed of all of her property in the instrument, which would include her food and clothing. This provision could not reasonably become effective until after her death. The purpose for which she wanted all of her property used was for "educating youths to Christ." She delegated to the appellee the power to carry out the provisions of her will.

We hold the instrument to be testamentary in character and that the *animus testandi* is apparent from the writing. *Cartwright* v. *Cartwright,* 158 Ark. 278, 250 S. W. 11.

The appellants also contend that the proof was not sufficient to establish said will by three credible, disin-

terested witnesses because some of the witnesses were members of the appellee church.

Mr. Bill Lauck Wood, a church member witness, was an officer of the bank where the deceased transacted her business. Mr. William G. Spencer, a church member witness, was her lawyer — all such witnesses were mature and no gain would inure to any of them, individually, under the will. They were competent witnesses. See 57 Am. Jur. p. 243, Sec. 320.

The statutory method of making the proof of a holographic will is found in Ark. Stats. 1947, Section 62-2117, Sub-Sec. B. The proof in this case was sufficient to establish the validity of the will. *Sanders* v. *Abernathy,* 221 Ark. 407, 253 S. W. 2d 351.

The court's action in probating the will is supported by a preponderance of the evidence.

Judgment affirmed.

REBSAMEN MOTOR COMPANY *v.* PHILLIPS.

5-948 289 S. W. 2d 170

Opinion delivered April 2, 1956.

[Rehearing denied April 30, 1956.]

Spitzberg, Mitchell & Hays, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

A. F. House, amicus curiae.

J. Seaborn Holt, Associate Justice. By this suit appellants, for themselves and all others similarly situated, question the constitutionality and validity of Act 182 of the Acts of the 1955 Legislature, §§ 75-1501 — 1506 Ark. Stats. 1947 Sup.

Their complaint contains these allegations: ". . . 2. Plaintiff, Rebsamen Motor Company, is a corporation organized under and existing by virtue of the laws of the State of Arkansas. It is engaged in the business of a motor vehicle dealer in the City of Little Rock, Arkansas; it holds a *bona fide* contract or franchise with the Ford Motor Company, manufacturer of Ford automobiles; it maintains adequate space in one of the buildings in which its business is conducted for the display of new and unused motor vehicles, the repair and servicing of motor vehicles, and the storage of new parts and accessories for motor vehicles. It is also engaged in the businesses of repairing and servicing motor vehicles and the selling of new parts and accessories for motor vehicles. Its principal place of business is located in the City of Little Rock, Arkansas. 3. The plaintiff, R. W. Morris, Jr., is employed as a salesman by the plaintiff, Rebsamen Motor Company . . . Defendants [appellees] are attempting to enforce the provisions of this act which would require the plaintiffs and other persons similarly situated as motor vehicle dealers and motor vehicle salesmen in the State of Arkansas to pay license fees. This act is void in that it violates Article I, Sections 1, 8 and 10; Article IV, Section 2; the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States; Article II, Sections 2, 3, 7, 8, 13, 18, 21, 22 and 23; . . . of the Constitution of the State of Arkansas. 5. The defendants are threatening to continue the enforcement

of this Act. Unless they are restrained from enforcing the provisions of Act 182, the plaintiffs and others similarly situated as motor vehicle dealers and motor vehicle salesmen in the State of Arkansas will suffer irreparable injury for which they have no adequate remedy at law. 6. Act 182 is void because (1) it is indefinite, vague and ambiguous; (2) the license fees which are charges under its provisions are excessive for fulfilling the purposes of the act; and (3) it is discriminatory in that it requires franchised dealers and their employees to obtain a license and pay a fee, but it does not require non-franchised dealers to either obtain a license or pay a fee." They ask that the act be declared unconstitutional.

Appellees' answer was a general denial of all material allegations. Trial resulted in a decree upholding the constitutionality and validity of the act, in all respects; that its enactment was within the police power of the State of Arkansas; and dismissed appellants' complaint. This appeal followed.

Act 182 attempts to set up a commission of seven members to be appointed by the Governor, one from each of the 6 Congressional Districts, and one from the State at large to be chairman. Among its provisions are the following: "SECTION 1. Necessity for regulation — Legislative finding. The legislature finds and declares that the distribution and sale of motor vehicles in the State of Arkansas vitally affects the general economy of the State and the public interest and the public welfare, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate and to license motor vehicle manufacturers, distributors and dealers doing business in Arkansas, in order to prevent frauds, impositions and other abuses upon its citizens . . . SECTION 2. (b) 'Motor Vehicle Dealer' means any person, firm, association, corporation or trust not excluded by subsection (c) of this Section who sells, solicits or advertises the sale of *new and unused* motor vehicles and holds a *bona fide* contract or franchise in effect with a manufacturer or distributor of the *new or unused*

motor vehicle or vehicles proposed to be dealt in and who maintains adequate space in the building or structure wherein his, its or their established business is conducted for the display of *new and unused* motor vehicles and also provides for the repair and servicing of motor vehicles and the storage of new parts and accessories for the same . . . (d) 'Motor Vehicle Salesman' means any person who is employed as a salesman by a motor vehicle dealer whose duties include the selling or offering for sale of *new and unused motor* vehicles. (e) 'Commission' means the Arkansas Motor Vehicle Commission created by this Act. (f) 'Manufacturer' means any person, firm, association, corporation or trust, resident or nonresident, who manufactures or assembles *new and unused* motor vehicles. (g) 'Distributor' or 'Wholesaler' means any person, firm, association, corporation or trust, resident or nonresident who in whole or in part sells or distributes *new and unused* motor vehicles to motor vehicle dealers, or who maintains distributor representatives. (h) 'Factory Branch' means a branch office maintained by a person, firm, association, corporation or trust who manufactures or assembles motor vehicles for the sale of motor vehicles to distributors, or for the sale of motor vehicles to motor vehicle dealers, or for directing or supervising, in whole or in part, its representatives. (i) 'Distributor Branch' means a branch office similarly maintained by a distributor or wholesaler for the same purposes a factory branch is maintained. (j) 'Factory Representative' means a representative employed by a person, firm, association, corporation or trust who manufactures or assembles motor vehicles, or by a factory branch, for the purpose of making or promoting the sale of his, its or their motor vehicles, or for supervising or contracting his, its or their dealers or prospective dealers. (k) 'Distributor Representative' means a representative similarly employed by a distributor, distributor branch or wholesaler . . ."

Each member was required to execute a bond of $5,000 and was to receive $10.00 per diem each day re-

quired in attending meetings; provided, that such pay shall not exceed $200 per annum for any one person.

"SECTION 3 . . . (d) The Commission shall appoint a qualified person to serve as Executive Secretary thereof, to serve at the pleasure of the commission, and shall fix his salary and shall define and prescribe his duties . . . (f) . . . At the close of each fiscal year hereafter said commission shall file with the Governor and the State Auditor a true and correct report of all fees and charges collected and received by it during the preceding fiscal year and shall at the same time pay into the general revenue fund of the State a sum equal to ten per centum (10%) of the gross fees and charges so collected and received . . . SECTION 4. Licenses. (a) On or after July 1, 1955, it shall be unlawful and constitute a misdemeanor for any person, firm, association, corporation or trust to engage in business as, or serve in the capacity of, or act as a motor vehicle dealer, or motor vehicle salesman, or manufacturer, distributor or wholesaler of motor vehicles, or factory branch, distributor branch, or factory representative or distributor representative, as such, in this State without first obtaining a license therefor as provided in this Section; . . . (c) . . . (1) For each Manufacturer, Distributor or Wholesaler, Factory Branch or Distributor Branch, One Hundred Dollars ($100.00). (2) For each Motor Vehicle Dealer, Factory Representative or Distributor Representative, Twenty-Five Dollars ($25.00). (3) For each Motor Vehicle Salesman, Five Dollars ($5.00) . . ."

Section 5 sets out numerous grounds on which the Commission may deny an application for a license or revoke or suspend a license already granted, among these grounds are: "(c) For any willful failure to comply with any provision of this Act or with any provision of this Act or with any rule or regulation adopted and promulgated by the Commission under authority vested in it by this Act . . . (g) Being a Manufacturer of motor vehicles, Distributor, Wholesaler, Distributor Branch or Factory Branch, or officer, agent or other representative thereof, who has either induced or

coerced or attempted to induce or coerce any Motor Vehicle Dealer: (1) To accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodity or commodities which shall not have been ordered by said Motor Vehicle Dealer; (2) To use automobile or truck registration figures, lists or any analysis therefrom; likewise the use of any competitive sales figures of cars, trucks, parts or accessories, as a basis of conducting business; (3) To order or accept delivery of any motor vehicle with special features, appliances, accessories or equipment not included in the list price of said motor vehicles as publicly advertised by the manufacturer thereof; (4) To order for any person any parts, accessories, equipment, machinery, tools, appliances or any commodity whatsoever. (h) Being a Manufacturer of Motor Vehicles, Distributor, Wholesaler, Distributor Branch or Factory Branch or officer, agent or other representative thereof, who: (1) Has refused to deliver to any Motor Vehicle Dealer having a franchise or contractual arrangement for the retail sale of *new and unused* motor vehicles sold or distributed by such Manufacturer, Distributor, Wholesaler, Distributor Branch or Factory Branch, any motor vehicle, publicly advertised for immediate delivery, within sixty (60) days after such dealer's order shall have been received; (2) Has attempted to induce or coerce, or has induced or coerced, any Motor Vehicle Dealer to enter into any agreement with such Manufacturer, Distributor, Wholesaler, Distributor Branch or Factory Branch or representative thereof or to do any other act unfair to said dealer by threatening to cancel any franchise or contractual agreement existing between such manufacturer, distributor, wholesaler, distributor branch or factory branch and said dealer; (3) Has unfairly, without due regard to the equities of said dealer and without just provocation, canceled the franchise of any Motor Vehicle Dealer. The non-renewal of a franchise or selling agreement without just provocation or cause shall be deemed an evasion of this paragraph and shall constitute an unfair cancellation; (4) Has refused to extend to a Motor Vehicle Dealer the privilege of determining

the mode or manner of available transportation facility which said dealer desired to be used or employed in making deliveries of *new motor vehicles* to him or it." . . .

Legislative acts are presumed to be constitutional and valid until the contrary is shown, and the burden is on those who may question their constitutionality. We have concluded that appellants have met that burden here and that the trial court erred in upholding the constitutionality of Act 182.

In reading and considering this act in its entirety it is readily apparent that its purposes and effect, and under its terms, appellant, along with his salesmen and other franchised dealers and their salesmen, were regulated and required to pay a license fee for the privilege of engaging in the business of selling *new and unused motor vehicles* and on failure to pay the tax to be subject to prosecution on a misdemeanor charge, while their competitors in the same community, who are not franchised, but who may deal in both new and used cars, along with their salesmen, were not regulated or required to pay the license fee and could operate without penalty, even though they were engaged in the same business. To hold that under its police power the legislature could enact such legislation, exempting from the tax automobile dealers engaged in *new and used* cars from paying the license fee, and at the same time requiring franchised dealers in the same community, who deal only in *new and unused cars* to pay the tax, is clearly, we think, an arbitrary classification and in conflict with Section 18 Article 2 of the Constitution of the State of Arkansas 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 also contravenes the Fourteenth Amendment to the Constitution of the United States which prohibits a state from denying to "any person within its jurisdiction the equal protection of the laws."

"The principle of equality and uniformity requires that license or privilege taxes be imposed equally and impartially on all persons pursuing the same avocation or exercising the same privileges, . . . the legislature may not, under the pretense of a license fee or tax, impose unequal taxes on persons similarly situated." 53 C. J. S., Licenses, Sec. 22(a), pp. 533-4.

"It has been held . . . that an act or ordinance is unconstitutional if it arbitrarily and unreasonably discriminates between different modes of conducting the same business unless there is something in the one mode which makes it more dangerous to the public." 53 C. J. S., Licenses, Sec. 22(b) (2), p. 544.

The regulation of the sale of motor vehicles under the state's police power to prevent fraud and to promote the general public welfare, we think, is a proper subject for legislative action, however, the Legislature, under the guise of regulation, may not indulge in what in effect would be arbitrary price fixing or the interference with lawful competition.

This court in *Ex Parte Deeds,* 75 Ark. 542, 87 S. W. 1030, in striking down Act 136 of the Legislature of 1901, the purposes of which were similar in effect to Act 182 here, said: " . . . Reading the act literally, it pronounces a penalty against 'any person, either as owner, manufacturer or agent,' who, without having first procured a license, 'shall travel over or through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage and vehicles, or either of said articles,' but provides that the same 'shall not apply to any resident merchant in said county.' In other words, it permits 'any resident merchant in said county,' but no other person, to 'travel over and through any county and peddle or sell' the articles named without license so to do. It therefore falls clearly within that clause of the Fourteenth Amendment to the Federal Constitution, which prohibits a State from denying to 'any person within its jurisdiction the equal protection of the laws,' and is also in conflict with Section 18 of Article 2 of the Constitution of the State,

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.' . . . The Supreme Court of the United States in *Connelly* v. *Union Sewer Pipe Co.,* supra, [184 U. S. 540], said: 'In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.' "

Appellees say that acts similar to Act 182 here are in force in many other states and none found to be invalid. From our somewhat limited search we have been unable to find any statute similar, in effect, to Act 182 in any other state which has been declared constitutional and upheld. Appellees have pointed to none. We have, however, found that Nebraska has a statute similar, in effect, to Act 182 and in construing the provisions of that statute the Supreme Court of that state, in *Nelsen* v. *Tilley,* 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729, (1939), held: "A provision in regulatory statute limiting issuance of motor vehicle dealer's license for sale of new automobiles to persons enfranchised by manufacturers of new motor vehicles, is an unlawful restriction on the right of a person to adopt and follow a lawful industrial pursuit, and contravenes the Four-

teenth Amendment to the Federal Constitution and the sections of the State Constitution providing that all persons should have equal rights, guaranteeing due process of law, prohibiting grant of special privileges or immunities, and forbidding discrimination between citizens of the United States."

We further point out that sub-division (d) Section 3 above which provides; "The commission shall appoint a qualified person to serve as Executive Secretary thereof, to serve at the pleasure of the commission, and shall fix his salary, etc." . . . is clearly an attempt by the Legislature to delegate this power to the commission. This power to delegate is denied the Legislature under Article 16, Section 4, of our Constitution which provides: "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." See our recent case *Gipson* v. *Crawfis,* 225 Ark. 903, 286 S. W. 2d 336.

Considering this Act 182 in its entirety, and finding all of its material provisions, which were intended to effectuate its purposes, to contravene provisions of both our State and Federal Constitutions, we hold it unconstitutional and invalid. Accordingly, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

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

Paul Ward, Associate Justice (dissenting). I find myself unable to agree with the majority opinion herein which holds Act 182 of 1955, relating to the distribution and sale of motor vehicles, unconstitutional. The majority opinion, as I understand it, assigns three reasons or grounds for the conclusion reached. They are: (a) Act 182 makes an arbitrary and therefore an unconstitutional classification; (b) A similar act was held unconstitutional

by the Supreme Court of Nebraska, and; (c) Act 182 attempts an illegal delegation of legislative power to the Commission. I shall discuss the above reasons or grounds in the order named.

(a) The majority find that the legislature has no constitutional right to require a license fee from a franchised dealer who deals in new and used cars, and allow a used car dealer to sell new and used cars without having to pay any license fee. It seems to me that this view overlooks entirely the main features and main purpose of said Act 182. The act itself is rather lengthy and much of it is devoted to definitions and setting up the Commission and the rules and regulations governing it. It would serve no useful purpose to set out the provision of the act at any length because, as I understand the act and its purpose, the real gist of the enactment revolves around Section 5(g)(1). In effect this portion of the act is designed to prevent an automobile manufacturing company from forcing a local dealer in this state to accept and pay for more automobiles than the dealer orders, or can dispose of at the price at which he is required to sell them. It is very plain not only from the act but from common knowledge that this situation just described could exist only between a manufacturer and its authorized dealers. Consequently there is no occasion, and the act makes no attempt, to regulate used car dealers or "bootleg" new car dealers. As a matter of fact it seems clear to me that if this act is allowed to stand and its provisions are enforced there will be no more "bootleg" dealers in new cars.

The majority opinion has not discussed the purposes of the act or the evils which it is designed to eliminate, and therefore there is no point in attempting to show that there is a necessity for regulations of the kind here involved for the protection of the general economy and public welfare as set forth in Section 1 of the act.

The fact that many other states have enacted laws very similar to Act 182 and some have gone unchallenged for 15 years or more is itself a reason why this court

should not strike down this act unless it clearly appears to be unconstitutional. The law is well settled that acts of the legislature are presumed to be constitutional and every reasonable intendment to that end should be indulged.

The following states have enactments containing the same meaning and almost the same wording as Section 5(g)(1) referred to above, see: Wisconsin Stats., 1953, Chapter 218.01 et seq. and particularly subparagraph 15 at page 2771; West's Louisiana Stats. Annotated, Vol. 18, Sec. 32:1255(8)(b) at page 100; Colorado Rev. Stats. 1953, Section 13-11-14-(9)(a), at page 202; Code of Virginia, Vol. 7, Chapter 7, Article 3, Section 46-534(1) at page 171; Florida Stats., Chapter 320, Section 64(5); Tennessee Code Annotated, Vol. 10, Sec. 59-1714(g)(1); 47 Oklahoma Stats. Annotated, Section 565(g)(1) at page 386, and; Public Laws of Rhode Island 1949-50, Chapter 2595, Article VIII, Section 2(5), at page 1255. My limited investigation reveals that several other states have laws somewhat similar in purpose to Act 182. A few of which are Iowa, South Dakota, Michigan, Ohio and Mississippi.

While some of the regulatory acts by other states have been in force for more than 15 years no decision has been called to my attention and I have been unable to find one which has directly passed upon the constitutionality of the main features of Act 182. In the case of *Kuhl Motor Co.* v. *Ford Motor Co.,* 270 Wis. 488, 71 N. W. 2d 420, the Supreme Court upheld appellee's right to cancel a contract with its dealer, appellant. It did so upon the ground that the contract giving the right of cancellation was entered into before the Motor Vehicle Act was passed, which act had the same provision in it that is in Act 182. The Motor Vehicle Act was discussed at length and there is every indication that the Wisconsin Court considered the act constitutional, but did not think it should impair an existing contract. One of the judges dissented on the point above mentioned but no judge suggested that the act was unconstitutional as to future contracts.

(b) The majority quote a headnote from the case of *Nelsen, et al.* v. *Tilley,* 137 Neb. 327, 289 N. W. 388 (1939),

leaving the impression, perhaps, that the Supreme Court of Nebraska has held unconstitutional an act like the one here under consideration. A careful reading of the decision in that case justifies no such impression. It is true that in the Nebraska statute there is the same language as that found in Act 182 and referred to particularly as Section 5(g)(1) noted above. If may be significant that the Nebraska Court found no fault with this part of the act. The court did however find objections, as shown at page 392, to certain language in the act which is not found in Act 182. That language limited a dealer to selling only the kind of an automobile that his license specified.

(c) The majority opinion concludes that the language in Section 3(d) constitutes an unlawful delegation of legislative power to the Commission to employ and pay a secretary and necessary clerical help. The expense for this help is to be paid out of the fees provided for in the act, and is not an attempt to expend state money without an appropriation. Such procedure is not at all unusual. When the legislature created the Licensing Board for Contractors it provided in Ark. Stats. § 71-706 that "The Board shall be further empowered to employ an Assistant Secretary . . . and whose salary shall not exceed $1,800 per year." In the act regulating real estate brokers and salesmen it is provided, Ark. Stats. § 71-603(f) that from the fees collected the Board shall pay all incident expenses including not to exceed $5.00 a day to an examiner. Other instances of similar legislation could be cited and I know of no decision by this court holding any of them unconstitutional. The payment of expenses provided for in Act 182 are merely incidental to and necessary for the effective operation of the Commission which it creates. These provisions in no way violate our holding in *Gipson* v. *Crawfis,* 225 Ark. 903, 286 S. W. 2d 336, relied on by the majority.

Chief Justice Seamster joins in this dissent.

BOCKMAN *v.* BUTLER, ADMINISTRATRIX.

5-899 288 S. W. 2d 597

Opinion delivered April 2, 1956.

John C. Sheffield and *Cracraft & Cracraft,* for appellant.

A. M. Coates, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is by Dr. James Bockman from judgments against him for malpractice in the diagnosis and treatment of two little boys, each suffering from a skull fracture. The

complaints alleged, the evidence showed, and the Jury found, that, as a result of such malpractice: one little boy died, the other experienced considerable pain, and the grandparents incurred expense and suffered mental anguish. This is the second appearance of this case. In *Bockman* v. *Butler,* 224 Ark. 125, 271 S. W. 2d 918, the facts are given in detail, and need not be here repeated. We remanded the cases because of errors in instructions; and on retrial there were verdicts against Dr. Bockman as discussed in Points II and III, *infra.* On this appeal, Dr. Bockman presents the three points now to be discussed.

I. Appellant says: *"In an action for malpractice, the accused doctor has a right to have his standard of care and treatment measured and tested by the rules and principles of the particular school of medicine to which he belongs and not by those of some other school."*

In the course of the trial, seven physicians testified that Dr. Bockman's diagnosis and treatment of the little boys amounted to malpractice. Six of these were practicing physicians in Phillips County, and the seventh was the neurosurgeon of Memphis who performed the operation on Willie Donald. On cross-examination of each of these doctors, it was developed that they were of the Allopathic school of medicine, and it seemed to be generally conceded, without direct question and answer to that effect, that Dr. Bockman was of the Eclectic school of medicine. Because of the fact that all of the testifying doctors were of the Allopathic school, and that Dr. Bockman was of the Eclectic school, the appellant, after having developed this distinction on cross-examination, moved to strike from the record all of the testimony of the seven doctors as incompetent, and also moved for a directed verdict because there was no testimony by any doctor of the Eclectic school. Also on the same point Dr. Bockman complains of the giving and refusing of certain instructions.

One of the leading cases on this point is that of *Swanson* v. *Hood,* 99 Wash. 506, 170 Pac. 135, in which the Supreme Court of Washington stated:

"Appellant takes the broad position that a physician of one school is not competent to testify in a suit for malpractice or negligence of a physician of another school. Several decisions are cited which it is claimed support this view, but, as we read them, they hardly go that far. The rule is not that a physician of another school is not competent to testify, but that a defendant's treatment is to be tested by the general doctrine of his own school, which is a very different thing; in other words, the standard of exclusion of evidence is not the school of the witness, but the premises of his testimony. If the premises from which he testifies, that is to say, the criterions by which he measures defendant's treatment, are those of defendant's own school, the witness is not disqualified merely because he himself belongs to another school. *Bowman* v. *Woods,* 1 G. Green (Iowa) 441; *Force* v. *Gregory,* 63 Conn. 167, 27 Atl. 1116, 22 L. R. A. 343, 38 Am. St. Rep. 371; *Martin* v. *Courtney,* 75 Minn. 255, 77 N. W. 813; *Patten* v. *Wiggin,* 51 Me. 594, 81 Am. Dec. 593; *Grainger* v. *Still,* 187 Mo. 197, 85 S. W. 1114, 70 L. R. A. 49."

Our own case of *Dorr, Gray & Johnston* v. *Headstream,* 173 Ark. 1104, 295 S. W. 16, while dissimilar in facts from the case here, nevertheless points to the logic of the quoted language, because, in our case, doctors who did not devote their entire time to the practice of X-ray were nevertheless permitted to testify as to what would be negligence in X-ray matters. There is an annotation in 78 A. L. R. 697 entitled: "Competency of physician or surgeon of school of practice other than that to which the defendant belongs to testify in malpractice case"; and many cases are there cited in accord with the language quoted from the Washington case of *Swanson* v. *Hood* (*supra*).

In the case at bar, Dr. Bockman did not testify, and no doctor of the Eclectic school of medicine testified; and Dr. Bockman did not claim, nor offer to prove,

that the teachings and methods of practice of the Eclectic school of medicine were at variance from those of the Allopathic school in injuries like those here. On the other hand, several of the seven doctors testified that they had never heard of any school of medicine diagnosing and treating skull fractures like Dr. Bockman did in this case. Dr. Schultz, the neurosurgeon, testified:

"Q. You have detailed the accepted method of head injuries of the kind we have here. Do you know of any other method that is known to medical science in the treatment of such head injuries?

A. I assume you mean the treatment as of today's modern medical science?

Q. Yes.

A. No, I don't . . ."

Dr. McCarty, of Phillips County, testified:

"Q. You have testified what the general practice of the doctors in good standing in this vicinity is?

A. Yes, sir.

Q. Do you know of any other method known to medical science for treating injuries of this type?

A. No, sir . . ."

Dr. Bell, of Phillips County, after describing a method of diagnosis and treatment entirely at variance with that used by Dr. Bockman, testified:

"Q. Is there any other method known to medical science of treating head injuries of the type I have mentioned?

A. Not to my knowledge . . ."

So we conclude that, under the testimony of Doctors Schultz, McCarty and Bell, there was sufficient evidence to take to the Jury the question of the malpractice of Dr. Bockman; and, therefore, appellant's first contention is without merit under the facts as shown by the record in this case.

II. The appellant says: *"The verdicts of the jury were excessive and not supported by the evidence."*

It will be remembered that the little boys had already received the skull fractures before they were taken to Dr. Bockman and, of course, the rule is well settled that in such a situation the physician found guilty of malpractice is not chargeable for pain, suffering or anguish that arose because of the original ailment, but is chargeable only for the pain, suffering, anguish and expenses that naturally follow from the malpractice. (See 41 Am. Jur. 247 and cases cited in footnotes 12 and 13 thereof.) Because of this rule, appellant argues that the verdicts are excessive.

The verdict for Willie Donald was $250.00 for pain and suffering resulting from the malpractice; and a reading of the record in this case establishes that such amount is not excessive. But for Dr. Bockman's malpractice, the little boy would have been promptly taken to the hospital in Helena and correctly treated. Because of Dr. Bockman's malpractice, the little boy suffered much more and had a long hard recovery. There was a verdict for Everlina Butler for $250.00. It was shown that she was the grandmother of Willie Donald and stood in *loco parentis* to him, and that because of Dr. Bockman's malpractice she was obliged to take the child to Memphis and expend considerable time and money in his recovery, all of which could have been materially reduced except for the malpractice of Dr. Bockman. So the verdict to her was not excessive.

Likewise, in the Aubrey Donald case, there is nothing excessive in the verdict of $500.00 to Lee Butler and Everlina Butler, grandparents of Aubrey Donald, for the medical and funeral expenses that they incurred. From the evidence the Jury could have found that this little boy would not have died except for Dr. Bockman's malpractice; and we cannot say that the $500.00 is excessive for the funeral expenses and other expenses in connection with the death of this little boy. That leaves only the question of $2,000.00 for mental anguish, which is to be discussed in the next topic.

III. The appellant says: *"The jury verdict in favor of the next of kin of Aubrey Donald for mental anguish was not supported by any evidence of such mental anguish."*

The Jury verdict was for $2,000.00 for the use and benefit of the next of kin for mental anguish for the death of Aubrey Donald; and the evidence conclusively established that Lee Butler and Everlina Butler, the grandparents of Aubrey Donald, stood in *loco parentis* to him. Prior to Act 115 of 1949, in a case like this one, damages were not recoverable for mental anguish sustained because of the death of a loved one.[1] Our present statute allowing recovery for mental anguish may be found in § 27-904 in the Cumulative Pocket Supplement of Ark. Stats., and a comparison of the previous law with the 1949 Act shows that in giving the items of damage there can now be compensation to the next of kin for "mental anguish"; and then there is added this clause at the end of the previous law:

"However, when mental anguish is claimed as a measure of damages under this statute, such mental anguish will be applicable only to the wife, parent, child, brother, sister or persons standing in *loco parentis* to the deceased at the time of the injury which caused the death of the deceased."

That Everlina Butler and Lee Butler sustained mental anguish in the loss of the little grandchild they had raised, is clearly reflected from the evidence. The appellant claims that Everlina Butler and Lee Butler as grandparents were not the "next of kin" of the little boy, and that there is no evidence that the "next of kin" — if same be other than Everlina Butler and Lee Butler—ever sustained any mental anguish. There is nothing in the record to show that there were any next of kin except the grandparents, Lee Butler and Everlina

[1] In 3 Ark. Law Review at page 373 there is a very good statement of the holdings prior to the Act 115 of 1949 and the effect of that Act in allowing recovery for mental anguish.

Butler, and Willie Donald, the little brother.[2] There is no evidence in this record that the parents of Aubrey Donald are living. Certainly Everlina Butler and Lee Butler stood in *loco parentis* to the deceased at the time of the injury; and our Statute says that when mental anguish is claimed as damages, then it must have been suffered by certain persons, some of whom are those who stood in *loco parentis*. Everlina Butler was the Administratrix; she brought this action; she testified that she and Lee Butler stood in the relation of parents to the little boy.

Finding no error, the judgment is affirmed.

---

[2] Everlina Butler testified: "Q. Is Lee Butler your husband? A. Yes, sir. Q. What kin was Aubrey Donald and Willie Donald to you? A. Grandsons. Q. How long had they lived with you and your husband? A. All their life. Q. All their life they had lived in your home? A. Yes, sir. Q. You and your husband stood in the relationship of parents to them? A. Yes, sir."

Lee Butler testified: "Q. You are the husband of Everlina Butler? A. Yes, sir. Q. And the grandfather of these two children? A. Yes, sir. Q. Everlina testified that you have raised the two children from birth? A. Yes, sir."

FINKBEINER *v.* FINKBEINER.

5-091 288 S. W. 2d 586

Opinion delivered April 2, 1956.

Terral & Rawlings and *John T. Haskins,* for appellant.

Owens, McHaney, Lofton & McHaney, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee was granted a divorce from appellant on March 1, 1955. A separation agreement and property settlement previously executed by the parties was incorporated in and made a part of the decree. In accordance with said agreement the decree provided that appellant should have custody of their seven year old adopted daughter and that appellee should pay her $25.00 per week for the child's support. Appellant had custody of the child until July 19, 1955. On that date the child was left to spend the night in appellee's home as she did occasionally. The next day appellee refused to surrender the child and had some sort of order served on appellant, the exact nature of which is not disclosed, restraining her from calling appellee on the telephone or going about his separate residence.

On July 29, 1955, appellee filed the instant petition to modify the original divorce decree by giving him custody of the child. After appellant responded a hearing was held September 15, 1955 resulting in a decree granting appellee's petition because of changed conditions since rendition of the original decree, with the right of appellant to have the child on alternate Saturdays from 9 a. m. to 6 p. m. A fee of $100.00 was allowed appellant's attorneys but her prayer for alleged arrearages in the weekly child support payments was denied. This appeal is from so much of the decree as awarded custody of the child to appellee and denied the prayer for judgment for the support payments. Appellant also asks an additional fee for the services of her attorneys on this appeal.

I. *Change of Custody.*

Appellant earnestly contends the chancellor erred in considering personal information not produced in the trial of the case and certain incompetent evidence elicited on the court's own motion; and that the evidence adduced by appellee is insufficient to show such changed conditions since the original decree as to justify a change in the child's custody. Each of these contentions might be worthy of serious consideration and entitled to merit except for the fact that appellant, by her own admissions and testimony, demonstrated that the safety and welfare of the child would be best served by a denial of custodial rights to her for the time being. It would serve no useful purpose to detail the excessive drinking, drunken driving and other indiscretions over a protracted period since the original decree which appellant frankly admitted from the witness stand. Suffice it to say that such admissions afforded sufficient basis for the chancellor's determination that a present change of custody was for the best interest of the child.

II. *Arrearage in Support Payments.*

A preponderance of the evidence supports appellant's contention that appellee voluntarily took charge of the child on July 19 without proper court order and thereafter refused to restore custody to appellant or her attorneys. If appellee felt he was entitled to immediate custody, as he now contends, he should have procured a proper court order authorizing such action. Appellant had probably made definite financial arrangements for the child's care in reliance on a proper compliance with the decree by appellee. Appellee is a principal stockholder in a meat packing company and financially well fixed, while appellant is apparently dependent on the alimony and child support payments. Under all the circumstances, appellee was a mere volunteer in taking custody in violation of the court's original decree and is not entitled to credit to the extent of the weekly payments for the expenses incurred between July 19 and the trial date. This is the effect of our holding in

McCourtney v. *McCourtney,* 205 Ark. 111, 168 S. W. 2d 200.

III. *Attorney Fees.*

While appellee did not appeal from that part of the decree allowing a fee to appellant for her attorneys' services in the trial court, it is insisted that she is precluded from recovering an additional fee for such services in this court under *Nelson* v. *Nelson,* 146 Ark. 362, 225 S. W. 619. It is true that the court held outright in that case that a divorced wife is not entitled to attorney's fees in a proceeding for change in the custody of children after rendition of a final decree of divorce. However, as appellee frankly concedes, this holding was not followed and the case has become of doubtful value as a precedent by reason of such subsequent cases as *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379, and *Hydrick* v. *Hydrick,* 224 Ark. 712, 275 S. W. 2d 878. In the *Vilas* case the mother was held entitled to additional attorney's fee in her suit to modify a divorce decree as to child custody but the majority attempted to distinguish the *Nelson* case on the ground that the custody question was left open by the terms of the *Vilas* decree.

The *Hydrick* case involved a proceeding for modification of the divorce decree giving custody of children to the father, and we said: "The court may in its discretion allow an attorney's fee in a child custody case after the parties have been divorced. In *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379, the court cited *Spratt* v. *Spratt,* 151 Minn. 458, 185 N. W. 509, 187 N. W. 227, and said: 'The opinion in that case recognized the fact that there was a division in the authorities, a number of which were there cited, but the conclusion was there announced that the chancellor had the power to make an allowance to the wife for her counsel fees in a proceeding for a modification of the judgment respecting the custody of the children, although a decree for divorce had been previously granted. Accepting this view, the majority are of the opinion that an additional fee . . . should be allowed.' See also, *Waller* v. *Waller,* 220 Ark. 19, 245 S. W. 2d 814.

Ark. Stats. Sec. 34-1210 provides for the allowance of attorney fees to a wife during the "pendency" of an action for divorce or alimony. In most jurisdictions with similar statutes the courts have held that such provision is broad enough to include cases wherein one of the parties has petitioned for modification of that portion of the decree relating to child custody after the decree has become final on the ground that the new proceeding is merely a continuation of the original action. See cases collected in an annotation on the question in 15 A. L. R. 2d 1270. This view is in harmony with our holdings in the *Vilas* and *Hydrick* cases and the general proposition that as to child custody the decree is only final on the conditions existing at the time of rendition. Where the petition for modification relates only to child custody as in the instant case, we conclude that the allowance of attorney fees to the divorced wife is a matter within sound judicial discretion and that so much of the *Nelson* case as holds to the contrary is overruled.

Although appellant was not entitled to custody of the child at the time of trial, it was shown that she was making a determined effort toward rehabilitation. In view of the possibility of future litigation of the custody question and in fairness to all concerned, we deem it appropriate to say that any future modification proceedings may be maintained in either division of the Pulaski Chancery Court. See *Robinson* v. *Robinson,* 218 Ark. 526, 237 S. W. 2d 20.

That part of the decree relieving appellee of the child support payments for the period from July 19 to the trial date is reversed and judgment will be entered here for appellant in the sum of $211.00 for such arrearage and for an attorney's fee of $250.00 in addition to the fee of $100.00 awarded by the chancellor. Appellee will pay all court costs and his motion to require appellant to pay cost of his supplemental abstract is denied. In other respects the decree is affirmed.

5-903 288 S. W. 2d 585

Opinion delivered April 2, 1956.

[redacted]

Ovid T. Switzer and *W. P. Switzer,* for appellant.

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

GEORGE ROSE SMITH, J. This is a civil action brought by the prosecuting attorney to have the appellant's place of business declared to be a public nuisance. Ark. Stats. 1947, §§ 34-111 *et seq.* The trial court found the place to be a nuisance and entered an order directing that it be closed and that Lawson and all other persons be enjoined "from operating the said place for any purposes whatsoever for a period of one year from this date."

The establishment in question, known as Sam Lawson's Cafe, is situated on a highway west of Crossett. It is shown that Lawson keeps a music machine and permits couples to dance, which brings the cafe within the

statutory definition of a dance hall. Ark. Stats., § 34-111. The State's evidence shows that the establishment is noisy, that it is frequented by intoxicated persons although the county is dry, that empty whiskey bottles accumulate outside the building, that Lawson has been convicted for the possession of liquor for sale in his home nearby, that male patrons have been guilty of indecent exposure on the public road, that one girl was shot in the cafe, that fights have occurred there, and that it is the kind of place that breeds law violations. The defense testimony tends to show that Lawson has attempted in good faith to conduct an orderly place of business, that he is unable to control the actions of his patrons as strictly as he would like to, and that the cafe is no more objectionable than similar establishments in the vicinity. Upon reviewing the proof we do not find the circuit court's conclusions to be contrary to the preponderance of the evidence, which is the test to be applied in this proceeding. *Alston* v. *State,* 216 Ark. 604, 226 S. W. 2d 988.

In one respect, however, the court's order is too broad. The statute contemplates that the initial order shall merely abate the nuisance. Ark. Stats., § 34-117. The more severe course of closing the establishment for a year is authorized only in a contempt proceeding for a violation of the initial injunctive order. Ark. Stats., § 34-118; *Futrell* v. *State,* 207 Ark. 452, 181 S. W. 2d 680; *State ex rel. Atty. Gen.* v. *Williams,* 222 Ark. 966, 264 S. W. 2d 417. The order will therefore be modified, in accordance with the *Williams* case, to enjoin Lawson from using the property or permitting it to be used for dancing or for the sale of intoxicants for a period of one year from the date of the trial court's order. The Attorney General concedes that the order should be modified but asks that the limited injunction be made perpetual, citing the *Williams* case. Here, however, the State did not appeal and therefore is not entitled to affirmative relief going beyond the scope of the circuit court's judgment.

Affirmed as modified.

WINDSOR AUDIT COMPANY *v.* THORNBROUGH, COMMISSIONER OF LABOR.

5-906 288 S. W. 2d 594

Opinion delivered April 2, 1956

Gayle Windsor, Jr., for appellant.

Sam M. Bains and *Luke Arnett,* for appellee.

PAUL WARD, Associate Justice. Appellant, the Windsor Audit Company, a corporation, as an employer in 1947 became subject to the Arkansas Employment Security Act (Ark. Stats. § 81-1101 et seq.). As such employer it paid to the state 2.7 per cent of its annual payroll each year. The 2.7 percentage just mentioned was fixed by Ark. Stats. § 81-1108(c)(3)(I). Appellant did not make payments to the state for all the calendar year 1951 and the first three quarters of 1952. Under the law as it then existed and prior to 1955 if appellant had not failed to make payments as stated above then it would have been entitled [in case of a favorable experience rating] to have its percentage of payment reduced under subsections 81-1108(c)(3)(II)(A)(B)(C)(D). Appellant would have been entitled to this chance for a reduction in percentage because it would have been continually making payments for three years or more under the subsection (I) above mentioned.

However in 1955 the legislature passed Act 395 amending portions of the Employment Security Act. Section 22 of said Act re-enacted subsection (I) mentioned above and made an addition thereto, which amendment or addition is the basis of the controversy causing this appeal. Set out below we copy in full the

original subsection (I) and the amendatory section. The original subsection will be in small print and the amendatory portion will be set out in capitals.

"(I) Each employer's rate shall be 2.7 per centum except as otherwise provided in the following provisions. No employer's rate shall be less than 2.7 per centum unless and until there shall have been three years throughout which any individual in his employ could have received benefits if eligible. PROVIDED THAT, FOR THE TWELVE (12) MONTH PERIOD COMMENCING APRIL 1, 1955, AND FOR EACH TWELVE (12) MONTH PERIOD THEREAFTER, AN EMPLOYER WHO HAS NOT BEEN SUBJECT TO THE LAW FOR A SUFFICIENT PERIOD TO MEET THIS REQUIREMENT MAY QUALIFY FOR A RATE LESS THAN 2.7 PER CENTUM IF HIS ACCOUNT HAS BEEN CHARGEABLE THROUGHOUT A LESSER PERIOD BUT, IN NO EVENT, LESS THAN THE ONE-YEAR PERIOD ENDING ON DECEMBER 31 OF THE PREVIOUS CALENDAR YEAR."

It is the contention of appellant that it is now entitled to have the percentage of its payments reduced [having been making payments for more than a year] under the provisions of the amendment which, appellant says, shortens the experience rating period from three years to one year. It is the contention of appellees that the old law, as it is set out in small print above, applies to appellant, and that appellant is not entitled to take advantage of the one year period.

After a careful examination of the applicable provisions of the statutes we have concluded that appellees' interpretation is correct. It will be noted from the amendatory act copied above that the one year period applies to "an employer who has *not* been *subject to the law,* etc.," referring to the law existing previous to the 1955 amendment. The one year period therefore cannot apply to appellant because it has since 1947 been subject to the Employment Security Act.

To hold in accordance with appellant's contention would be to hold that the portion of the statute quoted

in small type is surplusage and a nullity. This would be true because any employer, whether a new one who had been in business for less than three years or an old employer who was in the status that appellant now occupies, would be eligible to qualify under the one year provision, and consequently there would be no case in which the old law would be applicable.

Affirmed.

BOYD EXCELSIOR FUEL COMPANY *v.* MCKOWN.

5-865 288 S. W. 2d 614

Opinion delivered April 2, 1956.

Rose, Holland & Holland, for appellant.

Kincannon & Kincannon, for appellee.

SAM ROBINSON, Associate Justice. The appellant operates a coal mine where the appellee worked as a miner for about 10 or 12 years. In 1951, appellee quit work and made a claim for workmen's compensation, contending that he is disabled because of silicosis. The first hearing was conducted by Mr. C. L. Farish, Chair-

man of the Workmen's Compensation Commission, who made a finding that the claimant contracted silicosis within the meaning of the statute while in the employ of the respondent, and awarded compensation. On appeal to the full Commission, compensation was denied by a majority of the three member Commission. Mr. Farish was no longer Chairman; but Mr. Arnold B. Sikes, who was then a member of the Commission, dissented, stating it is his opinion that the claimant has Grade 2 Silicosis, and is totally and permanently disabled. The claimant appealed to the Circuit Court and there, after a very careful study of the case by the court, the finding of the Commission was reversed and the claimant was awarded compensation. The employer is the appellant here.

The Commission made a finding of fact, as follows: "Claimant has been a coal miner for more than forty years. From about 1939 to 1951, claimant was, except for a period of one or two years during World War II, employed in some capacity in the coal mine of respondent employer. Claimant resigned his employment with respondent employer on June 25, 1951, and the reason given for resignation is that some misunderstandings arose when effort was made to assign claimant to a lighter job involving the transfer of another employee. Claimant had requested lighter work, or a few months' leave from the mine, because he felt worked down and needed a rest. A day or two after resigning from employment with respondent employer claimant went to a doctor. This led to a series of examinations by various doctors in an effort to diagnose and treat claimant's ailment. Claimant was then complaining of extreme shortness of breath and rapid fatigue upon exertion. As early as July 1951, a diagnosis of emphysema was made by the Arkansas Tuberculosis Sanatorium and the opinion was advanced that claimant was totally and permanently disabled at that time on account of emphysema. Claimant was examined on several other occasions by the Arkansas Tuberculosis Sanatorium, and also by several other medical authorities. Eventually the Arkansas Tuberculosis Sanatorium, through Dr. J. D. Riley,

ventured an opinion that claimant suffered 'Silicosis, Grade II, Advanced Emphysema.'

"Dr. Charles T. Chamberlain, Ft. Smith, Arkansas, examined claimant at least twice and concluded that 'The cause of his (claimant's) total and permanent disability is chronic pulmonary fibrosis and silicosis, grade one.' Dr. Chamberlain's findings are practically the same as those of Dr. Herbert C. Sweet, of St. Louis, Missouri. Other doctors, notably Dr. O. A. Sanders, of Milwaukee, Wisconsin, and Dr. Jesse E. Douglass, of Webb City, Missouri, make a diagnosis of no finding of silicosis. Dr. Douglass finds 'severe emphysema,' and Dr. Sanders finds, 'Possible emphysema.'

"Dr. Harley Darnall, of Ft. Smith, Arkansas, called as a witness by respondent, testified at length and in detail, and though he found no silicosis as a result of his examination of claimant, he did find 'Severe emphysema,' and stated on cross-examination that he could not make a diagnosis of silicosis because of the absence of nodules appearing on X-ray of the lungs, but that some recognized medical authorities did make findings of silicosis in the absence of such nodules upon X-ray examination.

"Dr. E. Z. Hornberger, Jr., of Ft. Smith, Arkansas, also called to testify by respondents, stated that Grade I Silicosis could well be present in a patient and no nodules show up on X-ray examination. Dr. Hornberger was then asked: 'Grade I would not make a person 100 per cent disabled?' The doctor replied: 'That's a hard question to answer.' Dr. Hornberger was next asked: 'Well, it wouldn't ordinarily disable?' He answered: 'In the average case it shouldn't.'

"The primary question for decision here is whether or not this claimant's disability derives from silicosis."

According to the Commission's finding of fact, Dr. Riley, who examined the claimant on three different occasions over a period of about eight months, Dr. Charles T. Chamberlain, who actually treated the claimant for a long period of time, and Dr. Herbert C. Sweet, of St. Louis, Missouri, who had ample opportunity to examine

claimant while in a hospital, all gave a positive diagnosis of silicosis. In making a finding against silicosis, the Commission appears to rely upon the testimony of Dr. O. A. Sander, of Milwaukee, Wisconsin, Dr. Jesse E. Douglass, of Webb City, Missouri, Dr. Harley Darnall and Dr. E. Z. Hornberger, of Fort Smith. If there is any substantial testimony to support the Commission's finding, it must be found in the testimony of the four doctors just mentioned. There is no other testimony in the record indicating that the claimant does not have silicosis. In fact, circumstantial evidence of silicosis is very strong.

Silicosis is a disabling condition of the lungs caused by inhaling dust of stone, sand, or flint; among other manifestations is the formation of fibrous tissue in the lungs. See Maloy's Medical Dictionary. The claimant had worked as a miner for more than 40 years. Conditions in appellant's mine were such as to give rise to silicosis; others besides claimant had become disabled from silicosis while working in the mine. Although there is evidence to the effect that the appellant used precautions to keep down dust and the mine was known as a wet mine, still, there is no substantial evidence in the record that silicosis could not be contracted in the mine, but there is substantial testimony to the contrary. A careful examination of the evidence in this case leaves no doubt but that the claimant is permanently and totally disabled due to a lung condition; according to the undisputed evidence, he has emphysema. There is no substantial evidence that emphysema of the lungs is not caused by silicosis.

Now as to whether the testimony of Drs. Sander, Douglass, Darnall and Hornberger is substantial evidence to the effect that the claimant does not have silicosis: There appears to be a report in the record signed Jesse E. Douglass, who, judging from the report, we assume is a doctor. It does not appear that he testified in the case and it does not appear that there was any opportunity for cross-examination. The record does not show the qualifications of the doctor or identify him

in any manner other than the report signed, as indicated. The report deals with appellee McKown, and states: "Three years ago developed progressive dyspneoa and weakness. For the past two years has had cough with some expectoration. Has difficulty in laying down to sleep. In 1951 had three examinations with Chest X'Ray Films at Arkansas State Sanatorium and on last examination was told he had Silicosis and Emphysema. Has had two subsequent examinations by doctors in Fort Smith, with Chest X'Ray Films and was apparently given the same diagnosis. Diagnosis: Marked Emphysem... with no Silicosis or Tuberculosis. Opinion: This man has severe Emphysem... which is totally and perma*nt*ly disa*bel*ing but I do not know that it is compens*i*ble. It did not occur as the result of his occupation. I do not know the cause of this man's Emphysema." The undisputed evidence in the record is that silicosis will cause emphysema. Dr. Douglass states: "I do not know the cause of this man's Emphysema." If he does not know the cause of the emphysema, it can hardly be said that his testimony to the effect that it is not caused by silicosis is substantial evidence. It is not clear as to how he arrived at his conclusion; there does not appear to have been any opportunity for cross-examination. Ark. Stats. § 81-1323 (c) provides that evidence before the Commission may "include verified medical reports which shall be accorded such weight as may be warranted from all of the evidence in the case." Dr. Douglass' report was not verified, as required by statute, however no objection was made to it; but, nevertheless, the report is only entitled to "such weight as may be warranted from all of the evidence in the case." In view of all of the other evidence in the case, and, considering that Dr. Douglass' qualifications are not shown; that there is no evidence of the extent of the examination he made; that there was no opportunity to cross-examine; and that the report is not verified, it cannot be said that his report warrants a finding that the claimant does not have silicosis.

Now, as to Dr. O. A. Sander, of Milwaukee, Wisconsin: There is no showing as to his qualifications except

that one of the local doctors at Fort Smith testified that he knew Dr. Sander. Dr. Sander's report is not verified, as required by statute, nor was there any opportunity for cross-examination. Even if his report had been verified, it would only be entitled to such weight as may be warranted from all of the evidence in the case. When his entire report is considered in the light of the other evidence, it is not entitled to much weight. The evidence is overwhelming to the effect that the claimant is totally and permanently disabled; the only real issue is whether the emphysema is caused by silicosis or something else. But, according to Dr. Sander's report, there is not much wrong with the man. Of course, Dr. Sander had no opportunity to examine claimant, and merely gave his opinion on information furnished by others. He states: "There is no evidence of Silicosis. Possible emphysema, but a high grade emphysema is not suggested by the X-ray appearance . . ." The doctor then says that emphysema does not cause disability unless extreme, and then adds: "Such extreme emphysema is not suggested by this man's X-ray films."

Next, the Commission's finding deals with the testimony of Dr. Harley Darnall, Fort Smith. Dr. Darnall, called as a witness by respondent, merely testified that X-ray shows no evidence of silicosis, but states that the claimant has severe emphysema, and there is scarring in the chest, and he could give no definite reason for it. The sum and substance of Dr. Darnall's testimony is to the effect that from an X-ray he cannot find silicosis.

The next doctor giving testimony upon which the Commission based its finding, is Dr. E. Z. Hornberger. This witness, introduced on behalf of respondent, states that the claimant has all of the symptoms of silicosis except the nodules and that he does not have an asthmatic chest. The doctor further states that Silicosis, Grade I, is not demonstrable by X-ray. On direct examination, the doctor was asked:

"Q. Grade I would not make a person one hundred percent disabled?

A. That's a hard question to answer.

Q. Well, it wouldn't ordinarily disable?

A. In the average case it shouldn't.

Q. That is the only criterion of silicosis, from your studies and experience, that is missing — the nodules?

A. That's right. Silicosis could be the cause of what he has in his disability at the moment as far as the examination of the individual."

It certainly cannot be said that Dr. Hornberger's testimony is substantial evidence to the effect that the claimant does not have silicosis. In fact, according to Dr. Hornberger, Grade I Silicosis will not show in an X-ray, and when asked whether Grade I would render a person 100 per cent disabled, he said: "That's a hard question to answer."

There is other medical testimony in the record, produced by respondent, that the Commission does not mention in its finding. Dr. Mendelsohn, who is an X-ray expert for the Holt-Krock Clinic, states there is no evidence of tuberculosis or pneumoconiosis, but there is marked emphysema. Although Dr. A. B. Martin, of the Holt-Krock Clinic, states that X-ray does not show silicotic nodules, and notwithstanding Dr. Mendelsohn's report, the Clinic made a diagnosis of silicosis.

Dr. W. F. Rose testified that Grade I Silicosis is not disabling and that there must be nodules in the lungs before a diagnosis of silicosis can be made. He does not know whether the claimant has silicosis and has not examined him. All this doctor can say is that probably, from the reports, McKown is not disabled from silicosis, and his opinion is partially based on the report of Dr. Riley, who says silicosis is present.

It is apparent from the Commission's finding that the reports of Dr. O. A. Sander, of Milwaukee, Wisconsin, and Dr. Jesse E. Douglass of Webb City, Missouri, were largely relied on as a basis for the finding that claimant does not have silicosis. But, as heretofore pointed out, the reports of these doctors were not veri-

fied, as required by statute; there was no opportunity to cross-examine; and although the statute makes the reports admissible in evidence, if verified, they are only entitled to such weight as is warranted from all of the evidence in the case.

Many times, we have held that the finding of the Commission will be sustained if supported by any substantial evidence. *Duke* v. *Pekin Wood Products Company,* 223 Ark. 182, 264 S. W. 2d 834; *Springdale Monument Company* v. *Allen,* 216 Ark. 426, 226 S. W. 2d 42; *Tri-States Construction Company* v. *Worthen,* 224 Ark. 418, 274 S. W. 2d 352; *American Casualty Company* v. *Jones,* 224 Ark. 731, 276 S. W. 2d 41. Here, it does not appear that there is any substantial evidence to support the Commission's finding. The evidence in this case is overwhelming to the effect that the claimant is permanently and totally disabled, and that his disability is due to the condition of his lungs; circumstantial evidence points to silicosis as the cause of the disability. All of the doctors who examined the claimant over a period of time stated that his disability is due to silicosis; evidence to the contrary is very weak and not substantial. Whether there is substantial evidence is a matter of law. *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738.

The law of this State is that workmen's compensation cases should be broadly and liberally construed, and that doubtful cases should be resolved in favor of the claimant. *Arkansas National Bank of Hot Springs* v. *Colbert,* 209 Ark. 1070, 193 S. W. 2d 806; *Elm Springs Canning Company* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Williams Manufacturing Company* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380; *Peerless Coal Company* v. *Jones,* 219 Ark. 181, 240 S. W. 2d 647.

If this law has any meaning or force or effect, it should be applied here. The judgment of the Circuit Court is affirmed.

Justices Holt, McFaddin and George Rose Smith dissent.

George Rose Smith, J., dissenting. Contrary to every pertinent decision of this court the majority opinion views the evidence in this case in the light least favorable to the findings of the Commission. The abundance of substantial evidence supporting the denial of this claim is minimized, characterized as weak, or ignored altogether. Before discussing the evidence I should like to review the rules that govern us in the consideration of appeals like this one.

It was settled by the early case of *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82, that the findings of the Workmen's Compensation Commission are entitled to the same weight as the verdict of a jury. The substantial evidence rule was adopted in that case and has been uniformly followed ever since.

When the findings of the Commission are given the same effect as a jury verdict certain other rules applicable to the review of jury trials come into play and have been invariably followed in the past. One is that the evidence must be viewed in the strongest light in favor of the Commission's findings. *Hughes* v. *Tapley,* 206 Ark. 739, 177 S. W. 2d 429; *Ozan Lbr. Co.* v. *Garner,* 208 Ark. 645, 187 S. W. 2d 181; *Campbell* v. *Athletic etc. Co.,* 215 Ark. 773, 223 S. W. 2d 499. The rule is the same whether the Commission allows or denies the claim. As we said in *Springdale Monument Co.* v. *Allen,* 216 Ark. 426, 226 S. W. 2d 42, where the Commission had rejected the claim: "When we give to the testimony its strongest probative force in favor of the action of the full Commission denying the award, as we must do, we are unable to say that such action was not based on some substantial testimony."

As in the case of a jury, it is for the Commission and not this court to draw inferences and reach conclusions from the facts. *Wren* v. *D. F. Jones Const. Co.,* 210 Ark. 40, 194 S. W. 2d 896. It is likewise the Commission's sole province to arrive at a conclusion of fact when medical testimony is in conflict. It was said in *Ark. Workmen's Comp. Com'n* v. *Sandy,* 217 Ark. 821, 233 S. W. 2d 382: "In the instant case, the medical testimony as to the extent of the claimant's disability was conflicting, and the

Commission evidently chose to accept the report of Dr. Cheairs. The courts are without authority to reverse the conclusion of the Commission in this regard."

A more detailed statement of the rule as to conflicting medical evidence was made in *Burdine* v. *Partee Flooring Mill,* 218 Ark. 60, 234 S. W. 2d 193: "We do not have here a case wherein the expert testimony can be held to be uncontradicted: ' "Moreover, were it conceded that all the expert witnesses introduced in the case agreed upon conclusions as argued by appellant, the jury would not necessarily have to so find the facts to be, because such testimony may be controverted by any other competent evidence." *St. Paul Fire & Marine Ins. Co.* v. *Green,* 181 Ark. 1096, 29 S. W. 2d 304. Not only this, but, were it conceded that all the expert testimony offered by both parties was in full accord and agreement and not contradicted by any other expert evidence, yet the jury would not be bound by such testimony. 11 R. C. L., 586, states the rule as follows: "Even if several competent experts concur in their opinion, and no opposing expert evidence is offered, the jury are still bound to decide the issues upon their own fair judgment." ' *Ark. Power & Light Co.* v. *Bollen,* 199 Ark. 566, 134 S. W. 2d 585."

The pertinent evidence, considered in accordance with the binding rules referred to above, may be divided into two categories: first, the proof relating to the silica hazard to which McKown was exposed, and, second, the medical testimony.

There is direct and positive evidence that McKown was not injuriously exposed to a silica hazard in the Boyd mine. When he went to work for that company in 1938 or 1939 he stated, according to the uncontradicted proof in the record, that his asthma was so bad that he could not work inside the mine. He was therefore given an outside job, at which he worked until 1942.

It was in 1942 that McKown began to work inside the mine. He was, for at least 90% of his time, employed as a pumper, his duty being to tend the pumps that expel water from the mine. There is proof that as a pumper

McKown worked in the wettest, most dust-free parts of the mine, and in addition he was in the indraft of fresh air that was continuously circulated through the mine. The Boyd mine was the first one in the state to be fully equipped with water, which was constantly sprayed upon the cutting machines to keep down harmful dust. The mine was subject to surprise inspections by state, federal, and insurance company representatives; all the reports were commendatory.

Three men, it is true, were awarded compensation benefits for silicosis after having been last employed in the Boyd mine. These men, however, worked in the dusty areas of the mine and may have acquired silicosis before the mine was equipped with water. They were not pumpers and did not work in the favorable conditions that attended McKown's job. The principal testimony indicating that McKown worked for any substantial time where rock was being cut is given by McKown himself. His credibility is open to question. When he resigned his job in 1951 he applied for unemployment compensation, stating (a) that he had been discharged, (b) that he had been replaced by a machine, and (c) that he had applied for work at Camp Chaffee. McKown admitted at a hearing below that all three statements were false and had resulted in fraud charges being brought against him. The Commission was certainly free to discredit McKown's testimony about his exposure to dust and to believe the contrary proof given by unimpeached witnesses.

The foregoing was the background of proof that the Commission had before it in weighing the medical testimony. At the outset I would lay aside the majority's remarks about the qualifications of the doctors, the verification of their reports, and the lack of cross-examination. None of these matters have been or could be raised by the appellee. The procedure before the Commission is informal. Hardly any of the many physicians who testified were asked about their qualifications. Had there been any desire on the part of the claimant to examine the witnesses about their qualifications, to demand that their reports be verified, or to exercise the right of cross-

examination, the issue should have been raised before the Commission. The supposed defect could then have been readily remedied. It is elementary that a litigant, by failing to object, waives irregularities that could be corrected at once if a timely objection were made.

Upon the record only a few positive statements can be made about McKown's condition. He is undoubtedly disabled by reason of shortness of breath and rapid exhaustion upon exertion. He undoubtedly has emphysema of the lungs, which is a condition characterized by a thickening in the walls of the air spaces through which oxygen is absorbed into the blood stream. It is undoubtedly true that repeated X-rays do not show in McKown's lungs the nodules that ordinarily accompany a disabling grade of silicosis.

Emphysema is not itself a disease; it is a secondary result of something else. The pivotal medical issue is whether McKown's emphysema is the result of silicosis or of some other condition. On this point the medical testimony is in irreconcilable conflict; the witnesses themselves concede that certainty is impossible. Dr. Riley summed up the matter by saying that the only absolute method of determining the presence of silicosis is a postmortem examination.

There are two medical theories concerning the diagnosis of grade II silicosis, which, according to much of the proof, is the lowest disabling grade of the disease. Some authorities believe that this grade can exist even though X-ray films reveal no silicotic nodules. Other authorities, equally respected, believe that such nodules are invariably present when the disease has progressed to the point of disability.

Neither school of thought professes absolute certainty in the matter. Here, for example, even the physicians on whose testimony the majority opinion rests are not nearly so positive as the majority members of this court. Dr. Chamberlain is perhaps as sure of his position as any of the doctors diagnosing McKown's malady as silicosis. He says that grade II can be eliminated, be-

cause the nodules are absent. He is unable to attribute the emphysema to any particular cause; grade I silicosis can or cannot be present. Dr. Riley made a diagnosis of silicosis, grade II, in April 1952, after having found no evidence of silicosis upon two examinations of McKown in 1951. Both his diagnoses cannot be correct, as it is shown without dispute that the disease could not have originated or progressed between his examinations without continued exposure to silica. A careful study of the record shows that the testimony favoring McKown's claim is just as "weak" as the majority have termed the testimony upon which the Commission chose to rely. McKown, of course, had the burden of proof.

The testimony which the majority dismiss as insubstantial includes the opinions of five physicians, some of whom are unquestionably experts in the field. Dr. Sander, according to the evidence, is a recognized authority. In obtaining his expert opinion the Commission submitted for his consideration the X-rays, the reports of the other doctors pro and con, and all other available material. Upon the basis of all the data in the case Dr. Sander says: "In conclusion, it is my opinion that this man has no evidence of silicosis."

Other testimony supporting the findings of the Commission includes the following: Dr. Rose, a Fort Smith physician who has had forty years of experience with coal miners, states that nodules must be present before a determination of silicosis can be made; he rules out silicosis in McKown's case. Dr. Douglas states that McKown has marked emphysema with no silicosis. Dr. Darnall, who is the only thoracic surgeon in Fort Smith, and who was cross-examined, testified: "I cannot see evidence of silicosis by X-ray and I cannot make a diagnosis of silicosis." Dr. Hornberger is of a similar opinion.

The majority's implication that McKown's emphysema can be explained only upon the assumption that he has silicosis is not supported by the record. Both Dr. Sander and Dr. Hornberger say that the emphysema could be caused by asthma. As Dr. Sander puts it: "The

causes of emphysema are numerous. They include not only long-standing asthma and chronic bronchitis. . . . Every internist sees many cases of severe emphysema in persons who have never had dust exposure in a mine or factory and who have never had the diseases which one commonly thinks of as causes of emphysema.'' No witness disputes this testimony. For several years prior to 1942 McKown's asthma was so severe that he could not work inside the mine. He admits that he was treated for asthma immediately after he became disabled in 1951. The Commission was at liberty to conclude, on the basis of uncontradicted substantial evidence, that McKown's emphysema is of asthmatic origin. In any event the question is one of fact for the Commission alone.

The majority pay lip-service to the substantial evidence rule by citing some of the cases in which it has been applied. But in this record there is unquestionably substantial proof to show that McKown does not have silicosis. The evidence of exposure preponderates in favor of the appellants. Five skilled physicians affirmatively state that McKown does not have the disease. There are admittedly other causes for the development of emphysema, one of which is shown to exist in McKown's case.

What, then, can be the explanation for the reversal of the Commission's decision upon a question of fact? The answer apparently lies in the final words of the majority opinion, where it is said that compensation cases should be liberally construed and that doubtful cases should be resolved in favor of the claimant. It is undoubtedly true that the compensation law itself should be liberally construed in favor of the workman. It may also be true that the commissioners, within the limits of their consciences, should construe the evidence liberally in the claimant's favor. But if the majority mean that it is reversible error for the Commission to fail to take a liberal view of the evidence in favor of the claim, the decision is demonstrably wrong for several reasons.

First, the authorities elsewhere (we have not passed directly on the point) sensibly reject the view that the

Commission commits reversible error when it does not view the evidence favorably to the employee. To quote a few cases:

"It is of course the settled rule everywhere that these acts are to be liberally construed in favor of the workman; but this does not mean, as counsel seem to argue, that the rule as to the measure of proof, of the sufficiency of evidence, is different from the rule in ordinary cases. The burden is on the plaintiff to reasonably satisfy the trial court that the accident arose out of and in the course of the workman's employment, and where there is any substantial legal evidence in support of the findings of the trial court, the judgment, whether affirmative or negative, will not be disturbed on appeal." *Ex parte Coleman,* 211 Ala. 248, 100 So. 114.

"The act . . . is of course to be liberally construed in furtherance of a legislative purpose to provide compensation for accidental injuries sustained within the scope of its provisions, but the rule of liberal construction has nothing to do with the function of the commission in weighing evidence or in resolving conflicts in the testimony." *Staten* v. *Long-Turner Const. Co.,* Mo. App., 185 S. W. 2d 375.

"The liberality of construction of the Workmen's Compensation Act extends only to the provisions thereof and not to the proof required upon the trial on the merits." *Hinton* v. *Louisiana Central Lbr. Co.,* La. App., 148 So. 478.

"In the case at bar, it must be remembered that workmen's compensation statutes shall be liberally construed, and, also, that that rule does not apply to questions of fact but to matters concerning the construction of the statute, and that the principle does not dispense with the requirement that those who claim benefits under the act must, by competent evidence, prove the facts upon which they rely." *Ehman* v. *Dept. of Labor & Industries,* 33 Wash. 2d 584, 206 P. 2d 787.

Second, the notion that the Commission's findings should be set aside for its failure to view the evidence

with indulgence toward the claimant cannot be reconciled with the long-settled rule that the findings must be upheld if supported by substantial evidence. This case is a perfect illustration. There is undoubtedly substantial evidence to sustain the Commission's decision, but that decision is nevertheless being set aside. Obviously the two theories cannot be harmonized. To enforce the majority's view is to read something into the statute that is not there: a requirement that a double standard of review be applied in the compensation cases. The substantial evidence rule is apparently to be applied when the Commission makes an award; all doubts are then to be resolved in favor of its findings. But when the Commission denies the award—a result that seems to be implied as one reason for having a hearing—the substantial evidence rule no longer applies; all doubts are to be resolved against the Commission's findings. There is no support in the statute or in the cases for such a rule.

Third, and most important, it is clearly wrong to require the Commission to take a biased view of the evidence. If the commissioners are to be responsible for determining the facts they must be free to decide issues of credibility and other controverted points of fact in accordance with their own consciences. If they sincerely believe that witness A is lying and that witness B is telling the truth, they must be free to accept B's testimony, whether it is favorable or adverse to the claimant. No self-respecting man would continue to sit upon a tribunal which was required by a higher court to take a prejudiced view of the evidence. Yet that must be the result if this court holds that the commissioners commit reversible error when they fail to show sympathy for the claimant. In the administration of justice it is certainly a new doctrine for a court to declare that the finders of the facts must *not* be fair and impartial, that they must, under penalty of reversal, tip the scales in favor of one of the litigants. I regret that I cannot put into stronger language my conviction that the decision in this case is wrong.

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

WASHINGTON *v.* JOLLIFF.

5-928 288 S. W. 2d 600

Opinion delivered April 2, 1956.

Frank C. Douglas, for appellant.

Percy A. Wright, for appellee.

SAM ROBINSON, Associate Justice. Appellee, C. A. Jolliff, has a judgment against appellant, Joseph Washington, in the sum of $2,090.00. Jolliff procured a writ of garnishment against the Caldwell & Still Gin Company and George Thompson, alleging that the garnishees were indebted to Washington. The garnishment was sustained by the Chancery Court, and Washington has appealed.

Appellant, Joseph Washington, is one of eight sons and daughters of Tom Washington, who died in 1944, leaving a 40 acre farm. The status of Joseph's interest in the farm is the issue here. The garnishee, George Thompson, leases the place, and pays $1,000.00 per year rent. In accordance with an agreement between the parties, he pays the rent to the other garnishee, Caldwell & Still Gin Company. The money is then used to pay the taxes, and the balance is used for the benefit of Mat

T. Washington, a minor son of Tom, and a brother of Joseph.

On appeal, Joseph Washington contends: First, that the property is the homestead left by his father, Tom Washington, and that the minor, Mat T., is entitled to the use of the property as a homestead, or the income therefrom until he becomes of age. See Arkansas Constitution, Article 9, Section 6. Appellant's contention in this respect cannot be sustained, because there has been a judicial determination that the property is not the homestead of the minor children of Tom Washington. The decree was entered by the Mississippi Chancery Court, Osceola District, July 24, 1950. Mat T., represented by a guardian, was a party to that case, and there was no appeal from the decree.

Next, Joseph says that his part of the income is exempt from garnishment because his part of the property constitutes a homestead. Also, he has filed a schedule claiming as exempt his part of the rent because he is a married man, and does not own property of the value of $500.00. See Arkansas Constitution, Article 9, Section 2. On July 17, 1952, the Mississippi Chancery Court made a finding that the property did constitute the homestead of Joseph. But, the question is, has he since that time abandoned the property as his homestead? In our opinion, the evidence sustains the finding of the Chancellor that there has been such an abandonment. Joseph moved to Detroit in 1952; has lived and worked in that city since that time, and the circumstances indicate that he does not intend to return to Arkansas. And, as to his claim of exemption under Article 9, Section 2 of the Constitution of Arkansas, he cannot claim benefit of the exemption laws of this State, since he is a non-resident. *Person* v. *Williams-Echols Dry Goods Company,* 113 Ark. 467, 169 S. W. 223.

The decree is affirmed.

DORSEY *v.* DORSEY.

5-933 289 S. W. 2d 190

Opinion delivered April 9, 1956.

[redacted]

J. E. Brazil and *Clay Brazil,* for appellant.

Gordon & Gordon, for appellee.

LEE SEAMSTER, Chief Justice. The appellant, J. L. Dorsey, and the appellee, Dorothy T. Dorsey, were married in Georgia on the 20th day of July, 1954, and lived together as husband and wife until the 14th day of January, 1955, when the appellant left Georgia and moved to Morrilton, Arkansas. On the 18th day of March, 1955, the appellant filed suit for divorce in the Chancery Court of Conway County, Arkansas. On the same day an Attorney Ad Litem was appointed for the appellee and a warning order was issued by the Chancery Clerk.

On June 10, 1955, appellee filed an answer and cross-complaint in which she prayed for a divorce, temporary and permanent alimony, attorney's fees, adjudication of certain property rights, and other relief. On July 11, 1955, the appellee filed an amendment to the cross-complaint asking for a lien on certain property owned by appellant, which was located in Morrilton, Arkansas. The appellee requested the appointment of a receiver to collect rents on the property. The appellee also filed a Lis Pendens notice on the same date.

Thereafter, on July 14, 1955, the appellant filed a motion to dismiss the action on the grounds that he had not completed residence and domicile requirements in Arkansas and the appellee was not a resident of Arkansas, therefore, the Conway Chancery Court did not have

jurisdiction over the action. The appellant insisted that there was pending in the State of Georgia an action involving substantially the same issues between the parties. The trial court denied the action to dismiss and this appeal follows.

Under our Statutes (Sec. 27-1405 and Sec. 27-1406, Ark. Stats., Anno. 1947), the appellant has the right to dismiss his complaint, but he has no right to a dismissal of the appellee's cross-complaint. In the instant case, the motion of the appellant was to dismiss both the complaint and cross-complaint.

The trial court was correct in refusing the appellant's motion to dismiss the appellee's cross-complaint. In divorce cases, the court having jurisdiction, the defendant may proceed to a final decree on the cross-complaint, where the plaintiff either dismisses his complaint or is denied relief. See *Rowell* v. *Rowell,* 184 Ark. 643, 43 S. W. 2d 243; *McDougal* v. *McDougal,* 205 Ark. 945, 171 S. W. 2d 942; and the Annotation in 89 A. L. R. 1203.

Section 27-1407, Ark. Stats. Anno., 1947, provides that in any case where a set off or counter-claim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action or failed to appear. See also *Dillon* v. *Hawkins,* 147 Ark. 1, 227 S. W. 758; *Church* v. *Jones,* 167 Ark. 326, 268 S. W. 7. We have also held that a dismissal of a complaint by the plaintiff after a cross-complaint has been filed will leave the cross-complaint pending for such disposition by the court as the law and facts may justify. *Dailey* v. *Allen,* 222 Ark. 402, 259 S. W. 2d 516; *Tarr* v. *Tarr,* 207 Ark. 622, 182 S. W. 2d 348; *Zurich General Accident and Liability Ins. Co. Ltd.* v. *Smith,* 209 Ark. 135, 189 S. W. 2d 718.

Should the appellant dismiss his complaint the case would stand for trial on the cross-complaint of the appellee. The appellant would be in court on the cross-complaint by reason of initially filing his complaint and seeking relief against appellee.

Decree affirmed.

5-914 288 S. W. 2d 948

Opinion delivered April 9, 1956.

Bethell & Pearce, for appellant.

White & Martin, for appellee.

J. SEABORN HOLT, Associate Justice. January 19, 1954, appellant, Martin M. Roberts, was granted a divorce from Peggy Roberts (now Jerome) on the grounds of indignities and mental cruelty. There was a voluntary property settlement, approved by the court and incorporated in the decree. The parties had three children born to them, a boy 8 years of age and two little girls, one 6 and the other 4, at the time the decree was granted.

The trial court found that appellee was a fit and proper person to have their custody and awarded their custody to her, conditioned, "that she shall not remove the residence of said children from the Fort Smith District of Sebastian County, Arkansas, and subject to the right of reasonable visitation and temporary custody by the plaintiff; . . ." Appellee, the mother, was awarded $300 per month for the support of herself and the children.

Thereafter, August 24, 1955, appellee married Major George W. Jerome, of the regular army, who was stationed at El Paso, Texas. Major Jerome had previously been married and divorced and has the custody of a 7-year-old daughter. Appellant, Roberts, remarried in July, 1955, and is a dentist living in Fort Smith. On August 29, 1955, appellee, mother of the three children involved, filed a motion to modify the January 19, 1954, decree to permit her to take the children to El Paso, Texas, where she intended to reside with her new husband in his home there, and she also asked that the amount for support be reduced to a reasonable sum. Appellant resisted this motion at a hearing and asked the court to change the custody of the children to him. There was a decree granting appellee's request to be allowed to remove the children to her new husband's home in El Paso, Texas, and denying appellant's request that their custody be given to him. The decree contained a provision that appellant "shall be and he is hereby given the right to have said children to visit him during the summer vacation, following each school term, for a period of from one (1) to three (3) months as agreed upon by the parties herein; that plaintiff shall and he is hereby ordered to pay into the registry of this court the monthly sum of $100 for the support and maintenance of said children and the further sum of $50 in a federal savings and loan association, acceptable to both parties hereto, in trust for the use and benefit of each of said children during his or her minority, and that no withdrawals of the corpus or interest of said trust shall be made except over the joint signatures of the parties herein; that defendant shall and she is hereby ordered to notify the clerk of this court and the plaintiff herein of

any change in her present address or residence at 7721 Matamoros, El Paso, Texas." This appeal followed.

For reversal appellant says: "The issue in this case is simple to state, viz., will the welfare of the children involved be best served by permitting the mother to retain custody and remove them from the supervising care of their father, or will it be better served by granting custody to the father?"

Our rule in child custody cases is well established and is as re-announced in the case of *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455, in this language: "In determining the custody of a minor child, the welfare of the child is the supreme and controlling consideration. . . . It is the well-settled doctrine in this state that the chancellor, in awarding the custody of an infant child, or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor; the right of each parent to its custody being of equal dignity. . . . 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. . . . The party seeking a modification of a divorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification." After a review of all the testimony, we are unable to say that the preponderance thereof does not support the findings of the trial court, to the effect that there had been no such changes or altered conditions, since the original divorce decree, to warrant changing the custody of these children from their natural mother to their father. In fact, appellant, when questioned by the court, in effect, so admitted when he testified: "THE COURT: You still say that she is taking care of them about the same as she was before you got your divorce? A. Yes, sir." There is no showing that the mother is not a fit and proper person. Obviously, the natural mother, in the

absence of evidence of moral or general unfitness, should always be preferred over a step-mother. We said in the recent case of *Cushman* v. *Lane,* 224 Ark. 934, 277 S. W. 2d 72, "It is true that the rights and feelings of a natural parent are to be considered and his preferential right to custody will be recognized unless circumstances are such as to render such custody inimicable to the best interests of the child. *Griffen* v. *Newcom,* 219 Ark. 146, 240 S. W. 2d 648," and in *Massey* v. *Flinn,* 198 Ark. 279, 128 S. W. 2d 1008, "The infant needs female care and guidance of that patient, ever-watchful nature which is better insured by the natural affection of a grandmother than by the inexperienced efforts of a father or the sense of duty of the second wife."

It appears that the court conditioned appellant's right to appeal, on his first paying an attorney's fee of $250 to appellee, and appellant insists that this was beyond the power of the court. We agree with this contention of appellant, since the right of appeal is guaranteed to everyone. It was, however, within the sound discretion of the court to allow an attorney's fee and it is not argued that the court abused its discretion in allowing a fee in the amount of $250 here. In fact, the trial court is in a much better position to determine a reasonable fee than this court could be. We think no prejudice resulted to appellant's rights since an appeal has in fact been properly prosecuted by him to this court.

Appellant also argues that the court erred in rejecting his suggestion of the desirability of the Court's talking to the children. The record reflects the following: "MR. BETHELL: If the Court please, I believe that's all unless the Court desires to talk to the children. THE COURT: Now, Mr. Bethell, I don't believe it's necessary, and I don't think that it would do any good." There was no error here. The court acted within its sound discretion and no abuse thereof appears.

Affirmed.

4832 289 S. W. 2d 524

Opinion delivered April 9, 1956.

[Rehearing denied May 14, 1956.]

Nance & Nance and *Mann & McCulloch,* for appellant.

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

ED. F. MCFADDIN, Associate Justice. Appellant was convicted of keeping a gambling house in violation of § 41-2001, Ark. Stats. His motion for new trial contains thirteen assignments which he has grouped and argues under the four topics now to be discussed.

I. *Motion For Directed Verdict.* This necessitates a review of some of the evidence. The Sheriff of St.

Francis County obtained a warrant to search a gambling house known as "The Groves"; and executed the warrant one night about ten o'clock. Appellant, Copeland, opened the door when informed of the warrant. Approximately seventeen persons were engaged in gambling, either at the dice table or the roulette wheel. Gambling equipment, firearms and liquor were seized; and also a book later to be discussed.

A crate was located which had contained the roulette wheel, and on the crate there was a shipping tag which gave Copeland's name and Memphis street address. The money box contained only $70.80; but Copeland had $2,950.00 in his pocket. The "guests" were allowed to leave unmolested; but those operating the gambling devices were taken into custody. As the officers were leaving with Copeland, he instructed the cook to stay there and look after the building until he returned. Two officers testified that Copeland volunteered the information to them that he and one Harold Suitts owned The Groves. In view of all of the foregoing, it was clear that a case was made for the Jury as to Copeland's guilt or innocence under § 41-2001, Ark. Stats.

II. *Motion For Continuance.* Copeland sought a continuance because of the absence of the witness, McMillan; and in the motion for continuance Copeland stated that McMillan worked at The Groves and was there at the time of the raid and would testify: ". . . that the said Joseph H. Copeland did not or does not have the ownership of or a proprietary interest in The Groves nor was he the operator thereof." After the motion for continuance was filed, the Prosecuting Attorney went to see McMillan—ill at his home—and when the Prosecuting Attorney reported to the Court, the following occurred:

"Q. Mr. Henry, did he say categorically on that occasion that he could not testify under oath that Copeland did not own any proprietary interest?

"A. He said he could not and would not testify under oath that Mr. Copeland did not own any interest

in the club, nor could he testify to any other person that did or did not own an interest in the club.

"MR. LONG: I believe that is all."

CROSS-EXAMINATION BY MR. McCULLOCH:

"Q. The purpose of your questioning, Mr. Henry, was directed to whether he was able to state of his own knowledge positively as to the ownership?

"A. I asked him if he knew who owned it.

"MR. McCULLOCH: Well, in view of what Mr. Henry has said, we would be willing to amend that stipulation in line and put it on information and belief, that is so far as he knows of his own knowledge Mr. Copeland is not the owner or operator, but that is as far as we can go. . . .

"THE COURT: Let me see if the Court understands the amendment you are making, Mr. McCulloch; you are willing to make what amendment?

"MR. McCULLOCH: We are willing to amend it to the extent that we are not positive that Mr. McMillan would testify positively as to the ownership of the place; he would testify on his information and belief.

"THE COURT: Now, the Prosecuting Attorney has just testified that he told him that he did not know who owned it and he wouldn't swear whether or not the man did or did not own it.

"MR. McCULLOCH: Well, it is our contention that his testimony would be that from his knowledge of all the circumstances in view of his position as an employee, that it is his information and belief that Mr. Copeland does not own it.

"MR. LONG: I think you can say that.

"THE COURT: All right, you are ready to admit that?

"MR. LONG: That he will testify that.

"THE COURT: If present, he would testify that according to this statement here in the motion, to the best of his knowledge and belief; is that right?

"MR. LONG: I think we would have to do that.

"THE COURT: Then I presume the case is ready for trial.

"MR. McCULLOCH: Of course, we still have our motion for a continuance; we realize what position that puts us in and we object to going to trial at this time, for the record."

In the course of the trial the Court told the Jury:

"Thomas McMillan, a witness called by the defendant in this case is ill and unable to be present as evidenced by a doctor's certificate filed in this case and it has been stipulated and agreed between counsel for the defendant and the Prosecuting Attorney that said witness, Tom McMillan, if present would testify as follows: That he was an employee and worked in the operation of the place known as The Groves, that he was working there on the night when the raid was made by the sheriff and other officers and was present when the raid was made, that he did not have any definite information as to the owner or owners of the property known as The Groves or the personal property contained therein, but according to his information and belief Joseph H. Copeland was not one of the owners.

"MR. McCULLOCH: We object to the giving of the stipulation in the form as given by the Court on the grounds that it was not in the form agreed upon as shown by the prior notes of the reporter. (Exceptions noted.)

"THE COURT: Gentlemen, you are instructed that under the law when the State of Arkansas through its Prosecuting Attorney admits in a criminal case that the witness would testify to certain facts, the law requires them also to admit the truth of the statements which they admit the witness would make if present. Call your next witness."

On appeal Copeland argues: (a) that he was entitled to the continuance as a matter of right; and (b) that the statement that the Court gave the Jury was not as strong a statement of the witness' testimony as Copeland was entitled to have. There is no merit to Copeland's claim for continuance as a matter of right. There was another witness, John L. Adams, who worked at The Groves and who testified that Copeland was not the owner of the place; so McMillan's testimony would have been cumulative on that point. The Court could have denied the motion for continuance because the evidence of the absent witness was cumulative. *Pool* v. *State,* 121 Ark. 17, 180 S. W. 339; and see cases collected in West's Arkansas Digest "Criminal Law," Key No. 596(1).

The second argument made by Copeland—that the statement the Court gave the Jury was not as strong as he was entitled to have—is likewise without merit. In continuances in criminal cases, when the State admits that an absent witness would testify as claimed, then the State must also admit the truthfulness of such statements of the absent witness.[1] See *Graham* v. *State,* 50 Ark. 161, 6 S. W. 721; and see *Tiner* v. *State,* 110 Ark. 251, 161 S. W. 195. As originally drawn, the motion for continuance recited that McMillan would swear that Copeland *was not the owner of The Groves.* To have admitted the truthfulness of that statement would have been tantamount to a dismissal of the case; so, in order to prevent such eventuality, the Prosecuting Attorney inquired of the witness what he *knew,* and found out that the witness did not know and would *not swear* that Copeland did not own The Groves. Thus, all that McMillan could have testified to was that he did not know who owned The Groves. The Court told the Jury, and the State admitted, that McMillan did not have any definite information as to who owned The Groves. That is the full force of McMillan's testimony; that is what the State

[1] In civil cases the person resisting the motion for continuance can admit that the absent witness would testify to certain facts without admitting the said facts (see § 27-1403 Ark. Stats.); but in criminal cases the State is required to admit the stated facts to be true (see note following § 43-1706 Ark. Stats.).

admitted and that is what the Court told the Jury; and no error was committed.

III. *Admitting the Book in Evidence.* When the officers seized the gambling equipment, etc., they also seized a book containing what purported to be, *inter alia,* a profit and loss statement on the gambling operations. This book was admitted in evidence just as the gambling equipment, the dice and the other seized articles could have been admitted. It was not attempted to show who made any of the entries in the book; but it was shown that there was one entry in the book showing a payment for: "Wheel Refinished, $252.16." It was not claimed that this was in Copeland's handwriting; but it was merely shown that a certain amount was paid for having the roulette wheel refinished. It had previously been shown that the crate, in which the roulette wheel fitted, had a tag on it showing that the crate was shipped to Copeland at his Memphis, Tennessee, address. When Copeland was on the witness stand, he testified regarding the roulette wheel:

"Q. You say the wheel was shipped to you in Memphis?

"A. Yes, sir, c.o.d.

"Q. Did you own the wheel yourself?

"A. No, sir.

"Q. Who owned it?

"A. We sent it, I sent the wheel to Chicago or Cincinnati, one, I believe it was Cincinnati.

"Q. Whose wheel was it?

"A. It was the place's wheel.

"Q. The place?

"A. Yes.

"Q. Where did they get it?

"A. I don't know; it was there when I went over there.

"Q. So, you took it and sent it over to be refinished and they returned it to you back in Memphis?

"A. I didn't take it; they told me to take it and have the board refinished, just the board.

"Q. And you did that?

"A. Yes.

"Q. And it was shipped back to you in Memphis?

"A. Yes.

"Q. Did you return it from Memphis, yourself?

"A. Yes, sir.

"Q. You set it up?

"A. I didn't set it up; I put it in the house in the rear."

Since the only entry in the book sought to be introduced in evidence related to the payment for the roulette wheel, and since Copeland admitted having the roulette wheel, we can see no harm in the Court's ruling regarding the book.

IV. *Testimony of a Witness Not Under the Rule.* One of the witnesses in this case was a deputy Sheriff named Kinzer. He was called by the State and immediately when he was called the following occurred:

"MR. LONG: Your Honor, in fairness to the Court and to the defendant, also, I want to point out that early in the testimony of Mr. Thomas, I discovered Mr. Kinzer sitting in the courtroom; he had been working down here and he didn't know he was supposed to be under the rule. He is being called for the purpose of corroborating an admission made out here in the jail. Now, if the defendant wants to object to his testimony under those conditions, and the Court wants to sustain it, now will be the time to do it.

"MR. NANCE, SR.: We would like to object to it, Your Honor.

"MR. LONG: His testimony does not touch on anything that Lt. Thomas did.

"THE COURT: How long were you in the courtroom?

"THE WITNESS: Ten minutes, Judge, I would say.

"THE COURT: Is that the only witness you heard testify?

"THE WITNESS: Yes, sir.

"THE COURT: Well, this witness hasn't actually been put under the rule, because he was not here when the rule was invoked and since this last witness—, if his testimony doesn't touch on any matters that Lt. Thomas testified about, I think the objection to him testifying would be overruled. If he starts to testify to anything that Lt. Thomas touched on, however—.

"MR. LONG: That will be avoided, Your Honor.

"MR. NANCE, SR.: Note an exception, Your Honor."

The gist of the whole point is that Mr. Kinzer had not been in the courtroom but ten minutes and all he had heard was the testimony of a State Policeman which related to matters entirely different from those connected with Kinzer's testimony. When Kinzer testified, there was no motion made to exclude his testimony other than the one objection previously recited above. In this jurisdiction, the Trial Court is invested with considerable discretion in the matter of putting witnesses under the rule.[2] Certainly there was no abuse of discretion under the facts and circumstances in this case.

Finding no error, the judgment is affirmed.

Justice MILLWEE concurs.

---

[2] Section 43-2004 Ark. Stats. says that in certain matters in criminal trials, the code of practice in civil cases shall govern. Section 28-702 Ark. Stats. comes to us from the civil code and the cases construing it show the broad discretion allowed the Court in this matter of putting witnesses under the rule.

5-912 288 S. W. 2d 946

Opinion delivered April 9, 1956.

[redacted]

Glenn F. Walther, for appellant.

Richard W. Hobbs and *McMath, Leatherman & Woods,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit by a husband to vacate a decree by which his wife was divorced from her former spouse.

Plaintiff, Leon Weill, filed suit in the Garland Chancery Court on November 9, 1954, to set aside a decree of divorce which defendant, Estelle Goldstein Price Weill, hereinafter called "Mrs. Weill," obtained from defendant, Daniel H. Price, in the same court on December 13, 1949. The complaint alleged that all three parties are residents of New York; that Mrs. Weill obtained the divorce in 1949 upon perjured testimony as to her residence in Garland County for the ninety-day period preceding the date of the decree and under a collusive agreement between the defendants under which Price signed an entry of appearance in New York the day before the suit was filed; that Mrs. Weill was never domiciled in Arkansas; and that the perjured testimony of Mrs. Weill and any other person who might have testified concerning her residence in Garland County constituted a fraud on the court, which was without jurisdiction of the parties to said suit.

Plaintiff further alleged that he and Mrs. Weill went through a marriage ceremony in New York on May 1, 1953, and cohabited as husband and wife until October 18, 1954; that in March, 1954, she informed plaintiff that she obtained the divorce from Price after having resided in Arkansas for only one day; that, after investigation and consultation with counsel, plaintiff became convinced that Mrs. Weill's divorce from Price was illegal and void and by reason thereof he had separated from her. The prayer of the complaint was that the 1949 decree be set aside and the marriage relationship between Mrs. Weill and Price be declared in full force and effect.

Mrs. Weill demurred to the complaint on the grounds that plaintiff was not a proper party to bring the action, and that the complaint did not state facts sufficient to constitute a cause of action on his behalf. Defendant Price filed a "Response and Motion to Dismiss" the complaint because the matter decided in the original divorce suit was *res judicata,* and on several other grounds. This appeal is from a decree sustaining both the demurrer and the motion to dismiss.

The well-recognized general rule that strangers to the record have no standing on which to base an application to vacate a judgment unless so authorized by statute ordinarily applies to judgments and decrees of divorce. 17 Am. Jur., Divorce, § 479. Hence, the right to have an invalid divorce decree set aside ordinarily exists only in favor of the injured spouse, and does not exist in a person who was a stranger to the suit. 27 C. J. S. Divorce, § 170. The rule that a stranger to the record has no standing directly to attack a judgment or decree either by petition in the original proceeding or by an independent suit has been applied to decrees of divorce in many cases which are collected and cited in annotations in 99 A. L. R. 1310, 120 A. L. R. 822, 6 A. L. R. 2d 614 and 12 A. L. R. 2d 727. There are decisions cited to the contrary which usually involve an exception to the general rule and the plaintiffs were held not to be strangers to the record because they were privies to one of the original parties and their property rights were concerned.

The general rule has been applied in many cases where relief from the divorce decree was sought by the new spouse of the original plaintiff, and no property rights were involved. Perhaps the case most nearly in point with the facts here is *Suiter* v. *Suiter,* 74 Ohio App. 44, 57 N. E. 2d 616. In that case Mrs. Suiter had obtained a divorce from Mr. Suiter on a complaint in which she represented that she had resided in the jurisdiction for the required time. Mrs. Suiter's second husband, McFarland, filed a petition in the original action to set aside the decree on the ground that her claim of residence was false and fraudulent. In affirming the action of the trial judge in sustaining a demurrer to the petition on the ground that McFarland was a stranger to the divorce action and had no standing as a party to seek to set aside the decree, the court said: "At the outset it will be observed that the original action was in divorce wherein the wife sued the husband for dissolution of the marital union. Upon the face of the proceedings and upon the judgment entry the proceedings are regular and all essentials of jurisdiction of parties and subject-matter appear. No property rights were involved, nor does the decree do more than to dissolve the marital relation and divorce the parties thereto. The divorce action in its nature is personal. There is nothing in the divorce proceedings nor in the defendant McFarland's petition which would give application to the doctrine of privity of title. The defendant-appellant had no right which he could have asserted at the time of the decree, nor did he then, has he since, nor does he now, stand in the relation of either the plaintiff or the defendant in the original action nor has he succeeded to the rights of either."

A similar action was held subject to demurrer in *Martocello* v. *Martocello,* 197 Ga. 629, 30 S. E. 2d 108. Other cases applying the same principle under somewhat different factual situations are *Tyler* v. *Aspinwall,* 73 Conn. 493, 47 At. 755, 54 L. R. A. 758; *Ruger* v. *Heckel,* 85 N. Y. 483; *de Marigny* v. *de Marigny* (Fla.), 43 So. 2d 442; *James* v. *James,* 131 Okla. 276, 268 P. 726; *Thomas* v. *Lambert,* 187 Ga. 616, 1 S. E. 2d 443.

We are convinced the chancellor correctly sustained the demurrer of Mrs. Weill to the complaint. Insofar as the record discloses, the decree sought to be vacated is perfectly valid on its face and the parties to it seek no redress. There is no allegation in the complaint suggesting that plaintiff's property or other rights have been injuriously affected or prejudiced in any manner by the decree he seeks to vacate. In the normal course of events it would seem that if plaintiff, in good faith, married Mrs. Weill under an innocent reliance on the former decree, he would be seeking its affirmation rather than its nullification. The Florida court suggested the dangers potentially inherent in this situation in the *Marigny* case, as follows: "If the appellant-petitioner may maintain the instant suit it would be possible for any party to a fraudulent divorce decree, which is valid on the face of the record, to conspire with another person to enter into a marriage with him or her with the sole purpose in mind of having said spouse thereafter bring a proceeding to impeach the divorce decree and thus accomplish indirectly, by means of such conspiracy and fraud, that which could not be accomplished directly. It is our conclusion that the lesser evil would result from a judgment unfavorable to the appellant-petitioner's position and that decency, good morals and the welfare of society would be more nearly satisfied by such ruling. Certainly, such a decision would be less inimicable to the interests of our citizens as a whole than one favorable to the appellant-petitioner for the latter, in our opinion, could lead to 'widespread social disorder.' See *Shea* v. *Shea,* 270 App. Div. 527, 60 N. Y. S. 2d 823, at page 827." Mr. Weill's position is also similar to that of the plaintiff in the *Ruger* case where the New York court said: "In bringing this action the plaintiff meddled with a matter which did not concern him. . . . It is impossible to discover any ground in law or morals upon which his complaint can stand. In refusing to listen to him the court does not aid in giving effect to a judgment obtained by fraud. It regards him as a suitor without a cause of action and rejects his petition, because he is not aggrieved." Courts sit to vindicate rights at the instance

of parties whose rights have been invaded, and not to vindicate mere abstract principles of justice. A party whose rights have not been invaded cannot be heard to complain if a court refuses to act at his instance in righting the wrongs of another who seeks no redress. *Tyler* v. *Aspinwall, supra.*

Since the chancellor correctly sustained the demurrer of Mrs. Weill and dismissed the complaint upon plaintiff's failure to plead further, it becomes unnecessary to determine whether error was committed in also sustaining the separate motion to dismiss filed by defendant Price.

Affirmed.

FIDELITY RESERVE INSURANCE COMPANY *v.* ENGLISH.

5-911 288 S. W. 2d 951

Opinion delivered April 9, 1956.

Dinning & Dinning, for appellant.

A. M. Coates, for appellee.

George Rose Smith, J. This is an action upon a sickness and accident policy which provides twelve months of benefits for disability "resulting solely from bodily injuries effected directly and independently of all other causes through accidental means." In appealing from a judgment for the plaintiff the insurer relies upon several clauses in the policy to support its denial of liability.

It is contended that the appellee's disability did not result solely from accidental means, within the language quoted above. The undisputed facts are that the appellee accidentally stepped on a roofing tack, gangrene developed despite medical attention, and the afflicted leg had to be amputated below the knee. The appellant's argument is based on proof that the appellee, a woman past sixty, suffers from arteriosclerosis, without which the wound would not have become gangrenous. In construing language like that appearing in this policy we have uniformly held that the injury is covered if the accident precipitates the disability, even though the condition would not have occurred without the contributing effect of a preëxisting disease. *Fidelity & Cas. Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A., N. S. 493; *The Travelers Ins. Co.* v. *Johnston,* 204 Ark. 307, 162 S. W. 2d 480; *Union Life Ins. Co.* v. *Epperson,* 221 Ark. 522, 254 S. W. 2d 311. This view of proximate causation also answers the appellant's argument that the appellee's disability is due solely to heart disease, for which the policy does not provide coverage.

The appellant relies upon another clause in the contract which allows somewhat smaller benefits for con-

finement resulting from illness. It is insisted that the claim should have been asserted under this provision rather than under the paragraph relating to disability occasioned by accidental injury. The wording of each clause is sufficiently comprehensive to cover the present claim, and, since the policy is to be construed against the insurer, there is no basis for holding that the insured is compelled to select the least beneficial claim that the contract permits her to assert.

Two additional defenses must be rejected for want of proof. The appellant's reliance upon a clause requiring a disabled insured to be regularly attended by a physician is met by the complete absence of proof that the appellee was not so attended. This general provision, appearing in the latter part of the policy, constitutes an exception to the basic insuring clauses and therefore presents at most an affirmative defense that must be pleaded and proved. *Stucker* v. *Hartford Acc. & Ind. Co.*, 220 Ark. 475, 248 S. W. 2d 383. Here the defense was pleaded but not proved. Neither is there sufficient proof to establish the contention that the appellee accepted a check in full settlement of her claim.

The insurer's remaining contention, that its liability is limited in any event to specific indemnity for the appellee's loss of one foot, is in our opinion also an affirmative defense that was waived by the defendant's failure to plead it. The complaint stated a prima facie cause of action under the disability provisions of the policy. The answer contained a general denial and a counterclaim to recover sums already paid, upon the theory that the plaintiff's disability was due solely to heart disease. Thus the defendant elected to join issue with the allegations of the complaint, without suggesting in any way that it might be liable under a separate paragraph in the contract for specific indemnity for the loss of the plaintiff's leg. In these circumstances the company waived the right to rely upon the alternative clause relating to specific indemnities, and the court did not abuse its discretion in refusing to allow this defense to be brought

into the case for the first time in the form of a requested instruction to the jury.

Affirmed.

SPEED *v.* MAYS.

5-926 288 S. W. 2d 953

Opinion delivered April 9, 1956.

[Rehearing denied April 30, 1956.]

Joe Holmes, for appellant.

Sid J. Reid, for appellee.

PAUL WARD, Associate Justice. In the "STATEMENT OF CASE" at the beginning of appellant's brief is found, in substance, the following: Some time prior to 1943, Middleton Mays died intestate possessed of certain lands in Grant County; The deceased left surviving him six children one of whom is Martha Speed, this appellant; On November 4, 1943, two of said children (Bennie Mays and W. L. Mays) brought a suit against this appellant and the other children (or heirs) of said Middleton Mays asking to have said lands partitioned; All defendants in said suit were properly served except this appellant; Among the papers in said suit is an Entry of Appearance presumably signed by this appellant, but appellant alleges that she did not sign said Entry of Appearance; On June 21, 1944, a partition decree was

entered, and the lands were sold to W. L. Mays for $500; All of the heirs of said Middleton Mays except appellant received their share of the purchase price; The trial court [presumably speaking of the present litigation and not the suit filed in 1943 as above mentioned] sustained the demurrer to the petition of Martha Speed [this appellant] on the ground that the matter had been judicated and for the further reason that 12 years have elapsed and she [appellant] has not been diligent in seeking a remedy, and; Exceptions to the ruling were taken and an appeal was prayed and granted.

Following the above STATEMENT OF CASE the brief sets out two points for reversal and then follows the argument. The only reference made to the record in the entire brief is to "The Entry of Appearance" found on page 15 of the record. Reference to the record shows an Entry of Appearance signed by Martha Speed on November 6, 1943, and filed November 8, 1943. An examination of the record shows that Martha Speed was sworn and testified, and that Gean McDonald, the chancery clerk, was sworn and testified at length.

From the above it clearly appears that appellant has wholly failed to comply with Rule 9(d) which requires appellant to abstract the "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 abstract shall contain full references to pages of the record." In this case appellant has abstracted no pleading, no testimony and no decree, and there is nothing in the entire brief upon which the judges of this court could confidently say that the decree of the trial court should be reversed. The several judges of this court are not required to make an individual search of the record, particularly in the absence of proper references thereto, in order to arrive at a decision, and it certainly is not practical to do so.

What we have said above is not to be considered in any way a retraction or modification of Rule 9(e). The

latter rule applies when the appellant has made out a *prima facie* case for a reversal, which was not done here.

Since no error is shown the decree of the trial court must be affirmed.

Affirmed.

EDWARDS *v.* THE CARTER OIL COMPANY.

5-887 288 S. W. 2d 954

Opinion delivered April 9, 1956.

L. B. Smead, W. R. McHaney and *Melvin T. Chambers,* for appellant.

Gaughan, McClellan & Laney, for appellee.

SAM ROBINSON, Associate Justice. This action involves the ownership of part of the minerals in 65 acres of land. It is the practice in oil fields to refer to the ownership of a percentage of the minerals in a given tract of land as so many "acres of minerals," or "mineral acres." As an example, if a person owns 25/100ths of the minerals in 100 acres, he is regarded as owning 25 "mineral acres," or 25 "acres of minerals." We will follow that practice in this case.

A grantor's act in purporting to convey 16.1 acres of minerals and to reserve 10 acres of minerals, when he had title to only 11.8 mineral acres, gives rise to this cause of action. The Chancellor held that appellants and appellee take the same percentage in the 11.8 acres of minerals they would have had in the 26.1 acres of minerals if there had been that many.

Jewel Edwards, J. M. Passwater, and the widow and son of L. L. McDonald have appealed, contending that they are the owners of 9 acres of minerals; and The Carter Oil Company has cross-appealed, contending that under the deed, it is entitled to 16.1 acres of minerals, but since only 11.8 acres are available, it is entitled to that acreage.

Ben Wheeler died intestate, leaving twelve heirs and 65 acres of land. Five of the heirs conveyed one-half of their interest in the minerals to Jack Machen; later, four of these five heirs, along with two others, conveyed one-half of their interest in the minerals to L. L. McDonald for himself and as trustee for Jewel Edwards and J. M. Passwater. The heirs, Wesley Wheeler and Buck Wheeler, grantors in the deed to McDonald, had previously conveyed their interest to Wade Kitchens. Later, a suit was filed by the heirs to cancel the deed to McDonald, alleging that it was fraudulently obtained. That suit was settled and a consent degree was entered. In order to effectuate the settlement, L. L. McDonald executed a deed to his attorney, W. D. McKay, to 26.1 mineral acres; McKay, in turn, executed a deed to 16.1 mineral acres to O. D. Boreing, trustee for the Wheeler heirs. The deed specifically reserves 10 acres in McKay. McKay then executed deeds totaling 9 acres of minerals to McDonald, Edwards and Passwater (this apparently left McKay with one acre of minerals and, later, he gave a quitclaim deed to The Carter Oil Company). Standard Oil Company then acquired the interest of the Wheeler heirs and Machen. Several years later, this interest was transferred by the Standard Oil Company to The Carter Oil Company; later, in 1949, The Carter Oil Company brought in producing wells on the property.

Appellants Jewel Edwards, J. M. Passwater, and the widow and son of L. L. McDonald filed this suit, contending that they are owners of 9 acres of minerals. They contend that, by the deed from McKay to Boreing, 10 acres of minerals were reserved and that McKay deeded 9 acres to appellants. It appears that in the controversy between McDonald, trustee, and the Wheeler heirs, the parties reached the conclusion that McDonald had title to 26.1 mineral acres on the theory that there were only eight Wheeler heirs, whereas, in fact, there were twelve heirs; also, there was a slight miscalculation. In any event, actually McDonald never at any time had title to more than 11.8 mineral acres; this is obvious from the deeds.

The deed from McKay, trustee, to Boreing, trustee, apparently conveys 16.1 acres of minerals, and the deed further provides: "And it is the further intention to convey all interest acquired from L. L. McDonald et ux under deed dated January 29, 1938, except 10 full royalty acres, containing 65 acres, more or less." It will be noticed that the deed refers to royalty acres, however, all of the other deeds dealt with minerals. McDonald did not receive a deed from the Wheeler heirs to 26.1 acres of minerals, but the deeds from the Wheelers called for one-half of certain heirs' interest. Of course, McKay could not convey 16.1 acres of minerals, as he had title to only 11.8 acres, but all the parties thought he had title to 26.1 acres. This was a mutual mistake, obvious from the provisions of the deeds. McDonald, owner of part of the minerals, and trustee for Edwards and Passwater, attempted to convey to McKay 26.1 acres. This was done so that McKay could, in turn, convey portions of the minerals to everybody concerned, as agreed. The McDonalds, Passwater and Edwards are not now in a position to say that since a mistake was made, and there were only 11.8 acres of minerals instead of 26.1, they are to get 9 acres and the Wheeler heirs and those holding through them are to get only 1.8 acres (it will be recalled that the title to 1 acre remained in McKay).

The Carter Oil Company is not an innocent purchaser without notice. McDonald's interest in the minerals is shown in The Carter Oil Company's chain of title. In determining whether McDonald had title to enough minerals to convey to McKay 26.1 acres, the first thing to be determined was whether McDonald had a deed from all of the Wheeler heirs. An investigation would have revealed that only eight of the twelve heirs had conveyed to McDonald, and two of these heirs had previously conveyed one-half of their interest to Machen; two others had conveyed all of their interest to Kitchens. The oil company had notice of the deeds to Machen and Kitchens, and an investigation would have shown that only eight of the twelve heirs conveyed to McDonald, hence, McDonald could not have owned 26.1 mineral acres. The deed from McKay, trustee, to Boreing, trustee, attempts to convey 16.1 acres. McKay had title to only 11.8 acres; therefore, of course, he could not convey 16.1 acres. The record was sufficient to put the oil company on notice that McKay could not convey the number of acres mentioned in the deed, and a proper investigation, called for by the condition of the title, would have brought to light the fact that there had been a mutual mistake by the Wheeler heirs and McDonald, trustee. Hence, it cannot be said that the oil company was an innocent purchaser without notice. We said, in *Richards* v. *Billingslea,* 170 Ark. 1100, 282 S. W. 985: "This court has held that whatever puts a party on inquiry amounts to notice where the inquiry becomes a duty and would lead to knowledge of the requisite facts by the exercise of ordinary diligence and understanding. *Jordan* v. *Bank of Morrilton,* 168 Ark. 117, and *Walker-Lucas-Hudson Oil Co.* v. *Hudson,* 168 Ark. 1098." See also *Kellogg-Fontaine Lumber Co.* v. *Cronic,* 219 Ark. 170, 240 S. W. 2d 872; *Trinity Royalty Company, Inc.* v. *Riggins,* 199 Ark. 939, 136 S. W. 2d 473.

Affirmed on appeal and on cross-appeal.

5-892 288 S. W. 2d 957

Opinion delivered April 9, 1956.

Mac W. Martin, for appellant.

Thomas B. Tinnon, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Irene M. Stephens, and the appellee, Elmer D. Stephens, were married in Illinois in 1947; they were middle-aged, and Mrs. Stephens had three children by a former marriage. In October 1950, Mr. and Mrs. Stephens made a trip to Baxter County, Arkansas, and purchased some land. There was one tract of 3⅔ acres conveyed to both parties as an estate by the entirety, and one 10 acre tract conveyed to Mrs. Stephens. The 10 acre tract cost $1,000.00, and Mr. Stephens made the down payment of $100.00; later, Mrs. Stephens paid the $900.00 balance of the purchase price. In 1951, the parties moved to Arkansas; they intended to build a home on the 3⅔ acre tract, but changed their plans, sold that property, and built the home on the 10 acre tract. Both contributed to the cost of building the home; Mr. Stephens contributed to the extent of between $10,500.00 and $11,000.00 and

later, contributed an additional amount by paying off mortgages on the property totaling $1,400.00. Mrs. Stephens contributed about $8,000.00, including what she had paid on the purchase price. In 1955, Mrs. Stephens filed suit for divorce. Mr. Stephens answered, alleging that the home on the 10 acre tract had been acquired by their joint efforts, and asked that the property be sold and the proceeds divided accordingly. Mrs. Stephens, although not denying that Mr. Stephens had contributed between $10,500.00 and $11,000.00 to the building of the home, denies that he has any interest in it. Upon trial of the cause, the chancellor granted Mrs. Stephens a divorce, and decreed that the property in question be sold, and the proceeds divided equally. Mrs. Stephens has appealed from that part of the decree ordering a sale of the property and a division of the proceeds.

Soon after construction of the home, the parties realized that the title was in Mrs. Stephens, and, in the event of her death, Mr. Stephens could be dispossessed by the children of Mrs. Stephens. The parties, therefore, made a joint will; in this will, each left to the other a life estate in any property owned, with the remainder going to the children of Mrs. Stephens, Mr. Stephens having no children. At the same time, they entered into a contract to keep the will in force. The contract provides:

". . . Whereas, all property owned severally or jointly by the Parties hereto has been acquired and improved through the mutual efforts of the Parties hereto; and in consideration of the mutual promises and agreements of the Parties hereto, joint wills were executed and entered into by the Parties hereto.

"Now, therefore, in consideration of the premises and promises herein, the Party of the First Part agrees, promises and covenants that the said will as now made in possession of the Peoples Bank, Mountain Home, Arkansas, shall not be revoked, cancelled or annulled, but shall be and remain his last will and testament without changes.

"In consideration of the foregoing, the Party of the Second Part hereby promises, agrees and covenants that she will leave in force and unchanged her will which has been made jointly with the First Party."

By this contract in writing, the parties recognized that they had acquired the property through their mutual efforts.

The chancellor's decree, providing for a sale of the property and a division of the proceeds, is in accordance with the principles of equity and good conscience. In effect, Mr. Stephens was given a lien. He has reached the age of retirement and only has a small pension of $101.55 a month. He invested his life's savings in the home; he and Mrs. Stephens agreed in writing that the property had been acquired and improved by their joint efforts. It would be unthinkable to say, in the circumstances existing here, that Mr. Stephens has no interest in the home.

It is appellant's contention that, since she had title to the 10 acres, Mr. Stephens' contribution of all the money he had to the construction of a home on the property is considered in law as a gift to her. It is true that there is a presumption that the transaction was a gift, but such presumption is rebuttable. *Mann* v. *Mann,* 164 Ark. 43, 260 S. W. 731; *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867. We think the presumption was overcome in this case. The will and the contract to keep the will in force shed light on the intention of the parties in respect to the interest of each in the property. Moreover, as was said in the *Mann* case: ". . . it does not comport with reason that one will denude himself of all his earnings during a long period of years without making some provision for his old age." We have several cases holding that the chancellor has a right to divide the property on an equitable basis where it has been acquired by the joint effort of the parties, and here, the contract regarding the will and the other evidence in the case show that the property was acquired by the parties' joint efforts.

In *Taylor* v. *Taylor,* 224 Ark. 328, 273 S. W. 2d 22, the husband was granted a divorce on the ground of adultery, but the wife was awarded certain household furniture and one-third interest in fee in real property standing in the husband's name. The court held that this was proper, since the property was accumulated through the joint efforts and earnings of the parties. The court said: "In the instant case the Chancellor concluded that most of the property was accumulated through the joint efforts of the parties. This conclusion is not against the preponderance of the evidence." In the case at bar, in the contract regarding the will it is agreed that the property was acquired by the joint efforts of the parties. In *Williams* v. *Williams,* 186 Ark. 160, 52 S. W. 2d 971, the court said: "It is clear from the evidence that both appellant and appellee worked and conducted the business which resulted in the accumulation of the property in controversy. It is immaterial whether there was a partnership. If appellee and appellant, by their joint work, labor and management, acquired the property, a court of equity would, even before the recent statutes [removing a married woman's disabilities], protect the wife's interest in the property." The same principle that requires the protection of a wife's interest in property also requires the protection of the husband's interest. See also *Price* v. *Price,* 217 Ark. 6, 228 S. W. 2d 478. In *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330, it was held that where the husband, through a contribution of $100.00 on his part, assisted his wife in obtaining a fee simple title to property in which she had an interest but not the fee, the husband was entitled to a lien for the $100.00.

With reference to a situation similar to the case at bar, it is said, in 17 Am. Jur. 469: "Equity and good conscience require . . . that a fair division shall be made, taking into consideration the relative wants, circumstances, and necessities of each, of the property accumulated by their joint efforts and savings." Here, the actual cost of the property involved is in the neighborhood of $20,000.00. Presumably, it will bring that much,

or more, at a sale. The fact that it has such a substantial value is due to the joint efforts of the parties to this litigation, and the evidence is overwhelming to the effect that Mr. Stephens, in contributing his life's savings to the project, did not intend such a gift to Mrs. Stephens.

The chancellor's decree that the property should be sold and the proceeds divided between the parties is correct, and it is therefore affirmed.

GARDNER *v.* GARDNER.

5-874 289 S. W. 2d 182

Opinion delivered April 16, 1956.

Cooper Jacoway, for appellant.

Owens, McHaney, Lofton & McHaney, for appellee.

LEE SEAMSTER, Chief Justice. This is the second time that the parties to this cause have been before this court. On the first occasion, *Gardner* v. *Gardner,* 225 Ark. 828, 286 S. W. 2d 23, this court affirmed a decree awarding appellee, Dr. Melvyn J. Gardner, a divorce from the appellant, Bernice A. Gardner. This second appeal follows from the action of the trial court in making alimony and child support awards.

The appellant insists that the allowance of $125.00 per month as alimony to her and $225.00 per month

for the support of the four minor children of the parties is an insufficient amount to provide for their living expenses. The appellee has appealed from that portion of the decree allowing the appellant the sum of $125.00 per month as alimony.

The appellant contends that the total allowance to her for alimony and child support should be at least $500.00 per month and appellee contends that he is able to pay only a total of $300.00 per month.

The appellee is employed as a physician at the Veterans Administration Hospital at Fort Roots in North Little Rock, Arkansas. His net income, after deductions, is approximately $302.48 every two weeks and his yearly net income would be $7,864.48. Deducting the allowances made by the trial court, in the sum of $4,200.00, would leave a balance of $3,664.48 in expendable funds for the appellee. One of the items that is withheld from the gross income of the appellee, is the sum of $600.00 per annum for insurance and retirement pay. The appellant contends that the $600.00 is a savings account for appellee and should be considered as such in determining his ability to pay.

The appellee contends that he owns only his clothing, some medical books and a 1953 model automobile. At the time of the trial, he still owed on the automobile seven monthly payments of $94.00 each.

The parties were involved in litigation in Florida by reason of a separate maintenance suit brought by the appellant against the appellee. The Florida court rendered a judgment in favor of appellant, against appellee, for $175.00 per week. The appellee succeeded in procuring a reduction of this allowance in the trial court. The appellant appealed this order to the Florida Supreme Court and the Supreme Court of Florida set aside the reduction order and required appellee to continue the $175.00 weekly payments. The litigation was expensive for the appellee. A fee in the sum of $2,500.00 was allowed appellant's attorneys and a master's fee of $500.00 was also allowed, and judgment rendered against the appellee for the amount and other costs. The ap-

pellee still owes about $9,000.00 on the Florida judgment. He contends that he is unable to make these payments since said amounts are beyond his means.

There have been many cases of similar character before this court. Each is decided upon the peculiar facts as presented therein. Taking into consideration all the elements in the instant case, we cannot say that the order of the trial court is against the preponderance of the evidence.

The case is affirmed at the cost of appellee, and an additional attorney fee of $200.00 to appellant's attorney, will be assessed against the appellee.

Justice MILLWEE not participating.

ARKANSAS POWER & LIGHT COMPANY *v.* ARKANSAS PUBLIC SERVICE COMMISSION.

5-875 289 S. W. 2d 668

Opinion delivered April 16, 1956.

[Rehearing denied May 21, 1956.]

House, Moses & Holmes, W. H. Holmes, Ed. B. Dillon, Jr., and *Richard McCulloch,* for appellant.

John R. Thompson, Tom Gentry, Attorney General, *Ben J. Harrison,* Asst. Atty. General, *Reed W. Thompson, James K. Young, Jabe Hoggard, O. D. Longstreth, Jr., Dave E. Witt* and *Joseph R. Brooks,* for appellee.

P. A. Lasley, amicus curiae.

J. SEABORN HOLT, Associate Justice. Proceeding under the provisions of Act 324 of the Acts of the Legislature of 1935 [Sec. 73-201 et seq. Ark. Stats. 1947] and an order of the Commission made June 24, 1944, appellant, Arkansas Power and Light Company, on May 27, 1954, filed its application with the Arkansas Public Service Commission asking for approval of an increase in electric rates over its present rates in order to increase appellant's revenues in the amount of $3,900,000. In its petition the power company appears to admit that its overall net earnings then amounted to a rate of return in excess of 5%. Following a long and patient hearing, resulting in the taking of more than 1,500 pages of testimony, the Commission found that the company was earning—,5.985%,—approximately 6%, all to which it was entitled, and denied the company's petition. Later (December 2, 1954) the company's petition for a rehearing was filed and also denied. Thereafter, (December 3, 1954) after filing an additional bond in the amount of $1 million, the company appealed to the Circuit Court of Pulaski County and that court, after a consideration of the record made before the Commission, on September 23, 1955 dismissed the company's petition for review and in all things affirmed the Commission's findings. This appeal followed.

At the outset we point out certain well defined rules governing this court in reviewing the powers and actions of the Arkansas Public Service Commission in a utility rate case such as is presented here. The Commission must and does have broad powers and is a fact finding body. Our Legislature has delegated and entrusted the administration of Act 324 to the Commission, and not to the courts. The primary object of the

Commission is to provide that rate of return which is adjusted to appellant's needs consistent always with the interest of the public. Apart from the judicial review that may be resorted to under the Act, it is not for us to advise the Commission how to discharge its functions. When an appeal is taken to the circuit court, that court, as well as this court on appeal from the circuit court, shall not extend the review of the Commission's findings and actions "further than to determine whether the Department [Commission] has regularly pursued its authority, including a determination of whether the order, or decision under review, violated any right of the complainant under the Constitution of the United States or of the State of Arkansas." [Sec. 73-233 (d) Ark. Stats.] The Circuit Court, and this court on appeal, reviews the Commission's findings on the record before the commission, and if we find any substantial evidence to support it, it is our duty to permit the Commission's order to stand if it is not arbitrary and is free from fraud. We said in the recent case of *City of Fort Smith* v. *S. W. Bell Tele. Co.,* 220 Ark. 70, 247 S. W. 2d 474, "If the Department's [Commission] order is supported by substantial evidence, free from fraud, and not arbitrary, it is the duty of the Courts to permit it to stand, even though the Courts might disagree with the wisdom of the order."

As to the power of the Commission to regulate rates of utilities § 73-218 Ark. Stats. 1947 provides: "The Department [Commission] upon complaint, or upon its own motion, shall, upon reasonable notice and after a hearing, have the power to: (1) Find and fix just, reasonable and sufficient rates to be thereafter observed, and enforced and demanded by any public utility."

The Commission on November 22, 1954, after the extended hearing as indicated, made the following findings: "1. The Commission has jurisdiction under applicable statutes to determine the reasonableness of the Company's rates upon its own motion or upon application of the Company for approval of a change in rates. 2. The filing of a new rate schedule and application for

approval thereof by the Company put in issue the reasonableness of the rates, and in that connection the Commission has the right to determine any and every question incidental and pertinent thereto, notwithstanding its previous orders. 3. Consistent with the law and reason, the question of whether the company's rates are reasonable depends upon the amount of the rate base and the rate of return determined in the light of present day conditions and circumstances, and not upon a formula process for determining the rate base of the Company devised in the year 1944 which obviously did not contemplate conditions and circumstances now apparent which require adjustment of such process; nor upon the fairness of a rate of return calculated under conditions and circumstances in the year 1944. 4. In determining the rate base of the Company, as well as determining the revenue and expenses of the Company, for the purpose of determining whether it is earning an adequate return upon its investment, some point of time must be fixed for the purpose of submitting pertinent facts and data, and in this proceeding sound reasoning requires that this period be fixed as the year commencing April 1, 1953 and ending March 31, 1954, which is the period used by the Company in submitting its application in this proceeding. 5. In determining the Electric Rate Base as provided for in the 1944 order, the percentage relationship between electric property and total property must be determined in order to arrive at the electric rate base, which is the portion of capital, liabilities and surplus that is invested in electric property according to the procedure specified in the 1944 order. All of Account 100.3, Construction Work in Progress, is included in electric property; and over the past ten years the Company's plant under construction has included substantial amounts which represented plant which, upon completion, brought in additional income or reduced expenses of operation. It is improper to use this plant under construction in the determination of the rate base unless some provision is made for the inclusion of additional revenues, or the exclusion of expenses saved, particularly where it appears that interest is

capitalized by the Company during the construction period which, as of the period, ending March 31, 1954, amounted to $1,097,655. The better procedure is to remove from electric property that portion of plant under construction which, when completed, will be revenue producing, or will effect substantial savings in operation cost; and Appendix (i) shows the calculations as they should be made for the applicable period.

[Appendix i Arkansas Power & Light Company

Determination of Deficiency in Return Under Staff Motion

Line No.	Acct. No.	Account	April 1, 1953	March 31, 1954
1		Net Capital from Company Ex. "D"	$166,236,709	$187,086,539
		PLANT		
2	100	Electric Plant	180,308,933	218,021,909
		Less:		
3		Plant under construction which is deemed to be revenue-producing when completed	22,096,692	29,269,798
4			$158,212,241	$188,752,111
	250.1	Less:		
5		Reserve for Depreciation or Retirement of Electric Plant	18,391,574	20,290,970
	250.2			
6		Reserve for Amortization of Plant Acquisition Adjustments	1,724,478	2,137,547
7		NET ELECTRIC PLANT	$138,096,189	$166,323,594
		OTHER PROPERTY		
8	110	Other Physical Property	93,774	14,063
9	111	Investment in Associated Companies	17,000	17,000
10	112	Other Investments	23,000	32,000
11		Plant Under Construction per Line 3 above	22,096,692	29,269,798
12		TOTAL OTHER PROPERTY	$ 22,230,466	$ 29,332,861
13		TOTAL NET PROPERTY	$160,326,655	$195,656,455
14		PER CENT — Net Electric Plant of Total Net Property (Line 7 ÷ Line 12)	86.13%	85.00%
15		ELECTRIC RATE BASE (Line 1 × Line 14)	$143,179,677	$159,023,558
16		AVERAGE RATE BASE FOR PERIOD		151,101,618

(Page 2 of 2)

[redacted]

	ANNUAL ALLOWABLE RETURN		
1	6% of Rate Base — Page 1, Line 16 ($151,101,618 × .06)	9,066,097	
2	Interest on Customers' Deposits from Company Exhibit "F"	96,258	
3	Amortization of Plant Acquisition Adjustments from Company Exhibit "F"	415,070	
4	Base Allowable Return		$ 9,577,425
	AVAILABLE FOR ALLOWABLE RETURN		
5	Year Ended March 31, 1954 from Company Exhibit "G," Page 2	9,358,255	
6	Less: Over-accrual from Income Taxes (Tr. Page 753)	196,482	
7	Total Available Return		9,554,737
8	DEFICIENCY IN RETURN (Line 4 - Line 7)		$ 22,688]

The portions of the amounts in plant under construction which represent plant which will be revenue-producing when completed, $22,096,692 at April 1, 1953, and $29,269,798 at March 31, 1954, should be included in the classification of "Other Property." To include this plant under construction in electric plant in calculating the rate base would result in distortion because the Company would be permitted to earn a return on that property before it is useful in providing utility service and before the full influence of the property on revenues and expenses has been felt. By this process the Electric Rate Base as of April 1, 1954, is $151,101,618.

"6. While the Commission's order of June 24, 1944, specified a rate of return of 6%, Arkansas Statutes and Court decisions do not require that the rate of return be 6%. The only requirement is that the rate of return be reasonable. In Appendix (i) [above], a rate of return of 6% has been applied to the rate base of $151,101,618, and the resulting figure $9,066,097, is the annual allowable return. To this figure are added $96,258, which represents interest on customers deposits, and $415,070, which represents amortization of electric plant acquisition adjustments. Both of these figures are taken from Company Exhibit "F." The total $9,577,425, is the base allowable return. 7. On the basis of the Company's operating revenues and operating expenses for the year

ended March 31, 1954, the amount available for allowable return has been determined to be $9,358,255 according to Company Exhibit "G." To this, the amount of $196,482 should be added because of over-accrual of Federal Income taxes during the year ended March 31, 1954. The total of these two amounts is $9,554,737, which is the total available return. The total available return, $9,554,737, after taking into consideration the allowances for interest on customers deposits and the amortization of electric plant acquisition adjustment, represents a rate of return of 5.985% on the rate base as determined in Appendix (i). The difference between this and the 6% allowable under the 1944 order expressed in dollars amounts to $22,688, which is negligible. 8. Therefore, (1) the application of the Company to increase its rates should be dismissed; (2) the company should refund to its customers all amounts collected in excess of those amounts which would have been collected under the superseded rates, by rates placed into effect under bond; (3) the order of June 24, 1944, with respect to Sections II-A and IV-A should be amended, as hereafter provided. It is, therefore, ordered that: 1. The application of the Arkansas Power and Light Company for increase in its rates which was filed with this Commission on May 27, 1954, be, and is hereby, dismissed. 2. The Arkansas Power and Light Company within sixty (60) days from date of this order shall make refund to its customers all amounts collected in excess of those accounts which would have been collected under the rates superseded by the rates placed into effect under bond together with interest at the rate of six per cent (6%) per annum. 3. Section II-A of the order of June 24, 1944, be, and is hereby amended as follows: . . . " Then follows the amendment which would, in effect, disallow, as part of the rate base Account 100.3 (Work Under Construction) supra, and also would disallow the right to capitalize 6% thereon as part of the rate base. As thus amended, "the order of June 24, 1944, and amendments thereto, shall be continued in full force and effect. This order shall become effective fifteen (15) days from the date hereof."

For reversal appellant presents the following points: "I. The Commission's Amendment of its own Prudent Investment Standard was arbitrary and unreasonable and its findings of fact are not supported by any substantial evidence.

"The arbitrary Amendment of the June 24, 1944, Order deprives Company of its property without due process of law. II. The Commission's Findings of Fact and its Selection of a Test Period were not supported by the evidence and were arbitrary. The Commission's action deprived the company of due process of law. III. The Company was denied its Constitutional Rights of Procedural Due Process of Law. (a) The Commission denied the Company due process by amending the order of June 24, 1944, without prior notice to the company or a hearing and acted beyond the powers granted by Act 324 of 1935. (b) The Commission denied the Company due process by rejecting all evidence of operations after March 31, 1954, without prior notice and hearing to the Company. IV. The Commission's Order of November 22, 1954, was retroactive in effect and is therefore void. V. The Commission's calculations and findings were erroneous and contrary to the order of November 22, 1954."

The record reflects that the company, pursuant to the 1944 order, kept three separate accounts: (1) Account 100.1 denominated Plant in Service, (2) Account 100.3 — "Construction Work in Progress" and (3) a special account called "Excess Net Electric Revenue Deferred Credit Fund" and was required to place in this last fund any earnings in excess of 6% of its capital investment allowed under the 1944 order. So, appellant, in effect, will always be held to 6% earnings.

In short, appellant stoutly argues (1) that the Commission was bound by the 1944 order which required it to follow the Prudent Investment theory, invaded its constitutional guarantee of due process and equal protection by refusing to include as a part of the rate base a proper average, or portion, of Account 100.3 (Construction Work in Progress) and also 6% interest thereon,

in the amount of $1,097,655. In this connection appellant says: "The inclusion of construction work in progress in the rate base is expressly authorized by the order of 1944 and the accrual of interest during construction is authorized by the Uniform System of Accounts." Appellant further contends, (2) that the Commission was without authority to change the 1944 order without first giving notice to appellant, and (3) that the Commission arbitrarily selected the testing period of the 12-month period ending March 31, 1954, and in refusing to consider as an additional testing period that period from March 31 to August 31, 1954. We do not agree to any of these contentions.

(2). As to the question of notice [which we first consider] we hold that ample notice was in fact given to appellant. This was evidenced in the order of June 2, 1954 and that of August 24, 1954, suspending the effective date of the rates in order that an investigation could be made. As indicated, appellant, initiated the present action for increased rates on May 27, 1954; and, it further appears that on August 20, 1954, one of the city intervenors, the City of Little Rock, filed its intervention which it denominated: "Petition for review of all prior orders establishing rate of return on plant investment," and asked the Commission to review all orders previously made by it as to percentage of earnings allowable on net plant investment. The Attorney General's intervention contained this prayer: "Wherefore, the intervenor prays that the foregoing matter be fully developed as to the Rate Base, Rate of Return and all other particulars in order that a fair and equitable rate may be established for all parties and classes of consumers concerned." As indicated, the Commission's order denying appellant's petition was not made until November 22, 1954.

(3). As to the testing period, it clearly appears to us from the record that the appellant, itself, in its Rate Application chose the testing period, and the Commission accepted Appellant's choice. Appellant's Application was tried throughout on the theory that the test period should be the 12 months ending March 31,

1954. In other words, March 31 was to be the cut-off period of this pattern year. As we read the record, the Commission, in effect, appears to have adopted the course of using a test period selected by appellant and based on appellant's most recent actual experience, and adjusted to known charges affecting operating costs and revenues in the immediate future. We, therefore, hold that appellant is not in position to question the test period.

THE RATE BASE. (1) It appears that the Commission determined the rate base to be $151,125,571 (Appendix i above) and the allowable rate thereon of 6% (or 5.985% or approximately 6%) amounting to $9,554,-737, as the annual allowable return. In establishing this rate base the commission refused to allow the average amount over the test period that the power company had invested in "Work Under Construction" (Account 100.3) and not revenue producing. We hold that there was substantial evidence to support the findings and conclusions reached by the Commission, under the broad powers granted to it, and that the Commission in its actions did not invade the company's constitutional rights. It was clearly the duty of the Commission, when the company sought an increase in rates, to determine whether the company was entitled to any increase in order to earn a fair return on its invested capital. It was not bound by its 1944 Order, and could make changes in it, on proper notice to appellant — which it did — just as long as, in so doing, it did not invade the constitutional rights of the power company. "Whenever there is filed with the Department by any public utility any schedule stating a new rate or rates, the Department may, either upon complaint or upon its own motion, upon reasonable notice, enter upon an investigation concerning the lawfulness of such rate or rates; . . . " [Section 18 (b) Act 324 of 1935, now § 73-217 b Ark. Stats. 1947].

In a well considered and reasoned case — from which we shall quote somewhat at length — where the situation was similar, in effect, to that on which our Commission acted here, the Supreme Court of Vermont in *Re Central Vermont Public Service Corp.*, 116 Va. 206,

71A 2d 576, 83 PUR NS 47, with reference to the duty and powers of a public service commission of that state to follow any certain formula in fixing rates, announced certain rules and principles of law applicable here. It was there said: "In the employment of its test-year basis the commission made no adjustment for the revenues which would be produced from the plant under construction when completed. Once it had been decided to eliminate plant under construction from the rate base [as here] the exclusion of revenues to be received therefrom automatically followed. Only so could it be determined whether the petitioners' earnings were adequate to provide a fair return on the property producing those earnings. Both property under construction and the estimated revenues therefrom must be included in the rate base, or neither." Here the commission included neither, which was proper. ". . . The inclusion of property under construction before the plant which it is designed to replace has actually been retired would obviously result in a double return . . . In the computation of the rate base, allowance is afforded the petitioner for capitalization of materials used in construction and inventories on hand before they were used in the process of construction . . .

"The issue here presented, that is, inclusion or exclusion of property under construction, is essentially one of fact for the commission's determination. The commission has found for exclusion, and no error appears.

"An administrative agency performing the delegated legislative function of rate making has a broad discretion. Mr. Justice Cardozo, speaking for the United States Supreme Court, said of it: 'Regulatory Commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasijudicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed.' *Ohio Bell Teleph. Co.* v. *Ohio Pub. Utilities Comm.* (1937) 301 U. S.

292, 304, 81 L. ed. 1093, 1101, 18 PUR NS 305, 313, 57 S Ct 724, 730. Such Commissions are not bound to the service of any single formula or combination of formulas. *Federal Power Commission* v. *Natural Gas Pipeline Co.* (1942) 315 US 575, 586, 86 L ed 1037, 1049, 1050, 42 PUR NS 129, 138, 62 S Ct 736, 743. In that case Mr. Chief Justice STONE said for the court: 'Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.' "

Having concluded that our Commission here, has acted within its statutory authority, and that there was substantial evidence adduced to support its findings and order, we must and do affirm the judgment of the Pulaski Circuit Court.

Chief Justice SEAMSTER not participating, Justice McFADDIN dissenting in part.

ED. F. McFADDIN, Associate Justice (dissenting in part). There is only one point on which I dissent, but I consider that point to be of sufficient importance to require that the entire case be returned to the Public Service Commission to give further consideration to the matter of a rate increase in the light of this one point. It is this: in deciding that Arkansas Power & Light Company was not entitled to any rate increase, the Commission deliberately refused to consider an item of approximately Twenty Million Dollars which passed from "Construction Work in Progress" (Account No. 100.3) to "Plant Account" (Account No. 100) during the course of the hearings. I think the Commission should have considered this item in deciding a fair rate for the foreseeable future; it was duly called to the attention of the Commission and yet consideration was refused; and the result

was to fix a rate of return ignoring this item of approximately Twenty Million Dollars that was used and useful in the public service at the very time that the Commission made its order of November 22, 1954 in this case. So much for summary: now for the details.

In 1944 the then Department of Public Utilities—now the Public Service Commission[1]—had an extensive investigation into the affairs of the Arkansas Power & Light Company (hereinafter called "Power Company"). That hearing resulted in the order of 1944 adopting the "prudent investment rate base," and allowing the Power Company to earn 6% on the said rate base. The 1944 order also provided, *inter alia,* that the Power Company should file regular returns on prescribed forms and that if the net return of the Power Company at any time exceeded 6% on the said rate base, then said excess should be put into a special account to be held for disposition by the Commission. In the 1944 order, a rate base formula was adopted which allowed the Power Company to consider as used and useful in the public service all amounts shown in the "Construction Work in Progress Account," which was and is carried on the books of the Power Company as Account No. 100.3: that is, during the time any plant was in the course of construction, the Power Company was allowed to consider that account as a part of its prudent investment, even though it might be some time until the particular plant under construction actually went into use as serving the public. This Account No. 100.3, called "Construction Work in Progress Account," is one of the main issues in the present case, and must be constantly remembered.

The 1944 order—setting up the aforesaid formula—continued as satisfactory both to the Power Company and the Commission until May 27, 1954, when the Power Company filed the present application for rate increase,

[1] The Department of Public Utilities was the name of the administrative tribunal in 1944 (see Act No. 324 of 1935). By Act No. 40 of 1945, and later by Act No. 155 of 1951, the name was changed to the present name, "Public Service Commission," and the powers and duties of the old "Department of Public Utilities" were transferred to the present Public Service Commission. See § 73-101 et seq., Ark. Stats.

claiming that it was not earning 6% on its rate base as calculated under the 1944 order. To establish that it was not earning the 6% return, the Power Company selected the test year beginning April 1, 1953 and ending March 31, 1954. Since the application for rate increase was filed May 27, 1954, the year ending March 31, 1954 was as near to the filing date as bookkeeping methods permitted. This test year was selected by the Power Company, so March 31, 1954 was the "saw-off" date at the time the petition was filed.[2] After various interventions, pre-trial conferences, etc., the hearing finally got under way, and the Power Company established that on April 1, 1953, the beginning of the test year, it had in the Account No. 100.3 (Construction Work in Progress) the sum of $22,096,692.00; and on March 31, 1954, the close of the test year, the Power Company had in the said Account $29,269,798.00. The average of the opening and closing amount was $25,683,245.00, which, in round figures, I list at Twenty-five Million Dollars as the average of the "Construction Work in Progress Account" during the test year.

When the Commission found this amount in the Account No. 100.3 (Construction Work in Progress), the Commission decided that the Twenty-five Million Dollars represented an amount that was not then—on March 31, 1954—actually "used and useful in the public interest": rather, it was an amount of money then tied up in construction but not actually used by the Power Company in serving the public. The Commission, by its order of November 22, 1954 (here appealed from), held that the amount shown in Account No. 100.3 should not be considered in deciding a rate increase. In other words, the Commission changed the "prudent investment formula" prescribed in the 1944 order so as to eliminate from the rate base the amount in Account No. 100.3 on March 31, 1954. With such amount of Twenty-five Million Dollars eliminated, the Commission found that the Power Company was making approximately 6% on its rate base and,

[2] But months were spent in the course of the hearing, and the order of the Commission denying the Power Company a rate increase was dated November 22, 1954.

therefore, denied any increase. As aforesaid, this Account No. 100.3 (Construction Work in Progress) is the big issue in this case. There are many other issues,[3] but I direct my attention solely to this one issue because I consider it to be of sufficient magnitude to justify a reconsideration by the Commission.

The Power Company claims that the Commission had no right to change the "prudent investment formula" set up in the 1944 order, and that such change—the elimination of Account No. 100.3—is confiscatory, retroactive, void, etc. I see no merit in this argument of the Power Company. Any regulatory tribunal, like the Public Service Commission, can change the formula for determining the rate base at any time, so long at the formula adopted and put into existence prescribes a fair rate of return for the foreseeable future. In the case of *City of Ft. Smith* v. *Southwestern Bell Tele. Co.,* 220 Ark. 70, 247 S. W. 2d 474, there were mentioned several different methods for determining a rate base. The telephone rate was based on "net cost less depreciation." Other formulas or methods to determine the rate base were mentioned as "original cost" and "reproduction value"; and, here, the Power Company's rate base is on "prudent investment." In the case of *City of Ft. Smith* v. *Southwestern Bell Tele. Co., supra,* we said:

"From all of the cases and authorities which we have studied, we reach the conclusion that no public utility has a *vested right* to any particular method of valuation. The aim of a regulatory body is to determine a fair valuation; and the method of calculation may vary as between the type of the utility involved and the economic conditions existing."

No utility acquires a contractual right to any particular method of determining its rate base. The question is always: "What is a fair method to determine the rate base?" In its application of May 27, 1954, the Power Company said it was entitled to a rate increase and

[3] I am inclined to believe that the Commission was in error in refusing due consideration to an item of increased labor costs that occurred during the course of the hearing.

thereby asked the Commission to investigate the affairs of the Power Company. The power to investigate carries with it the power to change the previous method of determining the rate base. The only restrictions on the Commission in event of such change are (a) that the rate base selected be fair and reasonable in the light of business conditions; and (b) that it will yield a fair and reasonable return in the foreseeable future. So I see no merit in the Power Company's claim that the Commission had no power to change the rate base formula prescribed in the 1944 order.

But, when I consider what the Commission *did* in its order of November 22, 1954 about the Account No. 100.3 (Construction Work in Progress), I find myself in dissent from the majority opinion in the case at bar: the Commission refused to consider the fact that, within two months from March 31, 1954, approximately Twenty Million Dollars of the Twenty-five Million Dollars in Account No. 100.3 had passed from Construction Work in Progress into the Plant Account of the Power Company. In other words, during the course of the hearing before the Commission, it was definitely shown that approximately Twenty Million Dollars had passed to the stage of "used and useful in the public service"; yet the Commission refused to consider that matter of Twenty Million Dollars in deciding a rate base for the foreseeable future. I think the Commission acted arbitrarily in refusing to consider such fact before it when it made its order of November 22, 1954.

It must be borne in mind that months were spent by the Commission in examining and cross-examining the witnesses put on by the Power Company. Then, when the Power Company rested, the staff of the Public Service Commission moved that the petition for rate increase be dismissed because the staff of the Public Service Commission claimed that the Power Company had not shown itself entitled to any increase. Hearings were held all through August, 1954 and over into November, 1954; and in these hearings it was shown by the Power Company that, as of August 31, 1954, the balance in the Account

No. 100.3 (Construction Work in Progress) was only $4,856,306.00. Thus, from the average of $25,683,245.00 shown in the Account No. 100.3 for the test year, the sum of $20,826,939.00 had passed from the "Construction Work in Progress Account" to the "Plant Account" actually *used and useful in the public service.*[4] Thus, when the Commission made its order on November 22, 1954 (entirely eliminating the Account No. 100.3—Construction Work in Progress), the Commission had uncontradicted evidence before it which showed that more than Twenty Million Dollars—entirely excluded because it was "Construction Work in Progress" on March 31, 1954—had, by August 31, 1954, become "Plant Account," used and useful in the public service. Yet the Commission entirely refused, in its order of November 22, 1954, to allow the Company any return on the said Twenty Million Dollars that had become used and useful in the public service in the course of the hearing.

The Commission was not set up to determine whether a rate base was fair in the past, but to determine a rate base that would be fair in the foreseeable future; and when this Twenty Million Dollar item was not taken into consideration, I think the result reached by the Commission was arbitrary and approaches the borderline of confiscation. In *City of Ft. Smith* v. *Southwestern Bell Tele. Co.*, 220 Ark. 70, 247 S. W. 2d 474, in speaking on this point, we quoted from *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. Ed. 316, 47 S. Ct. 144, as follows:

" 'In every confiscation case, the future as well as the present must be regarded. It must be determined whether the rates complained of are yielding *and will yield,* over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, a reasonable rate of return on the value of the property at the time of the investigation *and for a reasonable time in the immediate future.*' " And then we stated our own conclusions:

[4] Part of this was Lynch Unit No. 3 which was placed in operation on June 19, 1954; and Couch Unit No. 2 which was placed in operation on July 31, 1954; and part related to heavy transmission lines.

"We recognize that a utility rate must be reasonable and just as to the present, and also for a reasonable time in the future, and that the Commission may—in order to forestall subsequent applications for rate increase—allow a reasonable figure for anticipated extensions to be made in the future. But to anticipate reasonable future extensions is one thing, and quite another thing to select a future date after the closing of the evidence on which to base a factual finding as to value of property. We adhere to the view that in order to determine the actual plant, used and useful, on a certain date, there must be *proof,* as distinguished from mere *promises or predictions*; . . ."

In the case at bar the Power Company met the test by offering *actual proof,* because it showed that on August 31, 1954 more than Twenty Million Dollars had been passed from "Construction Work in Progress" to "Plant, used and useful in the public service"; and yet the Commission refused to consider any situation arising after March 31, 1954. Therein I think was the fatal error in this hearing.[5]

It is argued in the briefs that the Commission had the right to assume that the Twenty Million Dollars in new Plant would produce enough additional revenue to afford a 6% net return on the Twenty Million Dollars. As far as I can find, there is no evidence from which the Commission could reach any such assumption. At all events, the Commission did not offer any such explanation in its order of November 22, 1954. In the 1944 order it was provided that the Power Company would make semi-annual returns and, if it ever earned more than 6%, such excess was to be put into a special account. With that provision facing the Commission, I can see no justification for the Commission's refusal to consider the

[5] If my views—as herein expressed—had prevailed and the cause had been remanded to the Commission to consider a rate schedule to include this Twenty Million Dollar item, then I would have voted that the Commission should exclude from the Account No. 100.3 (Construction Work in Progress) any amounts that represented *accrued interest* as distinct from actual cash invested. To allow *accrued interest* would be to allow the Power Company a rate of return on *"accrued items"* rather than *"actual investment items."* This is discussed by the Vermont Supreme Court in "Petition of Central Vermont Public Service Corp., 71 Atl. 2d 576."

approximately Twenty Million Dollars that passed from Construction Work in Progress to Plant, used and useful in the public service, during the course of this hearing. I seriously believe that the Commission's failure to consider the item justifies the Power Company's claim of arbitrariness and confiscation, unless this Court is now willing to say—and I am not—that, even considering the item, the rate of the return to the Power Company, though less than 6%, is still an adequate return. I am not willing to go that far in this case. The majority has not shown itself willing to go that far; and, therefore, I think this case should be returned to the Commission to consider a rate increase in the light of facts that occurred during the course of its hearing. It is entirely proper to consider a test year, but what the Supreme Court of Pennsylvania said in the case of *City of Pittsburgh* v. *Pa. Pub. Util. Com'n,* 171 Pa. 187, 90 Atl. 2d 607, is apropos to the situation here:

"We recognize the necessity, as a practical matter, for a cut-off date and the use of a base year in arriving at a final determination. But the Commission cannot be oblivious to recent figures in its own files supplied by the utility. . . . The Commission may not ignore recent information and evidence which substantially affect the problem before it. Allowance must, of course, be made for property additions to the rate base. . . . The Commission should also consider any further available material evidence on this question. As the Commission said in its present order: 'Equity requires that respondent's rates, being made for the future, should be predicated upon the latest tax conditions known.' "

For the reasons herein stated, I respectfully dissent.

5-944 289 S. W. 2d 176

Opinion delivered April 16, 1956.

[redacted]

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

Henry S. Yocum, J. R. Wilson, T. O. Abbott, Surrey E. Gilliam, and *Bolivar L. Allen,* for appellee.

ED F. MCFADDIN, Associate Justice. This suit involves a portion of an old cemetery in El Dorado. In effect, it is a three-cornered lawsuit between (a) Trustees of the First Methodist Church of El Dorado (hereinafter called "Church"); (b) Trustees of Warner Brown Cemetery (hereinafter called "Cemetery Trustees"); and (c) certain heirs of Warner Brown, hereinafter named. The Church brought the suit against the Cemetery Trustees and Warner Brown heirs as a class, and prayed that the title of the Church be quieted to a strip of land that had formerly been a portion of the Warner Brown Cemetery. From a decree awarding the Church

the prayed relief, certain Warner Brown heirs have appealed. The appellants here are Joe Slade, Pattie Goodwin Wharton, Nell Goodwin Smith and Lena Goodwin Trimble.

In 1848 Warner Brown, a citizen of the then recently incorporated Town of El Dorado, deeded certain property to the Methodist Church and deeded adjoining property to three Trustees of the Warner Brown Cemetery. Two of these Trustees were Peter D. Goodwin and John H. Askew. The name of the third Trustee has been forgotten. Unfortunately the deed from Warner Brown to the three Trustees was never placed of record and its contents are necessarily left to the recollection of the witnesses. Warner Brown died in 1853, and his grave is in the Cemetery. At all events, the parcel of land became a cemetery and burials in it continued to be made at irregular intervals until 1938. Whether it was originally intended as a public cemetery is not known: there is no record of any lots being sold, but over the years it was used by people of various religious affiliations, and by those in no wise related to Warner Brown; so it may be conceded that the public nature of the cemetery has been established (see 10 Am. Jur. 489).

In 1892 the original Cemetery Trustees had died without naming any successors; and seven persons, representing themselves to be some of the lineal descendants of Warner Brown, executed and recorded an instrument naming William W. Brown, J. S. Frost and Hugo W. Goodwin to be the Trustees of the Warner Brown Cemetery, and providing that the survivors of the said three Trustees should have power to select successor Trustees[1]. In 1930 William W. Brown, as the sole

[1] This instrument, omitting only signatures, reads as follows: "Know Ye That we lineal descendants of Warner Brown have met in an informal family meeting to consider and give shape to a revival of Trusteeship to a certain Cemetery lot situated in the Town of El Dorado, Ark. The original Trustees, viz: Peter D. Goodwin, John H. Askew and .... having died without any revival of other Trustees for said Lot and as we can find no record of the work & management of said Trustees but only know that the said Warner Brown, appointed them about the year 1848 to act for the Heirs and descendants of himself, in controlling said lot to be kept and used for a burial place for him & them forever. Knowing these facts we undertake to and hereby revive the Trusteeship by appointing William W. Brown,

survivor of the 1892 Trustees, appointed Thomas Goodwin and W. W. Brown, Jr. to act with him as Trustees. In 1952, W. W. Brown, Jr., being the sole survivor of the 1930 Trustees, named Alta Goodwin and Dan Lee Staples to act with him as Trustees; and these three are the presently acting Trustees of the Warner Brown Cemetery named in this suit.

In 1954 the said Trustees realized (a) that burials had ceased in the cemetery since 1938; (b) that the cemetery was without any money for maintenance; (c) that the monuments over the graves were falling down; and (d) that some effort should be made to obtain perpetual care. Thereupon the Cemetery Trustees made a contract with the First Methodist Church of El Dorado, which needed land on which to erect an educational building. The contract was that the Trustees of the Warner Brown Cemetery conveyed to the Church the West 86 feet of the cemetery property and, in return, the Church agreed, *inter alia,* (a) to construct and maintain a steel fence at least six feet high on all sides of the cemetery not enclosed by a brick wall; (b) to move all bodies from the 86-foot strip into the other portion of the cemetery; (c) to erect a suitable monument in the cemetery to the memory of Warner Brown; (d) to erect a plaque designating the cemetery as the "Warner Brown Cemetery";

J. S. Frost and Hugh W. Goodwin as Trustees to assume and take control of said lot. It being all of Lot No. 21 Town Plat of the Town of El Dorado, except that part sold to the Trustees of the Methodist Episcopal Church South see Record Book E, p. 424. And our desire and wish is that the Trustees for Warner Brown Heirs act in concert with the Trustees of the M. E. Church South acting for the Church situated on said Lot in improving, fencing and beautifying said cemetery & church lot and such other matter as may insure to the benefit of both sets of Trustees and as others not heirs of Warner Brown have been permitted to bury their friends on said lot we direct and request that the Trustees herein appointed recognize and make good such permits and if they see proper to grant or sell other like privileges, the proceeds to be kept in trust for repairs of said grounds or to the erection of a suitable mark at the grave of the Donor Warner Brown or both & should either of the Trustees mentioned herein refuse to act, or die, to perpetuate a Trusteeship to said Cemetery property it shall be the duty of the other two to select some one to act as Trustee and in this manner keep up the full corps of Trustees for all time and to the end that all may know the situation of this property we recommend that the trustees have this placed upon the Record of Deeds in the County Clerk's Office and also made of record in the books of minutes kept by Trustees of the M. E. Church situated on part of said lot."

(e) to have the cemetery suitably landscaped; and (f) to provide it with continuous care[2].

After the contract was made and the deed delivered and all the graves moved from the 86-foot strip and, just as the Church was about to commence the erection of a $400,000.00 educational building on the 86-foot strip, some question arose as to the validity of the conveyance by the Cemetery Trustees to the Church. Thereupon, the Church brought this suit, which resulted in the decree previously mentioned. The appellants here are some of the named heirs of Warner Brown resisting the suit. They were sued as representatives of all of the other heirs of Warner Brown; and on appeal they make the three points now to be stated.

I. The appellants say: "*This is not the character of action contemplated by Section 27-809 Ark. Stats., and therefore plaintiffs were not entitled to maintain the same as a class action.*" Section 27-809 Ark. Stats. reads:

"Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring all before the Court within a reasonable time, one or more may sue or defend for the benefit of all."

Our Statute is a recognition of the equity idea of class representation and we have a number of cases bearing on the matter of class representation. A few of them are: *Connor* v. *Thornton,* 207 Ark. 1113, 184 S. W. 2d 589; and *Holthoff* v. *State Bank,* 208 Ark. 307, 186 S. W. 2d 162. Appellants rely on the case of *Hunt* v. *McWilliams,* 218 Ark. 922, 240 S. W. 2d 865, rather than the cases on class representation. We hold that the case at bar affords a classic example of the application of our Statute on class representation. Here the evidence showed that no one was able to name all of the heirs of Warner Brown. One of his descendants, who was a witness in this case, was Walter W. Brown, Jr. He testi-

[2] The records in the office of the State Board of Health do not list the Warner Brown Cemetery as registered in keeping with § 82-402 Ark. Stats.

fied that Warner Brown died intestate on December 3, 1853, having been married three times and having been the father of twenty-six children; that descendants of Warner Brown had been located in nearly every State in the Union; and that it was impossible to determine the names and addresses of the many heirs of Warner Brown.

Mr. Joe K. Mahoney testified that he had lived in Union County for more than seventy years and had practiced law in El Dorado for many years; that some of his ancestors were buried in the Warner Brown Cemetery; and that he had occasion in his practice to attempt to determine the heirs of Warner Brown. Mr. Mahoney said that he did not know any person who could make an affidavit as to who were all the heirs of Warner Brown; and that they were literally scattered to the four corners of the world.

Under these facts, we think that a sufficient showing was made for the application of our Statute on class representation. The appellants, Slade, et al, defended the action in good faith and, as far as we can envision, made all possible defenses that anyone could have made: thus, they fulfilled the spirit of the class representation Statute. In 39 Am. Jur. 919, cases from this and other jurisdictions are cited to sustain this statement:

"The doctrine of class representation applies to defendants as well as plaintiffs. In cases where the persons who have a common interest or a common right and who properly should be made parties defendant to an action are too numerous to be conveniently brought into court, equity allows the suit to be brought against one or a few individuals who are in fact the representatives of the larger class."

II. The appellants say: "*The surviving trustee was without authority to make the appointment of the successor trustees and therefore the successor trustees were not the duly qualified and acting trustees on the date the quitclaim deed was delivered.*" In the argument on this point, appellants point out that no record has ever

been found of the terms of the original deed made by Warner Brown to the Trustees of the Cemetery and, therefore, there is no showing that the surviving heirs of Warner Brown had the authority to appoint any trustees, as was done by the November, 1892 instrument. Appellants continue their argument by saying that the alleged trustees in 1954 had not been duly appointed as trustees and therefore had no power to make the contract with the Church and convey the 86-foot strip that had been a portion of the Cemetery. It is unfortunate that the original conveyance by Warner Brown to the three trustees was never placed of record, but that is the condition that confronts us in this record. If the three original trustees had no right to appoint successor trustees, then ever since 1892 people have been acting as trustees without authority. But the point is that persons have acted as trustees and that the court of equity in this case has sanctioned such actions.

It is elementary law that a court of equity will appoint trustees in any proper case in order to prevent a failure of the trust. This was recognized by our Court in the early case of *Conway, et al., ex parte,* 4 Ark. 302 (Loc. Cit. 361):

"But even suppose that the ten trustees, who signed the deed, were incompetent to take, still, the other five being competent, a court of equity would not permit the trust to fail; for it is a rule in equity which admits of no exception, that a court of equity never wants a trustee. Whenever a trust is created, either by deed or will, or by operation of law, and no person is appointed trustee, equity will follow the estate, and cause the trust to be executed. If no trustee is named, or he dies, or the trust devolves upon an incompetent person, the trust shall prevail, and the Chancellor will appoint trustees. *White* v. *White, Bro. C. C.* 12, *Atty. Gen'l* v. *Rupin,* 2 Peere Wms. 425, *Ellison* v. *Ellison,* 6 Ves. 663, 2 Story's Equity 241, Co. Lit. 113 a. n. l. *McCarty* v. *Orphan Asylum Society,* 6 Cowen, 337."

Again, in Vaughan v. Shirey, 212 Ark. 935, 208 S. W. 2d 441, we said:

"It is familiar law that equity will not permit a trust to fail through the failure of the named trustee to serve, but will, in that event, appoint another trustee . . . "

When Warner Brown conveyed the cemetery to Trustees in 1848, a trust was created. So, even if W. W. Brown, Jr., Alta Goodwin and Dan Lee Staples were not the duly appointed, qualified and acting Trustees of the Warner Brown Cemetery at the beginning of this suit, they certainly were such after the decree of the Chancery Court in this case, because the decree not only recognized them as the Trustees, but recites: " . . . and their appointment are approved and confirmed; . . ." Thus, the Chancery Court, which at all events had the residual power to appoint trustees, approved and confirmed the appointment of the said Trustees and likewise approved the execution of the deed which they made.

III. The appellants say: "*The trustee grantors named in the deed were without the power or right to execute, acknowledge and deliver said conveyance and in so doing their actions were in violation of the original purposes of the trust and constituted a breach thereof.*" This is the most serious question presented by the appeal. If we knew what the original conveyance made by Warner Brown recited, we would know whether the trustees were empowered to make a conveyance of a portion of the property and our question would be answered one way or the other. But, in the absence of such positive information, we have to apply general principles of law. At the outset, we state that what the Trustees did in this case was a very fine, common-sense solution of serious difficulties. In 1848 Warner Brown could hardly have seen that in the next hundred years El Dorado would become an oil metropolis and grow from a town of several hundred people to a large and flourishing city; he could hardly have seen that the little cemetery by the Church would be abandoned for cemetery purposes (the evidence shows that there have been no burials in this cemetery since 1938); and he could hardly have seen that in a hundred years some of the graves would

be obliterated and some of the monuments destroyed by time.

What Warner Brown wanted was the permanent maintenance of the burial places of those whose bodies might be interred in the cemetery. The Cemetery Trustees in 1954, by executing the contract and deed with the Church, have accomplished that evident purpose: for all of the bodies theretofore interred in the 86-foot strip have been removed, and the remaining portion of the cemetery is guaranteed continuous care. A very fine and sensible solution has been made by the Trustees[3]. We find no case exactly in point with the situation here, but equity should be as alert to approve common sense solutions as parties are to make them. In *Renn* v. *Renn,* 207 Ark. 147, 179 S. W. 2d 657, we said:

"A court of conscience must keep the granted relief abreast of the current forms of iniquity. We should never naively refuse relief against fraud simply because there is no similar instance of such fraud in any of the books."

The converse of the quoted statement applies here: a good sensible solution has been made which carries out the evident purpose of Warner Brown; and equity should approve such a solution, even though no case like this one appears in the books.

---

[3] There is a conflict in the cases as to the power to sell cemetery lands for other purposes. In 14 C. J. S. 80 the text says: "The power to alienate cemetery lands is restricted, but the fee of a cemetery may be sold subject to the rights of lot owners." (Here there is no showing that any cemetery lots were ever sold.) Among other cases which sustain the quoted text are: *City of Tacoma* v. *Tacoma Cemetery,* 28 Wash. 238, 68 Pac. 723; *McDonald* v. *Monongahela Cemetery* (Pa.), 75 Atl. 38; and *Laurel Hill Cemetery* v. *Sargent* (Calif.), 238 Pac. 732. Contrary to the above quoted text, there is an Annotation in 130 A. L. R. 250 wherein cases are cited to sustain this text: "Where land has been appropriated for use as a private cemetery, title thereto cannot thereafter be transferred by sale, lease, devise, or descent in any manner so as to affect the rights incident to the Private Cemetery." *A fortiori,* the foregoing text would apply also to public cemeteries. But we do not have to decide in this case which rule is correct, because our decision is based on the doctrine of *cy pres,* which is not considered as a sale but a kindred use of the trust property.

The Trial Court rested its decree on the *Cy Pres* Doctrine; and that seems very reasonable[4]. There is a splendid recent volume entitled "The Cy Pres Doctrine in the United States," written by Edith L. Fisch. It is therein stated that the phrase "*cy pres*" comes from the French expression "*cy pres comme possible,*" which is translated: "as near as possible." Bogert, in "The Law of Trusts and Trustees," Volume 2, A, section 431, says that the *Cy Pres* Doctrine is:

". . . the principle that equity will, when a charity originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies."

Arkansas, along with twenty-eight other States in the American Union, has approved the *Cy Pres* Doctrine. Here are some of our cases involving it: *State National Bank* v. *Bann,* 202 Ark. 850, 153 S. W. 2d 158; *State ex rel Attorney General* v. *Van Buren School Dist.,* 191 Ark. 1096, 89 S. W. 2d 605; and *McCarroll* v. *Grand Lodge,* 154 Ark. 376, 243 S. W. 870.

In the case of *Bossen* v. *Women's Christian National Library Assn.,* 216 Ark. 334, 225 S. W. 2d 336, we said:

"In 10 Am. Jur. Charities, Sec. 51, it is said: 'The American Law Institute takes the position that the trustee of a charitable trust can properly sell trust property if a power of sale is conferred in specific words, or such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that the property was to be retained in specie. Even a prohibition against the sale will not prevent the court from authorizing the trustee to make sale, in case of necessity

[4] Quite apart from the *Cy Pres* Doctrine, we cite for information purposes an Annotation in 168 A. L. R. 1018, and particularly that portion on page 1031 dealing with charitable trusts.

arising from unforeseen change of circumstances, and to apply the proceeds to the purposes of the trust. Thus, where the circumstances existing at the time of the creation of a charitable trust have changed to such an extent that in order to carry out properly the charitable intention of the donor, it is necessary to dispose of the trust property and devote the funds to the acquisition of a more suitable location, a court of equity will authorize the sale of the property.' See, also, Restatement, Trusts, Vol. 2, Secs. 380, 381 and 399; Bogert, Trusts and Trustees, Vol. 2, Sec. 438."

We reach the conclusion that the decree of the Chancery Court should be affirmed under the *Cy Pres* Doctrine.

Affirmed.

OMOHUNDRO *v.* SALINE COUNTY.

5-897 289 S. W. 2d 185

Opinion delivered April 16, 1956.

Appellant Pro Se, for appellant.

H. B. Means, W. R. Thrasher and *Richard M. Hart,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee, Saline County, condemned about 1.75 acres of land belonging to appellant for highway purposes along U. S. Highway 167 on a petition filed by the State Highway Department. Appellant's claim for $15,000.00 in damages was allowed by the Saline County Court in the sum of $102.54. On appeal to circuit court the jury fixed appellant's damages at $300.00 and she has appealed from a judgment based on this verdict.

Able and competent attorneys represented appellant in circuit court but she represents herself on this appeal. Appellee has very obligingly furnished us with a proper abstract of the record and statement of the issues involved, all of which is understandably lacking in the brief of appellant, who is not an attorney.

According to a stipulation and the proof adduced by appellee, the 1.75 acres were taken from the western edge of a 50-acre tract owned by appellant. The entire tract is low, unimproved wooded land that is traversed by creeks and subject to considerable overflow. An experienced real estate agent placed a value of $30.00 per acre on the entire tract and stated that the value of the remaining lands had not been diminished by the taking nor had such lands suffered any special damage thereby. A drainage engineer testified that a slight change in the channel of a creek resulting from the highway construction improved rather than injured the drainage of said lands. The lands were assessed for tax purposes at $3.00 per acre.

Appellant was the only witness in her own behalf. She testified that she paid $2,500.00 for the 50 acres about 35 years ago; that there was a knoll or high place where the lands were taken which constituted a prospective house site and without which the balance of the land was rendered worthless to her; and that there had been a total loss in value of the entire 50-acre tract of $300 per acre. She had cut some timber from the lands and ad-

mitted she had about the same amount of timber as when she first bought it. By agreement the jury was permitted to view the lands in question.

Appellant first contends the transcript lodged by her is inaccurate and does not contain a true record of the proceedings below. Upon the same contention being made in circuit court, a hearing was conducted pursuant to Ark. Stats. Sec. 27-2129.1. A record of this hearing fully supports the trial court's conclusion that there were no errors or deficiencies in the transcript of the proceedings. In this connection appellant also argues that six or seven acres of her land were actually taken instead of the 1.75 acres as stipulated by counsel of the parties at the trial. Even if this issue could be raised for the first time on appeal, there is nothing in the record to substantiate this assertion or to show that the stipulation as to the quantity of land taken was either inaccurate or improvidently entered into by the attorneys.

Proper objection was made to evidence offered by appellee as to the assessed valuation of the lands in question for tax purposes. This evidence was admissible under Ark. Stats. Sec. 76-521. While the statute is not controlling, the jury had a right to consider evidence of the assessed valuation along with all the other evidence in ascertaining the value of the lands taken. *Washington County* v. *Day,* 196 Ark. 147, 116 S. W. 2d 1051. The award of $300 damages made by the jury was several times the amount fixed by witnesses for appellee. Viewed in the light most favorable to appellee, as we must in determining its sufficiency, the evidence is substantial and sufficient to support the verdict. The judgment is accordingly affirmed.

5-916 289 S. W. 2d 183

Opinion delivered April 16, 1956.

[redacted]

John B. Driver, for appellant.

W. J. Cotton, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee to quiet his title to 170 acres of land. The appellants intervened and asked that they be permitted to show title in themselves to part of a twenty-acre tract that was claimed in its entirety by the appellee. The suit became in substance a boundary line dispute and resulted in a decree fixing the boundary along an old fence line that crosses the tract. The appellants contend that the line should have been fixed along a branch that runs through the tract.

The decree is in accordance with the weight of the evidence. Neither side established, or even attempted to establish, a perfect record title to the land. The chancellor, in rejecting the appellee's assertion of title to the entire twenty-acre parcel, found that the appellants and their predecessors in title had been for more than seven years in adverse possession of that part of the tract lying south and east of the fence line. The decree accordingly quieted the appellants' title to that portion of the land. The chancellor confirmed the appellee's title

to the unimproved portion lying outside the fence upon proof of tax payments for more than seven years under color of title. Ark. Stats. 1947, § 37-102.

In claiming more land than the chancellor awarded them the appellants rely upon the testimony of several witnesses who say that the branch has long been understood to be the line. This testimony may be true, but it falls short of establishing a record title, or adverse possession, or an agreed boundary line, or any other fact of substantive importance. It shows at most the existence of a general belief about the line, but of course such a belief could not have the effect of vesting or divesting the title to real property.

The appellants think the chancellor erred in allowing the appellee to use affidavits as proof, in spite of the fact that the appellants intervened and contested the case. Ark. Stats., § 34-1906. It is true that affidavits were attached to the complaint; but the trial was heard upon testimony adduced in open court, and there is nothing to indicate that the chancellor gave any weight to the affidavits in the record. In any event we try the case *de novo,* and without regard to the affidavits the decree is supported by the preponderance of the testimony.

A third contention is that equity does not have jurisdiction to quiet the title to land not in the plaintiff's possession. The land outside the fence, however, either was in the plaintiff's possession or was wild and unimproved, so that the case necessarily falls within the court's jurisdiction. Ark. Stats., § 34-1901.

Affirmed.

5-920 289 S. W. 2d 186

Opinion delivered April 16, 1956.

[redacted]

Lawrence Dawson and *Coleman, Gantt & Ramsay,* for appellant.

Brockman & Brockman, for appellee.

PAUL WARD, Associate Justice. Virgil Finley Graham died in Pine Bluff, Arkansas, October 20, 1954, leaving a will by which his entire estate was left to certain friends and relatives. Appellants, Elnora Graham and Hazel Raffety Lemons, were named executrices. The deceased was thought to be unmarried and childless, and his will did not mention either a wife or a child.

When the will of Mr. Graham was offered for probate, appellees, Virgil Hill and Ada May Graham, intervened and claimed the estate as the adopted child and widow, respectively, of the deceased.

Testimony was introduced with respect to the above mentioned claims, and at the conclusion the Probate Judge found that appellees had sustained their claims, and accordingly entered a final order declaring Virgil

Hill [or Virgil F. Graham, Jr.,] to be the adopted son of the testator and entitled to inherit the entire estate, subject to the dower interest and statutory allowances of Ada May Graham who was found to be the widow of the testator.

From the above order appellants prosecute this appeal, seeking a reversal on three separate grounds which we discuss below.

1. The first ground relied on by appellants is stated in these words: "Appellees did not discharge the burden of proof which rested on them to establish their respective claims." In our opinion the great weight of the testimony shows that the testator and Ada May Graham were married in Illinois in 1907 and lived together as husband and wife for several years, and that there is no evidence that they were ever divorced. It is also conclusively shown that Mr. and Mrs. Graham adopted appellee, Virgil Hill, on May 12, 1919. We do not believe appellants can seriously question the above statements. An Illinois marriage license was introduced showing it was issued November 25, 1907, and that the marriage of Virgil Finley Graham and Miss Rosa May Whitlock was solemnized on the same day. Appellee, Ada May Graham, testified that they were so married, and she and several witnesses living in Pine Bluff said they lived together in that City as husband and wife. The testimony shows that there was an order entered in the Probate Court of Jefferson County, dated May 12, 1919, showing the adoption of one Orbett Hale by V. F. Graham and Ada May Graham. Introduced also was a copy of the petition of adoption, signed by V. F. Graham and Ada May Graham, dated April 18, 1919, asking to adopt Orbett *Hale,* a male child, under the name of Virgil F. Graham, Jr. Numerous witnesses stated that they knew of the adoption and knew that the boy lived in the home of Mr. and Mrs. Graham. There is however some conflict in the testimony as to how long Virgil Hill lived in the home of Mr. and Mrs. Graham, but that feature will be discussed presently. We think the testimony sustains the trial court on this point.

2. Appellants next contend that "the jurisdictional defects in the order of adoption were not cured by Act 408 of 1947." The basis for this contention is as follows: It is conceded that the order of adoption fails to show Virgil Hill was a resident of Jefferson County or that the consent of his parents or parent was obtained; and it is further conceded that these defects would have rendered the order of adoption void [under numerous decisions of this court] prior to 1947. Section 3 of said Act 408 provides, generally, that a decree of adoption, theretofore or thereafter made, is not subject to attack "for irregularities or jurisdictional defects" after two years, provided the child has lived with the adoptive parents for that length of time.

Section 3 above mentioned was construed in *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623, and *Brunk* v. *Merchants National Bank, Executor,* 217 Ark. 499, 230 S. W. 2d 932, and held to be a valid statute of limitations. In the latter case we said: ". . . an attack on the original order of adoption is barred by limitations under the provisions of Section 3 of Act 408 of the Acts of 1947."

We cannot agree with appellants' contention that the greater weight of the testimony does not support the trial judge's finding that Virgil Hill lived with his adoptive parents for two years after the date of adoption. While the testimony is not entirely definite and harmonious regarding dates and periods of time, as might be expected after a lapse of nearly 30 years, yet we think it clearly supports the court's finding. One witness who lived across the street from the Grahams about 1919 says they had the child for as long as two years. Mrs. Graham said they kept the child about 4 years, that she took him with her to St. Louis in 1925, and then turned him back at the age of five and one-half years, and that she and Mr. Graham lived together until about 1924 or 1925. Mrs. Watts, who, with her husband, seemed to have had custody of the child before adoption, stated that Mr. and Mrs. Graham kept him until he was five and one-half years old, and for more than two years after the date of adoption. Mr. Watts said he could not re-

member dates very well but thought Mr. and Mrs. Graham kept the child more than a year. W. E. Bobo said Mr. and Mrs. Graham were living together in 1922 or 1923 and that they had the child with them at that time.

Mrs. Wooten, however, testified that the Grahams were married in 1918, and that Mrs. Graham left for St. Louis in 1920 when the child was turned back. Mrs. Cameron stated that she knew Mr. Graham in 1920, that he was not married, and that he had no child living with him. Mrs. Lemons thought, but couldn't swear, that Mr. Graham was not in Pine Bluff from 1920 to 1925.

In view of the discrepancies in the testimony we cannot say that the trial judge, who heard and observed the witnesses, was not justified in finding that the Grahams kept the child two years after the date of adoption.

3. We do not agree with appellants' contention that "the Probate Code has made a change in the law with regard to the pretermission of children," as applied to this case. As before noted, Virgil Finley Graham did not mention his [adopted] son in his will, and appellants take the position that this fact did not render him intestate as to this son, due to a change in the law made by the [new] Probate Code—Act 140 of 1949. Appellants concede the law was otherwise before the enactment of the Probate Code in 1949.

The statutes applicable to pretermitted children, before the enactment of the Code in 1949, were Ark. Stats. § 60-119 and § 60-120. The former applies where the will is made *before* a [pretermitted] child is born and the latter where the will is made *after* the child is born, as in the case under consideration. The above statutes were replaced in the 1949 Code by Ark. Stats. (Sup.) § 60-507(a) and § 60-507(b). Appellants' argument is grounded on the change of the wording in said section 60-507(a). A comparison of this section with its counter part, § 60-119, reveals that the former mentions an "adopted" child while the latter does not. It is reasoned therefore by appellants that, since no reference is made to an "adopted" child in Section 60-507(b) [the

section applicable here], the legislature meant to express a difference between a "natural" child and an "adopted" child, and so meant to exclude the latter.

We are not convinced by appellants' argument, for two reasons. First, we have many times held [as conceded by appellants] that the word "child" includes an "adopted child" in this kind of a situation. Second, there appears to be a good reason for the above mentioned change in wording. In Section 60-119 it is not literally correct to include an "adopted" child in the phraseology "When a testator shall have a child *born* . . . " Although an "adopted" child may occupy the same legal status as a "natural" child, yet it is not correct to say the "adopted" child is *born* to its adoptive father. We think, therefore, the only significance attached to the change made in Section 60-507(a) is the indication of an effort to use correct phraseology.

Affirmed.

MINGE *v.* MINGE.

5-945 289 S. W. 2d 189

Opinion delivered April 16, 1956.

S. L. Richardson, for appellant.

Herrn Northcutt and *Oscar E. Ellis,* for appellee.

SAM ROBINSON, Associate Justice. On December 6, 1954, appellee, Wanda Va Minge, was granted a divorce from appellant, Lehman M. Minge, and she was awarded custody of their five children, ranging in age from thirteen months to seven years. Appellant was ordered to pay $115.00 per month as support for the children. Only about four months later, on April 12, 1955, appellee filed a petition alleging that appellant was $486.00 behind in the payment of support as ordered by the court, and asked that he be cited for contempt. In response, appellant asked that the monthly payments of $115.00 be reduced, or that he be given custody of the children. The chancellor denied a reduction of the $115.00 per month, denied change of custody of the children, and committed the appellant to jail for contempt. The court also ordered that appellant's parents be allowed to have the children two Sundays out of each month, provided a bond was made in the sum of $1,000.00 for their return, as directed by the court.

Appellant purged himself of the contempt by paying the delinquent support money, and was released from jail; hence, the question of whether the court erred in holding him in contempt is moot. *Ex Parte Rubly,* 222 Ark. 423, 261 S. W. 2d 4. No facts are shown that would justify a change in custody of the children. As to whether the court erred in denying a reduction in the $115.00 per month support for the five children, appellant has married again since he was divorced by appellee, but it appears his present wife is self-supporting. He earns a salary of about $275.00 per month; after he sends appellee $115.00 per month for the children, he has remaining about $160.00, and he says he cannot live on that amount. But, there is no showing that he cannot live on $160.00 as well as his five children can live on $115.00 per month; in fact, it appears that on $115.00 per month the children can have only the barest necessities, and the monthly payments cannot be reduced without causing the children actual suffering.

We cannot say there was an abuse of discretion on the part of the trial court in requiring a $1,000.00 bond guaranteeing that when the children are taken on Sunday they will be returned to the mother, as directed by the court.

Affirmed.

MITCHELL *v.* MILLER.

5-902 289 S. W. 2d 523

Opinion delivered April 23, 1956.

Herrn Northcutt and *W. G. Wiley,* for appellant.

W. E. Billingsley and *Chas. F. Cole,* for appellee.

LEE SEAMSTER, Chief Justice. John T. Mitchell died testate in Izard County, Arkansas, on January 24, 1954. Thereafter, on May 23, 1955, an instrument dated May 1, 1946 was admitted to probate by the Izard Probate Court as Mitchell's last will and testament. The appellant, Forrest Mitchell, has appealed from said order admitting the will to probate.

This is the second appearance of the instant case before this court. The first case is found in *Miller* v. *Mitchell,* 224 Ark. 585, 275 S. W. 2d 3, whereby this court held that the will in question was properly executed. The appellant now contends that the deceased did not have mental capacity to make a will, at the time of its

execution; also that the deceased was unlawfully coerced and influenced to execute said will.

The record discloses that the deceased had been married twice, Susie Mitchell being his first wife and the mother of the deceased's only child, the appellant herein. The deceased and the appellant's mother were separated when appellant was about two years old and they remained separated for a period of fourteen years. When the appellant was sixteen years old his parents were re-united and he lived with them until he was twenty-one years of age.

In 1934, a short time after the death of the appellant's mother, John T. Mitchell married Martha Mitchell, who is now his widow. There were no children born of this union, however, Martha Mitchell had two sons, John F. Miller, the appellee here, and L. E. Owens. These two step-sons worked the Mitchell place and farmed it until the time of John Mitchell's death, a period of twenty years.

Witnesses for appellant testified that deceased was injured by a runaway team in 1944 and was accidentally shot in the back of the head in 1945: that the two incidents affected the deceased's mind so that thereafter he was not mentally capable of transacting his business; that deceased was dominated by his second wife to the extent that she took over and managed his business affairs; that at times the deceased would not recognize them, however, when they identified themselves he would be glad to see them. One witness testified that he reached an oral agreement with the deceased to buy some of the deceased's land, however, the wife stopped the sale by saying that the deceased had no land for sale. A similar incident occurred when the wife stopped the sale of two heifers.

Appellee presented evidence to the effect that the deceased was mentally competent at the time he made and executed his will and that no one coerced him or interfered with his making of the will. Three disinterested witnesses testified that the deceased was satisfied with

the preparation of his will by an attorney and that he was mentally competent at the time of the execution of the will; that thereafter, the deceased continued to transact his own business until shortly before the time of his death in 1954.

We think the evidence as to the condition of the deceased's mind, at the time he executed the will, preponderates in favor of his competency. The evidence of undue influence and coercion is inconclusive and of a spotty nature. It must be concluded that the deceased knew the provisions of his will and that these provisions were satisfactory to him. He had ample opportunity to change the provisions of the will, if he had so desired.

This court has held many times that the burden of **proving mental incapacity** to make a will rests on the one alleging it. *Thiel Special Adm.* v. *Mobley,* 223 Ark. 167, 265 S. W. 2d 507. There is no evidence of undue influence being exercised by the principal beneficiaries upon the deceased, at the time of the execution of the will. *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695. The testimony reveals that the beneficiaries took no part in the preparation of the deceased's will nor did they make any suggestions to the deceased as to the disposition of his property.

The Chancellor saw and heard the witnesses and admitted the will to probate. We cannot say his findings are against the preponderance of the evidence.

Affirmed.

KELLEY *v.* COLDREN.

5-929 290 S. W. 2d 424

Opinion delivered April 23, 1956.

[Rehearing denied June 11, 1956.]

Giles Dearing, for appellant.

James Robertson, for appellee.

J. Seaborn Holt, Associate Justice. This is a suit for specific performance of an option contract to purchase real estate. Appellant, Mrs. Bertha Kelley (as vendor) and Mrs. Sarah Coldren (as vendee) on April 7, 1947, entered into an option agreement containing these provisions: "That Vendor is the owner of the following real estate situated in Cross County, Arkansas, described as follows, to-wit: Part of the West Half (W ½) of the West Half (W ½) of Section 34, bounded and described as follows: [then follows a complete metes and bounds description]. It is the understanding of the parties to this contract that the Arkansas State Highway Department contemplates moving Highway No. 64 to a route North of its present location, and possibly said Highway will cross the land and lots set out above. For and in consideration of one ($1.00) dollar cash in hand paid by Vendee, the receipt of which is hereby acknowledged, Vendor agrees with Vendee that if said Highway No. 64 crosses her land or lots above described, she will sell Vendee an acre of land on the South side of said Highway to be selected by Vendee for the sum of Five Hundred ($500.00) Dollars, provided said Highway is built within seven (7½) and one half years from this day. It is agreed that when said highway shall have been completed and opened for use, then within a reasonable time thereafter the vendee shall select said parcel of land on the south side of said highway, notwithstand-

ing the fact that the time limit mentioned in this agreement may not then have expired. Vendee agrees that if vendor plats said lands adjacent to said highway, when and if it is built across said lands that lots as set out above she will accept lots and parts of lots according to said plat sufficient to make one acre, provided she shall have at least Two Hundred (200) feet frontage on said highway."

Appellant, in her answer to appellee's complaint for specific performance of this option contract, admitted the execution of the above option and also that the route of Highway No. 64 was changed so that it does cross her lands described therein, but denies that said Highway was completed or built and opened to the public for use within the 7½ years after the date of the option.

On a trial the chancellor entered a decree on the following fact findings: "The court finds that the route of Highway No. 64 was changed and the new route crossed the lands of the defendant set out in the Option Contract and said Highway was built within 7½ years from the date of the signing of said Option Contract, and that the plaintiff has performed those conditions imposed upon her under the Option Contract within a reasonable time after her rights had accrued and the happening of the contingency upon which the Option Contract was conditioned, plaintiff having on the 6th day of October, 1954, exercised her option and selected the following acre of land on the South side of said Highway No. 64 to-wit: . . . And after the refusal of the defendant to execute and deliver her deed to plaintiff for said acre of land, plaintiff did on the 18th day of February, 1955, file this suit for specific performance of said Option Contract, and paid into this court $500.00 as a tender to the defendant in full consideration for the payment of said acre of land, and the court finds that specific performance of said Option Contract should be directed herein."

For reversal appellant earnestly contends that the court erred in finding that the highway had been built and was open for use within 7½ years from the date

of the option, and also that the court erred in finding that appellee had exercised her option and selected the acre of land in question as required under the terms of the option agreement.

After a review of all the testimony, which we do not detail, we have concluded that the findings of the chancellor were not against the preponderance thereof. It appears clear to us that the relocated Highway No. 64 across appellant's property had been substantially built or completed when the appellee, within a reasonable time thereafter, exercised her option to select and buy the one acre tract in question, on October 6, 1954. It was then graveled and in use by the public. We find no provision in the option requiring black-top paving in building the highway, as appellant insists was contemplated. In fact, we find in it no provision for any kind of paving.

While it is true, as appellant argues, that the cited $1.00 consideration was not a valuable consideration, but merely nominal, and that appellant's offer to sell the one acre tract here might have been withdrawn by her had she acted before appellee's acceptance of October 6, 1954, however, the evidence shows that she did not act to withdraw said offer before appellee accepted. "It is the acceptance, while outstanding, which gives an option not given upon a consideration vitality," *Hogan* v. *Richardson,* 166 Ark. 381, 266 S. W. 299 and *Lion Oil Refin. Co.* v. *Flocks,* 199 Ark. 871, 136 S. W. 2d 163.

Appellant also argues there was no description of the one acre tract in the Option Contract sufficient to warrant specific performance. We do not agree. The option contained a complete description of all of the land out of which the one acre tract was to be selected, and carved, and provided that appellee should select this one acre tract "on the South side of said Highway. . . . and have at least Two Hundred (200) feet frontage on said highway." This was exactly what appellee did. We hold that this description was sufficient, along with proof adduced, to furnish the key to identify the one acre tract, and in accord with our long established rule that, "the contract [for specific performance] must

disclose a description which in itself is definite and certain, or one which is capable of being made certain by other proof, the contract itself furnishing the key by which the property may be identified," *Routon* v. *Walthour-Flake Co., Inc.*, 221 Ark. 354, 253 S. W. 2d 208.

Finding no error, the decree is affirmed.

[redacted]

MANILA SCHOOL DIST. No. 15 *v.* SANDERS.

5-896 289 S. W. 2d 529

Opinion delivered April 23, 1956.

[redacted]

Oscar Fendler, for appellant.

Bruce Ivy, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant, Manila School District No. 15 of Mississippi County (hereinafter designated as "School District"), filed this action against Earl Sanders, the Johns-Manville Sales Corporation, the Hartford Fire Insurance Company, and five other insurance companies. The complaint alleged that Sanders contracted to put a Johns-Manville roof on the gymnasium building of the School District; that the roof leaked and was defective, for which Johns-Manville Corporation was liable; that the School District carried insurance on the gymnasium building with the Hartford

Company and the other five insurance companies, containing coverage against windstorm and hailstorm, and that the insurance companies were liable for some of the plaintiff's damages; that, after several unsuccessful efforts to fix the leaks in the roof, Sanders removed several sections of the roof from the gymnasium building, without taking proper precautions against possible rain; and that a rainstorm damaged the floor of the gymnasium to the extent of several thousand dollars, for which Sanders was liable.

Before trial, the Johns-Manville Sales Corporation paid the School District $274.00, and the action was dismissed against that company. Likewise, the School District, after conceding certain payments to have been received, dismissed its complaint against all of the insurance companies. Thus Sanders remained as the sole defendant. In his answer and cross-complaint, Sanders claimed, *inter alia*: (a) that he put the roof on the gymnasium according to the plans and specifications furnished him; (b) that he did extra work on the roof in the amount of $473.00 for which he prayed judgment; and (c) that he did not fail ". . . to take any precaution to protect the roof or interior of the gym from being flooded with water either before or after the roof was exposed, and denies that his crew rushed off the job and allowed the water to pour into the gym and flood the floor of the gym."

The case was tried to a jury and resulted in a verdict for Sanders and the School District has appealed, presenting the points to be later discussed, after we have first made some observations on the record before us.

I. *The Record Before Us.* When the appellant gave notice of appeal, it also designated the points upon which it would rely on appeal and designated that portion of the record which it desired.[1] Such action on the

[1] We copy below the designation of the record on appeal and statement of points, as made by appellant, at the time notice of appeal was given: "In accordance with §§ 8 and 11 of Act 555, Acts of the Arkansas General Assembly, 1953, I, Oscar Fendler, as attorney for the plaintiff, Manila School District No. 15, of Mississippi County, Arkansas, which has filed its Notice of Appeal, do hereby designate the contents of record on appeal and make its statement of the points on which it intends to rely on the appeal.

part of the appellant was in full compliance with Act 555 of 1953, which is the applicable practice Act in such cases. If appellee, Sanders, had desired any additional portion of the record to be brought up, he had only to follow the provisions of Act 555. He did not designate any additional record to be furnished, and so he cannot now be heard to say that some portion of the testimony not before us caused the Trial Court to make certain rulings. Section 12 of Act 555 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." (Italics supplied.)

"Designation of Contents

"I. All pleadings and other written matter that has been filed with the Clerk.

"II. The instructions to the jury given by the Court and all instructions to the jury offered by the plaintiff, or proposed by the plaintiff whether given by the Court or refused by the Court. Also all objections that plaintiff made to instructions as finally given by the Court, together with any other objections or reasons offered by plaintiff's counsel in regard to any instructions.

"III. The testimony of R. C. Fincher.

"Statement of Points

"I. The Court erred in giving Court's Instruction No. 4, because this Instruction does not correctly state the law relating to 'Act of God'; and because that there was no substantial evidence of any damage being caused by 'Act of God' or by 'some other cause or causes' on and after March 1, 1954, the date that the Court and parties agreed was the time of alleged damage to the gymnasium floors.

"II. The Court erred in giving Court's Instruction No. 5, as modified; because same is only a partial statement of the law relating to 'Act of God'; because the Court should have added to this Instruction the words specifically requested by the Plaintiff; and because the Instruction made no reference to the defendant Sanders having the burden of proving this defense.

"III. The Court erred in refusing to give plaintiff's Instruction No. 3, because this proposed Instruction correctly defined the law of 'Act of God' and placed the burden of proving same upon the defendant who relied thereupon.

"IV. The Court erred in declining to give plaintiff's proposed Instruction No. 2, because this Instruction correctly stated the law of indemnity under insurance policies, and its omission could have easily confused the jury in concluding that plaintiff has already been paid fully for this alleged tort of defendant Sanders.

"V. The Court erred in refusing to admit the testimony of R. C. Fincher in regard to the reasons for the Insurance Company's making any payments to the plaintiff for alleged storm damage."

We dwell on this matter in detail because appellee insists in several places in his brief that certain testimony not before us would explain away arguments that the appellant makes.[2] The answer to such insistence of appellee lies in the fact that the appellee should have designated such additional portions of the omitted evidence as he thought material and that it is too late now for him to urge before us that certain omitted evidence was material. In the recent case of *Griffin* v. *Young,* 225 Ark. 813, 286 S. W. 2d 486, we held that we can no longer in a "point-designated-short-record-appeal," indulge any presumption that something omitted explains away the point which the appellant aptly designated.

II. *Instructions Relating to "Act of God."* The Court gave to the Jury the Court's Instructions Nos. 4 and 5, which read:

"COURT'S INSTRUCTION NO. 4. On the other hand, if you find that the alleged damage to the gymnasium floor of February or March, 1954, of the plaintiff School District was not caused by the negligence of the defendant Sanders, but was caused by an Act of God or from some other cause or causes, your verdict will be for the defendant.

"COURT'S INSTRUCTION NO. 5. Under the law an 'Act of God' is a violent disturbance of the elements, such as a storm, tempest or flood, and it must be the immediate, proximate and sole cause of the loss or damage, not concurred in by the negligence of the defendant, his agents, servants or employees. The Act of God which excuses must be not only the proximate cause, but the sole cause."

To these instructions the School District objected generally and specifically,[3] claiming, *inter alia,* that the

[2] The following appears in appellee's brief: "Appellant did not file with this Court an abstract of the testimony of the witnesses. It will be presumed that all the testimony supported the verdict of the jury, and the judgment of the Court. It is also presumed that the Court gave proper instructions covering the pleadings and the issues as developed from the testimony of witnesses."

[3] Parts of the specific objections were as follows: "The plaintiff now objects to the Court's Instruction No. 5 on the ground that it is merely a partial statement of the law relating to Act of God and that

Court should further instruct the Jury regarding the Act of God as follows:

"Therefore, unless you find that the defendant Sanders and his employees were free from fault and that their acts of negligence, if any, did not contribute to or corroborate with an alleged rainstorm in causing the damages here sued upon, your verdict would be for the plaintiff."

Although the quoted language was lifted from an instruction approved by us in *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79, the Court refused to give the language as requested by the School District. We hold that the Court committed error in failing to give the cautionary instruction as just copied. There is nothing in the pleadings to show that Sanders pleaded that the sudden rainstorm which came up was the act of God; but something must have happened in the course of the trial to cause the Court to give Instructions Nos. 4 and 5 which the Court gave and which we have copied; and when the Court gave those Instructions it should also have instructed the jury as requested by appellant, because, where the negligence of a party concurs with the act of God, then the act of God is no defense. *Mitchell* v. *Hahn,* 131 Ark. 286, 198 S. W. 528; *Arkansas Land & Lbr. Co.* v. *Cook,* 157 Ark. 245, 247 S. W. 1071; *Hope Basket Co.* v. *Thomasson,* 190 Ark. 956, 82 S. W. 2d 241; and *Lee* v. *Crittenden Co.,* 216 Ark. 480, 226 S. W. 2d 79.

III. *Instruction On Amount Paid By Insurance Companies.* The School District asked the Court to instruct the Jury as follows:

"PLAINTIFF'S PROPOSED INSTRUCTION NO. 2. You are further instructed that any recovery that the Manila School District might have received from an insurance company or from a number of insurance

---

the court should specifically tell the jury, just as in the case of *Lee* v. *Crittenden County,* 216 Ark. 480; in other words, the Court should further instruct the jury, that therefore, this should be added to Instruction No. 5: 'Therefore, unless you find that the defendant Sanders and his employees were free from fault and that their acts of negligence, if any, did not contribute to or corroborate with an alleged rainstorm in causing the damages here sued upon, your verdict would be for the plaintiff.'"

companies was upon a private contract of indemnity that existed solely between the plaintiff School District and those insurance companies, with the premiums paid by the plaintiff School District, and with such recovery being for the sole and exclusive benefit of the plaintiff School District and not for the benefit of the defendant Sanders; and that any payment made by any of the insurance companies to the School District is not a credit upon anything that this jury might find is owed by the defendant Sanders."

The Court refused this instruction and the point was duly preserved. The Instruction should have been given. The only testimony brought before us is that of the witness, Fincher, who was an adjuster for some of the insurance companies; and that witness testified that he paid the School District for his insurance companies a total of about $700.00 because of windstorm and hailstorm damage.

The purpose of the plaintiff's Instruction No. 2 was to tell the Jury that any money the School District had received from the insurance companies had nothing to do with the liability of Sanders to the School District for leaving the roof exposed. We have already recited that the Johns-Manville company was at one time a defendant and six insurance companies were at one time defendants, and that they all went out of the case by payment and settlement. Without Instruction No. 2 being given, the Jury might have concluded that the only damage to the gymnasium floor was $700.00 or less and that the School District had received that amount from the insurance companies and could have concluded that the School District had received full compensation. The Instruction No. 2 was a cautionary instruction that should have been given.

For the errors indicated, the judgment is reversed and the cause is remanded.

Mr. Justice MILLWEE dissents.

McCUTCHEON *v.* McCUTCHEON.

5-942 289 S. W. 2d 521

Opinion delivered April 23, 1956.

Ben C. Henley, for appellant.

J. Loyd Shouse, for appellee.

MINOR W. MILLWEE, Associate Justice. Under a decree of divorce granted appellant, Betty McCutcheon, from appellee, Kenneth McCutcheon, on April 15, 1954, she was given custody of their six year old son and by mutual agreement was awarded $91.00 per month for the child's support. On June 29, 1955, appellee filed his petition for modification of the original decree by reducing the monthly support payments. This appeal is from a decree reducing said payments to $50.00 per month.

Appellee is twenty-four years of age and has been in the military service since some time prior to his divorce from appellant. He has remarried and has a young child by his second marriage. His present wife and child live with appellee near his military base. Appellee's gross military pay at the time of the trial was $274.50 which is slightly more than he was receiving at the time of the divorce. Deduction of the $91.00 government al-

lotment for the support of his first child left a total net income of $183.50 to appellee which includes an allotment of $65.90 for the second wife and child. Appellee testified that the added responsibilities of supporting his second wife and child made it impossible to properly maintain them and also meet the monthly support payment for his first child, the amount of which was agreeable at the time of the divorce. His father testified he had to send extra money for appellee and his second wife and child to live on.

Appellant testified that her earnings were slightly less than at the time of the divorce and that there had been a slight increase in the child's expenses since he had attained school age. Her conclusion that it now takes more than $100.00 monthly to keep the child is hardly supported by her attempt to itemize expenses. She now lives on a farm with her parents who have cows and chickens and make a garden. In reducing the support payments, the chancellor found that a continuation of the payments at $91.00 would work a hardship on appellee and his present family, and that the sum of $50.00 monthly for support of his first child represented the amount usually awarded in that jurisdiction for parties similarly situated.

For reversal, appellant contends the remarriage of appellee and birth of his second child did not constitute such a changed condition as would warrant a reduction of the monthly support payments. The amount allowed for child support is subject to modification when required by the changed condition of the parties by increasing or reducing the amount according to the necessity of the one and the ability of the other party. *Watnick* v. *Bockman,* 209 Ark. 696, 192 S. W. 2d 131. While the fact that a divorced husband has remarried is not alone ordinarily a ground for reducing the amount of the allowance for child support, it is a circumstance that may be considered in weighing the equities of the situation. 27 C. J. S., Divorce, 1245; 17 Am. Jur., Divorce and Separation, Sec. 703. We have applied this principle in suits for modification of alimony payments. In *Lewis* v. *Lewis,* 213 Ark. 262, 209 S. W. 2d 874, we held

the trial court properly declined to consider a husband's additional obligations created by his remarriage where other attendant circumstances, very different from those present here, justified such refusal. On the other hand, in *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897, where attendant circumstances were different, this court ordered a substantial reduction in alimony payments to give a second wife and child something approaching equal treatment with the first wife.

In *Dobrzeniecki* v. *Dobrzeniecki,* 223 Ark. 828, 270 S. W. 2d 891, a contributing factor in the denial of a divorced wife's request for increased child support payments, where the former husband's earning power had increased since the original decree, was the fact of his remarriage and the assumption of additional family obligations by reason thereof. In *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409, relied on by appellant, a reduction was denied where both parties had remarried and the soldier husband's increased net income was nearly twice that received by appellee here.

Appellee had a legal right to remarry and it is not for us to say whether he should or should not have done so under the situation presented here. The fact remains that many young divorced husbands do remarry and additional children are born to the second marriage whose interest and welfare is of as much concern to the courts as those of the first marriage. So we conclude that the chancellor had a right to consider appellee's remarriage and the fact that he has a child by the second marriage as a material circumstance in determining whether the changed condition of the parties warranted a modification of the allowance for the support of his first child. Under all the circumstances, however, we have concluded that the original award should be reduced to $60.00 per month. So modified, the decree is affirmed.

WARD, J., concurs.

Opinion delivered April 23, 1956.

[Rehearing denied June 4, 1956.]

Arvey, Hodes & Arnold & Arnold and *Mantynbank,* for appellant.

Shaver, Tackett & Jones, for appellee.

PAUL WARD, Associate Justice. Appellant, Rock-Ola Manufacturing Corporation, filed a complaint against appellee, Lynn Farr, d/b/a Lynn Farr Music Company, upon the following allegations: Appellee executed to appellant a note for $2,296.83 on April 4, 1953, [upon which note three payments were made] and also a note for $864.72 on August 20, 1953; Both notes are past due, and demand for payment has been made, and; Appellee has failed and refused to pay. The prayer was for judgment on the notes for the balance due with interest, costs, and attorney fees [as provided in said notes]. For answer, appellee admitted the execution of the notes, but denied all other allegations, and for other defenses stated: (a) The notes were executed for three automatic record phonographs [and related equipment] which appel-

lant warranted to be fit for the purpose intended, but which were not, and; (b) In connection with the purchase of said merchandise appellant promised appellee an exclusive dealership in specified territory but failed and refused to carry out said promise.

After the introduction of testimony by both sides, the issues were submitted to a jury, under the court's instructions, and the jury returned a verdict in favor of appellee. Appellant now prosecutes this appeal.

For a reversal of the judgment in favor of appellee, appellant sets out three points, all of which amount to a contention that there is no substantial evidence to support the verdict of the jury.

After a careful examination of appellant's abstract and the testimony set forth therein [together with the testimony abstracted by appellee], we have reached the conclusion that (a) a jury question was raised by the testimony, and, further, that (b) appellant did not make objections in the trial court adequate to raise, on appeal, the question of the sufficiency of the evidence.

(a) Since we are affirming the judgment of the trial court on two grounds, as indicated above, it would serve no useful purpose to set out the testimony at length. It suffices to point out: The record, as abstracted, shows appellee defended on the ground of fraud in that his purchase of the merchandise was a part of an oral agreement, whereby appellant was to give him an exclusive dealership in a specified territory in Arkansas and Texas, and that appellant failed and refused to carry out this promise; The testimony clearly supports the above defense, and; The only disputed question of fact is whether appellee waived appellant's breach of contract by using, and making payments, on the machines after he knew of the breach. While the question is a close one, we cannot say, as a matter of law, that there was no substantial evidence to support the jury's verdict.

(b) Appellant's abstract does not show that any proper motion or objections were presented to the trial court to raise, here, the question of the sufficiency of the evidence to support the jury's verdict.

No instructions or objections thereto and no motion for an instructed verdict at the close of the testimony were shown. Thus, appellant allowed the issues to be presented to the jury without making any objection. Not only did appellant *allow* the fact issues to be presented to the jury, but, by reference to the record [not abstracted], we find appellant *requested* instructions [given by the court] on the questions of fraud and breach of warranty. By such action appellant waived the question of the sufficiency of the evidence. See *Bank of Hatfield* v. *Clayton,* 158 Ark. 119, 250 S. W. 347. In this case we said:

"It is further insisted by counsel that appellant, by requesting the court to give instructions submitting the issues to the jury, not only waived the error in submitting the issues at the request of appellee, but waived the right to assign as error the insufficiency of the evidence to support the verdict. Counsel is correct in the first contention, for we have often held that a request for an instruction submitting an issue operates as a waiver of the error in giving an abstract instruction on the same issue."

In *St. Louis, Iron Mountain & Southern Railway Company* v. *Jacobs,* 70 Ark. 401, 68 S. W. 248, it was stated:

"The questions as to whether or not the provision was reasonable and fair requiring suit to be brought within ninety days after the injury, and whether or not such provision had been waived by appellant, were submitted to the jury upon the evidence, at the request of appellant. Appellant, therefore, cannot now complain of the verdict on these questions."

Again, in *Berman* v. *Shelby,* 93 Ark. 472, 125 S. W. 124, this court said:

"Appellant, in his prayer for instruction number II, asked the court to submit to the jury the question as to whether or not appellees had waived the right to cancel the lease because of any failure that might have been on the part of appellant to put the water heater in

the bath room. Appellant therefore cannot complain of the finding of the jury that there was no such waiver."

We find the same announcement in *Morris* v. *Raymond,* 132 Ark. 449, 201 S. W. 116, in these words:

"We need not consider whether or not there was sufficient testimony to establish the allegations of undue influence, for as we have already seen, both parties asked for instructions on this question, and appellant can not now complain that there was no testimony upon which to predicate such instructions."

We note further however it was held in the *Clayton* case, supra, and in *Missouri Pacific Railroad Company et al.,* v. *Lamb,* 195 Ark. 974, 115 S. W. 2d 864, that even where no motion for an instructed verdict was requested, the point could be raised in a motion for a new trial which questioned the sufficiency of the evidence. That rule is of no avail to appellant in this case however because no motion for a new trial was made. Act 555 of 1953, Section 11, permits but does not require a motion for a new trial. Section 21 of said Act does require an aggrieved party to ". . . make(s) known to the court the action which he desires the court to take . . . " This was not done by appellant in this instance.

We deem it proper to dispose of another point argued by appellant. The record shows that after the jury had returned a verdict appellant made the following oral motion to the court: "We wish to move the court for a judgment notwithstanding the verdict of the jury." This motion is not abstracted by appellant but is merely referred to in the brief. Assuming [though not deciding] that this reference is sufficient to call for our consideration of the motion, we hold it was not sufficient for the purpose contended. The motion was insufficient, if for no other reason, because it did not call to the court's attention the [now] alleged insufficiency of the evidence. By the wording of this motion the trial court could only guess why appellant thought the verdict should be set aside and judgment rendered in its favor.

It follows that the judgment of the trial court should be, and it is hereby, affirmed.

Affirmed.

Justice HOLT dissents.

J. SEABORN HOLT, J., dissenting. As I read the record the primary and decisive question is whether appellee, with full knowledge of any alleged defects or alleged fraud, failed to rescind the sales of the material in question and thereby ratified them in their entirety. I am convinced that he did, and, therefore, this court should not permit him to escape his just liability on the notes sued on. The undisputed testimony, as I read it, is to the following effect. Appellee received the equipment involved in February 1953 and executed the notes on April 4, 1953 and August 20, 1953, to pay for the equipment. Appellee made three payments to appellant of $127.60 each, the last of which was made on September 10, 1953 and knew of the alleged defects in the machines a few days after he first put them on location. He made his first complaint to appellant regarding the alleged defectiveness of the machines in January 1954 and appellant's engineer repaired the machines in January 1954. Appellee expressly affirmed the sales in January 1954 by offering to return the machines to be sold by appellant, with appellee's account to be credited with the amount so received. Appellee waited until August 1954 before making known any complaint regarding the termination of his dealership or any other alleged ground of fraud. The first trial of this case was held in December 1954 which resulted in appellant being awarded the relief it sought and appellee put the machines out on location after the first trial in February and March of 1955.

Our governing rule, on facts such as are here presented, is re-announced in the recent case of *Teare, et al.* v. *Dennis, et al.,* 222 Ark. 622, 262 S. W. 2d 134, "Fraud inducing a contract may be waived, and a contract obtained by fraud, being voidable and not void, may be ratified by the party who was induced by the fraud to enter into the contract. Ratification or its equivalent is shown

where with actual or constructive knowledge of the true facts a party by acts of commission or omission shows a clear intent to affirm the contract despite the fraud, as where he accepts the benefits thereof or acts in a manner inconsistent with repudiation. After the defrauded party with knowledge of the facts has elected to treat the contract as valid, he cannot change his position and assert that it is invalid. 17 C. J. S., § 165 b, page 520. See *Smith* v. *Bank of Marianna,* 176 Ark. 1146, 5 S. W. 2d 335." In the more recent case of *Advance Aluminum Castings Corp.* v. *Davenport,* 224 Ark. 440, 274 S. W. 2d 649, we held: "Headnote 1—Sales—Fraud—Payment as waiver of.—Purchaser of cooking utensils, by making monthly installment after knowledge of defects therein, waived any fraud that might have been practiced on him by vendor."

The majority opinion points out that our examination of the record discloses that immediately following the jury's verdict appellant made the following motion: "We wish to move the court for a judgment notwithstanding the verdict of the jury," and the majority seem to imply that since this motion was not abstracted it should not be considered even though we actually discovered it in the record. The majority goes further and says that in any event this motion was not sufficient to bring to the trial court's attention the sufficiency of the evidence to support the verdict. I do not agree. In justice and in all fairness, I think that what appellant did was sufficient to call to the court's attention the sufficiency of the evidence. It seems to me that it would be entirely too technical to hold otherwise.

I, therefore, would reverse the judgment and remand the cause with direction to the trial court to enter a judgment in accordance with the prayer of appellant's complaint.

JOHNSTON *v.* WIDENER.

5-947 289 S. W. 2d 520

Opinion delivered April 23, 1956.

Kirsch, Cathey & Brown, for appellant.

Foster Clarke and *Penix & Penix,* for appellee.

SAM ROBINSON, Associate Justice. The appellant, Shirley Johnston, was granted a divorce from the appellee, Sylvia Johnston, now Sylvia Widener, in the Craighead Chancery Court on December 31, 1949. By agreement, the father, Shirley, was given custody of the three children. Later, Sylvia married Widener, and lives in Chicago with her husband. On March 3, 1954, she filed a petition in the Arkansas court where the divorce was granted, alleging changed conditions, and asked that she be given custody of the children. Three children are involved: Donna Jean, at that time seven years of age; Shirley, age fourteen; and Walter Ray, age twelve. The mother's petition was granted by the chancellor to the extent of awarding her the custody of the youngest girl, Donna Jean. The father, Shirley, who works in St. Louis, had placed the children with his father and mother who live in Arkansas, and they were allowed to retain custody of the two older children. On appeal, *Johnston* v. *Widener,* 225 Ark. 453, 283 S. W. 2d 151, this court held that the father and his parents should be allowed to retain custody of all three children, but said further: "The appellee [Sylvia] 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." On remand, the parties were unable to agree as to what would constitute "reasonable visitation," and it became

necessary for the chancellor to decide that point. The chancellor reached the conclusion that the mother should be permitted to have all three children with her in Chicago during the months of June and October each year; the school attended by the children is not in session during those months. It was further provided that the mother should make bond to return the children as directed. The father, Shirley, has appealed, contending that the chancellor has given the mother custody of the children for part time, which is not in accordance with the reasonable visitation privilege granted by this court.

At the hearing in the Chancery Court on the mother's petition for custody of the children, it has shown rather conclusively that she was not allowed to see the children at all except under the most difficult circumstances; that she had been accorded no privacy with the children, and, by reason of having been denied a normal relationship with the children, she had lost their affection to some extent. This court suggested that the mother should endeavor to win back the affection of the children, and the trial court was justified in reaching the conclusion that this could be done only by the children being with the mother, as indicated. In these circumstances, we cannot say that the trial court's order is anything other than a grant to the mother of reasonable visitation privileges.

Affirmed.

SMITH *v.* POWELL.

5-909 289 S. W. 2d 689

Opinion delivered April 30, 1956

Mann & McCulloch, for appellant.

Jack P. West and *E. J. Butler,* for appellee.

LEE SEAMSTER, Chief Justice. The appellants, Mr. and Mrs. T. E. Smith, and the appellee, H. E. Powell, own adjoining farms in St. Francis county, Arkansas. On February 21, 1955, the appellee filed the instant suit alleging that appellants had constructed a fence between their properties, a portion of said fence extending a considerable distance into appellee's property. The appellee prayed for a mandatory injunction against the appellants, compelling them to remove said fence and fence posts from the appellee's property, and the restoration of his property to its former condition, with a fence placed on the old fence line between the properties. Upon trial of the issues, the trial court rendered a decree in favor of appellee, whereby, appellants were ordered to remove the new fence and restore the old fence line (true boundary line) to the same condition that it was prior to the relocation of the new fence. The trial court found that appellee was the owner, by adverse possession, of the property north of the old fence line. This appeal follows.

For reversal, the appellants contend: (1) That the new fence is the true boundary line; (2) no adverse possession was acquired by appellee; and (3) there was no binding agreement, between the parties, to move the new fence.

The appellants and their witnesses testified that the true boundary line is north of the new fence, based upon a survey made by H. L. Frank, an 82 year old engineer employed by appellants to make a survey. Mr. Frank had been employed for over 50 years as a surveyor for lumber companies in east Arkansas. He started his survey from the road at the southwest corner of appellants' property running north — then east and back south on the east line of appellants' property. According to one witness, Frank lacked 10 or 12 feet in getting back to appellants' fence at the southeast corner. The south line of appellants' property was the middle of the road south of his fence. The engineer then ran another survey starting 6 miles north of the line at a known corner and arrived at a point

within four feet of the line that he first established as the true boundary line. This line was 33 links north of the new fence line, on the west side, and either 31 or 51 links north of the new fence line on the east side. Frank testified that he had established the true boundary line between the properties.

Appellant, T. E. Smith, and his witnesses, testified to the following: That the old fence line was not straight; that the gaps in the old fence line had been changed several times within the last seven years; that the old fence had not been maintained continuously in one location.

The testimony of the appellee and his witnesses was to the effect that a fence, denoting the boundary line between the properties, had been maintained continuously at approximately the same location since 1906; that in 1927, a surveyor ran the line and found the true boundary line to be the old fence line.

A witness, George Southall, testified that he had been surveyor of St. Francis County for a period of 33 years; that he had previously surveyed this boundary in 1930 and found the true boundary line to be the location of the old fence line; that after appellants built the new fence and by agreement of the parties, he resurveyed the properties and found the true boundary line to be the same as the previous survey, the old fence line; that the new fence that had been erected by appellants was north of the true boundary line, by 6 inches on the west end graduating to 26 feet 5 inches north on the east end.

Southall further testified that the new fence runs in a northeasterly direction from west to east; starting on the west side it runs north 88 degrees and 43 minutes east, to the east side; that the true line is parallel with the south line of the southwest quarter and this line, according to the Government survey in the State Land Commissioner's office, runs from west to east on a variation of one degree — it is described as north 89 degrees east. Southall stated that after this survey was made, the appellants agreed to move the new fence to the previous location, but later refused to perform.

The evidence reveals that the land north of the old fence line had been enclosed as appellee's property, for more than 35 years. The appellee had rented the property from 1929 until 1941, at which time he purchased it and used it for farming and pasture during all of said time.

We have had many occasions in the past to pass upon boundary line disputes. It is principally a question of fact. While it is the duty of this court to try chancery cases *de novo,* the findings of the Chancellor will not be disturbed where they are not against the preponderance of the evidence. *England* v. *Scott,* 205 Ark. 47, 166 S. W. 2d 1014.

We find the evidence in this case preponderates in favor of the trial court's findings and decree, no error appearing, the decree is affirmed.

CHRISTY *v.* SMITH, ADMINISTRATOR

5-953 **289 S. W. 2d 885**

Opinion delivered April 30, 1956

[Rehearing denied May 28, 1956.]

Courtney C. Crouch and *Lewis D. Jones,* for appellant.

A. L. Smith, for appellee.

J. SEABORN HOLT, Associate Justice. Bertha L. Allen died testate leaving the following holographic will: "Siloam Springs, Arkansas Dec. 27-1946. Let this be my last will — After all Dr. bills, hospital and nurse bills, funeral bill and all other debts have been paid set aside $1,000.00 for inscription on stone that should be there up to date and the rest of the $1,000.00 one thousand dollars to be used on the Box and A. M. Allen lot and the I. N. Allen lot for perpetual care — Then pay Albert Allen the son of F. Melvin Allen, deceased and wife Clara Allen $1,000.00 One Thousand Dollars— Then pay Robert Milton Petty Jr. son of R. M. Petty Sr. and wife Lela Petty $3,000.00 Three Thousand Dollars— Then pay Bertha L. Allen's sisters and brothers One-half (1/2) of the remainder—each to share equally—and then pay Albert M. Allen's sisters and brothers the other one-half (1/2) of the remainder—each to share equally.

Bertha L. Allen."

August 17, 1955 appellants, R. F. Christy and Elizabeth Christy Allen, filed a petition in the Benton Probate Court asking for a construction of the will and alleging: "1. That an instrument dated the 27th day of December, 1946, was on the 24th day of February, 1955, admitted to probate as the Last Will and Testament of Bertha L. Allen, deceased. 2. That A. L. Smith of Siloam Springs, Arkansas, is the duly appointed administrator with Will annexed. 3. That the petitioners herein are the sole and only heirs at law of Edna Etta Box Christy, who was a sister of the said Bertha L. Allen, deceased. 4. That Edna Etta Box Christy died on the 19th day of December, 1929, predeceasing the said Bertha L. Allen, and predeceasing the date of the execution of the instrument admitted to probate as the Last Will and Testament of the said Bertha L. Allen. 5. The petitioners further state that it was the manifest intention of the said Bertha L. Allen that they, the petitioners herein, should be beneficiaries of a portion of her estate in the manner hereinafter set out. 6. That the said Bertha L. Allen, after making certain specific bequests, devised and bequeathed

one-half of the residue of her property to her brothers and sisters in words as follows: 'Then pay Bertha L. Allen's sisters and brothers one-half (1/2) — each to share equally . . .' 7. That at the time the will was executed, the said Bertha L. Allen had only one living sister, viz: Lela Petty. 8. That the said Bertha L. Allen well knew Edna Etta Box Christy to be deceased, and that with the intention that the children of her deceased sister, the petitioners herein, should take their mother's part, the said Bertha L. Allen used the 'Sisters' to indicate that not only should the living sister share in her estate, but also that the children of her beloved deceased sister should share in her estate as beneficiaries of this portion of her estate. 9. That the said Bertha L. Allen well knew the petitioners herein, was exceedingly fond of them, and desired that they should be recipients of her estate along with her other relations. 10. That it is, therefore, manifest that the intention of the said Bertha L. Allen was that the said R. F. Christy and Elizabeth Christy Allen, children of the said Edna Box Christy, should take what would have been their mother's share had she been living at the time of the execution of the Will, and stand in her place per stirpes in relation to the class. Further, that it was the manifested intention of the said Bertha L. Allen that the devise made to the said Edna Etta Box Christy should not lapse, but should go to her issue . . . [the will was made a part of this petition] WHEREFORE, the petitioners pray that the court construe the said Will and order that the administrator of the said estate distribute to the petitioners whatever part of the said estate that Edna Etta Box Christy, their mother, would have received under the provisions of said Will were she alive at the time of the distribution of said estate."

Appellee, administrator, demurred to this petition on the grounds, "that the facts set forth in said petition are not sufficient to authorize any construction of said will by this Court; that said petition with the exhibit thereto show on their face that petitioners have no interest in the estate of said deceased; . . . that there is no ambiguity or uncertainty in the language of said will call-

ing for granting of the petition of petitioners for construction of said will and that said petition should be dismissed." On a hearing the court sustained the demurrer and directed partial distribution of the estate. This appeal followed.

For reversal appellants contend, in effect, that the court erred in holding that the will needed no construction and then proceeding to construe the will without observing the necessary rules of construction, "without holding a hearing on the petition", and also erred in excluding appellants (petitioners) from participating in the estate.

We hold that the court was correct in sustaining the demurrer. The provisions and language used by the testatrix in the above will are plain and unambiguous and her intention as to the disposition of her property seems to us clear. The substance and effect of appellants' argument appears to be that Bertha L. Allen, after she had made certain specific bequests, then divided and bequeathed one-half (1/2) of the residue of her property to her sisters and brothers by using this language "then pay to Bertha L. Allen's sisters and brothers one-half (1/2) of the remainder—each to share equally", and that in doing so it was Bertha's intention that appellants, the two children of Bertha's deceased sister, Edna Etta Box Christy, should stand in their mother's shoes and take her share. We do not agree. Our rule appears well settled that a legacy or devise lapses when the legatee or devisee died before the testator. There is but one exception to this rule and that is where the legacy or devise is to a child or other descendant of the testator, § 60-410 Ark. Stats. 1947 Supp. Here it is undisputed that Bertha Allen never had but two sisters, one, the mother of the two appellants here, died before Bertha Allen made her will and at her death she had but one living sister. Obviously, from a mere reading of the will, the names of appellants are not mentioned directly or indirectly. There is no uncertainty or ambiguity as to the designation of all beneficiaries under the will. On the question of interpretation and construction of wills, the rule announced in a long line of our cases is that it is only where there is

some ambiguity or doubt as to the meaning of the language used in the will that recourse to judicial interpretation and construction is justified, *Quattlebaum* v. *The Simmons National Bank, Administrator,* 208 Ark. 66, 184 S. W. 2d 911. In the Quattlebaum case we said: "The purpose of construction and interpretation being the ascertainment of the testator's intention, it follows that where such intention is expressed in the will in clear and unequivocal language, there is no occasion for judicial construction and interpretation, and it should not be resorted to or allowed, . . . The cases all agree that the testator's intention can be gathered only from the will itself and that extrinsic evidence is not admissible to prove an intention in regard to the disposition of the property not expressed in the will. . . . The rule is established beyond controversy, except when changed by statute, that a legacy or devise lapsed when the legatee or devisee dies before the testator. See, also, *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90. . . . In the absence of a statute to the contrary, the death of a beneficiary before the testator caused the gift to lapse, and it was immaterial whether or not the testator had knowledge, in his lifetime, of the death of such beneficiary."

In *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546, citing the Quattlebaum case above, we said: "Before the necessity for judicial interpretation of a will may arise there must be found in the language of the will an ambiguity or uncertainty; and where no such ambiguity or uncertainty is found, there is no need for the application by the court of any of the rules for construction."

Our case of *Combs* v. *Combs,* in 172 Ark. 1073, 291 S. W. 818, is in point here, there the question for decision was, as here, whether the complaint stated cause of action and from a ruling of the trial court sustaining the demurrer to the complaint and dismissing the case was that appeal. In the Combs case it appears that the testator in his will made a limitation in favor of the sons of "my three brothers Alfred, Sewell and Isaac Combs" when in fact he had only two brothers, bearing the names given. A suit was brought seeking to establish that Al-

fred Combs and Sewell Combs, carried in the will, were not his brothers but were nephews. We there said: "Appellants' next contention is that, the complaint having alleged that C. F. Combs and H. H. Combs are the sons of Sewell Combs, named in the will of Nathan Combs, and that Nathan Combs never had a brother named Sewell, but that said Sewell Combs, of which said appellants were sons, was in fact a nephew of Nathan Combs to designate the sons of his nephew, Sewell Combs, instead of his brother, Sewell Combs, states a cause of action. But the language of the will of Nathan Combs was: 'To the sons of my three brothers, Alfred, Sewell and Isaac Combs.' The contention of appellants is that Nathan Combs intended only to mention the sons of one brother, Isaac Combs, and intended to mention his two nephews, Alfred and Sewell Combs, instead of his two brothers Alfred and Sewell Combs. To do so, we would have to change the language of the will to read: 'To the sons of one brother, Isaac Combs, and to the sons of two nephews, Alfred and Sewell Combs.' We cannot do this, and we cannot hold that the testator intended to name the sons of two nephews instead of the sons of two brothers named. This clause of the will, upon this allegation of the complaint, would be void for uncertainty. 40 Cyc., 1445, announces the rule of the law on this point as follows: 'In order that a beneficiary may take under a will, he must be designated therein, either by name or by description, with such certainty that he can be readily identified and distinguished from every other person, otherwise the devise or bequest is void for uncertainty.' . . . there is no uncertainty or ambiguity in the designation, 'to the sons of my three brothers, Alfred, Sewell and Isaac Combs.' It does not read to the sons of one brother and two nephews, but to the sons of three brothers. Therefore parol evidence would not have been admissible in proof of the allegation in the complaint."

It would have been a simple matter had the testatrix desired appellants (children of her deceased sister) to share in her estate to have so stated and named them in her will. As pointed out, they were not even mentioned. We think it makes no difference that appellants' mother

was not living at the time the will was executed, the fact remains that she predeceased Bertha L. Allen, and before the will came into effect on the date that Bertha Allen died. Having concluded that it was the clear intention of the testatrix, Bertha L. Allen, that only such of her two sisters and brothers who survived her should share in her estate, we must and do affirm the judgment.

CHENEY, COMMISSIONER OF REVENUES *v.* BELOTE.

5-932 289 S. W. 2d 665

Opinion delivered April 30, 1956.

O. T. Ward, for appellant.

Willis V. Lewis, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal by the Commissioner of Revenues of the State of Arkansas (hereinafter called "Commissioner") from an adverse decree of the Pulaski Chancery Court in two cases consolidated for trial in that Court. In one case the Chancery Court made permanent an injunction which prevented the Commissioner from collecting taxes

claimed to be due the State; and in the other case the Chancery Court denied the Commissioner the right to proceed to collect taxes claimed to be due the State. The taxes involved are the 2% Gross Receipts Tax under § 84-1903 *et seq.*, Ark. Stats., and the Special 3% Excise Tax under Act 252 of 1951 (as now found in § 48-411 Ark. Stats. Cum. Pocket Supp.). The claimed amounts arose out of the operation of the Virginia Liquor Store at 517 West Eighth Street in Little Rock. Although the listed appellee in this Court is Arcie B. Belote, the real appellees are J. E. Ebbert and Ebbert Industries, Inc. An uncontested decree was rendered against Belote in favor of the Commissioner, and from that decree there has been no appeal. J. E. Ebbert and Ebbert Industries, Inc., prevailed in the Chancery Court, and the Commissioner has appealed.

On May 28, 1954, the Commissioner made an audit of the Virginia Liquor Store covering the period from October 1, 1951, to December 31, 1953, and ascertained a sales tax delinquency of $655.74 and a 3% excise tax delinquency of $1,037.50. Notice of such amounts was promptly sent by registered mail to J. E. Ebbert at 517 West Eighth Street. No reply being received, the Commissioner issued a tax deficiency assessment, as provided by § 84-1910 *et seq.*, Ark. Stats., and filed said certificate in the office of the Circuit Clerk of Pulaski County, as provided by § 84-1912 Ark. Stats.

Thereupon, on July 26, 1954, J. E. Ebbert and Ebbert Industries, Inc., filed suit No. 100538 in the Pulaski Chancery Court to enjoin the Commissioner and the Sheriff of Pulaski County from proceeding to collect any moneys that were claimed due from the Virginia Liquor Store; and a bond of $1,500.00 was filed to support the injunction. Shortly after the filing of the above suit, the Commissioner filed suit No. 100698 in the Pulaski Chancery Court against Arcie B. Belote, J. E. Ebbert and Ebbert Industries, Inc., alleging that the State was entitled to collect the delinquent taxes as shown by the audit hereinbefore mentioned, and that J. E. Ebbert and Ebbert

Industries, Inc., had taken over the Virginia Liquor Store and were operating same without a retail dealers sales permit, as required by the Gross Receipts Law.[1] The prayer was for the sale of the merchandise and fixtures to pay the claim of the State of Arkansas in the amount of $1,693.24, with interest and costs. Upon issues joined, the two suits were consolidated and tried in the Pulaski Chancery Court, and resulted in a decree (a) giving the State an unsecured decree against Arcie B. Belote for the amount sued for; and (b) denying the State all relief against J. E. Ebbert and/or Ebbert Industries, Inc. From that decree the Commissioner has appealed and brought up the entire record.

The evidence established that for some time prior to April 9, 1954, Arcie B. Belote, wife of Bill Belote, owned and operated a liquor store at 517 West Eighth Street in Little Rock; that J. E. Ebbert was secretary-treasurer and owner of 51% of the stock of Ebbert Industries, Inc., a corporation controlled by him and his wife; and that about April 9, 1954, Mr. Ebbert undertook to purchase for Ebbert Industries, Inc., the Virginia Liquor Store. Mr. Ebbert testified that, while investigating the store, he checked with wholesale liquor dealers to ascertain any outstanding bills due by Virginia Liquor Store, and also went to the Sales Tax Division of the State Revenue Department and talked to Mr. E. R. Hendricks, the Director of the Sales and Use Tax Division. Mr. Ebbert said that on that visit he learned that there was some question about sales tax remittances for the two most recent months, and that these were later paid by someone.

Mr. Ebbert testified that about ten days after the said trip to the Sales Tax Division, he visited the Alcoholic Beverage Control Board and obtained a liquor li-

[1] Section 84-1913, Ark. Stats., is specific in this regard. This section also says: "A permit is not assignable and shall be held valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. The permit shall at all times be conspicuously displayed at the place of business for which issued in a position where it can be easily seen. Said permit shall be in addition to all other permits now or hereafter required by the Statutes of the State of Arkansas."

cense for Ebbert Industries, Inc., to operate the Virginia Liquor Store. He said that he then purchased the Virginia Liquor Store from Mrs. Belote for Ebbert Industries, Inc., and placed two clerks in charge, and that he only visited the store occasionally. He testified that his corporation, Ebbert Industries, Inc., operated several places, and that he knew the difference between the Sales Tax Division, and the Alcoholic Beverage Control Board, heretofore mentioned. Mr. Ebbert also testified that in May, 1954, he made another visit to Mr. Hendricks in the Revenue Department to pay the April sales tax; and that the receipt was issued to the "Virginia Liquor Store," as were all subsequent receipts. In other words, there is no evidence that the State ever issued any receipt to Ebbert Industries, Inc., in the operation of this liquor store, or ever issued any retail dealers sales permit to Ebbert Industries, Inc.

The case at bar is ruled by the case of *Thompson* v. *Chadwick,* 221 Ark. 720, 255 S. W. 2d 687, which is not cited in any of the briefs. If the Chancery decree should be affirmed by us, then the fears expressed by the minority in *Thompson* v. *Chadwick, supra,* would be completely realized; because, in the case at bar, all that J. E. Ebbert claimed that he did was (1) to go to the Revenue Department and ask if any tax was due; and (2) upon being advised that two months were in arrears, he arranged to have those two months paid; and (3) he claimed he made application for a retail dealers sales permit. If such inquiry by Ebbert can prevent the State from enforcing its tax collection laws, as set up in § 84-1907 *et seq.,* Ark. Stats., then it would be better that the State employees should never give any answers to any inquiries, for fear some waiver might be claimed. But in *Thompson* v. *Chadwick, supra,* the majority was careful to point out that it was only when the State issued a *new retail dealers sales permit* to the purchaser that the State lost the right to enforce its claim against the new owner on a subsequently discovered delinquent assessment against the former owner. In *Thompson* v. *Chadwick* we said:

"So the Commissioner had from May 7th to May 24th to determine whether Donau had paid all taxes due the State. If the Commissioner had been dissatisfied or uncertain as to the correctness of Donau's return, then a permit should not have been issued to Chadwick until all doubts had been removed as to the full payment of tax by Donau."

In the case at bar, the facts show that Mr. Ebbert was never able to obtain a new retail dealers sales permit as required by § 84-1913 Ark. Stats. Mr. Hendricks said that the records of his Department bore the notation that no new permit was to be issued for operation of Virginia Liquor Store. Mr. Ebbert did not state that he had received a new permit, but claimed that he had applied for one and "thought" it had been issued.[2] In short, Mr. Ebbert never received a new permit from the State of Arkansas issued to him or to Ebbert Industries, Inc., to operate the Virginia Liquor Store; and, until the State issued a new permit, then the State had not waived its statutory rights under § 84-1907 *et seq.*, Ark. Stats. Such is our holding in *Thompson* v. *Chadwick, supra.*

It follows that the Chancery Court decree is reversed and the cause is remanded, with directions to vacate so much of the decree heretofore entered as is adverse to the Commissioner; and to dismiss the injunction and render judgment for the State on the injunction bond filed for the amounts claimed, up to the full obligation of the

[2] Mr. Ebbert's testimony showed some confusion on this point. He said that when he went to the Revenue Department to make inquiry, before closing the deal, he took the sales tax permit of the Virginia Liquor Store and surrendered it and made application for a new permit for Ebbert Industries, Inc. This visit to the Revenue Department was ten days before Mr. Ebbert went to see the Alcoholic Beverage Control Board to obtain a liquor license. It seems strange that *ten days before* Mr. Ebbert made the purchase of the Virginia Liquor Store, and while he was still inquiring as to outstanding bills, he would have in his possession the retail dealers sales permit of the Virginia Liquor Store, which § 84-1913 required to be at all times displayed in the store; and it also seems strange that Mr. Ebbert would have surrendered the permit and made application for a new permit *ten days* before he went to see the Alcoholic Beverage Control Board to see if he could get a liquor license.

bond; and if there be due amounts in excess of the bond, to allow the State to proceed as it sees fit to enforce its lien under § 84-1912 Ark. Stats. for the balance due.

HAMMETT *v.* CANNON.

5-936 289 S. W. 2d 683

Opinion delivered April 30, 1956.

Williamson & Williamson, for appellant.

Chas. F. Cole, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second appearance of this case in this Court. See *Cannon* v. *Owens,* 224 Ark. 614, 275 S. W. 2d 445.

On the first appeal we held that the deed of certain lands conveyed to Mrs. Mary Vannatter a life estate, with remainder to her daughter and son-in-law, Lizzie Cannon and Clint Cannon; but we remanded the case so that the appellees in the first appeal (appellants in this appeal) might offer their evidence as to other defenses against the remaindermen. Such defenses were (a) duress and undue influence practiced by Lizzie Cannon and Clint Cannon on Mrs. Mary Vannatter; and (b) non-perform-

ance by Lizzie Cannon and Clint Cannon of their promise to take care of and support Mrs. Mary Vannatter during her lifetime. On remand the evidence was offered on the said defenses and the Chancery Court held the evidence insufficient to defeat the deed; so the beneficiaries under Mrs. Vannatter's will are the present appellants and Lizzie and Clint Cannon, the remaindermen in the deed, are the present appellees.

I. *Undue Influence and Duress.* The Notary Public who prepared the deed of June 28, 1948—from Tubbs and wife to Mary Vannatter for life and remainder to Lizzie and Clint Cannon—testified that he went out to see Mrs. Vannatter before preparing the deed and ascertained how she wanted it, went back to his office and prepared the deed, then went back to Mrs. Vannatter and read the deed to her. He asked her, "Is that the way you want it to be?"; and she said, "Yes, that is what I want. That is the way I want it." The grantors in the deed were apparently present at the aforesaid conversation, yet they were not called as witnesses. In short, any evidence as to undue influence or duress is entirely too sketchy to justify a decree defeating the deed on that ground. The Chancellor affirmatively stated: "There will be no finding of fraud, duress or undue influence." We cannot say that such conclusion is against the preponderance of the evidence.

II. *Non-performance of Promise of Support.* The deed of June 28, 1948, contained no restriction on the remainder: that is, the deed did not say that Lizzie Cannon and Clint Cannon had promised to support and care for Mrs. Vannatter during her lifetime as a consideration for receiving the property at her death. The present appellants, therefore, had the two-pronged burden of proving: (a) that such a promise of support was a consideration of the deed;[1] and (b) that such promise was broken by Lizzie and Clint Cannon so as to amount to

[1] Proving the consideration is entirely different from proving an express trust by parol evidence, so cases cited by the appellee on express trust are not in point.

fraud. On this angle of the case the Trial Court made this finding in announcing his decree:

"To vary a written instrument the proof must be very clear, and the agreement would have to be clearly established in all its terms; and I find that proof in this case has not been established to the extent required by law; and I further find that if there was such an agreement that the proof doesn't establish that the plaintiffs here failed and refused to carry out their part of the contract."

The appellants say that the Chancery decree is against the preponderance of the evidence on both prongs of the support matter. Typical of the evidence offered to prove the agreement of support is that of J. T. Smith, the Notary Public who prepared the deed. He testified that at the time the deed was prepared, Mrs. Vannatter told him that the Cannons were to ". . . take care of her." But there was an entire absence from the deed of any such provision and we have already detailed the testimony of the Notary Public as to reading the deed to Mrs. Vannatter. An agreement, to provide care and support, is one thing; and a mere expectancy or hope, that the remaindermen will provide care and support for the life tenant, is another thing. The hope or expectancy of the life tenant does not make a definite agreement by the remaindermen. We cannot say that Mrs. Vannatter's conversation with the Notary Public evidenced more than a hope or expectancy on her part.

The strongest circumstance to support the claim of an agreement, to provide care and support for Mrs. Vannatter, was the fact that some time after the deed had been recorded, Clint Cannon took Mrs. Vannatter to an attorney so she could execute her will; and this will stated:

"In consideration of their taking care of me, living with me and furnishing me a home for the balance of my natural life in my present home one mile West of Mountain View, Arkansas, in which they now live with me, I

do hereby GIVE and BEQUEATH unto my beloved daughter, LIZZIE CANNON, and her husband, CLINT CANNON, my said above mentioned home and the 15 acres of land upon which it stands. In case my said daughter, Lizzie Cannon and her husband, Clint Cannon, cease, fail and/or refuse to live with, support and care for me for the balance of my lifetime in my said home, then this bequest shall become null and void and the above mentioned homestead property shall go in equal shares to my Four daughters, Lizzie Cannon, Pearl Martin, Cordelia Taylor and Edna Hammett, share and share alike."[2]

Even though this will was subsequently revoked, it is argued by appellants, and with much plausibility, that this provision in the will—executed after the deed—showed that Clint Cannon and Lizzie Cannon had made such a promise of support to Mrs. Vannatter. This provision in the will is a strong argument; but the fact still remains that if any such agreement of support had been made *before* the deed was executed, Mrs. Vannatter would most probably have included it in the deed rather than in a subsequently drawn will. The *quantum* of evidence, to establish a promise of support made as a consideration for the deed, must be more than a preponderance. In *Viesey* v. *Wooten,* 220 Ark. 962, 251 S. W. 2d 593, we said:

"The preponderance of the evidence here does not show that, as part of the consideration for the conveyance of the property to the Wootens, they were to look after Martha for the rest of her life. And, even if there had been such a preponderance of the evidence, a mere preponderance would not be enough to ingraft on the deed a consideration other than that expressed therein."

The Chancellor held that the evidence in the case at bar did not measure up to the *quantum* required; and from a careful study of the record, we cannot say that the Chancellor was in error. There is no need for us to consider the matter of non-performance of the alleged

[2] This will was dated September 17, 1948. There was an earlier will dated August 12, 1948, which contained a somewhat similar clause.

promise, since we hold that the evidence is not sufficient to establish the promise. Letters relied on by the appellants, written by the Cannons to Mrs. Vannatter, are not as broad as the appellants assert. The rights of Lizzie and Clint Cannon vested at the time of the deed; Mrs. Vannatter had the place for life, and the Cannons had only the remainder. During Mrs. Vannatter's lifetime the Cannons did not try to take the place from her. They became entitled to it on her death.

Affirmed.

JEWELL *v.* GENERAL AIR CONDITIONING CORP.

5-938 289 S. W. 2d 881

Opinion delivered April 30, 1956.

[Rehearing denied May 28, 1956.]

Richard W. Hobbs, for appellant.

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

MINOR W. MILLWEE, Associate Justice. Appellee, General Air Conditioning Corporation, is a contractor and wholesale distributor of air conditioning and refrigeration equipment at Little Rock, Arkansas, and will hereinafter be referred to as "General." Appellants, Nat F. Jewell and wife, hereinafter called "Jewell," are partners in the sale and installation of air conditioning and refrigeration equipment at Hot Springs, Arkansas. Jewell was a dealer in equipment sold by General from 1951 to 1953, inclusive, and the parties joined in several contracts for the installation of such equipment.

On November 23, 1954, General brought suit against Jewell to reopen, surcharge and restate an alleged account stated entered into by the parties October 12, 1953, under which alleged errors in Jewell's favor occurred either through mutual mistake of the parties or by a mistake of fact on the part of General and fraud on the part of Jewell. The answer of Jewell pleaded an accord and satisfaction or compromise of the accounts between the parties as a complete defense to the suit. This appeal is from a decree in General's favor in the sum of $3,091.00.

Jewell first contends the chancellor erred in refusing to hold that a written settlement of accounts executed by the parties constituted an irrevocable accord and satisfaction, or compromise, instead of an account stated, as the court found. In this connection it is also argued that there is no evidence to support the court's finding that errors amounting to $3,091.00 in said written settlement occurred through a mutual mistake of facts by the parties. We cannot agree with counsel in these contentions.

According to the evidence General and Jewell were indebted to each other in varying amounts over the pe-

riod from 1951 to 1953 on joint installations of air conditioning equipment in certain business buildings in Hot Springs. In 1951 they were jointly involved in installations at the S. H. Kress Store and St. Joseph Hospital, which jobs were completed prior to December, 1951. Jewell kept inadequate records and did not furnish General with statements of its charges for labor and materials on these and subsequent jobs. In closing out the two contracts for accounting and income tax purposes on December 31, 1951, General estimated the amount due by it to Jewell on the two jobs at $3,000.00 and Jewell was credited with this amount on General's books. Jewell's continued failure to keep proper records or furnish General with statements of the amounts due it precluded a balancing of accounts from time to time. In the summer of 1953 the account had grown so large that General's president insisted upon a settlement. After some negotiations, General furnished Jewell with an itemized statement of what the latter owed it on September 25, 1953, and Jewell furnished General with a similar statement of the amount owing to Jewell on October 3, 1953.

On October 12, 1953, the parties entered into a written letter agreement settling the accounts between them. Each party accepted the account previously rendered to the other as stating the correct amounts due each other, except for a minor mathematical correction, and Jewell paid General $521.21, which represented the difference between the two accounts, in full settlement of the contracts specified in the letter agreement. At the time of the settlement, neither party recalled the $3,000.00 estimated credit given Jewell December 31, 1951, and this credit was overlooked and not taken into consideration in reaching the settlement. The result of this mutual mistake was to credit Jewell with $3,000.00 more than it was entitled to receive inasmuch as the charges under the Kress and St. Joseph Hospital contracts were included in the settlement. In the annual audit of General's books for 1953 which was completed in February or the early spring of 1954 the auditors discovered the $3,000.00 error and required General to set the amount back on its books

as a charge against Jewell. In June, 1954, General demanded payment of the $3,000.00 and also the sum of $91.00 represented by an additional error in Jewell's favor which appeared on the face of the Jewell statement of account used as a basis of the 1953 written settlement.

While Mr. and Mrs. Jewell testified they had no knowledge of the $3,000.00 error until June, 1954, they admitted that they noticed the discrepancy when General rendered statements to Jewell in January, 1952. It is also undisputed that each party accepted at face value the respective statements of account which formed the basis of the written settlement of October 12, 1953, and that neither party noticed or considered the $3,091.00 error at that time. While Mr. Jewell also testified the parties were still in dispute about certain items and that he waived his rights to certain profits in consideration of the settlement, we think a preponderance of the evidence supports the chancellor's conclusion that each party through mutual mistake thought it was receiving everything due it on the contracts involved in the written settlement and that neither consented to take less than what was actually due it in reaching the settlement of their respective accounts at that time.

We also hold that a preponderance of the evidence supports the trial court's finding that the letter agreement of October 12, 1953, constituted an account stated, and not an accord and satisfaction as contended by Jewell. An account stated has been defined as an account balanced and rendered with an assent to the balance, express or implied. *Brown* v. *Southern Grocery Co.,* 168 Ark. 547, 271 S. W. 342, 40 A. L. R. 383. We have also held that an account stated is only *prima facie* correct, and may be impeached for fraud, mistake or error. *Drake* v. *Howell,* 177 Ark. 1156, 9 S. W. 2d 565. In the early case of *Roberts* v. *Totten,* 13 Ark. 609, it was held that a court of equity will not suffer an account stated to be conclusive upon the parties where there has been any mistake, omission, fraud or undue advantage by which it is in truth vitiated and the balance is incorrectly stated.

See also, *St. Louis Cooperage Co.* v. *Jackson,* 121 Ark. 633, 182 S. W. 534; *Loewer* v. *Lonoke Rice Milling Co.,* 111 Ark. 62, 161 S. W. 1042.

An accord and satisfaction generally involves a contract whereby the debtor agrees to pay and the creditor to receive a different consideration or a sum less than the whole amount of the debt in satisfaction of the larger sum. As the textwriter says in C. J. S., Accord and Satisfaction, Sec. 1: "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is, or considers himself, entitled to; and a 'satisfaction' is the execution, or performance, of such an agreement." In summarizing the court's conclusion in *McMillan, Administrator* v. *Palmer,* 198 Ark. 805, 131 S. W. 2d 943, Judge BAKER said: "In accord and satisfaction there are certain elements that must usually or ordinarily be considered. First, there is a disputed amount involved. Second, there is a consent to accept less than the claimed amount in settlement of the whole. In this case there was no dispute. There was an actual agreement upon the amount that should be paid. 1 Am. Jur., Accord and Satisfaction, §§ 19 and 30. 1 C. J. S., Accord and Satisfaction, §§ 1, 2 and 3. 1 R. C. L., Accord and Satisfaction, § 3." So here, we conclude that a preponderance of the evidence fails to show any dispute in the amounts owed by the parties or that Jewell consented to take less than what was actually due it under the contracts involved in the written letter agreement at the time of its execution.

Even if the settlement of October 12, 1953, constituted an accord and satisfaction, the authorities generally seem to hold that it may be rescinded if it was executed through a mutual mistake of material facts. 1 C. J. S., Accord and Satisfaction, Sec. 43; 1 Am. Jur., Accord and Satisfaction, Sec. 72; *Road Improvement Dist. No. 4 of Conway County, Ark.* v. *Wilkerson,* 5 Fed. 2d

416. However, we do not reach this question since we think the chancellor was correct in holding that the letter agreement of the parties merely constituted an account stated and not an accord and satisfaction.

Jewell finally contends the chancellor erred in refusing to hold that General was barred by laches or estoppel from maintaining the instant suit. Since neither laches nor estoppel was pleaded as a defense below, the court was not afforded an opportunity to pass on such issues and the attempt to raise them for the first time on appeal comes too late. *Gerard B. Lambert Co.* v. *Rogers,* 161 Ark. 307, 255 S. W. 1089; *Bell* v. *Lackie,* 210 Ark. 1003, 198 S. W. 2d 725; *Steele* v. *Steele,* 214 Ark. 500, 216 S. W. 2d 875.

Affirmed.

TAYLOR *v.* CITY OF PINE BLUFF.

4839 289 S. W. 2d 679

Opinion delivered April 30, 1956.

[Rehearing denied May 21, 1956.]

Kenneth C. Coffelt, for appellant.

Wilton Steed, for appellee.

George Rose Smith, J. The appellant was charged with having kept his grocery store open on seven separate Sundays, in violation of state law. Ark. Stats. 1947, § 41-3802. The trial court directed a verdict of guilty upon each count, as is permissible in a misdemeanor case when the proof of guilt is undisputed and the punishment is by fine alone. *Huff* v. *State,* 164 Ark. 211, 261 S. W. 654. The jury assessed the minimum fine of $25 for each offense.

The appellant's principal contention is that the Pine Bluff police are enforcing the statute with such discrimination as to deny to the appellant the equal protection of the laws. The trial court rejected the appellant's offer to prove that, pursuant to a policy adopted by the mayor or the city council, the police have singled out grocery stores in the enforcement of the Sunday law. According to the proffered evidence the police arrest everyone who operates a grocery on Sunday, but they allow business to be done on that day by such concerns as drug stores, hotels, filling stations, restaurants, funeral homes, bakeries, tourist courts, bus stations, city park concessions, and sporting goods stores. It is argued that this proof should have been admitted and would have established a defense to the charges.

Needless to say, the mere fact that a law is not strictly enforced in every instance is not ordinarily a defense in a criminal case. The accused cannot as a general rule escape punishment by proving that someone else has committed the same offense with impunity. Nevertheless, it was settled by the decision in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, that purposeful discrimination in the enforcement of an osten-

sibly fair law may violate the constitution. If the unlawful administration of the statute results "in its unequal application to those who are entitled to be treated alike," there is a denial of equal protection. *Snowden* v. *Hughes,* 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497.

Thus the question is whether the Fourteenth Amendment requires that Sunday laws apply alike to grocery stores and to the other businesses mentioned in the appellant's offer of proof. In other words, if the state statute applied by its terms to grocery stores alone, would it be valid?

This question would not receive the same answer in all jurisdictions. The problem has often arisen in connection with statutes and ordinances containing enumerated exceptions to the general prohibition against the doing of business on the Sabbath. All courts agree that some classification is permissible under the equal protection clause and under similar guaranties in state constitutions, but there is no uniformity of opinion as to the exact point at which classification becomes so unreasonable as to be arbitrary.

In some states the issue of discrimination has been tested on the basis of the various commodities that can or cannot be lawfully sold on Sunday. According to this view if one merchant is allowed to sell a certain article on the Sabbath the same privilege must be granted to everyone else. Consequently grocers have been successful in attacking laws that allow drug stores to operate on Sunday, merely by showing that grocery stores and drug stores sell at least a few of the same items. *Allen* v. *City of Colorado Springs,* 101 Colo. 498, 75 P. 2d 141; *Ex parte Hodges,* 65 Okla. Crim. 69, 83 P. 2d 201. In what is perhaps an extreme example of this view it was held that the owner of a monument works could challenge as discriminatory a law that allowed cemeteries to conduct business on Sunday. *Gaetano Bocci & Sons Co.* v. *Town of Lawndale,* 208 Calif. 720, 284 P. 654.

It does not seem to us that the equal protection clause restricts the legislature to classifications based on the type of commodity being sold. The legislature might reasonably believe that it is necessary and desirable to allow pharmacists to fill prescriptions on Sunday. It might also find that druggists are unwilling to open their stores for that limited activity alone and that medicines can be made available to the public on Sunday only by permitting all departments of the drug stores to remain open. Hence it does not necessarily follow that because the druggist sells a bar of soap on Sunday the grocer has a constitutional right to do the same. A study of the cases indicates that to test discrimination solely on the basis of the article sold is apt to result in abolishing all exceptions to Sunday laws, for businesses are tending more and more to overlap one another's activities.

We prefer to give full effect to the presumption of constitutionality that attends every statute and to uphold the statutory classification in the absence of proof indicating that there is no reasonable basis for the distinctions laid down by the legislature. Under this view, which prevails in many jurisdictions, Sunday laws applicable only to grocery stores and meat markets have been held to represent a reasonable classification. *People* v. *DeRose,* 230 Mich. 180, 203 N. W. 95; *State* v. *Somberg,* 113 Neb. 761, 204 N. W. 788; see also *Theisen* v. *McDavid,* 34 Fla. 440, 16 So. 2d 321; *State* v. *Towery,* 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed, 347 U. S. 925, 74 S. Ct. 532, 98 L. Ed. 1079. It is our conclusion that a Sunday law applying only to grocers would be valid and that therefore the appellant is entitled only to be treated in the same manner as other grocers. The trial court correctly refused the defendant's offer of proof.

Two remaining contentions may be answered quickly. It is said that the appellant was prejudiced by a remark made by the city attorney in his opening statement to the jury. Apart from the fact that the court admonished the jury not to consider the remark, the argument is refuted by the fact that the court directed verdicts of guilty,

leaving only the matter of the punishment to the jury. Since the jury imposed the minimum fine in each case the appellant cannot have been harmed.

We are also urged to declare as a matter of common knowledge that public necessity requires grocery stores to be open on Sunday. We do not know this to be true; rather to the contrary, in many communities such stores are closed on Sunday without apparent detriment to the public welfare. Moreover, the statute puts the issue of necessity on an individual basis, as it provides that "necessity on the part of the customer" may be shown as justification for commercial activity on the Sabbath. Ark. Stats., § 41-3803. It may be doubted whether this exception was meant to permit business as usual on Sunday, without regard to the needs of any particular patron.

Affirmed.

ROBINSON, J., dissents.

SAM ROBINSON, Associate Justice (dissenting). I dissent for the reason that, in my opinion, there has been purposeful discrimination against the appellant in violation of his rights under the Fourteenth Amendment to the Constitution of the United States. Appellant was convicted of violating Ark. Stats. § 41-3802 by keeping his grocery store open on Sundays. The statute provides: "Every person who shall, on Sunday, keep open any store or retail any goods, wares and merchandise, or keep open any dram shop or grocery, or who shall keep the doors of the same so as to afford ingrees [ingress] or egrees [egress], or retail or sell any spirits or wine, shall, on conviction thereof, be fined in any sum not less than twenty-five [$25.00] dollars, nor more than one hundred dollars [$100.00]." Thus, it will be seen that it is a violation of the law to keep open *any store or retail any goods, wares and merchandise on Sunday.*

Amendment No. Fourteen to the Constitution of the United States provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. The sole question here is whether the appellant has

been denied that protection. The statute prohibiting the sale on Sunday of goods, wares and merchandise, on its face, is fair, and no contention is made that it is invalid; but the manner of enforcement is in violation of the Fourteenth Amendment. Although a law is fair on its face and impartial in appearance, yet, if it is applied and administered in an unequal manner it is within the prohibition of the Constitution.

In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, the court said: "The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution." Although the statute prohibits the sale of *any goods, wares or merchandise* on Sundays, the law enforcement officers are permitting other places of business to remain open and are allowing the barter and sale of almost every known kind of merchandise, except groceries.

It was held in *Tarrance* v. *Florida,* 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572, that an actual discrimination is as potential in creating a denial of equal rights as a discrimination made by law. A large latitude is allowed to the states for classification upon any reasonable basis and what is reasonable is a question of practical details into which fiction cannot enter. *Kidd* v. *Alabama,* 188 U. S. 730, 23 S. Ct. 401, 47 L. Ed. 669. In the absence of any showing of reasonable basis for the discrimination by the administrative officers, as here, the court has no right to conjure up possible situations which might justify the discrimination. *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266, 56 S. Ct. 457, 80 L. Ed. 675. Discriminations are not to be supported by mere fanciful conjecture and cannot stand as reasonable if they offend the plain standards of common sense. "That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado &*

Santa Fe Ry. v. *Ellis,* 165 U. S. 150, 155, 17 S. Ct. 255, 41 L. Ed. 666. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Hartford Steam Boiler Inspection and Insurance Company* v. *Harrison,* 301 U. S. 459, 57 S. Ct. 838, 81 L. Ed. 1223.

Drug stores are permitted to stay open on Sunday and it is a matter of common knowledge that they sell a large assortment of merchandise. In fact, variety or department stores would be more appropriate names; they sell all kinds of goods, including home appliances and wearing apparel. We know that sporting goods stores, also allowed to do business on Sunday, sell guns and ammunition, fishing tackle, boats and motors, shoes, boots, clothing, stoves, electrical appliances, and almost everything a person needs for hunting, fishing and outdoor activities. Bakeries are permitted to remain open, and we know that they sell practically nothing that is not sold in grocery stores. Certainly there is nothing obnoxious about the grocery business that would justify discrimination; in fact, such discrimination as is shown here cannot be justified on any reasonable basis. And although classification is permitted without denying the equal protection of the laws, a classification based on no adequate reason is invalid. *Kansas City Southern Railway Co.* v. *Road Improvement District No. 6 of Little River County, Arkansas,* 41 S. Ct. 604, 256 U. S. 658, 65 L. Ed. 1151, reversing 139 Ark. 424, 215 S. W. 656, 217 S. W. 773. The Supreme Court of the United States said, in *Power Co.* v. *Saunders,* 274 U. S. 490, 47 S. Ct. 678, 71 L. Ed. 1165, reversing 169 Ark. 748, 276 S. W. 599: "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, *Truax* v. *Corrigan,* 257 U. S. 312, 333, 42 S. Ct. 124, 66 L. Ed. 254; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg,* 238 U. S. 56, 59, 35 S. Ct. 675, 59 L. Ed. 1119, and extends as well to corporate as to natural persons, *Smyth* v. *Ames,* 169 U. S. 466, 522, 18 S. Ct. 418, 42 L. Ed. 819; *Gulf, Colo-*

rado & Santa Fe Ry. Co. v. *Ellis,* 165 U. S. 150, 154, 17 S. Ct. 255, 41 L. Ed. 666; *Santa Clara County* v. *Southern Pacific R. R. Co.,* 118 U. S. 394, 396, 6 S. Ct. 1132, 30 L. Ed. 118. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. *Truax* v. *Corrigan, supra,* p. 337; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra,* 155; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Ft. Smith Light & Power Co.* v. *Board of Improvement, ante,* p. 387."

The legislature of the state has not seen fit to discriminate against grocery stores by placing them in a category separate and apart from other mercantile establishments, and provide that they must remain closed on Sundays while other places of business are permitted to remain open; and for the administrative officers of the state to take it upon themselves to inflict such discrimination is clearly contrary to the plain provisions of the Fourteenth Amendment. Hence, I respectfully dissent.

LEEK *v.* BRASFIELD.

5-918 290 S. W. 2d 632

Opinion delivered April 30, 1956.

[Rehearing denied June 18, 1956.]

Brockman & Brockman, for appellant.

Daggett & Daggett, for appellee.

George Rose Smith, J. This action was brought by the appellee to recover damages for the inundation of his farm in Desha County. The complaint asserts that the flooding of the land was due to the defendant's wrongful conduct in preventing the repair of a dam that protected the plaintiff's farm. The jury awarded damages to the plaintiff in the amount of $550. The basic question in the case is whether the defendant's conduct amounted to an actionable wrong.

The plaintiff's land lies a mile or more below the defendant's farm on a drainage canal constructed by Cypress Creek Drainage District. At a point between the two farms, where the artificial drain leaves the bed of Cypress Creek, the district long ago constructed a dam across the creek bed in order to divert the water into the canal. In the spring of 1953 some unknown person cut this dam. The cutting of the dam was beneficial to the defendant, as it provided an additional channel for the escape of water that might otherwise have backed onto his property. But the breach in the dam was detrimental to the plaintiff, whose lower land was exposed to the danger of the flood water's coming through the gap in the dam.

The plaintiff and another landowner, R. B. Stimson, asked the commissioners of the district to repair the dam. The commissioners, feeling that it was the district's duty to mend the break, authorized Stimson to employ a con-

tractor to do the work. Stimson arranged for W. A. Spradlin to repair the dam.

Spradlin proceeded toward the dam site with a piece of heavy equipment that had cost some thirteen thousand dollars. As Spradlin was making a preliminary survey of his task he met the defendant; upon this encounter the plaintiff bases his cause of action. The jury were warranted in believing that the defendant threatened to tie up Spradlin's expensive equipment in a court proceeding if Spradlin went forward with the project. Spradlin, who considered the job a minor undertaking that he had accepted as an accommodation to the landowners, yielded to the defendant's threats and abandoned the work. Within a month or so there were heavy rains which flooded the plaintiff's lands. There is evidence to show that the damage would not have occurred if the dam had been repaired.

The appellant first argues that Spradlin's attempt to mend the break was illegal and might in fact have been enjoined if suit had been filed. This contention is without merit. The district was undoubtedly authorized by law to repair the damage to its drainage system. The commissioners, instead of attending to the matter themselves, duly empowered Stimson to employ someone to do the work. We perceive nothing in this situation giving rise to any cause of action on the appellant's part.

It seems plain that the appellant did not have an unqualified privilege either to obtain an injunction or to threaten to do so. "Litigation and the threat of litigation are powerful weapons. . . . The use of these weapons of inducement is ordinarily unprivileged if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication." Rest., Torts, § 767, Comment b. If the appellant had actually brought the suit, maliciously and without probable cause, he would have exposed himself to liability in damages

for malicious prosecution. *Harr* v. *Ward,* 73 Ark. 437, 84 S. W. 496; *Citizens' Pipe Line Co.* v. *Twin City Pipe Line Co.,* 183 Ark. 1006, 39 S. W. 2d 1017.

In insisting that he was at liberty to threaten to file a lawsuit the appellant cites cases holding that such threats do not constitute duress and should be resisted by a man of ordinary firmness. This argument, however, merely shows that the appellant's conduct may not have been a tort of which Spradlin could have complained; it does not reach the issue of whether that conduct resulted in an actionable injury to the appellee.

It is our opinion that the court properly submitted the issue to the jury. It cannot be doubted that the appellee could have asserted a cause of action against whoever actually cut the dam. The wrongful act of preventing repair was just as injurious to the appellee as the wrongful act of cutting. On this point we adopt the reasoning followed in *Parrish* v. *Parrish,* 21 Ga. App. 275, 94 S. E. 315. There two trees on the defendant's land had been blown over by high winds and had fallen across a stream, forming a barrier that gradually obstructed the natural flow of the water. The plaintiff, who owned the adjoining land upstream, asked that the trees be removed, but the defendant refused either to remove them or to allow the plaintiff to do so. A heavy rain fell and resulted in the plaintiff's land being flooded. The court held that a cause of action existed, upon the theory that even though the original obstruction was not chargeable to the defendant his subsequent conduct amounted to a tortious maintenance of the condition.

The appellant pretty well concedes that he could not lawfully have used physical violence to prevent the repair of the dam, but he argues that it was permissible for him to achieve his purpose by the use of words alone. From the plaintiff's point of view, however, it makes no difference which method was followed to accomplish the intended result. The tort lies in the fact that the defendant's deliberate intermeddling kept the dam from being mended. "One who, without a privilege to do so, inten-

tionally prevents a third person from giving to another aid necessary to his bodily security, is liable for bodily harm caused to the other by the absence of the aid which he has prevented the third person from giving." Rest., Torts, § 326. While the quoted statement is limited to torts resulting in bodily harm the same principle is applicable to cases involving damage to property. Rest., 1948 Supplement, Torts, § 497.

It is suggested that the elapse of a month between the defendant's wrongful conduct and the actual injury to the plaintiff should prevent recovery. This suggestion involves questions of proximate cause and of the plaintiff's duty to take additional measures to protect his land. There was no request below that these matters be submitted to the jury, and we are not willing to say as a matter of law that the short time interval was fatal to the plaintiff's right of recovery.

On the principal issue in the case it is our conclusion that the plaintiff's proof presented a question for the jury. With respect to the appellant's other contentions we find no error in the admission of certain testimony or in the giving of an instruction requested by the plaintiff.

Affirmed.

ROBINSON, J., dissents.

SAM ROBINSON, Associate Justice. I dissent, for the reason that I do not believe a mere threat of filing a lawsuit, such as the one appellant suggested, is actionable.

The appellee Brasfield was the plaintiff in the Circuit Court. He alleged that he had been damaged by water overflowing his land due to a break in a dam or levee, and that the appellant Leek is liable for such damages because he had, by threats, prevented Spradlin from repairing the levee. At the trial, it developed that the alleged threat consisted of Leek, in effect, telling Spradlin, the contractor engaged to do the repair work, that he (Leek) was going to be damaged if the break was repaired; that he did not believe Spradlin had a legal right

to repair the levee, and that if he persisted in doing so a lawsuit would be filed against him. The evidence further developed that before Leek expressed his final views to Spradlin, he conferred with his attorney.

Leek made no threat of any physical violence. In fact, he instructed Spradlin as to the road to take in order to get to the break in the levee. Leek's language was not abusive nor insulting; by no process of the imagination can his words to Spradlin be construed to mean that he threatened to do anything other than what he had a legal right to do, and that was, to seek redress in the courts for any damages he might sustain. Even if Leek's threat to take the matter to court should be considered as morally wrong in the circumstances, it would not give rise to a cause of action. In *Cooley on Torts,* 4th Edition, page 4, it is said: "An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will." So far as I have been able to ascertain, this is the first time any court has held that a threat to file a lawsuit, in itself, gives rise to a cause of action.

In *17 American Jurisprudence,* page 892, § 17, it is said: "It is the well-established general rule that it is not duress to institute or threaten to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. It is never duress to threaten to do that which a party has a legal right to do, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise agreement."

Appellee takes the position that, since Leek threatened to test the issue in the courts, he, appellee, had the right to let the break in the levee go unrepaired, wait for the water to overflow his land, and then make Leek pay

for the damages merely because Leek threatened to appeal to the courts for the enforcement of any rights he had. In the future, when anyone is threatened with a lawsuit, in the event he takes certain action, he can safely refrain from doing the act, whatever it may be, and if he is thereby damaged, he can then collect from the one who threatened litigation.

The established law that a threat of litigation in itself does not give rise to a cause of action should not be disposed of by saying that this law applies to Spradlin but does not affect Brasfield. Spradlin was the contractor employed to do the work. If he had no cause of action against Leek because of the threat to file a lawsuit, Brasfield certainly had no cause of action because of the alleged threat. There is no contention that Brasfield was not fully informed as to everything that transpired; sufficient time elapsed between the threat of litigation made by Leek and the time the land was overflowed that Brasfield could have taken any action he might have desired to enforce any rights he had.

If the threat by Leek is not actionable, then Brasfield has no cause of action, because a threat of filing suit is all that Leek did. Ordinarily, a mere threat is not actionable. In *Cooley on Torts,* 4th Edition, page 35, it is said:

"A threat to commit an injury is also sometimes made a criminal offense, but except in cases where a threatening gesture may constitute an assault, it is not an actionable private wrong. Damages cannot be recovered for a mere threatened injury. Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. Words never constitute an assault, is a time honored maxim. Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or

anger, though when afterward reported by witnesses they seem to express deliberate malice and purpose to injure. Even when defamation is complained of the law is very careful to require something more than expressions of anger, reproach, or contempt, before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And comparing assaults and threats, another important difference is to be noted: In the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually none beyond what the party assaulted has in his power of physical resistance."

In *52 American Jurisprudence,* page 380, it is said: "A mere threat to commit an injury is not an actionable private wrong, since it is only the promise of doing something which in the future may be injurious, and may never be carried into effect."

In a note on the subject in 5 A. L. R. 1287 it is said: "It will be observed that it is held in the reported case [*Brooker* v. *Silverthorne,* 111 S. C. 553, 99 S. E. 350, 5 A. L. R. 1283] that an action will not lie for merely abusive language nor for language of a threatening nature unless it was such as to put a person of ordinary reason and firmness in fear of bodily hurt."

"Because a person has a right to threaten to do that which he has a right to do, a threat to bring an action to enforce a lawful demand, or one which he in good faith believes to be lawful, does not constitute duress." *Wise* v. *Midtown Motors,* 231 Minn. 46, 42 N. W. 2d 404, 20 A. L. R. 2d 735.

The majority opinion cites *Parrish* v. *Parrish,* 21 Ga. App. 275, 94 S. E. 315, but, when the facts in that case are considered, it will be seen that there is not much similarity between that case and the one at bar. There, a stream became clogged by fallen trees, and the property owner would not remove the obstruction nor permit his neighbor to do so. As a result, the water backed up on the neighbor's property. Refusal of the owner of the property where the obstruction existed to permit his neighbor to

come on the land to remove the trees from the water amounted to an affirmative wrongful act. The court stressed the point that one who is injured in his riparian rights may recover damages therefor. Of course, the neighbor would not dare go on the land without permission. He would have been guilty of trespassing, and might have been met with physical violence. Here, of course, Leek had no right to physically prevent the repairing of the levee, and he made no threat of any such attempt; he merely said he was going to court to enforce whatever rights he might have. Although he may have lost his case in court, there would be no actionable wrong in his bringing suit; no malice on his part is alleged or proved.

The majority opinion cites *Restatement, Torts,* § 326, as authority for the proposition that one may be liable for preventing another from going to the aid of one in trouble, and cites *Restatement, Torts,* 1948 Supplement, § 497, to the effect that the rule also applies to cases involving damage to property; however, in my opinion, the cited authority does not imply that a cause of action may be based on a threat to bring a legal cause of action.

Appellant Leek had a perfectly legal right to file a suit to prevent the repair of the levee. He did not threaten to do anything other than what he had a legal right to do. This court said, in *Ellis* v. *First National Bank of Fordyce,* 163 Ark. 471, 260 S. W. 714: "It is not duress to threaten to do that which a party has a legal right to do, and the fact that a party threatens to bring suit to collect a claim constitutes neither duress nor fraud, and a compromise of such a claim is binding in law."

And the court said, in *Vick* v. *Shinn,* 49 Ark. 70, 4 S. W. 60: "If there is in fact a cause of action when the threat is made, the plaintiff, by bringing suit, would only enforce a legal right; if there was no cause of action . . . , the party threatened should exercise the ordinary degree of firmness which the law presumes every man to possess, and meet the issue of the unjust suit. One cannot be heard to say that he had the law with him, but feared to meet his adversary in court."

That is exactly what has happened here. The appellee says, in effect: We have the law with us. Leek had no legal right to prevent the closing of the gap in the levee, but, since he threatened to file suit, we were afraid to meet him in court.

JAMES *v.* HUMPHREY, AUDITOR.

5-950 289 S. W. 2d 691

Opinion delivered April 30, 1956.

Herndon & Schoggen, for appellant.

Tom Gentry, Attorney General, and *Ben J. Harrison,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellants, as taxpayers of the State of Arkansas, brought this suit in the Chancery Court of Pulaski County to have declared illegal and void a large number of contracts for printing and supplies for the State of Arkansas awarded on bids received by the Secretary of State on July 1, 1955. From an adverse decision appellants prosecute this appeal. To reverse the decree of the trial court appellants rely on the following grounds: First, the advertisement for proposals published by the Secretary of State did not advertise for separate sealed proposals as specifically required by Section 14-307 of the Statutes of Arkansas. Second, the bids were not submitted as separate sealed proposals.

Third, the opening of bids by the Secretary of State as required by Section 14-318 of the Arkansas Statutes was not complied with in that bids from various bidders on the several contracts sealed together in one envelope were not opened at a public meeting at the time and place designated in the advertisement. On the contrary, such envelopes were merely slit and the contents afterward removed and tabulated. Fourth, that the keeping of the bids opened and unpublished over a period of five days, two of them being holidays, violated the secrecy of the proposals and renders contracts let thereon invalid.

In all parts material to this case said Section 14-307 provides as follows: The Secretary of State shall publish a notice in the paper "stating that *separate sealed* proposals for the furnishing of the supplies . . . are invited . . ." and will be received at his office on the 15th day after the first publication. (Emphasis supplied.)

In like manner said Section 14-318 provides substantially as follows: "At the time and place designated in the said advertisement for the opening of bids the Secretary of State, in the presence of such persons as choose to attend, shall open all bids submitted, and shall award each of the said contracts, respectively to the person or persons who, after due deliberation, he [they] shall find to be the lowest bidder in the aggregate for the same." Two or more contracts may be awarded to the same person.

There is no dispute about the facts as developed by the testimony, and it is agreed that the chancellor stated them correctly, as follows: "The principal facts, as developed by the evidence, are undisputed. The Secretary of State advertised for proposals for the furnishing of printing and supplies under a number of different categories or classifications. Numerous printers and suppliers throughout the State submitted proposals on one or more of these categories. Some printers submitted bids on more than one classification. All proposals were submitted on forms supplied or approved by the State

and each proposal was submitted on a separate form with a bond attached thereto. In some instances, however, several proposals were enclosed and sealed in the same envelope before delivery to the Secretary of State.

"At the appointed hour (11:00 A. M. on July 1, 1955), a number of the bidders assembled at the Office of the Secretary of State. The Secretary and his staff then proceeded to slit open the envelopes but, at that time, did not remove the contents from them. This activity was done in the private office of the Secretary of State which then contained his staff and approximately thirty interested bidders. Because of the crowded condition of the room, the Secretary of State indicated that more room was needed to spread out and properly tabulate and consider the various proposals. One of the bidders 'moved' that the interested spectators move out and leave the tabulation to the Secretary and his staff; whereupon most of the interested spectators left the private office of the Secretary of State. There is no evidence that the Secretary of State or his assistants asked that anyone leave. The door to this office was never closed and there was no indication that the spectators or other interested citizens could not view the proceedings, except for the limitation of space. The business of tabulating the bids continued for the next several days, interrupted only by necessary recesses for meals, and it was dispensed with at night and throughout an intervening weekend and holiday. Throughout this time several persons interested in the process observed the tabulation and examination of the bids. During the time actual tabulation was not being conducted, the proposals were kept in a safe in the office of the Secretary of State."

We agree with the conclusion reached by the chancellor and in support thereof we adopt his language as set out in the decree: "The first two contentions of plaintiffs may be dealt with together, as they refer to the requirement in the statutes regarding the advertisement and submission of 'separate sealed proposals.' Plaintiffs contend that this phrase, as used in the statute, re-

quires the Secretary to advertise for and the bidders to submit proposals which are sealed separately; and they contend that the fact that several proposals from one or more bidders were sealed together in one envelope is a violation of the statutory requirement. I cannot agree with this position. The apparent reason for the requirement of separate proposals is to facilitate the comparison of one proposal to another and to safeguard the public against possible collusion in the submitting of bids. The requirement that the proposals be sealed is, of course, to protect against tampering with the proposal after it has left the hands of the bidder. These safeguards are protected even though several are sealed in the same container or envelope until, at a given time, they are opened by the proper authorities of the State. Thus, under the proof here, all proposals submitted were separate and were sealed in such a manner as to meet the requirement of the statutes. Parenthetically, a grammatical construction of the phrase also supports this view. In the phrase 'separate sealed proposals' the words separate and sealed are both adjectives modifying the noun proposals. The exact meaning being, therefore, that the proposals should be separate from one another and that they should be sealed. This does not precisely mean, as plaintiffs contend, that each proposal should be sealed separately from every other proposal. Had that meaning been intended, the proper form of the phrase would have been 'separately sealed proposals.'

"Plaintiffs also contend that the Secretary of State did not comply with the statute (Ark. Stats. (1947) Section 14-318) in opening the bids and that after opening them they were left unpublished for a period of five days, thus violating the secrecy of the proposals, and that either of these alleged violations rendered the contracts let on the bids invalid. Section 14-318, Ark. Statutes for 1947, provides that at the time and place designated in the advertisement the Secretary of State, 'in the presence of such persons as choose to attend shall open all the bids submitted and shall award each of the said contracts respectively to the person or persons who, after due de-

liberation, they shall find to be the lowest bidder in the aggregate for the same.' There is nothing in the evidence that indicates a violation of this portion of the statute. The bids were opened beginning at 11:00 A. M. on July 1, 1955, at the office of the Secretary of State, which was the time and place designated in the advertisement. Because of the number of proposals and the number of contracts to be bid upon, the task of examining, tabulating and comparing the proposals required considerable time. The phrase 'after due deliberation' from the quoted portion of the statute above indicates that the Secretary should take a reasonable time to determine the lowest responsible bidder for each contract. It would be impossible for the task to be completed at the exact instant of 11:00 A. M. There is no proof in this case to the effect that any person who chose to attend was prohibited from doing so; on the contrary, there is in this record the testimony of several who did attend and observe the tabulation from time to time. The fact that the bids were left open and unpublished for a period of five days was necessary because of the multiplicity of proposals coupled with intervening holidays. Certainly the statutes do not require the deliberation of bids to be conducted continuously until the final lowest responsible bidder has been ascertained. Thus, under the facts of this record, the manner in which the Secretary proceeded to tabulate the bids after their original opening does not violate the statutes governing this activity."

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

Affirmed.

Justice George Rose Smith dissents.

George Rose Smith, J., dissenting. In 1874 the legislature adopted a detailed plan for safeguarding the integrity of competitive bids for certain public contracts. It seems to me that the majority opinion, by its failure to give effect to two provisions of the 1874 law, approves a procedure far more lax than that which the lawmakers meant to sanction.

The statutory scheme is a simple but effective one. It is contemplated that a single advertisement will invite bids for a number of different contracts, which must be let separately. To the end that the bids for each particular contract may be considered together the law requires that separate sealed proposals be submitted and that each proposal be indorsed to show the contract to which it pertains. Ark. Stats. 1947, §§ 14-307 and 14-313. In this way all the sealed bids for a particular contract can be grouped together and opened at the same time. It is required that the bids be opened in the presence of such persons as choose to attend. Ark. Stats., § 14-318. The contract is then awarded, after due deliberation, to the lowest responsible bidder. *Ibid.* The vital precautions against the possibility of fraud or collusion lie in the requirement that separate sealed proposals be submitted and that these proposals be opened in the presence of any interested persons who care to be present.

The procedure that is actually being followed is not that contemplated by the statute. A person who bids for more than one contract is permitted to inclose all his proposals in a single sealed envelope. This practice makes it impossible to assort the sealed envelopes and open simultaneously all those relating to a particular contract. Instead there is originally a mere slitting of the envelopes; it may be several days before the bids for a given contract are gathered together and compared. Yet the slitting of the envelopes effectively destroys the secrecy of every bid and leaves the way open for fraudulent manipulation in the interval that elapses before the bids are compared. Of course the issue is not whether such fraud has actually occurred; it is whether the law permits even the possibility to exist.

In approving the practice that now prevails the majority first hold that the requirement of "separate sealed proposals" is satisfied by the inclosure of several proposals in one envelope. In this view the words "separate" is considered as having been intended to prevent a bidder from lumping two or more contracts together in one proposal. This interpretation of the law is unsound.

The legislature had already provided, by § 3 of the act, that the various contracts must be let separately. Ark. Stats., § 14-305. There was no need to repeat the word "separate" in the same sense in § 4 of the act; it would add nothing to what had already been said. In the latter section the word means something else: that the various sealed proposals must themselves be separate from one another. (This construction is of course grammatically impeccable, as the adjective "separate" can perfectly well modify the complete concept of a "sealed proposal" as distinguished from a proposal that may be sealed or unsealed.)

The majority also hold that the act of slitting the envelopes meets the statutory direction that the bids be "opened" in the presence of witnesses. This holding hardly seems to merit discussion. It is at least difficult to see why an interested person would make a trip to the state capitol merely to observe the slitting of envelopes. What he would be interested in is the privilege of being present when the contents of the envelopes are withdrawn and made available for inspection. That is the privilege that is denied to him by the majority's decision.

COOPER *v.* CHAPMAN.

5-908 289 S. W. 2d 686

Opinion delivered April 30, 1956.

E. J. Butler, for appellant.

Mann & McCulloch, for appellee.

SAM ROBINSON, Associate Justice. While a guest in an automobile owned and operated by the appellant, R. O. Cooper, the appellee, Nettie M. Chapman, was seriously injured. She filed suit against Cooper, alleging that he operated the car in a willful and wanton manner which resulted in her injuries. The case was defended on the theory that the defendant Cooper's conduct was not willful and wanton within the meaning of our guest statute. Ark. Stats., §§ 75-913-14-15. There was a judgment for Mrs. Chapman in the sum of $7,500.00, and Cooper has appealed.

After all the evidence was introduced, Cooper moved for a directed verdict on the ground that the evidence was not sufficient to take the case to the jury on the question of whether his operation of the car amounted to willful and wanton misconduct. His motion was overruled.

There were three passengers in the car in addition to Cooper: Mrs. Chapman, Mrs. Leslie and Mrs. Riley. The evidence shows that Cooper had been drinking to some extent; there is actual proof of only two drinks, but he had a bottle of whiskey with him in the car, and while at the hospital after the accident, an officer smelled alcohol on his breath. Mrs. Leslie, who was sitting in the back seat, testified that she looked at the speedometer and the car was traveling 100 miles an hour. Both she and Mrs. Chapman attempted to get Cooper to reduce the speed, but he continued at the high rate of speed until a moment before the wreck. Mrs. Leslie testified that he went off on the shoulder of the road, and then she said: "The last thing I remember we were begging him to slow down." On cross-examination, the witness testi-

fied that Mrs. Chapman complained to Cooper that he was going 100 miles an hour, and begged him to slow down. The witness further testified that both she and Mrs. Chapman repeatedly asked him to slow down, and that she stated to Cooper: "If you are going to drive that fast I would rather you would stop and let me out."

Mrs. Chapman testified that she did not actually look at the speedometer, but she knew he was driving awfully fast. She asked him to slow down. "I told him he was flying too low." On two different occasions, she asked him to slow down; Mrs. Leslie repeatedly asked him to slow down, and when he did finally slacken his speed it was only to the extent of reducing it about 15 miles an hour.

Cooper made the remark: "I didn't know I was going a 100." The car turned over with such terrific force that it knocked Cooper and two of the passengers unconscious; however, although Mrs. Chapman was seriously injured, she was not rendered unconscious. The car turned end over end; it did not collide with anything, Cooper merely lost control by reason of the terrific speed.

Mrs. Riley, another passenger in the car, testified for the defendant, but admitted on cross-examination that she had previously told one of the attorneys for the plaintiff that they were going over 100 miles an hour. Cooper admitted that Mrs. Chapman told him he was "flying too low without wings." He also stated that the car would go over 100 miles an hour, and on another occasion, he had driven it 115 miles an hour.

Under the evidence in this case, the jury could have reached the conclusion that the car was going between 85 and 100 miles an hour at the time of the wreck; that the passengers, particularly Mrs. Leslie and the plaintiff, Mrs. Chapman, had repeatedly requested Mr. Cooper to slow down, but that he had not done so to any appreciable extent. Such terrific speed on the road from Forrest City to Wynne in the night time, over the protests of the passengers, is sufficient ground to base a finding

of willful and wanton misconduct. To sustain his argument that the evidence was not sufficient to send the case to the jury, appellant cites several cases, including *Splawn, Admx.* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248; *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30; *Froman* v. *J. R. Kelley Stave & Heading Company,* 196 Ark. 808, 120 S. W. 2d 164; *Hodges* v. *Smith,* 175 Ark. 101, 298 S. W. 1023; *Haag* v. *Morgan,* 225 Ark. 664, 284 S. W. 2d 866; *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S. W. 2d 472; *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723, and *Steward, Administrator* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901. But all of these cases can be distinguished on the facts. We think the case of *McAllister, Administrator* v. *Calhoun,* 212 Ark. 17, 205 S. W. 2d 40, is more closely in point with the facts of the case we have here. There, on evidence very similar to the evidence in the case at bar, it was held to be a question of fact for the jury as to whether the operator of the car was acting in a willful and wanton manner, and we think the *McAllister* case is controlling. In that case, we quoted from *Splawn, Admx.* v. *Wright, supra*: "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." And, in *Steward, Administrator* v. *Thomas, supra,* we said: "It is one thing to persistently pursue a course of driving in a reckless and dangerous manner over the protest of the occupants of the car and an entirely different thing to act in a negligent manner on the spur of the moment."

Appellant further contends that the testimony of Officer Beech, a State Patrolman, expressing his opinion as to the speed at which the car was traveling at the time of the wreck, was inadmissible. He was asked if his investigation showed the speed of the vehicle just before the accident. The attorney for the defendant spoke up and said: "Let him qualify the witness."

The court said: "The witness should be qualified, whether or not he examined the vehicle involved and he should state what other evidence he based his opinion on,

if he has any. First, do you have an opinion from your investigation as to the approximate speed of the vehicle at the time of the wreck?''

A. ''Yes, sir.''

The court: ''Tell the jury upon what you base that opinion?''

A. ''The opinion is based on the distance the vehicle traveled after it got out of control.''

The court: ''Proceed.''

Counsel for plaintiff then questioned the witness with reference to his opinion as to the speed the car was traveling and no further objection was made. Beech then testified that in his opinion the car was traveling about 95 miles an hour at the time of the mishap. In these circumstances, it cannot be said that there was any objection to the witness giving his opinion as to the speed of the car. If counsel for defendant was not satisfied as to the witness's qualifications and the basis on which he formed his opinion as to the speed, he should have made a further objection, as the court had apparently complied with counsel's request that the witness be qualified.

It is argued that there was error in the giving of several instructions and the failure to give others. We have carefully examined the instructions, and we find no error.

It is further contended that the verdict in the sum of $7,500.00 is excessive. Mrs. Chapman was seriously and painfully injured, her injuries consisting of a broken neck, six broken ribs, a leg broken in two places, and her knee was injured to such an extent that an operation may be required at a later date. Her back was burned, causing disfigurement; she suffered concussion, severe contusions and lacerations, and shock.

She was a waitress in a cafe at Forrest City, earning $21.00 a week and her meals, and tips which averaged about $10.00 a week. Her hospital bill was approxi-

mately $1,200.00, and her doctor bill about $600.00. She was injured on the 16th day of April, 1955; the case was tried on the 17th day of August, 1955, and there was evidence that she might not be able to go to work for another year. We cannot say that the verdict was excessive.

Finding no error, the judgment is affirmed.

HOSKINS *v.* MELTON.

5-943 289 S. W. 2d 884

Opinion delivered May 7, 1956.

Louis Tarlowski, for appellant.

No brief for appellee.

LEE SEAMSTER, Chief Justice. The appellee, B. E. Melton, transacting business as Melton Truck Line, filed an application with the Arkansas Public Service Commission for a certificate of public convenience and necessity to transport lumber, plaswood and treated timber, within the State of Arkansas by motor vehicle over eleven designated routes. The appellants herein, D. W. Hoskins, C. N. Fikes, H. J. Fikes, D. L. Baker and Arkansas Motor Freight Lines, Inc., appeared before the Commission and protested the granting of such certificate. Each of the appellants alleged they were certified common carriers in Arkansas and that each was authorized to haul lumber. They further alleged that no public need existed for the proposed service of appellee; that appellants were able to furnish the equipment to supply any additional needs of the public in hauling lumber in the state.

After consideration of the testimony and evidence, the Commission issued a permit to the appellee.

The appellants appealed to the Pulaski Circuit Court, Second Division, from the Commission's order granting appellee the permit. The court modified the Commission's order and remanded the case to the Commission with directions to grant the applicant (appellee) a certificate of Public Convenience and necessity (permit) in accordance with the court's conclusion of facts. The instant appeal is from the Pulaski Circuit Court's order, approving the Commission's action of granting a certificate of public convenience and necessity (permit) to the appellee.

For reversal, the appellants list the following points.

(1) The judgment of the Pulaski Circuit Court and the Order of the Public Service Commission are arbitrary and against the weight of the evidence, and in conflict with the principles enunciated by this Court in such cases as *Missouri Pacific Railroad Co.* v. *Williams*, 201 Ark. 895, 148 S. W. 2d 644, and *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907.

(2) The judgment of the Pulaski Circuit Court is erroneous and arbitrary in authorizing appellee to render any service and to render service to intermediate points along the highways shown in its judgment, since the record is wholly devoid of any proof tending to show public need for service to intermediate points, or elsewhere.

(3) The Amendment to Order, dated May 31, 1955, issued by the Public Service Commission, permitting order to become immediately effective, is arbitrary and unlawful in direct contravention of Section 7 (f) of Act 397 of 1955.

(4) The judgment of the Court, and order of the Commission, in granting appellee any authority to operate as a motor carrier is arbitrary and contrary to the weight of the evidence and contrary to § 2 and 9 (a) of Act 397 of 1955.

The evidence is clear that appellants, with the exception of D. W. Hoskins, do not serve, nor do they have permits authorizing them to service the area which the appellee proposes to service. The appellant, D. W. Hoskins, services some but not all of the area. The record reveals that none of the appellants transports plaswood. The evidence further reveals that appellee has the equipment and desires to serve the lumber producers in a large area situated around Nashville and southwest Arkansas. It is the intention of appellee to deliver their products to other portions of the State, namely central, northwest and northeast Arkansas.

We hold that a preponderance of the evidence sustains the Commission's findings that there is a public need for the trucking service proposed by appellee in the area covered by the certificate. *Potashnick Truck Service Inc.* v. *Missouri and Arkansas Transportation Co.*, 203 Ark. 506, 157 S. W. 2d 512; *Southeast Arkansas Freight Lines Inc.* v. *Arkansas Corporation Commission*, 204 Ark. 1023, 166 S. W. 2d 262.

Finding no error in the judgment of the trial court, the case is affirmed.

CALVERT FIRE INSURANCE CO. *v.* EATON.

5-957 289 S. W. 2d 896

Opinion delivered May 7, 1956.

Kaneaster Hodges, for appellant.

Harry L. Ponder and *D. Leonard Lingo,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Roland Eaton, purchased an automobile for $675 from R. C. Tate. Appellant, Calvert Fire Insurance Co., carried collision coverage on the car, with the usual $50 deductible clause. On November 21, 1953, the day following the purchase of the car, it was totally wrecked. Appellee brought this suit to collect from appellant $122 alleged due on the insurance contract. He alleged in his complaint: "On November 21, 1953, while said policy was in full force, plaintiff's automobile was damaged in a collision. An adjuster, acting as agent for defendant, called upon plaintiff, and it was agreed between them that the automobile was a total loss, and that its actual cash value at the time of loss was $675.00. From this amount there was deducted $50.00 leaving a balance due from defendant to the plaintiff of $625.00. The adjuster, acting for defendant, informed plaintiff that the salvage from the wreck had been sold by the adjuster to a third party for a net amount of $122.00 and that this amount would be paid by the purchaser to plaintiff. Relying upon the assurance of the adjuster that $122.00 would be paid to him, plaintiff agreed to accept from defendant $503.00 representing the amount due him after deducting $50.00 and $122.00 from the agreed actual value of $675.00. The balance of $122.00 due to this plaintiff from defendant, under his policy of insurance, has not been paid, either by the purchaser of the salvage, or defendant, although demand has been made." Appellant answered with a general denial, and in addition pleaded that: "On December 22, 1953, Roland Eaton and B. F. Eaton executed and delivered to the defendant, Calvert Fire Insurance Company, a Loss or Damage Agreement by the terms of which the said Messrs. Eaton represented and agreed that the total loss or damage resulting to them from the automobile mishap above mentioned was in the sum of $503.00 * * *

"In consideration of and in reliance upon the * * * Loss or Damage Statement, the defendant

Company issued its draft in the amount of $503.00 on January 22, 1954 and, upon the direction of plaintiff, delivered the same to Commercial Credit Corporation of Jonesboro, Arkansas.

"The entire agreement of the parties in settlement of the loss was integrated into the above mentioned written instrument. The plaintiff cannot by parol engraft other or different terms upon the written agreement.

"The defendant Company issued and delivered its settlement draft in reliance upon the above mentioned Loss or Damage Agreement and plaintiff is estopped to deny or controvert its terms."

Trial before the court sitting as a jury resulted in a judgment for appellee for the amount sought, and this appeal followed. For reversal appellant argues: "The Loss or Damage Agreement of the parties was an integration of all their parol understandings and the plaintiff cannot vary or add to it by parol testimony. Hence, the parol testimony of plaintiff and other witnesses was inadmissible; the defendant issued and delivered its settlement draft in reliance upon the Loss or Damage Agreement and the plaintiff is estopped to deny or controvert its terms; the Contract of Insurance provides there shall be no abandonment to the Company," and appellee, was, therefore, bound by this release. Appellant would be right in its contention if there were no substantial evidence to substantiate appellee's contention that the release agreement was obtained by misrepresentation and fraud, (whether intentional or unintentional) on the part of appellant's agent, Sanders, in procuring the release agreement.

After a careful review of the evidence presented, we have concluded that there was substantial evidence of fraud as alleged by appellee. The evidence shows that appellant, insurance company, took possession of the salvage through its agent, Sanders, asked for bids and secured a bid from Charlie Metzler of $122 for the salvage. Sanders and appellee, Eaton, agreed that the cash

value of the car was $675 less the $50 deduction, — or $625 —, and that the net amount due on the insurance contract was $625. Appellee Eaton testified that he was to get $625, that Mr. Sanders paid $503 and that that is all he, Eaton, has gotten out of it. He further testified that they wanted him to sign the release so that the car could be sold for salvage, that the insurance company was selling it for salvage, that he, Eaton, took no bids on the salvage and that Mr. Sanders did not read the release to him before he signed it and that he did not read it. "Q. Did Mr. Sanders tell you whether or not you would get $625, or get the benefit of it? A. Yes, sir. Q. What did he say? A. The way I understood the contract was written out $675.00. I had insurance to cover that. I still owe $137.00 on this wrecked car. Q. What did Mr. Sanders tell you about whether you would get $625.00? A. Yes, sir, or else I wouldn't have signed any release on $503.00. . . . Q. Did Mr. Sanders tell you if you signed the release you would get your $625.00? A. Yes, sir."

G. W. Sanders testified, in effect, that he makes up salvage descriptions, sends them to the Memphis office, which in turn accepts bids from interested parties. That he told Eaton that Metzler would pay him $122 if he sold the salvage to him, that his company (appellant) got the bid and no one contacted Metzler but the company.

R. C. Tate, the dealer who sold the car to Eaton testified: "Here is what Mr. Sanders told me— he told me that the owner of a car wouldn't get the salvage in his name, * * * he couldn't even bid on it. He told me that was the law, but he told me in this case, being as Mr. Metzler had bid on this he would get Mr. Eaton to sign a release and Mr. Metzler could pay him because the title had never been changed. Q. In other words, the title was in Mr. Eaton? A. That is right, I sold it late one afternoon and the fellow hit him that night. That is why he wanted him to sign the release and let Mr. Metzler pay him. Q. Because it was Mr. Eaton's car? A. Because the title was still in Eaton's name."

From the above, as we have indicated, we think that there was substantial evidence that the release involved here was obtained from Eaton by misrepresentation on the part of appellant's agent, Sanders. In other words, that the release was induced by Sanders' promises to Eaton, that Metzler would pay him, Eaton, in addition to the $503.00, $122.00 for the salvage. In the case of *Gold Shaft & Block Co.* v. *O'Keefe,* 200 Ark. 529, 139 S. W. 2d 691, we said: "There can be no doubt from the record in this case that appellee signed the release relying absolutely on Gouldman's statement that the property damage was not mentioned and that he would not have signed it otherwise, but was induced to believe by Gouldman that it was a release for the damages for personal injury. Under the circumstances the appellee had the right to rely on Mr. Gouldman's statement." In *Lyle* v. *Federal Union Insurance Co.,* 206 Ark. 1123, 178 S. W. 2d 651, we said: "In the instant case, the jury should have been instructed that if it found that appellants and appellees agreed upon a settlement of appellants' claim at the sum of $2,650 and appellants were led to accept and cash the drafts for a less amount, upon the assurance by agents of the insurance companies that the balance due under the compromise would be paid, appellants were not bound by the acceptance of these drafts and would be entitled to recover the amount of the damage as shown by the testimony, less the amount paid thereon." The principles of law involved in this Lyle Case would apply with equal force here. In the present case it appears that appellee, in his agreement with appellant, accepted the payment of $503 on the representation that there was a balance due, under the settlement, of $122 which would be paid to appellee and appellee was not estopped by accepting the draft for $503, since he was induced to accept it, as indicated, through misrepresentation, nor was appellee required to make any tender, in the circumstances. See *Unionaid Life Insurance Company* v. *Harkey,* 187 Ark. 87, 58 S. W. 2d 422.

Affirmed.

ALUMINUM COMPANY OF AMERICA *v.* ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.

5-925 289 S. W. 2d 889

Opinion delivered May 7, 1956.

Reuben Goldberg and *Gordon E. Young,* for appellant.

John R. Thompson, W. S. Mitchell and *Edward L. Wright,* for appellee.

ED. F. MCFADDIN, Associate Justice. The issue here posed is, the effect of escalator clauses being included in a petition for rate increase. A somewhat similar question was presented in the recent case of *Monsanto Chemical Co.* v. *Robinson,* 225 Ark. 1006, 290 S. W. 2d 6 (opinion delivered February 20, 1956). In the present case the *appellant* is the Aluminum Company of America; and A. B. Green Fire Brick Company and Malvern Brick & Tile Company, designated as *intervenors,* also are on the same brief with the appellant. In addition to referring to these mentioned parties as "appellant" and "intervenors," we will refer to them collectively as "Industrial Consumers."

In the present case: on March 14, 1955, Arkansas-Louisiana Gas Company (hereinafter called "Gas Com-

pany") filed with the Arkansas Public Service Commission (hereinafter called "Commission"), Schedule 3-B, to be effective April 15, 1955, which schedule was a rate increase and made the price of gas to large industrial consumers as follows:

MONTHLY CONSUMPTION RATE:

First	1,000	M.C.F. at	$0.3000	per	M.C.F.
Next	4,000	M.C.F. at	0.2600	per	M.C.F.
Next	5,000	M.C.F. at	0.2200	per	M.C.F.
Next	90,000	M.C.F. at	0.1900	per	M.C.F.
Next	150,000	M.C.F. at	0.1800	per	M.C.F.
Next	250,000	M.C.F. at	0.1750	per	M.C.F.
All over	500,000	M.C.F. at	0.1725	per	M.C.F.

This Schedule 3-B also had in it two clauses reading as follows:

"TAX ADJUSTMENT CLAUSE:

"The above rates will be increased by any new or additional taxes (as herein defined) which may be imposed on the company after April 15, 1955. The term 'taxes' shall mean any tax (other than ad valorem, franchise, income or excess profit taxes), license, fee or charge levied or assessed by any governmental authority on the purchase, production, severance, gathering, transportation, handling, sale or delivery of gas sold under this rate schedule.

"COST OF PURCHASED GAS ADJUSTMENT CLAUSE:

"The rates shown above are based on the various costs of gas purchased for delivery to customers served from the company's integrated transmission system as said costs will prevail by contractual agreements through December 31, 1955. Beginning with the bills rendered for the month of February, 1956, the above rates shall be increased or decreased each month by the increase or decrease in the weighted average unit cost of such gas purchased during the monthly period ending on the last

day of the preceding billing month above or below the average weighted cost of all such gas purchased during the year ended December 31, 1955. Any change in rates so determined will be computed to the nearest one-hundredth of a cent ($.0001)."

The foregoing "Tax Adjustment Clause" and "Cost of Purchased Gas Adjustment Clause" are together referred to hereinafter as the "escalator clauses"; since that is the recognized nomenclature in utility cases.[1]

When the Gas Company filed its said application for rate increase, these three Industrial Consumers resisted the petition for a variety of reasons, among others being the matters hereinafter set forth. Over the strenuous objection of these Industrial Consumers, the Commission, by order of April 14, 1955, approved the Gas Company's tendered bond of $1,250,000.00 and allowed the aforesaid copied "Monthly Consumption Rate" to become effective on April 15, 1955, under the provisions of § 73-217 Ark. Stats.; but in the said order the Commission recited that ". . . the tax and cost of gas escalator provisions in said schedule shall not be made effective until after further order of the Commission." So, ever since April 15, 1955, the Gas Company has been collecting from these Industrial Consumers at the monthly consumption rate hereinbefore mentioned and thus put into effect under bond, as aforesaid; and these Industrial Consumers have at all times insisted that the monthly consumption rate so put into effect under bond is void *because of the inclusion in the said Schedule 3-B of the two escalator clauses hereinbefore copied.*

The Commission denied such insistence of these Industrial Consumers; the Circuit Court affirmed the Com-

[1] In the volume, "Conduct of the Utility Rate Case," edited by Francis X. Welch, and published by Public Utilities Reports, Inc., in 1955, there is a discussion on pages 33 and 34 of escalator clauses in utility rates. The expression, "escalator clause" is not confined to utility cases. For use in other cases see *Wasservogel* v. *Meyerowitz,* 79 N. Y. S. 2d 256; *Simpson Bros.* v. *Dist. of Columbia,* 179 F. 2d 430; *Pfotzer* v. *U. S.,* 176 F. 2d 675; *Simpson Bros.* v. *Dist. of Columbia,* 73 F. Supp. 858; *Record & Tribune Co.* v. *Brandtjen & Kluge, Inc.* (Iowa), 39 N. W. 2d 288; *E. F. Pritchard Co.* v. *Heidelburg Brewing Co.* (Ky.), 212 S. W. 2d 293; and *Lincoln Rug Co.* v. *East Newark Realty Corp.* (N. J.), 61 A. 2d 448.

mission; and the matter is here on appeal. In a printed brief containing 61 pages of argument, and again in oral argument before this Court, these Industrial Consumers have strenuously urged: (a) that the inclusion of the escalator clauses rendered void the entire application for rate increase filed by the Gas Company on March 14, 1955; (b) that the Commission had no power to allow the monthly consumption rate in Schedule 3-B to go into effect because of the presence of the escalator clauses; and (c) that because the Gas Company in the Schedule 3-B asked more than it was entitled to, then the Gas Company lost the right to receive anything.[2] And all such insistence is in the face of an admission by the Industrial Consumers that on final hearing on the rate increase, the Commission denied the Gas Company all prayed relief in regard to the two escalator clauses.

There is no necessity for us to discuss whether escalator clauses are good or bad, or to discuss whether these two escalator clauses come within the intendment and fulfillment of § 73-219 Ark. Stats., which section seems to

---

[2] The three Industrial Consumers refer to the Schedule 3-B filed by the Gas Company with the Commission as "the proposed rate schedule"; and here are the topic headings in the brief of the three Industrial Consumers in this Court:

"I. *The Arkansas Statutes Do Not Authorize the Filing of a Rate Schedule Containing Escalator Clauses Such As Those Appearing in the Purported Rate Schedule Tendered for Filing by the Company. Therefore the Commission Should Have Sustained Petitioner's Motion to Dismiss the Proceedings and Strike the Schedule from the Files.*

"A. The purported rate schedule tendered for filing by the Company did not comply with the requirements of § 73-217 and was therefore not acceptable for filing.

"B. The purported rate schedule tendered by the Company did not comply with the requirements of § 73-219 and was therefore not acceptable for filing under that section.

"C. The purported rate schedule did not comply with other provisions of the Arkansas Statutes.

"D. Decision of other commissions support the analysis here presented of the unacceptability of the Company's escalator schedule.

"II. *The Commission Was Without Jurisdiction to Take Any Action With Respect to the Purported Rate Schedule and All Actions Taken by the Commission With Respect Thereto Were Unlawful.*

"A. The Commission has no jurisdiction to act on a utility's rates unless the conditions to attachment of such jurisdiction are met; none of which were complied with in this case.

"B. The Commission unlawfully approved a bond filed by the Company to make effective its suspended rate schedule and unlawfully upon approval of said bond prescribed a different schedule for the interim period of investigation."

recognize some sort of escalator clause to be possible in some situations. The entire matter of escalator clauses was denied by the Commission; and anything we might say as to the validity or invalidity of escalator clauses would be *obiter dicta.* But, notwithstanding all the above, the appellant and the intervenors insist that the inclusion of the escalator clauses in the Gas Company's petition for rate increase automatically prevented the Commission from allowing the monthly consumption rate to go into effect under bond; and this insistence is because—as the Industrial Consumers argue—the Commission could not "cull out" the good from the bad in allowing the rate to go into effect under bond.[3]

We cannot believe—and we, therefore, refuse to hold—that the Public Service Commission was without power to eliminate the escalator clauses before approving the bond to allow the monthly consumption rate to go into effect in accordance with § 73-217 Ark. Stats. The law authorizing the Public Service Commission to act in such matters is found in § 73-201 *et seq.,* Ark. Stats.; and the law gives the Commission many powers. Section 73-202 says the Commission is vested with the power ". . . to supervise and regulate every public utility . . . and to do all things, whether herein specifically designated, that may be necessary or expedient in the exercise of such power. . . ." Certainly if the Commission can "supervise and regulate" a public utility, it can strike the escalator clauses out of a proposed application before allowing the new rate to go into effect under bond. Again, § 73-204 says that ". . . all rates . . . demanded . . . by any public utility . . . shall be just and reasonable, and to the extent that the same may be unjust or unreasonable, are hereby prohibited and declared unlawful." Certainly the Commission had the right to determine that the escalator clauses here in-

[3] It must be remembered that § 73-217, Ark. Stats., was amended by Act 31 of 1955 so as (*inter alia*) ". . . to require a showing of immediate and impelling necessity before a rate increase is allowed a public utility under bond." But the Act 31 of 1955 is not here involved, because this case on the bond matter was decided by the Commission before the effective date of Act 31 of 1955.

volved were not "just and reasonable" so as to be put into effect under bond.

Again, under § 73-217, the utility could put into effect under bond an increased rate; but § 73-219 provides that a hearing must be held before any ". . . sliding scale or automatic adjustment of charges . . ." could be made effective. The Gas Company had a right, when it filed its Schedule 3-B, to ask that its monthly consumption rate go into effect under bond, and that, on final hearing, the escalator clauses be considered under § 73-219. The inclusion of these two requests in the one schedule was not fatal to the power of the Commission to approve the bond and allow the monthly consumption rates to go into effect. To hold otherwise would be to take our present system of liberal pleadings back to the days of the old common law pleadings: when, if the action were brought in trover and should have been in detinue, the result was fatal to the plaintiff's case; or, if the action were brought in assumpsit and should have been brought in covenant or debt, then the plaintiff lost because he had brought the wrong kind of action. We abolished these old forms of action by our Civil Code of 1869; and the spirit of the Civil Code militates against the argument made by these Industrial Consumers. There is nothing fatal to a petition for a rate increase merely because the petition asks for more than is to be allowed on preliminary hearing.

The appellant and intervenors cite us to two cases of the U. S. Supreme Court decided on February 27, 1956, in which they claim the Court held that it is fatal to file a petition under one section of the law when it should have been filed under another section of the law. These two cases are: *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U. S. 332 (Adv. op.), 100 L. Ed. (Advance Sheets) 291, 76 S. Ct. 373 (Adv. op.); and *Federal Power Comm.* v. *Sierra Pacific Power Co.,* 350 U. S. 348 (Adv. op.), 100 L. Ed. (Advance Sheets) 300, 76 S. Ct. 368 (Adv. op.). But, as we read these two cases, they hold that a bilateral contract rate cannot be changed by

a unilateral filing by the utility with the commission for a new rate. In the Mobile case, Mr. Justice HARLAN summed up the holding of the Court in these words:

"For the reasons discussed below, we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action."

This quotation goes like a refrain through the entire opinion. And in the *Sierra* case the same point is made. There is nothing in the record before us to even indicate that the Gas Company had made a *preferred bilateral* contract with any of these three Industrial Consumers so that a unilateral filing could not be made. As a matter of fact, such evidence of a *preferred bilateral* contract would be in the teeth of § 73-206 *et seq.*, Ark. Stats. So we fail to see how the two cases from the United States Supreme Court have any bearing in the case at bar.

In the recent case of *Monsanto* v. *Robinson,* 225 Ark. 1006, 290 S. W. 2d 6 (opinion of February 20, 1956), the appellant there made the same contentions as are here made by these Industrial Consumers; and in holding such contentions to be without merit, we said:

"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."

The foregoing quotation disposes of the contentions of the three Industrial Consumers in the case at bar.

Affirmed.

McCord *v.* Robinson.

5-956 289 S. W. 2d 893

Opinion delivered May 7, 1956.

[redacted]

French & Camp, for appellant.

Westbrooke & Westbrooke, for appellee.

Minor W. Millwee, Associate Justice. Appellee, Mildred Robinson, is the youngest child of A. A. and Ella Armstrong, who are now deceased. Appellants, who are the other children and heirs of said decedents, brought this suit to set aside a deed from the parents to appellee on the ground that it was never delivered. On a former appeal, we held the trial court erred in sustaining appellee's motion to dismiss at the conclusion of appellants' testimony and the cause was remanded for further proceedings and final determination of the question whether there had been a sufficient delivery of the deed to appellee. *McCord* v. *Robinson,* 225 Ark. 177, 280 S. W. 2d 222. On remand, the cause was submitted on the testimony adduced at the first hearing plus additional proof offered by the parties. The instant appeal is from a decree finding the proof insufficient to sustain appellants' allegation of nondelivery of the deed and dismissing the complaint for want of equity.

. . Appellee resided with her parents on the forty acres in controversy in 1934 when Mr. Armstrong became involved in a foreclosure proceeding against another tract he then owned. He became apprehensive that a possible deficiency judgment in that suit might eventually jeopardize his interests in the home place. After consulting counsel, he and Mrs. Armstrong, on July 21, 1934, executed a general warranty deed of the forty-acre homestead to appellee, reserving a life estate to the grantors. Appellee continued to reside with her parents, while three older daughters married and moved to homes of their own.

Appellee testified that on the date of the execution of the deed her father handed it to her and said, "Sis, this is for you and don't record it until my death, but upon my death, you get the deed on record . . . Furthermore, you are going to have to take care of it." Appellee placed the deed in her mother's trunk, where she and her parents kept other valuable papers. The deed remained in the trunk, which was accessible to appellee and her parents, until May 5, 1943, when appellee had it recorded because she was afraid it might be destroyed after a threat to that effect by a brother-in-law. Appellee's mother acquiesced in the recording of the deed. While the deed was recorded without the prior consent of her father, the latter told appellee to "just let it be, just like it is," after she explained why the deed was recorded, shortly after it was done. Appellee returned the deed to the trunk after it was recorded.

After A. A. Armstrong's death, on July 8, 1944, each of his other three daughters was given $500 from proceeds of the sale of another tract which he owned, but appellee was given none of said proceeds because she was getting the home place. Appellee continued to reside with and care for her mother until the latter's death in April 1954. A small amount of personal property, left by Mrs. Armstrong, was divided equally between the two other sisters who survived their mother and appellee received none of it.

Several neighbors of the Armstrongs, who were not related and were apparently disinterested witnesses, testified to statements repeatedly made by A. A. and Ella Armstrong before and after the recording of the deed to the effect that they had deeded the forty acres to appellee and intended for her to have the place and that it was not for sale for that reason.

Opposed to the foregoing evidence was that of appellants and some close relatives to the effect that they had heard A. A. Armstrong on different occasions direct that the deed be procured from "his box" or "his drawer" and read to him; that he repeatedly stated the deed was to remain there and admonished appellee and others that it was not to be recorded; and that he became angry and threatened to have the deed "taken off the record" upon learning that it had been recorded. There was no proof of any effort to carry out such threat or to destroy the deed which remained in the trunk for nearly a year prior to his death and after he learned it had been recorded.

For reversal appellants argue there was no delivery of the deed which remained at all times in the possession and under the dominion of the grantors; and that the evidence adduced by appellants was sufficiently clear and decisive to rebut any presumption of delivery arising from the recording of the deed. We cannot agree with these contentions. On the former appeal, we cited numerous decisions which set forth the applicable rules for determining whether there has been a delivery of a deed. The rule is stated in *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1033, as follows: "A deed is defined to be 'a written instrument signed, sealed and delivered'; and it is essential to the validity of a deed that there should be a delivery of the instrument. But in order to constitute a sufficient delivery thereof it is not necessary that there should be an actual manual transfer thereof to the grantee or a formal acceptance thereof by him. The question of a delivery of a deed is largely one of intent; and if it clearly appears from the words or acts of the grantor that it was his intention to treat the instrument as his deed and to make a disposal thereof, indicating that it

should be effective, then the delivery is sufficient. As is said in the case of *Russell* v. *May,* 77 Ark. 89: 'Any disposal of a deed, accompanied by acts, words or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance, is a sufficient delivery.'

"The registration of a deed raises a presumption of the delivery to and acceptance by the grantee thereof. It is evidence of a most cogent character tending to show delivery. It is a solemn proclamation to the world that there has been a transfer of the title to the property from the grantor to the grantee, of which our law makes everyone take notice. 1 Devlin on Deeds, § 392; 13 Cyc. 567; *Hedge* v. *Drew,* 12 Pick. 141; *Robbins* v. *Rascoe,* 120 N. C. 79; *Snider* v. *Lackenour,* 38 Am. Dec. 685.

"A deed signed, acknowledged and recorded, is complete and valid, although there is no evidence of a formal delivery thereof; and the presumption of delivery arising therefrom can only be overcome by clear and decisive proof that the grantor did not part and did not intend to part with the possession of the deed. The weight of authority is that a deed, thus executed and recorded, is valid and effective to pass title, although retained by the grantor in his possession. There mere fact of his retaining it in his possession is not sufficient to show that it was not intended to be absolute. *Adams* v. *Adams,* 88 U. S. 185."

In *Battle* v. *Anders,* 100 Ark. 427, 140 S. W. 593, this court 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." See also *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568.

We think a preponderance of the evidence supports the chancellor's finding that appellants failed to meet the

burden of showing nondelivery of the deed in question. In our opinion, a preponderance of the evidence clearly indicates that there was a manual transfer of the deed to appellee with the intention of the grantors that it pass out of their control and operate as a conveyance. Nor do we agree with the further contention that the instrument in question is merely an "insurance deed" which was prematurely recorded without the consent of the grantors. In *Cavett* v. *Pettigrew,* 182 Ark. 806, 32 S. W. 2d 808, cited in support of this contention, there was an effort to establish a lost deed which was never to be recorded at all and was only to become effective upon an eventuality which never happened.

In the recent case of *Lindsey* v. *Christian,* 222 Ark. 169, 257 S. W. 2d 935, we said: "We have held in a long line of cases, some of which are reviewed in *Smith* v. *Smith,* 218 Ark. 228, 235 S. W. 2d 886, that a deed like this one, if delivered, is a valid grant of a future interest, the quoted language merely reserving a life estate to the grantor. Here it is shown that the appellee agreed not to record the instrument until Lindsey's death, but this fact does not distinguish the case from our earlier decisions. Since the remainder interest passed upon delivery of the deed it makes no difference, as between the parties to the conveyance, whether the deed was ever placed on record." So here, the fact that possession of the land was reserved to the grantors for life does not defeat the passing of the title to appellee upon delivery of the deed which was shown by a preponderance of the evidence.

Affirmed.

Opinion delivered May 7, 1956.

Mahony & Yocum and *Stein & Stein,* for appellant.

Spencer & Spencer, for appellee.

GEORGE ROSE SMITH, J. In the court below the appellee was granted a divorce upon the ground of personal indignities. In her testimony she recounted several occasions on which her husband, the appellant, had cursed and beaten her. It is now contended that this testimony was not corroborated, that the defenses of condonation and recrimination were established, and that the chancellor erred in his division of the couple's property.

When there is plainly no collusion in the case the corroborative proof need not be especially strong. *Kirk* v. *Kirk,* 218 Ark. 880, 239 S. W. 2d 6. A sister of the appellee stated that she had observed bruises assertedly resulting from the appellant's mistreatment of his wife. Another sister, who had lived next door to these litigants, testified that she had heard the appellant cursing the appellee and had seen him strike her, kick her, etc. This proof amply meets the requirement that the testimony of a party be confirmed.

Neither condonation nor recrimination was established as a defense. The plaintiff testified that she was forced to leave her husband several times before their final separation and that she returned to him as a result of his promises to improve his behavior in the future—promises that were not kept. Upon these facts the condonation was conditional and does not prevent the court from awarding the injured spouse a divorce. *Franks* v. *Franks,* 211 Ark. 919, 204 S. W. 2d 90. As to recrimination, the appellee was not blameless, but we do not think her actions serious enough to afford the appellant a ground for divorce. Hence the proof does not sustain the defense of recrimination. Davis, Mutual Misconduct in Arkansas Divorce, 3 Ark. L. Rev. 132, 137.

The chancellor took the view that the plaintiff was entitled to a half interest in all property standing in the defendant's name. In all but one particular this conclusion is supported by the weight of the evidence. The couple's home was owned as a tenancy by the entirety and was correctly ordered sold, the proceeds to be divided equally. Ark. Stats. 1947, § 34-1215. The appellee was employed during most of the marriage and contributed her earnings to the acquisition of furniture and other personal property. In these circumstances the chancellor was justified in holding that the appellee had an equal claim to the items so acquired. *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S. W. 2d 550.

The undisputed proof shows, however, that the appellant received $3,600 from his mother's estate a few

months before his wife left him for the last time. Although the appellant testified that most of this money had been dissipated before the suit was filed, the chancellor had good reason to disbelieve this testimony. The appellant stated, wholly without corroboration, that he put $1,000 in currency in a church collection plate and that two or three weeks later he lost $1,900 in a dice game. According to his own testimony he could not afford either outlay. The trial court was warranted in concluding that this money was being wrongfully concealed in an attempt to defraud the plaintiff of her marital interest in the fund. Nevertheless, since it is not suggested that the plaintiff contributed in any way to the acquisition of this money, her claim thereto does not extend beyond the one-third interest allowed by the statute. Ark. Stats., § 34-1214. The decree is too liberal in awarding her one-half of this $3,600.

The money judgment against the appellant must be reduced by $600, the difference between a third and a half of the money inherited by the appellant. As so modified the decree is affirmed, with an allowance of $150 to the appellee's counsel for their services in this court.

PARK CORPORATION OF ARKANSAS *v.* TRI-COUNTY DRAINAGE DISTRICT.

5-959 290 S. W. 2d 18

Opinion delivered May 7, 1956.

Norton & Norton, for appellant.

Henry S. Wilson and *Rieves & Smith,* for appellee.

PAUL WARD, Associate Justice. Appellants, Park Corporation of Arkansas (a corporation), M. D. Parker, L. E. Burch, Jr., and Mrs. Lurlin F. Burch, are owners of real estate in St. Francis County. One appellee is the Tri-County Drainage District (hereafter referred to as Tri-County District) which was organized under the laws of this state about the year 1914 and embraces lands in Cross, Crittenden and St. Francis Counties, and another appellee is East St. Francis Drainage District No. 1 (hereafter referred to as District No. 1) which came into existence under the provisions of Act 371 of 1947 and embraces all the lands in St. Francis County which were originally in said Tri-County District.

Appellants brought this suit in the Chancery Court of St. Francis County seeking to have removed, as clouds upon their titles, certain assessments made by appellees against their lands, and to enjoin other similar assessments. The trial court sustained a demurrer to appellants' complaint, and this appeal follows.

The allegations in appellants' complaint can be better understood in the light of an understanding of the statutory background of the two appellee drainage districts. Appellants do not question [except as hereafter noted] the legality of the formation of the Tri-County District. As stated above this district included lands in the three counties mentioned above, and it was empowered to make assessments and construct a drainage system for the benefit of the three counties. The Tri-County District continued intact until about the year 1948, during which time a drainage system was established and paid for by assessments against the lands in the three counties. During all this time assessments were made and the affairs of the district were administered by the Circuit Court of Crittenden County.

In 1947 the Legislature passed Act 371 [now appearing in Ark. Stats. as Sections 21-577 to 21-582, inclusive]. It was under the provisions of this Act that District No. 1 came into existence, and the Act gave District No. 1 "the power to preserve the portion of the drainage system located in such [St. Francis] county as provided in Section 4481 et seq. of Pope's Digest. . . ." Said Section 4481 grants to the district the power "of preserving the same, of keeping the ditches clear from obstructions and of extending, widening or deepening the ditches from time to time. . . ." In Section 5 of said Act 371 [Ark. Stats. § 21-581] there is, however, a provision that the Circuit Court of Crittenden County shall have authority "to cause to be levied and collected a tax on all the lands of the original district for the purpose of paying the expenses incident to the cleaning out (but not for the purpose of extending, widening or deepening) existing ditches so as to provide an adequate outlet for the entire drainage system of the original district."

Appellants' complaint. The complaint filed herein is somewhat lengthy and involved, but it contains, in substance, the following allegations: (a) The plaintiffs own lands in St. Francis County as stated above; (b) The appellee districts were organized as stated above, and the commissioners of said districts are made party defendants together with the county clerk and the collector of St. Francis County; (c) Tri-County District, under orders of the Crittenden County Circuit Court, and District No. 1, under orders of the County Court of St. Francis County, "both assert the right to make contracts for cleaning out and otherwise preserving" the identical ditches dug by Tri-County District, and have asserted the right "to levy and collect special maintenance taxes for such purposes"; (d) Tri-County District is now applying to the Crittenden County Circuit Court "for a levy of taxes annually upon its purported assessment to be expended for the cleaning out and maintenance of the same ditches in St. Francis County together with other of the original ditches in Cross and Crittenden Counties"; (e) One or the other of said assessments (if not

both) is void and of no legal effect, but constitutes a cloud upon the title to appellants' lands; (f) Tri-County District has no right to receive, handle or dispose of any taxes collected from lands in St. Francis County for the purposes mentioned; (g) The taxes collected by either of the drainage districts are expendable only for providing an adequate outlet for the drainage system as originally constructed, and the outlet for the entire system is in St. Francis County; (h) Tri-County District is about to enter into contracts for cleaning out and improving the outlet of the drainage system in St. Francis County; (i) The levies made by the Circuit Court of Crittenden County against the lands in St. Francis County are void because Crittenden County is in the Second Judicial Circuit of Arkansas and St. Francis County is in the First Judicial Circuit, and; (j) Appellants are entitled to an adjudication under the Declaratory Judgments Act. The prayer was: (a) That the clouds cast upon the titles to appellants' lands by said assessments, liens and levies be removed, and; (b) That the clerk and collector of St. Francis County be restrained from placing upon the tax books, or endeavoring to collect any tax or assessment upon their lands.

To the above complaint Tri-County District and its commissioners entered a demurrer on two grounds: (a) That there is another action now pending between the same parties in the Circuit Court of Crittenden County involving the same issues as raised by appellants, and; (b) That the complaint fails to state facts sufficient to constitute a cause of action. In sustaining appellees' demurrer the trial court did not specify upon which ground it based its decision. We have concluded, however, that the court's action was justified on the second ground mentioned above, and we will therefore not discuss the merits of the first ground.

As we interpret appellants' complaint, their main concern is that both districts are collecting [or attempting to collect] taxes on their lands in St. Francis County to clean out that portion of the drainage ditch in St.

Francis County, and that Tri-County District is collecting [or attempting to collect] taxes on their lands in St. Francis County to clean out portions of the original ditch which lies in Cross or Crittenden County. We have concluded that all of the above mentioned activities are permissible under the law.

Referring to the statutes mentioned above in their entirety and in particular to those portions above set forth, we find that the County Court of St. Francis County had the power to make assessments against appellants' lands [in St. Francis County] to preserve that portion of the drainage system located in St. Francis County, to preserve the same, *to keep the ditches clear from obstructions* and to extend, widen and deepen the ditches. The substance of appellants' complaint is, in this connection, that District No. 1 was preparing to make contracts and use the tax money to clean out that portion of the ditch or canal which ran through St. Francis County. It is clear to us therefore that appellants have not, thus far, alleged any grievance from which they are entitled to equitable relief. Likewise it appears from Section 5 of said Act 371 [Ark. Stats. § 21-581] that the Circuit Court of Crittenden County is empowered to levy and collect taxes on appellants' lands in St. Francis County "to clean out existing ditches so as to provide an adequate outlet for the entire drainage system of the original district." As we view appellants' complaint, this is exactly what they have alleged Tri-County District has done or is doing, because, in the absence of allegation to the contrary, we must assume that the words "existing ditches" embraces that portion of the main canal or ditch which runs through St. Francis County—in fact the complaint alleges this to be true. From the above we conclude therefore that both districts have a right to make assessments to clean out the main ditch or outlet in St. Francis County.

Not only do the two districts have the powers mentioned above but we conclude that the spirit if not the exact letter of the statute gives Tri-County District the

power to levy assessments against appellants' lands in St. Francis County [along with all of the other lands in the other two counties which are embraced in the district] to pay the expenses of "cleaning out" an obstruction or obstructions in the main ditch or canal even though said obstructions are in Cross or Crittenden County. Obviously Act 371 of 1947 grants the original district the power to keep the main ditch or canal in all three counties cleaned and opened so that the system will be serviceable for all three counties, while at the same time the Act [by reference to Section 4481 of Pope's Digest] gives District No. 1 the power [or option] to preserve and clean out that portion of the ditch in St. Francis County.

As we have heretofore noted, the two districts had the authority to make the levies complained of. Appellants' complaint makes mention of these levies by the Circuit Court of Crittenden County and the County Court of St. Francis County but does not state in what particular said levies are unlawful. In the absence of such allegations we must presume that the levies were made according to law. If, however, appellants had made allegations [which they have not clearly done] that the tax money [though lawfully assessed] was being used for an unlawful purpose, it would not follow that such assessments, lawfully made, are a cloud upon the titles to their lands. If either district makes an attempt to use the tax money for an unlawful purpose, appellants will then have an adequate remedy to prevent such attempted action. In this connection we point out that Tri-County District's power is limited, and that it has no right under the statutes to levy a tax on appellants' lands in St. Francis County for the purpose of digging additional ditches or for the purpose of preserving and cleaning out any existing ditches except the main ditch or canal which provides drainage for the entire district.

Appellants contend that assessments made by the Circuit Court of Crittenden County against their lands in St. Francis County are null and void, notwithstanding the provisions in Section 5 of said Act 371, because the

Circuit Court of Crittenden County could have no jurisdiction [to make assessments] outside its own judicial district. This contention on the part of appellants cannot be sustained. This court has heretofore recognized that where several counties are included in an improvement district it is necessary for the Circuit Court of one county only to have jurisdiction for the purpose of administering the affairs of the entire district. There is no direct constitutional prohibition against such jurisdiction and justification lies in the fact that Circuit Courts are the repository of all unassigned jurisdiction. In the case of *Grassy Slough Drainage District No. 1* v. *National Box Co.,* 111 Ark. 144, 163 S. W. 512, Chief Justice McCulloch, among other things, said: "The Circuit Courts of the state being the repository of all unassigned jurisdiction, it is within the power of the legislature to confer on them jurisdiction to determine questions relating to the organization of districts not local to a county." Later, in the case of *Russell, et al.* v. *Cockrill,* Judge, 211 Ark. 123, 199 S. W. 2d 584, the court quoted with approval: " 'The Constitution prescribes, limits, and defines, with more or less accuracy, the jurisdiction to be exercised by all of the courts except the Circuit Courts, and instead of attempting to define their jurisdiction (other than appellate) leaves to them the great residuum of civil and criminal jurisdiction not distributed exclusively to other courts.' " The case of *Lesser-Goldman Cotton Co., et al.* v. *Cache River Drainage District, et al.,* 174 Ark. 160, 294 S. W. 711, involved a drainage district composed of portions of Craighead, Jackson and Lawrence Counties [the former county being in one judicial circuit and the latter two in another]. The drainage district was organized under an act of the legislature by an order of the Circuit Court of Craighead County. In that case litigation came to this court over an attempt to extend the district to Poinsett County and this court said: "The land of the district being in more than one county, the proceedings must necessarily be before the circuit court, as the statute provides, which procedure was followed in this case." Appellee, Tri-County Dis-

trict, was also the appellee in the case of *Dickerson* v. *Tri-County Drainage District, et al.,* 138 Ark. 471, 212 S. W. 334, and the court, among other things, there said: "The statute now under consideration confers jurisdiction on the circuit court where the lands are situated in several counties, and we have upheld the statute in that respect." [Citing *Grassy Slough District,* supra]. A careful reading of the *Dickerson* case, supra, shows that it was necessary for the court, in reaching the conclusion it did, to pass upon the power of the Circuit Court of Crittenden County to organize the district embracing lands in two separate judicial circuits, and its authority to make assessments in all of the counties.

In appellants' complaint, but not in their prayer, they seek an adjudication under the Declaratory Judgments Act. By this, apparently, appellants' objective was to have the court declare which assessment lien, if valid, was prior to the other, but this question has heretofore been considered by this court. See *Board of Commissioners of McKinney Bayou Drainage District* v. *Board of Directors of Garland Levee District,* 181 Ark. 898, 28 S. W. 2d 721; *Howe* v. *Long Prairie Levee District,* 187 Ark. 725, 62 S. W. 2d 10; *Sanders* v. *Mhoon,* 214 Ark. 589, 217 S. W. 2d 349; and *Street Improvement District No. 419* v. *Pinkert,* 221 Ark. 265, 253 S. W. 2d 780.

It follows, in view of what we have heretofore said, that the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

Chief Justice Seamster and Justice McFaddin dissent.

Ed. F. McFaddin, Associate Justice, dissenting. The appellants filed this suit and the appellees demurred; the trial court sustained the demurrer and dismissed the suit when the appellants elected to stand on the complaint:

so the case comes to us on the issue of the sufficiency of the complaint to state a cause of action.[1]

I am of the opinion that, when we give the allegations in the complaint the broad and liberal interpretation to which they are entitled, there was enough alleged in the complaint to state a cause of action and that the demurrer should have been over-ruled. That we do give the allegations in the complaint a broad and liberal interpretation when testing their sufficiency against a demurrer, is well recognized. In *Rice* v. *King*, 214 Ark. 813, 218 S. W. 2d 91, Mr. Justice Frank G. Smith stated the rule:

"The sufficiency of this pleading is being tested on demurrer and it was said in the case of *Sharp* v. *Drainage Dist. No. 7,* 164 Ark. 306, 261 S. W. 923, that under our code every reasonable intendment and presumption is to be indulged in favor of the pleading and a complaint will not be set aside upon demurrer unless it be so fatally defective that taking all the facts admitted the court can say that they furnish no cause of action[2] whatever."

This suit presents important questions in the field of improvement district law, and is the first time that Act 371 of 1947 has been before this Court. That Act was an effort to localize to the County level the upkeep of access ditches in multi-county districts; but the Act recognized the necessity of the continuation of the original multi-county district for the upkeep of the main ditches or outlet of the district. To clarify as to terminology: the small ditches leading into the main ditch can be referred

[1] I thoroughly agree with the majority that the other point of the demurrer—pendency of another action—is without merit. In the case of *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8, we held that it is only when the complaint shows *on its face* the fact of another pending action, that the matter may be raised by demurrer. The complaint in this case does not show such fact on its face and, if the appellees wanted to make a defense that there was another pending case, they would have had to introduce proof and that would have precluded the demurrer.

[2] For other cases to the same effect see *Story* v. *Cheatham,* 217 Ark. 193, 229 S. W. 2d 121; *Ferrell* v. *Elkins,* 159 Ark. 31, 251 S. W. 380; *Cox* v. *Smith,* 93 Ark. 371, 125 S. W. 437; and *Cazort* v. *Dunbar,* 91 Ark. 400, 121 S. W. 270.

to as *access ditches,* and the main ditch leading to the outlet of the district is called either the *main ditch* or the *outlet ditch.* In the case at bar, the question, whether the ditches involved were outlet ditches or access ditches, seems to me to have been a matter that should have been developed by the evidence.

The Tri-County District was organized by the Circuit Court of Crittenden County in or about 1915 and is composed of territory in Cross, Crittenden and St. Francis Counties. In 1948 the East St. Francis Drainage District No. 1 was created (and will be referred to herein as the "St. Francis District"). This St. Francis District was created pursuant to Act 371 of 1947. The complaint in this case alleges that the Tri-County District is proceeding to collect benefits on the lands in St. Francis County based on the old 1915 assessment of benefits; and that the St. Francis District is attempting to collect benefits on the same lands in St. Francis County based on the 1948 assessment of benefits.

As I understand the law, the St. Francis District can collect assessment of benefits for the purpose of keeping up the access ditches in St. Francis County, and the Tri-County District can collect benefits on the lands in St. Francis County only for the purpose of keeping up the main ditches or outlet ditches of the Tri-County District. In other words, the benefits collected on the St. Francis County lands under the 1915 assessment cannot be used—since 1948—for the purpose of cleaning out or keeping up any of the access ditches in Cross County or Crittenden County.

With the above understanding, I come to the allegations in the complaint; and I think these allegations were broad enough to allege that the Tri-County District was seeking to collect benefits from the lands in St. Francis County on the 1915 assessment for the use of cleaning out the keeping up the access ditches in Cross County and Crittenden County. Here are the allegations in the complaint:

"13. Plaintiffs allege that the Defendant East St. Francis Drainage District No. One is now collecting taxes each year upon its purported Assessment as above described, and the Defendant, Tri-County Drainage District, is now applying to the Crittenden County Circuit Court for a levy of taxes annually upon its purported Assessment to be expended for the cleaning out and maintenance of the same ditches in St. Francis County together with other of the original ditches in Cross and Crittenden Counties . . .

"14. (f) That any such taxes collected or to be collected by the Defendant Districts, or either of them, are expendable only for the improvement and maintenance of the drainage ditches in St. Francis County, and may not be lawfully diverted to the improvement or maintenance of the ditches of Tri-County Drainage District in Crittenden County or Cross County; and

"(g) That under Act 371 of 1947, being Sections 21-577 to 21-582 inclusive ASA 1947, taxes collected upon levies made or to be made in the name of Tri-County Drainage District are expendable only for providing an adequate outlet for the drainage system originally constructed by the said Tri-County Drainage District, and the outlet for the entire said drainage system has always been and is now in St. Francis County and in the area now constituting the separate District of East St. Francis Drainage District No. One; . . ."

As I read the majority opinion, it holds that the foregoing allegations do not state that the moneys collected on the lands in St. Francis County were to be used in cleaning out the access ditches in Cross County and Crittenden County. So we all seem to agree that the Tri-County District cannot collect benefits on the lands in St. Francis County for use in cleaning out or maintaining the access ditches in Cross County or Crittenden County.

The question is whether the allegations in the complaint stated a cause of action. I think they did when

given a broad and liberal interpretation; and, therefore, I dissent from the affirmance. This is an important case and the facts should have been developed once and for all to prevent a multiplicity of litigation.

WHITE, BAKER AND WHITE *v.* STATE.

4833 289 S. W. 2d 900

Opinion delivered May 7, 1956.

R. W. Laster and *C. Van Hayes,* for appellant.

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

SAM ROBINSON, Associate Justice. Appellants were convicted on a charge of robbery. On appeal, they say, first, that the evidence is not sufficient to sustain the charge. From the evidence, the jury could have concluded: The three appellants, along with one John Zinamon, got together in Little Rock and agreed to go out west of Little Rock for the purpose of intercepting and robbing the driver of a Goff Wholesale Grocery Company truck. The appellant, Joe Baker, furnished the automobile used to go to the scene of the crime. The appellant, Winston White, furnished the pistol and blackjack to be used in the robbery. The robbers failed to locate the Goff truck and decided to rob Mr. E. M. Brown,

who operates a small store and filling station in Saline County. The conspirators discussed in detail the method of perpetrating the crime, and it was decided that they would pretend to purchase some gasoline, and, while Mr. Brown was servicing the car, Zinamon would knock him in the head with the pistol or blackjack. In a discussion as to how hard Mr. Brown was to be struck, some were in favor of killing him, but others favored hitting him only hard enough to cause unconsciousness; those who preferred unconsciousness over killing prevailed. They executed the plan, as agreed, but although Zinamon struck Mr. Brown with his pistol twice with such force as to require ten or eleven stitches to close the wounds, Brown was not rendered unconscious; he was able to run through his store to the apartment at the rear, where he obtained a .22 rifle, and after returning to the front of the store, he shot at the robbers some fifteen times. But his wounds were bleeding profusely, the blood running down into his eyes, and he was, therefore, unable to take aim, hence none of the shots were effective. While Zinamon was beating Mr. Brown, as planned, Winston White ran into the store to get the money from the cash drawer; but when Brown, not being completely disabled, ran into the store, the robber who had entered the store became frightened and ran out without having gained entrance to the cash drawer. Therefore, the only thing obtained in the robbery was the gasoline worth $2.80. Such facts are sufficient to sustain the charge. "Robbery is the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender." Ark. Stats., § 41-3601.

Appellants further contend that a pistol introduced in evidence by the State was not identified as the one used in the robbery. The pistol was found near the place where two of the defendants said it was thrown out of the car, which was at a point between the scene of the robbery and the place where two of the defendants were arrested while standing near the car used in the rob-

bery. The pistol was sufficiently identified by circumstantial evidence.

Appellants' confessions were introduced in evidence and, on appeal, they say the State did not prove the confessions to be voluntary. The question of whether the confessions were voluntary was gone into at the trial, and evidence that they were voluntary is overwhelming.

It is true that two of the defendants claim they were mistreated by the State Police at the time of the arrest. Their testimony in that respect is denied by the officers, and by Mr. Brown, who was present. The defendants showed no signs of mistreatment, and, furthermore, they were in jail in charge of the officers of Saline County at the time the confessions were made to the officers and prosecuting attorney. Appellants do not claim to have been mistreated by any one after being placed in jail. In addition to the testimony of the officers, circumstances do not indicate any kind of mistreatment.

The judgment is affirmed.

HAYNES *v.* RIALES.

5-955 290 S. W. 2d 7

Opinion delivered May 14, 1956

Kenneth C. Coffelt, for appellant.

Louis Tarlowski and *Catlett & Henderson,* for appellee.

LEE SEAMSTER, Chief Justice. Appellant, Roy M. Haynes, brought suit in the Pulaski Chancery Court, First Division, to enjoin the appellee, Roy L. Riales, from receiving money as an auditor for the Arkansas Burial Association Board. The complaint reads as follows:

"The plaintiff, for his cause of action herein against the defendants, and each of them states:

"He is a resident citizen of Polk County, Arkansas, and is a member of the Arkansas House of Representatives from said county. He brings this suit as a taxpayer of the state, for himself as a taxpayer and for the taxpayers of Arkansas.

"The defendant Riales is a member of the Arkansas State Senate, representing the Sixth Arkansas Senatorial District, and has been such since January, 1955, having been elected and qualified to serve for a period of four years ending January, 1959.

"The Arkansas Legislature of 1953 enacted Act 91, which is known as the Arkansas Burial Association Act, and such Act is now, and has been since its passage and approval, in full force and effect. Said Act created what is known as the Burial Association Board, conferring upon said board certain powers, directives and authority, and provided how said board should be selected. The defendants, Nelson, Lattimer, Holmes, Shinn, Mays, Howard and McNabb are now, and have been since the passage of said act, the duly appointed, qualified and acting members of said Burial Association Board. The defendant Simms is the Executive Secretary of said Board.

"Plaintiff alleges, that the said Burial Association Board as provided for under the terms of said act, is a State Agency; that said board is an administrative State Board, whose duties are to carry out the terms of said act as enacted by the State Legislature; that the funds created by, and expenditure of such funds as authorized under the terms of said act, are public funds, and subject to control by the State Legislature; that the positions of employment, including the board members, created under the terms of the Act, are civil positions of employment of, and by the state, and constitute civil offices of the state.

"Defendant, Riales, has continuously since being sworn in as State Senator, as herein alleged, been employed as field Auditor by the defendant members of said Burial Association Board, and is being paid for his services as such by them, and by the herein named defendant Executive Secretary of said board. The salary and expenses being paid defendant Riales by defendant board members and Executive Secretary, as alleged, amount to approximately $8,000 annually. Defendant Riales is receiving said moneys as said auditor while at the same time receiving his salary from the State of Arkansas as State Senator from the Sixth District. Plaintiff alleges, that unless restrained, the defendant Riales, will continue to receive said moneys from said board as one of its field auditors while serving as State Senator at the same time, and for such practice to continue, will cause this plaintiff and the other taxpayers of the state to suffer irreparable damages.

"Plaintiff alleges, that for the defendant Riales to receive said moneys from the defendant, Burial Association Board members and said Executive Secretary, and for them to pay out to him said moneys, as herein alleged, is in strict violation of Sec. 10, Art. 5 of the Constitution of the State of Arkansas which provides, 'no senator or representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this state.'

"Plaintiff alleges, that the moneys already paid out by the said defendant board members and Executive Secretary, to defendant Riales, should be recovered for the taxpayers, and that judgment should be had against the defendants, for the taxpayers of the State for said moneys already paid out to defendant Riales since he has been State Senator, as alleged; that the defendants should give an accounting to this court as to the exact amount of moneys paid to and received by Riales, as alleged, since he has been serving as State Senator."

Appellees demurred on grounds (1) that the Court had no jurisdiction of the subject of the action; (2) that the appellant did not have legal capacity to sue; and (3) that the complaint did not state a cause of action. The trial court sustained the demurrers and dismissed the complaint. This appeal follows.

The sole question presented here is whether the appellee, Roy L. Riales, has been appointed to any civil office under this State. The demurrer admitted that he was elected, and is now serving as a State Senator from the Sixth Arkansas Senatorial District; that he was when elected, and is now serving in the capacity of an auditor for the Arkansas Burial Association Board.

The Arkansas Burial Association Board was created by Act 91 of the General Assembly of 1953. By reference to this act, Section Four authorizes said Board to employ and fix the duties and salaries of an executive secretary, two auditors, and such other clerical assistance as may be necessary to carry out the provisions of the Act.

The question presented is whether the position of auditor for Arkansas Burial Association Board is a civil office or a mere employment. In the case of *Rhoden* v. *Johnston,* 121 Ark. 317, 181 S. W. 128, the court discussed at length the necessary provisions of the law to create a civil office. The court in the above case cited with approval the following cases and the definition there given of a public office.

"An apt definition is given by the Supreme Court of the United States in the case of *United States* v. *Hartwell,* 6 Wall. 385, as follows: 'An office is a public station or employment, conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties.' "

"The same court, in *Hall* v. *Wisconsin,* 103 U. S. 5 said: 'Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required.'

"The Supreme Court of Mississippi, in *Shelby* v. *Alcorn,* 36 Miss. 273, gave a definition which has met our approval, as follows: 'And we apprehend that it may be stated as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer.'

"In *United States* v. *Maurice,* 2 Brock. 96, Chief Justice Marshall said: 'Although an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer.' "

In the recent case of *Bean* v. *Humphrey, State Auditor,* 223 Ark. 118, 264 S. W. 2d 607, this court said:

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

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

" 'There are points of difference between a public office and a public contract. As observed above, a public office embraces the idea of tenure, duration, and continuity. The duties connected therewith are continuing and permanent. A public contract, on the other hand, is limited in its duration and specific in its objects. Its terms define and limit the rights and obligations of the parties, and neither may depart therefrom without the consent of the other. Unlike a public office, a public contract does not involve a delegation of a function of sovereignty. The fact that the duties of a particular position or governmental function do not depend on contract is itself one of the criteria of a public office.

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

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

hand, is a position in the public service which lacks sufficient of the foregoing elements or characteristics to make it an office.' ''

Act 91 of 1953 does not set out the following: the term or tenure of the auditors; the length of time the auditors are to serve in their respective positions; the emoluments and duties of the position. The Burial Association Board is merely authorized to employ and fix the duties and salaries of the auditors—this to be done by contract or agreement and may be discontinued at the pleasure of the board.

This act does not make the position of auditor a civil office, but rather an employment subject to the authority of the Burial Association Board. The act further provides, ''the operation of the Burial Association Board and the carrying out of the functions set out in this Act shall be at no expense to the State of Arkansas.''

Finding no error, the decree sustaining the demurrer is affirmed.

EARLY *v.* STATE.

4841 290 S. W. 2d 13

Opinion delivered May 14, 1956.

Eugene Coffelt, for appellant.

Tom Gentry, Attorney General, *Paul C. Rawlings,* Assistant Attorney General, for appellee.

J. Seaborn Holt, Associate Justice. Appellant, under the provisions of § 41-1928 Ark. Stats. 1947, was charged by information (November 10, 1954) with the crime of removing mortgaged property from the State of Arkansas with the felonious intent to cheat and defraud the mortgage holder in the collection of the secured debt. A jury trial resulted in a verdict of guilty, and the minimum punishment fixed at a term of six months in the Arkansas Penitentiary. From the judgment is this appeal.

First, appellant contends that the evidence was not sufficient to support the verdict and judgment. We do not agree. The testimony shows that on June 8, 1954, appellant executed a note for $4,250 to the Bank of Bentonville, secured by a chattel mortgage covering some 19 head of registered short horn cattle and other personal property. After this mortgage became due (July 1954) appellant sought permission from the bank (mortgagee) to remove the cattle to Miami, Oklahoma, but his request was denied over appellant's threat that if the bank refused his request he would do all in his power to defeat collection of the debt by inducing friends not to attend foreclosure sale. In September 1954 appellant, without the consent or knowledge of the bank, removed 9 head of the mortgaged cattle to Oklahoma. Foreclosure sale was held November 5, 1954, at which all of the cattle were to be sold, however, the 9 head in

Oklahoma were not returned from Oklahoma until November 24, 1954 and they were sold at a second sale on December 10, 1954. The proceeds from the sales left a deficiency judgment of more than $2,000.

In addition to the above evidence, the President of the Bank testified that when he learned that the cattle had been taken to Oklahoma he called appellant, who admitted he had removed them to Oklahoma, but he did not heed the bank's request that the cattle be returned to Arkansas immediately. "Q. Were these cattle represented to you as being registered animals? A. Yes, sir. Q. I will ask you to tell the jury whether or not the registration certificate or papers indicating that they were purebred and registered, were furnished by the defendant? A. No, sir." It further appears that appellant was arrested on the above charge in Oklahoma and had to be extradited for trial in Arkansas. We think the above testimony is substantial and, therefore, sufficient to support the jury finding that appellant removed the property to Oklahoma with the intent to defeat the bank in the collection of its debt. The jury was the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Herron* v. *State,* 202 Ark. 927, 154 S. W. 2d 351. The verdict must stand when supported by substantial evidence. The rule is well established also that in passing on the legal sufficiency of testimony to support the jury's verdict, we must give to the evidence its highest probative value in support of the verdict. Also we must consider the evidence in the light most favorable to the State. See *Bird* v. *State,* 175 Ark. 1169, 299 S. W. 40; *Storms* v. *State,* 179 Ark. 1158, 16 S. W. 2d 468; *Moore* v. *State,* 167 Ark. 164, 267 S. W. 769.

Appellant next argues that the court erred in permitting the State's counsel to cross-examine him as to any "hot checks" written by appellant and further as to his conviction on a "bootlegging" charge. These contentions are without merit. When Early took the witness stand, he placed himself in the same position as any other witness and it was proper to question him

as to any "hot checks" that he may have issued, or as to any "bootlegging" charges, as affecting his credibility as a witness. In *Willis* v. *State,* 220 Ark. 965, 251 S. W. 2d 816, we said: "It was competent for the State to cross-examine the accused concerning prior unlawful or immoral conduct, regardless of time, for the purpose of testing their credibility . . . [Also citing *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, and *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41.]" It appears that appellant did not ask the court for an instruction limiting the testimony as to the hot checks for impeachment purposes only. His complaint now comes too late. In *Roy* v. *State,* 102 Ark. 588, 145 S. W. 190, this court said: "It is also insisted that, as the proof of the contradictory statements was only for the purpose of impeaching the witness, it was error for the court to admit the testimony without cautioning the jury to consider it for no other purpose. It is true that when such testimony as that which was introduced is competent for one purpose, it is the duty of the court, when requested, to explain to the jury the purpose for which it is admitted and to admonish the jury not to consider it for any other purpose. The party objecting cannot, however, complain or object unless he has requested the court to give such admonition. Where the testimony is competent for one purpose, if the other party conceives that it is likely to be considered by the jury for another purpose, and thus become prejudicial to his rights, it is his duty to call the matter to the attention of the court and ask an instruction limiting its consideration . . ." As to questions on the "bootleg" charge, the record reflects that these questions went to the credibility of the witness and appellant's testimony relating to the charge was not objected to.

Appellant's contention that he was prejudiced by the admission in evidence of the extradition proceedings, we find to be untenable, for the reason that this evidence was admissible as bearing upon appellant's good faith and intention in the whole transaction.

We find no error in the court's refusal to give certain instructions requested by appellant, since these in-

structions, we find, were in effect fully and fairly covered by other instructions given. The court was not required to repeat or multiply instructions. After a review of all the instructions we hold that they clearly presented the law applicable to the facts in the case and that no prejudice to appellant's rights appears.

Finally, appellant says that the court placed a heavier burden on him than the law requires, and in this connection says: "The burden was on the State to prove that the property was removed from the State of Arkansas with the fraudulent intent to defraud the Bank of Bentonville beyond a reasonable doubt and the court should have instructed the jury on this point, in no uncertain terms." We think this contention untenable for the reason that the court in its instructions properly placed the burden of proving appellant's guilt, beyond a reasonable doubt, on the State. In Instruction No. 2 we find this language: "You are told that the burden of proof is upon the State of Arkansas to show this defendant to be guilty beyond a reasonable doubt," and Instruction No. 7 provides: "You are instructed that the allegation in the Information with the term fraudulent intent is a fact to be established by the State of Arkansas beyond a reasonable doubt the same as any other material allegation in the Information. Such intent, that is, fraudulent intent, however, need not be proved by direct testimony but may be established by circumstantial evidence as in the case of any other disputed fact," and Instruction No. 13 provides: "In summary, it is substantially as I told you. You will determine whether or not the taking of the mortgaged property from beyond the bounds of the county and State of Arkansas with the fraudulent intent or whether it was with good intent, considering all the evidence in the case." See *Hampton* v. *State,* 67 Ark. 266, 54 S. W. 746.

Finding no error, the judgment is affirmed.

Justice Robinson dissents.

5-910 290 S. W. 2d 637

Opinion delivered May 14, 1956.

[Rehearing denied June 18, 1956.]

A. D. Chavis, for petitioner.

Max M. Smith, for respondent.

ED. F. MCFADDIN, Associate Justice. This is an original proceeding for a writ of mandamus,[1] brought by Mr. and Mrs. A. D. Chavis (hereinafter called "petitioners") against the Honorable John M. Golden, Circuit Judge of the 10th Judicial District of which Cleveland County is a part.

The petitioners allege that since July 15, 1955 they have had pending in the Cleveland Circuit Court

[1] See Rules of this Court, effective January 10, 1954, concerning original proceedings, i.e. Rules 16 and 17.

their motion to vacate a summary judgment rendered against them, and that the Cleveland Circuit Court refuses to rule on said motion. The prayer is for a writ of mandamus to compel the Circuit Court to rule, one way or another, on the said motion. Honorable John M. Golden, Judge as aforesaid (hereinafter called "respondent"), replies, *inter alia,* (I) that a valid judgment was rendered against petitioners in the Cleveland Circuit Court on September 27, 1954, and they failed to perfect their appeal to the Supreme Court; and (2) that on July 11, 1955 he denied the motion to vacate the said judgment and that petitioners then sought to present the same motion by some form of amendment, which he refuses to permit.

The record[2] reflects that in 1953 J. D. Mitchell filed a replevin action against Sterling Watts in the Justice of the Peace Court of Van McKinney, Justice of the Peace in and for Rison Township, Cleveland County, Arkansas. The action was to repossess a 1949 model Ford truck from the defendant, Sterling Watts. Judgment was rendered in the Justice of the Peace Court in favor of the plaintiff, Mitchell; defendant, Watts, made a supersedeas bond, as provided for by § 26-1302 Ark. Stats.; and the bond was approved by the Justice of the Peace. The original bond has been brought before us by our order of *subpoena duces tecum,* and bears the undenied signatures of the petitioners as sureties.[3]

The case of *Mitchell* v. *Watts* was appealed to the Cleveland Circuit Court, wherein some questions were raised about the original replevin bond filed by Mitchell and the original cross bond or retaining bond filed by

[2] Aside from the pleadings and exhibits, the remainder of the record in this Court consists of copies of correspondence and of affidavits that have been filed without objection from either side.

[3] The bond reads in part: "Whereas, the defendant, Sterling Watts, has appealed from the ruling and judgment of Van McKinney, a Justice of the Peace in and for the Township of Rison, in the County of Cleveland, in an action between J. D. Mitchell, Plaintiff, and Sterling Watts, defendant: Now, if said Sterling Watts will prosecute his appeal with due diligence to a decision, and if, on such appeal, the judgment of the justice be affirmed, or if, on the trial anew in the Circuit Court, judgment be given against the appellant, he shall satisfy the judgment, or if his appeal be dismissed, he shall pay the judgment of the Justice, together with the costs of the appeal, this bond shall be void."

Watts; but the record does not disclose that anyone—prior to judgment in the Circuit Court—questioned the validity or sufficiency of the supersedeas bond signed by these petitioners as sureties for Watts. It is because these petitioners were sureties on this supersedeas bond that judgment was rendered against them in the Circuit Court. At all events, Watts, the client of A. D. Chavis, retained possession of the truck after the judgment of the Justice of the Peace, because of this supersedeas bond.

The replevin action of *Mitchell* v. *Watts* was tried to a jury in the Cleveland Circuit Court (respondent presiding) on September 27, 1954, and the verdict was against Watts. Thereupon—on the same day—the Court rendered judgment against Watts and against these petitioners, who were the sureties on his supersedeas bond. A. D. Chavis was present in court representing Watts when the judgment was rendered against the sureties. The correctness of such judgment against the sureties is to be discussed in Topic I, *infra*. Notice of appeal to the Supreme Court was given in regard to the judgment of September 27, 1954, but no appeal was ever perfected and the judgment became final.

Then, on June 30, 1955, the petitioners filed in the Cleveland Circuit Court their "Petition to Vacate a Void Summary Judgment," which stated, in effect, that a summary judgment was entered against the petitioners on September 27, 1954 and that the Court was in error in entering said summary judgment because the said A. D. Chavis and wife were not sureties on the "cross bond" of the defendant, Sterling Watts (the motion failed to mention in any respect the fact that Chavis and wife were sureties on the supersedeas bond). On July 11, 1955, the foregoing petition of Chavis and wife was heard in the Cleveland Circuit Court (respondent presiding), and the following order was made:

"Now on this day comes on for hearing the petition filed by A. D. Chavis and Alma Chavis, as sureties on bond for Sterling Watts, and comes the defendant, Max Smith, by his attorney, Jay W. Dickey, and the

court doth find that judgment was entered on the 27th day of September, 1954, on said bond in open court, in the presence of A. D. Chavis and other parties to the suit, and that no objection was made at that time, and that no appeal was taken therefrom, and thereafter, A. D. Chavis filed a petition requesting that execution be quashed, and same was denied; and further that the term of court has expired in which the denial was made, and this court does not have further jurisdiction of the matter. The court further finds that after said petition was denied, A. D. Chavis prayed an appeal to the Supreme Court of Arkansas from the order denying the motion to quash execution; and the Court finds that the said A. D. Chavis has failed to perfect his appeal, and that the petition filed herein should be dismissed.

"IT IS, THEREFORE, by the court considered, ordered and adjudged that the petition of plaintiffs filed herein be and the same is hereby dismissed."

Thereafter, on July 15, 1955 (four days after the above order) the petitioners filed a pleading entitled: "Amendment to Original Petition of Alma Chavis and A. D. Chavis to Vacate and Set Aside a Void Summary Judgment That Was Entered Against Them in the Above Case." This said pleading reiterated many of the matters contained in the pleading previously ruled on and contained this statement:

"That the Court agreed to hear the original petition herein, on the 11th day of July, 1955, at Rison, Arkansas, and both contending sides were present in court, ready for a hearing which was partially heard, then abruptly ended by the Court's verbal opinion that said summary judgment was founded upon and rested upon an old appeal bond made in a J. P. Court for appeal to the Cleveland Circuit Court, which appeal bond was made and fulfilled its mission in the perfection of that appeal from the J. P. Court to the Cleveland Circuit Court . . ."

The Cleveland Circuit Court (respondent presiding) refused to consider as filed the pleading of July 15, 1955; and then on August 5, 1955, the petitioners filed

a motion[4] in the Cleveland Circuit Court praying that the Court rule on the pleading of July 15th. The Cleveland Circuit Court refused to consider as filed this motion of August 5, 1955; and then the petitioners filed the mandamus proceeding in this Court. There are several "side issues," but the foregoing recitals present the material facts and indicate the issues involved.

I. *The Liability of Sureties On A Supersedeas Bond Filed Under* § 26-1302 *Ark. Stats.* The determination of this point is the fundamental issue in the case. Petitioners say that the Cleveland Circuit Court had no right to render summary judgment against them on September 27, 1954, because, as sureties, they were entitled to ten days' notice before summary judgment could be entered, and they cite § 29-201 Ark. Stats., which requires ten days' notice to a surety before summary judgment can be rendered.[5] But petitioners are in error in this contention because § 29-201 is not the applicable Statute in a situation such as is here before us.

The petitioners filed a supersedeas bond in the Justice of the Peace Court in substantially the form stated in § 26-1302 Ark. Stats. We held in the case of *Judd* v. *Wilson,* 182 Ark. 729, 32 S. W. 2d 614, that one who signed such a supersedeas bond made himself a party to the proceedings and was, therefore, constructively present at every step of the litigation, and that a judgment against the principal warranted a judgment against the surety. So when Mr. and Mrs. Chavis signed the supersedeas bond in this case they, in effect, became parties to the litigation; and when judgment was rendered

[4] The motion of August 5th read: "Come Petitioners, Alma Chavis and A. D. Chavis, and file their motion for the court to pass on and enter an order, allowing or disallowing their original petition with their amendment thereto, for the vacating of a Summary Judgment entered against them, in the above Replevin suit, in which suit they were not parties, nor were they on any cross-bond in that suit,—which petition and amendment thereto were filed for separate relief, under § 27-907 of Arkansas Statutes of 1947, with all other relief asked for in their (petition) and the amendment to their petition, now pending."

[5] Even if petitioners were correct as to § 29-201 being the applicable Statute, still the record shows that Mr. Chavis was present in court on September 27, 1954 and did not claim the benefit of the 10-day Statute, so he might have waived it by such failure to object; but we rest our decision on the ground stated in the opinion.

against Watts, judgment could properly be rendered against the sureties without any further notice.

The bond did not serve its purpose merely to get the case from the Justice of the Peace Court to the Circuit Court, as the petitioners claim: rather the bond was a continuing obligation, and the judgment against the sureties is not governed by the summary judgment Statute, but is governed by the provisions of § 26-1302 Ark. Stats., as construed by this Court in the case of *Judd* v. *Wilson, supra.* That case settles the power and right of the Circuit Court to render judgment against Mr. and Mrs. Chavis on September 27, 1954. The judgment was not a summary judgment under § 29-201 Ark. Stats., as petitioners suggest, but was a judgment on the supersedeas bond under § 26-1302 Ark. Stats. and is governed by the holding in *Judd* v. *Wilson, supra.*

II. *The Limitations on Mandamus Proceedings.* We have many, many cases of this Court showing the limitations on the use of the writ of mandamus.[6] In *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548, we held that mandamus could not be used to correct an erroneous decision already made. So if the petitioners herein thought that the judgment against them of September 27, 1954, was erroneous, they should have perfected their appeal to this Court. In *Calloway* v. *Harley,* 112 Ark. 558, 166 S. W. 546, we quoted from an earlier case:

" 'As a general rule the party applying for a writ of mandamus must show a specific legal right to its issuance, and also the absence of any other legal remedy. For it is a well settled principle that mandamus will not be allowed to take the place of, or usurp the functions of, an appeal. *Automatic Weighing Co.* v. *Carter,* 95 Ark. 118.' "

Again, in *Carter* v. *Marks,* 140 Ark. 331, 215 S. W. 732, in affirming the action of the Circuit Court which denied a writ of mandamus involving a Probate Court matter, we said:

[6] See West's Arkansas Digest "Mandamus", Key No. 1 et seq.

"Petitioner had a full year in which to perfect his appeal, yet, without complying with the requirements of the Statute by filing an affidavit for appeal, he waited until after the expiration of the year and then applied for a discretionary writ upon the ground that his year had expired and that he had no other adequate remedy."

So, here, the petitioners had the right of appeal from the judgment of September 27, 1954. They gave notice of appeal and specified the points, one of which was that the Court was in error in rendering the judgment against them; yet the petitioners suffered that appeal to lapse. Then when the Court made its ruling on July 11, 1955 denying the "Petition to Vacate a Void Summary Judgment," the petitioners had a right of appeal which they could have pursued; so they cannot claim now that they are entitled to a writ of mandamus.

In *McBride* v. *Hon,* 82 Ark. 483, 102 S. W. 389, the Circuit Court dismissed some defendants from the case on a demurrer; and thereafter the plaintiff sought to redocket the case against those defendants. The Circuit Court refused to re-docket the case, and the plaintiff brought mandamus proceedings in this Court, seeking to require the Circuit Court to rule on the motion to reinstate. We said:

"Now Mrs. McBride petitions this court to compel the circuit judge, through a writ of mandamus, to docket said cause and set the same for trial. The petition can not be sustained. The determination of the motion to docket the case was a judicial question. *Hempstead County* v. *Grave,* 44 Ark. 317; ex parte *Johnson,* 25 Ark. 614."

In the case at bar the Circuit Court ruled on the petitioners' motion on July 11, 1955. The attempt to file an amendment and seek another ruling was really an attempt to have the case re-docketed, and this the Circuit Court refused to do because he had already ruled on the motion.

The petition for writ of mandamus is denied.

REYNOLDS METAL COMPANY *v.* BRUMLEY.

5-927 290 S. W. 2d 211

Opinion delivered May 14, 1956.

Wright, Harrison, Lindsey & Upton, for appellant.

Tom Gentry and *Joe W. McCoy,* for appellee.

MINOR W. MILLWEE, Associate Justice. This case involves the applicable statute governing the time limit within which a claim for additional compensation must be filed under the Workmen's Compensation Law.

There is no dispute in the material facts. Appellee, William J. Brumley, suffered a cerebral thrombosis

while working for appellant, Reynolds Metals Company, on September 20, 1950, resulting in an immediate loss of vision in the left eye and a slight paralysis of the left side of his body. His claim for compensation was controverted by the company and its insurance carrier. After hearings before one commissioner and the full Commission, the latter, on March 6, 1952, found that appellee had sustained a compensable accidental injury arising out of the course of his employment. There was an award of compensation for temporary total disability at the rate of $25 per week from December 2, 1950 to January 16, 1951 and, beginning with the latter date, compensation at the same weekly rate for a period of 100 weeks for the loss of vision in the left eye. It was further directed that appellants pay the reasonable medical and hospital bills incurred by appellee as a result of the injury. There was no appeal from this award.

The last payment of the 100 weeks compensation awarded for loss of vision was made to appellee on December 8, 1952 and he signed a "Final Receipt" for the benefits awarded. Appellee continued working on the assumption and medical finding that the disability from the injury to his left side was temporary in nature. On October 26, 1953, he became unable to work and reported to Dr. Cole, a company doctor, who sent him to Dr. Robert Watson in Little Rock, Arkansas on October 30, 1953. Appellee was placed in the Baptist Hospital where he remained nine days under the observation, examination and care of Dr. Watson who was then under the mistaken belief that appellee had a brain tumor.

The letter from appellants to Dr. Watson for the Little Rock appointment stated that he was to see appellee for examination only, but appellee was never so advised. Upon appellee's release from the hospital on November 7, 1953, Dr. Watson gave him a prescription for 100 tablets of nicotinic acid, to be taken over a period of thirty days, and advised appellee to rest and take reasonable exercise without over-exertion. According to Dr. Watson, this constituted the only known treatment for one in appellee's condition which had gradually pro-

gressed since the original injury from total temporary disability to total permanent disability. Appellee made additional trips to see Dr. Watson on November 23, 1953 and February 10, 1954. The insurance carrier paid appellee for the medicine prescribed by Dr. Watson and his expenses incurred on the first trip to Little Rock on December 2, 1953. It also paid appellee's hospital bill of $152.55 on February 4, 1954 and made a final payment to Dr. Watson for his services on February 18, 1954.

Appellee filed his claim for additional compensation for total and permanent disability on May 4, 1954. At a hearing before a single commissioner on September 14, 1954, appellants pleaded Section 18 (b) of the Workmen's Compensation Law as a complete bar to the claim. This section now appears as Ark. Stats. Sec. 81-1318 (b), 1955 Supplement, and reads: "*Additional compensation.* In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of accident, which ever is greater." Appellants' plea was sustained by order of the commissioner on November 4, 1954.

On appeal to the full Commission, a hearing was held January 31, 1955 in which appellants pleaded Section 26 of the Compensation Act as a bar to the claim. This section now appears as Ark. Stats. Sec. 81-1326, 1955 Supplement, and provides: "*Modification of awards*—Except where a joint petition settlement has been approved the Commission may at any time within six [6] months of termination of the compensation period fixed in the original compensation order or award, upon its own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate, review any compensation order, award or decision, and upon such review may make an order or award terminating, continuing, decreasing or increasing for the future the compen-

sation previously awarded, subject to the maximum limits provided for in this Act [§ 81-1301—81-1349]. Such review and subsequent order or award shall be made in accordance with the procedure prescribed in Section 23 [§ 81-1323] hereof. No such review shall affect any compensation paid pursuant to a prior order or award. The Commission may at any time correct any clerical error in any compensation order or award." The full Commission sustained appellants' new plea and again dismissed appellee's claim. On appeal to Circuit Court this finding was reversed and the claim was held to be filed within the time prescribed by law.

For reversal of the circuit court judgment, appellants contend, as the full Commission found, that Sec. 81-1318 (b), supra, has to do only with the time of filing a claim when voluntary payments of compensation have been made as distinguished from payments made as the result of an award or order of the Commission after a hearing. We find no such distinction in the statute which is clearly made applicable to a claim for additional compensation in cases where compensation for disability has been paid on account of injury. The instant case is of that character. In *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S. W. 2d 796, this section, which then appeared as Sec. 18 (a), was held to impose an absolute limitation on the time for filing a claim for additional compensation under the Compensation Act. In *Ragon* v. *Great American Indemnity Co.,* 224 Ark. 387, 272 S. W. 2d 524, we held that the cost of medicine and medical, surgical or hospital services was a part of "compensation" under Sections 2 (i)[1] and 11[2] of the Compensation Act. This decision was handed down December 20, 1954 and doubtless prompted appellants' change of

[1] This section appears as Ark. Stats. § 81-1302 (i), 1955 Supplement and reads: " 'Compensation' means the money allowance payable to the employee or to his dependents, and includes the allowances provided for in § 11 [§ 81-1311], and funeral expense."

[2] This is Ark. Stats. § 81-1311, 1955 Supplement and reads in part: "The employer shall promptly provide for an injured employee such medical, surgical, hospital and nursing service, and medicine, crutches, artificial limbs and other apparatus as may be necessary during the period of six months after the injury, or for such time in excess thereof as the Commission, in its discretion, may require."

defense at the hearing before the full Commission on January 31, 1955.

There appears to be some merit in appellee's contention that he has not sought a review or modification of the original award within the meaning of Sec. 81-1326, *supra,* which merely constitutes a grant of additional power to the Commission and not a statute of limitations. However, if it be conceded that said section is a statute of limitations, there is sufficient ambiguity between it and Sec. 81-1318 (b) as to cast considerable doubt as to which one is applicable to the instant proceeding. In this situation we are committed to the rule that if a substantial doubt exists as to which is the applicable statute of limitations, the longer rather than the shorter period of limitation is to be preferred and adopted. *Jefferson* v. *Nero,* 225 Ark. 302, 280 S. W. 2d 884. This rule is in harmony with our settled policy of giving a broad and liberal construction to the provisions of the Compensation Act to effectuate its purposes and the further policy of resolving doubtful cases in favor of the claimant. *E. H. Noel Coal Company* v. *Grilc,* 215 Ark. 430, 221 S. W. 2d 49; *Triebsch* v. *Athletic Mining and Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26.

By our holding in the *Ragon* case, supra, the furnishing of medicines and medical services to appellee in November and December, 1953 and February, 1954 constituted payment of "compensation" to appellee within the meaning of Sec. 81-1318 (b), supra. This holding follows the general rule that where an employer or his insurance carrier has furnished an injured employee medical and hospital services, this constitutes a payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation. See cases from other jurisdictions cited in 144 A. L. R. 617. In this connection, we cannot agree with appellants' further contentions that the medical services performed by Dr. Watson were in the nature of "an examination only" and that, even if such services constituted "treatment," same would not toll the statute be-

cause they were not furnished pursuant to a requirement of the Commission. The original award required appellants to pay reasonable medical and hospital bills incurred as a result of appellee's injury and it is undisputed that Dr. Watson prescribed medicine to be taken over a 30-day period along with rest and reasonable exercise as the only treatment known to him for appellee's condition. In our opinion such services amounted to treatment and not merely an examination, as was true in *Wilson* v. *Border Queen Kitchen Cabinet Co.,* 221 Ark. 580, 254 S. W. 2d 682, relied on by appellants. We are of the further opinion that appellants must be held to have waived the requirement of a Commission order by voluntarily furnishing the medical services after the six months period provided in Sec. 81-1311. See *Blahut* v. *Liberty Creamery Company* (Mo. App.) 145 S. W. 2d 506; *Buecker* v. *Roberts,* (Mo. App.) 260 S. W. 2d 325; *Ketchell* v. *Wilson & Co.,* 138 Kan. 79, 23 Pac. 2d 488, and other cases to the same effect which are cited in Fifth Decennial Digest, Workmen's Compensation, Key No. 1295.

It follows that appellee filed his claim for additional compensation well within one year from the date of the last payment of compensation as provided in Section 81-1318 (b) which we find to be the applicable statute of limitations. The judgment is accordingly affirmed.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J., dissenting. I would remand the case to the Commission for its determination of a question of fact that was not reached at the original hearing. The appellee was sent to Dr. Watson for examination only. The required examination proved to involve elaborate procedures that kept the patient in the hospital for more than a week and that were extremely painful. Partly, if not wholly, to alleviate this pain Dr. Watson prescribed sedatives and the use of nicotinic acid. He also told the patient that he should take routine exercise and avoid overexertion in the future. It seems to me that the record presents an issue of fact as to whether these

matters amounted to treatment furnished by the employer. If the Commission should hold that the medication and advice were merely incidental to the diagnostic examination and did not amount to the giving of treatment, that holding would in my opinion be supported by substantial evidence. Consequently I think the majority have decided an issue of fact that should be determined by the Commission alone.

AYERS v. AYERS.

5-958 290 S. W. 2d 24

Opinion delivered May 14, 1956.

Bethell & Pearce, for appellant.

Jack Rose and *Holland & Holland,* for appellee.

GEORGE ROSE SMITH, J. This is an appeal by the husband from a decree which denied either spouse a divorce, for the reason that both were at fault, and which allowed the wife alimony of $100 a month in addition to the sum the husband had agreed to pay for the support of his wife and children. The appellee originally sought a divorce upon the ground of personal indignities. By

cross-complaint the appellant asked for a divorce on the ground of adultery, and the chancellor remarked in an oral opinion that "he came pretty close to proving it." In fact, the chancellor seems to have been convinced that adultery had occurred, for that was his reason for denying a divorce to the wife.

In our opinion the appellant did prove his charge by a preponderance of the evidence. We will not detail all the testimony indicating that the appellee entered into an adulterous relationship with J. S. Griffin. After some eight years of a not too happy marriage Mrs. Ayers met Griffin, who is a bus driver, during a trip to Florida in 1953. She readily admits that between that meeting and her separation from her husband, in February, 1955, she frequently met Griffin for coffee and talked to him repeatedly by telephone. She attributes to coincidence the fact that she seems to have encountered Griffin in or near Little Rock, Hot Springs, Houston, Omaha, and perhaps other cities. Mrs. Ayers says, for example, that she flew to Houston to see a basketball game, but it happened that Griffin was also there; they had dinner and breakfast together and stayed at the same hotel. There is also evidence that she visited Griffin at his apartment in Fort Smith and may have received him in her home during her husband's absence. The chancellor feared that if he granted the divorce sought by both parties "Mrs. Ayers will immediately get married to her bus driver friend," and the increase in alimony was awarded on the express condition that Mrs. Ayers not see Griffin in the future.

The appellant, it is true, is by no means free from fault. In the course of establishing a successful position in the business world he seems to have devoted very little time to his family. When his suspicions were aroused he had his wife spied on by paid investigators. Perhaps with some provocation he cursed and struck his wife when she asked if she might have Griffin in the home for coffee. On another occasion he lost his temper at a dance and injured his wife's hand slightly. Had the plaintiff's own conduct been guiltless the chancellor

would have been justified in granting her a divorce for indignities.

Thus the question is whether both parties should be denied a divorce when the husband has been guilty of indignities and the wife of adultery. That same situation was presented in *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41, where the court concluded: "We concur in the finding of the court below that both parties were at fault, but we think appellee [the wife] was the greater and the first offender, and we have concluded, under the case made, that a decree of divorce should be awarded appellant, and it will be so ordered." We think the same course should be followed in the present case, especially as there seems to be no possibility of a reconciliation. Indeed, a psychiatrist whom both parties consulted before their separation was of the opinion that their temperaments would continue to clash. (We do not mean to intimate that the present suit is a collusive one; the record shows clearly that it is not.)

We do not regard condonation as being an issue in the case, although it was mentioned during the court's deliberations. In the course of her testimony the appellee stated that she and her husband had marital relations a day or two before they separated. This issue, however, was not raised by the pleadings, was not explored at the trial, and has not been argued in the briefs. A defense that was apparently waived by the appellee and that was certainly not fully developed should not be made the controlling point in the case.

By their written separation contract the parties agreed that the appellant would pay $300 a month for the support of Mrs. Ayers and the three children. Mrs. Ayers was represented by counsel during the protracted negotiations that preceded the execution of the separation agreement. The evidence does not persuade us that she was overreached in the matter or that there were misrepresentations about her husband's financial condition. The chancellor's award of an additional $100 a

month for alimony, as distinguished from maintenance for the children, was based upon his finding that Ayers was not entitled to a divorce and was conditioned on Mrs. Ayers' not seeing Griffin again. Since we hold that the appellant is entitled to an absolute divorce on account of his wife's misconduct the premise for the trial court's increase in alimony no longer exists, and the appellee should be bound by her agreement. We point out, however, that the agreement is not conclusive with respect to maintenance for the children and may be modified as in other cases. *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409.

The appellant's complaint that the trial court allowed an attorney's fee as a condition to the right of appeal is answered by the opinion in *Roberts* v. *Roberts,* .....Ark. ....., ... S. W. 2d ....., and in this case, as in that one, we do not consider the amount fixed to be excessive.

Reversed.

McFaddin and Ward, JJ., dissent.

Ed. F. McFaddin, Associate Justice (Dissenting). The majority has reversed the Chancery decree and has awarded Mr. Ayers a divorce on the ground of Mrs. Ayers' misconduct. I dissent from such holding of this Court, because the evidence shows that Mr. Ayers condoned any misconduct on the part of his wife.

Their separation occurred in the fall of 1954; and they were negotiating concerning a property settlement until February 7, 1955. Mrs. Ayers testified that she had lived with her husband after the property settlement was signed on February 7, 1955. Here is her testimony:

"Q. You have lived with him as husband and wife since the date the property settlement was signed?

A. Yes, I have . . .

Q. To refresh your memory, I ask you if the property settlement was signed on the 7th day of February, 1955.

A. That's right.

Q. But you have lived together as husband and wife since the date of that contract?

A. That's right, he did not move that day."

When Mr. Ayers was asked about this matter of condonation, he testified:

"Q. Mr. Ayers, the testimony has been throughout the trial that the last property settlement that you and your wife executed was on February 7th, 1955. Is that true and correct?

A. Yes, sir.

Q. That's true and correct. I'll ask you on that night did you go to your home, where Mrs. Ayers was—I will ask you, did you all on that night sleep together as man and wife and have sexual relations as man and wife on the night that you signed the property settlement?

A. On the night that we signed the property settlement?

Q. Yes, sir. At 2120 Valley Lane.

A. I don't remember.

Q. Would you say then that you did not or that you did?

THE COURT: He said he didn't remember, Mr. Rose.

A. Jack, I can't truthfully say yes and I can't truthfully say no because I don't remember that night."

Mr. Ayers knew all about the alleged misconduct and infidelity of his wife at the time of the signing of the property settlement on February 7, 1955; yet he did not deny that they resumed marital relations that night after the property settlement had been signed. I maintain that such testimony makes a clear case of condonation and that Mr. Ayers should not be granted a divorce

since he had condoned the very acts on which the majority of this court is granting him a divorce. The majority opinion says:

"We do not regard condonation as being an issue in the case, although it was mentioned during the court's deliberations. In the course of her testimony the appellee stated that she and her husband had marital relations a day or two before they separated. This issue, however, was not raised by the pleadings, was not explored at the trial, and has not been argued in the briefs. A defense that was apparently waived by the appellee and that was certainly not fully developed should not be made the controlling point in the case."

The Chancellor said that Mr. Ayers had "almost" established Mrs. Ayers' infidelity; yet the Chancellor denied Mr. Ayers a divorce; and it could well have been on this ground of condonation. In the case of *Buck* v. *Buck,* 205 Ark. 918, 171 S. W. 2d 939, we discussed in considerable detail the matter of condonation:

"While appellant did not specifically plead condonation as a defense in her answer, in the course of the trial, it developed, from the testimony, that there had been a condonation on the part of appellee, and we think the court should have treated, and did treat, the answer as amended to conform to this proof. As indicated, we think the preponderance of the testimony supports appellant's contention that these parties resumed their marital relations voluntarily and in good faith; that appellee, by his acts, condoned his wife's misconduct, and that the court erred in awarding him a divorce."

Thus when condonation is shown by the evidence, the pleadings are treated as amended; and apparently the Chancellor so understood. The Chancery Court evidently considered the matter of condonation because the Chancellor denied Mr. Ayers a divorce. On appeal here, Mrs. Ayers was defending the decree granted to her; and so there was no occasion for her to mention condonation in her brief. Certainly the appellant, Mr.

Ayers, was not going to spend a great deal of time calling the Court's attention to his condonation. But the majority is in error in saying that the matter was "waived". Condonation is always an issue, because the State is always a silent third party in every divorce case; and when parties have cohabited, with knowledge of infidelity, the State is entitled to have them remain as husband and wife. (See 27 C. J. S. 703 "Divorce", § 114.) On this point of condonation, I respectfully dissent from the majority holding in the case at bar.

GILLENWATER *v.* JOHNSON.

5-549 290 S. W. 2d 1

Opinion delivered May 14, 1956.

Norton & Norton and *Harvey G. Simmons,* for appellant.

Daggett & Daggett and *Ronald A. May,* for appellee.

PAUL WARD, Associate Justice. On March 24, 1955 appellee, James Johnson, was struck and injured by a pickup truck which was owned by appellant, Wallace Gillenwater, and driven by his employee, Cleophus Hicks. A suit for damages was filed by appellee alleging negligence on the part of appellant's employee-driver, and also alleging a fracture of the left fibula, mangled and lacerated right ear, and contusions on chest, shoulders and back. In his answer appellant alleged contributory negligence on the part of appellee, and further, (a) that on March 30, 1955 appellee released appellant of all claims in consideration of the payment to him of $100 and a promise to pay up to $100 for medical expenses,

and (b) appellee ratified and confirmed the above settlement by endorsing and cashing a draft for $100 on April 1, 1955. A jury trial resulted in a judgment in favor of appellee, and appellant prosecutes this appeal.

The only grounds relied on by appellant for reversal are (a) the release executed by appellee on March 30, 1955 and (b) the ratification by appellee on April 1, 1955 when he endorsed and cashed the settlement check. Both of these grounds are covered by appellant's assertion and appellee's denial that James Johnson was mentally capable of understanding and executing the release on March 30th and the ratification on April 1st. Since appellant makes no objection to any of the court's instructions, the question for our decision here may be stated in this way: Is there substantial evidence to sustain the jury's finding that appellee did not have mental capacity to understand and appreciate the effect of the release and ratification. After a careful consideration of all the testimony we reach the conclusion that this question must be answered in the affirmative.

It is not denied that on March 30th appellee, after he was injured on March 24th, made a settlement for $100 in lieu of all injuries sustained and the like amount for medical expenses, or that on April 1st he endorsed and cashed the draft for $100. It is not contended by appellee that the representative of the insurance company involved made any misrepresentation to or in any way over reached appellee to induce appellee to make the settlement or accept the draft. There are, however, other facts and circumstances disclosed by the record which we think justified the jury in reaching its verdict.

Appellee is a negro about 90 years old with scarcely any education. It is admitted by appellant that at the time the settlement was made appellee was injured more severely than he himself knew or the insurance company's representative knew. Following the accident appellee was treated by a physician who prescribed, and appellee took, codeine tablets. One doctor testified that appellee could have had a slight concussion and that appellee, as a result of the accident and of taking the

codeine tablets, could be incapable and incompetent to transact business at the time the settlement was made. Another doctor, in answer to a hypothetical question, stated: "Taking into consideration his age, and with cerebral arteriosclerosis, and never having been to a doctor before, and probably never having taken any codeine before, he could have probably got a 'buz' on—kind of a slight drunk with half a grain of codeine. I think all of that, that would affect his mental processes some."

Appellant makes the point that there is no testimony to show the mental condition of appellee at the exact time the settlement was made, and argues that he could have had a lucid interval at that particular time in spite of the medical testimony referred to above. We think however that the question for the jury was whether appellee's over all mental condition was such, during the period from March 30th to April 1st, that he fully understood and realized the implications and results of his actions in attempting to release his claim for injuries.

Affirmed.

DEDMON *v.* THALHEIMER.

5-937 290 S. W. 2d 16

Opinion delivered May 14, 1956.

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

Wootton, Land & Matthews, for appellee.

SAM ROBINSON, Associate Justice. This is a personal injury case growing out of an automobile collision. Appellant was the plaintiff in the Circuit Court, and there was a judgment for the defendant, appellee. The principal issue on appeal is the court's ruling in refusing to permit the plaintiff to question the veniremen with reference to any connection with insurance companies.

Counsel for appellant asked permission to discuss a matter in chambers. Upon retiring, he stated to the court that he would like to ask the veniremen in a group the following question: "Have you ever been in the employ of any liability insurance company, or do you own any stock in any liability insurance company at the present time, or are you insured with any mutual benefit liability company where your premiums are determined upon the size of judgments given in personal injury actions for the previous year?" Appellee objected to the question being asked, and questioned the good faith of counsel for the plaintiff in seeking to ask the question. It developed that the defendant was insured by the St. Paul-Mercury Indemnity Company; and counsel for the plaintiff insisted that he, in good faith, wanted to propound the question. The court replied that it was understood that counsel was in good faith, but that the question of insurance had no place in the case, and sustained the objection. The court considered that counsel was in good faith in attempting to ask the question, and there is nothing in the record going to show otherwise.

In the trial of a civil action in circuit court in this State, each side has the right to excuse three veniremen peremptorily. In cases where the defendant is covered by liability insurance, the plaintiff might want to excuse any one that he suspects may be either biased or prejudiced where insurance is involved; and he would have a perfect right to exercise a peremptory challenge for that reason, if he so desired. The test of whether counsel

may ask questions of veniremen in regard to insurance is whether the questions are propounded in good faith. If counsel, in good faith, thinks that liability insurance is involved, then he may ask questions calculated to bring to light any bias or prejudice a venireman may have for or against insurance companies. The thing works both ways: A person may have connections with an insurance company that would cause him to be biased in favor of such companies. On the other hand, a venireman may be, for some reason, prejudiced against insurance companies. A lawyer trying a case would be rather careless if he failed to ascertain as well as possible if any one on the venire was biased or prejudiced on a question involved in the litigation, even though such question would be only indirectly involved. Very seldom do lawyers on both sides know the connections and background of all the veniremen or whether they would have an opinion as to the merits of the case. And the purpose of the *voir dire* examination is to enable counsel to ascertain whether there is ground for a challenge for cause, or for the exercise of a peremptory challenge. Of course, questions about insurance would be improper if counsel does not in good faith believe that some insurance company is interested in the outcome of the litigation. *Gill* v. *Whiteside-Hemby Drug Co.,* 197 Ark. 425, 122 S. W. 2d 597. But here, it is admitted that insurance is involved, and there is no indication of bad faith.

In the *Gill* case, the plaintiff was not permitted to ask the veniremen about insurance, but there it was shown, in chambers, that at the time of the mishap involved in the litigation the defendant had no insurance and no insurance company was interested in the outcome of the case. In *Derrick et al.* v. *Rock et al.,* 218 Ark. 339, 236 S. W. 2d 726, *evidence* of insurance was unnecessarily and gratuitously injected into the trial, and in holding that such *evidence* was inadmissible, *Ward* v. *Haralson,* 196 Ark. 785, 120 S. W. 2d 322, was cited. In that case, it was said: "The statement of counsel for appellees, injecting into the case the fact, if it be a fact, that appellants had insurance coverage, was wholly inexcusable,

uncalled for by anything that had previously occurred in the case, and was highly prejudicial." In *Rambo* v. *Rambo,* 195 Ark. 832, 114 S. W. 2d 468, it was held that a reference, in the complaint, to insurance not pertinent to the issue involved should be stricken.

But the rule with regard to questioning a venireman about his connection with an insurance company is stated in an extensive annotation in 4 A. L. R. 2d 761, at page 793, as follows: "Provided counsel acts in good faith, he may, in one form or another, question prospective jurors on the voir dire respecting their interest in, or connection with, liability insurance companies." A great number of cases from the federal courts and about 35 states are cited in support of the rule. Among our own cases cited which support the rule are: "*Pekin Stave & Mfg. Co.* v. *Ramey* (1912) 104 Ark. 1, 147 S. W. 83; *Cooper* v. *Kelly* (1917) 131 Ark. 6, 198 S. W. 94; *Williams-Echols Dry Goods Co.* v. *Wallace* (1920) 142 Ark. 363; 219 S. W. 732; *Ellis* v. *Warner* (1930) 182 Ark. 613, 32 S. W. 2d 167; *Bourland* v. *Caraway* (1931) 183 Ark. 848, 39 S. W. 2d 316; *Sutton* v. *Webb* (1931) 183 Ark. 865, 39 S. W. 2d 314; *Lewis* v. *Cox* (1933; Ark.) 58 S. W. 2d 215; *Loda* v. *Raines* (1937) 193 Ark. 513; 100 S. W. 2d 973; *Missouri Pacific Transp. Co.* v. *Talley* (1940) 199 Ark. 835, 136 S. W. 2d 688 (cert. dismd. (1940) 311 U. S. 722, 85 L. Ed. 470, 61 S. Ct. 5) (compulsory insurance)."

Appellant contends that the court erred in permitting the introduction of the repair bill of one of the automobiles involved in the collision. "It is contended by appellant that the question of the violence or force of such impact cannot be shown by the amount of the repair bill to one of the automobiles involved in the collision." If only slight damage was done to an automobile involved in a collision, as shown by the repairs which were necessary, such small damage would be a reasonable inference that the impact was not great, hence the evidence was admissible.

For the error in refusing to permit counsel for the plaintiff to question the veniremen with respect to insurance, as pointed out, the cause is reversed and remanded for new trial.

SOUTHERN LUMBER COMPANY *v.* CASH, COMMISSIONER OF LABOR.

5-961 290 S. W. 2d 11

Opinion delivered May 14, 1956.

Williamson & Williamson and *W. H. Howard,* for appellant.

Luke Arnett and *Clifton Bond,* for appellee.

SAM ROBINSON, Associate Justice. A local office of the Employment Security Division of the State Labor Department denied compensation to certain employees on strike. The issue here is whether there was a valid appeal to the Board of Review.

Prior to July 27, 1953, C. F. Douglas, W. O. Moore, C. R. Wolfe, John L. Wolfe and Elmer Wolfe, hereinafter referred to as the appellees, were employees of the Southern Lumber Company. At that time, they went out on strike, along with about 175 other employees. A short time later, appellees and the others on strike applied to the local office of the Employment Security Division for unemployment benefits. Their application was denied on the ground that they were directly involved in a labor dispute, causing the work stoppage. On September 1, 1953, the appellees, with the other

strikers, filed an appeal with the Board of Review. On November 12, 1953, the strike was called off, but the appellees were not re-employed although they repeatedly sought to return to work. The evidence is convincing that it was not because of any fault on their part that they were not re-employed. All of the original strikers withdrew their appeal to the Board of Review except the appellees in the case at bar. They continued to sign for unemployment compensation. Moore signed nineteen times.

In March 1954, the fact that these appellees were not being paid unemployment benefits was called to the attention of Mr. Robert B. Taylor, representative of labor. He inquired of the local office of the Employment Security Division as to the reason these men were not being paid benefits. Following this inquiry, in the early part of April 1954, the local board issued an order denying benefits to the appellees on the ground that they were disqualified because they had voluntarily quit their employment without just cause. On April 9, 1954, Mr. M. P. Filiatreau, Chief of Benefits of the Employment Security Division, wrote to Mr. Taylor, as follows: "On March 31 you wrote this office requesting information regarding the denial of benefits to individuals who were involved in the labor dispute at the Southern Lumber Company of Warren, Arkansas. According to our records there are five individuals who were denied benefits under Section 5 (a) of the Arkansas Employment Security Law following the termination of the stoppage of work caused by the labor dispute. Each of these cases has been appealed to the Appeals Tribunal and is subject to review by that body."

Following Mr. Filiatreau's letter, the matter was set for a hearing before the Board of Review. The appellant, Southern Lumber Company, contended that, actually, there had been no appeal by the appellees from the order denying compensation on the ground that they voluntarily quit without just cause. No other reason was given in support of the contention that compensation should be denied. The Board of Review ruled in favor

of the appellees; the lumber company appealed to Circuit Court, where the ruling of the Board of Review was affirmed, and the company has appealed to this court.

Appellant contends that, although the appellees appealed from the first order of the local office denying compensation on the ground that they had participated in a labor dispute causing work stoppage, there was no appeal from the order denying compensation on the ground that they had voluntarily quit their work without good cause. To say that appellees took no appeal to the Board of Review on the question involved would be disposing of the case on an extreme technicality. Soon after appellees stopped work, they applied for compensation; it was denied; they appealed; they never returned to work; they never withdrew their appeal. There is no sound reason why they should have to take a second appeal. At all times after the appeal, there was a controversy pending before the Board of Review between appellant, on the one hand, and appellees, on the other, as to whether compensation should be paid. The Board of Review had full authority to settle all controversies existing between the parties at the time of the hearing on appeal. It would be contrary to the spirit of the act to hold otherwise. Of course, if one of the parties pleads surprise and requests additional time to prepare on some issue he has not deemed as pending on appeal, his request should be given full consideration. But, in this case, there was no indication that there was any defense to the claims for compensation except the issue of whether there was a valid appeal. The Board of Review and the Circuit Court were correct in holding that the appeal which was pending and undisposed of, involving the question of whether appellees were entitled to benefits, was sufficient to give the Board of Review jurisdiction to determine whether the local office was correct in denying benefits for any cause.

Affirmed.

PADGETT *v.* ARKANSAS POWER & LIGHT CO.

5-960 290 S. W. 2d 426

Opinion delivered May 21, 1956.

Fred Newth and *Kenneth C. Coffelt,* for appellant.

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

LEE SEAMSTER, Chief Justice. This appeal is from the judgment of the Pulaski Circuit Court, Second Division, sustaining a demurrer to appellants' complaint containing allegations to the following effect:

"The defendant is a private corporation organized and existing under the laws of the State of Arkansas. Its stock is owned by individuals as private personal property. It is a public utility corporation generating, transmitting and selling electric power in Little Rock, and various sections in Arkansas in connection with the operations of its enterprises. It constructs and maintains power lines for the transmission of electricity in the City of Little Rock, Arkansas, and elsewhere within the state.

"Within one year next before the filing of this suit, the defendant, its agents, servants and employees, with the consent and authority of the Public Service Commission of Arkansas, and the City Council of Little Rock, constructed a heavy voltage high power line across, over and upon certain portions of the said parcels of proper-

ties of each of the plaintiffs, as herein above described, to which they hold fee simple title, subject to street easements for construction of utility lines and street uses, thereby taking such portions of plaintiffs' said properties without just compensation to them, and thereby damaging the remaining portions of each of the parcels of the plaintiffs' said properties as herein alleged in this complaint, in that the said erection of said power line, including its posts, wires, cross arms, guy wires, dead men, and its entire construction which is located within the boundaries of the easements of the streets adjoining the said properties of the said plaintiffs has reduced the market value of each of the properties of the plaintiffs, herein described, at least (50%) fifty per cent.

"Each of the parcels of the properties of the plaintiffs, as herein described, borders certain streets within the City of Little Rock. It is within the boundaries of these streets that the said power line and its entire construction is located, but the plaintiffs allege that their fee simple title to their said parcels of properties herein described, extends to the center of said streets wherein the said power line is located, and that, therefore, the erection of said power line by the defendant constitutes an additional servitude on each of the parcels of property of each of the plaintiffs, as herein described.

"The said power line was located by the defendant, its agents, servants and employees, for the purpose of distribution of said electricity for light and power within the City of Little Rock.

"Plaintiffs allege, that said power line is a high voltage line carrying 115,000; that the poles of the line are approximately 80 feet high from the ground, and they have 17 foot cross-arms; that because of its very nature, as herein alleged, it has decreased the value of plaintiff's properties at least 50%; that because of this fact the laying of said power line in the manner as herein set forth, not only has taken the properties of the plaintiffs within the streets where the line is located, but it amounts to taking their entire properties in that

its construction has damaged the entire lands of the plaintiffs herein described and as herein set forth.

"These plaintiffs, and the entire territory wherein said power line was constructed, have been supplied with electric power by defendant for many years. The franchise under which the defendant has the right to construct electric power lines within the street easements in the city of Little Rock, was executed and entered into in 1888. The streets adjacent to plaintiffs' properties were dedicated as public streets subsequent to 1888 and prior to plaintiffs' acquisition of their said properties herein described. The plaintiffs do not believe, and therefore allege, that at that time it was not contemplated by any person or government agency that such a power line as is involved in this suit, would ever be constructed within any residential district of the said City of Little Rock.

"Plaintiffs allege that they have no other remedy save this suit to recover the damages due them which has been done their property by the construction of said power line by the defendant, as herein set forth."

For reversal of the trial court's judgment, the appellants cite the following points:

"(1) The construction of the power line constitutes additional servitude on the lands of the plaintiffs.

"(2) The construction of the line constitutes a taking of all of the lands of the plaintiffs inside and outside of the street easement, because the construction of the line has diminished in value the entire properties of the plaintiffs fifty per cent. Their lands, therefore, have been taken without just compensation in violation of Section ..... of the State Constitution.

"(3) When the street was dedicated it was not contemplated that such a power line as is involved in this case, would be constructed in any residential area in Little Rock, and therefore, the easement agreement is not binding against these plaintiffs."

The question thus presented in this case is whether the construction of a high voltage electrical line by the appellee, wholly within the street easement, amounted to the taking of a portion of the appellants' properties, and damaging the remaining portions of the said properties without just compensation to the appellants. The appellants earnestly insist that the construction of the power lines in the street easements adjacent to their lots is the imposition of an additional servitude on their lands, a taking of a new and distinct easement without just compensation for resulting damages.

The appellants rely upon the authority cited in *Southwestern Bell Telephone Company* v. *Biddle,* 186 Ark. 294, 54 S. W. 2d 57. In this case the court referred to Section 3989, Crawford and Moses' Digest (Section 73-1801, Arkansas Statutes, Anno., 1947), which follows:

"Any person or corporations organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof, which may be hereafter invented or discovered, may construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this State, or across and under the waters and over any lands or public works belonging to this State, and on and over the lands of private individuals, and upon, along, and parallel to any of the railroads or turnpikes of this State, and on and over the bridges, trestles or structures of said railroads; Provided, the ordinary use of such public highways, streets, works, railroads, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes, by reason of the occupation of said lands, railroads and turnpikes by said telegraph or telephone corporations."
The holding of the court in this case was:

"We also think that the erection of a telephone line upon the public highway along lands of adjoining owners, in which the public only has an easement for use as a highway, would not prevent the owner of the land from collecting damages for the new servitude to which his land is subjected, such use not having been in contemplation when the easement was taken or granted."

In the case of *Cathey* v. *Arkansas Power and Light Co.,* 193 Ark. 92, 97 S. W. 2d 624, the court held that where a power line was constructed along a state highway, the adjacent land owner over whose land the power line was constructed in the highway easement was entitled to nominal damages for the additional servitude not contemplated when the easement was originally acquired.

It would bear to note that the two cases cited above have reference to telephone and power lines constructed over highway easements in the country, i. e., rural property. There is a generally recognized distinction between a highway in the country and a street in a municipality, as to the mode and extent of the use and enjoyment, and, consequently, as to the extent of the servitude in the land upon which they are located, the urban servitude being much more comprehensive than the rural. Streets within the limits of municipal corporations are subject to many uses by the public to which highways in the country are not subject. Moreover, as a village grows into a town and the town grows into a city, the rights of the public in its streets are correspondingly broadened. As a rule, country highways are needed only for the purpose of passing and repassing, and, subject to some exceptions, the rights of the public and of the authorities in charge are confined to the use of the surface, with such rights incidental thereto as are essential to such use. Streets, however, may be used for many purposes other than travel, such as construction of sewers and drains, the laying of gas and water pipes, the erection of telegraph, telephone and electrical power lines, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times they have been subjected. See *Colegrove Water Co.* v.

Hollywood, 151 Cal. 425, 90 P. 1053, 13 L. R. A. (NS) 904; *Lostutter* v. *Aurora,* 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; *Henkel* v. *Detroit,* 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; *Allen* v. *Boston,* 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423; *Ft. Wayne* v. *Coombs,* 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; *Smith* v. *Central Power Co.,* 103 Ohio St. 681, 137 N. E. 159.

The evolution of public utilities and the widespread and ever-increasing use of public utility service throughout the state have greatly varied the uses of the streets. It is doubtful whether this great variety of uses has really increased the burdens. The increased burdens upon the streets are caused primarily by the largely increased population, and the demands of the people for necessities, conveniences, and luxuries of modern living conditions. It has been found more economical as well as more speedy to transport merchandise and passengers by rail, to convey electrical energy for light, heat, and power and to transmit messages and information by wires, and to convey gas for fuel and lighting and water for municipal purposes by pipe lines, and other utilities by still other and different methods.

It is hardly correct to say that by such new adoptions the streets are subjected to uses not contemplated when streets were laid out many years ago. It would be more correct to say that present uses are the progression and modern development of the same uses and purposes.

The allegation of the appellants, in their complaint, is to the effect that the construction of the power lines in the street easement constitutes an additional servitude on the properties of the appellants. Their entire claim for damages is based on the theory that the construction of the power lines involved in this case is not a use of a street within that allowable under a public easement for utilities. The complaint concedes and states that the appellee "had the right to construct electric power lines within the street easements in the City of Little Rock."

It is only when a street is subjected to a new servitude inconsistent with and subversive of its proper use

as a street, that the abutting land owner can complain. In no event would compensation in such case be allowed for speculative or contingent damages. We find that the street easement carries with it the right to construct on the streets in cities and towns such reasonable facilities as may be needed to carry public utility service to the inhabitants of such municipalities. In the instant case no additional servitude is imposed upon the property of appellants by construction of such reasonable facilities in the abutting street easements.

Finding no error, the case is affirmed.

MANLEY *v.* STATE.

4840 290 S. W. 2d 446

Opinion delivered May 21, 1956.

George F. Hartje, for appellant.

Tom Gentry, Attorney General; *Ben J. Harrison,* Assistant Attorney General, for appellee.

LEE SEAMSTER, Chief Justice. The appellant, Richard Manley, Jr., was tried and convicted in the Faulkner Circuit Court of the crime of unlawfully possessing intoxicating liquor for sale in a prohibited area, after having been previously convicted of the same offense. The jury assessed his punishment at a fine of $750.00. This appeal follows.

The appellant contends for a reversal of the judgment the following: (1) the Court erred in failing to direct a verdict of acquittal for the reason that the evidence was not sufficient to convict the appellant of the crime charged; (2) that a mistrial should have been granted when the prosecuting attorney in his opening statement to the jury said, "the appellant was tried in the municipal court and convicted"; (3) because the prosecuting attorney in his opening statement to the jury said, "officers and others will testify that this man (the appellant) is a known bootlegger—has a reputation of being a known bootlegger," and, (4) that the Court erred in giving instruction No. 6, which is:

"Possession of personal property may be actual or constructive. Possession is such control of property that the person having it may legally enjoy it to the exclusion of others, and it means that which one occupies or controls.

"Actual possession is the detention and control of the manual or ideal custody of anything which is the subject of property.

"Constructive possession simply means that while the property is not actually in the physical control of the owner, it is assumed to exist where a person holds claim thereto.

"The defendant is charged with the unlawful possession of liquor for the purpose of sale. If, as the owner of the premises upon which it is charged intoxicating

liquors were kept, if such occurred, defendant unlawfully possessed intoxicating liquors for the purpose of sale, either actually or constructively, and the jury finds such to have occurred by evidence convincing you of his guilt beyond a reasonable doubt, then defendant should be convicted."

The record reveals that the appellant owns a building which faces on Markham Street in Conway, Arkansas. There is a parking lot situated at the rear of the building. There is also an outside door located at the rear of the building which opens into a hall. From this hall there are other doors which open to a cafe, closet, and to a room which is sub-let to a group or association of individuals who call their organization the Monarch Club. There is a one chair barbershop located in the northeast corner of the building; the cafe is situated just south of this barbershop. The two occupy all of the building facing on Markham Street. The appellant utilizes a room for his office in the southwest corner of the building.

The appellant testified that he rented the barbershop to Charlie Henry; the cafe to Gloria Stein Holloway; and, the club rooms to the Monarch Club. The Monarch Club consists of six members and Charlie Henry, the barber, was one of the members and acted as treasurer for the Club.

On March 4, 1955, the sheriff of Faulkner County and other duly authorized officers, who were armed with a search warrant, conducted a raid on appellant's place of business. They found four half-pints of whiskey in the hall closet and nine half-pints of whiskey in the club room refrigerator. They also found one half-pint bottle of whiskey, about half full, on a table in the Club room. A search of a trash can in the hall produced thirteen empty half-pint whiskey bottles.

Other evidence was introduced to show that taxicabs would frequently drive to the back door of appellant's building and discharge a passenger who would enter the building and return immediately to the waiting cab; that on two separate occasions persons emerging from the

rear door of the building were searched and each of them had on his person a one-half pint bottle of whiskey; that appellant plead guilty, on May 5, 1952, to possessing more than one gallon of liquor in a dry county; that on December 15, 1954, the appellant was tried and convicted of the charge of possessing liquor for sale in a dry county.

The record also reveals that duly authorized officers had raided the appellant's place of business no less than three times in the past three years, always finding whiskey in the building; that during the recent raid, officers found the hall closet locked and Charles Henry, the barber, told them he had no key to the door, whereby, the officers threatened to break the door and the appellant intervened and instructed Henry to open the door with his (Henry's) key. The evidence also amply shows that appellant had the reputation in the community of being a liquor dealer.

The appellant testified that he did not have any control over the part of the building rented to other parties; that he did not own the whiskey found in the building and that he had nothing whatsoever to do with the liquor.

The cafe operator testified that she was the owner of the four half-pints of whiskey found in the hall closet and all six of the members of the Monarch Club testified that they owned the whiskey that was found in the Club room. These members also testified that at the previous trial of appellant, they had testified that they owned the whiskey found on the premises, at the time of the previous raid.

The jury heard the witnesses testify; they observed their demeanor while on the stand and if there is any substantial evidence introduced to sustain the jury's verdict, the Court will not disturb their verdict. The evidence in this case is sufficient to sustain the jury's verdict. The jury had the right to conclude, from the facts and circumstances introduced in this case, that appellant was engaged in the liquor traffic in a dry county; that the Monarch Club was only a device which appellant

would use as a shield in case he was caught with the illegal whiskey.

In regard to point number two, the court sustained the objection of appellant and admonished the jury as follows:

"I will repeat to you the admonition, to disregard the statement made by the Prosecuting Attorney as to the disposition of the case in the lower court, and it should not have any bearing on your determination of the guilt or innocence of the defendant in the trial of this case, and you should determine his guilt or innocence today upon the evidence heard in the trial of the case and the instructions of the Court and not for any other reason or on any other basis." This admonition cured the error by the prosecuting attorney. See *Walker* v. *Fayetteville,* 93 Ark. 443, 125 S. W. 412.

The objection to the prosecuting attorney's statement that he expected to prove by the officers that "appellant was a known bootlegger—had a reputation of being a known bootlegger," was not reversible error for the reason that it is permissible to make proof of a defendant's reputation in the trial of a person charged with violating the liquor law in a dry county. Ark. Stats. 1947, Sec. 48-940. See also *Craig* v. *State,* 204 Ark. 798, 164 S. W. 2d 1007; *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713.

The contention of appellant that instruction No. 6 was error because there was no evidence to show that the liquor found was actually or constructively the property of appellant is similar to the request for an instructed verdict. The testimony indicated that appellant demonstrated his control over the premises when he directed Charlie Henry to open the door to the locked hall closet where a portion of the whiskey was discovered. We hold that the instruction was proper in view of all the facts and circumstances proven at the trial.

Finding no error, the judgment is affirmed.

5-934 290 S. W. 2d 430

Opinion delivered May 21, 1956.

[redacted]

Gus Causbie and *S. M. Bone,* for appellant.

George W. Booth, for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves title to a 5 acre tract of land described as: "A part of the SE 1/4 of the NE 1/4, Section 13, Township 19 North, Range 4 West, lying west of Booth's Creek containing 5 acres more or less and described by metes and bounds as follows: Beginning at the southwest corner of the SE 1/4 NE 1/4, Section 13, thence north on the half mile line to the point of intersection of Booth's Creek; thence along the present bed of said creek to the point of intersection with the south line of the SE 1/4 NE 1/4 of Section 13; thence west to the point of beginning." The facts appear not to be in dispute. As early as 1902 C. D. Foster conveyed this 5 acre tract to M. F. Booth and by mesne conveyances the land was conveyed to appellant, Otis Spradling in 1952. Appellants and their predecessors in title have been in actual possession and control of the said tract of land since 1902. This tract was never segregated and assessed separate from the 40 acre tract, but was included therein. Appellants and their predecessors paid the taxes on this 5 acre tract under an erroneous description as being in the NE 1/4 of the NE 1/4, Section 13, Township 19 North, Range 4 West, until 1945, when a correct description was made of this 5 acre tract on the tax books and, thereafter to the present, appellants have

paid taxes due on this 5 acre tract under the correct description of SE 1/4 of NE 1/4 Section 13, Township 19 North, Range 4 West. The alleged owners of the SE 1/4 of NE 1/4 above, continued to pay the taxes on the entire 40 acre tract, which included the 5 acre tract, until 1935 when it forfeited to the State for the year 1935, was sold and title confirmed in the State on March 4, 1941. Thereafter, on October 26, 1954, the State Land Commissioner executed a deed to the SE 1/4 of the NE 1/4 Section 13, Township 19 North, Range 4 West (40 acres) to appellee, I. N. Green. The record reflects that appellee concedes the following: "Mr. Causbie: 'We desire to introduce the tax receipts from the year 1935 to the year 1954, inclusive, which show that the land was paid on as the Southwest Part of the Northeast of the Northeast until 1945, and from that time on was paid on as the Southwest Part of the Southeast of the Northeast.' Mr. Booth: 'That is correct' . . . 'I agree that in 1902 C. D. Foster deeded this fractional five acres to M. F. Booth and that there were about six transfers of the same land to other parties until Harvey Spradling acquired the land on August 10, 1949, and that on August 2, 1952, Harvey Spradling conveyed the land to Otis Spradling, and that this is the same land in controversy here.' "

From a decree declaring that appellee was the owner in fee simple of the SE 1/4 of NE 1/4 Section 13, Township 19 North, Range 4 West, containing 40 acres more or less, is this appeal. Appellee says: "The only question before this court is: 'did the State have power to sell in 1935, land that had not been separated from the forty acre tract?' This five acre tract that was purchased in 1902. The owner of the forty acre tract, as far as the records show, continued to pay the taxes on the whole forty until 1935 when it went delinquent. Then the whole forty was sold for taxes and confirmation was had in 1941."

Our rule is well settled that a tax sale is void when it appears that the taxes had been paid on the land at the time of the foreclosure tax sale. The power to sell requires that there must be a lawful tax due, and "the

owner fairly in default," (*Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409, 147 A. L. R. 1132). Obviously, it appears to us here that the State was accepting and collecting taxes twice on this same 5 acre tract, in other words, taxes that had been paid in 1935, and it does not appear that this tract had ever forfeited for taxes. Act 423 of 1941 [now § 84-1325 Ark. Stats. 1947] relating to the force and effect of a confirmation decree of the sale by the State of tax forfeited lands provides: "Nothing in this Act shall prevent any person attacking such decree at any time on the grounds that taxes have actually been paid." Since appellee acquired this property on October 26, 1954, some 13 years after the effective date of Act 423 of 1941, it applies here, and as indicated, if the taxes had already been paid on this 5 acre tract for the year 1935, (and not only for that year but from 1902 to the date of the present trial) and we hold that they were, then the State lacked the power to sell and the sale was void. In *Wallace* v. *Brown,* 22 Ark. 118, 76 Am. Dec. 421, this court said: "It has been well said, that the delinquency of the owner to pay the taxes, is the essential fact upon which the power of sale rests. The right to sell is founded on the non-payment of the tax. If the tax be paid before the sale, the lien of the State is discharged, and the right to sell no longer exists. Where the owner has performed all of his duties to the government, no court will sanction, under any circumstances, the forfeiture of his rights of property. The law was intended to operate upon the unwilling and negligent citizen alone. The legislative power extends no further. The sale involves an assertion by the officer that the taxes are due and unpaid, and the purchaser relies upon this, or on his own investigations, and his title depends upon its truth . . ."

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

Justices MILLWEE, GEORGE ROSE SMITH and WARD dissent.

GEORGE ROSE SMITH, J., dissenting. The appellants had the burden of proving that the 1935 tax sale was void

and that the State's deed to the appellee therefore conveyed no title. The meager record in this case contains, in my opinion, no evidence to sustain the appellants' attack upon the appellee's title.

The majority hold that the sale was void for the reason that the taxes had actually been paid. The facts are that the appellants and their predecessors in title had, for many years prior to 1935, paid the taxes on a five-acre tract in the northeast quarter of the northeast quarter, perhaps in the belief that they were paying on five acres in the southeast quarter of the northeast quarter. As far as the record shows the five acres now in dispute had never been separated on the tax books from the rest of the forty-acre tract. Apparently someone else paid the taxes on the entire forty acres until it forfeited for nonpayment of the 1935 taxes. It is quite plain that if there was in fact any double taxation it was with respect to the other five-acre tract, on which the appellants and their predecessors were paying by mistake, and of course that fact would not ordinarily affect the validity of the tax sale involving the forty acres now owned by the appellee.

The most that can be said from the record is that the owners paid taxes on the wrong five acres, by mistake. The sole question then becomes: by whose mistake? If the error was made by the taxing officials the sale would be void. *Schuman* v. *Person,* 216 Ark. 732, 227 S. W. 2d 160, 21 A. L. R. 2d 1269. But if the mistake was that of the taxpayer it would not affect the validity of the sale. As we said in *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193: "Appellants allege, and the allegation is not disputed, that they thought they had paid the taxes every year on the two blocks in question, but it will require no argument to show that one may not discharge his obligation to pay his taxes by showing that he thought he had paid them when his misapprehension was not induced by some officer charged with the duty of collecting the taxes, and no such contention is made here."

Even a mistake by the taxing official does not invalidate the sale if the landowner is equally at fault. In *Redfern* v. *Dalton*, 201 Ark. 359, 144 S. W. 2d 713, the landowner paid his money to the county clerk and directed that officer to redeem the land from a 1933 forfeiture and also to satisfy the currently due taxes for 1934. The clerk effected the redemption but failed to pay the current taxes. In holding that the clerk's error did not invalidate the sale we said: "If it be said that the clerk should have included the 1934 taxes in the 1933 redemption certificate, it may be answered that he did not do so, and any inspection of the certificate would have disclosed the fact that it did not purport to cover the 1934 taxes . . . Taxes cannot be discharged in this manner, and the court below properly held that they had not been paid."

It is unnecessary to cite other decisions to the same effect. It is settled by many prior cases that a landowner cannot plead his own mistake as a basis for setting aside a tax sale unless that mistake was induced by the taxing officials. There is a presumption that those officers perform their duty. Since the burden of proof was on the appellants and they failed to offer any evidence whatever to show that they were misled by the public officers, the chancellor had no choice except to follow the decisions of this court and uphold the appellee's title. His decree should be affirmed.

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

EUREKA SPRINGS SALES COMPANY *v.* WARD.

5-963 290 S. W. 2d 434

Opinion delivered May 21, 1956.

J. E. Simpson, for appellant.

J. B. Milham and *H. G. Leathers,* for appellee.

ED F. MCFADDIN, Associate Justice. This appeal involves an auctioneer's liability arising from the sale of some stolen cattle.

The appellant, Eureka Springs Sales Company, is a domestic corporation and operates a sales barn in Eureka Springs. On August 28, 1954, a man, giving his name as Clyde Williams, transported six cows to the barn of appellant for sale at auction that day. Four of the cows, which he said belonged to Edgar Ray, were sold for a gross of $418.63; and, after deducting a commission of $13.56, appellant's check—drawn on the Bank of Eureka Springs for the net of $405.07 and payable to Edgar Ray—was delivered to the said Clyde Williams. The other two cows, which Clyde Williams said belonged to

him, were sold for $183.66; and, after deducting $6.01 commission, a check for $177.65 was delivered by appellant to the said Clyde Williams.

Later, in the course of the auction sale, Clyde Williams bought two cows for a total of $124.00; and, at his suggestion, he redelivered to the appellant its check for $177.65 and, in return, received appellant's check for $53.65 drawn on the Bank of Eureka Springs, and also received the two purchased cows, which he loaded in his truck and took with him and proceeded—it later developed—from Eureka Springs to Harrison. At Berryville, enroute, Clyde Williams stopped at the grocery store of Shirley Williams and endorsed the said $53.65 check and received therefor some groceries and the balance in cash. Shirley Williams deposited the check in his bank and it was duly paid by the Bank of Eureka Springs when presented.

Clyde Williams proceeded from Berryville to Harrison, and there dropped his *alias* and became Edgar Ray, which was his real name. He had some time previously purchased a truck from J. P. Williams, a used car dealer in Harrison, and owed a balance of $325.00 on it, for which title had been retained. On August 28, 1954, Edgar Ray tendered to J. P. Williams appellant's said check of $405.07, and received therefor a receipt for the $325.00 balance due on the truck. J. P. Williams cleared the title to the truck and gave Ray $80.07 balance in cash. J. P. Williams deposited the $405.07 check in the Security Bank of Harrison; and, when it reached Eureka Springs in due banking channels, payment was stopped by the appellant.

The reason payment was stopped was because the six cows which Ray (alias Williams) had taken to the Eureka Springs Sales Company had been stolen from the appellee, Charles J. Ward, a farmer in Oklahoma. Ward had discovered the theft on August 28, 1954, and had diligently traced the cattle to the appellant's sales barn. Ray was apprehended and remained in jail in Harrison for some time; and while there he delivered the two cows (for which he had bid $124.00 at appellant's

sale, as aforesaid) to Shelby Morris to apply on a past due grocery bill. In due time, Ray was tried in Oklahoma and convicted for cattle theft and sentenced to the Oklahoma penitentiary, where he was a prisoner at the time of the trial below.

Ward, the owner of the six cows, sued appellant, Eureka Springs Sales Company, for $602.29, the amount for which appellant sold the six cows at auction. Appellant tendered $602.29 into court, and interpleaded Shirley Williams, J. P. Williams and Shelby Morris, and asked affirmative relief against each of them. The various parties set up their respective claims and defenses; and trial in the Chancery Court resulted in a decree adverse to the appellant and in favor of each of the other parties; and from that decree appellant brings this appeal.

I. *Appellant's Liability To Ward.* The Trial Court was correct in rendering judgment of $602.29 for Ward. There was evidence that the six cows might have been worth more, but Ward claimed only the amount appellant had received from the sale of the cattle, which sale was an act of conversion.

The general rule—as regards all personal property except money and negotiable paper—is, that a purchaser from a thief acquires no title against the true owner, in the absence of limitations and estoppel (and neither of these is involved in this case). Section 68-1423 Ark. Stats., being a portion of the Uniform Sales Act, is recognition of such rule. In the early case of *Phelan* v. *Dalson,* 14 Ark. 79, this Court said:

". . . it is clear that where property has been obtained from the owner by a felonious act, his unqualified ownership is not in the least changed, and he may peaceably take it, in whose hands soever he may find it." To the same effect see *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; and see also 46 Am. Jur. 622. In 42 Am. Jur. 227, in discussing theft of personal property as affecting the owner's title and civil rights as against an innocent purchaser from the thief, the holdings are summarized:

"Even though such a purchaser may be treated as having title and the right to their possession as against everyone but the rightful owner, a sale by the thief or by any person claiming under the thief does not vest any title in the purchaser as against the owner, though the sale was made in the ordinary course of trade and the purchaser acted in good faith."

Thus, Ward never lost title to his cows; and appellant[1], by selling them at auction, became liable to Ward since such sale was a conversion. In 5 Am. Jur. 489, in discussing the liability of an auctioneer, there are these statements:

"The authorities are practically unanimous in holding that an auctioneer who sells property in behalf of a principal having no title thereto is personally liable to the true owner for conversion, regardless of whether he had notice of the true owner's title, or whether he acted with the utmost good faith in total ignorance thereof . . . The fact that the auctioneer has sold the goods and turned over the proceeds to his principal in innocence and good faith affords him no protection. The rule of liability on the part of the auctioneer applies where he innocently sells stolen property; . . ."

In an Annotation in 20 A. L. R. 135, many cases are cited[2] to sustain this text:

"An auctioneer who makes sale of property which does not belong to the one employing him, and passes the title to the purchaser, is personally liable to the true owner for the conversion."

Appellant, by selling Ward's cattle, became liable to him for $602.29 for the conversion; and the Chancery Court was correct in so holding.

II. *Appellant's Liability To J. P. Williams.* The Chancery Court was correct in rendering judgment

[1] Act 206 of 1937 (now found in § 78-901 *et seq.*, Ark. Stats.) is an attempt to regulate the moving of animals. Then we have two recent cases involving sales of stolen animals: see *Oliver* v. *Eureka Springs Sales Co.*, 222 Ark. 94, 257 S. W. 2d 367; and *Stanley* v. *Eureka Springs Sales Co.*, 223 Ark. 877, 269 S. W. 2d 319.

[2] See also 53 Am. Jur. 837, "Trover and Conversion," § 41.

against appellant in favor of J. P. Williams for $405.07, being the amount of the check on which appellant had stopped payment. As heretofore stated, the rule—that a thief can convey no title to stolen personal property—has no application to a thief transferring money or negotiable paper to a *bona fide* purchaser for value without notice. In 42 Am. Jur. 227-228, the text reads:

"A different rule, however, applies in the case of stolen money and negotiable securities, including travelers' checks . . . The rule is well settled that a bona fide purchaser of a negotiable bill, bond, or note, although he buys from a thief, acquires a good title, if he pays value for it, without notice of the infirmity of his vendor's title."

And again in 8 Am. Jur. 331, the text reads:

"It is familiar law that one in possession of chattels by theft can convey no title to an innocent purchaser. Coin and bank bills are excepted from this rule, however. As to those, even if feloniously obtained, the holder can convey a good title to an innocent purchaser. From the highest considerations of public policy and of commercial necessity, the law also excepts from the rule negotiable instruments acquired for value in good faith before maturity and without notice."

In *Mo. Pac. Rd. Co.* v. *M. M. Cohn Co.,* 164 Ark. 335, 261 S. W. 895, the Railroad Company had delivered a check to an imposter, who endorsed the check in the name of the payee and delivered the check to M. M. Cohn Company in return for merchandise of value. This Court held that the Railroad Company was liable to Cohn Company for the amount of the check; and that case is ruling here. J. P. Williams, in good faith and without notice, parted with his retained title to the truck and with money, all on the faith of appellant's check. Williams duly deposited the check, and appellant is liable to Williams for the amount of the check. See also Annotations in 22 A. L. R. 1228; 52 A. L. R. 1326; and 112 A. L. R. 1435.

III. *Appellant's Claim Against Shirley Williams.* The Chancery Court was correct in refusing to allow appellant to recover from Shirley Williams for the amount of the check of $53.65. What has been said regarding the J. P. Williams claim applies here also. Shirley Williams had cashed appellant's check and received the money thereon; and appellant cannot recover from Shirley Williams.

IV. *Appellant's Claim Against Shelby Morris.* The Chancery Court was in error in refusing to allow appellant to recover from Shelby Morris the two cows (valued at $124.00) which Morris had received from Edgar Ray to apply on a past due grocery bill while Ray was in jail charged with cattle theft. Ray—alias Williams—acquired these two cows from appellant by an act of fraud: i.e., he represented himself to be the owner of the two stolen cows that had been sold for $177.65; and then redelivered the check for that amount to appellant to pay for the two cows here involved, worth $124.00. Thus Ray had acquired possession of the two cows (valued at $124.00) by a fraudulent act. Our quotation from *Phelan* v. *Dalson,* 14 Ark. 79, applies here:

". . . it is clear that where property has been obtained from the owner by a felonious act, his unqualified ownership is not in the least changed, and he may peaceably take it, in whose hands soever he may find it." See *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; and see also 46 Am. Jur. 622 and 42 Am. Jur. 227.

Appellant could have recovered these two cows from Ray, and certainly Ray could pass no good title to Shelby Morris. A recent case applying the aforesaid principle is *Dobbins* v. *Martin Buick Co.,* 216 Ark. 861, 227 S. W. 2d 620. Therefore, we reverse so much of the Chancery decree as refused appellant recovery against Shelby Morris; and remand that angle of the case to the Chancery Court with directions to enter a decree in favor of appellant as against Shelby Morris. In all other respects, the decree of the Chancery Court is affirmed.

V. *Costs.* Ward complains of the order of the Chancery Court that required him to pay all the costs of that Court. The Chancery Court has discretion in adjudging costs. *Penix* v. *Pumphrey,* 125 Ark. 332, 188 S. W. 816; *Lyle* v. *Latourette,* 209 Ark. 721, 192 S. W. 2d 521; *Thomas* v. *Smith,* 215 Ark. 527, 221 S. W. 2d 408. Ward has not cross-appealed; so we cannot consider his argument that the Chancellor abused judicial discretion in the matter of costs.

As regards all of the costs accruing after the decree below, we adjudge the same one-fifth against Shelby Morris and four-fifths against the appellant.

Justices George Rose Smith and Robinson concur.

George Rose Smith, J., concurring. With respect to the two cows transferred to Morris, Justice Robinson and I would rest the decision on a different ground from that adopted by the majority. It is true that one who steals a chattel acquires no title that he can transfer to another, but it is also true that one who obtains property merely by fraud or trick acquires a voidable title that he can pass to an innocent purchaser for value. *Pingleton* v. *Shepherd,* 219 Ark. 473, 242 S. W. 2d 971. Morris, however, is not such a purchaser, for he merely credited the value of the cattle upon a pre-existing debt, which does not constitute the giving of value. *Hamilton* v. *Rankin,* 108 Ark. 552, 158 S. W. 496. Hence Morris is not entitled to retain the animals in any event, and it becomes unnecessary to determine whether Ray's manipulations amounted to larceny or simply to fraud.

Williams *v.* Martin.

5-939 290 S. W. 2d 442

Opinion delivered May 21, 1956.

Odell Pollard and *Barber, Henry & Thurman,* for appellant.

Yingling & Yingling, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee, F. M. Martin, brought this action for damages growing out of a collision on August 16, 1954, in which his pick-up truck was struck by appellant's trailer truck at a point on U. S. Highway 67 near Judsonia, Arkansas where said highway intersects a graveled road known as the old Plainview Road. Trial resulted in a verdict and judgment for appellee in the sum of $1,500.

According to the evidence on behalf of appellee, he approached the intersection in question on the graveled road which intersects the paved highway at right angles on the north and stopped at a stop sign which is located some distance from the pavement. After looking in both directions and observing a car that passed going toward Searcy, he drove to the opposite or right-hand side of the paved highway, going in a northeast direc-

tion. As he drove on the pavement, appellee observed in his outside rear view mirror the loaded cattle truck driven by appellant's employee, Carl Smith, at a rapid rate of speed about 200 yards behind the pick-up truck. After appellee had traveled about 35 or 40 yards on his right hand side of the highway, appellant's truck struck the left rear of appellee's vehicle, knocking it off the right hand side of the road. The impact threw appellee's head against the rear glass window of the truck and "addled" him. As he slumped over the steering wheel with his foot on the accelerator, his truck traveled about 300 feet down the graveled shoulder and back on the highway where it was again struck by appellant's truck.

Appellee sustained injuries which hospitalized him for 21 days and required 26 stitches in his head and nose. It was stipulated that damage to his truck amounted to $500. A sign reading "Reduce Speed Ahead" was located on the appellant's driver's right hand side of the highway about 175 yards from the intersection and signs indicating a speed limit of 35 miles per hour were located on both sides of the highway about 55 yards further east toward the intersection.

While the testimony to the effect that appellee stopped at the stop sign and entered the intersection first is undisputed, the evidence on behalf of appellant was that appellee drove his truck on the highway when appellant's driver was only 30 or 40 feet from the intersection and while two cars going in the opposite direction were approaching the intersection and had stopped suddenly to permit appellee to drive on the paved highway. Under this sharp dispute in the evidence, the questions of the negligence of the appellant's driver and the contributory negligence of appellee were matters properly to be determined by the jury. It follows that appellant's motion for an instructed verdict on the ground that appellee was guilty of contributory negligence as a matter of law was properly denied by the trial court.

R. L. Knox, a deputy sheriff, was called as witness by appellee. He testified that he was in the sheriff's office at Searcy, Arkansas when he and another deputy, in response to a telephone call, drove to the scene of the accident and made an investigation. In response to a question as to whether appellant's driver, Carl Smith, made any statement as to any effort on his part to avoid the accident, Knox was permitted to answer as follows, over the objection of the appellant: "He said it looked like there were so many cars and trucks in there that he had to do something; that he had to hit somebody. He said he was afraid if he hit his brakes too hard it would jack-knife the truck and kill the cattle in the truck."

We agree with appellant's contention that this statement of the driver was not a part of the *res gestae* and should not have been admitted. It should be noted that this testimony was not elicited to contradict or impeach appellant's driver, who had not then testified, but was admitted as substantive evidence of his negligence. While the exact time that had elapsed since the accident was not shown, we take judicial notice of the fact that Searcy is several miles from the scene of the collision and that several minutes had elapsed since the accident when Smith made the statement. In *Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535, relied on by appellant, a much shorter period of time had elapsed between the collision and the appearance of the officer than in the case at bar. After quoting at length from the case of *Carr* v. *State,* 43 Ark. 99, this court there held that statements of the defendant's driver about his brakes not holding were not a part of the *res gestae,* saying: "The statements do not come within the definition thus given, for, if the statements of the driver merely constituted a narrative of a past event, elicited by questions propounded by the officer in investigating the circumstances of the collision, this does not make them a part of the transaction itself, but a mere history or narrative of the transaction, given afterward. The investigation and inquiry of the officer necessarily broke the continuity between the main fact sought to be elicited

and the narrative given of it, and we think that, under these circumstances, the evidence cannot be received as a part of the *res gestae. River, Rail & Harbor Cons. Co.* v. *Goodwin,* 105 Ark. 247; *Webb* v. *Kansas City Southern Ry. Co.,* 137 Ark. 107."

The principles applicable in determining whether particular statements are admissible as a part of the *res gestae* were stated by Chief Justice Hart in the opinion in *Public Utilities Corp. of Ark.* v. *Cordell,* 184 Ark. 678, 43 S. W. 2d 746, as follows: "No hard and fast rule on the subject can be laid down, and each case, in the very nature of things, must depend upon the accompanying facts. Various elements for consideration must be looked into. The declaration need not be strictly coincident with the act which caused the injury, but it must stand in immediate causal relation to that act and be a part of it. The declaration must be so near in point of time as to grow out of and explain the character and quality of the main fact, and must be so closely connected with it as to practically constitute but one entire transaction. The evidence offered as part of *res gestae* must not have the earmarks of a device, or an afterthought, or be merely a narrative of a past transaction. *Clinton* v. *Estes,* 20 Ark. 225; *Carr* v. *State,* 43 Ark. 104; *Little Rock, Mississippi River & Texas Ry. Co.* v. *Leverett,* 48 Ark. 333, 13 S. W. 50, 3 Am. St. Rep. 230; *Little Rock Traction & Electric Co.* v. *Nelson,* 66 Ark. 494, 52 S. W. 7; *Itzkowitz* v. *P. H. Ruebel & Co.,* 158 Ark. 454, 250 S. W. 535, and *Kansas City So. Ry. Co.* v. *Morris,* 80 Ark. 528, 98 S. W. 363."

Appellee insists that even though Smith's statement to Knox was not a part of the *res gestae,* it was not sufficiently prejudicial to warrant a reversal under our holding in *Coca Cola Bottling Co. of Southwest Arkansas* v. *Carter,* 202 Ark. 1026, 154 S. W. 2d 824. It is true that we there held a driver's statement inadmissible but not prejudicial because there was ample substantial evidence aside from the statement to establish liability against the defendant. Although the judgment was not reversed, the verdict was drastically reduced in that case because of the error in admitting the statement. There

is no contention in the instant case that the verdict is excessive and a majority of the court is unwilling to say the statement here involved was not prejudicial in view of the implication that the jury might draw therefrom to the effect that appellant's driver preferred to protect his employer's cattle at the calculated risk of injuring appellee.

Appellant also complains the court erred in giving Instruction No. 3 requested by appellee over the specific objection that it affirmatively placed upon appellant's driver an unqualified duty to yield the right of way to appellee at the intersection. The instruction reads: "You are instructed that while it was the duty of the plaintiff Martin to bring his truck to a stop at the stop sign on the highway upon which he was traveling before entering the main highway, No. 67, at the intersection of the two highways, and to proceed cautiously, yielding to vehicles not required to stop which were within the intersection or were approaching it so closely as to constitute an immediate hazard; *it was likewise the duty of the driver of defendant's truck to yield the right of way to plaintiff*; and if you find from a preponderance of the evidence that plaintiff reached the intersection first and, acting as a reasonably prudent person should have acted under the circumstances and conditions as they appeared to him, had entered the intersection before the driver of defendant's truck reached said intersection and that the driver of defendant's truck negligently failed to yield the right of way to plaintiff, thus causing plaintiff's damages and injuries, if any, your verdict should be in favor of the plaintiff, unless you further find the plaintiff was guilty of contributory negligence as that term is defined in these instructions." (Italics supplied). Appellee concedes the instruction may have been awkwardly phrased and a majority of the court holds there is merit in appellant's contention that the jury may have considered it as an unqualified assertion of an affirmative duty on the part of appellant's driver to yield the right of way to appellee.

We have examined appellant's other contentions for reversal and find them to be without merit. It is the

opinion of the majority, in which the Chief Justice and the writer do not concur, that the admission of the statement of the appellant's driver to Knox after the collision and the giving of Instruction No. 3 as requested by appellee constituted prejudicial and reversible error. The judgment is accordingly reversed and the cause remanded for a new trial.

KIMERY *v.* SHOCKLEY.

5-965 290 S. W. 2d 442

Opinion delivered May 21, 1956.

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

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

GEORGE ROSE SMITH, J. This is an action brought by the appellees, real estate brokers, to recover a commission of $1,050 under an exclusive listing contract by which the appellants employed the appellees to sell certain property. The jury returned a verdict for the plaintiffs.

The appellants concede that they would owe the commission if the property had been sold by the appellees or by any other broker, but they insist that under the particular wording of the contract they were entitled to sell the land themselves without liability to the brokers. The trouble with this argument is that the abbreviated record filed in this court contains nothing to show that the property was in fact sold by the owners themselves. When error appears in a record shortened without objection we are not to presume that the judgment is sup-

ported by the omitted matter, Ark. Stats. 1947, § 27-2127.6; but it goes without saying that when the abbreviated record is free from apparent error we cannot assume that the omitted matter would require a reversal of the judgment.

Affirmed.

SMITH *v.* DEAN.

5-935 290 S. W. 2d 439

Opinion delivered May 21, 1956.

McCourtney, Brinton, Gibbons & Segars, for appellant.

John S. Mosby, for appellee.

GEORGE ROSE SMITH, J. In 1953 the appellant, Vanteen Dean Smith, was convicted of having murdered her

former husband, Harold Dean. *Smith* v. *State,* 222 Ark. 650, 262 S. W. 2d 272. Thereafter she filed a petition in the probate court, asking (a) that Dean's entire estate be vested in her as the surviving tenant by the entirety, and (b) that in the alternative she be allowed the widow's statutory allowance of $1,000. Ark. Stats. 1947, § 62-2501. This is an appeal from an order denying both claims.

Dean's estate consists of personal property that was ostensibly owned by him alone. This property was duly inventoried by the administrator, who is a necessary party to a proceeding involving the title. *Jenson* v. *Housley,* 207 Ark. 742, 182 S. W. 2d 758. In contending that an estate by the entirety really existed the appellant relies solely on her own testimony to the effect that she and her former husband contributed their respective earnings to the purchase of the property and intended to own it jointly. This testimony clearly relates to transactions with the decedent and was properly objected to as being inadmissible under the dead man's statute. Ark. Const., Schedule, § 2. There is no other proof to show that the supposed tenancy by the entirety ever existed.

In resisting the claim for statutory allowances the appellees rely on Ark. Stats., § 61-230, which provides that when one spouse kills the other and is convicted of murder the one so convicted shall not be "endowed" in the estate of the decedent. The section in question is part of Act 313 of 1939, and a reading of that act as a whole shows that it was intended to apply only to dower and curtesy, not to the widow's statutory allowance.

Apart from statute, however, it is a familiar principle of law that one who wrongfully kills another is not permitted to share in the other's estate, to collect insurance on his life, or otherwise to profit by the crime. *Horn* v. *Cole,* 203 Ark. 361, 156 S. W. 2d 787; Rest., Restitution, § 187. That principle would control this case were it not for the fact that the record contains no legal proof that the appellant killed Harold Dean. We cannot take judicial notice of the facts disclosed by the record in

the earlier criminal proceeding. *Murphy* v. *Citizens' Bank of Junction City,* 82 Ark. 131, 100 S. W. 894, 11 L. R. A. N. S. 616.

At the trial below the appellees introduced a certified copy of the judgment of conviction, but it is the settled rule in this state that such a judgment is not admissible to prove the facts on which it was based. *Horn* v. *Cole, supra; Washington Nat. Ins. Co.* v. *Clement,* 192 Ark. 371, 91 S. W. 2d 265. We realize that the soundness of this rule is not universally conceded. The arguments for and against it were analyzed in detail by Dean Wigmore, who concluded that the application of the principle should be relaxed in certain "exceptional situations." Wigmore on Evidence (3d Ed.), § 1671a. Even if the question were one of first impression we would hesitate long before declaring that the present majority view is wrong. Much more is involved than the mere formality of retrying an issue already decided, for even the critics of the rule do not contend that the prior decision should be conclusive. All concede that the opportunity for a retrial should be afforded, and presumably that opportunity would be taken advantage of in most cases by the party dissatisfied with the outcome of the first trial. Thus the minority rule does not do away with the need for a reexamination of the issue previously determined. On the other hand, the practical advantage of the traditional view lies in its assurance that in every case the triers of the fact will have the testimony itself before them and not merely a written record of the conclusion reached by some other tribunal—a conclusion that may have been influenced by factors not relevant to the later case. Since we are not convinced that our own precedents are demonstrably wrong we think it best to preserve certainty in the law by declining to overrule our earlier decisions. It follows that there is no competent evidence to show that the appellant has forfeited her right to the statutory allowance. We express no opinion as to whether proof of the conviction alone would be suffi-

cient to bar dower under Ark. Stats., § 61-230, *supra,* as the appellant did not claim dower in Dean's estate.

Affirmed as to the asserted tenancy by the entirety, reversed as to the statutory allowance.

HOLT, J., dissents.

J. SEABORN HOLT, J., dissenting. I would affirm this case in its entirety.

The appellant, Vanteen Dean Smith, was convicted of the crime of second degree murder, a felony, on evidence that showed she had killed her husband, Harold Dean, by poisoning. She was sentenced to serve, and did serve, a term in our State Penitentiary. On appeal to this court we affirmed the judgment, *Smith* v. *State,* 222 Ark. 650, 262 S. W. 2d 272, and in that opinion said: ". . . the evidence was sufficient to have supported a conviction for first degree murder."

The majority holds that the introduction of a certified copy of the judgment of appellant's conviction of a *felony,* was not sufficient to prove the facts on which the judgment was based. In other words, that there was no competent proof that appellant actually killed her husband. I do not agree. It seems to me that we should here and now adopt the fair and common sense rule, sanctioned by sound reasoning, that the offer in evidence of a certified copy of the judgment of a felony conviction, in the trial of a later civil case is sufficient evidence of the facts on which it was based. This procedure appears now to be in accord with the modern trend of decisions in many of the courts of this nation. As I view it, to require the appellees here to prove over again that appellant killed her husband, in the teeth of a jury verdict and the solemn decision of this court that she did, would be little short of ridiculous. In support of my views *McCormick on Evidence,* Page 619, has this to say: ". . . a growing minority of courts . . . has insisted that common sense and consistency of adjudication require that a judgment of conviction, offered against the person convicted in a later civil case involv-

ing some of the same issues, be admitted as evidence of the facts on which the judgment was based. This view was embodied in the Model Code, and has been sanctioned by the Uniform Rules with the important limitation to convictions for felony. . . . Rule 63(20) makes admissible 'evidence of a final judgment adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment'.

Probably the trend of evolution will be toward the admission generally against a present party of any judgment or finding in a former civil or criminal case if the party had an opportunity to defend. The principles on which is founded the hearsay exception for official written statements would justify this extension." We said in the *Horn* v. *Cole Case,* 203 Ark. 361, 156 S. W. 2d 787, "We think that the principle of sound public policy which demands that a sane, felonious killer should not profit by his crime should be applied as often as and whenever any claim is made by such killer, whether under contract, will, or statute. The decisions which we prefer to follow attain the result which everyone (and even the cases holding the contrary) admits ought to be attained if possible." I think all will agree that appellant ought not to be allowed to profit by her own felonious act.

LEE, EXECUTRIX *v.* ERICKSON.

5-971 291 S. W. 2d 238

Opinion delivered May 21, 1956.

[Rehearing denied June 25, 1956.]

Parker Parker, for appellant.

Robert J. White, Bob Bailey and *Bob Bailey, Jr.,* for appellee.

PAUL WARD, Associate Justice. Appellees, Andrew Erickson, Ben George, and Ray Brown, entered into a partnership to farm certain lands belonging to George during the year 1951. In the early part of 1951, for the purpose above mentioned, appellees purchased from the D. W. Lee Implement Company certain farming equipment including a tractor, cultivators, row planters and middlebuster discs, hereafter referred to as equipment. These articles were paid for in cash. On May 15th of the same year appellees borrowed $1,000 from said Implement Company and executed a note therefor. After a two months illness D. W. Lee died on May 27, 1953 [after this suit was filed in January, 1953] and Nora Mae Lee was appointed executrix, and as such was substituted for the D. W. Lee Implement Company in the litigation. We will hereafter refer to appellant as the Implement Company.

On about September 15, 1951 appellees purchased a used combine from the Implement Company for which they made a part payment, leaving a balance due of $844.98. On December 17, 1951 appellees refinanced their indebtedness to the Implement Company by executing another note in the amount of $1,854.47.

On January 21, 1953 D. W. Lee [for the Implement Company] filed suit against appellees on said note for $1,854.47. After a lengthy hearing the trial court held that the Implement Company, by repossessing the equipment and combine, waived its right to sue on the note,

holding that appellant could have its option of taking the equipment and the combine or accepting the sum of $405 which had been deposited in the court as the proceeds from a public sale under an attachment, which sale had not been approved by the court. We conclude that it was error for the trial court to hold that the Implement Company had waived its right to sue on the note for $1,854.47.

The material portions of the pleadings, facts, and circumstances we gather from the record, which is somewhat contradictory and confusing, are substantially as hereafter set out. It appears conclusively that appellees were indebted to the Implement Company in the amount alleged. One of the partners did not sign the note but the testimony is clear that he was bound as a partner. The note sued on had been assigned by the Implement Company to a finance company and the evidence is not clear that the note had been returned to the Implement Company, and appellant was unable to produce the original note. [However the trial court apparently was convinced that appellant was the owner of the note, and we cannot say it was wrong.] The record contains a purported copy of a conditional sales contract dated May 15, 1951 [the same day appellees borrowed the $1,000] in which the Implement Company purported to retain title to the equipment mentioned above. This instrument shows an unpaid balance of $1,038.80, and we assume that it was given to secure the loan for $1,000. The record contains the purported copy of a conditional sales contract dated September 17, 1951 [the date the used combine was purchased by appellees] in which the Implement Company retained title to said combine, showing a balance due of $844.98. The testimony shows that all of the indebtedness of appellees to the Implement Company was refinanced on December 14, 1951, and the record contains a purported copy of a conditional sales agreement as of that date in which the Implement Company purported to retain title to the combine and the equipment, showing a balance of $1,854.47.

When the Implement Company filed suit on January 21, 1953 on the $1,854.47 note it asked for an attachment against appellees for the equipment and the combine. The sheriff served the attachment and took the equipment and combine into his possession, and, under orders of the court, advertised and sold the same for $405. It is not shown to whom the sale was made, but the court did not approve the sale, but ordered the money paid into court. Later in the trial of the cause testimony was introduced showing that, after the suit was filed, appellant took charge of all of the equipment and the combine prior to the issuance of the attachment. To corroborate this, there was introduced into the record a chattel mortgage dated May 2, 1953 wherein the combine and equipment were mortgaged to the Merchants National Bank of Ft. Smith, said chattel mortgage being signed "D. W. Lee Implement Company" (by) "Juanita Lee Edwards." There is, however, nothing in the record to show what authority Juanita Lee Edwards had to sign the chattel mortgage.

As we view the above factual situation it appears to us that when the Implement Company, on December 14, 1951, together with the appellee partners, executed the purported conditional sales contract the Implement Company had no power to retain title to the equipment and combine. It is undisputed that all of the equipment was paid for in cash and of course the title passed from the Implement Company to the partners. The combine had been bought some 4 months previously, and the new note which was executed on December 15, 1951 included the $1,000 borrowed money. It is our opinion therefore that said purported conditional sales contract should be treated as an equitable mortgage. This being true it makes little difference in the result we reach in this case whether or not the Implement Company had in fact taken possession of the equipment and combine after suit was filed. Moreover, the contention on the part of appellees that the Implement Company took possession of the equipment and combine is hard to reconcile with the undisputed fact that the sheriff levied upon and took possession of same at a later date.

Treating the Implement Company as a mortgagee it did not, by taking possession of the equipment and combine, waive its right to recover on the note, and it can be charged only with the fair market value of said equipment and combine. The situation existing here is parallel to the situation set forth in the case of *Wells* v. *Derrick,* 225 Ark. 993, 287 S. W. 2d 4, where we quoted with approval: " '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.' " " '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.' " There is no proof in this record of any special damages.

Upon remand, the trial court is directed to enter judgment against Andrew Erickson, Ben George, and Ray Brown for the full amount of the note sued on plus interest, and the said appellees to be given their option of crediting against said judgment the amount of $405 [the proceeds of the sale] or to have another sale and credit the proceeds thereof against said judgment, or the privilege of retaining said equipment and combine and paying the full amount of the judgment.

Reversed and remanded for further procedure in accordance with the conclusions above set out.

RUNKLE *v.* FUESS.

5-970 290 S. W. 2d 433

Opinion delivered May 21, 1956.

Willis & Walker, for appellant.

Arnold M. Adams and *A. F. House,* for appellee.

SAM ROBINSON, Associate Justice. This case grows out of an alleged breach of a contract of employment. Appellant Runkle employed appellees Harry and Mazie Fuess to operate Runmoor Lodge, in Boone County, beginning April 1, 1953 for one year, at a salary of $400.00 per month, together with their living expenses. Runkle discharged the appellees in December 1953; they did not obtain other employment until March 1, 1954. Later, they filed this suit against Runkle, asking judgment in the sum of $2,098.30 for salary due at the time they were discharged and for damages they sustained by reason of Runkle's breach of the contract of employment. The jury returned a verdict for the amount sued for, and Runkle has appealed.

First, it is contended that the amount of the judgment is not sustained by the evidence. The jury found for appellees on all issues. There is evidence that Runkle

owed appellees $400.00 per month for eleven months—a total of $4,400.00—less salary payments totalling $1,-661.70; Social Security, $170.00; and Withholding Tax of $470.00, making a total of $2,301.70 to be credited against the $4,400.00, leaving $2,098.30, the amount of the verdict. Hence, the verdict is fully sustained by the evidence.

The court gave appellees' requested Instruction No. 8, as follows: "If you find that the contract was not amended and that there was no violation on the part of the plaintiffs, then you should return in their favor a verdict for the sum of $4,800.00 less salary actually paid to plaintiffs and less the sums of $170.00, $400.00, and the amount of withholding taxes paid by the defendant for the plaintiffs, and less any additional amounts the plaintiffs could have earned after December if by reasonable efforts they could have obtained other employment before they went to the Eldorado Golf Club in March of 1954." Appellant objected on the ground that the undisputed evidence shows that appellees, upon being discharged by appellant, did not seek other employment until March 1954. Actually, appellees did not receive the notice of their discharge by Runkle until about January 25, 1953. Following the receipt of this notice, Fuess was ill for about thirty days, and then appellees found other employment and began work March 1. During the short time they were unemployed, they drew some Social Security payments so that appellant had to pay for only about 45 days that appellees were out of work. The rule is that a party in the circumstances of appellees must make a reasonable effort to obtain other employment. Here, there was no showing that appellees could have obtained other employment before March 1, and the burden was on the appellant to produce evidence that such employment could have been obtained before that time. In *Van Winkle* v. *Satterfield,* 58 Ark. 617, 25 S. W. 1113, the court said: When a servant is wrongfully discharged by his employer, it is his duty to use 'reasonable efforts to avoid loss by securing employment elsewhere.' . . . The burden of proof is on the employer to show that the servant might have obtained

similar employment; for the failure of the servant to obtain other employment does not affect the right of action, but only goes in reduction of damages, and, if nothing else is shown, 'the servant is entitled to recover the contract price upon proving the employer's violation of the contract, and his own willingness to perform.' "

"The burden of proof was on the defendant to show that the plaintiff found or could have found employment elsewhere of the same or similar character for the balance of the term." *School District No. 65 of Randolph County* v. *Wright,* 184 Ark. 405, 42 S. W. 2d 555.

Appellant complains of the court's failure to give his Instruction No. 5, but this instruction limited appellees' recovery to a time prior to December 11, 1953. The evidence was sufficient to sustain a recovery to March 1, hence the court correctly refused the instruction.

Affirmed.

GEORGE ROSE SMITH not participating.

STRAWN *v.* CAMPBELL, COUNTY JUDGE.

5-990 291 S. W. 2d 508

Opinion delivered May 28, 1956.

[Substituted opinion delivered July 2, 1956.]

LEE SEAMSTER, Chief Justice. The appellants, as taxpayers, filed this suit in the Pulaski Chancery Court, First Division, to enjoin the County Judge and others from proceeding under the provisions of Act 351 of the 1949 Acts of the General Assembly of Arkansas. The appellees filed a general demurrer to the complaint and it was sustained by the trial court. The appellants have appealed.

On October 3, 1955, the assessor of Pulaski County, a majority of the members of the Equalization Board of Pulaski County, a majority of the members of each municipal council within Pulaski County, and a majority of the members of each school board within Pulaski County, acting under the provisions of said Act 351, petitioned the Pulaski County Court to employ professional appraisers for the purpose of appraising all real and personal property within the county, said appraisal to be furnished to the tax assessor as an aid in assessing said property for ad valorem taxes.

On November 10, 1955, a hearing was had on said petition, after publication of a notice of said hearing as

provided by the act, at which time the County Court found that there was a need for the employment of professional appraisers to appraise all real and personal property within Pulaski County, and that the interest and welfare of the public would be promoted thereby. It was ordered that three property owners of Pulaski County named in the court's order, enter into negotiations for the employment of qualified appraisers to appraise all real and personal property within the county for a sum certain, the terms and conditions of the contract to be stated in writing, signed by the contracting parties, and submitted to the County Court for final approval. The aforesaid order was amended by an order of December 29, 1955, designated as an order nunc pro tunc, in which the County Court directed the persons named in the original order to negotiate a contract for the appraisal of real estate only.

In compliance with the order of the County Court, the property owners named in said order proceeded to negotiate a contract with E. T. Wilkins and Associates providing for the appraisal of all the real estate in Pulaski County, which contract was approved by the County Court on February 2, 1956.

For reversal, the appellants cite the following points: (1) Act 351 of the Acts of the General Assembly of 1949 is in contravention of Section 28, Article 7, of the State Constitution, in that it inhibits the expenditure of county taxes by the County Court unless approved by a majority of the members of the city councils and a majority of the members of the school boards in the area affected; (2) said Act is in the contravention of Amendment 40 of the State Constitution; in that it authorizes the use of school funds for purposes other than "the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness" as limited in said Constitutional Amendment; (3) the order of the County Court is in excess of the court's jurisdiction in that the petition asked for the appraisal of "real and personal" property, whereas the court ordered the appraisal of real property only;

and, (4) said Act 351 constitutes an unlawful delegation of authority.

In regard to appellants' first point, Act 351 does not compel the County Court to employ professional appraisers, nor does it prevent the court from employing professional appraisers. The exclusive original jurisdiction remains in the court to determine whether to employ said appraisers. This act simply sets up the machinery whereby a petition may be addressed to the discretion of the County Court to employ appraisers. If the court finds that there is a real need to employ professional appraisers, then it appoints a committee of property owners to negotiate a contract. That contract is not effective until it is approved by the County Court. If for any reason at all the court is dissatisfied with the terms of the contract, it may refuse to approve it.

The respective taxing units are required to approve the contract due to the fact that they share proportionately the expenses of the appraisal. The contract is without effect until approved by the County Court; since under the Constitution and laws the County Court has exclusive original jurisdiction in all matters relating to county taxes and the disbursement of money for county purposes. If the taxing units refuse to approve the contract, the County Court could employ the same appraisers. The only difference is that under these circumstances the county would have to pay the costs of the appraisal without contribution by the several taxing units. Section 28, Article 7, Constitution; Sec. 22-601 Ark. Stats., 1947; *State Use of Prairie County* v. *E. F. Leathem and Company*, 170 Ark. 1004, 282 S. W. 367.

Section 5 of the Act provides:

"Claims for costs of publication incurred and for appraisal services in accordance with the terms of the appraisal contract shall be filed with the clerk of the court as other claims against the county are filed, and the county court shall promptly examine each such claim, and if it finds same to be correct, enter an order directing the county clerk to issue a warrant upon the

county treasury, payable from the general fund of the county, for the amount so found to be due."

It can be readily seen that the County Court has exclusive jurisdiction over the expenditure of county funds in this instance.

The appellants' second contention is to the effect that Act 351 contravenes Amendment No. 40 to the State Constitution in that the expenditure here contemplated would not be for (1) maintenance of schools, (2) the erection and equipment of school buildings, nor (3) the retirement of existing indebtedness. This amendment does not pertain to the assessment of property, nor does it prohibit the payment out of school funds such taxing unit's pro rata share of the cost of assessing and collecting taxes.

Section 5, Article 16 of the State Constitution provides "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another."

Section 46, Article 7 of the State Constitution provides that: "The qualified electors of each county shall elect one sheriff, who shall be ex-officio collector of taxes, unless otherwise provided by law; one assessor, one coroner, one treasurer, who shall be ex-officio treasurer of the common school fund of the county, and one county surveyor, for the term of two years, with such duties as are now or may be prescribed by law. Provided, that no per centum shall ever be paid to assessors upon the valuation or assessment of property by them."

The General Assembly has provided by Section 12-806, Ark. Stats. Anno., 1947, that: "It is hereby declared to be the policy of the state and local governments of Arkansas that from and after July 1, 1947, the State and every county, municipality, school district and other taxing unit, excepting only special improvement dis-

tricts to which the county assessor is not required by law to render service, receiving ad valorem or other tax funds collected by county collectors shall contribute funds for the payment of the salaries and the necessary expenses incurred in the performance of their official duties, of the county assessors and their deputies.

"For the purpose of carrying out the foregoing policy, the amount so to be contributed annually by each of said taxing units shall be in the proportion that the total of such taxes collected for the benefit of each such taxing unit bears to the total of such taxes collected for the benefit of all such taxing units. Provided, however, that the pro rata contribution of such salaries and expenses of any such taxing unit which receives taxes collected for the purpose of meeting debt service requirements of its issued and outstanding bonds shall be charged to and paid out of the said taxing unit's general fund, and not to or out of any special fund it may maintain for such purpose, nor in such other manner as will diminish the amount necessary to meet such debt service requirements."

The General Assembly has also provided by law that the several taxing units shall pay their pro rata share of the costs of the salaries of the county collectors and the county treasurers. In the case of *Terry, County Judge* v. *Thornton,* 207 Ark. 1019, 183 S. W. 2d 787, this court said, "Certainly the school fund should not be made to bear more than its just proportion of the salaries of the Collector and Treasurer" — thus requiring the schools, along with the other various taxing units, to pay their just proportion of the cost of collecting and disbursing tax funds. See also *County Board of Education* v. *Austin,* 169 Ark. 436, 276 S. W. 2.

The State Constitution clearly gives the General Assembly the authority to require the schools to pay their pro rata share of the costs of assessing property, a portion of which may be applied to the expenses of employing professional appraisers. This is a valid exercise of legislative power and is not prohibited by Amendment No. 40 to the State Constitution. The office of tax as-

sessor must form a part of any valuation scheme erected by the General Assembly, but the General Assembly may, from time to time, prescribe the duties of that office and adopt such methods as may be deemed expedient to ascertain the values of taxable property. See *Hutton* v. *King,* 134 Ark. 463, 205 S. W. 296.

Since the school district had assumed the obligation of paying its pro rata share of the cost of the appraisal, it was not improper for it to make an advancement to the Pulaski County General Fund, to be deducted from any amount found due the district to the Pulaski County General Fund in 1957.

The appellants next contend that the order of the County Court is in excess of the court's jurisdiction in that the petition asked for the appraisal of "real and personal" property, whereas the court ordered the appraisal of real property only. This point has no merit and has been settled by some of our earlier cases. *Evans* v. *Perciful,* 5 Ark. 424; *Estes* v. *Martin,* 34 Ark. 410. This court has held that once a court obtains jurisdiction of the parties and the subject matter, it has the right to decide every question arising in the case.

In the instant case, the appellants have made a collateral attack upon the order of the county court. A county court acting within the powers conferred by the Constitution and statutes is a court of superior jurisdiction, and, where by statute special powers have been conferred and such special powers exercised judicially, its judgment cannot be impeached collaterally except for want of jurisdiction or errors apparent on its face. *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S. W. 106; *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. 2d 24; *State ex rel, Attorney General* v. *Kent,* and *State ex rel, Attorney General* v. *Wilson,* 181 Ark. 683, 27 S. W. 2d 106. In the instant case, the County Court had jurisdiction of the parties and the subject matter and the court's order is valid on its face, therefore it is good on collateral attack.

The appellants' last point is based on the contention that the provisions of Act 351 constitutes an unlawful delegation of authority. Section 1 of the act specifically provides that the appraisal shall be "for the purpose of making such appraisal available to the county assessor as an aid to such assessor in making his appraisals or assessments for ad valorem tax purposes." This provision is not an unlawful delegation of authority — it can only make the appraisal available as an aid to the assessor. The assessor makes the final assessment under the act.

Finding no error, the decree is affirmed.

Justice GEORGE ROSE SMITH not participating.

Justice ED F. MCFADDIN dissents.

ED. F. MCFADDIN, Associate Justice (Dissenting). I respectfully dissent in this case because it is my studied conclusion that in affirming the Trial Court the majority has made mistakes both of omission and commission.

I. *Omission.* The majority—in considering the appeal only on the four points listed in the opinion—has omitted all mention of subsequent Legislative enactments that materially concern this matter of equalizing assessed values. Some of these Legislative enactments may — and I suspect, do—repeal the said Act 351 of 1949 here involved. At least, the majority should have mentioned the Acts, and decided whether any of them repealed Act No. 351 of 1949. Here are some of the Acts on the same general subject of increasing or equalizing assessed valuations: (a) Act. No. 10 of the Extraordinary Session of 1951 (involved in the case of *Campbell* v. *Little Rock School Dist.,* 222 Ark. 615, 262 S. W. 2d 267); (b) Act 371 of 1955; and (c) Act 153 of 1955. This last mentioned Act—No. 153 of 1955—provides in its caption, *inter alia*: "An Act Providing for a Complete Appraisal and Assessment of All Property in this State that is Required by Law to Be Assessed By County Assessors: . . ." Section 1 of the Act says, in part: "There shall be a complete new appraisal and assess-

ment as of January 1, 1957, of all property in the State of Arkansas, both real and personal, that is required by law to be assessed by County Assessors." If this Act means what it says, then, as of January 1, 1957, all previous assessments will be discarded; and the assessment here involved can hardly be made effective *before* January 1, 1957. Certainly the majority opinion should have examined this Act 153 of 1955 to see if it repealed the Act 351 of 1949 here involved.

The Act 153 of 1955 is a comprehensive Act that seems to take up the entire matter of equalizing assessed valuations; and our cases hold, that when the Legislature takes up an entire subject and legislates at length on it then other laws on that subject are impliedly repealed. In *Louisiana Oil Ref. Co.* v. *Rainwater,* 183 Ark. 482, 37 S. W. 2d 96, this Court held that the provisions in the old corporation law (requiring the filing of annual statements with the County Clerk) were impliedly repealed by a 1927 Act which dealt with the subject of corporations generally, but which omitted any provision about the annual report. In other words, the old provisions were impliedly repealed by a new law which omitted such details. Here is what the Court said in that case:

"As above stated, the act of 1927 provides a new scheme or system for the organization and regulation of corporations. It takes up the whole subject-matter anew and sets up a new plan. It is in no sense amendatory to the old act, but it is a new enactment covering the same subject-matter. It runs through 40 pages of the printed acts, with 57 sections. As we said in *Cordell* v. *Kent,* 174 Ark. 503, 205 S. W. 404, cited with approval in *State ex rel Atty. General* v. *Standard Oil Co.*, 179 Ark. 280, 16 S. W. 2d 581: 'Where the Legislature takes up a whole subject anew, covering the whole ground, revising the whole subject-matter of a former statute, and evidently intending to enact a substitute, the old statute is repealed, although the new statute contains no express words to that effect', and further, even though the old statute contains provisions not covered in the new."

It seems to me that in the case at bar the majority should have discussed this Act 153 of 1955 because, if Act 351 of 1949 is impliedly repealed by Act 153 of 1955, then that fact should have been stated in the majority opinion, even though neither side in this present litigation saw fit to raise the issue.

The failure of counsel to raise this question cannot excuse this Court, because, when the present opinion becomes final, every question that could have been raised—whether urged or not—is precluded from further consideration. In *McCarroll* v. *Farrar,* 199 Ark. 320, 134 S. W. 2d 561, this Court held, that where a citizen and taxpayer brings an action on behalf of himself and other taxpayers (just as is the situation in the case at bar), then such suit is a representative suit and every question that could have been raised in that suit—even though not raised—is barred in a subsequent suit.

In *McCarroll* v. *Farrar* there was the question of whether Act 310 of 1939 was unconstitutional because of certain omissions in the Legislative procedure. There had been a former suit (*Caldarera* v. *McCarroll,* 198 Ark. 584, 129 S. W. 2d 615) challenging Act 310, but the question sought to be raised in the Farrar suit had not been raised in the Caldarera suit. Nevertheless, this Court held that the Caldarera suit was *res judicata* against the claims that Farrar sought to raise, even though the questions had never been considered in the Caldarera suit. So here, in the case at bar, the question is the constitutionality and present validity of the Act No. 351 of 1949. The majority is holding that the Act is constitutional and valid and now in existence; and such holding will be *res judicata* even when some suit may arise involving Act 153 of 1955. Thus the Court is ruling out of existence, *in advance of consideration,* any question about the validity and effect of Act 153 of 1955 on the Act 351 of 1949 here involved.

I most strenuously maintain that, in omitting any consideration of subsequent Legislative enactments on the Act 351 of 1949, the majority is guilty of the fault of

omission. This Court is not excused merely because counsel for the parties in this suit did not see fit to raise the question. At least, such is my humble opinion. If the Court did not want to pass on the question without briefs, we should have asked counsel to rebrief the matter, rather than to close our eyes to the question of the effect of subsequent legislation.

II. *Commission.* But, entirely apart from the fault of omission, there is the equally serious fault of *commission,* because the majority is holding in this case that a School District can lend school funds. The complaint alleged:

"8. The plaintiffs are informed and believe and, therefore, allege that the defendants, Dr. William G. Cooper, Jr., Mrs. Arthur E. McLain, Mrs. Edgar F. Dixon, R. A. Lile, Harold J. Engstrom, Jr., and Dr. Dale Alford, as Directors of Little Rock Special School District, have agreed to advance to the Pulaski County General Fund a sum of money prior to June 30, 1956, within the 1955-1956 fiscal year of the Little Rock Special School District, and a sum of money after July 1, 1956, within the 1956-1957 fiscal year of the Little Rock Special School District, to be applied on the sum of $310,000.00 provided for professional services in the contract for appraisal, and to be deducted from the amount found to be due from the Little Rock Special School District to the General Fund of Pulaski County in the year 1957, as provided in Act 351 of the Acts of the General Assembly of 1949. The said payments by the Little Rock Special School District will constitute a diversion of school funds in violation of Amendment 40 to the Constitution of the State of Arkansas."

The demurrer filed by the appellees admits that the Little Rock School District is to "advance school money to the Pulaski County General Fund to apply on the cost of this appraisal business, and is to be repaid when Pulaski County gets increased revenues from this re-appraisal. That is a straight loan by the Little Rock School District to the General Fund of Pulaski County. In the

oral argument before this Court, I asked the attorneys to cite me to some provision of law that allowed a school district to lend money; and, with becoming candor, the attorneys advised me that they could find no such law. If the Little Rock School District can lend any of its money to Pulaski County, then it can lend its money to any other corporation or individual. The money that the School District receives, either from taxes or any other source, is certainly a trust fund to be spent for school purposes and not to be loaned to a corporation or an individual. I cannot see how the majority can affirm this case in the face of a complaint that contained the allegations as herein quoted.

In the oral argument it was said that the School District was merely "advancing" the money to Pulaski County and was to be repaid. It is a mere quibble of words to say that the "*advance*" here alleged will not be a loan; because a loan is an *advance to be repaid.* Nor can the loan of the school funds to Pulaski County be defended by Section 6 of the Act 351 of 1949 here involved. That section says:

"Annually at the time of making the final settlement of taxes collected by the county tax collector, the funds of the one or more taxing units in which property has been appraised under the terms of this Act shall be charged with such unit's respective pro rata share of such appraisal and publication costs and the amounts so charged shall be credited to the general fund of the county."

That section means that the General Fund of Pulaski County shall be repaid—from the increased tax moneys collected—for the overhead expense that the County has been out, and thus satisfies the requirements of *Hutton* v. *King,* 134 Ark. 463, 205 S. W. 296, cited in the majority opinion. The Act clearly contemplates that the County shall bear the expense originally. But in the case at bar, the School District is to lend its money to the Pulaski County General Fund and then get the money back when, as, and if, the tax collector receives more

money from this assessment procedure than he would have received without the assessment procedure. I urge the majority to show me any law in this state that allows (a) a school district to lend money, or (b) a county to borrow money from a school district. Until such a law can be found, I submit that this Court should not affirm this case.

School funds are trust funds and cannot be diverted In 47 Am. Jur. 363, cases from this jurisdiction and many others are cited to sustain the following text:

"School funds are held to be trust funds for educational purposes which the courts will not permit to be diverted to other even though closely kindred uses, no matter how meritorious the project may appear to be in its practical, ethical, or sentimental aspects. Even the legislature, itself, the fountainhead of matters educational, cannot divert school funds to other uses."

I submit that the majority opinion in this case is allowing school funds to be diverted to pay county expenses. In the case of *Walls* v. *State Board of Education,* 195 Ark. 955, 116 S. W. 2d 354, this Court held that the school funds could not be diverted, even to the assistance of the State School for the Blind; and yet, in the case at bar, the majority is allowing the school funds of the Little Rock School District to be loaned to Pulaski County so that Pulaski County may hire some assessors who, presumably, will increase assessed valuations so that not only the Little Rock School District, but the City of Little Rock and the other governmental agencies involved in this case will get more money. If there ever was a case of diversion of school funds, this is it.

I know that taxes should be equalized; I know that schools are entitled to more money; I believe in education. But I believe in the Law; and I believe that when a Court puts expediency ahead of the Law, the Court makes a great mistake; and I think that is what has been done by the majority in this case.

For the reasons herein stated, I respectfully dissent.

SPRINGFIELD *v.* CITY OF LITTLE ROCK.

5-964 290 S. W. 2d 620

Opinion delivered May 28, 1956.

[redacted]

O. W. Pete Wiggins, for appellant.

O. D. Longstreth, Jr., Dave E. Witt and *Joseph Brooks,* for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves the right of the City of Little Rock to condemn and order the removal (or razing) of 16 dwelling units located on four adjoining city lots, each 50 ft. x 140 ft., and numbered Lots 1, 2, 3, and 4 in Block 194, City of Little Rock, all owned by appellant, M. D. Springfield. The city, following an inspection of the above property, filed complaint in which it alleged that said property had been condemned by Ordinance No. 9814 enacted May 9, 1955, and after describing each of the 16 units further alleged that all had "been allowed to deteriorate and the condition of said pieces of property and the improvements thereon are such that they are now, and for several months prior hereto have been, a structural hazard, fire hazard, and health hazard; and further that said properties are now, and for some time past have been, a constant menace to the lives and health of the citizens of Little Rock," and prayed that appellant be required to raze or remove all of the houses from the property. Appellant answered with a general denial, alleged that the city was exceeding its authority, was acting arbitrarily, and in a cross-complaint prayed for per-

mission to repair the property. On a trial the court, after hearing testimony and viewing the property, sustained the city's complaint that each of these houses was "a menace to the health and safety of the citizens of the community, especially so to those adjoining to these houses" and ordered appellant to remove all the houses located on said property. This appeal followed.

For reversal appellant contends that the court's action was arbitrary, was without authority and an invasion of his constitutional rights. We do not agree.

The preponderance of the evidence shows that on an inspection made March 23, 1955, of Lots 1, 2, 3 and 4 here involved, it was found that six houses were located on Lot 1, with a family occupying each house, eight families shared one toilet, and for each particular dwelling there was no toilet, no bath, no kitchen and no water supply. The heating was unsatisfactory and there was evidence of rat harborage. The exterior and interior of the houses were in a bad state of repair; there was fire damage; the houses were only 4 ft. apart; and there were no screens on the windows. As to Lot 2 there was this testimony: "A. There are four houses on this particular lot and only two families. Q. What about the plumbing? A. It had a toilet and sink in the kitchen. Was in need of major repairs interior and exterior. There was rat harborage. Back yard was littered with rubbish, cans and automobile tires holding water providing mosquitoes breeding." On Lot 3 there were four families and 3 houses, one toilet to two families, no bath, only 4 ft. clearance between houses. As to Lot 4 there were four houses on this lot and three families; eight families were using one toilet. There was no toilet, bath or sink in any of these houses. They were in a bad state of repair and evidence of rat harborage under the houses. In short, it is clearly shown by the evidence that all of these houses were a fire hazard, a health hazard and a structural hazard.

Section 19-2803 Ark. Stats. 1947 provides: "Removal or razing of buildings.—They shall also have the power to order the removal or razing of, or to remove

or raze any buildings or houses that have become in the opinion of the council dilapidated, unsightly, unsafe, unsanitary, obnoxious or detrimental to the public welfare, and shall provide by ordinance the manner of removing and making such removals." Proceeding under the authority of this section, the City of Little Rock enacted Ordinance No. 9814 which contained the following provisions: "SECTION 1. That M. D. Springfield is the owner of the following described property and that said owner is hereby ordered to remove or raze the buildings upon said property within thirty (30) days from the effective date of this ordinance. SECTION 2. That said property is hereinafter set forth in this section, giving the street address, the legal description thereof, and the hazard which it constitutes to the citizens of Little Rock . . . " Then follows a legal description of each of the 16 dwelling units in which each is declared to be a structural, fire and health hazard. "SECTION 3. That the City Attorney is hereby directed to institute such legal proceedings as may be necessary in order to enforce the provisions of this ordinance, and to remedy the dangerous and unsightly conditions brought about as a result of the failure of the owner to properly keep up said property. SECTION 4. That said legal proceedings shall provide that unless the houses are razed within a certain period, to be allowed by the Court, the City of Little Rock be authorized to raze said property and have a lien upon the real estate for the cost of removing said house. SECTION 5. That all ordinances and parts of ordinances in conflict herewith are hereby repealed and, unless the provisions of this ordinance are put into effect immediately, the public peace, health and safety of the people of Little Rock will be adversely affected; therefore, an emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its passage and approval." [this ordinance was introduced and made a part of the record by stipulation of counsel.]

On the record presented we hold that the City has not only acted clearly within its police power, but that it was its duty, in the circumstances, to so act, in the in-

terest of the public health and safety of its inhabitants. "Generally there is a duty upon duly constituted municipal authorities to exercise the police power where there is a public need for it, but it is within their sound discretion to determine both the need and the measure to meet it. Courts will not interfere except for abuse of their discretion, and violation of their duty subjects them only to political consequences and not civil liability," *McQuillin on Municipal Corporations,* Volume 6, page 518, Paragraph 24.33. In the fairly recent case of *Geurin* v. *City of Little Rock*, 203 Ark. 103, 155 S. W. 2d 719, we said: "The police power is as old as the civilized governments which exercise it . . . Moreover, it has been said that the very existence of government depends on it, as well as the security of the social order, the life and health of the citizen, the enjoyment of private and social life, and the beneficial use of property. One of the most important fields of legislation that may be enacted under the police power is that of regulations in the interest of public health. If a city could not enact laws of this sort to protect the health of its citizens, any kind of disease might be permitted to spread among the inhabitants, resulting in great damage. It would be useless to undertake to review, or even collect the many authorities on this subject; but it is generally held that measures of this nature may be enacted." The general and accepted rule is further announced by *McQuillin in Volume 6,* page 495, paragraph 24.23, where he points out that under its police power a municipal corporation may destroy private property without compensation. "Under certain circumstances and by virtue of the police power a state or municipal corporation may without compensation to the owner destroy private property. This may be done, generally speaking, in these situations: (1) where private property is inherently a public nuisance or injurious to the public welfare, health, safety or morality; (2) where private property, not inherently, but by reason of the manner of its use, which the owner cannot or will not correct, is a public nuisance or injurious to the public welfare, health, safety or morality; and (3) where private property is not a nuisance or injurious to the public in any way but its destruction

is necessary to protect the public safety, health, morality or welfare. See *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Marysville* v. *Standard Oil Co.,* 27 F (2nd) 478.

"Unsanitary buildings or buildings injurious to the public health may be destroyed if necessary to abate the nuisance and protect the public health and safety. Quoting from Mr. Justice Harlan in *Mugler* v. *Kansas,* 123 U. S. 623." See also *City of Stuttgart* v. *Strait,* 212 Ark. 126, 205 S. W. 2d 35.

Having concluded that the preponderance of the testimony is not against the Chancellor's findings, that these buildings in question were a fire, health and structural hazard and irrepairable, we must and do affirm the decree.

BIGGER v. GLASS.

5-880 290 S. W. 2d 641

Opinion delivered May 28, 1956.

Josh McHughes, for appellant.

Cooper Jacoway, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellee filed this suit against appellant, originally praying for specific performance, but subsequently changed the prayer into a claim for damages; and such change is one of the

grounds on which appellant relies for reversal of the decree, awarding damages to appellee.

Appellee, Glass, owned a house and lot at "924 South Oak Street, Little Rock, Arkansas." On December 1, 1953, appellant, Bigger, made a written offer to buy the property (described as quoted) for $11,000.00 cash. The next day, December 2nd, he increased the offer to $11,500.00, which Glass and his wife[1] accepted. In the second offer, Bigger described the property as "924 S. Oak Street" and failed to add "Little Rock, Arkansas." Appellee complied with all the terms of said offer and tendered to Bigger a deed conveying a good title; but Bigger refused to fulfill his offer. Thereupon, Glass sued Bigger for specific performance. Originally he sued only on the offer of December 2nd; but when Bigger demurred on the ground that "924 S. Oak Street" did not adequately identify the property, Glass amended his complaint in an effort to have the offer of December 1st (in which the property was described as "924 S. Oak Street, Little Rock, Arkansas") used to complete the description of the property. He claimed that both offers were a part of the series of negotiations dealing with the property that resulted in the contract of December 2nd. Bigger demurred to the amended complaint and the Trial Court overruled his demurrer.

After realizing that Bigger was adamant in refusing to perform the agreement, Glass sold the property to a third person for $10,250.00, which was $1,250.00 less than the amount stated in Bigger's offer of December 2nd. Glass then amended his complaint, alleging the sale and giving credit for the amount received, and prayed a money judgment for the deficit. Bigger then renewed the earlier demurrer on the description issue, and also demurred on the further contention that Glass, in selling the property, had abandoned his original suit, and that such abandonment prevented him from suing for money damages. The Trial Court overruled the second demurrer as amended. Bigger refused to plead fur-

[1] Mrs. Glass was a party to this litigation, but for convenience we refer to Glass and wife as "appellee."

ther; the Court took testimony and gave Glass judgment against Bigger; and this appeal ensued.

We forego a discussion as to whether the first offer (which said "924 S. Oak Street, *Little Rock, Arkansas*") could be used to complete the description in the second offer (which omitted "Little Rock, Arkansas")[2], because we are convinced that the original suit for *specific performance* constituted an *election of remedies* and prevented the plaintiff from subsequently seeking damages. The rule on Election of Remedies is stated in 18 Am. Jur. 129, *et seq.*, to be that: "... where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods . . . he shall not thereafter adopt the alternate remedy, for a suitor cannot pursue a remedy which predicates his case upon one theory of right and thereafter seek a remedy inconsistent with such prior proceeding."

In 18 Am. Jur. 133, the text says:

"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."

We test the case at bar by these three essentials.

I. *Existence Of Two Or More Remedies.* It is obvious that when Bigger refused to perform the contract of purchase, Glass could have relied on the contract and sued—as he originally did—for specific performance; or, he could have treated the contract as broken by Bigger, and proceeded — as he subsequently attempted — to recover damages. The case of *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107, subsequently to be discussed, declares the existence of two remedies in a situation such as is here involved: so this element is present in this case.

[2] In the recent case of *Ray* v. *Robben,* 225 Ark. 824, 285 S. W. 2d 907, we discussed the validity of descriptions which referred to the property by street number in a named city.

I. *Inconsistency Between Such Remedies.* This brings us to the question as to whether a suit for specific performance is inconsistent with an action for damages[3]. The case of *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107, points the way to our present holding. The facts in that case were: that Whittington duly contracted to sell certain real estate to Belding and then refused to perform the contract; that Belding first filed action against Whittington for damages; that Belding later dismissed the damage claim and then filed suit in equity for specific performance of the contract. We held that the filing of the action for damages was an *election of remedies* that prevented the subsequent filing of the suit for specific performance. This Court there quoted from Elliott on Contracts:

" 'It is the doctrine of election of remedies that one having the choice of two or more inconsistent remedies for his relief is bound by his selection of the remedy he will pursue, and he cannot thereafter avail himself of the other remedies . . . So, where the party brings an action at law for damages for the breach, he cannot thereafter maintain a suit in equity to enforce specific performance.' "

This Court then summarized our holding:

"We conclude therefore that the appellants are barred from maintaining this action for specific performance of the contract because they first elected to prosecute an action for damages for a breach thereof."

The case of *Belding* v. *Whittington* holds that an action for damages is inconsistent with a suit for specific performance. The question here is whether the converse is true: i. e., is a suit for specific performance inconsistent with an action for damages on the same contract? Stripped of all legal niceties, the matter is simply this: when Glass asked specific performance he was offering to surrender the property to Bigger for the full amount of money contracted. When Glass asked

[3] Of course, there are some rare situations in which the court can award damages in a specific performance suit, as where there has been a partial failure of title or property; but no such situation is here presented. See 49 Am. Jur. 195, *et seq.*

damages, he was keeping the property and seeking damages. Certainly keeping the property is inconsistent with surrendering the property[4]. Other courts have held that a suit for specific performance is an election of remedies so as to prevent a subsequent action for damages on the same contract. In *Christman* v. *Rinehart* (Idaho), 270 P. 1059, the Supreme Court of Idaho used this language:

"Having elected the remedy of specific performance, plaintiff cannot now maintain the present action for damages, or rescission, since they are inconsistent remedies. See 20 C. J. p. 26, § 18; *Whitley* v. *Spokane & Inland Ry. Co.,* 23 Idaho 642, 132 P. 121; *Largilliere Co.* v. *Kunz,* 41 Idaho 767, 244 P. 404; *Otto* v. *Young,* 227 Mo. 193, 127 S. W. 9, page 18, par. 7; 25 Cal. Jur. p. 707."

In *Riley* v. *Cumberland . . . Rd. Co.,* 234 Ky. 707, 29 S. W. 2d 3, the Court of Appeals of Kentucky, in holding that specific performance was inconsistent with an action for damages, used this language:

"In the case of *Zutterling et al.* v. *Drake,* 10 Ohio Cir. Ct. (N. S.) 167, 30 Ohio Cir. Dec. 561, the court in stating the question before it said that under the contract set up the plaintiffs originally had two remedies for the enforcement of their rights against the defendant. One was an action on the contract for specific performance; the other was a suit at law for damages for

[4] There were filed by Glass an original complaint and two amendments. The prayer of the original complaint was: "Wherefore, plaintiffs pray that the defendants be required to pay to the plaintiffs said sum of $11,500.00 and that the plaintiffs be given judgment against the defendants and each of them in the sum of $11,500.00. Plaintiffs pray for their costs expended herein and for all other proper relief." The prayer of the first amendment to the complaint was: "Wherefore, plaintiffs renew their prayer for the relief prayed in the original complaint." The prayer of the second amendment to the complaint (which was the amendment asking damages instead of specific performance) said: "Wherefore, plaintiffs pray. in lieu of the relief prayed in the complaint as first amended, that plaintiffs be given judgment against the defendants jointly and severally in the sum of $2,008.20 and that said sum of $2,008.20 bear interest at the rate of six per cent per annum from the date of this second amendment until same with interest thereon has been paid in full. Plaintiffs pray for their costs expended herein and for all other proper relief." So the plaintiff, by changing the prayer of his complaint, apparently recognized the inconsistency between specific performance and damages.

breach of the contract. It was held that having elected to pursue the remedy of specific performance it was too late thereafter to institute a suit for damages. The court based the opinion on 7 Encl. Pleading & Practice, page 364. The opinion in the above case was cited with approval in the case of *Lee et al.* v. *Thoma,* 17 Ohio (N. S.) 144, 1 Ohio App. 384. Appellee cites the case of *Belding et al.* v. *Whittington et al.,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107. The opinion supports the position taken by counsel for appellee."

In 28 C. J. S. 1072, "Election of Remedies," Sec. 6, the foregoing cases, as well as others, are cited to sustain this textual statement:

"Other authority holds that damages and specific performance are alternative inconsistent remedies and, consequently, that a party electing the remedy of specific performance cannot thereafter maintain an action for damages."

We, therefore, conclude that the remedies of specific performance and damages for breach of contract are inconsistent remedies; and thus, the second element, in the rule of election of remedies, is present in this case.

III. *The Choice Of A Remedy.* The remaining question is whether the plaintiff made an *irrevocable* choice when he filed his suit and prayed for specific performance. In many jurisdictions, merely filing a specific performance suit is not considered an irrevocable choice, for that suit may be dismissed without prejudice and then a damage action may be filed[5]. This is no longer an open question in Arkansas, for we have a line of cases all holding that the filing of the suit is the act

[5] In 26 A. L. R. 111, in the Annotation following our own case of *Belding* v. *Whittington,* the annotator cites cases from several states which hold that the mere filing of an action or suit does not constitute irrevocable election; but the annotator there recognizes that *Belding* v. *Whittington,* and many other cases, hold that the filing of a specific performance suit is an irrevocable election. Besides the cases cited in the Annotation as so holding, we mention the following: *Levy* v. *Mass. Co.,* (N. J.), 2 A. 2d 341; *Kline* v. *Myriad Pictures,* 207 N. Y. S. 109; and see also cases cited in the Annotation in 6 A. L. R. 2d 10 *et seq.* For a recent case on Election of Remedies, see *Thompson* v. *Phillips,* 225 Ark. 736, 284 S. W. (2) 842.

of irrevocable election. In *Belding* v. *Whittington, supra,* the matter was surveyed in detail, and we there said:

"We believe the better reason is to hold one to a deliberate choice once made between inconsistent remedies, where that choice involves nothing more than the determination by the party as to which of two remedies will best subserve his purpose. Certainly this doctrine has the merit of preventing one who is about to hale another into court from making a capricious choice between inconsistent remedies which he may pursue. Because he knows that whatever course he elects to pursue he will not thereafter be allowed to shift his ground, unless he can show that his election was based upon a mistake of material facts."

In *Roy* v. *Notestine,* 216 Ark. 447, 226 S. W. 2d 66, and in *Sutterfield* v. *Burbridge,* 223 Ark. 854, 268 S. W. 2d 900, we reiterated and followed our holding in *Belding* v. *Whittington*; and in each case held that the *filing* of the proceeding constituted an irrevocable election.

So we conclude that appellee, Glass, by filing the specific performance suit, made an irrevocable election of his remedies arising out of his dealings with Bigger, and could not later convert the specific performance suit into a claim for damages. The decree of the Chancery Court is reversed and the cause is dismissed.

Justice MILLWEE not participating. Justice GEORGE ROSE SMITH concurs. Justice WARD dissents.

MORRIS *v.* STATE.

4836 290 S. W. 2d 624

Opinion delivered May 28, 1956.

Robert M. Lowe and *Shaver, Tackett & Jones,* for appellant.

Tom Gentry, Attorney General and *Roy Finch, Jr.,* Assistant Attorney General.

MINOR W. MILLWEE, Associate Justice. The principal issue on this appeal is whether the use of a deadly or dangerous weapon is a requisite to the commission of the crime of assault with intent to kill.

On November 16, 1955, appellant was charged by information with the crime of assault with intent to kill by striking and beating Robert Erwin with his fist with the unlawful and felonious intent to kill and murder him. The record reflects that upon being arraigned on November 19, 1955, appellant was advised by the court of the nature of the charge and the punishment that might be inflicted in the event of a conviction. At that time, appellant entered a plea of not guilty after he was advised of his right to court-appointed counsel in the event he was unable to employ an attorney. Appellant assured the court of his ability to employ counsel and the case was set for trial on November 28, 1955. After further conferences with the sheriff and prosecuting attorney and upon their recommendation that he be given the minimum punishment, the appellant changed his plea to one of guilty on November 22, 1955 and was sentenced to one year in the penitentiary.

A penitentiary commitment issued on the date of sentence had not been executed on December 3, 1955 when appellant employed counsel and filed a motion for leave to withdraw the plea of guilty with the alternative pleas that the judgment be arrested and the information quashed or a new trial granted because appellant could not have been guilty of the crime charged by striking the prosecuting witness with his fist as charged in the

information and had pleaded guilty without counsel to so advise him. This appeal is from an order overruling appellant's motion after a hearing.

It is earnestly insisted that the court erred in overruling appellant's motion in arrest of judgment and for leave to withdraw the plea of guilty because, as a matter of law, one cannot be adjudged guilty of assault with intent to kill by merely striking another with his fists under Ark. Stats. Sec. 41-606. The statute reads: "Whoever shall feloniously, wilfully and with malice aforethought, assault any person with intent to murder or kill, or shall administer or attempt to give any poison or potion with intent to kill or murder, and their counsellors, aiders and abettors, shall, on conviction thereof, be imprisoned in the penitentiary not less than one [1] nor more than twenty-one [21] years." Appellant relies on such cases as *Warren* v. *State,* 88 Ark. 322, 114 S. W. 705 and *Wilson* v. *State,* 162 Ark. 494, 258 S. W. 972, which hold that a conviction of the crime of aggravated assault under Ark. Stats. Sec. 41-605 is not sustained by a showing that the defendant inflicted injuries to another by striking with the fists or kicking him. These decisions are based upon the proposition that an injury in such manner does not constitute an assault with "a deadly weapon, instrument or other thing," as that statute requires. In contrast, Section 41-606, supra, does not require the use of a deadly weapon in the commission of the offense of assault with intent to kill.

In the absence of a statute requiring the use of a deadly weapon to constitute the offense, the applicable rule is stated in 26 Am. Jur., Homicide, Sec. 604, as follows: "No particular instrument or weapon need be employed in order to constitute an assault with intent to kill or murder. Such a crime is ordinarily committed by the use of a weapon, the employment of which is calculated to produce death, but the use of such a weapon is not requisite to the commission of the crime." See also 40 C. J. S., Homicide, Sec. 75. Our own decisions are to the effect that an assault with the bare fists may be attended with such circumstances of violence and brutality that an intent to kill will be presumed. In the re-

cent case of *McGaha* v. *State,* 216 Ark. 165, 224 S. W. 2d 534, we affirmed a conviction of murder in the second degree of one who used only his fists, saying: "Since death is not the natural or probable result of a blow with the fist, it seems that no intent to kill will, under ordinary circumstances, be presumed though death results from an assault thus committed. But it has been held in many cases that an assault without a weapon may be attended with such circumstances of violence and brutality that either malice or an intent to kill will be implied. Anno. 15 A. L. R. 675, 24 A. L. R. 666." See also *Howard* v. *State,* 34 Ark. 433, *Pixley* v. *State,* 203 Ark. 42, 155 S. W. 2d 710. Cases from other jurisdictions to the same effect are collected in an exhaustive annotation on the subject in 22 A. L. R. 2d 854.

It is clear from the record that the trial court was fully apprised of all the circumstances surrounding the assault in which the 23-year-old appellant administered a violent and brutal beating to his elderly and totally disabled father-in-law with his fist. While the court stated that permission to withdraw the guilty plea after sentence might involve the issue of double jeopardy, it is clear that he also concluded that the circumstances of the assault fully sustained the offense charged under the foregoing rule. Ark. Stats. Sec. 43-1222 provides: "At any time before judgment, the court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted." In construing the statute, we have repeatedly held that the right to withdraw a plea of guilty rests in the sound discretion of the trial court and that its action in this regard will be reversed only when it clearly appears that its discretion has been abused. *Estes* v. *State,* 180 Ark. 633, 22 S. W. 2d 36. While there is no statute on the subject of withdrawal of a plea of guilty after rendition of judgment, the trial court has the power to set aside its judgment at any time before the expiration of the term and the same rule has been applied in cases where the withdrawal motion was not made until after judgment entry. *McClain* v. *State,* 165 Ark. 48, 262 S. W. 987. *Gunter* v. *State,* 202 Ark. 551, 151 S. W. 2d 85.

A review of the entire record convinces us that appellant's motion for permission to withdraw the plea of guilty was not rejected because it had not been filed until after judgment, but was overruled upon findings and under circumstances which failed to disclose any abuse of the court's discretion. The court fully apprised appellant of the nature and gravity of the charge against him. Appellant voluntarily entered the plea of guilty with full knowledge of the consequences of his act in doing so and after being fully advised of his right to counsel under Ark. Stats. Sec. 43-1203. There is nothing in the record to show that he was induced to enter the plea of guilty improperly or that he did so in ignorance of his rights or under any misapprehension of the facts. Under these circumstances, it was within the sound discretion of the trial court to grant or withhold the privilege of withdrawing the plea of guilty, and we are unable to say that there was a clear abuse of such discretion. The judgment is accordingly affirmed.

ROBINSON, J., dissents.

LAMPKIN *v.* LONG.

5-975 290 S. W. 2d 623

Opinion delivered May 28, 1956.

Henry J. Burney, for appellant.

Millard Alford, for appellee.

GEORGE ROSE SMITH, J. In 1951 the appellants bought certain land from the appellee, the conveyance being by warranty deed. More than three years later this action for breach of warranty was brought by the purchasers, who asserted that the seller did not have title to one third of the property sold. The defendant answered with a general denial and a plea of limitations. The case, tried without a jury, was submitted upon an agreed statement of facts. The court entered judgment for the defendant, but the record does not indicate the ground on which the decision was reached.

It is admitted that the plaintiffs bought and paid for a lot and a half of ground. According to the stipulation, however, "the plaintiffs later learned that a fence runs diagonally across Plot 12, dividing Plot 12 into two equal halves and leaving the north half of said Plot 12 on the north side of said fence, which north half was and is being claimed by Albert L. Woody, thus leaving the plaintiffs with possession of only two thirds of the one and one-half plots; that said Woody claims said north half of said Plot 12 by virtue of adverse possession; that he claims to have had actual adverse possession since 1942; that the value of the north half of said Plot 12, which is being held by the said Woody, is $716.67; that plaintiffs have demanded possession of the north half of Plot 12 from said Woody and that he refuses to yield or give it to the plaintiffs; that the plaintiffs advised the defendant, Mrs. Annie Long, of this situation prior to bringing of this suit and that she has failed and refused to do anything about it; [and] that there has been no adjudication of title to the property as between the plaintiffs and the said Woody."

Upon the agreed facts the plaintiffs are entitled to recover. The plea of limitations is not well founded, since the suit was brought well within the five years allowed for an action for breach of warranty. *Bird* v. *Smith,* 8 Ark. 368; *Smith* v. *Boynton Land & Lbr. Co.,* 131 Ark. 22, 198 S. W. 107. Nor is it material that Woody's possession at the time of the conveyance gave

notice of his claim, for the covenant of warranty is a protection against known, as well as unknown, defects of title. Jones, Arkansas Titles, § 397.

The stipulation recites that there has been no adjudication of title as between the purchasers and Woody, but there is no requirement that such a suit be brought by the vendee as a condition precedent to his action against the vendor for breach of warranty. *Heyn* v. *Ohman,* 42 Neb. 693, 60 N. W. 952; *Jones* v. *Richmond,* 88 Va. 231, 13 S. E. 414; cf. *Hoppes* v. *Cheek,* 21 Ark. 585. When the adverse claimant clearly has paramount title to the property nothing could be gained by requiring the purchaser to bring an action having no prospect of success, an action in which the plaintiff could not truthfully prepare a complaint stating a cause of action.

This stipulation recites that Woody is in adverse possession of the half lot and "claims to have had actual adverse possession since 1942." The appellee, having agreed to this language, is not in a position to contend that it states a mere conclusion of law. *Redman* v. *Hudson,* 124 Ark. 26, 186 S. W. 312. At the very least the stipulation must be taken to mean that Woody would testify to the ultimate facts recited, and this, as we have seen, is sufficient to establish a prima facie case for the plaintiffs. Since no other evidence was introduced at the trial the appellants' proof is undisputed.

The judgment is reversed, and, as the amount of the appellants' damages is agreed upon, judgment will be entered here in the sum of $716.67, with costs.

CODER *v.* CODER.

5-979 290 S. W. 2d 628

Opinion delivered May 28, 1956.

Sam Goodkin, for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

PAUL WARD, Associate Justice. This is a child custody case, and, as usually happens in such cases, both cold facts and warm emotions are involved.

The litigation which led to this appeal began on September 6, 1955 when appellant, Nadine Coder, filed for a Writ of Habeas Corpus in chancery court to obtain possession of her 12 year old son, Frank Ray Coder. The writ was directed against Robert E. Coder, the father,

and his father and mother, Frank D. and Lola Coder, who at that time had actual custody of the child.

The factual background leading up to this litigation is, briefly, as follows: Nadine Coder and Robert E. Coder were married August 31, 1941 and Frank Ray was born some two years later; The parties were divorced in February of 1945, and remarried in February of 1946; They were again divorced in the latter part of 1949, the result of a suit filed by Robert E. Coder in Sebastian County Arkansas charging his wife with desertion; On December 17, 1951, while Nadine Coder was living with her son in St. Louis, Missouri, the Missouri court gave her the custody of her son; Shortly thereafter Nadine Coder, with her son, moved to the home of her parents in Neosho, Missouri where she was employed; In January 1953 Robert E. Coder, under circumstances to be discussed later, went to Neosho and got his son, and brought him to Fort Smith where he has lived with his father and his paternal grandparents until this time, and; In August 1953 appellant moved to California where she is employed, living in a rented home with no other adult.

After hearing all the testimony, the trial court denied appellant's petition for a Writ of Habeas Corpus and gave the custody of Frank Ray Coder to his father, Robert E. Coder, one of the appellees herein. The trial court further ordered that appellant, the mother, was entitled to have her son, Frank Ray Coder, spend his vacations [between school terms] with her in California, provided she furnish a $1,000 bond conditioned upon the return of the child to his father, provided she must return the child to his father at any time the child desires, and provided she pay the round trip fare each way. It was further ordered that the father should pay appellant the sum of $30 per month during the time she had the boy in her custody.

For a reversal, appellant makes the following contentions: (a) The trial court failed to give full faith and credit to the decree of the Missouri court; (b) Appellees failed to file an answer or any other affirmative de-

fense; (c) Appellees failed to show changed conditions since the Missouri decree, and; (d) The trial court imposed improper visitation conditions. We reach the conclusion that only the last of these contentions can be sustained.

(a and c). These contentions are so related that they may be discussed together. Appellant appears to be under the impression, and we think erroneously so, that the trial court based its decision on incidents and conditions that occurred and existed prior to the Missouri decree awarding custody of the child to her. It is true that some matters occurring prior to the said decree were brought out in the testimony, but the court explained that it could not intelligently compare present conditions with those existing prior to the Missouri decree without knowing something about the prior conditions. We gather from the trial court's decree that it was based on a change of conditions since the Missouri decree and not on conditions that existed prior thereto. The law in this respect is well settled. We have repeatedly held that a decree of another state fixing the custody of a child is final on conditions then existing, and should not be changed thereafter by a decree of a court of this state unless on conditions altered since the decree of the other state, or on material facts existing at the time of the decree of the other state but unknown to that court, and then only for the welfare of the child. See *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450; *Keneipp* v. *Phillips,* 210 Ark. 264, 196 S. W. 2d 220; *Turner* v. *Dodge, Chancellor,* 212 Ark. 991, 208 S. W. 2d 467, and; *Henkell* v. *Henkell,* 224 Ark. 366, 273 S. W. 2d 402. All of these cases, and many others, also hold that the welfare of the child must be considered.

After a careful consideration of all of the testimony we are persuaded that the weight of the evidence sustains the chancellor's findings that the change in conditions and circumstances since the Missouri decree, and the welfare of the child at the present time, justified awarding the custody of the boy to his father. Such holding is confirmed by the knowledge that the trial

judge observed the witnesses and their demeanor and was, therefore, in a better position than we to evaluate their testimony.

With one or two exceptions, later noted, the evidence is not in dispute.

Since 1953, when appellant left her parents in Neosho and moved to California, she has lived in a rented house with no one who could look after her son while she is absent at work. We are convinced that appellant has great love for her son and that she would do all in her power to look after him properly, and he would have access to excellent schools and churches, but she herself admits that during the interval when her son would be out of school in the afternoons and before she returned from work in the evenings he would be left to the care and protection of her neighbors. Also, it is the contention of appellees that appellant, in January 1953, voluntarily surrendered the permanent custody of her son to his father. Although this contention is denied by appellant, we think the weight of the conflicting testimony sustains it. Mrs. Lola Coder, the paternal grandmother of the boy, testified that appellant, in January 1953, telephoned her that she was having some trouble with the boy, that he didn't get along with his maternal grandmother, that she herself had to work, and that she didn't know what she was going to do. Mrs. Lola Coder further testified that she told appellant she would help her out and that she would be glad to keep the boy in her home. Following this the boy's father went to Neosho, Missouri and brought him back to Fort Smith, bringing all of his clothes. It is admitted by appellant that she agreed for the father to take the boy on this occasion but she denies that she agreed to turn over to appellees the permanent custody. Her statement is that she intended for the boy to make only a temporary visit with his father. Appellant further states that she had been trying all along to get the boy back but she fails to detail any means or attempts calculated to do so. The fact remains that she took no legal steps to regain custody of her son until she instigated this litigation on September 6, 1955. Under these circumstances we think the

chancellor was justified in finding that her actions were not compatible with her avowed intention to merely let her son make a temporary visit to Fort Smith. The undisputed testimony discloses that during the two and one-half years which the boy has lived with appellees in Fort Smith, he has been given proper care and treatment, he has been afforded excellent school and religious training, he has acquired wholesome friends and associates, and he is happy and contented in his present home. It is appellant's belief that the appellees have attempted to alienate her son's affections for her, but they and he deny this, and the boy says he still loves his mother but had rather live with his father. We agree with the chancellor that it is for the best interest of Frank Ray, who is now 12 years old, to remain with his father in the present surroundings. It is true that the father has employment which permits him to be at home only once or twice every two or three weeks, but at all times the boy is in the home and under the care and protection of his paternal grandparents.

(b) We do not agree with appellant that it was reversible error for the trial court to refuse to require appellees to file an answer to her petition or, in lieu thereof, grant her petition. The petition for the writ was filed on September 6, 1955 and the hearing was held two days later. At the hearing, the first witness was introduced by the petitioner and from this witness there was elicited certain information regarding the religious and educational environments which would surround the boy if he was permitted to go to California. Appellant testified next, and it was during her testimony that her attorney stated in effect that he was willing to develop matters subsequent to the Missouri decree, although at the same time he objected to the court hearing testimony as to conditions and matters previous to said decree. The trial court overruled appellant's objections on this point but explained its reasons as heretofore mentioned. Shortly thereafter appellant's attorney reminded the court again that he did not know what appellees' defense would be. Thereupon appellees' attorney, at the suggestion of the court, outlined appellees' defense.

There was no further insistence by appellant that any written pleading be filed by appellees and no further objections were made to the introduction of testimony on that ground. Under these circumstances appellant waived the filing of a formal answer by appellees and cannot at this time be heard to complain.

(d) We feel that the visitation conditions imposed by the court on appellant were too harsh, and that they might amount to a complete denial thereof. Appellant strongly insists that she is not able, under the circumstances existing, to make a $1,000 bond for the safe return of her son to Fort Smith if and when he visits her in California, and there is no evidence to the contrary. We think a bond in the amount of $500 should be sufficient, especially in view of the fact that the boy should within two years or less be capable of making his own decision as to where he wants to live. The trial court required appellant to pay all travel expenses for the boy from Fort Smith to California and return. It is usual in such instances, and we think it is appropriate in this case, for appellant to pay the travel expenses from Fort Smith to California and for the boy's father to pay his travel expenses from California to Fort Smith. We note also the court provided that when and if the boy should visit his mother during vacation time she should return him "to the home of his father at any time he desires." This restriction, it seems to us, is not only useless but it would be difficult to enforce, and it also might lead to a denial of visitation rights entirely. If and when the boy visits his mother during vacation time she should not in any way be hampered in her efforts to strengthen her son's ties of love and loyalty.

Therefore the decree of the trial court is modified as above set forth and, as so modified, is affirmed, and the trial court is directed to enter a decree in conformity with the views above expressed.

Justices Minor W. Millwee and George Rose Smith dissent.

Opinion delivered May 28, 1956.

[redacted]

Fred Newth and *Kenneth Coffelt,* for appellant.

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

SAM ROBINSON, Associate Justice. Appellant was convicted in the Pulaski Circuit Court of the crime of manslaughter, and, on July 18, 1955, during the March term of the Circuit Court, he was sentenced to three years in the penitentiary. The judgment was affirmed by this court January 9, 1956. *Maples* v. *State,* 225 Ark. 785, 286 S. W. 2d 15. Subsequently, on February 7, 1956, during the September 1955 term of Circuit Court, Maples filed what is designated as a motion to vacate the judgment. The motion alleges that a witness is now available who will testify that she saw the killing, and that Maples acted in self-defense. The motion further alleges that this witness was incompetent at the time of the first trial, and, therefore, was unable to testify. The trial court denied the motion, and Maples has appealed.

Prior to the trial in July 1955, Maples had filed a motion asking for a continuance on the ground that the witness referred to was not available at that time, but could be called as a witness later if a continuance were granted. The court denied the continuance, and, on appeal, there was no contention that the court erred in doing so.

Appellant now seeks a new trial, relying on authority of Ark. Stats. § 29-506, which provides: "The court

in which a judgment or a final order has been rendered or made, shall have power, after the expiration of the term, to vacate or modify such judgment or order, ...Seventh: For unavoidable casualty or misfortune preventing the party from appearing or defending." This statute has no application to criminal cases. *Thomas* v. *State,* 136 Ark. 290, 206 S. W. 435; *Smith* v. *State,* 200 Ark. 767, 140 S. W. 2d 675.

Appellant also says his constitutional rights were violated; however, the point is not argued, and no authority is cited.

Affirmed.

[redacted]

PASTEUR *v.* NISWANGER.

5-919 290 S. W. 2d 852

Opinion delivered June 4, 1956.

[redacted]

J. W. Patton, Jr., and *Shaver, Tackett & Jones,* for appellant.

Fulton, Hancock & McClain and *Keith & Clegg,* for appellee.

LEE SEAMSTER, Chief Justice. This appeal is from the Lafayette Chancery Court. The court decreed partition and sale of a leasehold working interest in an oil and gas lease on 40 acres of land in said county. The question involves the right of the court to enter a judgment for partition and order of sale of the leasehold working interest owned by the parties, under the facts in the case.

Appellant Edna Mae Pasteur acquired the ownership of the lease in question. To get the funds necessary to drill or work the lease, she sold and assigned a one-half interest in the lease to Adma C. Niswanger for the sum of $9,000, and Pasteur contracted with Niswanger to drill a well on the premises and if oil was found to also drill a second well thereon, to be commenced within six months from the completion of the first well.

By a later agreement between said parties Pasteur agreed to drill this second well on the leasehold premises and Niswanger was to pay her an additional $17,000 to pay for one-half of the cost of drilling the second well. Niswanger paid to Pasteur the $17,000 and still owns a half interest in the leasehold estate.

To provide funds for her part of the cost of drilling the second well, Pasteur sold other interests in the leasehold working interest; To appellant, Eddie Adamson, a one-sixteenth interest; to appellant, M. H. Harrell, three-sixteenths interest. Harrell mortgaged his interest to Farmers and Merchants National Bank of Gilmer, Texas; and to the appellee, Iris Jordan a one-sixteenth interest. Pasteur retained three-sixteenths interest in the lease. The working interest of seven-eighths is also subject to two overriding royalty interests, one eighth of one-eighth of seven-eighths leasehold interest held by Carter Oil Company and one-sixteenth of seven-eighths of leasehold interest held by T. C. Short.

The parties now own the respective interests as set out above in the leasehold working interest, including all machinery and personal property used on the premises. Both of the wells drilled by Pasteur were producing wells. The oil produced from the two wells is now being severed from the soil and delivered through oil pipe lines to the market.

Appellees filed the partition suit on the sole ground that they are co-tenants of the appellants in the leasehold estate and as such are entitled to a sale under partition and division of the proceeds of such sale among the parties as their interests are set out herein.

There is no evidence on this point but Title 53 of Arkansas Statutes, 1947, creates the Oil and Gas Commission and gives it jurisdiction over the production and sale of oil and gas in this state as a conservation regulation of such industry. It is necessary to secure a permit from the Commission before drilling starts for oil or gas. Where there is production, a division order requiring the proper measuring of the oil at the time of delivery to the pipeline, and a designation of the owners and their interest in the oil to be delivered must be set out. We assume the parties have complied with the law in drilling and selling the oil from the two wells here involved.

Our court has held that an oil and gas lease conveys an interest and easement in land itself, but no title passes until the oil and gas is reduced to possession. *Clark* v. *Dennis*, 172 Ark. 1096, 291 S. W. 807; *Osborn* v. *Arkansas Territorial Oil and Gas Co.*, 103 Ark. 175, 146 S. W. 122; *Davis* v. *Collins*, 219 Ark. 948, 245 S. W. 2d 571.

Oil severed from the soil and reduced to possession becomes personal property. *Shreveport-El Dorado Pipe Line Co.* v. *Bennett*, 172 Ark. 804, 290 S. W. 929.

No attempt was made in this case to partition the land upon which the lease exists. Our statute, Sec. 34-1801 Ark. Stats. 1947, provides for the partition of land. Owners of leasehold working interests are not co-tenants of the owners of the fee or surface of the land. Their

interests are of a different kind. Their interests are also of a different kind to the interests of the owners of mineral rights where severed from the land.

The mineral interests in land may be partitioned under the provisions of Sec. 53-401, Ark. Stats. 1947, and related sections, under the conditions therein set out. None of the statutes apply to the facts in this case or to the partition of a leasehold working interest. *Warfield Natural Gas Co.* v. *Cassady,* 266 Ky. 217, 98 S. W. 2d 495; *Hall* v. *Vernon,* 47 W. Va. 295, 34 S. E. 764; *Beardsley* v. *Kansas Natural Gas,* 78 Kan. 571, 96 P. 859, 173 A.L.R. 860, note 5.

There is no statutory right, to compel the partition of a leasehold estate working interest in this state. The right to have partition in equity is based upon the application of equitable principles, and only upon showing facts indicating sufficient reason for equitable interference. 173 A. L. R. p. 850-859.

In the case of *Fry* v. *Dewees,* 151 Kan. 488, 99 P. 2d 844, the court held that where there is production operating under a division order partition has already been made.

It has been held that there is no ground for partition of personal property where it is divisible by weight, a measure or number into portions identical in quality and value. There would be no dispute that a court of law or equity could settle. Counting, weighing and measuring are not judicial but ministerial functions. 40 Am. Jur. p. 87, Sec. 104.

The object of a leasehold estate working interest is to produce the mineral sought. As long as there is production, there is partition. Under the facts in this case the right to partition by the court should be denied.

The decree is reversed and the petition for partition is dismissed.

Justice McFaddin concurs.

Ed. F. McFaddin, Associate Justice (Concurring). From a decree of the Chancery Court ordering a sale of

the properties of all the parties, there is this appeal, challenging the validity of the order of sale. The appellants are Edna Mae Pasteur, Eddy Adamson, M. H. Harrell and the Farmers & Merchants National Bank of Gilmer, Texas. The appellees are Adma C. Niswanger and Iris Jordan.

The appellants and appellees together own a leasehold working interest in the SW¼ SW¼ Sec. 10, Twp. 16 S., R. 24 W., LaFayette County, Arkansas. All the parties herein are agreed: (a) When the original oil and gas leases were executed on the above 40 acres, there was a 1/8th interest retained by the landowner and called the "royalty interest". That interest is not involved herein. The remaining 7/8ths interest in the minerals was called the "leasehold interest". (b) On the particular 40-acre tract here involved there was carved out of this 7/8ths leasehold interest two overriding royalty interests, and being:

1/8 of 1/8 of the 7/8 or leasehold interest held by Carter Oil Company; and 1/16 of 7/8 of the 7/8 or leasehold interest held by T. C. Short. (c) The remainder of the leasehold interest (after the over-riding royalty interest in (b) above) is the leasehold working interest and is owned by the appellants and the appellees in these proportions:

Appellee, Adma G. Niswanger	1/2
Appellee, Iris Jordan	1/16
Appellant, Edna Mae Pasteur	3/16
Appellant, Eddy Adamson	1/16
Appellant, M. H. Harrell (subject to the mortgage of the Farmers & Merchants National Bank of Gilmer, Texas)	3/16

On August 26, 1952, appellant, Pasteur, owned all of the aforesaid leasehold working interest mentioned in (c) above, and made a contract with appellee, Niswanger, whereby, for the sum of $18,000.00 duly paid,

Pasteur assigned to Niswanger 1/2 of the said leasehold working interest owned by Pasteur, and also agreed to drill a well on the 40 acres of oil and gas. This well was drilled and became a producer; and then it became necessary to drill another well on the 40-acre lease, for half of the expense of which second well Niswanger became liable. She was advised by Pasteur that Niswanger's portion of the expense of the second well was $17,000.00, which amount Niswanger paid. Both wells were producing at the time of the litigation in the lower court.

On January 7, 1954, Niswanger filed this suit in the Chancery Court, praying for an accounting and claiming that Pasteur, in the operation of the wells, had overcharged Niswanger on the cost of the second well and had also failed to properly handle the finances of the entire leasehold working interest. Later, by an amendment, Niswanger alleged that the other parties to this litigation (besides Niswanger and Pasteur) had acquired interests in the leasehold working interest from Pasteur, and they were brought in as parties; and then Niswanger, by amendment, prayed that the entire lease-hold working interest of all parties in this litigation, including the machinery and equipment of the two wells, be sold and the proceeds held for partition after the accounting. Iris Jordan joined with Niswanger in seeking sale and partition, which was resisted by all the other parties. The Chancery Court ordered the sale of the lease-hold working interest of appellants and appellees and also the sale of the equipment and machinery of the appellants and appellees at the two wells. All of this was in advance of hearing the other questions in the case: it was conceded that there would be a subsequent accounting.

The parties on this appeal have briefed the case on the question of whether there can be a partition of oil and gas leasehold rights. I do not understand that to be the vital question. The real questions in this litigation are: (1) What was the status of the appellants and appellees between themselves; i.e., were they joint adventurers, partners, or what? (2) Whatever their status,

did equity have the power to sell the corpus of their holdings in advance of deciding whether there had been a breach of the operating agreement; i.e., could equity sell the corpus until it was first shown that a cause of action existed to justify the winding up of the relationship? I think the present decree should be reversed and the cause remanded to the Chancery Court for trial and decision on the two questions stated in this paragraph.

COLEY *v.* AMSLER, JUDGE ON EXCHANGE.

5-987 290 S. W. 2d 840

Opinion delivered June 4, 1956.

Lee Miles, Ed E. Ashbaugh and *Wright, Harrison, Lindsey & Upton,* for petitioner.

J. F. Holtzendorff and *Frances D. Holtzendorff,* for respondent.

J. SEABORN HOLT, Associate Justice. This is an original proceeding by petitioner, Frank Coley, for a writ of prohibition. On July 4, 1955, an automobile owned and driven by Naomi Faupel, and in company with her mother, collided with a truck driven by appellant, Frank Coley, in Lonoke County. August 22, 1955, Naomi Faupel brought suit against Coley in the Circuit Court of Prairie County based on personal injuries and property damage growing out of the mishap. Coley, after having been duly served with summons, appeared specially and filed

motion to quash the summons, and that the complaint be dismissed, on the ground that venue in Prairie County was improper since the collision happened in Lonoke County and Miss Faupel (he alleged) was not a resident of Prairie County at the time of the mishap. On a hearing, at which both parties offered testimony, the trial court overruled appellant's motion and on February 29, 1956, appellant filed in this court his petition for writ of prohibition seeking to prohibit the Prairie Circuit Court from proceeding further in the case. Appellant says: "The only question presented by this Petition is whether or not the plaintiff was a resident of Prairie County, Arkansas, at the time the accident giving rise to her complaint occurred."

The venue in this case and in similar litigation is controlled by § 27-610 and 27-611 Ark. Stats. 1947 which provide: "All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury . . . Any action for damages to personal property by wrongful or negligent act may be brought either in the county where the accident occurred which caused the damage or in the county of the residence of the person who was the owner of the property at the time the cause of action arose."

The testimony discloses that Naomi Faupel, single and now 25 years of age, was reared in Hazen, Prairie County. Her parents have continued to reside in their home in Hazen. After finishing high school in Hazen and a business education in Little Rock, Naomi Faupel returned to Hazen and worked for a construction company and a local bank until 1953. In October 1953, she, after having pursued a correspondence course to qualify for a position with an airline company, went to Kansas City, Missouri to take an additional six week's course of study, which was required. Following the completion of her course of study she applied for a position with the airlines, but finding no opening she accepted her present position with an insurance company, in order to support herself, but only on a "temporary basis." Her applica-

tion with the airlines was still pending. While working in Kansas City, she testified that she continued to claim Hazen as her home — "Q. And Hazen is your parents' home? A. And my home too." A substantial amount of her clothing, personal possessions, including her hope chest, silver and other treasures, were kept in her home in Hazen and that she maintained in Kansas City only such clothing as the seasons required. She returns to Hazen as often as she can on week-ends and on holidays — "Q. How often do you come back to see your mother and dad at Hazen? A. About every two months." She further testified that her visits to them were "from a week to ten days or two weeks, whatever time she has;" that on these visits she brings home her clothes and things like that and takes back some; that she had been in Hazen two days when the mishap here in question occurred and that she was going back to Kansas City to work and remain until Thanksgiving, when she would again be home. She had also been home thirty days before this on Labor Day. She continued to maintain her church membership in a church in Hazen, her membership in a riding club, claims interest in a horse which she and her father keep at Hazen, and maintains burial insurance at Hazen. She cast her maiden vote in Prairie County in 1951 and has voted in each election in that county since, voting an absentee ballot in 1954, and has purchased her poll tax for the year 1955 in Prairie County. Her name appears on the published and official list of qualified electors of Prairie County for each of these years. She has never voted in Missouri or any other place except Prairie County. She owned an Arkansas Driver's License for the years 1950, 1951, 1952, 1953 and 1954. She did not own an Arkansas Driver's License for the year 1955, but owned a Missouri Driver's license for that year. She paid no State Income Tax either in Missouri or Arkansas. The 1955 Hazen Telephone Directory shows the telephone at the Faupel residence listed in Miss Naomi Faupel's name.

Appellant stoutly contends that the undisputed testimony shows that Miss Faupel was not a resident of Prairie County at the time of the collision, but was in

fact a resident of Kansas City and that we must so declare as a matter of law. We do not agree. We do not think the evidence as to Miss Faupel's residence was wholly undisputed. The principles of law announced in our comparatively recent case of *Twin City Lines, Inc.* v. *Cummings, Judge,* 212 Ark. 569, 206 S. W. 2d 438, are controlling here. As indicated, the question of the trial court's jurisdiction turns upon a fact question, whether Naomi Faubel was a resident of Prairie County at the time of the mishap. We cannot say from the above testimony that the question of her residence was undisputed, and was such that the only inference to be drawn therefrom was that she was, in fact, a resident of Kansas City, as the petitioner here contends. We said in the *Twin City Lines* case above that: "The fact of deceased's residence at the time of her death is, therefore, a controverted and contested question which the trial court was called upon to determine from the testimony adduced on that issue. This court has repeatedly held that where the jurisdiction of a trial court depends upon a question of fact, a writ of prohibition will not lie . . . The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. When the court has jurisdiction over the subject-matter and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. . . . We do not regard the testimony as to deceased's residence as being wholly undisputed and certainly the legal effect of such facts is a matter that is highly controversial . . . Probably in most instances the facts upon which jurisdiction may rest or be determined are controverted. In most other instances they might be controverted, that is to say, there is the possibility of the facts being disputed. In either event the matter is one that must be determined by the trial court, and in the proper exercise

of the trial court's functions we do not interfere by prohibition. We might differ most seriously from the view taken by the trial court, but if we think the trial court erred, we can correct that only upon appeal." See also *Twin City Coach Co.* v. *Stewart, Administrator,* 209 Ark. 310, 190 S. W. 2d 629.

We conclude, therefore, that a disputed question of fact was presented and the Circuit Judge had the power in the circumstances to determine the question of the residence of Naomi Faubel, and even though he might have done so erroneously, petitioner has an adequate remedy by appeal and prohibition will not lie. The writ is, therefore, denied.

Justice WARD dissents.

PAUL WARD, Associate Justice, Dissenting. In my opinion the Writ asked for by petitioner should be granted. I cannot agree with the majority opinion for the reasons hereinafter stated.

The majority opinion is based on the holding in the *Twin City Lines, Inc.,* case. In the cited case the court itself said: "We do not regard the testimony as to deceased's residence as being wholly undisputed . . ." In order to bring the issue in the present case under consideration within the provisions of the *Twin City* case, the majority must, of course, find that the testimony and facts in the case are disputed, i.e. not undisputed. This is exactly what the majority has done in these words: "We do not think the evidence as to Miss Faupel's residence was wholly undisputed." I disagree with this finding by the majority, for two reasons: (a) First, the majority points out no disagreement and no conflict in the testimony, and (b) In the second place, the respondent specifically refutes the majority's finding. From the respondent's brief, at page 13, I quote: "We agree with the petitioner that the facts involved herein are not in dispute. . . ."

Since, therefore, no disputed question of fact was presented to the trial court or is presented to this court, it follows that only a question of law was presented below

and is now presented to this court. That question is: Do the undisputed facts in this case show Naomi Faupel to have been a resident of Prairie County or a resident of Kansas City? Briefly the undisputed facts are these: For two and one-half years (previous to the accident) Naomi Faupel had worked, lived and resided in Kansas City, Missouri, except for a visit, about once every two months, to her parents in Prairie County.

In the outset it is important not to confuse *residence* with *domicile.* Our courts have uniformly made a clear distinction between the two. This distinction, concisely stated, is that *residence* means a place where one lives or resides and *domicile* refers to one's permanent abode or legal residence or domicile. See *Norton* v. *Purkins,* 203 Ark. 586, 157 S. W. 2d 765; *Smith* v. *Union County,* 178 Ark. 540, 11 S. W. 2d 455, and *Shelton* v. *Shelton,* 180 Ark. 959, 23 S. W. 2d 629.

The undisputed facts in this case show too clearly to admit of argument or refutation that Naomi Faupel resided in Kansas City at the time of the accident and had been residing there for two and one-half years.

Because Naomi Faupel had a drivers license and a poll tax, and maintained a telephone in her name in Prairie County, is some indication, of course, that she meant to maintain Prairie County as her legal residence or permanent abode [although she herself said she had no present intention of returning to Prairie County], yet the incidents above mentioned are in no way incompatible with her maintaining her residence in Kansas City. Everyone is familiar with fine examples of the difference between maintaining a residence and a domicile. It can hardly be denied that all of the Senators and Congressmen together with all of their assistants from this State reside in Washington D. C. while the Congress is in session, but all of the parties mentioned would be the first to deny that their domiciles and legal residences are in Washington.

Ark. Stats. § 27-610 provides that when a person is injured, such as Naomi Faupel was in this case, that

person has a right to bring an action in the county where he "resided at the time of the injury."

Heretofore the word residence has had a well defined meaning. Black's Dictionary, 4th Edition defines residence as "a factual place of abode. Living in a particular locality." The new Webster's International Dictionary, Second Edition defines residence in this way: "Act or fact of abiding or dwelling in a place for some time; act of making one's home in a place." It appears to me that the majority opinion has thrown into utter confusion the common ordinary meaning of the word *residence* and, consequently the meaning of the statute above quoted.

ANDERSON *v.* STATE.

4830 290 S. W. 2d 846

Opinion delivered June 4, 1956.

W. H. Drew, for appellant.

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

Ed. F. McFaddin, Associate Justice. Information was duly filed against the defendant (appellant), Lon Anderson, charging that: "The said defendant on the 16th day of August, 1955, in Drew County, Arkansas, did unlawfully obtain the sum of $60.00 from Elliott Morgan and Alf Sanders by false impersonation, false pretense and false token, against the peace and dignity of the State of Arkansas." (See § 41-1901 Ark. Stats.). In response to defendant's motion, a Bill of Particulars was filed, which stated:

"That the defendant, Lon Anderson, did unlawfully obtain money from A. W. Sanders by: (a) False Impersonation — that he introduced and represented himself to be a Mr. Crosby, a representative of the International Paper Company, of Bastrop, Louisiana;

"(b) False Token — that he represented to the said A. W. Sanders that a certain pick-up truck in Monticello was for sale and showed the truck to the said A. W. Sanders, when in fact said truck was not for sale and Lon Anderson did not know the owner of said truck; and

"(c) False Pretenses — he obtained money in the amount of $60.00 from A. W. Sanders in Monticello, Arkansas, by falsely pretending to be in a position to arrange a bargain sale for a pick-up truck that did not exist, by falsely pretending to have the title transferred, by falsely pretending to make phone calls, and falsely showing said Sanders a pick-up truck that was not for sale."

On the said information and Bill of Particulars the defendant was tried and convicted; and on this appeal urges, *inter alia,* the points now to be discussed.

I. *Representation As Distinguished From Promise.* At the conclusion of all the evidence, the defendant moved the Court:

"Defendant demurs to the evidence presented by the State in that the testimony of the State's witnesses conclusively prove that the alleged transaction was a promise to take place in the future and as such cannot be false pretenses, and I therefore move for a directed verdict."

The Court overruled the motion; and there was no error in such ruling. The evidence established that the defendant approached A. W. Sanders and introduced himself as being a Mr. Crosby, and holding a responsible position with the International Paper Company, and being interested in making contracts with parties to cut and haul pulpwood timber for that Company. In discussing the proposed pulpwood contract with Sanders and several others, the defendant told Sanders that he could purchase a 1955 Chevrolet pick-up truck for $1,000.00, provided Sanders would pay $60.00 cash as interest. The story that the defendant told Sanders was: that a boy at Monticello owned the 1955 pick-up truck; that the boy had been recalled to the army; that the boy would sell the defendant the truck for $1,000.00 but would not sell it to anyone else at that figure; that the deal would have to be kept very quiet in order that some of the boy's relatives might not interfere; and that he would then have many months to pay the consideration of $1,000.00.

The defendant persuaded Sanders to go to Monticello and there showed Sanders a parked truck as being the one that Sanders was to receive. Sanders gave the defendant the $60.00 and defendant went into a store and returned and explained that a lady in Star City had to sign the title papers. Sanders stayed in Monticello and a friend of Sanders drove the defendant to Star City, where the defendant disappeared. After waiting

several hours and learning that the truck had been driven away, Sanders became suspicious and reported the entire transaction to the law enforcement officers, who located and arrested the defendant.

We have many cases which discuss the distinction between *representation* and *promise* in prosecutions for false pretense. Some such cases are: *State* v. *Vandimark,* 35 Ark. 396; *Parker* v. *State,* 98 Ark. 575, 137 S. W. 253; *Higgins* v. *State,* 141 Ark. 633, 217 S. W. 809; *Fisher* v. *State*, 161 Ark. 586, 256 S. W. 858; and *Lamb* v. *State,* 202 Ark. 931, 155 S. W. 2d 49. That some of the defendant's statements to Sanders were promises, as distinguished from representations, does not conceal the fact that material portions of the defendant's scheme were positive representations; he said his name was Crosby; that his work was to employ persons to cut and haul pulpwood; and he pointed out a particular truck as being the one that Sanders was to get for the $60.00 paid, plus the future payments to be made. All of these were representations of past or existing matters. That the transaction was to be shortly consummated did not make prospective some of the vital representations which caused Sanders to part with his $60.00. The Court was correct in refusing defendant's motion for an instructed verdict.

II. *Proof of Falsity Of The Representation.* One of the essential ingredients of the offense of false pretense is that the representation made must be false, and the burden is on the prosecution to prove such falsity. *State* v. *Asher,* 50 Ark. 427, 8 S. W. 177; *Fox* v. *State,* 102 Ark. 451, 145 S. W. 228. That the defendant made all the representations hereinbefore mentioned is not denied, since he offered no evidence. But the burden was on the State to prove that material representations were false; and on this point the evidence is too scant to sustain the conviction. For instance, there is no sufficient evidence that the truck pointed out to Sanders was not owned by a boy who was going to the army and who was willing to sell it for $1,000.00. Again, the defendant went into a store for the announced purpose of consulting the owner of the truck and came back and

reported a conversation; yet there is no evidence that the reported conversation did not take place. In one instruction (which was refused) the defendant asked the Court to tell the Jury:

"In the case before you there is evidence of false impersonation of a representative of International Paper Company by Lon Anderson, but the proof fails in any manner whatsoever to show that anything was received from anyone under such false impersonation."

This instruction, requested by the defendant, is almost an admission that he had falsely impersonated another; yet we cannot take this refused request as an admission of the falsity of material representations. In the absence of sufficient evidence of the falsity of the representations, we have concluded that justice will best be accomplished by reversing the judgment of conviction and remanding the case for a new trial, so that sufficient evidence may be offered as to the falsity of the defendant's material representations. There is ample precedent for remanding the case for a new trial in such a situation as this. See *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604; *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936; *Taylor* v. *State,* 211 Ark. 1014, 204 S. W. 2d 379; *Grigson & Gibson* v. *State,* 221 Ark. 14, 251 S. W. 2d 1021. In *Johnson* v. *State, supra,* Mr. Justice ROBINS used this language:

"We conclude that the testimony adduced was not sufficient to establish the guilt of appellant with the certainty that the law requires in cases of this kind. We cannot say that the circumstances shown could not be reasonably explained except upon the hypothesis of appellant's guilt. This language by Mr. Justice FRAUENTHAL, in the case of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, where a conviction had been had upon circumstantial evidence, is appropriate here: 'It may be that these defendants are guilty of this crime, but, after a careful examination of all the evidence adduced upon the trial and after drawing from it every inference that is rightfully deducible therefrom, we do not think that it was sufficient to warrant the defendants' conviction of this

crime. *France* v. *State,* 68 Ark. 529, 60 S. W. 236. It may be that on a future trial additional evidence may be introduced showing their guilt. The evidence that was introduced upon the trial below we think too slight to justify a conviction.' The judgment of the lower court is, therefore, reversed and the cause remanded for a new trial."

III. *Other Assignments.* There are other assignments which we find unnecessary to consider.

Reversed and remanded for new trial.

Justice ROBINSON dissents.

SCARBER *v.* STATE.

4834 291 S. W. 2d 241

Opinion delivered June 4, 1956.

[Rehearing denied July 2, 1956.]

Harry C. Robinson and *Gordon H. Sullivan,* for appellant.

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

MINOR W. MILLWEE, Associate Justice. This appeal is from a judgment entered upon a verdict imposing the death penalty against appellant, following his plea of guilty to the crime of rape.

The offense occurred in the early morning hours of August 29, 1955. The prosecutrix, a 76-year-old woman, lived alone in the Willisville community in Nevada County. Appellant entered the home by removing a screen from the back door. After grabbing the prosecutrix by the throat, beating her about the face and threatening to kill her, appellant proceeded to satiate his lust by ravishing her. A deputy sheriff tracked appellant to a barn where he was taken into custody.

Appellant was charged with rape and committed to the State Hospital for examination as to his sanity, and on October 3, 1955, hospital authorities reported that he

was without psychosis. After a thorough investigation of the case by able local counsel appointed to defend the appellant, a plea of guilty to the charge was entered on October 17, 1955. A hearing before a jury impaneled to fix the punishment on October 24, 1955 resulted in a verdict of guilty and assessment of the death penalty.

The first three assignments in the motion for new trial filed by counsel employed since the hearing challenge the sufficiency of the evidence to support the verdict. Aside from the plea of guilty, which is equivalent to a conviction (*State* v. *Wright,* 96 Ark. 203, 131 S. W. 688), there is ample independent, uncontradicted evidence to sustain the verdict.

Appellant next contends the court erred in failing to instruct the jury as to its power to fix the punishment at life imprisonment or death. There was no objection to the instructions given prior to submission of the case to the jury. In these instructions the court made it clear that it was within the jury's province to impose either life imprisonment or the death penalty. In this connection it is also argued that the court erred in telling the jury that they could fix the penalty at death only in the event they found "beyond a reasonable doubt" that appellant should receive such punishment. Not only did appellant fail to object to the instruction given but his request that it be amended to fully define "reasonable doubt" was granted. A judgment will not be reversed, even in a capital case, for the giving of an erroneous instruction which was not objected to in the trial court. *Johnson* v. *State,* 127 Ark. 516, 192 S. W. 895. Even if there had been a proper objection, appellant could not complain of an error that placed a greater burden on the state than it was required to assume under the law.

After a period of deliberation, the jury returned into open court and one of the jurors inquired whether there was any way that body could be assured that a life sentence would be served if assessed, or whether appellant might "stay up there a while and get out." In reply, the court stated that matters of clemency were

strictly within the power of the executive department and that such matters should not enter into the jury's final decision which should be based solely on the evidence and the law given them by the court. Appellant objected on the ground that "the court should have instructed the jury to determine the penalty involved and not to consider any clemency matter which was outside of their scope and should have given this as a direct order rather than in the ambiguous method used." We find no ambiguity in the court's reply which clearly and correctly answered the juror's query. See *Glover* v. *State,* 211 Ark. 1002, 204 S. W. 2d 373.

Appellant also contends that the jury should have been allowed to consider the charge of assault with intent to rape. No request was made for an instruction on this issue and there is no assignment in the motion for new trial based thereon. Even in cases which do not involve a plea of guilty, we have held that such an instruction is unnecessary when the facts establishing the principal offense cannot be interpreted as proving the lesser offense instead. *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937; *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785. That is the situation here and this contention is without merit.

Appellant also assigns error in the court's action in impaneling a jury to fix the punishment. While Ark. Stats. Sec. 43-2153 did not repeal the old statute (Ark. Stats. Sec. 41-3403) fixing the penalty for rape at death, it empowered the jury to reduce the punishment to life imprisonment. *Allison* v. *State,* 204 Ark. 609, 164 S. W. 2d 442. A jury may not be waived in a case where the death penalty may be imposed and it was mandatory that the court impanel a jury to fix the punishment under Ark. Stats. § 43-2108. *Carson* v. *State,* 198 Ark. 112, 128 S. W. 2d 373.

Appellant finally contends for reversal on the ground that the record does not affirmatively show that the jury and officers in charge of the jury were sworn in accordance with Ark. Stats. Secs. 43-2121 & 43-2122. The record does affirmatively show that the jury "were

duly qualified, accepted and sworn" to try the case. Under this state of the record an objection that the jury was not properly sworn cannot be sustained. *Pruitt* v. *State,* (Ark.), 11 S. W. 822. Prior to submission of the case to the jury it was within the court's discretion under Sec. 43-2121 either to permit the jury to separate after proper admonition or to be kept together in charge of an officer who was properly sworn. In the case at bar, the record affirmatively shows that the "statutory admonition" was given to the jury upon being permitted to separate for a five-minute recess prior to submission of the case to them. There is nothing to indicate any abuse of the court's discretion in permitting the jury to so separate instead of requiring that they be kept together in charge of an officer. Appellant made no objection to the separation of the jury or the admonition given and there is no assignment in the motion for new trial relating thereto.

In the recent case of *Baxter* v. *State,* 225 Ark. 239, 281 S. W. 2d 931, relied on by appellant, there was a reversal because the record did not show that the officer conducting the jury to the scene of the crime had been sworn in compliance with Ark. Stats. Sec. 43-2120. That holding is inapplicable here. As the majority pointed out in that case, it was within the court's discretion under Sec. 43-2121, supra, to permit the jurors to separate under proper admonition by the court or to require them to be kept together in the charge of officers properly sworn. In cases where the court's action in exercising its discretion under the statute is properly brought forward in the motion for a new trial, such assignment cannot be considered on appeal in the absence of an objection in the trial court. *Lesieurs* v. *State,* 170 Ark. 560, 280 S. W. 9. Further, there is no contention that the jurors were subjected to improper influences during the five-minute recess and no abuse of the court's discretion has been shown. Under these circumstances, no error was committed in permitting them to separate after being given the statutory admonition. *Borland* v. *State,* 158 Ark. 37, 249 S. W. 591.

We find no prejudicial error, and the judgment is affirmed.

ROBINSON, J., not participating.

HUTCHISON *v.* SHEPPARD.

5-954 290 S. W. 2d 843

Opinion delivered June 4, 1956.

Pickens & Pickens, for appellant.

Kaneaster Hodges, for appellee.

GEORGE ROSE SMITH, J. For the second time an appeal and cross appeal bring this case up for review. The suit was brought by the appellees, Kate Anthony Sheppard and others, to recover possession of 120 acres. The defense of the appellants, Porter Hutchison and his wife, was a claim of title in themselves. Our first opinion held that the Hutchisons had only an estate *pur autre vie,* which was terminated by the death of Edgar Anthony in 1953, and that Mrs. Sheppard then became entitled to possession for the rest of her life. The cause was remanded for further proceedings with reference to the appellants' right to reimbursement for improvements made before the expiration of their estate in the land. *Hutchison* v. *Sheppard,* 225 Ark. 14, 279 S. W. 2d 33.

Upon remand the chancellor, among other things, (*a*) gave the appellants judgment for $500 for improvements, this award being apportioned against Mrs. Sheppard and the reversioners, and (*b*) allowed the appellants $1,088 for their expense in planting and cultivating the unmatured crops that were on the land when the final decree was rendered in July of 1955. By appeal the Hutchinsons contend that both sums are inadequate; by cross appeal the appellees contend that the appellants are not entitled to anything upon either claim.

We consider first the allowance of $500 for improvements. The appellees contend that the Hutchisons did not have a good faith belief in their claim of ownership and therefore cannot rely upon the betterment act. Ark. Stats. 1947, § 34-1423. The chancellor's decision upon this question of fact does not appear to be against the weight of the evidence. Porter Hutchison bought the land from his father in 1941, received a warranty deed purporting to convey the fee simple, improved the property rather extensively, and testified that he "never was scared of the title." The appellees attempt to show that Porter did not pay full value for the land, but this argument is weakened by the fact that a father was selling to his son. The appellees also stress Porter Hutchison's admission that he "looked at" an abstract of title

in 1947. This, however, was six years after his purchase, and even if Hutchison saw the abstractor's description of the deed to Edgar Anthony for life, with remainder to his bodily heirs, it is doubtful if a layman would understand the legal effect of that conveyance. We are not convinced that the Hutchisons knew their estate to be a limited one.

The appellants' contention that the award of $500 is inadequate also involves the review of an issue of fact. There is much testimony concerning the cost and present value of the improvements, but the question is the amount by which they enhance the value of the land. *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88. The chancellor concluded that the buildings were originally worth $2,500, but he deducted $1,500 for depreciation and $500 more for the appellants' failure to keep the improvements in good repair. This reasoning is in harmony with the principles discussed in the *McDonald* case, and the finding of fact is well supported by photographs in the record. We cannot say that some higher allowance for the improvements would be better sustained by the evidence than is the figure fixed by the trial court.

The other issue relates to the item of $1,088 that was allowed for the planting and cultivation of the 1955 crop. This crop was growing on the land when Mrs. Sheppard finally obtained possession in June or July and was presumably harvested by her in the fall. In contending that the Hutchisons are entitled to nothing for having planted and cultivated the land Mrs. Sheppard argues that this is in substance an action in ejectment and that in such an action the ousted defendant is treated as a trespasser.

We do not find this argument persuasive. The original decree awarding possession to Mrs. Sheppard was entered in August of 1954. The Hutchisons elected to supersede that decree pending the first appeal, as they had a legal right to do. Their continued possession had the sanction of the law and cannot be regarded as a trespass. When Mrs. Sheppard's right to possession was confirmed by the decision of this court she could have demanded

either the rental value of the land or the land itself with the growing crop. Obviously she could not have both, since the landowner cannot expect to receive both the crop and a cash rent from the occupant who labored to produce it. See *Gardner* v. *Kersey,* 39 Ga. 664, 99 Am. Dec. 484. Mrs. Sheppard elected to take the crop, and it is plainly fair to require her to reimburse the Hutchisons for outlays that she would have been required to make if the decree had not been superseded and she had cultivated the land herself. The point was so decided in *Gillies* v. *Radke,* 78 N. D. 974, 54 N. W. 2d 155; see also Rest., Restitution, § 158.

The appellants are correct in their contention that the award of $1,088 is not quite sufficient. The undisputed proof shows that the appellants had spent $1,207.50 in planting and cultivating the land when possession was surrendered to Mrs. Sheppard in the summer of 1955. The chancellor disallowed three items of expense, totaling $119.50, that were incurred in the interval between the filing of the mandate from this court and the actual relinquishment of possession. These outlays, however, were just as beneficial to Mrs. Sheppard as the expenditures made before the mandate was filed, and there seems to be no sound reason for their disallowance. This award is therefore increased to the full amount of $1,207.50.

Affirmed as modified.

WALKER *v.* STATE.

4838 290 S. W. 2d 850

Opinion delivered June 4, 1956.

No brief for appellant.

Tom Gentry, Attorney General, *Paul C. Rawlings,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant, Tommy Loyd Walker, was charged by information with the crimes of burglary and grand larceny. Upon trial the jury returned a verdict of guilty of burglary and petit larceny, fixing his punishment at 3 years imprisonment in the penitentiary for burglary, and one day in jail and a $10.00 fine for petit larceny.

Upon appeal appellant has furnished no brief, but from the abstract furnished by the State we find in the Motion for a New Trial several assignments of error. These assignments will be considered under 6 separate heads.

1. Appellant's contention that the evidence is not sufficient to support the verdicts of the jury is without merit. Some time in May 1955 Kenneth Manker reported to the Sheriff of Cleburne County that his house had been burglarized. It was conclusively shown that a number of items, including quilts, bedspreads, radio, money, silverware and cooking utensils were missing from his

home. Many of these items were located at the home of Elmer Lawson who was an uncle of appellant, where Manker identified and recovered several of the items. Appellant admitted to the Sheriff, the Deputy Sheriff, and the Marshal of Heber Springs that he entered the Manker house through a window and removed the merchandise to the home of his uncle, Elmer Lawson. The officers located the radio on a creek bank where Walker said he had burned it for fear of being caught. Among the items missing from the Manker home were several silver dollars and 15 or 16 dollars in pennies. A merchant in Heber Springs stated that about the time of the burglary appellant brought to his store several silver dollars and a large number of pennies. The incident was so unique that the merchant, at the time, stated to appellant that he must have robbed some child's bank. The above, together with other testimony which it is unnecessary to set out, fully supported the jury's verdicts.

2. Appellant contends that, on the *voir dire* examination of the prospective jurors, the court erred in refusing to allow him to ask the jurors if they would vote for an acquittal if the State failed in proving beyond a reasonable doubt every material allegation set out in the information. No reversible error is shown for the reason that the record fails to disclose any objection at the time. Also when the court's attention was later called to this incident the jury was told, without objection, that the burden was on the State to prove every essential of the crime charged in the information.

3. It is insisted that the court erred in permitting the prosecuting attorney, in his opening statement to the jury, to say that the defendant took money, since the information does not state that money was taken. We see no error in this because, during the trial, two witnesses testified without objection concerning the money, and this testimony was also competent under the circumstances. The money was only one of the several items which appellant is shown to have taken from Manker's home. See *Childs* v. *State,* 98 Ark. 430, 136 S. W.

285; *Stapleton* v. *State,* 97 S. W. 296 (noted but not reported in 80 Ark. 617) and *Banks* v. *State,* 187 Ark. 962, 63 S. W. 2d 518.

4. Tom Hensley, deputy marshal, who found the missing items in the home of Elmer Lawson testified that no one present, including appellant, denied that the property belonged to Manker. Appellant objected to this testimony with reference to appellant. This did not constitute error because it was shown that appellant was present part of the time. Also, other testimony conclusively showed that the items belonged to Manker.

5. Appellant also objects to the court allowing the merchant to testify that appellant brought the silver dollars and pennies to his store. This testimony was competent as it tended to show appellant's connection with the crime. *Ward* v. *Young,* 42 Ark. 542.

6. Finally, appellant objects to the court's action in refusing to give three instructions requested by him. We have examined the record and these instructions were covered by other instructions given by the court. Moreover no objection was made to the court's refusal to give the requested instructions, and therefore there is nothing presented for our consideration. See *Wimberly* v. *State,* 214 Ark. 930, 218 S. W. 2d 730.

Affirmed.

MORRISON *v.* BLAND.

5-967 291 S. W. 2d 243

Opinion delivered June 4, 1956.

[Rehearing denied July 2, 1956.]

Penix & Penix, for appellant.

Kirsch, Cathey & Brown, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the appellees, Robert P. Bland and his wife, Anna Lou Bland, are liable to appellant, Byrd Morrison, doing business as Byrd Morrison Lumber Company, for lumber supplied by Morrison on a contract between the Blands and R. C. Whitlow. In May 1955, the Blands were preparing to build a house in Paragould. A short time previously, Frank Schreit, Jr. had purchased some lumber from R. C. Whitlow, and recommended Whitlow to Robert P. Bland; in fact, Schreit introduced Bland to Whitlow. Whitlow tried to sell lumber to Bland at that time, but Bland was not ready to purchase, as his plans were not complete. Whitlow gave Bland his card, which reads: "Whitlow Lumber Company, Ronald C. Whitlow, Owner, P. O. Box 38, Alicia, Arkansas."

Some time later, Whitlow again called on Bland and represented to him that there was going to be an advance in the price of lumber, but if Bland would place his order at that time and pay part of the purchase price, he could get it at the price then prevailing. They made a deal on those terms, and on May 31, 1955, Bland made a check payable to R. C. Whitlow in the sum of $2,000.00. Whitlow gave Bland a receipt which stated that the order was to be given at the buyer's option. Whitlow's name was given as salesman and Robert P. Bland as pur-

chaser, and nothing on the receipt indicated that any other person or company was involved. Whitlow told Bland that he would make arrangements with the Inman Lumber Company to deliver the lumber. Whitlow did not own a lumber yard or have a stock of lumber; in order to carry out his contract with Bland, it was necessary for him to get some one else to supply the lumber. He contacted appellant Morrison, who agreed to furnish the material and pay Whitlow a percentage of the selling price. But, it was necessary for Morrison to obtain the lumber elsewhere as he had no lumber yard or stock of lumber.

Whitlow obtained specifications of the desired lumber from Bland, gave an order for it to Morrison, and stated in the order that Inman was to do the hauling. Morrison obtained the first load of lumber from the Sparkman Lumber Company, Sparkman, Arkansas; Inman picked it up at that place and delivered it to Bland, at Paragould, on July 8. At that time, it appeared that some of the lumber was not according to specifications; there were no 8 foot 2 x 4's, and, also, some of the lumber was No. 1 whereas No. 2 had been ordered. Bland attempted to get in touch with Whitlow, but was unsuccessful, and Inman suggested that he talk with Morrison, as the lumber was coming through Morrison. Bland did contact Morrison, and was told that he could cut the 16 foot 2 x 4's in half in order to make the desired 8 foot lumber, and that additional 16 foot pieces would be furnished later. Morrison also stated that the No. 1 lumber was charged out as No. 2, as they did not have the No. 2, but made no statement with reference to his arrangements with Whitlow about furnishing the lumber.

About five days later, on July 13, Bland received an invoice from Morrison stating that there was a 2% discount for payment in 10 days; also stamped on the face of the invoice was an assignment whereby the proceeds of the invoice were assigned to the Merchants and Planters Bank, in Camden, with the request that the remittance be made to the bank. On July 18, the second load of lumber was shipped, and a few days later the invoice for that load was sent by Morrison to Bland, with the

same notation as to the assignment. The two invoices came to $2,191.96; Bland sent Whitlow his check for the amount of the difference between the $2,191.96, less 2%, and the $2,000.00 previously paid Whitlow. Whitlow contacted Bland and told him that he (Bland) was not entitled to the 2% discount because theirs was a net transaction, and Bland gave Whitlow another check for the additional amount. The last of August, Morrison called on Bland for payment, and Bland stated he had already paid Whitlow. Morrison then filed a lien on the property where the lumber was used. On August 30, this suit was filed, asking judgment against Bland in the sum of $2,191.96 and foreclosure of the lien. There was a judgment for Bland; Morrison has appealed.

According to the undisputed testimony in the case, Whitlow was not Morrison's agent. In dealing with Bland, there was nothing done or said by Whitlow to lead Bland to believe that any one was involved in the transaction except the two people, Bland and Whitlow. In fact, according to the undisputed evidence, no one else was involved at the time of making the contract for the sale of the lumber. There is no contention that, at the time the contract was made, Bland knew anything about Morrison; Whitlow says he was acting for himself, and Morrison says that Whitlow had no authority to act for him. Therefore, according to the undisputed testimony, Whitlow was acting for himself, solely, at the time he made the contract to sell lumber to Bland. Later, Whitlow, without the knowledge or consent of Bland, entered into a contract with Morrison whereby Morrison would supply lumber to Bland. One load of lumber was hauled by Inman from the Fordyce Lumber Company, Fordyce, Arkansas; that company's tally sheet went with the lumber. It shows the name, Morrison, written in pencil in the upper left hand corner. The other load of lumber was hauled by Inman from the Sparkman Lumber Company, at Sparkman, Arkansas; the tally sheet sent with that load of lumber shows that the lumber was sold to Morrison, and shipped to Inman Lumber Company, Walnut Ridge, Arkansas. None of these tally sheets or in-

voices shows in any manner what arrangements Whitlow had made for obtaining the lumber.

Bland made a contract with Whitlow for the purchase of the lumber, and paid for it. Whitlow made a deal with Morrison to furnish the lumber; Morrison, in turn, contracted with the Sparkman Lumber Company and the Fordyce Lumber Company to supply the lumber, and Inman was employed by Whitlow to deliver the lumber. Had Bland suspected there was anything wrong about the transaction, he would have had more reason to believe that Inman was the actual owner of the lumber than that Morrison owned it. When he saw the lumber, it was in Inman's truck, in the process of being delivered. There were two loads, and there was a tally sheet with each load; one tally sheet showed that the lumber was shipped to Inman by the Sparkman Lumber Company, at Sparkman, and the other showed that the lumber came from the Fordyce Lumber Company, at Fordyce. Morrison is located at Camden; he had no contract with Bland; he never heard of Bland before he (Morrison) made a deal with Whitlow to furnish lumber to Bland. Morrison had dealt with Whitlow previously and knew that he was an unreliable person. According to Morrison, Whitlow had given bad checks for lumber on other occasions, and collected from other customers contrary to Morrison's orders; he collected from Schreit in exactly the same manner he collected from Bland. In all probability, Morrison actually got a large portion of the money paid by Bland, but, according to Whitlow's orders, it was credited to Schreit instead of to Bland.

At the time of the receipt of the invoices by Bland, he had already paid Whitlow practically all of the purchase price, only a small part being paid thereafter. Although after delivery of part of the lumber, Morrison talked with Bland about specifications, he did not tell Bland that he was looking to him for the money. Bland knew that Schreit had dealt with Whitlow in exactly the same manner as he (Bland) contracted with him, and there was no complaint by any one. It did not appear strange that Morrison came into the deal; so did the In-

man Lumber Company, Sparkman Lumber Company, and Fordyce Lumber Company. Morrison did not discuss the method of payment with Bland; neither did he ask Bland for any reference as to his credit nor did he make any investigation of Bland as a credit risk. Bland knew that he had paid for the lumber, and there was nothing to indicate to him that there was not a mutual agreement between Whitlow, Morrison, Sparkman Lumber Company, Fordyce Lumber Company and Inman Lumber Company as to the delivery of the lumber. The invoices did not constitute a contract. In *Garner Manufacturing Company* v. *Cornelius Lumber Company,* 165 Ark. 119, 262 S. W. 1011, the court said, in quoting from the Supreme Court of the United States: " 'An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale; hence, standing alone, it is never regarded as an evidence of title.' *Dows* v. *National Exchange Bank;* 91 U. S. 618-630, 23 L. Ed. 214; *Sturm* v. *Boker,* 150 U. S. 312-328. To be sure, the invoice was relevant testimony to be considered in determining what the contract was between the parties, but it of itself did not constitute a contract."

If Morrison was an undisclosed principal and Whitlow was the agent, Morrison cannot recover because Bland could assert every defense against the unknown principal that he could against the agent. *Frazier* v. *Poindexter,* 78 Ark. 241, 95 S. W. 464. Morrison says, however, that Whitlow was not his agent, but was his broker. A broker is an agent. *Ballentine's Law Dictionary, Second Edition Page 174; 5 Words and Phrases 828.* Whitlow could not act as an agent for Morrison without Morrison's consent; *Restatement-Agency, § 15;* and, according to Morrison, Whitlow had no authority to act for him or use his name in any manner whatsoever. Morrison was not bound by anything that Whitlow did. Although the purchase price was paid, Bland would have no cause of action against Morrison if the lumber had not been supplied. Neither is Bland liable to Morrison on any contract, and he is not liable on a *quantum meruit* basis

because the lumber was supplied on a contract with Whitlow, and Morrison is not a party to that contract. *Stevens* v. *Owen,* 220 Ark. 196, 246 S. W. 2d 728.

It is agreed that Bland owes the sales tax to some one. From the record it appears that Morrison has paid the tax to the State, hence, according to equitable principles, Bland should reimburse Morrison for the sales tax paid. With this modification, the decree is affirmed.

Mr. Justice WARD dissents.

PAUL WARD, Associate Justice, dissenting. My reasons for disagreeing with the majority opinion are set out below.

1. The undisputed facts are: That Morrison shipped to Bland lumber valued at $2191.96. That Bland accepted and used the lumber; That Morrison has received not one cent for his lumber; That Bland had previously paid Whitlow $2000.00 for some lumber; That Whitlow was not the agent of Morrison, and; That Bland did not deal with Whitlow as an agent of any one.

2. The inevitable result is that Bland or Morrison must lose $2191.96, or some portion thereof.

3. It is a well established principle of law and equity that when one of two innocent parties must suffer because of a mistake, the one more responsible for the mistake, or the one who had the better opportunity to prevent the mistake must be the loser.

In my opinion the undisputed testimony in this case shows that Bland was the one who had the opportunity to prevent the miscarriage of justice, as shown by the following:

(a) When the first load of lumber was shipped to Bland on July 8, the tally sheet which went along with the lumber had nothing on it to show that the lumber was coming from Whitlow, but it did have on it the name of Morrison; (b) When the first load of lumber was received by Bland and part of it was not according to specifications, he was told to and he did talk with Mor-

rison about the lumber, and Morrison assured him that the defects would be supplied; (c) On July 13 Bland received an invoice from Morrison (not Whitlow) stating that he (Bland) was entitled to a 2 per cent discount *when he paid* for the lumber, and the invoice also directed Bland to pay the money to the Merchants and Planters Bank in Camden. Bland must have known that these directions were incompatible with the fact that he had already paid for the lumber; (d) A few days later Bland received the second load of lumber from the Sparkman Lumber Company with a tally sheet showing that the lumber had been sold to Morrison (not Whitlow).

In my judgment any one of the above enumerated incidents was sufficient and certainly all of them were more than sufficient, to have called to Bland's attention that something was wrong, and placed upon him the burden and obligation of making inquiry. This he did not do. The above is most significant in view of the fact that there is no contention that Morrison did anything to mislead Bland. The record discloses no fact or incident which was calculated to arouse suspicion that Bland had already paid Whitlow for the lumber.

Under the above stated factual situation, the decisions of this court make it clear that this case should be reversed and that Morrison should have judgment for his lumber. In the case of *Kellogg-Fontaine Lumber Co., Inc.* v. *Cronic,* 219 Ark. 170, 240 S. W. 2d 872, the question presented was whether a notation on a check was sufficient to put the payee on notice of certain existing facts, and this court approved this statement: " 'This court is committed to the doctrine that notice of facts which would put a man of ordinary intelligence on inquiry is equivalent to knowledge of all of the facts that a reasonably diligent inquiry would disclose.' " It was also there said that the same principle of law had been announced many times by this court. In the case of *Trinity Royalty, Inc.* v. *Riggins,* 199 Ark. 939, 136 S. W. 2d 473, the question was whether appellant, in buying an undivided interest in oil, gas and other minerals, did

so without notice that appellee had previously purchased the same interest. In dealing with this question the court made the same statement as quoted above.

When Morrison notified Bland that he was to pay for the lumber by sending his check to the Merchants and Planters Bank at Camden, Bland of course knew at the time that he had already paid Whitlow for the lumber. Certainly this was sufficient to put Bland on notice that something was wrong. If Bland, at that time, had merely told Morrison that he had already paid for the lumber in advance (to Whitlow) Morrison would have had an opportunity to protect himself and he certainly would not have shipped Bland the second load of lumber knowing that he would not receive any money therefor.

MARTIN v. POPE.

5-966 290 S. W. 2d 849

Opinion delivered June 4, 1956.

Paul K. Roberts, for appellant.

Martin & Haley, for appellee.

PER CURIAM. Appellees, Carl Pope and wife and Bradley Lumber Company, instituted this suit to quiet title to two adjacent 20-acre tracts of land. Appellants, Lummie Martin and Obilee Thomas, intervened in the suit which culminated in a decree quieting appellees'

title and dismissing the intervention of appellants on the ground that they had disposed of and no longer claimed any interest in the lands in controversy and had so testified at the trial.

At the outset, we are confronted with appellees' motion to dismiss the appeal supported by the affidavit of both appellants, which states: "That they are one and the same Obilee Thomas and Lummie Martin named in [the instant suit]; that they have never employed an attorney to represent them in said case and are not now represented by any attorney; that they sold the land in question and are not now and never have since said sale claimed any interest in said land; that they have not authorized any person to file an appeal with the Arkansas Supreme Court in connection with said case and that they do not desire said Court to consider any appeal in connection with said case; that they have not been in contact with any attorney in connection with perfecting an appeal and the first knowledge affiants had that an appeal had been taken was accidentally acquired from outside sources." The motion also sets forth the testimony of appellants at the trial to the effect that they had sold their interest in the lands in question.

"It is settled law that an attorney cannot compel his client to continue litigation, and that the client may dismiss or settle the cause of action without consulting his attorney. *Davies* v. *Patterson,* 135 Ark. 22, 205 S. W. 118. Of course, in ordinary litigation such settlement would be subject to the contractual rights of the attorney in the proceeds of the settlement. *St. L., I. M. & S. R. Co.* v. *Blaylock,* 117 Ark. 504, 175 S. W. 1170, Ann. Cas. 1917A, 563; *St. L., I. M. & S. R. Co.* v. *Kirtley & Gulley,* 120 Ark. 389, 179 S. W. 648; *Davis* v. *Webber,* 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81." *Purvis* v. *Walls,* 184 Ark. 887, 44 S. W. 2d 353. A client's action in settling or dismissing his claim or cause of action without consulting his attorney may also entitle the latter to a lien for his fee under Ark. Stats. Sec. 25-301.

Since appellants had the right to discontinue or settle any cause of action they had against appellees, the motion to dismiss is sustained, but without prejudice to counsel's right to pursue any right of action or lien he may have for his services.

MAGNET COVE BARIUM CORPORATION *v.* EVANS.

5-973 291 S. W. 2d 237

Opinion delivered June 11, 1956.

Riddick Riffel, for appellant.

Lookadoo, Gooch & Lookadoo, for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal from a judgment of the Hot Spring Circuit Court affirming an opinion of the Arkansas Workmen's Compensation Commission, wherein maximum compensation benefits were awarded the widow and minor child of Sam Evans, deceased, former employee of appellant, Magnet Cove Barium Corporation. The Commission's award of benefits was predicated upon a finding, "that deceased, Sam Evans, sustained an accidental injury on June 15, 1954, which arose out of and in the course of his employment, and which injury resulted in deceased's death on June 15, 1954." Appellee is the widow of the deceased, Evans.

For reversal, the appellants contend that the finding of fact that decedent's death resulted from an accidental injury in that the conditions under which he worked caused him to exert himself to a degree over and

above that normally required to operate his machine, is not based upon sufficient competent evidence. It is based on speculation and conjecture, and therefore was insufficient to support the award.

The record reveals that deceased died about 10:00 o'clock the morning of June 15, 1954, while at work in appellant's mine. The immediate cause of death, as revealed by autopsy, was coronary thrombosis with occlusion. The autopsy also brought to light the fact that deceased had a weakened or damaged heart of long standing, such being attested to by the presence of scars on the heart.

As deceased was alone at the time of his death it is not known exactly what his activities were during the moments immediately preceding death. However, the deceased was employed to operate a machine which, by cable attachment, controlled the movements of a five hundred pound bucket used to capture barite ore. Some fifteen to thirty minutes before death occurred a cable attached to the ore bucket broke while deceased was dragging for ore. A fellow employee, Cletus Grinder, left deceased at the time the cable broke, and returned fifteen to thirty minutes later to find deceased, apparently dead, in an ore drift. The location of deceased's body was some thirty-five or forty feet away from the machine he operated, in an ore drift that could only be reached by crawling or stooping. The body was covered to the arm pits with ore of various sizes ranging from the size of a grain of sand to the size of a man's fist. The body was within reaching distance of the heavy ore bucket which, at the time was lodged, or hung, against a wooden timber. The broken cable, referred to by Grinder, had been tied in the customary manner.

The uncontradicted testimony showed in addition to the facts as previously set out that there was a decided decrease in the amount of air where deceased's body was located and that the ore at this particular drift was gaseous and gave off fumes that made breathing difficult; that because of the size of the shot or dynamite blasts Scrapper Drift 91, the regular place of employ-

ment of the deceased, was too hot for him to go to work as his shift came on duty and it was necessary for him to wait a period of time before he could go to his place of employment; that Cletus Grinder, the fellow employee who found the deceased's body, worked several minutes attempting to rake the hot ore off the body — became weak from inhaling the gaseous air and had to leave the body in the shaft to go outside the shaft for fresh air.

The medical testimony adduced in this case is basically the same in that a heart attack such as was fatal to the deceased, could be brought about or precipitated by unusual physical effort or exertion, lack of oxygen and certainly it would be precipitated if an emotional disturbance or fear was added to the above conditions. In this particular instance the deceased had a previous heart condition as was shown by the autopsy report. The condition of the shaft in which the deceased was working was extremely hot and full of gaseous fumes and the deceased was found lying in a horizontal position buried to his arm pits in hot ore. We feel that these factors warrant a conclusion that deceased's death was an accidental injury resulting from an overexertion above and beyond that normally required to perform his duties.

We find that there is substantial evidence to sustain the award of the Commission.

Affirmed.

FERGUSON *v.* VAN GUNDY.

5-978 291 S. W. 2d 248

Opinion delivered June 11, 1956.

[Rehearing denied July 2, 1956.]

O. E. Williams, for appellant.

James R. Hale, for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Mrs. Ferguson, brought this action in ejectment at law alleging ownership and the right to possession of "Lot 5, except West 35 feet, and North half of Lot 6, Block 6, Jennings Addition to the City of Fayetteville, Arkansas." She further alleged: that she acquired title to this property by deed dated June 12, 1950 from the Commissioners of Sewer District No. 1 of the City of Fayetteville; that said Sewer District had acquired title through two foreclosure decrees for delinquent sewer tax assessments, the first deed to said District from the commissioner in chancery being procured on August 31, 1944 under a foreclosure decree of May 19, 1939, and the second deed to the District from the commissioner in chancery on March 20, 1950 under a foreclosure decree of June 6, 1944. Appellees answered with a general denial and also alleged as one of their defenses: "That if the Sewer District foreclosed assessment liens against the property of defendants, . . . each and all of said decrees of foreclosure of the assessment and all proceedings had thereunder are void, illegal and of no effect." On a trial, and at the close of all the testimony, both appellant and appellees asked for a directed verdict, whereupon the court found in favor of appellees and directed the jury to so find. This appeal followed.

For reversal appellant says: "It is plaintiff's (appellants) contention that the Court erred in refusing to give a directed verdict for the plaintiff and in giving a directed verdict for the defendants"; and argues that: "When the sewer district got deeds on August 31, 1944,

under the 1939 foreclosure, and March 20, 1950, under the 1944 foreclosure, it got two titles impervious to collateral attack." We have concluded that the court did not err in directing a verdict for appellees.

Appellant, as indicated, is relying on her deed, dated June 12, 1950, from said Sewer District No. 1 by its Board of Commissioners, and in support, as above indicated, she argues that when the district got a deed on August 31, 1944 under the 1939 foreclosure decree and another deed on March 20, 1950, under the 1944 foreclosure decree, that, in effect, the deed to her from the district under either of those foreclosure decrees would be valid and pass title to her. As to the effect of the foreclosure decree of May 19, 1939, we hold, for the reasons hereinafter stated, that this decree is void and of no effect as to the property here involved. The record discloses (and in fact it is stipulated) that the 1939 decree described the property here involved as: "Owner: W. J. Sanders, Description — Block 6, Pt. Lot 5 exc. W 35 ft. & N 1/2 Lot 6 (Among other lands) Years Delinquent: 1929 to 1937 inc. Assessment & Penalty 24.58." No mention of any Addition or city is contained in said description of the property. The failure to describe this property properly, by including in the description "Jennings Addition to the City of Fayetteville," made this 1939 decree and all proceedings thereunder void in so far as it affected the property here involved. In *Massey* v. *Bickford,* 208 Ark. 685, 187 S. W. 2d 541, where there was involved a tax forfeiture sale and a deed from the State Land Commissioner based thereon, and wherein the property was described as "Lot 5, Block 6, Fishback No. 2 Addition to the City of Fort Smith," and where it appeared that there was no "Fishback No. 2 Addition" in said city, we said: "It is undisputed that there is no such addition to the City of Ft. Smith as 'Fishback No. 2,' and we think the forfeiture, sale, confirmation and deed to appellee are all void and ineffective to convey the title to Lot 5, Block 6, Fishback Addition. It is conceded that the rule is that property must be sold under a proper and valid description to effect a valid sale. See *Shelton* v. *Byrom,* 206 Ark. 665, 177 S. W. 2d 421,

and cases there cited. But appellee insists that, because we have held in certain cases, 'the description of land in a tax deed is sufficient if it furnishes a key by which the land may be definitely located by proof aliunde,' *Moseley* v. *Moon,* 201 Ark. 164, 144 S. W. 2d 1089, this lot may be definitely located in Fishback Addition. This cannot be true. Since the description places the lot in Fishback No. 2 Addition, no amount of proof aliunde could locate it in an addition that does not exist. The description being absolutely null and void, it follows that all proceedings by which the State attempted to acquire title, including the confirmation, are null and void, as the court would have no power to confirm a title where there was a total absence of any kind of title." As to the foreclosure decree of Sewer District No. 1 on January 6, 1944, while it appears that the property here was correctly described in the decree of foreclosure, however, neither the "Commissioner's Report of Sale" nor the "Commissioner's Deed" to the District, based on this decree, in the description of the property, made mention of the "City of Fayetteville." In these circumstances the Commissioner's Deed to Sewer District No. 1 under this 1944 decree was void and conveyed no title to the District to the property here involved, and following our rule announced in the *Massey* v. *Bickford Case* above, the deed from the District, dated June 12, 1950, to appellant, Mrs. Ferguson, conveyed no title since the District had no title to convey to appellant.

Our rule is well established that in a case of this nature, appellant, (Plaintiff in the court below) must recover on the strength of her own title, and not on the weakness of her adversary, (appellees). *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951; *Crow* v. *Johnston,* 209 Ark. 1053, 194 S. W. 2d 193; *Bailey, Trustee* v. *Martin,* 218 Ark. 513, 237 S. W. 2d 16.

Affirmed.

OLIN MATHIESON CHEMICAL CORPORATION *v.* SHIREY.

5-952 291 S. W. 2d 250

Opinion delivered June 11, 1956.

[redacted]

Shackleford & Shackleford, J. M. Shackleford, Jr., Mehaffy, Smith & Williams, John T. Williams and *Robert V. Light,* for appellant.

Bruce Bennett, William I. Prewett and *Wright, Harrison, Lindsey & Upton,* for appellee.

ED. F. MCFADDIN, Associate Justice. The sole question on this appeal is whether the Trial Court was in error in refusing to direct a verdict for the appellant.

The appellee, Mrs. Ethel Shirey, as administratrix of the estate of her husband W. E. Shirey, filed action against Olin Mathieson Chemical Corporation (hereinafter called "Olin"), seeking to hold Olin liable for the negligent acts of L. C. Lester, the driver of the truck that killed W. E. Shirey. Lester was hauling a truck load of pulpwood timber from Olin's land in South Arkansas to the International Paper Company in Louisiana when he negligently drove his truck on the wrong side of the highway, into a truck being driven by W. E. Shirey; and, as a result, Shirey was killed. Olin has all the time insisted that there was no substantial evidence to take the case to the jury on the question of the liability of Olin for the negligence of L. C. Lester. Olin's defense was and is that Lester was not its employee, and

that Olin was and is in no way liable for the negligence of Lester.

Olin claims that it sold its pulpwood timber in Arkansas to Joe Canady, and that the relation between Olin and Canady was that of seller and buyer; that Canady contracted with Leo Harper, an independent contractor, to cut the pulpwood timber and transport the same from Olin's lands to the plant of the International Paper Company; and that Lester was the servant of Harper, who was an independent contractor. Thus, Olin claims that it could not be legally responsible for the acts of Lester, the servant of Harper, since Harper was an independent contractor dealing with Canady, who was, in turn, a buyer of timber from Olin.

But the appellee claims that the so-called seller-buyer relationship between Olin and Canady was a sham to conceal the real fact that Canady was an agent of Olin for the sole purpose of selling pulpwood timber; that Olin directed the activities of Canady; that Canady directed the activities of Harper; that Lester, as the admitted servant of Harper, was in effect working for Olin; and that Olin had the right to direct and control the operations of Lester in driving his truck. In the excellent briefs submitted in this Court, both sides have cited our authorities on independent contractors. Some of the cases so cited are: *Moore and Chicago Mill & Lbr. Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722: *Pine Woods Lbr. Co.* v. *Cheatham,* 186 Ark. 1060, 57 S. W. 2d 813; *Farmer Stave & Heading Co.* v. *Whorton,* 193 Ark. 708, 102 S. W. 2d 79; *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674; *Rice* v. *Sheppard,* 205 Ark. 193, 168 S. W. 2d 198; *Fordyce Lbr. Co.* v. *Wardlaw,* 206 Ark. 35, 176 S. W. 2d 241; *Hearnsberger* v. *McGaughey,* 218 Ark. 663, 239 S. W. 2d 17; *Mathews* v. *Zimmerman,* 221 Ark. 622, 255 S. W. 2d 168; *Hollingsworth & Frazier* v. *Barnett,* 226 Ark. 54, 287 S. W. 2d 888; *Ozan Lbr. Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341; *Barr* v. *Matlock,* 222 Ark. 260, 258 S. W. 2d 540; *Boone* v. *Massey,* 212 Ark. 280, 205 S. W. 2d 454; *Sinclair Refining Co.* v. *Piles,* 215 Ark. 469, 221 S. W. 2d 12; *Cap-*

ital City Lbr. Co. v. *Cash,* 214 Ark. 35, 214 S. W. 2d 363; *Ozan Lbr. Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182.

Olin insists that there is no substantial evidence to take the case to the jury as to the liability of Olin for the negligence of Lester. The rule is well established that where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question should go to the jury. *St. L. I. M. & S. Railway Co. v. Fuqua,* 114 Ark. 112, 169 S. W. 786[1]. It is also well established that it is proper to direct a verdict for the defendant only when, under the evidence and all reasonable inferences deducible therefrom, the plaintiff is not — under the law — entitled to recover. *Wortz* v. *Ft. Smith Biscuit Co.,* 105 Ark. 526, 151 S. W. 691[2].

We hold that the aggregate of the evidence, as hereinafter listed in the numbered paragraphs, was sufficient to present a jury question as to Olin's liability for the negligence of Lester:

(1) Olin owned a quarter million acres of timber land in South Arkansas and North Louisiana and regularly sold pulpwood from these lands. Olin sold pulpwood from its Louisiana lands to only one person, who was O. B. Crow; and Olin sold pulpwood from its Arkansas lands to only one person, who was Joe Canady.

(2) Canady had no capital invested and never *directly* paid Olin for such timber. Instead, all the timber from Olin's land was taken to the plant of the International Paper Company at Bastrop, Louisiana, and there scaled for the first time; and International calculated the amount of the timber at so much per cord and remitted to Olin, direct, the amount due Olin for such timber. At the time herein involved, International was paying $15.55 per cord for the timber and was remitting to Olin $3.50 per cord for pine timber and $2.50 per cord for gum timber. International had on file a written authorization from Canady to make such remittances

[1] Other cases to the same effect are collected in West's Arkansas Digest, "Trial," § 139.

[2] Other cases to the same effect are collected in West's Arkansas Digest, "Trial," § 139.

direct to Olin. After making such remittances to Olin, the remaining balance of the money was sent to Canady by weekly remittance; and from such amount Canady paid Harper and others similarly working. Harper, in turn, settled with Lester and Harper's timber cutters. Thus, Canady never paid Olin, *direct,* for any timber cut and never had any timber deed of any kind from Olin.

(3) The dealings between Olin and Canady had extended over several years; yet there had never been a written agreement of any kind as to the terms and conditions under which it was claimed that Olin sold, and Canady bought, the timber. The price that Olin was to receive from time to time was an oral matter. As aforesaid, there was no writing of any kind to evidence any agreement or sale between Olin and Canady; and Olin's agreement with Canady was terminable at any time. Likewise, all of Canady's agreements with Harper were oral and were terminable at any time.

(4) Olin's timber men would go over certain of Olin's lands in Arkansas and mark the trees and tops to be cut into pulpwood. Most of the time Canady went with Olin's timber men, but on one or more occasions Canady was away and Leo Harper went in place of Canady with Olin's timber men.

(5) After the trees were marked, Canady authorized Harper to cut the trees and tops into pulpwood and, after such was done, the pulpwood was loaded into trucks and hauled to the International Paper Company's plant in Louisiana, where the timber was scaled. One such truck was that of L. C. Lester.

(6) International Paper Company issued a scale ticket for each load. "Canady-Harper" was the name on the timber scale slips here involved. Once a week International delivered the scale tickets to Canady and paid him at the cordage rate shown, less the amount deducted and remitted direct to Olin, as previously recited. Canady then took the scale tickets to Olin and left them for Olin to calculate and determine whether all the timber cut from Olin's lands had reached International. The scale tickets remained with Olin.

(7) Some time prior to the events of this litigation, Olin's Chief Forester had become suspicious that some of the trucks hauling pulpwood from Olin's lands might not be taking the load to the International Paper Company's plant. So Olin's Chief Forester (the man in direct control for Olin) had "requested" Canady to have all the trucks hauling pulpwood from Olin's Arkansas lands numbered in *even numbers,* and had likewise "requested" Crow to have all trucks hauling pulpwood from Olin's Louisiana lands to be numbered in *odd numbers.* The identification of each truck was by a number in a circle painted on the door of the truck so hauling. Neither Canady nor Harper knew who had selected or assigned the numbers, and no one knew who paid for the number being placed on Lester's truck involved in this collision[3]. At all events, the trucks were numbered as "requested"; and Lester's truck was No. 40.

(8) Olin gave instructions to its field men and spotters that if anyone saw a truck loaded with pulpwood and bearing the Olin identification number, as aforesaid, such person was to make a note of the truck number, and the time, and direction the truck was headed, and report such information to Olin so that a check-up

[3] An inter-office communication brought into the record from Olin's files, dated August 26, 1954, read in part: "SUBJECT: Pulpwood truck numbers assigned to truckers hauling USM stumpage:

Joe Canady's producers — Arkansas

Truck No.		Truck No.		Truck No.	
2.	L. E. Gatson	16.	J. L. Gatson	30.	Leo Harper
4.	C. B. Smith	18.	Frank Thrower	32.	Leo Harper
6.	R. M. Smith	20.	Frank Thrower	34.	C. O. Rogers
8.	R. M. Smith	22.	L. E. Gatson	36.	Dick Dugal
10.	J. L. Gatson	24.	C. O. Rogers	38.	Clea Gatson
12.	G. A. McGee	26.	C. O. Rogers	40.	Leo Harper
14.	J. L. Gatson	28.	E. D. Furlow	42.	Taunton

O. B. Crow's producers (La.)

Truck No.		Truck No.		Truck No.	
1.	J. C. Edwards	19.	M. J. Halley	37.	W. L. Andrews
3.	H. V. Crow	21.	Bill Halley	39.	Will Traylor
5.	L. L. Edwards	23.	C. E. Halley	41.	Will Traylor
7.	L. L. Edwards	25.	J. C. Hodge	43.	K. C. Golsby
9.	S. D. Kennedy	27.	J. C. Nales	45.	A. L. McElroy
11.	S. H. Cooper	29.	J. L. Thomas	47.	Leon Washington
13.	E. Antley	31.	E. E. Auger	49.	Jas. C. Hunt"
15.	J. B. Ward	33.	J. A. Auger		
17.	J. B. Ward	35.	Frank Will		

could be made to see if the truck reached the plant of the International Paper Company.

(9) After a truck was once numbered by the Olin system, the driver of the truck was not to haul any pulpwood in that truck from any lands except Olin's, or to any place except the International Paper Company. If the driver of the truck desired to use the truck except for the Olin-International trip, then advance notice of such particular trip was to be given to Olin; and in such instance the truck driver was to be given an instrument bearing Olin's approval as to such particular trip[4].

(10) If a truck, numbered to the said Olin identification system, should be making a trip and taking pulpwood from lands other than Olin's to the International Paper Company's plant at Bastrop, the copy of Olin's approval of such outside trip was to be given to International.

(11) On one occasion a truck bearing an Olin identification number, as aforesaid, broke down enroute to the

---

[4] In the record are two letters wherein Leo Harper had made outside hauls. These letters were written by Olin's executives and signed by Harper before the proposed trip, and were worded as follows:

"August 2, 1954

"Mr. E. A. Freeman
Frost Lumber Industries, Inc.
Huttig, Arkansas.
Dear Mr. Freeman:

I will be hauling one load of gum pulpwood today, August 2, 1954, that belongs to B. A. Meshell. I have bought this load of wood from Mr. Meshell. This wood does not belong to Olin Industries, Inc. This is the only load of wood I will haul on this permit. This load of wood is on the side of the road about 3 miles north of Bastrop. I will haul this on my truck No. 32.

Yours very truly,
Leo Harper.

This is approved August 2, 1954. E. A. Freeman, Head Forester."

"September 9, 1954

Mr. E. A. Freeman
Olin Industries, Inc.
Huttig, Arkansas.
Dear Mr. Freeman:

I will haul 1 load of pulpwood from Belton Frisby's place 4 miles north of New London to Crossett today. Also we will be hauling 3 loads from East Main Street near El Dorado today to Crossett. We have no quota at Bastrop this week. This is the only outside wood I will haul without again notifying you and getting approval.

Yours very truly,
Leo Harper.

This hauling has been approved this day, September 9, 1954."

International Paper Company's plant; and one of Olin's executives instructed the driver of the truck to transfer the load to an unnumbered truck and to tell the International Paper Company that such Olin executive had so ordered.

(12) Canady paid the Workmen's Compensation insurance coverage on all of the men cutting and hauling for Leo Harper, as well as all other persons cutting and hauling pulpwood from Olin's Arkansas lands. He may have been repaid by Harper, but that point is uncertain.

On the facts reflected by the foregoing numbered paragraphs, we hold that a question was made for the jury as to whether Olin had the right to direct and control the operations of Lester and his truck. There is no need to take any one of these isolated facts and say that such matter in itself was sufficient to support the Court's decision in sending the case to the jury. The point is that all of these facts *together* made a case from which reasonable men might draw the inference that Canady was in fact an agent of Olin and that Canady, as such agent, dealt with Harper as a servant rather than an independent contractor and that Olin became liable for the negligence of Harper's servants. Thus, on the total of all these facts, we hold that a jury question was made.

The judgment is affirmed.

ARKANSAS STATE BOARD OF ARCHITECTS *v.* LARSEN.

5-989 291 S. W. 2d 269

Opinion delivered June 11, 1956.

Mehaffy, Smith & Williams and *B. S. Clark,* for appellant.

Bethell & Pearce, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal must be dismissed because of the absence of a final order from which an appeal might be prosecuted.

The appellant, Arkansas State Board of Architects[1], filed suit in equity against the appellee, Larsen. The complaint alleged that Larsen had prepared plans and specifications for the construction of a shopping center in Fort Smith; and that appellee was not a licensed architect, as required by § 71-301 et seq. Ark. Stats. The prayer of the complaint was that Larsen be enjoined from the further practice of architecture. To the complaint Larsen demurred on the ground that the Board's remedy at law was adequate. The Chancery Court sustained the demurrer and entered an order, which recited:

". . . that the Demurrer of the defendant to the Complaint of the plaintiff be, and the same is hereby, sustained, and the plaintiff is given leave to file an amendment to its Complaint within thirty days from this date, if so advised, and the defendant shall recover his costs herein expended, to all of which the exceptions of the plaintiff are noted."

Appellant attempts to appeal from the above quoted order; and appellee says: "The order from which this appeal is taken is not a final and appealable order." The appellee is correct. We have frequently held that where the record shows only an order made by the lower court disposing of a demurrer, and no final order or judgment, no appealable order is shown. *Campbell* v. *Sneed,* 5 Ark. 398; *Hamilton* v. *Buxton,* 5 Ark. 400; *Hanger & Co.* v. *Keating,* 26 Ark. 51; *Johnson* v. *Robinson,* 9 S. W. 432; *Gates* v. *Solomon,* 73 Ark. 8, 83 S. W. 348; *Moody* v. *Jonesboro, Lake City & Eastern Rr. Co.,*

[1] See § 71-301 et seq. Ark. Stats. for the law creating the appellant Board and involved in this case.

83 Ark. 371, 103 S. W. 1134; *Atkins* v. *Graham,* 99 Ark. 496, 138 S. W. 878; *Adams* v. *Primmer,* 102 Ark. 380, 144 S. W. 522; *Davis* v. *Receivers St. Louis & San Francisco Rr. Co.,* 117 Ark. 393, 174 S. W. 1196; *State* v. *Greenville Stone & Gravel Co.,* 122 Ark. 151, 182 S. W. 555; *Fairview Coal Co.* v. *Ark. Central RR. Co.,* 153 Ark. 295, 239 S. W. 1058.

The provision in the order here involved — adjudging the recovery of costs — does not make the order final. In *Johnson* v. *Robinson*[2], 9 S. W. 432, this Court, speaking through Chief Justice Cockrill, said, in a similar situation:

"A demurrer to the complaint was sustained, and costs thereupon awarded against the plaintiff. From these orders he appealed. There is no final judgment; nothing from which an appeal will lie. *Benton Co.* v. *Rutherford,* 30 Ark. 665, *Hamlett* v. *Simms,* 44 Ark. 141. Dismissed."

The provision in the order here involved — allowing time for amendment "if so advised" — does not make the order final after thirty days. In *Radford* v. *Samstag,* 113 Ark. 185, 167 S. W. 491, the trial court over-ruled a demurrer and allowed thirty days for answer; and such order was held not to be final and appealable. We there said:

"This was not a final order, and did not adjudge the rights of the parties, and there was nothing to prevent the court from reconsidering the demurrer, while said cause was still pending and undisposed of before him, and from changing his opinion and decision if he saw proper to do so."

Since the record in this case does not show that[3] the Trial Court made a final order or decree, the appeal must be dismissed as premature.

---

[2] The opinion in this case does not appear in the Arkansas Reports; so we have quoted it in full herein.

[3] It is interesting to note that in the case of *Radford* v. *Samstag, supra,* the Trial Court several terms later decided that the original demurrer should have been sustained; and we held that the Trial Court never lost jurisdiction after over-ruling the demurrer. Another interesting case is that of *Portis* v. *Board of Public Utilities,* 212 Ark. 822, 208 S. W. 2d 772.

DREWRY *v.* SYKES.

5-981 291 S. W. 2d 258

Opinion delivered June 11, 1956.

Wiley W. Bean, for appellant.

D. B. Bartlett and *Mark E. Woolsey,* for appellee.

MINOR W. MILLWEE, Associate Justice. On March 4, 1952, appellee, Ralph Sykes, entered into a written partnership agreement with appellant, L. E. Drewry, and H. K. Blackard for the operation of a coal mine located on a 40-acre tract of land in Johnson County belonging to appellee. The partnership was known as New Spadra Coal Company and was for a period of five years un-

less earlier dissolved by agreement or by operation of law. The agreement provided that appellee would lease to the partnership the coal underlying the tract, the coal mine and buildings for a term of five years with the right of renewal for an additional five years for a royalty of twenty-five cents per ton payable on the fifteenth day of each month for all coal mined during the preceding month. In addition, certain machinery and tools belonging to appellee would become the property of the partnership.

The agreement also provided that appellee would have a 3/4 interest in the partnership and that Drewry and Blackard would each have a 1/8 interest for which they agreed to pay $3,000 each by performing labor for wages to be agreed upon. All such wages were to be applied on the payment of their respective interests until the beginning of production and thereafter only twenty-five per cent of such wages would be so applied. In addition to wages, they also agreed to apply twenty-five per cent of any profits accruing to them from the operation until the full purchase price of $3,000 each was paid to appellee.

On June 23, 1952, appellant, Harve Willis, purchased a 1/8 interest in the partnership from appellee in accordance with the terms of the agreement. On November 10, 1952, Blackard sold his 1/8 interest to Willis, giving him a 1/4 interest, Drewry a 1/8 interest and appellee a 5/8 interest in the partnership subject to payment for the respective interests in the manner provided in the original agreement.

The partnership began operations shortly after execution of the agreement in March 1952. In the summer and early fall of 1952, only a few cars of coal were produced and the appellants and Blackard had made some improvements to the mine, including the digging of a

shaft 100 feet deep and appellee had spent considerable money in defraying expenses of the operation. The partnership was operating at a loss primarily because no sale could be found for the coal, and appellee was paying all partnership bills from his private funds. On November 1, 1952, it was agreed that the appellants and Blackard would operate the mine individually, pay all operating expenses and retain all profits after payment of twenty-five cents per ton royalty to appellee. The operation was continued by appellants under this arrangement until January 2, 1953 when they turned the keys over to appellee and procured other employment. Operations ceased and the mine remained idle until August 25, 1954 when the appellants returned and resumed operations on the same individual basis as when they quit in January, 1953, except that they failed to pay any royalty to appellee for the coal they produced.

On October 18, 1954, appellee brought this suit for dissolution of the partnership and an accounting and settlement of its affairs. After a lengthy trial the chancellor made extensive findings as the basis of a decree granting the relief prayed. After crediting appellants with all labor and money paid on their interests in the partnership, the court found that Drewry still owed $406.07 and Willis $103.20 for their respective interests. The court ordered the sale of all partnership assets including all machinery and equipment originally contributed by appellee together with all additional machinery and movable buildings, including a coal tipple, which had been placed on the premises since formation of the partnership. It was further directed that net proceeds of the sale be applied as follows: First, the sum of $542.19 to creditors other than partners; second, the sum of $8,082.01 to appellee as a creditor of the partnership; and third, that if any sale proceeds remained after payment of said liabilities, then the court would make further orders for the distribution of such proceeds. The court further directed that if the sale proceeds were insufficient to pay said liabilities, then said partners should contribute to the payment of said unpaid bal-

ance according to their respective interests in the partnership.

For reversal appellants first contend: "The trial court erred in stating an account for appellee, since an account had already been stated under oath and is a part of this record." This contention is predicated on the theory that appellee's answers to certain discovery interrogatories propounded by appellants, together with the exhibits thereto, constituted an account stated between the parties. These interrogatories and answers were propounded and given pursuant to Act 335 of 1953. They were filed with the clerk but never offered in evidence. Conceding, without deciding, that such interrogatories and answers are properly before us, they do not constitute an account stated between the parties. In *Charlesworth* v. *Whitlow,* 74 Ark. 277, 85 S. W. 423, this court held (headnote 2): "In an account stated two things are necessary, viz: (1) that there be a mutual examination of each other's items; (2) that there be a mutual agreement as to the correctness of the allowance or disallowance of the respective claims and of the balance on final adjustment." We have also defined an account stated as an account balanced and rendered with an assent to the balance, express or implied. *Brown* v. *Southern Grocery Co.,* 168 Ark. 547, 271 S. W. 342, 40 A. L. R. 383. In his answers to the interrogatories, appellee did not purport to strike a balance between the parties and there was no mutual agreement as to the correctness of the matters set forth in such answers. On the contrary, much of the testimony offered by appellants was in contradiction of some of the answers made by appellee.

It is next argued that the trial court erred in holding that the mine shaft and other realty were not a part of the partnership assets; and in requiring the purchasers of said improvements to remove a concrete building, coal tipple and blacksmith shop from the premises. Although appellants disavow any claim of ownership in the realty, it is nevertheless argued that they had a 3/8 interest therein until March 4, 1962 under that provision of the partnership agreement in which appellee agreed

to lease the mine and buildings to the partnership for a renewable 5-year term. While appellants make no contention that the partnership should not have been dissolved, it is argued that the mine shaft and a lease, which was never executed, should have been ordered sold along with the other properties. The mine shaft is simply a hole in the ground which became a part of the realty, and it is difficult to understand how the court could have ordered it sold or removed. The court did hold that all movable machinery and buildings were partnership assets and ordered them sold with the right of removal.

The execution of the lease by appellee was contingent upon the operation of the partnership in accordance with the terms of the agreement which was abandoned by mutual consent of the parties after November 1, 1952. A preponderance of the evidence supports the chancellor's finding that all mining operations after November 1, 1952 were conducted by the appellants individually, and not as a partnership, pursuant to the new agreement under which they were to pay all expenses and receive all profits and pay appellee twenty-five cents per ton royalty. In doing so, appellants clearly waived any rights they might otherwise have had under this feature of the agreement.

Appellants next say: "The Court erred in holding that Appellant Drewry must pay a balance of $406.07 into the partnership, the balance he owed on his 1/8 interest in the partnership; and that Appellant Willis owed and must pay into the partnership $103.20 as a balance due on his 1/4 interest in said partnership." A sufficient answer to this contention is that the court did not decree that appellants pay any amount into the partnership. There is no contention that the amounts of the unpaid balances which the court found due by appellants in payment for their respective interests are incorrect. The court did not direct that appellants pay these amounts into the partnership but decreed that if any proceeds from the sale of partnership assets remained after payment of the liabilities, then the court would make supplemental orders for the proper distribution of

such proceeds. In the event of an excess of sale proceeds over liabilities, the court will doubtless take these unpaid balances into consideration in determining the respective interests of the parties in said proceeds.

The fourth point argued by appellants is that the trial court erred in holding they were not entitled to damages for breach of the partnership contract by appellee. In this connection the court expressly found that appellants were not entitled to damages for the alleged wrongful dissolution of the partnership by appellee or alleged wrongful issuance of the temporary order restraining appellants from further operation of the mine. A great volume of testimony was introduced on this issue which we do not attempt to detail. As previously indicated, the partnership enterprise proved to be mutually unprofitable for all the parties concerned and was virtually abandoned in November 1952 when appellants proceeded to operate the mine individually for a time. This arrangement also proved unprofitable and appellants abandoned the project and procured other employment in January, 1953. When appellants returned nineteen months later they resumed operations by using the partnership equipment in mining coal and retaining the proceeds of all sales made by them without paying any royalty to appellee. There is considerable dispute as to the negotiations between the parties at this time which resulted in their failure to agree on a plan of future operation of the mines. At that time the partnership owed appellee approximately $8,000 which he had advanced to defray expenses of the partnership. Under all these circumstances, we cannot say the chancellor erred in refusing to hold there was a breach of contract on his part.

Appellants finally say that, regardless of the final disposition of the case on its merits, costs in the sum of $224.25 for that part of the record on appeal designated by appellee should be adjudged against him under Sec. 12 of Act 555 of 1953 (Ark. Stats. Sec. 27-2127.6). The statute authorizes this court to withhold or impose costs as circumstances may require for a party's infraction of the rule against the inclusion of nonessential matters

as part of the record on appeal. It further provides that no presumption shall be indulged that the findings of the trial court are supported by any matters omitted when the record has been abbreviated by agreement or without objection from opposing parties. *Griffin* v. *Young,* 225 Ark. 813, 286 S. W. 2d 486. We do not concur in appellants' contention that the record designated by appellee had no bearing on the decision of the questions presented by the appeal. It is true that appellee designated the entire record after appellants had designated only certain portions thereof, but the chancellor sustained in part appellants' motion to strike certain portions of the record designated by appellee. We cannot say that the remaining portions were not essential to the decision of the questions presented by the appeal. On the contrary, we agree with appellee's assertion that he might have found himself powerless to sustain the correctness of the chancellor's accounting and other conclusions reached if he had not designated that part of the record now challenged by appellants. See *Manila School District No. 15* v. *Sanders,* 226 Ark. 270, 289 S. W. 2d 529, where this court held that an appellee could not be heard to say that some portion of the testimony not in the record justified the trial court's rulings where he failed to designate any additional portion of an abbreviated record on appeal.

Affirmed.

DAGGETT *v.* ST. FRANCIS LEVEE DISTRICT.

5-984 291 S. W. 2d 254

Opinion delivered June 11, 1956.

[Rehearing denied July 2, 1956.]

Daggett & Daggett, W. H. Daggett, for appellant.

F. N. Burke, Jr., for appellee.

George Rose Smith, J. This is a taxpayer's suit brought by the appellant to enjoin the directors of the St. Francis Levee District from putting into effect a retirement plan for its officers and employees. The proposal, as approved by a resolution of the board of directors, contemplates that each participating officer and employee will contribute three per cent of his salary to the retirement fund, that these contributions will be matched with money appropriated from the district's treasury, and that the participants in the plan, upon reaching the age of sixty-five, will be entitled to retirement pay based upon their contributions and length of service. The chancellor sustained a demurrer to the complaint and dismissed the suit.

The levee district tacitly concedes that it has no inherent power to set up such a retirement plan in the absence of legislative authority. For that authority the district relies upon Act 126 of 1951, which provides that the directors shall have the power to fix the compensation to be paid to the district's officers and employees. Ark. Stats. 1947, § 21-648. It is contended that retirement pay amounts to compensation and therefore falls within the scope of the authority granted to the directors by the 1951 statute.

It cannot be doubted that a retirement allowance, financed over a period of years by the joint contributions of the employer and the employees, represents compensation rather than a mere gratuity. *Kane* v. *City of Flint,* 342 Mich. 74, 69 N. W. 2d 156; *Salz* v. *State House Com'n,* 18 N. J. 106, 112 A. 2d 716; *Retirement Bd. of Allegheny County* v. *McGovern,* 316 Pa. 161, 174 A. 400. Cases might also be cited to show that com-

pensation embraces the furnishing of group insurance, medical benefits, work uniforms, meals, housing, and anything else of value that the employer provides in return for the work done by his employees.

The question, however, is not whether retirement pay comes within the definition of compensation; it is whether the legislature may fairly be said to have had such pay in mind when it enacted the statute relied on by the district. When the statute is considered in the light of its history there can be no doubt that the enactment was for a purpose quite different from that of enabling a levee district to use tax funds for the creation of a pension plan for its employees.

It was formerly the practice of the General Assembly to fix by statute the salaries to be paid to employees of the St. Francis Levee District. Act 93 of 1913, § 3; Act 116 of 1920, § 2. Those two sections were expressly repealed by Act 49 of 1943, which authorized all levee districts to fix the compensation of full-time employees. Ark. Stats., § 21-612. The 1951 act, which applies only to districts composed of land in four or more counties, extended the district's authority to all employees, whether full-time or not.

It is perfectly clear that the purpose of the 1943 and 1951 statutes was simply to transfer to levee districts a power that the legislature had previously reserved to itself, that of fixing the salaries to be paid to officers and employees of the various districts. That the 1943 statute embodied an express repeal of earlier acts on the same subject establishes the legislative intent beyond question. If the lawmakers had meant to enter a new field by authorizing the use of tax money for the creation of a pension fund that intention would doubtless have been expressly stated in the statutes. The fact that the intention was not so stated convinces us that it did not exist. Additional legislation is needed if the appellee is to have the authority to adopt a retirement plan such as the one now in issue.

Reversed, the demurrer to be overruled.

McFaddin, J., concurs.

ARKANSAS STATE BOARD OF ARCHITECTS *v.* CLARK.

5-988 291 S. W. 2d 262

Opinion delivered July 11, 1956.

[Rehearing denied July 2, 1956.]

Mehaffy, Smith & Williams and *B. S. Clark,* for appellant.

Fietz & McAdams and *Barrett, Wheatley, Smith & Deacon,* for appellee.

PAUL WARD, Associate Justice. The appellant is the Arkansas State Board of Architects, created by Act 270 of the Acts of Arkansas for 1941 (Ark. Stats. § 71-301 et seq.) Appellant will hereafter be referred to as the Board. Appellees, T. J. Clark and C. L. Adkison are residents of Jonesboro, Arkansas. Two separate suits were filed in the chancery court, one against each of the above named appellees, but the allegations and the issues in both suits are essentially the same and we shall hereafter treat them as one suit against both appellees.

On May 25, 1955 the Board filed a complaint against T. J. Clark stating:

"The defendant prepared plans and specifications for the construction of an elementary school in Nettleton, Craighead County, Arkansas for the Nettleton-Phillips School District, the construction cost of which will amount to approximately $60,000.00. The defendant is not licensed to practice architecture in Arkansas as required by the provisions of the Arkansas Architectural Act, Act 270 of 1941, Section 71-301 et seq., Arkansas Statutes 1947, annotated."

The prayer was to enjoin Clark "from the further preparation of any plans or specifications pertaining to the construction" of the said school building; and "from practicing architecture in any manner in the State of Arkansas without first being licensed as required by law."

On August 15, 1955 Clark filed his Motion to Dismiss for the reasons that: (a) The complaint fails to state grounds upon which injunctive relief is authorized; (b) The plaintiff has an adequate remedy at law, and; (c) The plaintiff seeks to enjoin an alleged crime.

On October 31, 1955 the cause was submitted to the trial court on appellees' Motion to Dismiss, no testimony being taken. The trial court found that Act 270 of 1941 provides substantial legal remedies for its own enforcement, that it contains no provision for injunctive relief against violators, and accordingly dismissed the complaint.

Act 270 mentioned above contains, among other provisions, the following: Division II Section 1 states that "in order to safeguard life, health and property, no person shall practice architecture in this State . . ." unless he shall have secured a license to do so. Division VII Section 1 provides that any person who shall practice or offer to practice the profession of architecture in this state without being registered, etc. shall be guilty of a misdemeanor and shall, upon conviction, be sentenced to pay a fine of not less than $50 nor more than $500 or suffer imprisonment for a period not exceeding three

months, or both, each day of such unlawful practice to constitute a distinct and separate offense.

This court has had many occasions to consider the power of the chancery courts to issue injunctive relief in situations somewhat similar to those presented by this case. Some of the cases in which injunctive relief has been upheld by this court are *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718; *Ritholz* v. *Arkansas State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410; *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4, and *Arkansas Bar Association* v. *Union National Bank,* 224 Ark. 48, 273 S. W. 2d 408.

Two of the cases in which this court has denied injunctive relief are *State* v. *Vaughan,* 81 Ark. 117, 98 S. W. 685, and *State, Ex Rel. Robinson, Prosecuting Attorney* v. *Crown,* 211 Ark. 67, 199 S. W. 2d 323.

Our decisions seem to be in harmony on certain general principles regarding the power of courts of equity in the injunctive field. In the *Vaughan* case, supra, the following statement was approved: "It is no part of the mission of equity to administer the criminal law of the state . . . except so far as the same may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance." Again it was stated: "A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the law of the land is necessary to call into existence the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises and is not destroyed by the fact that they were accompanied by or are themselves violations of the criminal law." Substantially the same pronouncements were made in the *Meyer* case, supra, after which the court quoted with approval, " 'On the other hand, if the public nuisance is one touching civil property rights or privileges of the public or the public health is affected by a physical nuisance or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court

will enjoin notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery.' ''

In this case appellant stresses the fact that, even though property rights may not be endangered, the health and safety of the general public are in danger, calling attention to the purpose stated in said Act 270 as set forth above. Appellant recognizes in its brief that it is necessary to show that "(a) the illegal practice of architecture amounts to a public nuisance, and (b) the illegal practice affects public health and safety." It is noted here that appellant merely alleges that Clark prepared plans and specifications for the construction of the school building and that he was not licensed to practice architecture in Arkansas as required by said Act 270, there being no allegations that Clark was incompetent to prepare such plans or that his conduct created a nuisance or in any way endangered the public health and safety.

Our interpretation of the cases above mentioned in which injunctive relief was granted does not justify appellant's contention for a reversal in this case. The cases mentioned are distinguishable from the case under consideration because of the facts or the law involved. In the *Van Hovenberg* case, supra, appellee was attempting to build a filling station in the City of Texarkana in violation of a city ordinance and injunctive relief was granted, after the taking of testimony, on the ground that individual property rights were involved. In the *Ritholz* case, *supra,* appellant was enjoined from practicing optometry in violation of Act 94 of 1941. The injunction was issued after evidence was taken and the case decided on its merits. Said Act 94, regulating the practice of optometry, provided in Section 8 that the Board had a right to bring a suit to enforce or restrain the violation of any provisions of the act, and Section 15 provides that any violation of the act may be enjoined in the chancery courts of this state. Neither of these provisions appears in the act under consideration. This court approved an injunction in the *Meyer* case, *supra,* after a hearing on the facts, against one attempt-

ing to erect a nonfireproof building within the limits of the fire zone district. The decision rested on a substantial showing of property damage to the plaintiff's property and adjoining property through an increased fire hazard. In the *Arkansas Bar Association* case, supra, injunctive relief was granted on the merits after a full hearing on testimony and the question of the court's power to grant injunctive relief was not raised in the trial court or in this court.

Since appellant makes no allegation that the acts complained of in this case constitute a nuisance or a threat to the public health and welfare, it must rely upon the wording of the Act itself to supply this deficiency. However Act 270 does not declare the illegal practice of architecture to be a nuisance, and even if it did that alone would not necessarily make it such. In a long line of cases this court has held, with reference to municipalities, that the declaration in a city ordinance that certain acts constitute a nuisance does not make them such in fact. In *Ward* v. *City of Little Rock,* 41 Ark. 526, at page 529, this court said: "The ordinance prohibiting the working of convicts in the city and declaring the same a nuisance, was wholly ineffectual for any purpose." At page 530 we said: "But this does not authorize the council to condemn any act or thing, as a nuisance, which, in its nature, situation or use does not come within the legal notion of a nuisance." In *DeWitt* v. *Lacotts,* 76 Ark. 250, 88 S. W. 877, this court said: "Those statutes endow municipal corporations with power to prevent and abate nuisances, but they do not authorize the declaration of anything to be a nuisance which is not so in fact." Similar declarations were made in *Lonoke* v. *Chicago, Rock Island & Pacific Railway Company,* 92 Ark. 546, at page 551, 123 S. W. 395; *Town of Dardanelle* v. *Gillespie,* 116 Ark. 390, at page 393, 172 S. W. 1036; *Bryan* v. *City of Malvern,* 122 Ark. 379, at page 381, 183 S. W. 957; *Merrill* v. *City of Van Buren,* 125 Ark. 248, at page 254, 188 S. W. 537; *Wilkins* v. *City of Harrison,* 218 Ark. 316, at page 320, 236 S. W. 2d 82, and; *City of Springdale* v. *Chandler,* 222 Ark. 167, at page 168, 257 S. W. 2d 934.

After a careful consideration of the various expressions by this court on questions similar to the one presented here, we have concluded that the chancellor was right in refusing injunctive relief on the allegations contained in appellant's complaint, for the principal reason that Act 270 itself provides an adequate remedy. If Clark and Adkison are in fact violating the provisions of the act under consideration they are subject to a fine up to $500 or 90 days imprisonment, and each day of violation constitutes a separate and distinct offense. This, in effect, is the holding in the case of *State, ex rel. Robinson, Prosecuting Attorney* v. *Crow,* supra. There, the prosecuting attorney filed a suit to enjoin the State Board of Chiropractic Examiners from issuing licenses by reciprocity to applicants to practice in that field without requiring such applicants to present a certificate of ability in the basic sciences. A demurrer was filed to the complaint, and it was sustained by the trial court. Upon appeal this court sustained the action of the trial court. The act involved in that case was No. 147 of the Acts of 1929 which provided penalties for its violation. After setting out the penalties provided for in the act this court stated:

"So it is manifest that the Basic Sciences Act provides a plain and adequate remedy at law for the enforcement of its provisions without any necessity of applying to a court of equity to restrain a violation of the Act. Assuming without deciding that the State Board of Chiropractic Examiners is in error in licensing by reciprocity applicants from other States to practice chiropractic in this State without first requiring the presentation to it by such applicants of a certificate from the Basic Sciences Board, we think appellant should have pursued the enforcement remedy provided in the Act." Following the above the court said: " . . . the act prescribed the method of enforcement by prosecution and there is no necessity of resorting to the extraordinary remedy by injunction."

In the well considered case of *Smith* v. *Hamm,* 207 Ark. 507, 181 S. W. 2d 475, this court, in considering the power of chancery courts to grant injunctive relief in

nuisance cases, made announcements which we think are applicable to the case under consideration. In that case certain parties sought to enjoin the activities of other parties which were punishable by the criminal law but which were alleged to be a nuisance. The trial court sustained a demurrer to the complaint. This court, in sustaining the action of the trial court on the ground that injunctive relief was not proper, made these statements: "The fact that appellee's conduct was of a character to constitute a nuisance is not within itself sufficient to authorize the use of an extraordinary process of injunction for the abatement thereof." Following the above quote the court cited cases and quoted with approval the general rule found in 28 Am. Jur. 339, Injunctions, § 150. Contained in this quotation is the following: "In order, however, to obtain relief by injunction against the commission of acts of a criminal character, on the ground of injury to the property rights of an individual, the court will require that the *complainant clearly show such facts and circumstances in the particular case* as will justify the court in granting the relief desired." (emphasis supplied). While appellant in the case under consideration makes it clear that it is not relying on an injury to the property rights of an individual but on the ground of an injury to the public safety and welfare, yet we see no reason why it should not also be required to clearly show facts and circumstances which would entitle it to injunctive relief. The court's statement in the *Hamm* case is, we think, applicable to this case: "The complaint here failed to directly allege any such injury or damage, and such cannot reasonably be inferred from the facts which were alleged."

We see no merit in appellant's suggestion that we treat its petition for injunctive relief as a petition for a declaratory judgment. The issue in which appellant is interested, and the issue before this court, is not the constitutionality of said Act 270 or the interpretation of any of its provisions. The issue here is whether appellant's complaint contains sufficient allegations to invoke equitable jurisdiction, and our decision would necessarily be the same regardless of the method of approach.

It follows from what we have said above that the decree of the trial court must be, and it is hereby, affirmed.

Affirmed.

Justices HOLT and ROBINSON dissent.

SAM ROBINSON, Associate Justice. The General Assembly of this State, in an attempt to regulate the practice of architecture and thereby prevent the construction of buildings that might constitute a hazard to the public, at its 1941 Session, adopted Act No. 270, Ark. Stats. § 71-301. The preamble to the Act is as follows: "Whereas, in order to safeguard life, health and property, it is important that the practice of architecture in this State should be regulated." The Act provides for the licensing of architects, and makes it a misdemeanor for any one to practice architecture without being licensed. There are certain exemptions, among which are: "Buildings that are constructed at a cost, not including site, of not to exceed $10,000.00 provided said buildings are not intended, or adaptable, for public assembly or other occupancy that would be hazardous to said occupants in event of structural failure, fire or panic by said occupants." The Emergency Clause provides: "That inasmuch as designs for the construction of public and private works within the State of Arkansas are in progress, and that the design of all such public and private works, within the specific regulation of this Act, ought to be regulated in order to safeguard life, health, and property, etc."

Of course, it is the duty of all law enforcement officers to enforce the Act. But the Act consists of sixteen numbered sections and, from a practical standpoint, if the Act is enforced at all it will be due to the efforts of the State Board of Architects created by the Act. A constable, or a policeman, or a prosecuting attorney does not ordinarily examine the plans and specifications of a school being constructed in the community, to determine if such plans and specifications were prepared by a licensed architect. In the case at bar, the State Board of Architects discovered that appellee Clark was preparing

plans and specifications for a public school, the construction of which would cost about $60,000.00; that the appellee Adkison was going to supervise the construction of the building in an architectural capacity. The Board knew that neither of these men was a licensed architect, and that the lives of many children were thereby endangered. The principal purpose of Act 270 of 1941 was to prevent the very thing from happening that occurred here. It was the duty of the State Board of Architects to prevent the school from being constructed from plans prepared by some one other than a licensed architect. In an attempt to do its duty, the Board filed this suit, asking that appellees, who are not licensed architects, be enjoined from practicing architecture. Apparently, the Board has no other recourse to prevent the unlawful construction of the school. If the appellees had been deterred by the threat of the conviction of a misdemeanor for violating Act 270, this suit for an injunction would have been unnecessary.

The situation is exactly like that described in *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4. There, the court said: "It is characteristic of most instances in which injunctions against criminal acts are sustained that the threat of punishment after the event will not have a very strong deterrent effect upon the offender, as to some acts. This is because the criminal punishment is small and unimportant as compared with the benefits or profits expected to be gained from the criminal act. Oftentimes the act is a recurrent or continuing one, necessitating numerous successive petty prosecutions if the regular criminal procedure is to be followed. Frequently the acts are such that it is difficult to get jury convictions, either because local juries are prejudiced against the enforcement of the particular law involved, or for some other equally practical reason." And also, what Judge Frank Smith said, in *State, ex rel. Hale, Prosecuting Attorney* v. *Lawson,* 212 Ark. 233, 205 S. W. 2d 204, is applicable: "Evidently the impending prosecution has been held ineffective to compel the dairymen to submit their cows to the required inspection, as they are

still refusing to submit to the inspection. An injunction restraining them from selling their milk in Jonesboro, or elsewhere, will no doubt prove more effective." In the case at bar, there is no adequate remedy at law. Although, subsequent to completion of construction of the school, Clark and Adkison would be convicted of a misdemeanor, it is not likely that the school building will be torn down, even though it may be very dangerous to the children attending the school.

The majority distinguish *Meyer* v. *Seifert, supra,* on the ground that in that case property rights were involved; but here, human lives are involved, and it was pointed out in the Meyer case that an injunction would lie if the public health were affected. When lives of little school children are endangered, it cannot be said that public health is not affected. This court has repeatedly held that where the public health is affected an injunction will lie, although the act, which is sought to be restrained by the injunction, is a crime.

In *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718, the court said: "Appellees insist that, since an ordinance pronounces penalty for violation, appellants' rights are thereby circumscribed, and injunction does not lie. We cannot assent to this view. The ordinance prohibits erection and operation without the permit, and fixes a penalty of not more than $100 for violation. But the primary and fundamental purpose of the ordinance was to prohibit operation—not to punish. It is definitely settled that equity will not interfere to stay proceedings in a criminal matter. Here, however, the relief sought is abatement of unauthorized conduct. If it should be held that penalty of the ordinance deprived equity of jurisdiction, then any person desiring to proceed in violation of law could pay the maximum fine and become immune thereafter except as to damages. This is not the law."

In *Ritholz* v. *Ark. State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410, the court said: "The action is not one to enjoin the commission of a crime, as such.

Its purpose, primarily, is to prevent the illegal practice of optometry, rather than to penalize the practitioner. If the latter alone were the object, Chancery would be without jurisdiction. The rule, as stated in 28 American Jurisprudence, Injunctions, § 148, at page 338, is that acts amounting to a public nuisance will be restrained if they affect the civil or property rights or privileges of the public, or endanger the public health, regardless of whether such acts are denounced as crimes."

The language of the court in the *Ritholz* case is peculiarly applicable to the situation in the case at bar. The primary purpose of this suit is to prevent the illegal practice of architecture rather than to penalize the practitioner. The complaint alleges that appellees do not have a license to practice architecture, but are doing so. This, in itself, amounts to an allegation that the appellees were committing a nuisance.

In *Hudkins* v. *Arkansas State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538, the court quoted with approval from Chief Justice Hill's opinion in *State* v. *Vaughan,* 81 Ark. 117, 98 S. W. 685: " '. . . if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a Chancery Court will enjoin, notwithstanding the act enjoined may also be a crime.' " And the court further stated, in the *Hudkins* case: "As to the subject matter from which the case at bar proceeds, there is, upon the one hand, clear distinction between criminal conduct and punishment, while upon the other hand there is the public's right of protection against continuing practices of unlicensed individuals who persist in an activity legislatively found to be inimical to the common welfare."

In *State, ex rel. Atty. Gen.,* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327, the court held that it was proper to enjoin Karston from operating a gambling house although the operation of a gambling house in the State of Arkansas is a felony.

In *Ark. Bar Assn.* v. *Union National Bank*, 224 Ark. 48, 273 S. W. 2d 408, the Bank was enjoined from engaging in the practice of law without a license, when to do so was a violation of the law.

In *Meyer* v. *Seifert, supra,* Judge Leflar said: "A second contention urged by the defendants is that equity it without power, or should not exercise the power, to enjoin maintenance of the prohibited structure. The argument is that the ordinance prescribes criminal punishments, making violation a misdemeanor punishable by fine of not less than $10 nor more than $100 for each day of violation, and that this remedy is exclusive. That equity will not act to restrain ordinary violations of the criminal law, but will leave the task of enforcing the criminal laws to courts having criminal jurisdiction, is basic learning in our legal system. But is equally basic that if grounds for equity jurisdiction exist in a given case, the fact that the act to be enjoined is incidentally violative of a criminal enactment will not preclude equity's action to enjoin it.

"In one of the most publicized cases that ever arose in Arkansas, Chancellor Martin enjoined the holding at Hot Springs of a world championship heavyweight prize fight between James J. Corbett and Robert Fitzsimmons. *State ex rel. Atty. Genl.* v. *Corbett, Fitzsimmons, et al.,* Martin's Chanc. Decisions 366." . . . Judge Martin is then quoted with approval, as follows: "If the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery." 'Accord: *Hudkins* v. *Arkansas State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538; *State ex rel. Atty. Genl.* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327; *State ex rel. Hale* v. *Lawson,* 212 Ark. 233, 205 S. W. 2d 204. Hundreds of cases in other states are to the same effect. See *State ex rel. Smith* v. *McMahon,* 128 Kans. 772, 280 Pac. 906, 66 A. L. R. 1072 (injunction against

widespread practice of criminal usury); *Fitchette* v. *Taylor,* 191 Minn. 582, 254 N. W. 910, 94 A. L. R. 356 (injunction against unauthorized practice of law); *State ex rel. Crow* v. *Canty,* 207 Mo. 439, 105 S. W. 1078, 15 L. R. A., N. S. 747, 123 Am. St. Rep. 393, 13 Am. Cas. 787 (injunction against illegal bull fights)."

In *Arkansas State Board of Architects* v. *Bank Building & Equipment Corp. of America,* 225 Ark. 889, 286 S. W. 2d 323, this court held that under the statute involved here the appellee could be enjoined from practicing architecture.

In my opinion, the allegations that an unlicensed architect was preparing plans and specifications for a public school building, that the construction of the building would be supervised by an unlicensed architect, and that the building would be completed under such an arrangement unless the defendants were enjoined, are good allegations as against a demurrer.

For the reasons set out herein, I respectfully dissent.

Mr. Justice HOLT joins in this dissent.

LEWIS *v.* MILLER.

5-992 291 S. W. 2d 255

Opinion delivered June 11, 1956.

[Rehearing denied July 2, 1956.]

Carlos B. Hill, for appellant.

Jameson & Jameson, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether an instrument which, on its face, purports to be a deed, is in fact a mortgage. Appellees, I. O. Miller and Helen M. Miller, own a home in Fayetteville which was mortgaged to a building and loan association. In 1941, the mortgage was foreclosed and the property sold at the foreclosure sale to a Mr. Parks. H. O. Davis was a friend and neighbor of the Millers; after having seen an account of the sale in a local newspaper, he called on the Millers and offered his assistance in saving their home for them; of course, this was agreeable to the Millers. Davis, for the consideration of $1,670.00, obtained a deed to the property from Mr. Parks. Davis then agreed with the Millers that he would convey the property to them upon being reimbursed for all he had spent on it, plus 6.7% interest. It appears that the value of the property at the time Davis received the deed from Parks was about $6,000.00. There is evidence that in 1955 the property was worth $11,500.00.

In 1942, Mrs. Miller learned that Davis wanted to get his money out of the property. She contacted her friend, the appellant, Mrs. Jessie A. Lewis, who agreed to come to the aid of the Millers. The transaction was handled in this manner: Mrs. Lewis put up $2,200.00 to pay Davis, plus $25.00 for the examination of the abstract of title. Davis conveyed the property to the Millers, and they, in turn, gave to Mr. and Mrs. Lewis what appears, on its face, to be a warranty deed to the property. Mr. Miller and Mrs. Lewis then executed what is designated as a lease agreement, which provides that the property is leased to Miller for the term of two years, at a monthly rental of $25.00, the first payment being due on or before July 1, 1942. The lease agreement further provides that for the additional consideration of $1.00 and the prompt payment of the monthly rental and $2,225.00 plus interest at 6.7% per annum from July 1, 1942, in addition to any amount spent by Mrs. Lewis for taxes, repairs, improvements, interest, together with any

other expenditures which she may have made on the property, she would re-convey the property to the Millers at any time within the two year lease period. The monthly rent payments were to be credited against the indebtedness. The Millers claim that in 1944, before the expiration of the lease agreement, they wrote a letter to Mrs. Lewis exercising their option to purchase, and asked for a statement of the account, but that the letter was not answered. The Millers continued to pay the rent until 1952; in November 1953, I. O. Miller wrote to Mrs. Lewis, asking for a statement of the account, and indicated his intention to exercise his right to re-purchase. It appears that Miller was unable to get a statement of the account from Mrs. Lewis, and he, therefore, filed this suit in August 1954. The Chancellor held that the deed from the Millers to the Lewises, along with the lease agreement is, in fact, a mortgage. The Lewises have appealed.

There is only one issue, and that is, whether the so-called deed to the Lewises is, in fact a mortgage. In order to show that an instrument which, on its face, appears to be a deed is, in fact, a mortgage, the evidence must be clear, concise and convincing.

The court said, in *Buffalo Stave & Lumber Company* v. *Rice,* 187 Ark. 731, 62 S. W. 2d 2: "It is likewise the rule that, where a deed purports on its face to convey the absolute title, and where the contention is made that it was in fact intended as a mortgage, the evidence to support that contention must be clear, unequivocal and decisive. *Henry* v. *Henry,* 143 Ark. 607, 221 S. W. 481. In the case cited, and in all other authorities dealing with the subject, in determining whether a deed absolute on its face is such, indeed or only to be considered as a mortgage, the real question for the court's determination is what was the intention of the parties at the time; and where such deed is accompanied by an agreement to reconvey upon certain conditions, it is proper to construe the agreement and the deed together to determine whether that agreement was conditional sale or whether it should be deemed to be a mortgage when the transaction is considered as a whole. But the

court, in determining the question, is not limited to the determination from the instruments alone, but from these and whatever extrinsic facts or circumstances are disclosed by the evidence. In reviewing the decisions of courts of chancery on questions of this character, great weight should be given to the opinion of the court as the presiding judge may be fully apprized of the existence of circumstances which but dimly appear to us from an examination of the record."

The evidence here is completely convincing that the parties intended the transaction to be a mortgage. In the first place, in an effort to save her home, Mrs. Miller contacted Mrs. Lewis, seeking aid. It does not appear that Mrs. Lewis was in the market buying property, or had any thought of buying this particular property at the time, but merely wanted to help the Millers save their home. The property was actually worth around $6,000.00, and Mrs. Lewis paid out only $2,225.00 at the time of the transaction; it is not likely that the Millers, who had title to the property at the time, would have conveyed the property to Mrs. Lewis at such a low figure on a straight-out sale. There is other testimony from which there are strong inferences that the transaction was merely a loan made by Mrs. Lewis to help the Millers save their home, but we need look no farther than the testimony of Mrs. Lewis herself. Following are extracts from her testimony:

"Q. And how did you arrive at the figure $2,225.00 plus 6.7 interest?

"A. I didn't. That was the Miller—Davis came over with that. That's what Mr. Davis had in it and Mr. Miller said, 'we'll pay you 6.7 interest just the same as we have paid Davis.'

"Q. Well, then, in other words, they wanted you to hold the place in trust for them?

"A. No, just hold the place while they paid it out.

"Q. Just to hold the place while they paid it out?

"A. Yes, there was never any trust mentioned.

"Q. Well, you bought it with that intent?

"A. Yes, I bought it with that intent; if they paid it; that's what I told them, if they didn't pay it I intended to take it.

"Q. Now, can you explain why you provided in your lease agreement, as and when and if they exercised their option to re-purchase the place according to the instrument, that they would have to re-imburse you for the amount that you had paid H. O. Davis with interest, plus taxes, special assessments and insurance premiums, why did you want them to pay the taxes, insurance premiums, special assessments?

"A. Oh, my goodness, I didn't want to buy the place and then keep it up.

"Q. Now, then, according to this instrument it provides when the Millers exercise this option that they would have to reimburse you for these expenditures?

"A. Well, I should think so, less the payments that they had made.

"Q. Now why did you want them to re-imburse you for those expenditures?

"A. Well, you see, if I was giving them credit each month, on that, naturally I'd put my expenses and give them credit for what had been paid out, and whatever was left over went on the principal.

"Q. The principal of the debt?

"A. Yes."

In *Clark-McWilliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18, the court said: "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 . . . In the early case of *Scott* v. *Henry,* 13 Ark. 112, the court said: 'And, for the purpose of ascertaining the true intention of the parties, it is a well established rule that the courts will not be limited to the terms of the written contract, but will consider all the

circumstances connected with it; such as the circumstances of the parties, the property conveyed, its value, the price paid for it, defeasances, verbal or written, as well as the acts and declarations of the parties and will decide upon the contract and the circumstances taken together.' In that case, the court said that under the facts proved, although the evidence was not absolutely conclusive, still, under the uniform rules of courts of chancery, the court must treat the contract as a mortgage. This rule has been steadily adhered to ever since and applied by the court according to the particular facts and circumstances of each case. *Wimberly* v. *Scroggins,* 128 Ark. 67, 193 S. W. 264; *Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Rushton* v. *McIllvene,* 88 Ark. 299, 114 S. W. 709; *Gates* v. *McPeace,* 106 Ark. 583, 153 S. W. 797; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; and *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. 2d 308.

"However, every case must, of necessity, depend upon its peculiar circumstances. No fixed rule can be laid down by which it can be ascertained with mathematical certainty whether the proof has met the test above described. In the very nature of things, no decisive standard can be laid down to determine the sufficiency of the evidence. The reason is that the facts and circumstances stand in different relation to each other in separate cases, and what might satisfy the mind standing in a certain relation to surrounding facts and circumstances might not be clear and decisive proof in another case. Like any other fact to be proved by evidence which satisfies the mind of its truth, the proof may be inferred from the attendant circumstances and often cannot be proved in another way."

Affirmed.

4842 291 S. W. 2d 501

Opinion delivered June 18, 1956.

[redacted]

No brief for appellant.

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

LEE SEAMSTER, Chief Justice. The appellant, Otis Jones, was charged by information on July 20, 1955, with the crime of murder in the second degree. The cause came to trial on December 9, 1955, in the Pulaski Circuit Court, first division, and the jury returned a verdict of guilty of involuntary manslaughter. Punishment was fixed at three years in the Arkansas State Penitentiary and a fine of $1,000.00. This appeal follows.

The evidence reveals that the appellant, a cafe proprietor in North Little Rock, Arkansas, operated a small parking lot next door to his cafe and charged a fee of

25 cents for the privilege of parking on the lot. On June 25, 1955, at approximately 9 o'clock p. m., the deceased, Dennis Lee Martin, and James Robinson, parked a car driven by deceased on appellant's parking lot. A misunderstanding arose between the parties about the payment of the parking fee, but the sum demanded was paid. The deceased and James Robinson left the parking lot soon thereafter. About one o'clock a. m., they secured another car belonging to Martin's brother since the vehicle in which they were riding developed mechanical difficulties. They met Nem Parker, who was driving Martin's brother's car and the three of them proceeded back to the Otis Jones Cafe and again drove into the parking lot.

The deceased was driving the vehicle and demanded the privilege of parking the car without payment of another parking fee. Otis Jones demanded another fee and again an argument ensued.

The appellant testified that while he was talking to the deceased on the driver's side of the car, James Robinson, an occupant on the other side of the car, pulled out a knife and cut the hands of Jones' two sons; that Robinson threatened him with the knife when he went to the other side of the car; that Robinson started to get out of the car with the knife in his hand and he (Otis Jones) shot at Robinson but hit the deceased, who died shortly thereafter.

Vernon Jones, a son of Otis Jones, testified that after the cut was inflicted to his hand, he went around to the driver's side of the car and pushed inward on the door to keep the deceased in the car; that the car door came open during the struggle and the shot accidentally hit his leg.

The State introduced evidence to the effect that Robinson did not cut either of appellant's sons with a knife; that appellant walked around the car and fired a shot into the deceased without provocation.

Although the testimony of many of the witnesses was conflicting, the jury chose to believe the version of the

story as related by the State's witnesses. On appeal, this Court will not disturb the verdict unless there is a lack of substantial evidence to support the jury's verdict. Where the evidence is conflicting, as in this case, this Court will give the testimony tending to support the verdict its highest probative value. *Powell* v. *State,* 213 Ark. 442, 210 S. W. 2d 909.

The appellant contends that the trial court erred in failing to direct a verdict for acquittal. It is not error for the court to refuse to direct a verdict of acquittal, where the evidence is conflicting and presents a question for the jury to determine. *Graham* v. *State,* 197 Ark. 50, 121 S. W. 2d 892.

The appellant further contends that the court erred in failing to declare a mistrial because the prosecuting attorney asked the appellant the following: "Is that the way you felt about the other man you murdered too?" The trial court sustained an objection to this statement and admonished the jury to disregard the statement. Moreover, the appellant, under questioning by his attorney, explained fully about the former trouble as referred to in the prosecutor's question. We think the court's prompt admonition and the appellant's explanation overcame any advantage the prosecution may have obtained by asking the question. See *Walker* v. *City of Fayetteville,* 93 Ark. 443, 125 S. W. 412; *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26.

The appellant's contention that the court erred in modifying Instruction No. 5 offered by appellant will not be considered since no exceptions were saved to the court's action. The court gave a correct instruction covering the subject of the offered instruction and is not required to repeat its instructions to the jury. See *Wallin* v. *State,* supra.

The appellant objected generally to all of the instructions given by the trial court. This Court has consistently held that objections en masse to all of the court's instructions will not be considered if any of the instructions are good. *Ford* v. *State,* 222 Ark. 16, 257

S. W. 2d 30. We find no error in the instructions in the instant case.

By assignment 16, the appellant alleges error because of the excessiveness of the verdict. The punishment assessed was within the limit provided by statute.

Finding no error, judgment is affirmed.

ELLINGTON *v.* REMMEL.

5-968 293 S. W. 2d 452

Opinion delivered June 18, 1956.

[Rehearing denied October 1, 1956.]

Tommy H. Russell, for appellant.

Townsend & Townsend and *O. D. Longstreth, Jr.,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, W. J. Ellington, filed a petition alleging, "That on June 13, 1955, the City Council of the City of Little Rock, Arkansas, passed Ordinance No. 9841, which Ordinance

abandoned the City's right, title and interest to the following described street: West 31st Street from the east property line of Taylor Street east for approximately 140 feet to the west property line of an alley platted through Block 14 and the Replat of a part of Block 9, C. O. Brack's Addition to the City of Little Rock, Arkansas. That the aforementioned action by the Little Rock City Council stands to cause great harm to the plaintiff and others situated similarly to him in that the valuation of their property will be greatly decreased and their enjoyment of their respective properties will be greatly curtailed. That a large group of property owners in this area have objected and continue to object to this action by the City Council. That numerous property owners in this area have not consented to the abandonment of this street nor have they any desire to do so." He further alleged that the council acted without authority and prayed that said ordinance be declared void and that the street in question be reopened, etc. Appellees, interveners, answered alleging that they were the only abutting property owners on said street, that the City Council acted within its authority in enacting the ordinance in question and that said street was properly closed in compliance with § 19-3825 to 19-3830 incl. Ark. Stats. 1947. On December 13, 1955, a hearing was had and on evidence presented by both parties the court found that the ordinance in question "was duly passed by the City Council of Little Rock, Arkansas, and that all the provisions set out in Sections 19-3825 to 19-3830, Ark. Stats., 1947, have been fully complied with; that said street as shown on the plat has not been actually used as a street by the public for the last five years; and that the City Council has the power to vacate and abandon said street by proceeding in the manner followed in this instance," and from the decree in this appeal.

For reversal appellant relies on two points: "I. The Chancellor's finding of fact is not supported by the evidence. II. That the Court committed error in finding that all of the provisions of Sections 19-3825 to 19-

3830, Ark. Stats., 1947, had been fully complied with, and thereby dismissing the Plaintiff's complaint."

At the outset we are confronted with an insufficient abstract by appellant, and we have concluded that the decree must be affirmed for this reason. Rule 9—(d) of this court provides: "Abstract. ——The appellant's abstract or abridgment of the record should 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 abstract shall contain full references to pages of the record. When testimony is abstracted the first person rather than the third person should be used. Whenever a map, plat, photograph, or other exhibit must be examined for a clear understanding of the testimony, the appellant shall reproduce such exhibit by photography or other process and attach such reproduction to the copies of the abstract filed in this court and served upon opposing counsel, unless this requirement is shown to be impracticable and is waived by the court upon motion."

The record [transcript] reveals that the parties to this litigation presented seven witnesses whose testimony covered approximately 30 pages therein. It further appears that several of these witnesses had the benefit of a map or plat, from which they testified, showing the location of the street, lots, and surrounding property involved, and this plat or map has not been reproduced in appellant's abstract, thus denying us the benefit of it. Appellant has attempted to condense and abbreviate all of the testimony of the witnesses on only one page of his abstract and brief. From this abbreviation we are unable to understand, or gather, matters material to a necessary comprehension of all questions presented to us for a decision without exploring the record. We are not required to explore the one record [transcript] that is presented to us, this duty rests on appellant, and it is further his duty, as indicated, to furnish this court such an abridgment of the record that will enable us to understand the matters presented. This he has not done. We

said in *Files* v. *Tebbs,* 101 Ark. 207, 142 S. W. 159, "This court, not having had the same opportunity as counsel in the case to become acquainted with this litigation and not being furnished the means for an intelligent consideration and review of it by an abstract as required by rule nine, necessarily can not pass upon its merits without exploring the transcript, which, as has been often heretofore said, it can not be expected to, and will not, do, and this without regard to whether such failure to furnish an abstract is relied upon for an affirmance by opposing counsel or not. *Haglin* v. *Atkinson-Williams Hdw. Co.,* 93 Ark. 85, 124 S. W. 518; *Brown* v. *Hardy,* 95 Ark. 123, 128 S. W. 858; *Jett* v. *Crittenden,* 89 Ark. 349, 116 S. W. 665, and cases cited." See also *Golden* v. *Wallace,* 212 Ark. 732, 207 S. W. 2d 605; and *Barrett* v. *Fort Smith Structural Steel Co.,* 220 Ark. 114, 246 S. W. 2d 414.

Decree affirmed.

GAMMILL *v.* CITY OF BLYTHEVILLE.

5-982 291 S. W. 2d 503

Opinion delivered June 18, 1956.

James Gardner and *Gene Bradley,* for appellant.

Elbert Johnson, Taylor & Sudbury and *Reid & Burge,* for appellee.

ED. F. MCFADDIN, Associate Justice. This suit is an effort by appellants to be allowed to erect a filling station on lots they own in the City of Blytheville. The lots are located outside of the fire limits; and Ordinance No. 422 of Blytheville provides that no filling station, apartment house, or building for any business purpose, shall be erected in Blytheville outside of the fire limits until a permit be obtained from the City[1].

The appellants applied to the City Council for such permit; a number of property owners objected; the matter was heard by the City Council; and the permit denied. Appellants then filed this suit in the Chancery Court to enjoin the City and its officials from interfering with appellants in the erection of the proposed filling station on the lots in question, alleging, *inter alia,* that the lots were in a business district; that they were suitable only for business property; and that the City had acted arbitrarily in refusing the permit. Various property owners intervened to support the City; the Chancery Court denied the appellants the prayed relief; and this appeal ensued. The issues here are: (1) did the City Council act arbitrarily in refusing the permit; and (2) did the Chancery Court decide against the preponderance of the evidence.

The complaint alleged, and the evidence offered by appellants was designed to show: that "Crosstown" is a business section in Blytheville located several blocks West of the main business section; that U. S. Highway No. 61 traverses Twelfth Street or Division Street, running North and South; that Main, Walnut, Chickasawba and Hearn Streets run East and West and intersect Twelfth or Division Street — Main being the South one of said streets and Hearn being the North one; that the lots owned by the appellants are located at the Northeast corner of the intersection of Division and Walnut Streets; that from Walnut, extending South to the City

[1] This Ordinance No. 422 is not a zoning ordinance, but a restrictive ordinance. The authority of the City to have an ordinance of such type is not questioned on this appeal.

limits, there are many places of business fronting on Division Street, being filling Stations, restaurants, tourist courts, grocery stores, etc.; that appellants' lots are on U. S. Highway No. 61, which is an arterial highway; that across Walnut Street South of appellants' lots, there is a drive-in ice cream place, called "Kream Kastle"; that the natural development of the business section of "Crosstown" must be to the North; and that the said lots are ideally suited for a filling station.

Appellants also urge most vigorously that their lots are just North across Walnut Street from the property involved in the case of *City of Blytheville* v. *Lewis,* 218 Ark. 83, 234 S. W. 2d 374, wherein the property owner was permitted to make commercial use of the lot, and that the drive-in ice cream place, called "Kream Kastle" is now on the lots involved in that litigation. In addition to the case of *City of Blytheville* v. *Lewis, supra,* appellants cite us to these cases, which are urged as supporting appellants' contention: *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883; *City of Little Rock* v. *Sun Bldg. & Developing Co.,* 199 Ark. 333, 134 S. W. 2d 582; *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446; and *City of Little Rock* v. *Stannus,* 218 Ark. 893, 239 S. W. 2d 283. Appellants claim that in *City of Blytheville* v. *Lewis, supra,* we recognized "Crosstown" as a business district in Blytheville; and they quote to us this language from *City of Little Rock* v. *Pfeifer, supra*:

"When a business district has been rightly established, the rights of the owners of property adjacent thereto cannot be restricted so as to prevent them from using it as business property. It is the contention of the protestants that residence property adjacent to a business district becomes, on that account, less desirable for residence use. Conceding this to be true, and it is undoubtedly true, in a sense, that property thus located is not as desirable as residence property, it demonstrates the rights of owners of border line property between residence and business district to use their property for either purpose. In other words, if it has become less de-

sirable for residence property because of its proximity to the business district, they have the legal right, without interference, to use it for business purposes."

Even though the appellants have made a strong case, nevertheless, we have these matters: (a) the City Council of Blytheville denied the permit; (b) the Chancery Court denied relief; and (c) there is sufficient evidence to sustain the decisions of both the City Council and the Chancery Court. Briefly, here is a resume of some of the evidence offered by the appellees: (1) Walnut Street marks the extreme Northern limits of the "Crosstown" section; (2) the only business structure of any sort North of Walnut Street is a private hospital located on the Northwest corner of the intersection of Division and Hearn Streets, two blocks North and across Division Street from the lots in question; (3) this private hospital was built more than twenty years ago and before the City of Blytheville had enacted the ordinance here involved; (4) extending from the appellants' lots East to the main business district of Blytheville are seven blocks, each and all containing many residences and no business establishments; (5) extending West from appellants' lots to the city limits of Blytheville there are no business structures on Walnut Street; (6) in the same block with appellants' lots there have recently been constructed several fine homes, each costing from $20,000.00 to $50,000.00, and several of these homes have been constructed in the last four years; (7) many fine homes have been constructed on Walnut Street and Chickasawba Street since 1950, and there has been no business development on either of these streets. Appellees also lay great stress on our language in *City of Blytheville* v. *Lewis, supra,* wherein we said:

"There is little dispute in the evidence which shows that for more than 20 years a well-defined business district, known as 'Crosstown,' has been maintained along Division Street for several blocks northerly to the point where appellee's lot is located, and with Walnut Street as the northern terminus of said district."

It is emphasized that after the above quoted language used in 1950 — that Walnut Street was the North-

ern terminus of the district — the City of Blytheville has not allowed any permits for business property North of Walnut Street; that fine homes have been built on the lots adjacent to or near to the lots in question; and that we have here an advancing residential district, and not one which is retreating before the advance of commercial development. This last matter is a most cogent argument and, with the other recited facts, distinguishes the case at bar from any of those cited by appellants. Here we have an *advancing* residential district, with new and fine homes constructed close to appellants' lots. This is not a case wherein old homes have been allowed to deteriorate in the face of an advancing commercial district; but this is a case in which new homes are being built nearer and nearer to the lots now sought to be used for business purposes.

We recognized (in *City of Little Rock* v. *Sun Bldg. Co.*, 199 Ark. 333, 134 S. W. 2d 583) that a line must be drawn somewhere to separate business property from residential property. In *City of Blytheville* v. *Lewis, supra,* this Court said that Walnut Street was the North limit of the "Crosstown" district. The City Council has adhered to that line, and fine residences have been built, with Walnut Street as the line of demarcation between residence and business property. The property here involved is adjacent to such residences and is susceptible to use as residential property. We cannot say that the City Council was arbitrary in refusing appellants a permit, or that the Chancery Court decided against the preponderance of the evidence.

Affirmed.

5-995 291 S. W. 2d 498

Opinion delivered June 18, 1956.

Chas. F. Cole, for appellant.

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

GEORGE ROSE SMITH, J. This suit was brought by the appellant, Ida Billingsley, to foreclose a mortgage upon certain lots in Batesville. The cause of action is admittedly barred by limitations, but the original mortgagors did not interpose that defense. The statute was pleaded, however, by the principal appellee, W. F. Armstrong, and the only question in the case is whether Armstrong is entitled to rely upon the defense of limitations. The chancellor upheld Armstrong's plea, dismissed the complaint as far as the land is concerned, and limited the plaintiff to a personal judgment against the mortgagors.

These are the facts: On May 2, 1947, the mortgage in question was executed by H. A. Pruitt and his wife to secure a $1,500 note to John Edwards. The last installment on the note was due February 2, 1949. The Pruitts paid only $100 to Edwards, and in 1950 the note was purchased by Mrs. Pruitt's parents, Dr. and Mrs. Billingsley, who took an assignment of the note and mortgage. After Dr. Billingsley's death this suit was filed on October 12, 1954 — more than five years after the maturity of the debt. It is conceded that the Pruitts

made no payments after the due date of the note, and of course no such payments were indorsed on the margin of the record. The Pruitts preferred not to plead the defense of limitations against Mrs. Pruitt's mother.

Armstrong's interest in the land derives from a second mortgage which the Pruitts executed in 1949 to secure a debt owed to M. F. Highsmith. This mortgage recited the priority of the Edwards mortgage and authorized the second mortgagee to pay off the first mortgage and be subrogated to its lien. Highsmith foreclosed the junior mortgage in 1952, without making the senior mortgagee a party to the suit, and bought the property at the foreclosure sale. In June of 1954 Highsmith deeded the land to a corporation in which he is a stockholder, and on the day before this suit was filed the corporation conveyed the land to Armstrong by warranty deed. Armstrong made a down payment of $500, gave a mortgage for the unpaid balance of $5,500, and testifies that he knew nothing of the first mortgage when he bought the property.

The appellant argues that inasmuch as Highsmith's mortgage was expressly subordinate to Edwards' first lien Highsmith was not a third party within the meaning of the statute that requires payments to be indorsed of record in order to keep the lien alive as against third parties. Ark. Stats. 1947, § 51-1103. It is then contended that Armstrong stands in no better position than Highsmith and cannot interpose a plea that is personal to the original mortgagors.

A manifest flaw in this argument lies in its disregard of the fact that Mrs. Billingsley's mortgage is barred not merely of record but also in actuality. In the cases cited by the appellant, such as *McFaddin* v. *Bell,* 168 Ark. 826, 272 S. W. 62, the mortgagor had tolled the statute by payments made less than five years before suit was filed, but the mortgagee had not made the required indorsement on the margin of the record. In that situation the defense of limitations is not available to the original debtor or to anyone else who is not a stranger to the transaction. In the case at bar, however, the

debt was not kept alive by payments, and, unless the defense of limitations has been waived, the right to foreclose is barred "as to all parties and for all purposes." *Bank of Mulberry* v. *Sprague,* 185 Ark. 410, 47 S. W. 2d 201.

We think it plain that Armstrong is not bound by the Pruitts' election not to defend the case. It must be remembered that the Pruitts have no interest whatever in the land, for the Highsmith foreclosure divested their equity of redemption. *Clark* v. *Lesser,* 106 Ark. 207, 153 S. W. 112. If, as the appellant urges, the plea of limitations is personal to the Pruitts, the statement means no more than that they are free to admit their liability on the note. With respect to the land the plea is similarly personal to Armstrong, who is the real party in interest. His choice cannot be dictated by the Pruitts, who have no pecuniary interest in his dispute with the appellant. It is apparent that if the appellant's argument were accepted it would follow that a mortgage, barred both of record and in fact for fifty years or more, could still be foreclosed, with the mortgagor's consent, as against subsequent purchasers for value. Needless to say, that is not the law in this state.

Affirmed.

WARD, J., dissents in part.

PAUL WARD, Associate Justice, dissenting. After much deliberation I find myself unable to entirely agree with the majority opinion.

1. In the first paragraph the majority opinion states that: "The only question in the case is whether Armstrong is entitled to rely upon the defense of limitations," which he pleaded in this action. From this I gather that the opinion rests on the principle that Armstrong did have a right to plead the statute of limitations. It occurs to me that this announcement is contrary to the former holdings of this court. In the case of *Less* v. *Manning,* 202 Ark. 138, 149 S. W. 2d 40, at page 143 of the Arkansas Reports, we find this statement: "The statute of limitations would not begin to run until

payment was due: nor can a third party interpose the defense for the debtors." It is stated by the majority, and I agree, that Armstrong was a third party. In the case of *Henry* v. *Coe*, 200 Ark. 44, 137 S. W. 2d 897, at page 47 of the Arkansas Reports, in speaking of who can plead the statute of limitations, the court said: "The statute of limitations was personal as to them, and they did not plead it."

2. I agree with the majority that Armstrong is a purchaser for value of the land involved and as such is a third party, and, with the exception mentioned below, his title is not affected by the first mortgage. I think however that the reason why Armstrong is not affected is not because he was entitled to plead the statute of limitations but because he had a right to rely on Ark. Stats. § 51-1103.

3. In my opinion, since it is conceded that Armstrong still owes a large portion of the purchase price which he agreed to pay for the land in question, that Mrs. Billingsly should have a right to have her note paid out of the balance which Armstrong owes to the trucking company. My reasons for this conclusion are as follows: First, Pruitt was the only person who could plead the statute of limitations and he did not do so; Second, Highsmith having taken a second mortgage in which the first mortgage was specifically recognized, was not a third party under the holding of many of our decisions and could not therefore plead the statute of limitations; (This question is exhaustively discussed in 174 A. L. R. at page 687); Third, Highsmith having come into a court of equity seeking relief on technical grounds, must first offer to do equity, and; Fourth, under the views which I have expressed equity would be done and no one would be hurt. Mrs. Billingsly would collect a just debt, Highsmith would not only collect the money he loaned under his second mortgage but [being the owner of the trucking company] he would make a handsome profit in addition, and Armstrong would not be required to pay one penny more than he agreed to pay and would have his land clear of all incumbrances.

Under the view which I hold none of the dire consequences predicted by the majority would result. The majority opinion expresses the fear "that a mortgage, barred both of record and in fact for 50 years or more, could still be foreclosed, with a mortgagor's consent, as against subsequent purchaser for value." This could not happen for the simple reason that such a purchaser would be protected by Ark. Stats. § 51-1103 mentioned above.

RHEA *v.* STATE.

4843 291 S. W. 2d 505

Opinion delivered June 18, 1956.

Kenneth Coffelt, for appellant.

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

GEORGE ROSE SMITH, J. This is a petition filed by Sewell Rhea, a sixteen-year-old boy, for a writ of certiorari to quash a circuit court order by which Sewell was found to be in contempt of court and was sentenced

to serve 100 days in the county jail. The question is whether the petitioner, as a witness in the court below, was entitled to refuse to testify on the ground of self-incrimination. Ark. Const., Art. 2, § 8. Petitioner also relies on the similar clause in the Fifth Amendment to the federal constitution, but that clause does not apply to proceedings in the state courts. *Adamson* v. *California,* 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

The petitioner's brother, Keith Dale Rhea, was charged with having burglarized a service station owned by Mick Richards. During the trial of that case, which resulted in an acquittal, Sewell Rhea was called as a witness by the prosecuting attorney and was asked this question: "Did you, in the company of your brother, Keith Dale Rhea, break into Mick Richards' service station in May of this year?" The witness refused to answer the question and was thereupon held to be in contempt of court.

Inasmuch as an affirmative answer to the prosecuting attorney's question would undoubtedly have been incriminating, the witness was clearly entitled to remain silent unless there is some circumstance in the case that deprives the petitioner of his constitutional privilege. The State suggests two reasons for withdrawing the protection of the Bill of Rights, but neither suggestion is sound.

First, the State relies upon the provisions of Ark. Stats. 1947, § 43-915, which reads: "In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." It is contended that this section confers immunity against subsequent prosecution and effectively destroys any possibility that the witness's forced admissions may ever prove to be incriminating.

It is plain, however, that this statute applies only to proceedings before a grand jury. The statute was

enacted as § 67 of Chapter 45 of the Revised Statutes of 1838. This chapter relates to criminal procedure and, as may be readily seen from the table of contents which follows its title, is subdivided to conform to the various steps involved in a criminal proceeding. Sections 59 through 77 define the procedure to be observed by grand juries. When § 67 is read together with the sections that immediately precede and follow it there can be no doubt that it pertains only to testimony taken in the course of a grand jury investigation. And, with a single exception, the statute has been so applied in the reported cases. *Buzzard* v. *State,* 20 Ark. 106; *Ex parte Butt,* 78 Ark. 262, 93 S. W. 992; *Claborn* v. *State,* 115 Ark. 387, 171 S. W. 862; *Lockett* v. *State,* 145 Ark. 415, 224 S. W. 952.

It is true that in *State* v. *Quarles,* 13 Ark. 307, the statute was inadvertently applied to testimony adduced at a trial before a petit jury. The court's discussion, however, was directed to an entirely different issue, and there is nothing in the opinion to indicate that the court consciously meant to extend the statute beyond the scope clearly intended by the legislature. We do not regard the *Quarles* opinion as a controlling precedent on the issue now presented.

Second, the State contends that Sewell Rhea has already been convicted for the burglary of Richards' filling station and therefore can be compelled to testify about a crime for which he cannot again be put in jeopardy. Wigmore on Evidence (3d Ed.), § 2279. The defect in this argument lies in the State's inability to prove the asserted prior conviction. It would hardly be contended that every witness who claims his constitutional privilege must first prove the negative by demonstrating that he has *not* been convicted. Rather, when the claim of privilege is apparently well founded the burden logically and fairly rests on the State to refute the claim by showing that a prior conviction has robbed the testimony of its incriminating effect.

Here the proof falls a good deal short of establishing a prior conviction. There is admittedly no written

record of such a conviction by any court. The State attempted to prove by the county judge, C. O. Smithers, that Sewell Rhea had been found guilty by the juvenile court and had been sent to the Boys' Industrial School, but Judge Smithers' candid testimony does not satisfy the State's burden of proof. He recalled that Sewell had been brought before the juvenile court by the prosecuting attorney, but he is not certain that charges were preferred in writing. No copy of any such charges was produced by the State. Judge Smithers concluded that Sewell should be in the reform school, but he is unwilling to say that the boy was sent to that institution for the particular offense of breaking into the service station. "It seemed that it was that plus some other things. We didn't think maybe he was telling all the truth about them." There is no written record of the juvenile court decision; Judge Smithers simply turned the boy over to the sheriff with an oral order that he be taken to the Industrial School.

The legislature declared by Act 398 of 1955 that the Boys' Industrial School shall be deemed an accredited educational institution and "is not, and shall not be a part of the penal system of this State, nor shall it be construed as a penal institution." Ark. Stats., § 46-302.1. We need not, and do not, decide whether the sending of a boy to the Industrial School can amount to a conviction within the prohibition against double jeopardy. We merely hold that the State's burden of proving a conviction for the burglary of the service station was not discharged by the inconclusive oral evidence that was produced in the trial court. For all this record shows the petitioner may have been committed not for any specific offense but only because the juvenile court made a general finding of delinquency. Ark. Stats. § 46-302.2. Proof more clear-cut than this is needed to deprive a citizen of the protection afforded by the constitution.

Writ granted.

McKee *v.* Gay.

5-999 293 S. W. 2d 450

Opinion delivered June 18, 1956.

[Rehearing denied October 1, 1956.]

William S. Arnold, for appellant.

Etheridge & Sawyer, for appellee.

Paul Ward, Associate Justice. Prior to 1927 C. L. Gay was the owner of Section 33, Township 16 South, Range 4 West in Ashley County Arkansas. In the Southwest quarter of said section there is a brake or slough, known as Holloway Brake, which lies [for all purposes of this opinion] in the shape of a horseshoe with the south prong intersecting the west boundary line of said quarter section of land near the southwest corner thereof and with the north prong cutting the west boundary line of said quarter section of land approximately 1,500 feet (or more) to the north. The brake or

slough itself is apparently several hundred feet wide, and within the horseshoe there is approximately 35 or 40 acres of land — the exact amount of land being immaterial at this point.

On December 29, 1927 the said C. L. Gay made a deed to one A. T. Christian to the land within the horseshoe [and part of the brake or slough] by a description which reads as follows:

"Beginning at a point at the *low-water mark* on the line running between Sections 32 and 33 on the South side of the inside of the shoe of Holloway Brake, thence running South along said line between Sections 32 and 33, 1,523 feet, to the *low-water mark* on the North side of Holloway Brake, thence Eastward along the *low-water mark* of said Brake to a point of beginning, containing 43 acres, more or less." (emphasis supplied)

On October 27, 1947 A. T. Christian conveyed to appellant, Frank McKee, the same land described above by a deed containing exactly the same description. Previously thereto, and on May 27, 1944, the said C. L. Gay deeded to appellees, G. W. Gay and C. A. Gay, all of the land he owned in said Section 33 (including of course the Southwest quarter thereof) by a description which reads as follows:

"All of Section 33, Township 16 South, Range 4 West, except 43 acres, more or less, lying East of the Section line between Section 32 and Section 33 in the bend of Holloway Brake."

The proof indicates that there is valuable timber growing in Holloway Brake, and apparently the question of the ownership of this timber led to this litigation. Holloway Brake appears to be a marshy depression, some times being practically filled with water and at other times it is practically dry or the water stands in holes. It is stipulated and agreed that the brake is not a navigable stream, and on this fact appellant bases his contention that by virtue of his deed aforementioned he is a riparian owner and as such, under the law, he is the owner of Holloway Brake to the center line thereof. It is the contention of appellees, however, that appellant

is not a riparian owner and that his land extends only to the limits of the boundaries described in his deed.

It is our conclusion that appellant's contention cannot be sustained.

Under the holding of this court in *Kilgo* v. *Cook,* 174 Ark. 432, 295 S. W. 355, and under the holding by the Supreme Court of Wisconsin in the case of *Allen* v. *Weber, et al.,* 80 Wis. 531, 50 N. W. 514, 27 Am. St. Rep. 51, we are forced to conclude that appellant is entitled to no more land than is contained within the boundaries set out in the deed to him. In the *Kilgo* case, supra, appellee claimed the rights of a riparian owner under a deed which fixed as one of his boundaries the bank of War Eagle Creek. The court there noted that appellant Kilgo had previously thereto become the owner of the entire bed of War Eagle Creek by virtue of the fact that said creek had not been meandered by the government survey. In disposing of Cook's contention the court said:

"The title to the bed of the stream having been conveyed to appellant prior to appellee's acquisition of title, appellee took with notice of the prior grant and must be held to have known that his western boundary line was the brink of the east bank of War Eagle Creek, and that he acquired no title beyond the ripa."

In the *Allen* case, supra, the same question raised here by appellant was decided adversely to his contention where the language in the description of the deed was very similar to that contained in appellant's deed. In that case the court commenting on a description containing the words: " 'To the *low-water mark*; thence northerly along the *low-water mark* . . . .' " (emphasis supplied), stated that "There could be no language of description more clearly indicating the exact line than is found in the conveyances of this strip of land; . . . " The court also said: "The language 'along the bank' is not as certain and specific as the language 'along low-water mark.' " The court in the *Allen* case also commented on the fact that the description in the deed there under consideration was an indication of the

intention of the parties to convey only the land described. In the case under consideration all of the facts and circumstances indicate clearly that it was the intention of C. L. Gay in his deed to Christian to convey only the land contained within the boundaries of the deed of conveyance, and the record also discloses that the government survey took no note of the land now constituting Holloway Brake.

This suit was instituted by appellees for a declaratory judgment, asking the court to set out their rights and interests in Holloway Brake as opposed to appellant's claim. The trial court's finding in favor of appellees was based upon the principles above announced, but we are somewhat disturbed about the court's language in describing the dividing line between appellant and appellees. It appears to us that the court's description may or may not be correct. It followed generally the same language used in the deed of conveyance to appellant and then attempted to explain that the low-water mark was to be determined by reference to the character of soil and the appearance of vegetation, etc., realizing, no doubt, the difficulty of determining what the low-water mark was at the time the land was surveyed just prior to the first deed executed by C. L. Gay in 1927. It occurs to us that since the one definite description contained in the 1927 deed was the west boundary line of the 43 acres there described, this west boundary line being 1,523 feet north and south along the section line between Sections 32 and 33, we think the trial court made a helpful suggestion, [not taken advantage of by either party] that a surveyor be employed [at the cost of both parties] to determine a clear description of appellant's land. Obviously, if a surveyor could mark off 1,523 feet along said dividing section line with each end thereof extending into the brake and being of the same elevation, that such a line would be the true west boundary line of appellant's property. If such a line could be established, then the line drawn from one end thereof around the edge of the brake, maintaining the same level, to the other end of the line, would constitute a true designation of the line between the two parcels of land here

involved. As stated above it is possible that the line designated by the trial court duplicates the line which we have suggested but on the other hand it is possible that it does not.

Therefore we have decided to remand this cause so that the trial court may give both sides a reasonable time in which to request a survey if one is so desired. If no survey is requested by either party within the time fixed by the trial court, it will then reaffirm the decree already rendered by it herein.

REED *v.* BILLINGSLEA.

5-1004 291 S. W. 2d 497

Opinion delivered June 18, 1956.

Max M. Smith, for appellant.

George Howard, Jr., for appellee.

SAM ROBINSON, Associate Justice. The question here is whether the appellant, Willie Cora Lee Hudson Reed, is the heir of Ollie Hudson, who died intestate on the first day of July, 1955, while a resident of Jefferson County. The chancellor held against heirship.

It is established by the evidence that appellant is the illegitimate daughter of Hudson. While living in Milwaukee, Wisconsin in June 1944, appellant desired to obtain a government job, and, to do so, it was necessary that she have a birth certificate; she wrote to her father

in Pine Bluff, asking that he obtain and send to her such a certificate. Hudson complied with her request, and the certificate states that he is the father of appellant; he signed it before a notary public. This birth certificate is the basis of appellant's claim that she is the heir of her father, Ollie Hudson, although she is an illegitimate daughter.

An Act of the General Assembly of 1853, Ark. Stats. § 61-301-302, provides: (1) "In all cases hereafter, when any person may desire to make a person or persons his or her heirs at law, it shall be lawful to [do] so by a declaration in writing in favor of such person or persons, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this State." (2) "Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made, may reside."

Since it is clear that appellant cannot prevail because the birth certificate shows no intent on the part of Hudson to make her his heir, it is unnecessary to discuss other points.

Application of the statute is not limited to situations where a person desires to make an illegitimate child his heir, but applies to any one that a person may desire to make his heir. The title of the act, as appearing in the Acts of 1852-4-6-8, page 207, is as follows: "An act to authorize and prescribe the manner by which persons in this State may adopt illegitimate children and others, and make them their Heirs at Law." Thus, according to the act, a person may make any one his heir. But, a mere acknowledgment in writing by one person that another person is his illegitimate son or daughter is not sufficient under the statute to make such illegitimate person an heir of a father recognizing him as a son or daughter. The statute provides: "When any person may desire to make a person or persons his or her heirs at law, it shall be lawful to [do] so by a declaration in writing in favor of such person or persons."

Certainly, under this statute, nothing less than a declaration clearly stating that one wishes to make another his heir will suffice. Here, Hudson does not indicate in any manner that he wished to make appellant his heir. He merely procured for her a birth certificate, at her request. This cannot be said to be a declaration in writing to the effect that he wanted to make her his heir.

Affirmed.

BRYANT *v.* GREEN.

5-1006 293 S. W. 2d 447

Opinion delivered June 18, 1956.

[Rehearing denied October 1, 1956.]

Robert J. Brown, for appellant.

Parker Parker, for appellee.

SAM ROBINSON, Associate Justice. This is a suit by the appellees to foreclose a vendor's lien on property sold to appellants, Raymond C. Bryant and his wife, Lydia. Burl Johnson, Bryant's tenant, is also made a party defendant. The land is located in Yell County, and the Bryants were served with summons in Pulaski

County. In addition to asking for judgment on the debt secured by the lien, the appellees seek a judgment for money owed by the appellants on open account. The Bryants filed a motion to strike that part of the complaint dealing with the open account; the Chancery Court's action denying the motion is one of the principal issues on direct appeal.

On cross-appeal appellees contend, among other things, that all payments had been applied by appellees to the open account, and that the chancellor erred in applying any of the payments made by the Bryants to the indebtedness secured by the lien.

In 1948, appellees, W. H. Green and Viola Green, sold to appellants, Raymond C. Bryant and Lydia C. Bryant, 200 acres of land in Yell County for the consideration of $12,000, of which $3,000 was paid in cash, and the vendor's lien retained for $9,000, at 6% interest. Subsequently, Green extended credit to Bryant on various items totalling $3,691.23. Bryant paid to Green a total of $6,970.49. At the request of Bryant, D. B. McClure, a public accountant, figured the balance owed by Bryant to Green. McClure was called as a witness by Green, and at the conclusion of his testimony it was not clear as to just how much was owed on the indebtedness secured by the lien, or the balance on the open account. The court said, speaking to counsel for both sides: "Will you let Mr. McClure figure all of that and send me the figures? Will that be all right to both of you?" The lawyers on both sides stated that it would. Later, the court prepared a statement of findings and it is set out therein that $7,634.90 is owed by the Bryants which is secured by the lien, and that, in addition, Raymond Bryant is indebted to W. H. Green in the sum of $1,817.29.

Appellants say that the court erred in denying their motion to strike that part of the complaint alleging an indebtedness other than the one secured by the vendor's lien; that there is a misjoinder of causes of action; that the Yell Chancery Court does not have jurisdiction to render judgment on an open account where the defendants have been served with summons in Pulaski County.

In support of this contention, appellants cite *Barr* v. *Cockrill,* 224 Ark. 570, 275 S. W. 2d 6, to the effect that "in order to obtain judgment against a defendant in a county other than that in which a suit is brought on a transitory action, said defendant must be jointly liable with a defendant who resides or is summoned in the county where the suit is filed." Of course, this is a correct statement of the law, but it has no application here. Ark. Stats. § 27-1301 is controlling, and provides: "Several causes of action may be united in the same complaint, where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes: First. Claims arising out of contracts, express or implied . . ." Appellants contend that this statute is not applicable here because Burl Johnson, Bryant's tenant, who was in possession of the real property, was made a party as well as Lydia Bryant, the wife of Raymond C. Bryant. Lydia Bryant is liable on the debt secured by the vendor's lien, and it is claimed by Green that she is liable on the open account. Johnson was the Bryants' tenant; no judgment was rendered against him, and he is not an appellant here. This entire controversy grows out of contracts between the parties. Moreover, the Bryants filed an answer prior to filing a motion to strike.

Appellants also argue that the court erred in charging them with a $100 item and a $600 item, and failing to give them credit for an additional payment of $1,000. But we cannot say the court's finding in respect to these items is contrary to a preponderance of the evidence. Appellant also says that the statute of frauds applies to the $100 item and the $600 item. It is contended that Bryant is being required to answer for the debts of another; however, it appears that these were original obligations of Bryant.

On cross-appeal, appellees contend that the court erred in applying payments made by Bryant to the indebtedness secured by the lien; that Green had applied the payments to the open account, which he had a right to do as Bryant had not directed that the payments be

applied to either account. It appears from the record, however, that Bryant made the payments on the lien debt, that Green had so understood it, and had applied the payments accordingly. Bryant testified as follows:

"Q. The transaction you entered into, being the balance of the payments on the place, were to be made at the rate of $1,000.00 per year, bearing 6% interest?

A. That is correct.

"Q. Each payment was to have the interest taken out of it and the balance applied on the principal?

A. Yes, sir.

"Q. And the residue applied to the principal?

A. That is right.

"Q. Did you, this year, go to the home of Mr. and Mrs. Green to ascertain the state of the note?

A. Yes, sir.

"Q. Did you and he look at the records and from them take off the payments that had been made and putting them down and then having him to sign showing that they had been paid?

A. Yes."

The witness introduced in evidence a statement of the lien account set out at the bottom of an affidavit regarding the legal title to the land. It appears that the payments were applied against the lien indebtedness, and we cannot say the chancellor's holding in this respect was contrary to a preponderance of the evidence.

On cross-appeal, appellees make other points, all of which we have examined carefully, but we find no error.

The decree is affirmed on appeal and on cross-appeal.

JONES *v.* GREGG.

5-890 293 S. W. 2d 545

Opinion delivered June 18, 1956.

[Rehearing denied October 8, 1956.]

James R. Hale, for appellant.

Price Dickson and *W. B. Putman,* for appellee.

MARK E. WOOLSEY, Special Associate Justice. This is an action by appellees, as plaintiffs, for the rescission and cancellation of a written contract of sale and purchase and escrow agreement made and entered into on the 23rd day of August, 1952, by and between appellants, who are husband and wife, as sellers, and appellees as

buyers. The relevant facts may be summarized as follows:

On the 23rd day of August, 1952, appellant, J. Hal Jones, was engaged in the general produce business at Lincoln, Arkansas, under the name "Hal Jones Produce Company," his general business being the selling of standard brands of poultry feed to the poultry growers of that area, in which business he had been engaged for a period of approximately three or four years. He and his wife were the owners, as tenants by the entirety, of his place of business in Lincoln, which consisted of a tract of land containing approximately one and one-seventh acres on which were located the buildings used in connection with his business and also a dwelling house. They had purchased this property on the 27th day of May, 1950, from Mae E. Norwood, who, on said date, executed to them, a warranty deed to said property, which deed contained the following provision: "A vendor's lien is retained for the sum of $5,000.00 purchase price balance, evidenced by a promissory note of even date, bearing no interest, due on or before one year from date."

This deed was filed for record August 21, 1952, two days before the date of the contract forming the basis of this litigation. The vendor's lien retained in said deed from Mae E. Norwood to appellants had not been released of record, although appellants had paid the sum of $5,000.00 named therein. This payment of $5,000.00, however, was not made on the maturity date of the note, but shortly thereafter. Appellants' grantor, Mrs. Norwood, contended that since they had not paid the note at the time of the maturity thereof, she was entitled to the sum of $22.17 interest, which she demanded of them before she would satisfy of record the vendor's lien. Appellants, apparently relying on the words "bearing no interest," had refused to pay the sum of $22.17 being demanded of them as interest.

In addition to the above real estate, appellants were also, at the time of entering into the contract herein, the owners of a G. M. C. truck and a stock of goods and

merchandise held by them for sale, which merchandise was contained in the store or place of business located on the above property.

After certain preliminary negotiations, the parties on the 23rd day of August, 1952, entered into the written contract aforesaid, in which appellants, as sellers, and appellees, as buyers, agreed that appellants would sell to appellees for a total purchase price of $17,500.00, said real estate "and the business known as the Hal Jones Produce Company, including its fixtures and equipment, at Lincoln, Arkansas." In this contract appellants agreed to furnish buyers an abstract showing a good merchantable title to said lands; and the parties further agreed that upon approval of title by appellees, appellees would pay appellants $5,000.00 of the purchase price and would execute and deliver to appellants their promissory note for the balance of $12,500.00, bearing interest at 6% per annum, interest payable annually, said sum of $12,500.00 to be paid on or before two years from the date of said note. The contract further provided that appellees would deposit with the escrow agent named in said contract said down payment of $5,000.00 and said note for $12,500.00, and that appellants would leave with said escrow agent their warranty deed retaining a vendor's lien for the unpaid balance of the purchase price, "which deed, check and note will be delivered to the respective parties upon approval of the title." Miss Suzanne Chalfant Lighton, a practicing attorney at law in Fayetteville, was named as escrow agent in said contract.

In addition to the above real estate and business, it was also further agreed by said parties in said contract that appellants would sell to the appellees the stock of goods and merchandise of said business at a price to be determined by an inventory to be taken as of August 23, 1952, and would also sell to appellees the 1952 G. M. C. truck at an agreed purchase price of $2,000.00.

The contract concludes with a paragraph providing that "all accounts receivable as of the close of business on August 23, 1952, will be due the sellers, and there-

after will be due the buyers, it being further agreed that the division of the accounts receivable between the parties will be made when collection is made."

Appellees retained Miss Lighton, the escrow agent, as their attorney to examine the abstract and approve title for them. She had already examined the abstract a few days prior to the execution of the above contract, and all parties to the transaction understood that the vendor's lien aforesaid retained by Mrs. Norwood in her deed to appellants yet remained unsatisfied, and that the only point of contention between appellants and Mrs. Norwood was the item of $22.17 claimed by Mrs. Norwood as interest.

By agreement of the parties, the $5,000.00 check given as down payment on the purchase price of the lands and business was delivered by the escrow agent to appellant, J. Hal Jones, on the day the contract was executed upon his promise that he would have the vendor's lien satisfied upon his return from a vacation trip. The $12,500.00 note executed as a balance of the purchase price, together with the warranty deed from appellants to appellees, remained in the hands of the escrow agent until the trial of this cause, and were never by her actually delivered to the respective parties.

Upon the execution of the contract aforesaid, all the property including the real estate, stock of goods and merchandise and truck, was delivered to appellees, who thereupon engaged in the same business as appellant Jones had been engaged in, and for a while carried on the business under his trade name, Hal Jones Produce Company. All parties agree that the full purchase price of the truck and the stock of goods and merchandise was paid by appellees prior to the commencement of this action.

After his return from his vacation trip, which was made shortly after entering into the contract in 1952, appellant Jones still refused to pay to Mrs. Norwood the sum of $22.17 demanded of her as a condition to satisfying the vendor's lien; but on the 8th day of September, 1952, Mrs. Norwood executed a release deed releasing the

vendor's lien and delivered same to the escrow agent with instructions to deliver it to appellants only upon the payment of said disputed item of $22.17. The next day, September 9, 1952, the escrow agent wrote Mr. Jones advising him that the release deed had been left with her to be delivered to him upon the payment of said sum of $22.17, and advising him that title to the lands could not be approved until the vendor's lien was released. She suggested that he get in touch with her about the matter as soon as possible. Mr. Jones apparently ignored this letter; and on September 29, 1952, the escrow agent again wrote Mr. Jones urging that the matter be cleared up in order that she could approve title and deliver the escrow instruments to the proper parties. On January 6, 1953, she wrote appellees advising them that she had heard nothing from Mr. Jones and that "The title is in the same condition it was when I last talked with you."

Nothing further was done by appellants toward having the vendor's lien satisfied of record until after the commencement of this action, it being the contention of appellants that they did not owe Mrs. Norwood the $22.17 but that they told appellees that they would pay same when appellees' note or any part thereof (apparently meaning principal) had been paid. Appellees, however, stated that appellant Jones kept promising them that he would take care of the matter.

On September 24, 1953, appellees, who were still engaged in business on said property, paid appellants the sum of $750.00 as the interest on their note for the first year; and on August 23, 1954, they paid the further sum of $750.00 as the interest on said note for the second year, although the note still remained in the hands of the escrow agent. Appellees were also trying to borrow money on the property with which to pay their note, which was now due according to its terms, but were unsuccessful in their efforts. It further appears that appellant Jones had agreed to give them further time within which to pay the principal of the note.

It does not appear, however, that their failure to borrow the money on the property with which to pay

the note was due to the defect of the title, the reason being that the prospective lenders contacted by them were not willing to loan on this type of property at that time. There is no evidence that any loan was refused because of the unsatisfied vendor's lien retained by Mrs. Norwood in her deed to appellants; although, obviously, this lien would have to be cleared before any responsible person would make the loan on the property as security. The point is that appellees, in their negotiations for a loan on the property with which to pay the note, never reached the point where the vendor's lien entered into the matter.

Shortly after their note became due, appellees purchased from Mrs. Norwood other business property across the street from the property involved in this action, on which to carry on and conduct their business.

On October 8, 1954, appellees, without prior notice to appellants, filed their complaint in equity for the rescission and cancellation of only that part of the written contract of August 23, 1952, relating to the sale of the real estate and the business known as Hal Jones Produce Company, in which complaint they allege the failure of appellants to perform their obligation to have satisfied of record the vendor's lien shown in the abstract.

Appellants defended on the grounds that there could not be a partial rescission of the contract; that appellees were estopped from seeking rescission of said contract; and that they did not act within a reasonable time and were barred by laches. In a counterclaim they asked for a foreclosure of the vendor's lien retained in their deed to appellees.

The trial court found that that part of the written agreement between appellees and appellants "relating to the sale of the real property described in the plaintiffs' complaint and the business known as Hal Jones Produce Company together with its fixtures and equipment for a total consideration of seventeen thousand five hundred dollars ($17,500.00) is severable and divisible from the other provisions contained in said written agreement,"

and that appellees were entitled to rescind that part of the written agreement; that appellees had paid appellants $6,500.00 in principal and interest on the purchase price of said property, which sum they were entitled to recover from appellants; that appellees had occupied said premises for a period of 25 months and 13 days and had collected rentals from said property in the sum of $285.00; "and that the sum of $200 paid to the defendants for every month the premises were occupied by the plaintiffs together with the $285.00 rentals collected would make the defendants whole and place them in status quo"; and that appellants were entitled to recover from appellees the sum of $200.00 per month as the rental value of the property, plus the sum of $285.00 collected by appellees as rent, or a total of $5,371.58, which should be offset against said amount of $6,500.00 found to be due from appellants to appellees, leaving a difference of $1,128.42, for which amount appellees were entitled to judgment against appellants.

Based on these findings, the court decreed that the contract between the parties providing for the sale of the real property, and the business known as Hal Jones Produce Company, together with its fixtures and equipment, be cancelled and rescinded, and that appellees have and recover of and from appellants judgment in the amount of $1,128.42, which was declared to be a lien upon said real property. Appellants' counterclaim was dismissed for want of equity. From that decree comes this appeal.

For a reversal of the decree of the trial court, appellants argue and rely upon three propositions: (1) that appellees cannot rescind the contract in part; (2) that they did not seek a rescission within a reasonable time and are barred by laches; and (3) where there has been only a partial failure of consideration, there is no ground for rescission.

1. *Partial Rescission and Restoration to Status Quo.* Where a contract is entire and not divisible or severable, it must, as a general rule, be rescinded in toto and not in part; but if a contract consists of two or more

parts, which are independent of each other, a partial rescission may be allowed. This rule is stated in 12 Am. Jur., Contracts, Sec. 444, as follows:

"As a general rule the right to rescind must be exercised in toto. The contract must stand in all its provisions or fall altogether. Accordingly, a party cannot repudiate a contract or compromise so far as its terms are unfavorable to him and claim the benefit of the residue. A partial rescission, however, may be allowed where the contract is a divisible one."

The trial court found that the written agreement between appellants and appellees "relating to the sale of the real property described in plaintiffs' complaint and the business known as Hal Jones Produce Company, together with its fixtures and equipment, for a total consideration of seventeen thousand five hundred dollars ($17,500.00) is severable and divisible from the other provisions contained in said written agreement," that is, the provisions relating to the sale of the truck and stock of goods and merchandise of said business.

We agree with the trial court that the provisions of the contract relating to the sale of the real estate and the business are divisible and severable from the provisions relating to the sale of the truck. In fact, appellant Jones himself admits that the agreement as to the sale of the truck was separate from and independent of the sale of the real estate, business and stock of goods and merchandise.

On the authority of *Carr* v. *Hahn & Carter,* 133 Ark. 401, 202 S. W. 685, as well as other authorities hereinafter cited, and due to the nature of the subject matter, it is our opinion that the sale of the real estate, the business, and the stock of goods and merchandise were so interdependent and interrelated that they constitute an entire, and not a severable, contract. It is true that separate considerations are expressly stated for the real estate and business upon the one hand and the stock of goods and merchandise upon the other, the consideration for the real estate and business being $17,500.00, and that for the stock of goods and merchandise

being its value to be determined by an inventory to be taken as of August 23, 1952. The same was true, however, in the case of *Carr* v. *Hahn & Carter,* supra, the contract in that case stating a consideration of $4,000.00 for the purchase price of materials, fixtures, machinery, etc., to be used in the construction of a dredge boat and a consideration of $125.00 per month as salary for the installation of the machinery on the boat. In our opinion in that case we said:

"The right of plaintiff to a lien turns on the question of whether the contract for the sale of the material, machinery, etc., and the installation of it on the new boat, was entire or whether it was severable . . . It will be observed that the written contract fixes a separate price for the articles sold and specifies a time for delivery; but it also provided that plaintiff should install the machinery and be paid specified wages for his services during the period of installation."

We there held, "it is apparent that the parties did not intend the provisions with respect to the sale of the material and machinery and the installation of the same on the new boat to be severable, but that they were so dependent on each other that they were to be treated as parts of an entire contract."

A good treatment of the interesting but difficult subject of entire and severable contracts is to be found in 17 C. J. S., Contracts, Secs. 331-336. Also in 12 Am. Jur., Contracts, Secs. 315-320. The distinction between entire and severable contracts is stated in 17 C. J. S., Contracts, Sec. 331, as follows:

"As a general rule it may be said that a contract is entire when by its terms, nature and purpose it contemplates and intends that each and all of its parts and the consideration shall be common each to the other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment."

As in all other written instruments, the primary test for determining whether a contract is entire or sever-

able is the intention of the parties to the contract. This intention is to be ascertained from the language used, the subject matter of the contract and the circumstances of the particular transaction.

Other aids in arriving at the intention of the parties include the singleness or apportionment of consideration, the divisibility of the subject matter, and the construction given to the contract by the parties themselves. As a general rule it may be said that a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and that it is severable when, in its nature and purpose, it is susceptible of division and apportionment. Acts of the parties in treating the contract as entire or severable have an important bearing on its construction.

The real difficulty comes in the application of the general principles of law to each specific case. Taking all these elements into consideration, however, we are of the opinion that the sale of the real estate, the business and the stock of goods and merchandise, were so interrelated and interdependent that they constituted an entire contract, which was severable and divisible from that part of the agreement relating to the sale of the truck.

As to the stock of goods and merchandise, however, it appears that appellants had, prior to the commencement of this action, been placed in a position of status quo for all practical purposes, inasmuch as they had already received in kind, from time to time, goods and merchandise of like kind and quality, as well as of value, equal to the original inventory. Appellant, Hal Jones, virtually admits this. Therefore, so far as the stock of goods and merchandise is concerned, the result would be the same as if this part of the agreement were severable and divisible from the sale of the real estate and business.

We are still confronted, however, with the question of whether that part of the contract relating to the sale of the real estate and business was itself entire or severable. The contract provides that appellees shall pay $17,500.00 for the real estate, and "the business known

as the Hal Jones Produce Company, including its fixtures and equipment, at Lincoln, Arkansas." The question becomes, "Was the $17,500.00 consideration named in this part of the contract for anything more than the real estate, the fixtures and equipment?" In other words, was the $17,500.00 the consideration for the tangible assets only, consisting of the real estate, the fixtures and equipment, or was it also for certain intangibles such as good will, customer contracts, the right to handle and sell an established brand of merchandise, etc., all of which would be valuable? What is meant by the phrase, "and the business known as the Hal Jones Produce Company?" In view of all the facts and circumstances, it appears to us that the phrase means something more than the mere concrete, physical and tangible assets, such as the real estate, fixtures and equipment. In fact, appellees have taken advantage of these intangible assets by acquiring from Mrs. Norwood other business property across the street from the property in question in which to carry on this same business. See 12 C. J. S., Business, p. 770, Note 5, also 9 C. J., p. 1101, Note 28 (g).

We are therefore of the opinion that the part of the contract relating to the sale of the real estate and the business known as Hal Jones Produce Company, including the fixtures and equipment, included not merely the tangible and physical properties in connection with said business, but also certain intangibles pertaining thereto, and that it is in itself an entire, and not a severable, contract; and that, since appellants were not placed in a position of status quo as to the intangibles, it was error to rescind this part of the agreement.

2. *Reasonable Time and Laches.* There can be no question that appellants obligated themselves to furnish appellees with an abstract of title showing a good merchantable title in and to said real estate. The condition of the escrow agreement was that the respective escrow instruments were to be delivered to the respective parties only upon the approval of title. It is conceded by all parties that the abstract did not reflect a good mer-

chantable title because of the unsatisfied vendor's lien retained by Mrs. Norwood in her deed to appellants. Appellees had the right to demand a strict compliance with the terms of the escrow agreement. This rule is stated in 19 Am. Jur., Escrow, Sec. 20, as follows:

"In the law governing performance of escrow agreements, there is no doctrine of substantial compliance to be found. Compliance must be full and to the letter, or else it constitutes merely noncompliance. Strict and full performance only can discharge a condition precedent to valid delivery by the escrow holder. The question involved is one of performance of the escrow agreement, not of the ability of the parties to perform the agreement, since such ability, without full performance, cannot amount to compliance."

No time limit is contained in the agreement within which appellants should furnish such abstract; and, in the absence of a specific time limit, appellants had a reasonable time within which to furnish the abstract showing a good merchantable title. Appellants themselves admit that they could have done this within a very short period of time by the payment of the disputed item of $22.17; but they did not have the vendor's lien released and satisfied until after this suit was brought, a period of more than two years. There can be little doubt, therefore, that had appellees acted within a reasonable time after the failure of appellants to comply with their obligation of the contract, and had they complied with the requirements of law and equity in the matter of restoring appellants to the position of status quo, they would have been entitled to a rescission of the contract.

While the law gave them the right to rescind the agreement upon the failure of the appellants to comply with their part of the contract, this was only one of their remedies and they were not required to exercise it. The law does require, however, that in order to rescind a contract, the rescission itself must be made within a reasonable time after the facts giving rise to the right of rescission arise or become known; and, unless such right

to rescission is exercised within a reasonable time after the discovery of the facts justifying the rescission, the party otherwise entitled to rescind will be deemed to have waived this right.

In this case, appellees entered into possession of the property and remained in possession, carrying on and conducting their business operations thereon until the filing of this lawsuit. Although their note for $12,500.00 still remained in the hands of the escrow agent; yet when the first installment of interest in the amount of $750.00 became due one year after the date of the contract, they paid this interest, notwithstanding the fact that appellants had not yet performed their part of the contract and had apparently ignored the letters written by the escrow agent to get them to do so. When the second installment of interest became due, two years after entering into the contract, appellees again paid the interest in the amount of $750.00. Both payments were made directly to appellants. At the time the second installment of interest was paid, the note had by its terms become due, and appellees were making efforts to borrow the money with which to pay same.

While it is argued in their brief that they could not borrow money on the property because of the unsatisfied vendor's lien, appellees themselves admitted that in their negotiations for loans the question of title never arose and that they never showed the abstract to any of the prospective lenders. One of the prospective lenders inspected the property and found same was commercial property, on which they were not making loans at that time and the application for a loan was refused solely and entirely because of the type of the property and not upon any defect of title. There is no evidence that any loan was ever refused because of any defect in the title.

Finally, on October 8, 1954, less than two months after they had paid the last installment of interest, and after the note had become due, and after they had been unable to borrow money with which to pay the note, appellees, without prior notice to appellants, vacated the

property and filed this suit for the rescission of the contract.

Appellants contend that during this time this particular property had declined in value about 25%; and, in this, they were corroborated by other witnesses. The chancellor, however, apparently did not accept this testimony, and we are not in a position to say whether this is a fact.

It is our opinion, however, that appellants should be sustained in their contention that suit for rescission was not, under all the circumstances, brought within a reasonable time after the grounds therefor arose, especially in view of the fact that the suit was filed without prior notice to appellants.

In the case of *General Motors Acceptance Corporation* v. *Hicks,* 189 Ark. 62, 70 S. W. 2d 509, this court quoted with approval the following language of the Supreme Court of Washington in the case of *Lundberg* v. *Switzer,* 146 Wash. 416; 263 Pac. 178; 59 A. L. R. 131:

"The right to forfeit a conditional sales contract for overdue payments cannot be exercised without demand and a reasonable opportunity to comply, after there has been a waiver of strict performance by the acceptance of delayed payments."

In the same case, Mr. Justice FRANK G. SMITH, speaking for this court, said:

"This principle is that one may lose the right to enforce a contract strictly according to its terms if he induces the other party to the contract to believe that he will not strictly enforce it, unless, after inducing this belief, he gives reasonable notice that the indulgence will not be continued and a reasonable opportunity is given to comply after such notice.

"This principle is not confined in its application to questions arising under conditional sales contract."

It, therefore, appears to us that, having remained in possession of the property for more than two years during which time they were operating the business, and

collecting rents, and having made two annual payments of the interest on their note, and having advised appellants that they were seeking to borrow the money with which to pay the note, appellees had at least induced appellants to believe that they would not strictly enforce their rights to a rescission of the contract, and, that after this lapse of time, they should have given appellants reasonable notice that they did intend to rescind same. In view of these facts and principles, we sustain appellants' second contention.

3. *Rescission on Partial Failure of Consideration.* It is next contended by appellants that there could be no rescission of a contract for the purchase of land until there has been shown a failure of title, and that there could be no rescission for a partial failure of consideration. An examination of the authorities cited in this section of appellants' brief convinces us, however, that they apply to executed contracts, rather than to executory and escrow contracts such as in this case.

The vendor's lien retained in the deed from Mrs. Norwood to appellants having now been satisfied of record, appellants are now entitled to the payment of the purchase money note executed by appellees with accrued interest, which note is secured by vendor's lien on the property; and the note now being in default, appellants are entitled to a foreclosure of their vendor's lien as prayed in their counterclaim.

The decree of the trial court is, therefore, reversed and remanded for further proceedings in conformity with this opinion.

In connection with such further proceedings, we also note that the original escrow instruments were admitted in evidence in the trial court and now form part of the record on appeal to this court. These instruments will, upon proper motion by the parties entitled thereto, be withdrawn from the record and delivered to the parties

entitled to same under the terms of the original escrow agreement.

Reversed and remanded.

HOLT, MILLWEE and WARD, JJ., dissent. Chief Justice SEAMSTER not participating.

CROWLY *v.* THORNBROUGH, COMM'R. OF LABOR.

5-998 291 S. W. 2d 500

Opinion delivered June 18, 1956.

Mehaffy, Smith and *Williams* and *B. S. Clark,* for appellant.

Appellee *pro se.*

Tom Gentry, Attorney General and *Roy Finch, Jr.,* Asst. Atty. General for Intervenor.

PER CURIAM. This appeal is from an order sustaining defendant's demurrer to the complaint without any further action by the trial court. It is not a final and appealable order, and the appeal must therefore be dismissed as premature. It is so ordered. See *Atkins* v. *Graham,* 99 Ark. 496, 138 S. W. 878 and other cases cited in *Arkansas State Board of Architects* v. *Larsen,* ante page 536, 291 S. W. 2d 269.

COOLEY *v.* WALTHER.

5-974 291 S. W. 2d 515

Opinion delivered June 25, 1956.

[redacted]

Hardin, Barton, Hardin & Garner, for appellant.

Robert R. Brooksher and *Donald Poe,* for appellee.

LEE SEAMSTER, Chief Justice. This is the second time this case has been here on appeal. The facts were set out in the former appeal — *Walther* v. *Cooley,* 224 Ark. 1027, 279 S. W. 2d 288. In the former case this court held that the evidence was sufficient to make it a question of fact for the jury to determine. Under the rule many times announced by this court, the decision on the former appeal becomes the law of the case on this appeal — unless we can say that the testimony on the second appeal is substantially different from that on the first appeal. *Hallum* v. *Blackford,* 202 Ark. 544, 151 S. W. 2d 82. The testimony on this appeal is substantially the same as in the former appeal, with slight variations.

Upon trial of the issues in the Scott Circuit Court, appellee was awarded a judgment in the sum of $1,000, for personal injuries. For reversal, appellant contends (1) that the evidence is not sufficient to support the

verdict and judgment rendered, and (2) the verdict and judgment in the amount of $1,000 are excessive.

The appellant employed the appellee to assist in constructing a garage on appellant's property. The appellee was being paid at a rate of sixty cents per hour for his services. On January 5, 1954, the appellee was injured, at a time when the parties herein, and another hired hand, were placing rafters on the partially constructed building.

At the time of the mishap, the appellee was working on the south side of the building, using a scaffold and plate to stand on while nailing the rafters to the plate. When he stepped down from the plate to the scaffold, one of the braces on the scaffold broke and the appellee fell to the ground, landing on his head and shoulders. He sustained a broken rib, injuries to his right eye and fractures to bones of his right hand. At the time of the original trial, the appellee's right hand still suffered a partial permanent disability, to the extent that he was unable to grasp tools with which to pursue his occupation.

The record reveals that the appellant furnished the tools and material and supervised the construction of the building. The appellant personally built the south scaffold after selecting and furnishing the material. An inspection of the scaffold, after the accident, revealed that the timber used in its construction was defective and caused the break.

This court has many times held that it is a master's duty to exercise ordinary care to furnish his servant a reasonably safe place to work. *Arkadelphia Sand and Gravel Company* v. *Knight,* 190 Ark. 386, 79 S. W. 2d 71.

We hold that the evidence was substantial to sustain the verdict. We are also of the opinion that the amount of the verdict was very moderate, considering the injuries sustained by the appellee.

Judgment affirmed.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL No. 878 v. BLASSINGAME.

5-1010 293 S. W. 2d 444

Opinion delivered June 25, 1956.

[Rehearing denied October 1, 1956.]

[redacted]

Tom Gentry, for appellant.

Catlett & Henderson, for appellee.

J. SEABORN HOLT, Associate Justice. This appeal is from a decree permanently enjoining appellant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 878, from picketing the retail establishment of intervener, Ralph Royse, and the places of business of all other persons similarly situated.

Material facts appear not to be in dispute. Some of the members of appellant, Local Union 878, were involved in a labor dispute with the Terry Dairy Products Company, Inc., over wages, hours and working conditions. The Terry Dairy Company sold milk and other dairy products at wholesale prices to appellee, M. E. Blass-

ingame (who has gone out of business since the present litigation began), intervener, Ralph Royse, and other retail establishments such as restaurants and cafes which sell these milk products to their customers. In an effort to persuade the public not to purchase the products of the Terry Dairy Company, appellant placed pickets at the entrances of some of the retail establishments, including that of Royse, selling Terry products. These pickets carried a sign which read: "Employees of Terry Dairy Products Co. on strike for a living wage. This establishment serves Terry Dairy Milk. Please don't drink it." As indicated, a picket carrying the above sign was placed near the entrance of Blassingame's place of business and also at Royse's place of business. The complaint of Ralph Royse, alleged, in effect, that he was a wholesale customer of Terry Dairy Products Company, Inc., from which company he purchased dairy products for resale to the public at his place of business, 701 Broadway, Little Rock; that the appellant union, acting through its members, picketed his place of business and thereby deprived him of many of his customers and trade solely because he offered for sale products distributed by Terry Dairy; and that he had no labor dispute with the appellant union. Appellant answered, in effect, denying every material allegation in the complaint, and in addition that the trial court lacked jurisdiction for the reason that the jurisdiction over the subject matter as alleged in the complaint had been preempted by the National Labor Relations Act, as amended (Taft-Hartley Act), U. S. C. Title 29, S. 151, et seq, and that the right to advertise their grievances against Terry Dairy in a peaceful manner was guaranteed under the constitution of the United States, etc., and prayed that the injunction be dissolved. As indicated, the undisputed facts show that Royse had no labor dispute whatever with Local Union 878 above, and that there is no dispute between him and his own employees, none of whom belong to the above union. The picketing is not on the premises at the Terry plant—is entirely disconnected with it, but is on, or near, the premises of the re-

tailer, Royse. It further appears that there was no violence and that the picketing was peaceful.

For reversal appellant relies on two points: "1. Product picketing in a peaceful manner is not picketing for an unlawful purpose, and cannot be enjoined. 2. The evidence does not reflect that appellant is bringing this action for himself and all others similarly situated."

I.

We do not agree with appellant's first contention. We are here confronted with what is obviously, in effect, a secondary boycott — "A secondary boycott occurs when striking employees, in addition to picketing the premises of their own employer, also establish picket lines around the premises of others not so directly interested in the labor dispute, such as customers to whom the primary employer sells or manufacturers from whom he buys," *Boyd* v. *Dodge*, 217 Ark. 919, 234 S. W. 2d 204. There is no proof whatever in this case that the Terry Dairy Company was engaged in interstate commerce, or that a Federal question is involved. Such proof is a primary jurisdictional requisite as was said by the Supreme Court of the United States in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833, and this language was used: "It (National Labor Relations Act, as amended) sought primarily to empower a federal regulatory body, through administrative procedure, to forestall unfair labor practices by anyone in circumstances *affecting interstate commerce.* In circumstances, in effect, such as are presented here, the public policy of this state as affects picketing by labor unions was declared in the recent case of *International Brotherhood of Electrical Workers, Local Union No. 295,* v. *Broadmoor Builders, Inc.*, 225 Ark. 260, 280 S. W. 2d 898, we there held: "Headnote 1. Labor—Peaceful Picketing, Public Policy.—Picketing—which prevents 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 —

declared to be against the public policy of Arkansas." In the Broadmoor Case above, in which we sustained an injunction against picketing, as unlawful, we also pointed out in Footnote No. 7, that the Supreme Court of the United States has held that State Courts are given the right to determine public policy and to "set the limits of permissible contests open to Industrial combatants."

II.

As to appellant's second point, little need be said. The facts showed that pickets were placed at the entrances of not only Blassingame's place and Royse's place, but at other retail establishments, and appellee says: "The plaintiff files this complaint for himself and all others similarly situated, the same constituting a class of citizens who offer Terry Products for sale to the public and who are being picketed or are under the threat of picketing by virtue of said fact. It is impracticable to bring all of the members of the class before the court; the filing of separate suits by each of the members of the class would involve a multiplicity of suits . . . " We hold that appellee, Royse, here, was acting not only for himself but for a class and as a member of the class for which he so acted, and that it was proper for him to bring the present suit for the benefit of all. What we said in *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, is in point here, "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring them all before the court within a reasonable time, one or more may sue or defend for the benefit of all. Section 1098, Crawford & Moses' Digest [Now § 27-809 Ark. Stats. 1947]. But the person who so acts for a class must be a member of the class for whom he acts."

We conclude, therefore, that the decree was correct and we affirm.

Justice McFaddin dissents.

Ed. F. McFaddin, Associate Justice (Dissenting). The appellants were engaged in picketing an establish-

ment where Terry Dairy products were being sold: there was no mass picketing and there was no violence. The majority opinion in this case holds that the Chancery Court was correct in enjoining such picketing on the theory of a secondary boycott. I find myself unable to agree with that conclusion; hence this dissent.

There is a distinction between (a) a secondary boycott and (b) product picketing. A *secondary boycott* exists when the workmen on strike against one establishment attempt by picketing to induce *the workmen* of another establishment to cease working for their employer.[1] *Product picketing* is an effort by striking workmen of one establishment to persuade *the public* to cease buying the product of the establishment against which the workmen are on strike, but with no effort on the part of the strikers to influence the workmen of the place where the picketing is being conducted to cease from working at that establishment. I think that in the case at bar the picketing was *product picketing* rather than a *secondary boycott.*[2] But I propose to show that the majority opinion is wrong in this case whether the picketing was a *secondary boycott* or *product picketing.*

I. *Secondary Boycott.* If the picketing in the case at bar be regarded as a secondary boycott, then it is my understanding of the Taft-Hartley Act (U. S. C. A. Title 29, Section 158) that all jurisdiction in regard to a secondary boycott—absent mass picketing and violence—is in the National Labor Relations Board. *Capital Service* v. *N. L. R. B.,* 347 U. S. 501, 98 L. Ed. 887, 74 S. Ct. 699. The recent case of *Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162, decided by the U. S. Supreme Court on June 4, 1956, inferentially so holds.

The majority opinion in the case at bar says the picketing here was a *secondary boycott,* but that no interstate

---

[1] See U. S. C. A. Title 29, Section 158, sub (b) (4); and see *International Brotherhood* v. *N. L. R. B.,* 341 U. S. 694, 95 L. Ed. 1299.

[2] The majority opinion says of Royse's complaint: ". . . that the appellant union, acting through its members, picketed his place of business and thereby deprived him of many of his customers and trade solely because he offered for sale products distributed by Terry Dairy; and that he had no labor dispute with the appellant union."

commerce was shown to have existed so the State Court had jurisdiction. I understand that the old distinction, that actual movement of goods is necessary to make interstate commerce, has been changed both by the Wagner Act and the Taft-Hartley Act. It is not a question of whether the goods *actually moved* in interstate commerce, but whether the picketing ". . . would burden or obstruct commerce . . . or tend to burden or obstruct . . . the free flow of commerce." Such is the language of the Taft-Hartley Act as contained in U. S. C. A., Title 29, Section 142. So, if picketing here be a secondary boycott, it is not necessary to allege the actual movement of goods in interstate commerce, because the jurisdiction to enjoin a *secondary boycott* is exclusively in the National Labor Relations Board, absent mass picketing or violence. The effect here would be to reverse the decree and dismiss the injunction.

II. *Product Picketing.* If we regard the picketing here involved as product picketing—and I do so regard it—then there is nothing illegal in such picketing: it comes under the right of free speech guaranteed by the Constitution. Here are some cases from State courts that recognize the legality of *product picketing*: *Goldfinger* v. *Feintuch* (N. Y. 1937), 276 N. Y. 281, 11 N. E. 2d 910, 116 A. L. R. 477; *Fortenbury* v. *Superior Court* 16 Cal. 2d 405, 106 Pac. 2d 411; *Ohio Valley Adv. Corp.* v. *Union Local 207,* 138 W. Va. 355, 76 S. E. 2d 113; and *Galler* v. *Slurzberg,* 27 N. J. Super. 139, 99 Atl. 2d 164.

In the last cited case (*Galler* v. *Slurzberg*) the New Jersey Court said:

"We have here a form of secondary picketing known as product picketing — picketing directed against the product itself and not against the person selling it. Peaceful picketing of the place of business of a merchant selling the product of a manufacturer who is a party to a labor dispute, for the purpose of asking the public to refrain from purchasing such product, is permissible."
To sustain the quoted statement, thirteen cases are cited from various jurisdictions and also some textbooks and some annotations.

The majority opinion in the case at bar says that the public policy of Arkansas — as announced in *International Brotherhood* v. *Broadmoor,* 225 Ark. 260, 280 S. W. 2d 898—applies here, and justifies the injunction against product picketing. I cannot agree with such conclusion of the majority. *International Brotherhood* v. *Broadmoor* involved picketing against *the employer* at a place removed from the scene of employment; and we held that the effect of such picketing was to interfere with the normal use of the highways by other persons. *Remote picketing* against the employer — as in the Broadmoor case — is entirely different from *product picketing,* as in the case at bar. Under the guise of public policy, I seriously doubt if a State court still has jurisdiction to enjoin against product picketing, absent, as here, any mass picketing or violence.

I am bound to try to follow the holdings of the United States Supreme Court; and under such holdings — as I understand them — I think the decree here should be reversed and the injunction dissolved.

HALBERT *v.* HELENA-WEST HELENA INDUSTRIAL DEVELOPMENT CORPORATION.

5-1035 291 S. W. 2d 802

Opinion delivered June 25, 1956.

David Solomon, for appellant.

James P. Baker, Jr., Tom Gentry, Attorney General and *Rose, Meek, House, Barron & Nash,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit brought by appellants, as citizens, residents and taxpayers, seeking, *inter alia,* a declaratory judgment regarding the validity of Act 404 of 1955, known as the "Arkansas Industrial Development Act," and hereinafter referred to as "Act 404." The Trial Court sustained a demurrer to the complaint and dismissed the suit; and this appeal resulted. The defendants below and appellees here are: (a) Helena-West Helena Industrial Development Corporation (hereinafter called either "Hel-

ena Development Corporation" or "local corporation"); (b) the Arkansas Industrial Development Commission (sometimes called "State Commission") created by said Act 404 and the individual members of said Commission; and (c) the State Board of Finance (created by Act No. 338 of 1955) and the individual members thereof.

After stating the status of the parties, as above mentioned, the complaint alleged that the Helena Development Corporation, proceeding under Act No. 404, was about to issue $800,000.00 of industrial development bonds[1] secured by a mortgage on land and heavy industrial machinery; that from the proceeds of said bond issue, the Helena Development Corporation would acquire lands and buildings and install heavy industrial machinery at a total cost in excess of the bond issue; that the Helena Development Corporation would then convey the building and machinery to The Mohawk Rubber Company (an Ohio corporation) in consideration of The Mohawk Rubber Company assuming the $800,000.00 bond issue and operating a manufacturing establishment in the building so erected and equipped to manufacture automobile tires and other products; that the Arkansas Industrial Development Commission had approved the project under Act 404; and that the State Board of Finance had authorized the purchase of $400,000.00 of said bond issue. The complaint then alleged four points on which it claimed that the Act 404 is unconstitutional, and one additional point on which it claimed that the Helena Development Corporation was about to violate Section 27 of the Act 404. These grounds of attack will be listed and discussed hereinafter.

As aforesaid, the Chancery Court sustained a general demurrer and dismissed the complaint, so the issues before us are the same five grounds of attack as those

---

[1] An exhibit attached to the complaint gave the appraisal figures as follows:

"Appraised value of the lands	$ 49,800.00
Appraised value of the present improvements	730,797.39
Addition of boiler	25,000.00
Addition of heavy industrial machinery	500,000.00
Total	$1,305,597.39"

in the Trial Court; and no additional grounds of attack have been suggested or have occurred to this Court.

At the outset we briefly analyze the Act 404, which passed both Houses of the Legislature by overwhelming vote and without any amendment in the course of passage. The Act creates a State Commission known as the "Arkansas Industrial Development Commission" of seven members and hereinafter called "State Commission"; and in general terms prescribes the duties of said Commission. Section 13 of the Act allows fifteen or more natural persons in any city, town or county to organize a corporation under the Act for the industrial development of the area involved: Section 22 provides that the corporation shall be a non-profit corporation. The Act further provides that the organizers shall submit their proposed organization papers to the State Commission for approval and, when so approved, the papers shall be filed with the Secretary of State and corporate status shall begin. The local corporation so organized will seek to bring to the community new industrial plants. The local corporation can issue bonds for the construction of the plant, which it will then sell, rent or give to an industry as an inducement to locate in the community. There are restrictions as to the percentage of cost for which the bonds may be issued; the bonds may be secured by a mortgage on the physical assets of the local corporation; the local corporation is, in several respects, under the supervision and control of the State Commission. The Act also authorizes the State Board of Finance to purchase not to exceed one-half of the issue of the first lien industrial bonds issued by the local corporation, and the remaining bonds are to be sold to the public. Other particularities of the Act will be mentioned hereinafter.[2] Now we consider the five points that appellants make on this appeal.

[2] It is well to call attention to the fact that this is an effort by Arkansas to encourage the location of industries in our State. Other States have made such efforts. Some States proceed by private financing, as Arkansas is doing; some by public financing; and some by commercial credit corporations. Generally, Arkansas, Florida, Missouri and Oklahoma are using the private financing methods. Mississippi, Louisiana, Alabama and Tennessee, by and large, are using the public financing method, whereby municipalities or other political subdivi-

I. Appellants say: "*Act No.* 404 *of the Acts of the General Assembly of the State of Arkansas of* 1955, *in that it authorizes the issuance of bonds for the purpose of industrial expansion, is in violation of the provisions of Article* 16, *Section* 1 *of the Constitution of the State of Arkansas, as amended by Amendment No.* 13 *to the Constitution of the State of Arkansas, and is in violation of the provisions of Amendment No.* 17 *to the Constitution of the State of Arkansas, as amended by Amendment No.* 25 *to the Constitution of the State of Arkansas.*"

We pass for later consideration in this opinion the language of Section 20 of the Act 404, which reads:

"Any city, town, or county in the State may purchase membership in a local industrial development corporation organized under the provisions of this act."

With the exception of Section 20, we find nothing in the Act whereby any city, town, county or other subdivision of the State is granting any financial aid toward any development corporation organized under Act 404. The local corporation organized under the Act is a non-profit private corporation organized by individuals, who are, of course, public spirited citizens who want to see industrial development in their respective communities: but the corporation is a private corporation. In the case at bar, the Cities of Helena and West Helena and the County of Phillips are no more liable for the obligations of the Helena Development Corporation than they would be for the liabilities of grocery stores or mercantile establishments in their communities. Act 404 is not like the acts from other states considered in these cases, to-wit: *Miller* v. *Police Jury of Washington Parish,* 226 La. 8, 74 So. 2d 394; *In Re Opinion of Justices,* 99 N. H. 528, 114 Atl.

---

sions are authorized to issue general obligation bonds for the acquiring of funds to construct industrial sites. In the New England states, a development credit corporation plan is used, as a state-wide approach to the problem of assisting local industrial foundations in their efforts to attract and hold industry. As near as we can ascertain, the Arkansas Act No. 404 is not a copy of any act adopted by any other State, but is a composite of various acts; so we are not bound by any judicial construction made on any of the other acts. The point that we emphasize is that the Act 404 is Arkansas' attempt to keep up with the efforts that other States are making to attract industry.

2d 514; *In Re Opinion of Justices,* 254 Ala. 506, 49 So. 2d 175; *Faulconer* v. *City of Danville,* 313 Ky. 468, 232 S. W. 2d 80; and *Holly* v. *City of Elizabethton,* 193 Tenn. 46, 241 S. W. 2d 1001. The Arkansas Act organizes the local development corporation as a non-profit private corporation; and this is certainly within the powers of the Legislature.

II. Appellants say: "*Section* 20 *of said Act No.* 404 *is in violation of the provisions of Article* 12, *Sections* 5 *and* 7 *of the Constitution of the State of Arkansas, and is in violation of the provisions of Amendment No.* 13 *to the Constitution of the State of Arkansas.*" We have previously quoted Section 20 of the Act; and we conclude that this section offends against our Constitution and its Amendments. Article 12, Section 5 of the Constitution provides:

"No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual."

Amendment 13 of the Constitution provides in part:

"No municipality shall ever grant financial aid toward the construction of railroads or other private enterprises operated by any person, firm or corporation . . ."

Under Section 20 of the Act 404, a city, town or county is allowed to "purchase membership" in a local industrial development corporation. It would be doing indirectly what the Constitution forbids to be done directly, if a county or municipality were allowed to purchase a membership in the corporation, because such purchase of "membership" would certainly be granting financial aid to the said local corporation. When the Arkansas Legislature allowed the creation of local development corporations as private non-profit corporations, it could not at the same time allow counties or municipalities to grant financial aid to such corporations. The appellees cite the case of *Neel* v. *City of Little Rock,* 204 Ark. 568,

163 S. W. 2d 525, 142 A. L. R. 1071, as a case in which we allowed a city to donate money to the Community Chest and say that, by the same token, we should allow cities to buy memberships in local development corporations organized under Act 404. But in *Neel* v. *City of Little Rock,* some *surplus money* of a city was allowed to be given to public charity, which saved the city from making certain expenditures; that is far different from the situation here. At all events, *Neel* v. *City of Little Rock* is a borderline case; and we refuse to extend the effect of its holding.

So we conclude that Section 20 of the Act 404 should be stricken. But that does not affect the remainder of the Act, as we will discuss in the next section of this opinion.

III. Appellants say: "*Section* 36 *of said Act No.* 404 *is in violation of the provisions of Article* 16, *Section* 6, *of the Constitution of the State of Arkansas.*"

Section 36 of the Act 404 says:

"Bonds issued in accordance with the provisions of this act shall be exempt from all taxes, state, county and municipal; this exemption including income taxation and inheritance taxation."

We think this section is in violation of Article 16, Section 6 of the Constitution of Arkansas, which says:

"All laws exempting property from taxation, other than is provided in this Constitution, shall be void."

The appellees practically concede that the effect of our opinion in the case of *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5, is against the complete validity of this section. In the case of *Jernigan* v. *Harris* there was an effort to exempt from taxation certain improvement bonds to be issued, and in holding the exemption to be bad, Mr. Justice Frank G. Smith, speaking for this Court, said:

"It is attempted in both acts to exempt from all forms of taxation any of the bonds authorized by each of

the acts. Section 5 of article 16 of the Constitution provides that all property subject to taxation shall be taxed according to its value, in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State, and provides also the property which shall be exempt from taxation. Section 6 of the same article of the Constitution provides that 'All laws exempting property from taxation other than as provided in this Constitution shall be void.' It would appear therefore that this provision of the act exempting the bonds from taxation is void, at least when such bonds are held by any person or agency whose property is not otherwise exempt from taxation."

Appellees cite us to the cases of *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980; and *Ward* v. *Bailey,* 198 Ark. 27, 127 S. W. 2d 272, as cases in which certain exemptions were allowed on bonds. But the bonds issued in those cases were state bonds, and the bonds to be issued by the Helena Development Corporation are bonds issued by a private non-profit corporation; so the cited cases have no application.[3]

We come then to the effect of the invalidity of Section 20 and Section 36 of the Act 404; and with those sections stricken from the Act, the remaining portions of the Act remain full and complete. Section 38 of the Act 404 says:

"The provisions of this act are hereby declared to be severable. If any section, paragraph, sentence or clause of this act shall be held unconstitutional or invalid, the invalidity of such section, paragraph, sentence or clause, shall not affect the validity of the remainder of the said act."

In *Jernigan* v. *Harris, supra,* a section was stricken from an act and the remaining portion of the act was there,

[3] Amendment 27 to our Constitution allows a State agency to investigate and contract with the owners of any new manufacturing or processing establishment for an exemption from State property taxation for as long as ten years. Whether the Helena Development Corporation or The Mohawk Rubber Company could qualify under that amendment, is something to be demonstrated in a case developing the facts. We merely mention it as a point not raised or decided in the present case.

as here, held to be valid and enforceable. We adopt here what Mr. Justice Frank G. Smith, speaking for the Court in the Jernigan case, said:

"This exemption does not, however, render either act void, for the reason that each act contains identical sections reading as follows: 'The sections and provisions of this act are separable and are not matters of mutual essential inducement, and it is the intention to confer the whole or any part of the powers herein provided for, and if any of the sections or provisions or parts thereof is for any reason illegal, it is the intention that the remaining sections and provisions or parts thereof shall remain in full force and effect.' We have uniformly held that, where a statute is unconstitutional in part, the valid portion will be sustained if complete in itself and capable of being executed in accordance with the apparent legislative intent. These acts are both complete and capable of being executed in accordance with the legislative intent expressly declared in the section quoted, and the acts must therefore be upheld, notwithstanding this exemption and its consequent unconstitutionality as applied to persons or agencies whose property would otherwise be subject to taxation."

IV. Appellants say: "*Section* 34 *of said Act No.* 404 *is in violation of the provisions of Article* 16, *Section* 11 *of the Constitution of the State of Arkansas, and is in violation of the provisions of Amendment No.* 13 *to the Constitution of the State of Arkansas.*" We find no merit to the appellants' contention on this point. Amendment 13 of the Constitution says in part:

"Neither the state nor any city, county, town or other municipality in this State, shall ever lend its credit for any purpose whatever; . . ."

Section 34 of Act 404 authorizes the State Board of Finance "in its discretion" to purchase from local development corporations fifty per cent of the principal amount of the bond issue up to a certain amount. The State is certainly not lending its credit to the local development corporation when it purchases bonds and receives the bonds. The Act creating the State Board of Finance is

Act 338 of 1955 (see § 13-401 Ark. Stats. 1956 Replacement Volume). Whether the State Board of Finance invests the State's surplus in one kind of bond or another is a matter for the Legislature to permit, and for the State Board of Finance to then decide in the exercise of its discretion. Certainly the Legislature can determine what kind of securities can be purchased by the State Board of Finance in its discretion; and until it is shown — and it has not been so shown here — that the State Board of Finance has abused its discretion or that such investment impairs the State's ability to pay outstanding obligations as they mature, then no case is made by the appellants under this point.

V. Appellants say: "*The action of the defendant, Helena-West Helena Industrial Development Corporation, in issuing bonds for the purchase of heavy industrial machinery to be constructed into the building, as set out in the complaint, and in the application to the Arkansas Industrial Development Commission, is contrary to the provisions of Section* 27 *of said Act No.* 404."

In this point appellants are not attacking the constitutionality of any section of the Act 404 but are attacking the actions of the local corporation in attempting to borrow money for the purpose of purchasing heavy industrial machinery to be installed in the building involved. Appellants cite Section 27 of the Act 404, which reads:

"Each corporation organized under this act is authorized to borrow money and to issue negotiable coupon bonds for the repayment thereof from corporate funds to carry out the purpose for which the corporation is organized; *provided, however, that no first lien bonds shall be issued* by any corporation organized under the provisions of this act *for the purpose of purchasing equipment or other personal property.*" (Emphasis supplied by appellants.)

Appellants cite the following cases to sustain their position on this point, to-wit: *Sessoms* v. *Ballard,* 160 Ark. 146, 254 S. W. 446; *Barnes* v. *Jeffus,* 173 Ark. 100,

291 S. W. 990; *Bank of Mulberry* v. *Hawkins,* 178 Ark. 504, 10 S. W. 2d 898; *Bennett* v. *Taylor,* 185 Ark. 794, 49 S.W. 2d 608; and *Romich* v. *Kempner Bros. Realty Co.,* 192 Ark. 454, 92 S. W. 2d 215.

But as a part of appellants' complaint, there was a copy of the application of the local corporation to the State Commission and in that application there was the following paragraph which the demurrer admits to be true:

"In order to make these lands and improvements adaptable to the needs of The Mohawk Rubber Company as a plant site, and in order to make it possible for The Mohawk Rubber Company to use these lands and improvements as a plant site, it is necessary, and the Industrial Development Corporation proposes, to add to the lands and buildings a boiler of such nature and design, with all equipment necessarily appurtenant thereto, and in such location, as may be specified by The Mohawk Rubber Company. It proposes further to install heavy industrial machinery required in the manufacturing of vehicle tires. Individual pieces of this machinery weigh in excess of 75 tons. Much of it requires special foundations, some of them as much as eight feet thick. Much of the heavy machinery exceeds a normal floor in height and requires a special adaptation of ceilings and walls. Once the machinery is in place it is essentially a part of the land itself. It cannot be removed except by cutting the machinery into pieces, which cannot be reassembled to its former usefulness. If it is removed, the removal leaves the floor and ceiling of the building damaged and incomplete. The heavy foundations are useful for nothing else except similar machinery, and the ceiling must be repaired before the building can be used for any other purpose. Such machinery is as much a part of the land and buildings, for example, as a furnace or a central air conditioning system with pipes and ducts running throughout the building."

Under the admitted facts, it is clear that the Helena Development Corporation is not erecting a mere "barebones" building, but is erecting a manufacturing estab-

lishment: the boiler and the heavy industrial machinery are necessarily parts of the manufacturing establishment just as are the windows and doors of the building. A careful study of the entire Act 404 convinces us that Section 27, here under attack, was intended as an inhibition against the purchase of equipment and personal property separate from the erection of an industrial establishment: that is, a local corporation could not purchase equipment and personal property alone and transfer or lend or give such equipment to some manufacturing establishment. Here, the boiler and the heavy industrial machinery are to be installed in the building to complete the manufacturing establishment, and when installed in the building will become a part of the realty and conveyed and mortgaged as such. The Helena Development Corporation and the Mohawk Company so understand. In many of our cases we have held that when trade fixtures become a part of the realty, they pass with it as such. Such is the situation here. Some of our cases so holding are: *Waldo Fertilizer Works* v. *Dickens,* 206 Ark. 747, 177 S. W. 2d 398; *Morgan Utilities* v. *Kansas City Life Ins. Co.,* 183 Ark. 492, 37 S. W. 2d 90; *Dent* v. *Bowers,* 166 Ark. 418, 265 S. W. 636, 36 A. L. R. 443; *Peck-Hammond Co.* v. *Walnut Ridge Dist.,* 93 Ark. 77, 123 S. W. 771; *Kansas City So. Ry. Co.* v. *Anderson,* 88 Ark. 129, 113 S. W. 1030; *Thompson* v. *Lewis,* 120 Ark. 252, 179 S. W. 343; *Hoye Coal Co.* v. *Colvin,* 83 Ark. 528, 104 S. W. 207; and *Ozark* v. *Adams,* 73 Ark. 227, 83 S. W. 920. In the light of the foregoing cases, we find no merit in the appellants' fifth point.

Conclusion.

With Sections 20 and 36 of Act 404 stricken, there is still left a valid and workable Act; and the Helena Industrial Corporation can proceed under the Act minus these two sections. The decree is affirmed as to all matters except Sections 20 and 36 of the Act 404; as to them the decree is reversed and the cause is remanded, with directions to enter a decree in accordance with this opin-

ion. All costs will be equally divided between appellants and appellees.

HOLT, J. votes to affirm as to all matters except Section 36 of the Act 404 of 1955.

GEORGE ROSE SMITH, J. not participating.

MYERS *v.* MYERS.

5-980 294 S. W. 2d 67

Opinion delivered June 25, 1956.

[Opinion on rehearing delivered October 22, 1956.]

H. B. Stubblefield, for appellant.

Talley & Owen and *Dale Price,* for appellee.

Ed. F. McFaddin, Associate Justice. In the trial from which comes this appeal, the Chancery Court granted Mr. Myers (appellee) an absolute divorce from Mrs. Myers (appellant), and the decree provided for alimony, child support and visitation. Mrs. Myers brings this appeal, complaining of various rulings of the trial court. These parties have been in litigation for some time concerning their marital difficulties.

First Suit. On February 15, 1954, Mrs. Myers filed suit in the First Division of the Pulaski Chancery Court praying for a divorce from bed and board (i. e., judicial separation) from Mr. Myers: she also prayed for property division, alimony, custody of their two children and support money for them. That was Cause No. 99357 in the First Division of the Pulaski Chancery Court. Mr. Myers contested the suit and the trial resulted in a decree of June 10, 1954, awarding Mrs. Myers a judicial separation and also property rights, alimony, custody of and support money for the two children, and giving Mr.

Myers visitation rights. There was no appeal from that decree; and we refer to it as the "first suit."

Second Suit, or Present Suit. On December 16, 1954, Mr. Myers filed the present suit — No. 101532 in the Second Division of Pulaski Chancery Court — praying for an absolute divorce ". . . and all other just and equitable relief." He alleged that he and his wife had ". . . lived together as man and wife until the first day of February, 1954, at which time it became impossible for plaintiff (Mr. Myers) to longer live with the defendant." He claimed she was guilty of indignities, committed while they were living together. Within a few days after she was served with summons in the present suit, Mrs. Myers filed a petition in the First Division of Pulaski Chancery Court, under the same number as the first suit (i. e., No. 99357), and prayed for an absolute divorce. She then filed her motion in the present suit in the Second Division of the Pulaski Chancery Court (No. 101532), claiming that the First Division of the Pulaski Chancery Court had jurisdiction because of the first suit and her recently filed petition therein praying for an absolute divorce. When such motion was denied, Mrs. Myers filed in the Supreme Court a petition for writ of prohibition. We denied the writ on July 4, 1955 (see *Myers* v. *Williams,* 225 Ark. 290, 281 S. W. 2d 944; and we will refer to that as the "prohibition case"). On October 20, 1955, Mrs. Myers filed her answer in Case No. 101532 in the Second Division of the Pulaski Chancery Court, in which, *inter alia*: (a) she pleaded that the decree in the first suit (No. 99357) was ". . . *res judicata* and as a complete bar to the cause of action alleged and relief sought by . . ." Mr. Myers in the present suit; (b) she sought an absolute divorce from Mr. Myers on the ground of desertion; and (c) she also sought a complete enforcement of the decree rendered in the first suit (No. 99357) in the First Division of the Pulaski Chancery Court, as regards property rights, alimony and support.

With the issues thus joined, trial resulted in a decree awarding Mr. Myers an absolute divorce on the

ground of indignities, and adopting a considerable portion of the decree of the First Division Chancery Court in Case No. 99357 as to property rights, alimony, support for the two children and visitation. From the said decree, rendered on November 3, 1955 in the second case (No. 101532 in the Second Division of Pulaski Chancery Court), Mrs. Myers prosecutes this appeal, making eight contentions, which we will dispose of in this opinion. It is conclusively demonstrated that these parties cannot live together as husband and wife, and each now wants an absolute divorce.

I. *The First Suit And The Prohibition Case.* Mrs. Myers insists that the decree in the first suit was *res judicata* as to all matters, and that our opinion in the prohibition case (*Myers* v. *Williams,* 225 Ark. 290, 281 S. W. 2d 944) is ". . . erroneous and inconsistent and should be expressly overruled."

These contentions can be disposed of in short order. We adhere to our opinion in *Myers* v. *Williams*; and we do not consider the first suit as *res judicata* on property rights, alimony, child custody or support. In her first suit, Mrs. Myers sought only a decree of judicial separation: she did not want an absolute divorce. The decree stated that she continued to have dower rights in certain property. That decree is not *res judicata* on the questions of property rights, custody and child support here involved. In *Myers* v. *Williams, supra,* we quoted from Leflar on "Conflict of Laws," § 139, page 286:

"A decree for judicial separation, which used to be called a decree 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."

II. *Mr. Myers' Alleged Grounds For Divorce.* Mrs. Myers claims that Mr. Myers did not prove his cause of action for divorce; and in this contention we agree with her. As heretofore noted, Mr. Myers claimed in his complaint in the present case that he and Mrs. Myers had

". . . lived together as husband and wife until the first day of February, 1954, at which time it became impossible for plaintiff to longer live with the defendant. That during the time he and the defendant were living together as man and wife, she treated him with such ridicule, neglect, abuse and open insult . . . until his condition in life became intolerable . . ." In other words, Mr. Myers did not allege or prove any indignities suffered by him after the first day of February, 1954;[1] yet on June 10, 1954, the First Division of the Pulaski Chancery Court heard the parties and awarded Mrs. Myers a judicial separation. Any claim for indignities suffered by Mr. Myers prior to the date of that decree was lost to him by that decree because indignities had been the main issue in that litigation. The evidence in the case at bar is insufficient to award Mr. Myers a decree for any indignities suffered by him after the decree of June 10, 1954. Therefore, we hold that Mr. Myers did not prove his cause of action for divorce; and the Chancery Court was in error in awarding him a decree.

III. *Mrs. Myers' Alleged Grounds For Absolute Divorce.* In her pleadings filed in this case (No. 101532 in the Second Division of Pulaski Chancery Court) on October 20, 1955, Mrs. Myers alleged:

"That in January, 1954, said Johnnie Myers willfully deserted this defendant without reasonable cause, since which time said plaintiff has absented himself from this defendant continuously without reasonable cause, which desertion on the part of plaintiff for more than a year

[1] That the attorneys recognized that there was no testimony of matters after February, 1954, is shown by this portion of the present record:

"MR. OWEN (attorney for Mr. Myers): I believe that Mr. Stubblefield, if I understood and remember correctly, objected to the Court considering anything that happened prior to the June decree because it is *res judicata.*

"MR. STUBBLEFIELD (attorney for Mrs. Myers): No, subsequent to the separation. Your complaint alleges grounds that happened during the time they were living together.

"MR. OWEN: That is all right, we have shown very few instances — —

"THE COURT: Yes, the main thing the Court considers is that which happened prior to the separation."

. . . Defendant, Louise Myers, is entitled to a decree of divorce dissolving the bonds of matrimony subsisting between her and plaintiff . . ."

The evidence in the case at bar establishes Mrs. Myers' case for absolute divorce on the ground of desertion which had continued for more than one year prior to the filing of her pleadings alleging such ground for divorce. The Second Division of the Chancery Court in the case at bar should have awarded Mrs. Myers a divorce instead of awarding it to Mr. Myers. It is true that Mrs. Myers has some very strange religious beliefs, and that at one time it was suspected that she was mentally unbalanced: yet such matters do not prevent her from being entitled to a divorce on the ground of desertion. At all events, she has never been declared *non compos* and she still has the custody of the two children.

IV. *The Matter Of Property Rights, Alimony, Child Custody And Visitation.* As heretofore stated, in the decree from which comes this appeal the Second Division of Pulaski Chancery Court adopted in many places, almost verbatim, the decree that had been previously rendered in the First Division of the Pulaski Chancery Court in the Case No. 99357. There were two instances of difference.

In the first suit, the Court set aside certain conveyances that Mr. Myers had made to an uncle, involving nine parcels of real property, and vested the title in Mr. Myers subject to the inchoate dower rights of his wife. There is no showing whatsoever in the present case that the parties have not disposed of this property; and in the absence of all evidence concerning what has happened to the property since the first suit, we cannot indulge the presumption that Mrs. Myers has not joined with Mr. Myers in disposing of her dower interest. In short, Mrs. Myers has failed to establish in this record that Mr. Myers had any such property or that the Trial Court was in error in failing to award her any dower in any real property. The burden was on her in the Trial Court to establish her claim and is on her here to establish error committed by the Trial Court. In the absence of any evi-

dence as to property, we cannot say that error has been established. See *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6; and see also 27 C. J. S. 1138.

In the present decree, the matter of Mr. Myers' right of visitation to see his two children is arranged a little differently from what it was in the first decree; but we find no error in this particular. The court having jurisdiction can always change the rules as to visitation; and can also change child custody where a change in conditions is shown and where the best interests of the child so dictate. Mrs. Myers complains that in the decree in the first suit, she was awarded the absolute custody of the two children, whereas in the decree in the present suit the court said, as regards custody:

"The parties are the parents of two minor children who are presently residing with the defendant herein, and the cause with reference to the permanent custody of such children should be passed until a later time; that pending such, the plaintiff should have the said children over the week-ends, that is, Saturday and Sunday of each week."

The present decree certainly recognizes that for the present Mrs. Myers retains the custody of the children, because the decree further recites that Mrs. Myers is awarded ". . . the possession of and right to occupy with said two children as their home . . .," certain property in North Little Rock, and that Mr. Myers is to continue to pay all the utility bills except telephone bills; all subject to further orders of the Court.

V. *Attorney Fees, Court Costs And Directive.* In the first suit Mr. Myers was ordered to pay Mrs. Myers' attorney a fee of $500.00. In this second suit the trial court ordered Mr. Myers to pay Mrs. Myers' attorney a fee of $300.00, plus certain expense items. We adjudge that Mr. Myers shall pay Mrs. Myers' attorney an additional fee of $250.00 for services in this Court. We also adjudge all costs of both courts to be paid by Mr. Myers. In short, the only change we make in the Chancery decree from which comes this appeal is that the court should

have decreed a divorce for Mrs. Myers on the ground of desertion, instead of to Mr. Myers on the alleged ground of indignities. To that extent, and to that extent only, the decree is reversed and the cause remanded, with directions to enter a decree awarding Mrs. Myers a divorce. In all other respects the decree of the Chancery Court is affirmed.

Justices ROBINSON and GEORGE ROSE SMITH dissent in part.

ON REHEARING

GEORGE ROSE SMITH, J., on rehearing. In a petition for rehearing the appellant insists that her statutory interest in the appellee's real property should not be extinguished by reason of the fact that this issue was not fully developed at the trial. We are of the opinion that this contention is well taken and that the cause should be remanded for further proof on this point.

When a divorce is awarded to the wife the statute affirmatively requires that she be granted a third of the husband's personal property absolutely and a third of his real property for life. Ark. Stats. 1947, § 34-1214. We have uniformly been careful to protect the wife's rights despite deficiencies either in the pleadings or in the proof. In *Hegwood* v. *Hegwood,* 133 Ark. 160, 202 S. W. 35, the husband appealed from a decree of divorce which purported to award the wife an interest in certain town lots that were not described in the pleadings or the proof. Although there was nothing in the record to support the chancellor's action we affirmed the decree, saying: "The division of the property is a mere incident to the divorce suit and it is not essential to the jurisdiction of the court that the pleadings should set forth the property. The decree for divorce draws to the court the power to ascertain the description of the property owned by the husband for the purpose of awarding to the divorced wife her share thereof. Of course, there ought to be some evidence of the existence and description of the property upon which the court acts, but appellant is in no attitude to complain, for, if he is not the owner of property he suffers no injury by the award, and if he does own the

property described, the divorced wife is entitled to the share which the court awarded to her."

Similar reasoning was followed in *Parrish* v. *Parrish,* 195 Ark. 766, 114 S. W. 2d 29. There, as in the case at bar, the wife asked for a divorce and a division of the property, but there, as here, she failed to prove the extent of her husband's holdings. "The question as to the ownership and disposition of the property was not developed in the court below, and the court did not pass on this question." The wife was granted a divorce and, despite this deficiency in her proof, appealed from the chancellor's failure to make an award of property rights. We held that the court should have heard evidence on the question and affirmed the decree without prejudice to the wife's right to bring suit later for her interest in the property.

In the present case the wife's position is materially stronger than it was in the decisions just cited. Here the chancellor denied the wife's prayer for a divorce and so had no reason to ascertain the extent of the husband's property. Our original opinion reversed the chancellor's decree and awarded a divorce to the wife rather than to the husband. Since it would have been the chancellor's duty to make a property division if he had granted the divorce to the wife in the first instance, it is similarly our place to protect her rights when the divorce is granted in this court. The defect of proof was considered to be immaterial in the *Parrish* case, *supra,* and there is even more reason for disregarding it in the case at bar.

The record contains a description of the property that the appellee owned when his fraudulent conveyance was set aside in the First Division of the chancery court. We do not think it appropriate, however, to allow the appellant a life estate in a third of that land, without additional proof. Even though the appellant is entitled to her statutory interest in the appellee's property, the issue of alimony in turn depends upon the respective financial conditions of the parties after that award has been made. *Reed* v. *Reed,* 223 Ark. 292, 265 S. W. 2d 531. Fairness requires that these allied issues be re-examined together.

We accordingly exercise our discretion to remand the cause for further proof upon these issues. *Massey* v. *Tyra,* 217 Ark. 970, 234 S. W. 2d 759. To this extent the petition for rehearing is granted.

McFaddin, J., dissents to the court's action in granting the petition for rehearing.

Burton *v.* Griffith.

5-1011 291 S. W. 2d 516

Opinion delivered June 25, 1956.

Wood & Smith, for appellant.

Rose, Meek, House, Barron & Nash and *Phillip Carroll,* for appellee.

Minor W. Millwee, Associate Justice. This is a suit by appellants, as trustees of the Methodist Episcopal Church of Sweet Home, Arkansas, to quiet their title by adverse possession to a certain lot upon which appellee, M. A. Griffith, constructed a two-room house in 1955. Trial resulted in a decree dismissing appellants' complaint. The sole issue on this appeal is whether this holding is against a preponderance of the evidence.

In *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 706, this court stated the applicable law which has since been repeatedly approved, as follows: "When a landowner, through mistake as to his boundary line, takes possession of land of an adjacent owner intending to claim only to the true boundary, such possession is not adverse, and, though continued for the statutory period,

does not divest title; but when he takes possession of the land under the belief that he owns it, encloses it and holds it continuously for the statutory period under claim of ownership without any recognition of the possible right of another thereto on account of mistake in the boundary line, such possession and holding is adverse, and, when continued for the statutory period, will divest the title of the former owner who has been thus excluded from possession."

Appellants have owned and maintained a church on lot 14 of Nelson Burton Survey of the property in Sweet Home, Arkansas, for many years. The lot embraces about one acre and lies immediately north of and adjacent to lot 15 which is the property in controversy here. Both lots are rectangular in shape and the same width, but lot 15 contains only about ⅓ of an acre. According to the testimony of the trustees and other members, the church had occupied, used and claimed title to lot 15 for over 50 years prior to July, 1955 when appellees began building the house on it. Lot 16 lies south of and adjacent to lot 15 and the church has used and claimed the land north of a line marked by a fence now located on a line between the two lots. According to appellants' witnesses, the church maintained a parsonage for many years on the lot on which appellees built the house. This parsonage was torn down and rebuilt on the north side of the church building about 12 years ago. After that time, the church used the lot as a garden and recreation area and for the maintenance of a well until July, 1955. While counsel for appellees on cross-examination diligently sought an admission by appellants' witnesses that they had no intent to claim adversely because they would not want to take property that actually belonged to someone else, the net effect of their testimony is that the church occupied the disputed strip for over 50 years under an absolute claim of ownership and without regard to the true boundary.

Appellees admittedly have and claim no record title to the disputed tract and entered the property as mere squatters with the intent to retain possession for the required time to acquire title by adverse possession. While

one witness for appellees testified that the original parsonage was not located within the old fence line, we think his testimony is contrary to the preponderance of the evidence.

We are convinced that appellants established their claim of title by adverse possession in accordance with the rule laid down in *Goodwin* v. *Garibaldi,* supra, by a clear preponderance of the evidence. The decree is accordingly reversed and the cause remanded with directions to enter a decree consistent with this conclusion.

GEORGE ROSE SMITH, J., not participating.

LAWSON *v.* LAWSON.

5-1000 291 S. W. 2d 518

Opinion delivered June 25, 1956.

Roy E. Danuser, for appellant.

W. J. Denton, for appellee.

GEORGE ROSE SMITH, J. This was at first a suit for separate maintenance, brought by the appellee, Margaret Lawson. The chancellor refused to grant that relief, and there is no appeal from that part of the decree. By cross-complaint the defendant sought cancellation of a deed by which he had conveyed to his wife his half interest in certain land which the couple owned jointly. The principal appeal is from the chancellor's

refusal to cancel that deed. The appellee has perfected a cross appeal from the trial court's action in awarding to the appellant an eight-year-old car of admittedly small value. We find no merit in the cross appeal and will not discuss it in detail.

On direct appeal the main issue is whether the proof supports Lawson's charge that his wife obtained the deed by means of fraud, undue influence, and duress. Mr. and Mrs. Lawson bought the property, consisting of a grocery store and tourist court, in 1950, taking the title in Mrs. Lawson's name. She sued for a divorce in 1954, but the court dismissed her complaint for want of equity and also decreed that the real property standing in Mrs. Lawson's name was in fact jointly owned.

Although the couple resumed their marital relationship after the dismissal of the divorce case, Mrs. Lawson gave notice of appeal from the decree and paid for a transcript of the record. On May 26, 1955, which was within the time allowed for lodging the appeal in the prior case, Lawson executed the deed which he now asks us to set aside. The testimony about Lawson's reason for signing the deed is in such complete conflict that the issue narrows down to one of credibility.

Mrs. Lawson testifies that the deed was given in return for her promise not to carry through the appeal in the case then pending. Her version of the matter is corroborated by the fact that the appeal was actually discontinued, even though the record had been ordered and paid for.

Lawson denies that the lapse of the appeal had anything to do with his conveyance of the property. He says that his wife took advantage of his great devotion for Eugene Martini, who is Mrs. Lawson's grown son by an earlier marriage and whom Lawson says he has treated as his own son. Martini is a mentally disabled veteran of World War II; he has been in and out of various hospitals operated by the federal Veterans Administration. Lawson testifies that the appellee had her son put in jail on May 25, 1955, and threatened to send him to a mental institution if Lawson refused to relinquish his

interest in the real estate. According to Lawson he yielded to his wife's demands and signed the deed in the hope of keeping Martini in the family home. This testimony is denied by the appellee, who says that she had her son confined because he had become unmanageable. She says that she agreed not to send Martini to the hospital only because Lawson promised never to mistreat her or her son again. Lawson did not keep that promise, and Mrs. Lawson was forced to find a separate home for herself and her son. She thinks that Martini's condition has improved since he has been away from his stepfather.

The issue, as we have said, is largely that of which party is to be believed. Each attacked the other's credibility, Lawson by showing that his wife's reputation for truthfulness is bad, Mrs. Lawson by showing that her husband has been confined in three federal penitentiaries. The chancellor, who had the great advantage of seeing the witnesses on the stand, was not convinced by Lawson's evidence, and we cannot say that he was wrong. Clear and convincing proof is needed in a suit to cancel a deed for fraud in its procurement. *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253. Here the proof does not meet that test. On the one hand, there is nothing improbable in Mrs. Lawson's explanation of the matter. On the other, Lawson's version is at least rather hard to believe. It is unlikely that a mother would use her husband's affection for his stepson as a lever with which to pry away his property. It would certainly be unusual for a mother, whose love for her son is not otherwise questioned, to have her child put in jail in furtherance of a scheme such as Lawson charges in this case. There is reason to doubt if Lawson, after having regained his half interest in the land by means of a lawsuit with his wife, would within a few months have again been deceived into putting the property in her name. We need not determine whether the state of facts described by Lawson would amount to coercion, for the facts themselves have not been sufficiently proved.

Lawson also appeals from the chancellor's refusal to reopen the case to hear certain newly discovered evi-

dence. Lawson's petition for a bill of review is accompanied by the affidavits of five persons who say that Mrs. Lawson told each of them of her plan to obtain Lawson's property by threatening to send Eugene Martini to a mental institution. Two of these affiants had testified in behalf of the appellant at the trial. The chancellor, in denying the request for a bill of review, stated that one of the two had been an obviously prejudiced witness. The other made false statements either at the trial or in the affidavit, as his testimony cannot be reconciled. Apart from these considerations, the newly discovered proof is merely cumulative to other evidence that pertained to the identical issue at the original trial. The chancellor did not abuse his discretion in declining to reopen the case. *Richardson* v. *Sallee,* 207 Ark. 915, 183 S. W. 2d 508.

Affirmed.

BRYAN *v.* THOMAS.

5-1008 292 S. W. 2d 552

Opinion delivered June 25, 1956.

Talley & Owen and *William L. Blair,* for appellant.

Thompson & Stripling and *Wootton, Land & Matthews,* for appellee.

PAUL WARD, Associate Justice. A brief general statement of the facts preceding and leading up to this litigation will help to understand the issues involved on this appeal. Appellants, Vance Bryan and his wife Charlene, constructed the elaborate Jack Tar Hotel Courts in Hot Springs in 1947. In 1950 the properties were incorporated under the name of Jack Tar of Arkansas, Inc. with appellants owning practically all if not all of the stock. Some time thereafter appellants conveyed several parcels of real estate to the corporation. Substantially all of the money for the construction of the said hotel courts was financed initially by the Reconstruction Finance Corporation. Prior to the date of the incorporation appellants found themselves in financial difficulty and at different times borrowed large sums of money from Mr. C. D. Thomas, a resident of Texas. Most of appellants' negotiations with Thomas were conducted through Mr. Thomas' attorney, A. J. Thompson who lived at Nacogdoches, Texas. The first loan, in the amount of $100,000, which Thomas made appellants was secured by a bus station at Kilgore, Texas, a drug store

located near the hotel courts, and a piece of property on Lake Hamilton near Hot Springs. On November 23, 1951 (after the incorporation) the several loans made by Thomas to appellants were financed by a note in the total sum of $293,074.67, signed by appellants. This note was secured by the three properties above mentioned and also other properties.

In the fall of 1953 appellants became delinquent on the R. F. C. payments, and in order to avoid a foreclosure, tried to borrow an additional $22,500 from Thomas. Upon Thomas' refusal Mr. Bryan offered to transfer to Thomas one-half of the capital stock of the Jack Tar Corporation. This offer by Bryan was countered by an offer made by Attorney Thompson that Thomas would accept all of the stock in cancellation of the debt, and an agreement to this effect was prepared. Said agreement was mailed to Bryan on October 22, 1953 and on the following day Thomas and Thompson went to Hot Springs to meet with Bryan and to get the agreement signed.

The testimony regarding what happened at this meeting in the office of the hotel courts on October 24, 1953 has an important bearing upon the issues in this case.

Present at this meeting on October 24 was Thomas, Thompson, Bryan and Arnold Adams. Bryan states that he invited Arnold Adams, an attorney from Harrison, Arkansas, to be present because he knew that Adams had been representing the R. F. C. and he wanted him present for advice. It is admitted by all parties that one of the agreements reached was that the corporation would deed to Bryan all properties on which neither Thomas nor the R. F. C. had a lien. The particular properties involved in this litigation are (a) the drug store located adjacent to other hotel properties; (b) the manager's home which was directly adjacent to the hotel courts, and; (c) certain properties situated on Lake Hamilton, hereafter called the lake property. It is admitted by all parties that Thomas had a lien on the drug store property and the lake property but that neither

Thomas nor the R. F. C. had a lien on the manager's home. After whatever agreements were reached at this conference, Arnold Adams was instructed to draw up deeds and papers carrying out said agreements, and pursuant thereto, he prepared a deed conveying the drug store to appellant Bryan and the lake property to appellant Charlene Bryan. These deeds were sent to Thompson for him to affix the corporate seal, which act he did and returned the deeds. It is the contention of appellants that said deeds were prepared in accordance with the agreement reached by the said parties. It is the contention of Thomas that the said two pieces of property were to be left in the corporation pursuant to the original agreement referred to above, since neither piece of property was clear of liens. Appellants contend that this part of the original agreement was changed during the discussion and that the deeds were prepared in accordance with the changed agreement. Thomas brought this suit to have said deeds cancelled.

A third disagreement between the parties arises out of the conference held on October 24, 1953. In that connection Thomas and Thompson give this version of what occurred: Bryan stated in effect that he had no ready cash, that he would therefore probably lose any property conveyed to him, but that he had approximately $15,500 in checks which the corporation owed him, and that he, Bryan, reached into a drawer and held up a large number of checks representing to them to be in the amount of said sum, and; That Thomas thereupon agreed to take care of said checks by reducing liens against other property belonging to Bryan to the extent of said amount. Bryan's version of what occurred is, in effect, that the corporation owed him to the extent of approximately $15,500 and that the checks were evidence of part of that amount only.

On April 14, 1955 appellees, C. D. Thomas and Jack Tar of Arkansas, Inc. filed a complaint, with numerous exhibits attached, setting forth in detail the agreements entered into in the office of the hotel court on October 24, 1953 and describing the circumstances under which the deeds above mentioned were executed. Said com-

plaint, insofar as it pertains to the issues raised on this appeal as above indicated, alleged: (a) A fraudulent scheme on the part of Bryan to induce Thomas to pay off certain debts and satisfy certain liens on certain described property belonging to Bryan and prayed for judgment in the amount of $7,361.83 against Bryan including the right of subrogation as to the liens discharged; (b) that Bryan falsely and fraudulently represented that he individually [and not the corporation] was the owner of the manager's home and thereby induced Thomas to agree to convey to Bryan the lake property in exchange thereof, and the prayer was for the cancellation of the deed by which the corporation conveyed the lake property to Bryan, and; (c) That there was no consideration passing to the corporation or to Thomas for the conveyance, by the corporation, of the drug store to Bryan, and that said purported conveyance was obtained through the fraudulent scheme of Bryan to enrich himself at the expense of Thomas and the corporation, and the prayer was for the cancellation of said deed.

(a) The trial court rendered judgment in favor of C. D. Thomas against appellants in the total sum of $7,361.83 and subrogated Thomas to the rights of the liens which he had satisfied in that amount theretofore existing on a part of Lots 4, 5, 6 and 14 of Block 157 of the United States Hot Springs Reservation (described by metes and bounds in the transcript) and on Lot 8, Block 156 and a part of Lot 9 Block 156 [described by metes and bounds in the transcript] of the United States Hot Springs Reservation. Appellants appeal from a portion of the judgment [$5,361.83] and from the order declaring a lien therefor on specific property. After a careful consideration of all of the testimony bearing on this issue we think the judgment of the trial court should be sustained on this item. Regardless of whether or not Bryan represented, on October 24, 1953, that he had checks against the corporation in the amount of $15,500, it does appear from the record, apparently undisputed by appellants, that the corporation was indebted to him in the amount of $7,513.31 as of date June 30, 1953 and

that this amount did not include checks which Bryan was holding against the corporation. It is admitted by appellant that he did cash checks on the corporation in the amount of $4,889.89. These two items together total only $12,403.20. On the other hand there is evidence from which the chancellor was justified in finding that Thomas paid out approximately $15,000 on behalf of Bryan in addition to the checks which Bryan cashed against the corporation in the amount above stated. Bryan's own testimony shows that he did not have possession of any checks against the corporation other than those which he cashed in the amount of $4,889.89, and he admits that the latter amount was paid to him by the corporation. The testimony justified the trial court also in finding that Thomas paid off liens on specific properties as above set forth and it was correct in subrogating Thomas to all the liens of the former lien holders against Bryan's property.

(b) Some of the testimony and facts relative to the controversy over the manager's home and the lake property are undisputed, and some are in dispute. It is admitted the title to both pieces of property was in the corporation at the time the agreements were reached on October 24, 1953; that neither Thomas nor the R. F. C. had a lien on the manager's home but Thomas did have a lien on the lake property; that there was an agreement that Thomas would trade the lake property for the manager's home, and; that a deed was executed by the corporation conveying the lake property to appellant, Charlene Bryan. There is a sharp disagreement as to other pertinent facts. Thomas contends that on the date above mentioned, Bryan represented that he held title to the manager's home in his own name, while Bryan denies making such statement and contends that Thomas knew or should have known from the records that the title was in the corporation. Thomas concedes that he did agree with Bryan that the corporation would convey back to Bryan all properties on which neither he nor the R. F. C. had a lien *or which were not necessary to the conduct of the business of the hotel courts,* while Bryan and Adams state that nothing was said about the property being

necessary to the business. If the testimony of Bryan and Adams is accepted then clearly the court was wrong in ordering a cancellation of the deed to Charlene Bryan. This is true because it would make no difference whether the title to the manager's home was in the corporation or in Bryan since Bryan was entitled to this piece of property under the agreement as they all understood it. A different situation would be presented however if appellees' testimony is accepted and if this was all the testimony, in which event it would be material to determine whether or not the manager's home was in fact necessary to conducting the business of the hotel courts.

There are however several facts and circumstances which throw light on the disputed question and we think they are sufficient to call for a reversal of the trial court's decree. On October 24, 1953, while Thomas and his attorney were in conference with Bryan and Arnold Adams, some kind of an agreement was reached and Adams was to prepare the deeds. Following these instructions Adams prepared a deed by which the corporation conveyed the lake property to Charlene Bryan. This deed was mailed to Mr. Thompson who is Mr. Thomas' attorney and who admits that he was looking after Mr. Thomas' business affairs as well as his legal affairs in connection with this deal. Mr. Thompson had every opportunity to examine the deed and he affixed the seal of the corporation and returned it to Bryan without comment or objection. A casual examination of the description would have revealed the nature of the property. It is a significant fact that Thomas never requested Bryan to deed the manager's home to the corporation. It would appear to us that if Thomas and Thompson were under the impression that the title to the manager's home was in Bryan that they would have been intensely interested in seeing that Bryan executed a deed to the corporation in exchange for the deed by the corporation to Charlene Bryan. It is also significant that Thomas in the written agreement executed on October 24, 1953, released his lien on the lake property. This fact, we think, stoutly confirms appellants' contention. This suit by Thomas to cancel the deed by which the

corporation conveyed the lake property to Charlene Bryan is based on fraud. In our opinion the evidence falls short of discharging the burden on Thomas to prove such allegation. In this kind of a case fraud is never presumed but must be shown by clear and convincing evidence. The rule is well stated in *Ellis* v. *Ellis,* 220 Ark. 639, 249 S. W. 2d 302, involving the cancellation of a deed where the court, after stating "fraud is never presumed" said: "The rule is well settled that before we would be warranted in setting aside, or altering this deed, the burden was upon appellant to show by a preponderance of the evidence that is clear and convincing that fraud had been practiced upon her in procuring its execution."

(c) A different situation is presented in regard to the court's action in cancelling the deed executed by the corporation conveying the drug store to Bryan, and we cannot say its finding is not supported by the testimony weighed under the rule above announced.

As in the case of the lake property, the deed in question was prepared by Arnold Adams according to the instructions which he is supposed to have received during the conference on October 24, 1953. The deed which Adams prepared and sent to Thompson for the corporate seal contained the descriptions of several parcels of land, some of which were by metes and bounds and rather lengthy. One parcel of land described in the deed was the drug store and it reads: "Lot 9 in Block 154 of Hot Springs Reservation, as surveyed, mapped and platted by the United States Hot Springs Commissioners." There was nothing, other than this description, to indicate it was the drug store property. It is admitted that Thomas had a lien on the drug store property. It is likewise undisputed that neither of the three written agreements provided for a conveyance of this property from the corporation to Bryan, or for releasing Thomas' lien thereon. This fact we consider most persuasive against appellants' contention herein. It would seem strange indeed that four intelligent people would draft three separate written agreements summarizing four or five hours of discussion, and overlook an

item of the importance and value of the drug store here involved. It is contended however by appellants that there was an oral agreement, aside from the written agreements, that the drug store property would be deeded to Bryan. Appellees positively deny that any such agreement was made.

It appears to us that the most significant and vital testimony revolves around the dispute as to whether or not Mr. Thompson, Thomas' attorney, made a partial draft of a deed which was supposed to have been given to Arnold Adams as a part of his instructions, and which partially prepared deed contained the legal description of the drug store with the words "drug store" written in bold letters at the beginning of the legal descriptions. A photostatic copy of this partially prepared deed was introduced in the record and is made an exhibit to appellees' brief. Mr. Thompson denies that he prepared this instrument but Mr. Adams is of the opinion that he did prepare it. If we were convinced that Mr. Thompson prepared the instrument, knowing it contained a description of the drug store, we would certainly be strongly persuaded that the chancellor's ruling was against the evidence. We do not question but that Mr. Adams is sincere in believing that Mr. Thompson did prepare the questioned instrument but a careful reading of the record convinces us that Mr. Adams must have been misled by someone.

It appears from the testimony that all parties were in a room and that there was only one typewriter in the room, and that the two supplemental agreements were written on that typewriter at that time, and, further, that the partial deed in question was written on the same typewriter. Adams states that he is not sure who handed the questioned instrument to him, but he is sure that he did not write the words "drug store" on the face of the instrument but that he did make other penciled notations on the margin which appear in the photostatic copy. A careful examination of the said photostatic copy and a comparison of it with the original two supplemental agreements makes it impossible for us to believe that they were all written on the same typewriter. The typ-

ing used on the agreements appears to have been written on a machine with pica type while the questioned instrument appears to have been written on a machine with elite type. This comparison also shows that 60 spaces on the machine writing the agreements extends approximately one-half inch farther than 60 spaces on the machine which wrote the questioned instrument. It further appears that there is a rather marked but distinct dis-similarity in certain letters and figures found in the agreements and the questioned instrument. There can be no doubt, for instance, that the typewriter which made the figures "5 and 6" on the questioned instrument was not the same typewriter which made the same figures on the other instruments.

The deed from the corporation to Bryan conveying the drug store property was, as above indicated, written by Mr. Adams in his office at Harrison and was mailed to Mr. Thompson on October 29, 1953. At the same time Mr. Adams wrote a letter to Mr. Thompson at Nacogdoches, Texas which he enclosed with the deed. In this letter he stated: "Enclosed are corporation warranty deeds conveying that part of Jack Tar of Arkansas, Inc. *which was not under mortgage* to either the R. F. C. or Mr. Thomas." (emphasis supplied) It is admitted, of course, that the drug store did not fall within this classification. While Mr. Adams explained that this was just a mistake on his part, yet the fact remains that this statement in the letter was misleading to Thompson and may account for his failure to examine more carefully the descriptions in the deeds, it being remembered that the words "drug store" were not a part of the description. Appellants call our attention to the fact that Bryan, as manager of the hotel courts, made regular monthly reports to Thompson of all proceeds derived from the business and that none of the reports showed any proceeds from the drug store. Mr. Thompson's explanation of this is that he was only interested in the gross receipts from the entire business and attached no significance to the source from which they were derived.

In view of what has above been set forth, and after a careful consideration of all of the testimony, we are unable to say that the trial court was in error in decreeing a cancellation of this deed.

We cannot agree with appellants' contention that the court erred in terminating their right of redemption. In paragraph 4 of the original agreement executed on October 24, 1953 Bryan was given "an option to refund or refinance the indebtedness of said corporation and . . . shall have 12 months from the date hereof in which to do so . . ." This was followed by certain conditions that Bryan would pay to Thomas all funds due him including interest, expenses and attorney fee. Paragraph 5 of the agreement provides in effect that this right of redemption was subject to the right of Thomas to sell the property for $1,200,000.00 and, after paying all debts and expenses, remit to Bryan the balance. We do not think the latter clause in any way extended the 12 month period in which Bryan had a right to redeem. The question here considered is further complicated however by a paragraph in the supplemental agreement in which Thomas stated: "I further agree that if sale is not made within the twelve months provided in the contract, but is sold by me at any time thereafter, that you will receive your then equity in the property in cash or its equivalent." Notwithstanding the above quoted provision, we have reached the conclusion, after a careful consideration of all of the provisions in the different agreements and letters, that appellants were entitled, at most, to a reasonable time in which to redeem. Certainly there must be some terminating point. As was stated in the case of *McCollum* v. *Niemeyer,* 142 Ark. 471, 219 S. W. 746, where a similar issue was under consideration: "We think it would be a strained construction to say the clause meant that appellant should have all time, or forever, in which to make the election." This suit was filed approximately one and one-half years after appellants were granted the right to redeem, yet it appears that they have not attempted to avail themselves of that right. Under these

circumstances we are unwilling to say that the court was not justified in terminating appellants' right to redeem.

It is ably insisted by appellants that the entire decree of the trial court should be reversed for the reason that this litigation was barred under the doctrine of *res judicata.* This contention is based on the fact that on April 30, 1954 the Jack Tar of Ark., Inc. brought an injunction suit against Bryan to prevent him from cutting off the thermal waters from the hot springs to the Jack Tar Bathhouse. We think however there are at least two reasons why appellants' contention in this matter cannot be sustained. In the first place C. D. Thomas and Charlene Bryan, who are parties to the instant litigation, were not parties to the injunction proceeding. Another reason is: In his answer to the injunction suit Bryan made certain allegations relative to the original agreement entered into on October 24, 1953, heretofore referred to, and on motion of Jack Tar of Ark., Inc. these allegations on the part of Bryan were stricken from the answer as not germane to the suit. This had the effect of confining the issues to the right of Bryan to cut off the flow of water, and for that reason the injunction suit could not be *res judicata* of the issues involved in this litigation.

It is therefore our conclusion that the decree of the trial court should be, and it is in all things hereby affirmed, except that it is reversed insofar as it decreed a cancellation of the deed conveying the lake property to Charlene Bryan. Since the trial court should make the proper orders to restore the lake property to Charlene Bryan this cause is remanded for that purpose only.

TWIN CITY LINES, INC. *v.* COOK.

5-1018 291 S. W. 2d 810

Opinion delivered June 25, 1956.

Harper, Harper & Young, for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

PAUL WARD, Associate Justice. Two main questions are presented by this appeal. One is the effect of a Motion for New Trial in connection with the appeal procedure under Act 555 of 1953 and the other is the sufficiency of the testimony to justify an instruction permitting recovery for permanent injury.

On January 30, 1955 appellee, Tressie Mae Cook, was injured while riding in a bus operated by appellant in the City of Fort Smith. No question is raised here as to appellant's liability for the injury, and there is little, if any, conflict in the testimony relating to the extent of the injury. There is however a dispute, later discussed, as to whether the testimony indicates a permanent injury.

On a complaint by Tressie Mae Cook alleging injury to her right knee and leg, a linear fracture through the neck of the femur of her right hip, resulting in hospitalization, an operation and consequent pain and suffering now and in the future, in which complaint her husband joined alleging the loss of the services and the consortium of his wife and that he had been caused to expend large sums of money for hospital, doctor and medical expenses and would have to continue to do so in the future,

the jury awarded a verdict in favor of Mrs. Cook in the amount of $10,000 and in favor of Mr. Cook in the amount of $2,000.

The trial court, among other instructions not here questioned, told the jury by Instruction No. 23 that it could, in awarding damages to Mrs. Cook, take into consideration "any pain or suffering which she may sustain or suffer at the present time or in the future" and "whether the injuries, if any, are temporary or permanent."

To the above instruction appellant at the time objected as follows: "We object specifically to the submission of the question of permanent disability or permanent loss. There is no proof that she will lose any earnings as a result of this in the future. The defendant specifically objects to the submitting of the issue of permanent disability or of loss of future earnings . . . for the reason that there is no proof that she will sustain any permanent diminishment of her earning capacity." THE COURT: "That is overruled and your exceptions saved."

Motion for New Trial. In taking this appeal appellant complied with all the requirements of the new procedure under Act 555 of 1953, and in addition thereto he filed a Motion for New Trial. In this motion, however, appellant made no mention of the court's alleged error in giving the instruction set forth above. Appellees insist that appellant cannot now be heard to complain of the alleged erroneous instruction for the reason that it was not carried forward in said motion. This procedural question is presented to this court for the first time, but to us it is clear that appellees' contention cannot be sustained. Section 11 of the aforementioned act states that: "No Motion for a New Trial and no assignment of errors shall be necessary." In lieu thereof said act provides, in Section 8, for a designation of proceedings and evidence to be contained in the record on appeal and, in Section 21, for the method of making known to the court the objections to its rulings. Under the rules recently adopted by this court the latter method is the standard

procedure for perfecting appeals. If appellant had made no motion for a new trial there could be no question about it having properly perfected its appeal and its right to urge error on the part of the court in giving the above mentioned instruction. It would be a strained construction of said Act 555 to hold that appellant is in a more disadvantageous position by having filed a defective motion for a new trial than he would have been in if he had filed no such motion at all. We therefore hold that appellant has properly raised the question of the propriety of the trial court's instruction above set forth.

Sufficiency of the evidence. Appellant strongly and ably urges that the record contains no evidence to justify the giving of Instruction No. 23. In support of this contention appellant quotes extensively from *Missouri Pacific Transportation Company* v. *Kinney,* 199 Ark. 512, 135 S. W. 2d 56, where this court in a somewhat similar situation, among other things, said: "Before such a recovery can be allowed, the permanency of the injury must be made to appear from the evidence with reasonable certainty and that future pain and suffering are inevitable and if they appear to be only probable or uncertain they cannot be taken into the estimate." The same opinion quotes with approval from another decision this language: "The testimony, viewed in the strongest light in favor of appellee, does not make it reasonably certain that Wharton Bird was permanently injured. Unless there is testimony tending to show with reasonable certainty that the injury is permanent, the court should not permit the jury to assess any damages for permanent injury." Appellant then, in attempting to show that the testimony in the case under consideration did not come up to the standard announced in the above quoted rules, sets out portions of the testimony of Dr. W. E. Knight who treated Mrs. Cook:

"Q. If I understand you correctly, doctor, there's nothing in Mrs. Cook's present medical picture that indicates anything to you except a perfect result. Is that right?

A. That is right.

Q. And this other possibility that you have described which you say occurs in a certain percentage of these cases, is purely speculative. Is that correct?

A. That's right.

Q. You find nothing in her condition to base an opinion that that might occur?

A. I don't expect it to happen to her.

Q. So there's nothing there to cause you to suspect it, is there?

A. No.

Q. But you would have to speculate as to whether she'd have any disability or not, wouldn't you?

A. That's very speculative; yes.

Q. And there's nothing in her present condition, or the studies you have made of her, to indicate that she will obtain anything other than a perfect result?

A. That's what we hope and expect.

Q. But wouldn't the answer to my question be that there's nothing there—

A. Mr. Harper, I can't answer that yes or no, because that woman deserves that, and any hip has to be watched that period of time.

Q. I understand that, doctor, but isn't it true that there's nothing there at present that you can see or detect that indicates anything but a perfect result?

A. That is right."

We have given careful consideration to the above quoted testimony and judicial announcements, and have reviewed the fact situation in the above cited opinion, but have reached the conclusion that other evidence and circumstances disclosed by the record justified the trial court in giving the instruction complained of. In viewing this case as a whole we must keep in mind we have

on numerous occasions announced the rule that on appeal the evidence must be viewed in the light most favorable to appellee and that we must give every deducible inference therefrom which the jury might have believed or accepted as true. In the recent case of *Wilson* v. *Morse Mill Company,* 225 Ark. 405, 282 S. W. 2d 803, this court reaffirmed the well established rule that "... we must affirm where there is substantial evidence to support the judgment," and we also said that: "This court gives evidence adduced on behalf of the prevailing party the strongest probative force it will reasonably bear."

Viewed under the above rules, there is in this record testimony from which the jury could have found: Mrs. Cook was injured on January 30, 1955 and suffered pain until she was admitted to the hospital on February 5, 1955 at which time she was placed in traction; Three days later an incision was made in her hip and a metal screw approximately 4 inches in length was inserted into her hip bone; She remained in the hospital until February 21, 1955 when she was allowed to return home; The incision did not heal properly and her hip was very tender and painful; On recommendation of her doctor that exercise might relieve the soreness she returned to her usual work as a waitress on June 27, 1955; By July 23, 1955, she had to discontinue work on account of severe pains and was so sick that she was unable to see a doctor until August 3, 1955; At that time she was given an injection to ease the pain and she resumed work from August 23 to September 18, 1955 when the pain again forced her to quit; In October she was again hospitalized and another incision was made in her hip when the screw was removed, and; On November 2, 1955, at the time of the trial, Mrs. Cook still walked with a decided limp because of the injured leg, the involved area was swollen, she was still experiencing pain, and she was unable to work. Dr. Knight testified that it would take at least 6 or 8 weeks for Mrs. Cook to recover completely from the surgery, and that for a period of from 3 to 5 years it would be necessary for her to be under the surveillance of a bone specialist and to be checked

every 6 months during that period of time. The doctor also stated that it would be necessary to take two x-ray pictures at each checking, at an average cost of $10 to $15 each; that his clinic would perform these services without additional charge since she was his patient, but that if she were forced to seek the services of another physician regular charges would be made. As to the permanency of Mrs. Cook's disability the doctor had this to say:

"A. That's an impossible question to answer yes or no. Anybody that has a broken hip even though they get perfect results, which we expect Mrs. Cook to get, it should be observed and watched, with serial x-rays for a period of three or even up to five years from the time of the injury, because a certain number of these hips lose their blood supply, and this head dies and two or three years afterwards, even though they've been walking on it with no limp, they will develop pain in the hip and we take an x-ray and find that this round ball, the head of the femur, has begun to disintegrate and get soft and flat.

Q. What percentage of disability doctor, would she have, assuming the best result over this three to five year period you're talking about?

A. That's another question that you can't absolutely put down in mathematical numbers, but I would say that if she got a perfect result, she would have at the very most not over 10% disability of that leg. Now, that's not of the body as a whole but only to that leg."

From the above it is our conclusion that there is substantial evidence to justify the trial court's instruction herein complained of.

Appellant insists however, regardless of our views above expressed, that the judgments rendered in favor of appellees are excessive. We are not persuaded by appellant's argument that, after deducting $1,000 for the 10% disability, the remaining $9,000 was excessive. In the first place we have no way of knowing what portion of the judgment the jury awarded for permanent injury

and future pain and suffering. As we have said heretofore, there is no exact rule by which payment for suffering may be measured by a monetary standard. On the whole we cannot say that the verdict in her favor was excessive nor do we think the judgment for $2,000 in favor of Mr. Cook is excessive. Not only has he already been forced to expend approximately $1,000 for medical and hospital bills but there is a likelihood he may have to expend more in the future, and he has been deprived, and will in the future be deprived, of his wife's services.

Affirmed.

RHEA *v.* STATE.

4835 291 S. W. 2d 521

Opinion delivered June 25, 1956.

Kenneth C. Coffelt, for appellant.

Tom Gentry, Attorney General, *Ben J. Harrison,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant was convicted of the crime of grand larceny; he was charged with stealing an automobile. On appeal, it is contended that the trial court erred in admitting evidence that appellant committed other crimes similar to the one for which he was on trial. In arguing before the trial court the admissibility of evidence of other crimes, the prosecuting attorney said: "The purpose of calling said witness is to show a scheme or design on the part of defendant in the commission of crimes and for no other purpose. It is a separate and distinct offense." Over the objection and exception of the appellant, the State

was then permitted to introduce evidence that the appellant had stolen two other cars at times subsequent to the offense for which he was then on trial.

In many cases, this court has been confronted with the question involved here. In *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804, a judgment of conviction was reversed because evidence of the commission of another offense of a similar nature was admitted at the trial. In that case, it was pointed out that the question had been considered by us more than one hundred times, and prior decisions were reviewed extensively. We can add nothing to what was said in the *Alford* case, and it is controlling here. The evidence of other offenses was not admissible.

Reversed.

Mr. Justice McFaddin concurs. Mr. Justice Millwee dissents.

Block *v.* Terry.

5-1019 291 S. W. 2d 520

Opinion delivered June 25, 1956.

Talley & Owens and *William L. Blair,* for appellant.

Dave E. Witt, for appellee.

Sam Robinson, Associate Justice. This is a suit by real estate agents for a commission. It is alleged that

the principal violated his contract to sell; a jury was waived; the court held against the agents and they have appealed.

Raymond E. Block, Sam A. Block and Lewis S. Block, doing business as the Block Realty Company, entered into an agreement with John W. Terry to sell for Terry Lot 10, Block 3, Sheldon's Addition to the City of Little Rock, for the price of $8,500. Appellants were to receive $425 as their commission. Appellants obtained as purchasers for the property Samuel Wilkins and his wife, Molice; but the Wilkins' offer of purchase was conditioned on their obtaining an $8,000 loan. In preparing to make the loan the lending agency had the lot surveyed, and it was discovered that a driveway used by the occupants of Lot 10 was not located altogether on that lot, but part of the driveway was on the adjoining Lot 9, which is owned by the father and mother of John W. Terry, appellee. Before the lending agency would complete the loan to Wilkins, it required that the owners of Lot 9 execute an easement on that part of the lot on which the driveway was situated. The owners of Lot 9 refused to give an easement, and the sale of Lot 10 was not completed.

It is contended by the real estate agents that the deal fell through because appellee Terry refused to convey Lot 10, but the finding of the court that the actual reason for the sale not being completed was that no easement could be obtained on Lot 9 is supported by substantial evidence. The record is convincing that the lending agency would not lend the money to Wilkins to buy the property unless an easement for the driveway was obtained from the owners of Lot 9.

Terry's contract pertained to Lot 10, and he stood ready and willing to convey that lot, but he had made no agreement with reference to Lot 9. He could do nothing about obtaining an easement from the owners of Lot 9, nor did his contract obligate him to do so.

Affirmed.

DEASON *v.* BOSTON STORE DRY GOODS COMPANY.

5-983 292 S. W. 2d 261

Opinion delivered July 2, 1956.

Paul E. Gutensohn, Warner, Warner & Ragon and *Hardin, Barton, Hardin & Garner,* for appellant.

Shaw, Jones & Shaw, for appellee.

LEE SEAMSTER, Chief Justice. Appellant, Grace Deason, brought suit against appellee, Boston Dry Goods Company, to recover damages for physical injuries alleged to have been sustained by her from a fall she suffered while a customer in appellee's store. The negligence complained of was that on the first day of April, 1953, at approximately 9:45 a. m., the appellant entered appellee's store, made a purchase and started up the basement stairs, when she slipped on some foreign substance on the stairway. Appellant alleges (1) that the appellee carelessly and negligently allowed a foreign article to remain upon said stairs, when it knew, or by exercise of ordinary care, should have known that the same was in an unfit condition for customers using said stairway; and, (2) appellee carelessly and negligently allowed said stairs to be so highly waxed and polished that same were slick and highly dangerous to customers, and particularly to the appellant. The appellee answered with a general denial.

At the conclusion of the testimony, the trial court instructed the jury that the appellant had failed, as a matter of law, to meet the burden of proving that there was some foreign substance on the stairway, and under

the circumstances, the jury should not consider any allegations of a foreign article being on the stairway in determining whether the appellee was guilty of negligence. The court did submit to the jury the issue of whether or not the appellee's stairway was so highly waxed and polished as to be slick and dangerous to customers. The jury considered this issue and returned a verdict in favor of appellee. This appeal follows.

For reversal, the appellant contends (1) the court erred in sustaining the appellee's motion for a directed verdict for the appellee's negligence as to the foreign article on its stairway, and (2) the court erred in instructing the jury that they were to disregard any evidence as to a foreign article being on appellee's stairway.

The appellant testified: "I started up the steps — and when my foot hit the second step — my right foot — it hit something, I would not say what, but it just rolled enough to start me, and I tried to catch with my other foot, and my other foot hit that slick step and I slid — it was slick as glass, and I slipped the complete length of that, and my left foot hit the side of the wall over there and turned my foot."

The record reveals that the accident occurred shortly after the store had opened for business that morning and there is a complete lack of testimony as to whether any other person besides the appellant had used the stairway that particular morning, before the accident. There is evidence to the effect that the store cleaning crew had polished the floors and stairway the night before the accident. But there is a complete lack of evidence as to what type of foreign article the appellant slipped on and how long this article was permitted to lie on appellee's floor.

On the record presented, we have reached the conclusion that the trial court was correct in directing the jury not to consider any allegations of a foreign article being on the stairway in determining whether the appellee was guilty of negligence.

This court in *Kroger Grocery and Baking Company* v. *Dempsey,* 201 Ark. 71, 143 S.W. 2d 564, a case involving injury to a customer, said:

"It must be conceded under the testimony that appellee stepped on a banana peel and fell. We think, however, after a review of the testimony, that there is an absence of any evidence as to how the banana peel came to be upon the floor or how long it remained there prior to appellee's fall.

"It seems to be uniformly held in cases of this character that where a customer falls as a result of slipping upon some foreign object or substance, and there is no substantial proof showing that the store owner knew of its presence, or in the exercise of ordinary care should have known of its presence, there can be no recovery. In other words, it is necessary to show by substantial testimony the length of time the object had been on the floor or that it got there through the negligence of the defendant or its employees. negligence is never presumed, but must be proved by the party alleging it." See also *Davis* v. *Safeway Stores, Inc.,* 195 Ark. 23, 110 S. W. 2d 695; *Safeway Stores, Inc.,* v. *Moseley,* 192 Ark. 1059, 95 S. W. 2d 1136.

We think the rule laid down in these cases controls here.

Affirmed.

THOMAS, ADMINISTRATRIX *v.* COSTELLO.

5-1024 292 S. W. 2d 267

Opinion delivered July 2, 1956.

Sidney S. Taylor, for appellant.

P. E. Dobbs and *Mitchell & Mitchell,* for appellee.

LEE SEAMSTER, Chief Justice. The appellant, Lucille Baldwin Thomas, Administratrix of the estate of Helen Carpenter, deceased, has appealed from a decree of the Garland Chancery Court, which held that appellee, C. C. Costello, Jr., is an heir at law by equitable adoption of Mrs. C. C. (Barry) Costello and is entitled to one-third of the property owned by Mrs. Costello at the time of her death. Mrs. Costello died intestate on December 29, 1947.

The facts as developed by the evidence reveal that Mrs. Costello was married to Alonza Carpenter and two daughters were born of this union, Helen Carpenter, who never married, and Bopeep Carpenter, who at the time of Mrs. Costello's death was Mrs. Harry Bledsoe, an who is now Mrs. M. S. Nelson. After Mr. Carpenter's death, Mrs. Costello married C. C. Costello. Mrs. Costello, accompanied by her daughter, Bopeep, went to Little Rock in 1925 and at that time the appellee, who was then six weeks old, was given to Mrs. Costello by his natural mother, Idee Maroney. The appellee was taken into the Costello home in Hot Springs and reared as her natural child. He was held out to the public as Mrs. Costello's son and was given the name C. C. Costello, Jr. Appellee went through school and served in the army under such name. Most of the members of the family knew the true status of appellee but he was not told that Mrs. Costello was not his natural mother.

On December 29, 1947, Mrs. C. C. (Barry) Costello died intestate. The appellee was then over 22 years of age. Mrs. Costello's daughter, Bopeep, was appointed administratrix of her mother's estate. At this time the appellee was working for Bopeep's husband, as well as

living in their household. Bopeep listed only two heirs in the application for administration of her mother's estate, herself and her sister, Helen Carpenter. C. C. Costello, the second husband of Mrs. Costello, died when appellee was about two years old. Bopeep fully administered the estate of her mother and the final settlement was approved by the Garland Probate Court on April 18, 1949.

There was no personal property to distribute to the heirs after payment of debts and costs, however, the deceased left some real estate which was located in the City of Hot Springs. The two sisters, Bopeep and Helen, took charge of their mother's real estate, collected rents and paid the taxes. They later sold two houses and kept the money derived from the sales.

At the time of the trial, Bopeep had possession of the remainder of the real estate, which consisted of one lot upon which five rental houses were located. Helen Carpenter died intestate on April 5, 1954, leaving her sister, Bopeep, as her sole heir.

The appellant was duly appointed administratrix of Helen's estate, which included her interest in the real estate left by Mrs. Costello and possibly twenty-five dollars, after payment of debts.

The appellee testified that the discovery by him of two instruments in a deceased aunt's suitcase was the first information he had that he was not the natural son of Mrs. Costello. One of these instruments was a written statement, signed by Idee Maroney in the presence of two witnesses, under the date of June 18, 1925. In this letter Idee Maroney relinquished all rights to the appellee and gave him to Mrs. Costello to be adopted. The second instrument was another letter written by appellee's natural mother, Idee Maroney, in which she stated that she was leaving Little Rock and expressed appreciation to Mrs. Costello for "What you did for me." She stated further in the letter, "I give him to you and he surely belongs to you . . . you do just what you want to with the boy, it will be all right with me." The

letter and statement were contained in an envelope addressed to Mrs. C. C. Costello in Hot Springs; the stamped date on the envelope was blurred. The appellee also testified that the two daughters of Mrs. Costello paid him five hundred dollars from the proceeds of a $5,000 life insurance policy that Mrs. Costello left to her daughters as beneficiaries.

On August 16, 1954, the appellee filed an ex parte petition in the Garland Probate Court, to reopen the estate of Mrs. C. C. (Barry) Costello so that he could have his interest as an heir determined; he claimed that he was entitled to one-third of Mrs. Costello's estate by reason of equitable adoption. E. C. Thacker was appointed special administrator and the estate was reopened. The instant suit was filed by appellee against Lucille Baldwin Thomas, administratrix of the estate of Helen Carpenter, deceased, and E. C. Thacker, special administrator of the estate of Mrs. C. C. (Barry) Costello. Bopeep Nelson was not made a party to this suit.

The evidence reveals that appellee was never adopted by Mrs. C. C. (Barry) Costello, in the manner as provided by statute, Sections 56-101 to 56-120, inclusive, Ark. Stats. 1947. Mrs. Costello reared and held the appellee out as her natural son. However, no evidence was introduced to prove that Mrs. Costello ever agreed to adopt appellee. Our court has many times held that in an attempt to prove a contract to adopt a person, the burden of proof rests with the person claiming the benefit of an alleged contract for adoption, to establish it by clear, cogent and convincing evidence. *Stanley* v. *Wacaster, Administrator,* 206 Ark. 872, 178 S. W. 2d 50; *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822.

The Chancery Court is without authority to declare appellee an heir of Mrs. C. C. (Barry) Costello, by equitable adoption. This court held in *Cooper* v. *Bradford,* 196 Ark. 327, 117 S. W. 2d 719 that: "The mere contract to adopt is not sufficient of itself to make the child a legal heir of the promisor, because the right to take as heir exists only by operation of the law." The court in

the same case further said: "The right of inheritance, as such, is conferred in our state upon pursuing the special statutory proceeding for adoption." Citing *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30; *Chehak* v. *Battles,* 133 Iowa 107, 110 N. W. 330, 12 Am. Cas. 140, 8 L. R. A. (N. S.) 1130.

The decree of the Chancery Court is reversed and the complaint is dismissed.

LATHAM *v.* HUDSON, COUNTY JUDGE.

5-1005 292 S. W. 2d 252

Opinion delivered July 2, 1956.

Walter L. Brown and *Robert C. Compton,* for appellant.

Bruce Bennett and *Wm. I. Prewitt,* for appellee.

LEE SEAMSTER, Chief Justice. Appellant, J. H. Latham, filed a suit in Chancery Court of Union County, First Division, against Frank Hudson, County Judge, and Horace Williamson, Union County Supervisor of Schools. The other appellant, Howard H. Horne, filed an intervention in the same suit, seeking the same relief and bringing in these additional defendants: Perry Long, Treasurer of Union County, The Arkansas Appraisal Service Company, Inc., also Horace Williamson, W. R. McHaney and E. H. Davidson, as members of the Board of Equalization of Union County, Arkansas.

The purpose of the suit was to enjoin the defendants from carrying out an alleged contract entered into by and between the County Court of Union County, as party of the first part, the Board of Equalization of Union County, party of the second part, and the Arkansas Appraisal Service Company, Inc., party of the third part. In the contract the party of the third part agreed to perform the following services.

"1. Compile a list of record owners of the city real and personal property and of the rural real and personal property wherever situated or located in said Union County, Arkansas, as of January 1, 1955, wherever possible and as of January 1, 1956.

"2. Make a survey and appraisal of the city and rural real property wherever situated or located in said Union County, Arkansas, such surveys and appraisal to include all improvements and timber located thereon.

"3. Make a survey and appraisal of all commercial inventories and other personal property except autos, furniture, monies in the bank, farm livestock and equipment, and all items of personal effect.

"4. Make a survey and appraisal of all minerals in commercial production and the properties of all related industries.

"5. Make a survey and appraisal of all other real and personal property wherever located in Union County, Arkansas, except for all property assessed by statute by the Arkansas Public Service Commission.

"6. Procure all information possible and available for the use of first or second party when second party is sitting as the Board of Equalization of Union County, Arkansas, and to provide service as a witness and professional aid to the Board in its hearings and in any litigation arising from any assessments made on the basis of information furnished by third party.

"7. Provide second party with a record of all appraisals made; such records to contain (a) photographs of all real estate improvements estimated to be of more than $1,000.00 in value, (b) land descriptions, (c) record ownership (d) description, size, type of construction and area of buildings and, (f) the computation of the appraisal value of the property described.

"8. Furnish second party with all reports, records and pertinent data prepared or obtained by third party in carrying out the duties imposed hereinabove, such reports, records and pertinent data to become the property of second party upon completion of the appraisal work covered herein, and to provide second party with a summary report of findings upon completion of the said appraisal work, such report to be prepared and bound in any form devised by second party.

"Furthermore, it is agreed that the above recited compilations, surveys, appraisals and services shall be accomplished by third party on or before the third Monday in October, 1956.

"Recognizing that the cooperation of the parties hereto is of special importance in agreements of this character, the Board of Equalization and the County Court of Union County, Arkansas, expressly agree to

use all of their lawful powers in carrying out the purposes of this agreement.

"It is understood and agreed by and between the parties hereto that this instrument is a contract of employment by and between the County Court as the primary employer, the Board of Equalization as the secondary employer and the Arkansas Appraisal Service Co., Inc., as the third party. If, for any reason, it should be held that first party or second party is an improper party to this agreement or is without power to enter into this agreement, then it is hereby expressly agreed that this shall be a binding contract between the legal parties herein accordance with all of the provisions herein."

The contract also provided that the third party would be paid the total sum of $125,000, payable at the rate of $6,250 each month for a period of 20 months. The money was to be paid after an audit of the accounts by the County Court and out of the County General Fund.

The complaint further alleged that by proper resolution of the School Board of Union School District No. 2, and other school districts, municipalities and taxing units in Union County, by proper resolution, had agreed, by resolution with the County Court of Union County, to pay a specified amount each month out of each taxing unit's funds into the General County Fund for the purpose of paying each taxing unit's proportionate part of the cost of procuring the appraisal as provided in said contract.

The points raised on appeal are as follow:

1. Act 371 of 1955 is void for the reason that it takes from the County Court the exclusive jurisdiction over the expenditure of county funds.

2. The County Court had no authority to execute the contract.

3. Money is being paid out under the provisions of the contract without a valid appropriation by the Quorum Court of Union County, Arkansas.

4. The contract is void for the reason that it calls for the diversion of tax moneys from the purposes for which the money was levied and collected, in violation of the Constitution and Statutes of the State of Arkansas.

Section 5, Article 16 of the State Constitution provides: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another."

From this section, it is clear that the Legislature has not only the right, but it also has the duty to prescribe by law the manner in which the value of property shall be ascertained, for taxing purposes, making the same equal and uniform throughout the State.

The several General Assemblies, in recent years, have passed various acts in an effort to accomplish the Constitutional provision to equalize property taxes. Some of these Acts are: Act No. 9 of 1951, Special Session; Act 371 and Act 153 of the Acts of 1955; and, Act No. 351 of 1949. All of these Acts pertain to the assessment of property and to the adjustment of such assessments in an attempt to make them equal and uniform throughout the State.

Act 153 of 1955 provides, among other things, that the Public Service Commission may cause the State turnback or aid withheld from any county, municipality or school district that fails to adjust and equalize assessments on property at ninety per centum (90%) of twenty per centum (20%) of the true, actual and full market value.

Under Act 153 of the Acts of 1955, the Arkansas Public Service Commission, through its Assessment Coordination Division, is empowered and directed to assist

the several assessors in the State of Arkansas, in the assessment of property for tax purposes. This assistance is limited to recommendations and advisement since the division has no authority to make the assessments. The division is directed to coordinate the work of the assessor and the county equalization boards, with the purpose in view of causing all property in the State to be assessed in an equal and uniform manner. The Commission is also given authority to compel the county officers of this State, by mandamus, to perform their duties and assess all of the property in conformity with the law.

Section 22-601, Ark. Stats., 1947, provides: "The county court of each county in this State shall have the following powers and jurisdictions: Exclusive original jurisdiction in all matters relating to county taxes . . . to disburse money for county purposes, and all other cases that may be necessary to the internal improvement and local concerns of the respective counties."

By the passage of Act 153 of 1955, the Legislature has made it mandatory on the counties to procure a property assessment and valuation of all property assessed for tax purposes, so that the same is equal and uniform. Each county is compelled to perform its duty under the act or suffer the loss of a portion or all of the State's turnback or aid to said counties, or the taxing units therein.

From what has already been said, it is obvious that the Legislature has placed a heavy burden upon the county courts. We cannot conceive that the framers of our Constitution and the members of our several general assemblies meant to place this heavy burden on the county courts and at the same time deny them reasonable means for discharging such burden.

We hold that the county courts have the power and authority, under the general powers conferred upon them by our State Constitution and legislative acts, to enter into contracts for the employment of professional appraisers. The county court has the right to deter-

mine the necessity for the employment of professional appraisers and to fix the compensation to be paid for their services. See *Strawn* v. *Campbell, County Judge,* opinion of this Court, May 28, 1956, 226 Ark. 449, 291 S. W. 2d 508, *State Use of Prairie County* v. *Leathem and Company,* 170 Ark. 1004, 282 S. W. 367; Section 28, Article 7, Constitution of Arkansas; Section 22-601, Ark. Stats., 1947.

It is unnecessary to pass upon the constitutionality of Act 371 of 1955 since (1) the question was not raised in the trial court, and (2) in the instant case the county court had the power to enter into a valid contract under the provisions of other sections of our statutes enumerated above.

There is no merit in the contention that money was paid out under the provisions of the contract, without a valid appropriation by the quorum court. The complaint alleges that an appropriation was made by the quorum court. That appropriation is valid since the law requires the quorum court to make an appropriation for such purposes. See Section 17-409 (6), Ark. Stats., 1947. The contract was re-executed after an appropriation was made by the quorum court; therefore, it is a valid contract. *Craig* v. *Grady,* 166 Ark. 344, 266 S. W. 267.

We do not agree with appellants' contention that the monies to be expended under the terms of the contract herein constitute a diversion of tax monies from the purpose for which the money was levied and collected. The State Constitution, Section 5, Article 16, clearly gives the General Assembly the authority to require the county and its taxing units to pay their pro rata share of the costs of assessing property, a portion of which may be applied to the expenses of employing professional appraisers. *Strawn* v. *Campbell, County Judge,* supra; *County Board of Education* v. *Austin,* 169 Ark. 436, 276 S. W. 2.

Finding no error, the decree is affirmed.

Mr. Justice McFaddin dissents.

ED. F. MCFADDIN, Associate Justice (Dissenting). As I understand the majority opinion in this case, it holds on two points:

I. The majority says that there have been a number of Acts passed by recent Legislatures, all looking to the matter of equalizing assessments of values; and, without deciding what is unconstitutional in any of these Acts, the majority says that it finds enough legislative authority from various portions of these enactments to support the legality of the contract here involved. I refer to this point as "the power to contract."

II. The majority says that the contract here involved does *NOT* violate the rule that school funds are trust funds and cannot be diverted. I refer to this point as the "diversion of school funds."

I find no occasion to prolong my dissent by discussing point I - i.e., the power to contract — because I feel so deeply about the majority holding on point II — i.e., diversion of school funds — that I prefer to discuss it in some detail.

The complaint of appellants alleged that the total cost of the appraisal services was to be $125,000.00; that this was to be paid by the various taxing units on some predetermined basis; and that various school districts were to pay school funds for such appraisal. The complaint alleged the exact amount that each school district and other taxing unit in Union County was to pay. The complaint then said in Paragraph 9:

"That the said Union School District No. 2 of Union County, Arkansas, by and through the Defendant, Horace Williamson, is making illegal, unauthorized and unlawful payments of tax funds into the General Fund of Union County, Arkansas, in that Union School District No. 2 has neither the power nor authority to expend its funds for the purpose set forth in the said contract. That he has stated he will continue making such payments unless restrained by this Court."

Attached to the complaint and made a part was a copy of the Resolution of Union School Board, whereby that School Board was to pay from school funds a total of $1733.83 over a 20-months period and that was to be for the tax appraisal study.[1] In the face of the allegations and exhibit to the complaint, I cannot see how this Court can sanction such diversion of school funds. Our laws require that a budget be submitted to the electors of each school district before the annual election; and the school authorities are forbidden to depart from such budget. Yet in the case at bar this Court is now allowing a school board to spend money for a purpose that was never contemplated at the time the school budget was adopted. In my dissenting opinion in the case of *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508 (case No. 990 in this Court, original opinion delivered May 28, 1956, modified opinion delivered July 2, 1956), I discussed in some detail this matter of school funds being trust funds; and I refer to that dissenting opinion for a full statement of my views. I now say that there is absolutely no law in Arkansas—except for the present judge-made law of the majority in this case—that sanctions such a diversion of school funds as this present opinion now approves. So, without discussion of point I, I have stated my views on point II and my conscience is clear.

[1]The complete Resolution is as follows: "Honorable Frank H. Hudson, Union County, El Dorado, Arkansas. WHEREAS, the Union School Board met in a regular called session on the 3rd day of May, 1955, and by a majority vote passed the following resolution; and WHEREAS, it was determined by the said School Board that a Tax Appraisal Study of Union County would be to the benefit of our School District and would produce additional revenue over a period of time; and WHEREAS, it is necessary for the County to spend $125,000.00 to pay for the cost of said study; and WHEREAS, a pro rata cost for each taxing unit for such study has been determined based on the 1954 Ad Valorem Tax; and WHEREAS, it has been determined that the pro rata cost part for this School District is the sum of $1,733.83 which sum should be paid over a 20-month period of time, the first payment being due on the 10th day of July, 1955; and NOW THEREFORE, be it hereby resolved that this School Board does hereby agree to pay into the Union County General Revenue Fund the sum of $86.69 per month until the total cost of $1,733.83 be paid, said total cost being apportioned over a 20-month period in equal payments and we do hereby agree to make the first payment of 1/20th of the total sum on the 10th day of July, 1955. IN WITNESS WHEREOF, we have hereunto set our hands on this 3rd day of May, 1955. Dean Pritchard, Pres., W. M. Talor, Sec."

5-891 292 S. W. 2d 74

Opinion delivered July 2, 1956.

[redacted]

Claude F. Cooper and *Percy A. Wright,* for appellant.

Max B. Harrison, Harrison & Harrison, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a divorce case in which is also involved the custody of three little girls, the children of the parties. The husband

and wife each desire a divorce, and each[1] wants the custody of the children.

The parties were married on June 12, 1948 and lived together until January 11, 1955. Mr. Nance farms several hundred acres of rented lands here in Arkansas. Mrs. Nance's parents moved to Gary, Indiana, and in December, 1953 the Nances went to Gary, and both husband and wife worked there until August, 1954 when, at Mr. Nance's insistence, they returned to Arkansas. Mrs. Nance's parents remained in Gary; and on January 11, 1955, Mrs. Nance left Arkansas and returned to Gary, where she was living when Mr. Nance filed this suit on January 31, 1955. He prayed for absolute divorce and custody of the children, and alleged as grounds for divorce indignities and also adultery. Mrs. Nance by cross-complaint sought absolute divorce on the grounds of indignities and cruel and barbarous treatment. Trial in the Chancery Court resulted in a decree awarding Mrs. Nance a divorce and (a) custody of the three little girls, with visitation rights to Mr. Nance; (b) $75.00 per month support money for the children; (c) a lump sum of $500.00 in settlement of property rights and dower; and (d) attorney fees and court costs. From that decree Mr. Nance brings this appeal presenting points which we group and discuss under suitable topic headings:

I. *Who Is Entitled To The Divorce?* Mr. Nance claims that the Trial Court should have awarded him a divorce on his complaint instead of awarding Mrs. Nance a divorce on her cross-complaint. When Mr. Nance filed his suit the parties had been separated for only a short time. Mr. Nance alleged that Mrs. Nance had been guilty of indignities and he also accused her of adultery, since the complaint said:

"That the defendant during the time she was living with the plaintiff and the children hereinafter mentioned went to Gary, Indiana, where she could be near

[1] At the expense of philosophizing, it does seem that if both parents are so anxious for custody, they should compose their marital difficulties and make a united home for their offspring: but the parents have decided otherwise.

and be in the company of her paramour; that she preferred this to living with the plaintiff and their children."

Webster's Dictionary defines "paramour" as ". . . a lover . . . one who loves or is loved illicitly; one taking the place, without rights, of a husband or wife." So when Mr. Nance alleged that Mrs. Nance went to her "paramour," he in effect alleged adultery. Furthermore, in the evidence Mr. Nance named the alleged paramour and also offered the testimony of a priviate detective whom he had employed in Gary to shadow Mrs. Nance and report on all that she did; and the testimony of this private detective was designed to show that Mrs. Nance had been guilty of adultery. So the pleadings, as amended by the evidence, clearly charged adultery.

This Court finds the evidence insufficient to prove such a charge. Therefore, we have a case wherein an unsustained charge of adulty has been made and also one in which Mrs. Nance testified that the beatings she received at the hands of her husband forced her to leave him and seek shelter with her parents in Indiana. She was sufficiently corroborated as to Mr. Nance's barbarous treatment. So we have a case here very much like that of *Oliphant* v. *Oliphant,* 177 Ark. 613, 7 S. W. 2d 783; and we affirm the decree awarding Mrs. Nance a divorce.

II. *Custody And Support Of The Children.* These are children of tender age: the oldest little girl was born on July 4, 1949; the next little girl was born on July 12, 1951; and the youngest little girl was born March 5, 1953. When Mrs. Nance left Mr. Nance on January 11, 1955, she necessarily left the children with him; but in the decree from which comes this appeal, the custody of the three children was awarded Mrs. Nance; and we know — from another angle of this same case that was before us some time ago[2] — that she has the chil-

[2] Heretofore in this cause Mr. Nance asked us to require Mrs. Nance to return the children to the jurisdiction of this Court pending the appeal and he also sought to supersede the decree for maintenance until after this appeal is decided. We denied both motions. There have also been other pleadings and motions in this same cause.

dren in the home of her parents in Gary, Indiana. In the present record it was shown that Mr. Nance employed a 51-year old lady to be his housekeeper and to care for the little girls during the time he had them from January 12, 1954 until the decree herein which was filed on October 4, 1955.

The testimony shows that Mrs. Nance's mother (Mrs. Bryan) is 47 years of age; that the Bryans have a home in Gary; that Mrs. Bryan cared for the three little Nance children a portion of the time when the Nances were in Gary; and that Mrs. Bryan will assist Mrs. Nance in caring for the three little girls. From all of these facts this Court concludes that these little girls should be with their mother and grandmother rather than with a paid housekeper. The Chancellor awarded Mrs. Nance the sum of $75.00 per month for support of the three children. We do not consider this to be beyond Mr. Nance's ability to pay, in the light of the fact that he had been paying the housekeeper $60.00 per month and room and board for her services in caring for the children.

III. *Property Settlement And Attorney Fees.* The Chancery Court awarded Mrs. Nance $500.00 as a lump sum for property settlement and dower and awarded her $250.00 attorney fees. Mr. Nance has farming equipment and vehicles in which he has an equity of several thousand dollars; and Mrs. Nance gave him money to make some of the installment payments on the property. In view of all the evidence, we conclude that the Chancery Court did not abuse its discretion regarding property settlement and attorney fees.

IV. *Act No. 184 Of 1955.* This point has given us serious concern. The cause was submitted to the Chancery Court on July 28, 1955; and the Chancellor, on his own initiative — and so far as the record here shows without notice to either side — requested the Arkansas State Department of Public Welfare to investigate and report as to Mrs. Nance's situation in regard to custody of her three children. This request for information was claimed to be under Act No. 184 of 1955. The Arkansas State Department of Public Welfare did not make the in-

vestigation by one of its employees, but rather requested the Indiana Department of Public Welfare to make the investigation. In due time, the Indiana Department made the report to the Arkansas Department, and the Arkansas Department of Public Welfare forwarded the report to the Chancellor. After receiving the report the Chancellor made the decree of October 4, 1955, which referred to the said report from the Indiana State Welfare Department[3].

On appeal, appellant says that the entire decree should be reversed because of this welfare report, claiming, *inter alia*: (a) that any report under Act 184 had to be made by an employee of the Arkansas State Department of Welfare; (b) that the report was incompetent evidence; and (c) that no opportunity was ever allowed the appellant to contradict the report or cross-examine the person who made the investigation. Many pages might be written on the correctness of such extrajudicial investigations. In a few cases arising before Act 184 of 1955 we have referred to somewhat similar reports. See *Trannum* v. *George,* 211 Ark. 665, 201 S. W. 2d 1015; *Roberts* v. *Roberts,* 216 Ark. 453, 226 S. W. 2d 579; and *Ark. State Game & Fish Comm.* v. *Kizer,* 221 Ark. 347, 253 S. W. 2d 215. But in the case at bar we find it unnecessary to make any ruling concerning Act 184 of 1955 or the reports in this case, because this Court holds that the decree of the Chancery Court is correct in all matters, even entirely excluding the said reports.

Affirmed.

---

[3] In 35 A. L. R. 2d 629 there is an Annotation entitled: "Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children."

EASTON *v.* H. BOKER & COMPANY.

5-1021 292 S. W. 2d 257

Opinion delivered July 2, 1956.

John E. Harris and *Clinton R. Barry,* for appellant.

Shaw, Jones & Shaw, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. The appellee, H. Boker & Company, operates a scissors manufacturing plant in Fort Smith, and appellant-claimant, Easton, has worked in that factory for more than twenty-five years.

On June 2, 1953, while changing a grinding wheel, Mr. Easton hurt his left elbow. He was treated for the injury, and Xrays disclosed a fracture of a small outside portion of one of the bones around the left elbow. Mr. Easton suffered great pain in the left arm and was thereby incapacitated from work. Even though he was left-handed, his work required the full use of both hands. Numerous doctors examined him and all agreed that his injury was disabling. He drew temporary partial disability compensation until January 15, 1954, when his compensation payments were stopped. Thereupon, he filed this claim for continuation of his compensation; a single Commissioner decided adversely to Mr. Easton; the full Commission reviewed the record and heard other evidence and decided against Mr. Easton; the Circuit Court affirmed the Commission; and the case is here on appeal.

The sole question on this appeal is whether there is any substantial evidence to support the factual finding of the Commission, which was that Mr. Easton's temporary partial disability ceased on January 15, 1954. Our cases hold that factual findings of the Commission, if supported by substantial evidence, have the force and effect of a jury verdict. See *Chicago Mill & Lbr. Co.* v. *Fulcher,* 221 Ark. 903, 256 S. W. 2d 723; and cases there cited. With the foregoing understood, we come to the evidence in the case at bar. It is admitted by all parties that Mr. Easton was disabled by the injury he received on June 2, 1953, and that he remained disabled until January 15, 1954. Mr. Easton claims that he is still disabled. The appellees claim that he was restored to full ability to work on January 15, 1954; and that is the issue in this case.

The evidence reflects that on December 18, 1953, Mr. Easton, at the request of the appellee and its insurance carrier, allowed himself to be subjected to an operation on his left arm for the ostensible purpose of removing the fractured bone fragment on the outside of his elbow. The doctor who performed the operation said it was a success; but no one has ever denied that Mr. Easton is still undergoing as much pain in his left arm as he suffered before the operation. The only evidence offered by appellee and its insurance carrier, seeking to show Mr. Easton's condition *after the operation,* is contained in *four reports* made by two doctors to the insurance company. We now summarize and discuss these reports:

(a) On December 28, 1953, the doctor who performed the operation wrote the insurance company that he thought that Mr. Easton would have "one additional week of total temporary disability." So this report shows that Mr. Easton was not restored to full ability to work at that time.

(b) On January 6, 1954, the same doctor wrote the insurance company that Mr. Easton "should be considered disabled until his immediate post-operative course

has been completed. I anticipate this will be within the next two weeks." So this report shows that Mr. Easton was not then restored to full ability to work.

(c) On February 10, 1954, the same doctor wrote the insurance company regarding Mr. Easton:

"It is my feeling that he has reached maximum benefit from treatment and may be discharged from active treatment at this time. I do not feel that he has any measurable permanent[1] disability. The paresthesias[2] of which he complains are those which, in my experience, are relative to any post-operative condition about the elbow, and all of which disappear with time."

The report of February 10, 1954 does not say that Mr. Easton was *then* able to do his full work: rather the doctor said that Mr. Easton was still experiencing pain, which the doctor thought would "disappear with time." Just why Mr. Easton was cut off of disability benefits on January 15, 1954, in the face of this letter of February 10, 1954, is a matter beyond our understanding. Certainly Mr. Easton was not capable of doing full work on February 10, 1954.

(d) On March 24, 1954 another doctor made a report to appellee's insurance carrier as to Mr. Easton's condition at that time. In that report (two single-spaced typewritten pages) the doctor not only reviewed the entire history of Mr. Easton's disability, but told of Mr. Easton's then condition and also gave the doctor's opinion as to Mr. Easton's future condition. We copy these excerpts:

"There is hypalgesia[3] involving the entire left hand in a glove distribution extending up to the distal crease of the forearm on the palmar aspect of the forearm and extending up to the scar on the dorsal radial aspect of the forearm and swinging down gradually to meet the

[1] Notice that the doctor made reference to *permanent* disability rather than *temporary* disability.

[2] Webster defines this as meaning "a sensation as a prickling, tingling, or creeping, on the skin, without objective cause."

[3] Maloy's Medical Dictionary for Lawyers defines hypalgesia as "a condition in which the patient has a diminished sensitiveness to pain."

area on the front of the forearm on the dorsel ulnar aspect of the forearm. He consistently finds the pin point a little sharper over the little finger than he does over the other fingers of his hand but detects no difference in the sensation to pin prick on the ulnar and radial sides of the 4th finger nor over the ulnar and radial sides of the middle finger (in other words, he seems to have the same impairment in the portion supplied by the ulnar nerve as he has in the portion supplied by the median nerve). He has some mild disturbance of sensation up to the region of the insertion of the deltoid in the mid portion of the arm . . . The sensory disturbance of the hand does not follow a known anatomical distribution. It is entirely possible that the more definite sensory loss on the dorsal radial aspect of the forearm may be due to an injury to a cutaneous nerve but I feel that is of no particular significance as far as function is concerned."

Now with those findings, the doctor making the report gave the following as his opinion:

"I feel that this patient is definitely able to work and that his healing period should be terminated. It is entirely possible that going back to a job that requires constant use of the left hand after this long period of idleness may cause some difficulty *and it probably would be much better if he could be put at a job that was less exacting for the left hand for a week or two and then work back into his old job rather than suddenly putting him into this activity.*" (Emphasis our own.)

The foregoing report was on March 24, 1954, and it is crystal-clear that the examining doctor found that Mr. Easton was *then* still suffering pain and that if he went back to work he would have *some difficulty* and that he should be put on a job *less exacting*. This report shows that Mr. Easton was not able to return to *full work* on March 24, 1954. Just how the appellee and its insurance carrier can justify cutting off Mr. Easton's disability payments on January 15, 1954, in the face of this report, is something that we are unable to understand.

As aforesaid, the only evidence[4] in the record in this case even tending to show that Mr. Easton has ever recovered from his temporary partial disability is contained in the four reports from which we have copied above. In none of these reports did any doctor say that, *at the time of such report,* Mr. Easton was able to do a full day's work; nor did any doctor ever say that Mr. Easton was *free of the same pain that he had experienced from the time of his original injury on June 2, 1953.* These reports do not constitute *substantial evidence*[5] in the light of the record here before us, because the opinion of the doctor as to Mr. Easton's possible recovery *in the future* is based on a *state of facts* which definitely showed that Mr. Easton had not recovered at the time of the examination on which the opinion was based. In the case of *U. S.* v. *Thornburgh,* 111 Fed. 2d 278, Judge Sanborn, speaking for the Eighth Circuit Court of appeals, used this language, which we find apropos here:

"A reviewing court, however, is not always required to accept as substantial evidence the opinion of experts. 'Where it clearly appears that an expert's opinion is opposed to physical facts or to common knowledge or to the dictates of common sense or is pure speculation, such an opinion will not be regarded as substantial evidence.' *Svenson* v. *Mutual Life Ins. Co. of N. Y.,* 8 Cir., 87 F. 2d 441, 445. See also *U. S.* v. *Hill,* 8 Cir., 62 F. 2d 1022, 1025; *U. S.* v. *Doublehead,* 10 Cir., 70 F. 2d 91, 92."

Not only is there no substantial evidence to support the Commission's findings against Mr. Easton; rather the evidence is overwhelming to the effect that Mr. Easton has been temporarily partially disabled ever since his original injury in June, 1953. As late as January 15,

[4] Some time after January 15, 1954, the scissors factory was shut down for a short time; and Mr. Easton, along with others, applied for unemployment benefits. In the oral argument before this Court, appellees' counsel, with becoming candor, conceded that such application for unemployment benefit was not substantial evidence that Mr. Easton could work at such time.

[5] In *Arkansas State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, we discussed in some detail the matter of what is substantial evidence.

1955, before the full Commission, Mr. Easton brought witnesses and offered a doctor's report to show that Mr. Easton was still disabled; that he had gone back to work for the company and tried to do the work; that the company found that he could not do full work; that every time he tried to use his left arm, it swelled up and he was subjected to great and excruciating pain.

The judgment of the Circuit Court is reversed and the cause is remanded to the Circuit Court, with directions to remand the case to the Commission with directions to make an award to Mr. Easton for temporary partial disability benefits and other compensation benefits from January 15, 1954 until the Commission may subsequently decide on a record then made that Mr. Easton is then completely recovered.

COLLIE *v.* COLEMAN.

5-1016 292 S. W. 2d 80

Opinion delivered July 2, 1956.

Ed B. Cook, for appellant.

Bruce Ivy, for appellee.

MINOR W. MILLWEE, Associate Justice. This is the third appeal of this case. Appellants, as non-member

tenants and sharecroppers, sued a cooperative gin company and the landlord who was its principal stockholder for recovery of patronage dividends or refunds of appellants' alleged share of profits realized from cotton ginnings under Act 153 of 1939 (Ark. Stats. Sec. 77-1001 to 77-1025).

On the first appeal, we reversed a decree denying recovery to appellants as against Appellee Charles R. Coleman, the landlord and principal stockholder, and the cause was remanded with directions to make findings against him, "in accordance with the facts disclosed in the record, and for any other necessary proceedings not inconsistent with this opinion." *Collie* v. *Coleman,* 223 Ark. 206, 265 S. W. 2d 515.

On remand, a master was appointed whose report was only partially adopted in a decree which held that the gin company's stock instead of its cash par value should be surrendered and reissued to appellants and which rejected that part of the master's report which found that appellants were entitled to all refunds in cash after deduction of set-offs due Appellee Coleman. However, the decree found that appellants were entitled to recover their proportionate part of cash dividends paid to appellee and the gin company with interest at six per cent from date until paid.

In the opinion on the second appeal, the majority said: "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." *Collie* v. *Coleman,* 225 Ark. 254, 281 S. W. 2d 955. The instant appeal is from a decree entered March 16, 1956, upon this court's mandate on the second appeal and in which the Chancellor fixed each appellant's share of cash refunds with interest together with the amount of stock to be received by each.

Appellants contend the Chancellor erred in overruling their motion to take additional proof upon remand of the case on the second appeal, but it is clear from the opinion rendered therein that the court was to make findings on the record already made and that he correctly refused to open up the case again for further proof.

It is also argued that the court erred in refusing to render judgment in appellants' favor for six per cent dividends allegedly paid to appellee annually since the years 1948, 1949 and 1950, together with six per cent interest thereon. As previously indicated, the court did allow appellants their proportionate part of the cash dividends with six per cent interest from due date, together with the amount of stock each was to receive under the proof already made, but did not allow interest on appellants' proportionate share of stock issued. Insofar as the record discloses, this decree was in accordance with, and not contrary to, this court's mandate on the second appeal. Appellants also argue, and appellee concedes, that they are entitled to costs on the second appeal in the amount of $61.50 and the trial court will, of course, require compliance with this part of the former decree.

Appellants' principal contentions relate to matters that were finally determined adversely to them on the second appeal which became the law of the case.

On the record presented, we find no prejudicial error and the decree is affirmed.

Justice George Rose Smith disqualified and not participating.

Mo. Pac. R. R. Co., Thompson, Trustee *v.*
Ben M. Hogan.

5-1002 292 S. W. 2d 263

Opinion delivered July 2, 1956.

Pat Mehaffy and *S. Hubert Mayes,* for appellant.

Neill Bohlinger, for appellee.

Minor W. Millwee, Associate Justice. Appellant, Missouri Pacific Railroad Company, brought this action against appellee, Ben M. Hogan, to recover certain demurrage charges alleged to be due on freight cars delivered to appellee as a subcontractor in the construction of a government arsenal near Pine Bluff, Arkansas. The case was tried before the circuit court without a jury, upon certain stipulations and exhibits resulting in a judgment for appellant in the sum of $1,715.98 with interest at 6% from the date of institution of the suit. The principal issue on this appeal is whether appellant

was entitled to judgment for $2,195.96, the amount sued for, or the sum found due by the trial court.

According to the stipulations, the U. S. Government was engaged in the construction of the arsenal in 1952 and 1953 when appellee was a subcontractor in the project under contracts with prime contractors for the government requiring the use of large quantities of cement, lime and gravel within the arsenal area. The area was rather extensive and considerations of security required that ingress and egress be highly restricted. Appellant already has a switching point known as Baldwin, Arkansas which was located within the area. In order that carlot freight shipments might be delivered to the several contractors and subcontractors, the government constructed and operated a system of tracks within the area which connected with the lines of appellant and another railway company at Baldwin.

The government also constructed five sidetracks at Baldwin, which connected with the two railway lines and with the main line trackage of the government within the area. These sidetracks were known as "interchange tracks" and appellant's train crews were permitted to penetrate the arsenal area only as far as Baldwin for the purpose of placing loaded freight cars upon the interchange tracks and picking up empty cars which had been placed back on said tracks after being unloaded and returned from spur tracks assigned to the various contractors within the area. All switching, hauling and car spotting within the arsenal beyond Baldwin was done by the government over its tracks and with its equipment operated by the Corps of Engineers of the U. S. Army. Appellee paid the Corps of Engineers at the rate of seven dollars per car for its services in switching, spotting and transporting the cars between the interchange tracks and an unloading facility within the arsenal area assigned to appellee and known as Hogan Spur. This arrangement was in effect when both intrastate and interstate shipments were made to appellee and upon which the demurrage charges were made.

It was stipulated that Demurrage Rules and Charges, I. C. C. No. 4227, Freight Tariff N. 4-Z, issued January 10, 1950 were in effect during the time of the shipments involved herein. These tariffs had been duly published and filed with the Arkansas Public Service Commission. Rule 3, Sec. E of Tariff 4-Z, and a note thereto, provide: "Except as otherwise provided in Section B, Paragraph 1, of this rule, on cars to be delivered on interchange tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 A. M. after actual or constructive placement on such interchange tracks until return to the same or another interchange track. Time computed from actual placement on cars placed at exactly 7:00 A. M. will begin at the same 7:00 A. M.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 2, Section A, Paragraph 2, Page 40, Rule 4, Section C, page 43, Rule 5, page 44 and Rule 6, page 45.) Cars returned loaded will not be recorded released until necessary billing instructions are furnished.

"NOTE. Where two or more parties each with its own power take delivery from the same interchange track, or where this railroad company uses the interchange track for other cars, or where the interchange track is not adjacent to the plant and the industry uses this railroad's tracks to reach same, a notice of placement shall be sent or given to the consignee and time will be computed from the first 7:00 A. M. thereafter."

Rule 4, Sec. C. of said Tariff 4-Z reads: "Delivery of cars upon other than public delivery tracks or upon industrial interchange tracks (except as provided in Note in Rule 3, Section E., page 42), or written notice sent or given to consignee or party entitled to receive same, of readiness to so deliver, will constitute notification to consignee. (See Rule 5, Section A, Paragraph 1, page 44 and Rule 8, Section D, Paragraph 1 (b), page 47.)"

There is no dispute as to the number of shipments involved or the correctness of the tariff rates and taxes charged to appellee. The primary issue here relates only to the proper basis for computing demurrage charge on the several shipments. Appellee contends, and the trial court found, that in computing the charges the detention time should have been computed from the time of the delivery of each car by the government to the Hogan Spur to be unloaded by appellee until such time as the car was unloaded and the government crew was notified that the cars were available to be returned to the interchange track. The charges of $2,195.96 alleged to be due by the appellant were computed from the time of delivery of the cars and their placement on the interchange tracks at Baldwin until such time as the cars were returned to the interchange tracks by the Corps of Engineers and made available to appellant.

This question has been before the Interstate Commerce Commission and the federal courts in several cases. It was before the U.S. District Court for the Eastern District of Arkansas in *St. Louis-Southwestern Ry. Co.* v. *Farrell,* 114 F. Supp. 486, under a state of facts identical with those in the instant case except that different parties and only intrastate shipments were involved. In that case, the other railroad serving the same government arsenal area was held entitled to recover demurrage charges from consignee subcontractors computed on the same basis used by appellant in the instant case. In a well considered opinion the court held that the arsenal was an "industrial plant" within the meaning of Rule 3, Sec. G., supra; that delivery on the interchange tracks at Baldwin was delivery to the subcontractors; that the interchange tracks were "industrial interchange tracks" and not "public delivery tracks" within the meaning of Rule 4, Sec. G., supra; and that no notice of delivery upon said tracks was required by the tariffs. The court made certain "Conclusions of Law" which include the following: "3. Under the tariffs delivery of the several freight cars involved in this case to the interchange tracks at Baldwin was delivery to the defend-

ants, and no notice of the placement of such cars on said tracks was required to complete the delivery. Said cars were not re-delivered to the plaintiff until they were placed upon the outgoing interchange track by the Corps of Engineers.

"4. The fact that defendants were unable to deliver the empty outgoing cars to the plaintiff except through the medium of switching facilities of the Government does not relieve the defendants of the obligation to pay demurrage, nor the plaintiff of the requirement to collect it . . .

"6. Even if it be assumed that to hold the defendants liable for demurrage in this case will work a hardship on them or will be to some extent inequitable, such hardship or inequity under the law applicable to demurrage charges is insufficient alone to excuse the defendants from liability.

"7. Plaintiff is entitled to judgment for the amount sued for, plus interest and costs." Other cases to the same effect are: *Madsen Construction Co.* v. *Great Northern Ry. Co.,* 231 I. C. C. 283; *Federal Roofing & Siding Co.* v. *Southern Pac. Co.,* 269 I. C. C. 445; and *Chicago B. & Q. R. Co.* v. *Blunk,* 101 F. Supp. 219.

In view of a stipulation to the effect that the government railroad served not only the contractors engaged in the construction of the arsenal but also all rail shipment demands of "independent enterprises" within the area, appellee contends he was entitled to written notice of placement of the cars on the interchange tracks under that part of the Note to Rule 3, Sec. E, supra, which provides that notice is required, "where this railroad company uses the interchange tracks for other cars . . ." It is clear from the entire stipulations that no cars were placed on the interchange tracks except cars to be delivered thereon. The fact that such tracks were owned by the government and located in a highly restricted area precluded the use of such tracks for "other cars" as that term is used in the note. We agree with appellant's contention that the obvious intent of the provision

relied upon is to require written notice in those instances where cars other than those to be delivered on the interchange tracks are placed thereon. That condition is not present in the instant case, but it did exist in *Union Gas and Electric Co.* v. *C. & O. Ry. Co.,* 136 I. C. C. 275, relied on by appellee. As reflected in a prior decision of the same case in 126 I. C. C. 566, the tracks there involved were indiscriminately used "for public delivery and for various other carrier purposes."

In disposing of the question of notice in the Farrell case, the court said: "The contention is made that the plaintiff cannot prevail because no notice was given the defendants of the arrival of cars at the interchange tracks. Rule 4, Section C, of the tariffs provides, subject to an exception not applicable here, that delivery 'upon other than public delivery tracks or upon industrial interchange tracks . . . will constitute notification to consignee.' We are satisfied that the interchange tracks at Baldwin were not 'public delivery tracks' and that they were 'industrial interchange tracks' within the meaning of the aforementioned rule; hence, no notice of delivery upon said tracks was required." We concur in this view.

Appellant also contends that interest should have been allowed from the date the various charges accrued instead of from the date of the institution of the suit as the trial court found. The complaint did not expressly pray for interest and there is no showing of any demand by appellant for payment of the charges prior to institution of the suit on May 27, 1954. There also appears to be considerable merit in appellee's assertion that ascertainment of the correct amount of the charges involved a complicated accounting matter which was difficult to resolve without a comparison of appellee's records with those of appellant, which records were not made available until the suit was brought. The term "demurrage" is derived from the maritime law under which the question of the allowance of interest on sums found due on demurrage is held to be within the discre-

tion of the trial court. 48 Am. Jur., Shipping, Sec. 616. Many cases are collected in an annotation on the question in 96 A. L. R. 35. In the exercise of such discretion, the courts have allowed interest from various periods including the date of accrual of the charges as well as the date of commencement of suit. In some cases, as where there was an unreasonable delay by plaintiff in prosecution of the suit, interest before judgment has been disallowed altogether. Under the circumstances presented here, we do not think the trial court erred in refusing to allow interest from the date of the accrual of each of the charges.

Since we conclude that appellant correctly computed the demurrage charges, that part of the judgment finding it entitled to recover only $1,715.98 is reversed, and the cause is remanded with directions to enter judgment for appellant in the sum of $2,195.96 with interest at six per cent from May 27, 1954.

SMOCK *v.* CORPIER.

5-1022 292 S. W. 2d 260

Opinion delivered July 2, 1956.

Charles A. Wade, for appellant.

Wood & Smith, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee, who is the appellant's tenant, for specific performance of an option to purchase the land covered by the written lease. The defense is that the option was available to the tenant only during the first two years of the original five-year term and cannot be exercised during the five-year renewal term that is now in force. The chancellor, finding the lease to be ambiguous, allowed the appellee to introduce parol evidence to explain the document. Upon the basis of that proof the court held that the option to purchase could be exercised during the renewal term.

We are unable to determine from the appellant's abstract of the record, which the appellee has not supplemented, whether the chancellor's decree is erroneous. Parol evidence is frequently admissible to explain the meaning of a written instrument. The appellant asserts that this lease is free from ambiguity, but she has not quoted its language or even summarized it adequately. She also asserts that the oral proof was inadmissible, but she declines to abstract any of the testimony. It is manifestly impossible for us to sustain her contention without having either the lease or the testimony before us.

In reply to the appellee's criticism of the abstract the appellant insists that it is unnecessary to abstract the testimony in a chancery case, for the reason that this court tries the case *de novo*. The appellant is mistaken in her understanding of our practice. The case is tried *de novo,* it is true, but the trial is upon the evidence as abstracted by the parties and not upon the original record. We have repeatedly required compliance with Rule 9 in equity cases. *Davis* v. *Spann,* 92 Ark. 213, 122 S. W. 495; *Norden* v. *DeVore,* 207 Ark. 1105, 184 S. W. 2d 585; *Reep* v. *Reep,* 219 Ark. 270, 241 S. W. 2d 262.

Affirmed.

FAIRBANKS *v.* SHEFFIELD.

5-1045 292 S. W. 2d 82

Opinion delivered July 2, 1956.

[redacted]

Spitzberg, Mitchell & Hays, for appellant.

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

GEORGE ROSE SMITH, J. The appellees, as the members of the State Publicity and Parks Commission, have adopted a resolution providing for the issuance of $900,000 of revenue bonds to finance the construction of a new lodge, twenty-five cottages, and other improvements at Lake Catherine State Park. The bonds are to be issued under the authority of Act 399 of 1953. Ark. Stats. 1947, § § 9-617—9-626. By this taxpayer's suit the appellant seeks (a) a declaratory judgment holding that in five particulars Act 399 is unconstitutional or has been repealed, and (b) an injunction against the proposed action of the Commission. The chancellor entered a declaratory decree upholding the statute in all five respects and dismissing the complaint.

I. It is first contended that Act 399 embodies an unconstitutional delegation of legislative power, in that the Commission is authorized to determine what improvements to the state park system are needed, what their cost will be, what rentals and service charges should be imposed, and other details in connection with the proposed development of Lake Catherine State Park.

This contention is not well taken. The General Assembly has exercised its legislative function by creating the state park system, committing its management to the appellee Commission, authorizing the Commission to maintain "suitable public services and conveniences" and to make "reasonable charges" for their use, and empowering the Commission to extend, develop, and improve the park system. Ark. Stats. §§ 9-601 and 9-617. The vesting of all legislative power in the General Assembly does not require its members to examine the plans for each cabin, to determine what each building should

cost, or to fix the rentals and fees charged at the various state parks. These administrative details pertain merely to the execution of the law and may properly be left to the discretion of a subordinate agency. *Hogue* v. *Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49.

II. Section 10 of Act 399 requires that the revenues securing the payment of the bonds be deposited in a bank instead of being covered into the state treasury. The contention that this procedure is forbidden by the constitution was rejected in *Gipson* v. *Ingram,* 215 Ark. 812, 223 S. W. 2d 595, and need not be re-examined.

It is also insisted that the provisions of § 10 were impliedly repealed by Act 330 of 1955, which directs the Commission to deposit in the state treasury all moneys received from the park system. Ark. Stats., § 9-206. The legislative background of the 1955 statute refutes the suggestion of an implied repeal. It was provided by Act 170 of 1937 that all money received from the operation of the state parks should be paid into the state treasury. Ark. Stats., § 9-601 (6). With that general law on the books the legislature adopted Act 399 of 1953, which deals only with the issuance of revenue bonds and which expressly directs that the pledged revenue be placed in a bank. This special directive is evidently intended to facilitate the sale of the bonds and represents an exception to the general policy adopted in 1937. By Act 330 of 1955 the legislature abolished the State Forestry and Parks Commission and transferred its powers and duties to the appellee Commission. Among the powers so transferred is that of issuing revenue bonds under the authority of Act 399 of 1953. It is true that in Act 330 of 1955 the legislature repeated its 1937 directive that all park funds be paid into the treasury, but there is no reason to think that the restatement of the general principle was intended to do away with the specific exception that the legislature had already brought into existence.

III. The appellant maintains that Amendment 20 to the state constitution prohibits the issuance of these bonds without their first having been approved by a popular vote. Act 399 provides, however, that the bonds shall not constitute an indebtedness of the State within the meaning of any constitutional limitation. It is settled that Amendment 20 does not apply to bonds for which the State's faith and credit are not pledged. *Davis* v. *Phipps,* 191 Ark. 298, 85 S. W. 2d 1020, 100 A. L. R. 1110; *McArthur* v. *Smallwood,* 225 Ark. 328, 281 S. W. 2d 428.

IV. Pursuant to § 4 of Act 399 the bond resolution provides that in the event of default in the payment of the bonds any bondholder may apply for the appointment of a receiver, who may take possession of the properties and facilities of Lake Catherine State Park and operate them. The receiver is authorized to fix and collect fees and charges sufficient to provide revenues for the payment of the bonds and the costs of the receivership.

The appellant is correct in his contention that this section of Act 399 is an unconstitutional attempt on the part of the legislature to consent to a suit against the State. The constitution provides that the State shall never be made defendant in any of her courts. Art. 5, § 20. This provision is mandatory and cannot be waived by the General Assembly. *Ark. State Highway Com'n.* v. *Nelson Bros.,* 191 Ark. 629, 87 S. W. 2d 394. It is immaterial that the petition for a receivership would not involve a money judgment against the State. An action for the recovery of property sold to the State under a title-retaining contract cannot be maintained. *Allen Engineering Co.* v. *Kays,* 106 Ark. 174, 152 S. W. 992. Specifically, we have held that bondholders cannot obtain the appointment of a receiver to take charge of State property, for "any suit, whether in law or in equity, which has the purpose and effect, directly or indirectly, of coercing the State is one against the State." *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. 2d 993. It cannot be doubted that the State would be coerced by having

one of its parks taken from it and operated by a receiver for an indefinite period of time.

We conclude that those provisions of Act 399 which purport to authorize the bondholders to bring suit upon the bonds and to apply for the appointment of a receiver are invalid. These provisions, however, are clearly separable; their invalidity does not affect the rest of the Act nor impair any remedy that the bondholder may have in the form of an action for a writ of mandamus to compel the Commission to perform ministerial duties imposed by law. Whether such a remedy exists is not an issue in this case and is not determined by this opinion.

V. Finally, the appellant attacks § 7 of the Act, which reads: "All of the property controlled and operated by the Commission and the interest on all bonds issued hereunder shall be exempt from taxation by the State of Arkansas or by any municipal corporation, county, or other political subdivision or taxing district of the State, except that the bonds shall be subject to the payment of inheritance taxes." It is insisted that this language permits an exemption from property taxation, contrary to Article 16, § 6, of the constitution.

We do not so construe the language of the Act. The exemption of the Commission's own property from ad valorem taxation is clearly valid, since it is public property used for a public purpose. Art. 16, § 5. The reference to the bonds and interest thereon is somewhat ambiguous, and of course it is our duty to interpret the language, if possible, in such a way as to sustain the validity of the statute. We do not construe the Act as an attempt to exempt the bonds or their interest from ad valorem taxation, for such exemption would be invalid. *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5; *Ward* v. *Bailey,* 198 Ark. 27, 127 S. W. 2d 272. Rather, the only specific reference is to interest on the bonds, which indicates a legislative intention to exempt such interest from the state income tax. So construed, the exemption is valid. *Ward* v. *Bailey, supra.*

A declaratory judgment will be entered here, holding subsections (c) and (d) of § 4 of Act 399 to be unconstitutional. With this modification the decree is affirmed.

KERVIN *v.* HILLMAN, COUNTY JUDGE.

5-1074 292 S. W. 2d 559

Opinion delivered July 2, 1956.

Frank W. Wynne, for appellant.

Thomas E. Sparks, for appellee.

PAUL WARD, Associate Justice. By procedure not here questioned a special election was held in Dallas County on November 22, 1955, on the questions of acquisition of sites for and the construction of a hospital unit, and on the question of a tax of three mills to pay for the same. The main hospital was to be located in Fordyce, the county seat, "with emergency units thereof in Sparkman and Carthage." It was estimated that the tax would support a bond issue in the amount of approximately $204,000 which was to be supplemented by federal funds in approximately the amount of $266,666, making a total of $470,666. The ballots furnished to the voters contained the above information. The results of the election were 1,680 votes in favor of the hospital and

emergency units and 452 votes against them, and 1,665 votes in favor of the tax and 459 votes against the tax.

After the Quorum Court had levied the special tax on the assessed value of all taxable property in Dallas County for the years 1956 to 1976 inclusive, appellant, M. B. Kervin, a property owner and taxpayer in Dallas County, filed this suit in chancery court to restrain the County Judge from proceeding further in the sale of said bonds and to restrain the collector from proceeding further with the collection of said tax. It was alleged that "said emergency units are not complete hospitals but are small units each providing two beds designed for and intended to meet immediate and emergency temporary needs only for first aid treatment for their respective geographical areas, these geographical areas being some distance from the hospital at Fordyce, and that said patients receiving first aid treatment in these small units will either be discharged or prepared by such treatment for admission to the hospital at Fordyce."

The only ground alleged in the complaint, or relied on here by appellant, for the relief sought is that Amendment 17 to the Constitution of the State of Arkansas (as amended by Amendment 25) "contemplates the construction of a single hospital unit to be located at the county seat and does not contemplate or authorize the construction of such emergency units" located at points other than the county seat.

To the above noted complaint appellees filed a demurrer which was sustained by the trial court. Upon appellant's failure to plead further his complaint was dismissed.

We hold that the trial court was correct in sustaining appellees' demurrer and in dismissing appellant's complaint. The first section of Amendment 17 (as amended) vests in the qualified electors of each county the authority, by a majority vote, to construct a county hospital in the manner here undertaken. Ark. Stats. § 17-905 provides that: "The court shall designate the place whereon to erect any county building on any land be-

longing to the county at the established seat of justice thereof." As a guide for the construction of a constitutional amendment, appellant refers us to 16 C. J. S. 56, Constitutional Law, Sec. 19. The gist of the stated rule is: "If the language is clear and unambiguous its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written.

Based upon the above rules of construction, and applying a rather strict interpretation, appellant argues that by the language used in Amendment 17 (as amended) the framers did not intend that several hospitals or several partial hospitals would be built in different parts of a county, but that only one county hospital was intended.

We think appellant's argument is not supported by reason or by the former decisions of this court, and we think his conclusion cannot be logically drawn from the language used in said amendment.

It is obvious that the real purpose of Amendment 17 (as amended) was to make it possible for a county to provide hospital facilities for its citizens. It is not to be expected that the amendment would go further and specify in detail how this purpose was to be achieved. In the case of *Garner* v. *Lowery,* 221 Ark. 571, 254 S. W. 2d 680, this court, in deciding that Garland County had the power to *purchase* an existing hospital even though Amendment 17 only provides for the *construction* of a hospital, said: "The legislative intent was evidently directed to the fact of acquisition rather than to the method by which that result might be reached." In the case of *Bond, County Judge* v. *Kennedy,* 213 Ark. 758, 212 S. W. 2d 336, this court construed Ark. Stats. § 17-905 mentioned above in its relation to Amendment 17 (as amended) and held that a hospital need not be located at the seat of justice.

Likewise, and based on the above reasoning, we do not think a proper interpretation of Amendment 17 (as amended) forbids the construction of the two emergen-

cy units. Again this is the method selected by popular vote to carry out the purpose of furnishing hospital facilities, and it constitutes a detail not expected to be provided for in a constitutional amendment. Moreover Section 4 of said amendment provides that "more than one building or improvement may be embodied in such proceeding . . ." In the case of *Jeffery* v. *Fry,* 220 Ark. 738, 249 S. W. 2d 850, we construed Amendment 17 (as amended) to authorize an election for the construction of a new county jail and an extension to the courthouse.

The construction which we here give to Amendment 17 (as amended) is we think, fully supported by other decisions of this court. In *Bailey, Lieutenant-Governor* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, we said: "The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption . . ." We also said, in *Walton* v. *Ark. Construction Commission,* 190 Ark. 775, 80 S. W. 2d 927, that: "It must always be the purpose to construe or apply any provision of the Constitution to effectuate, as nearly as possible, the intent of the people as it may be interpreted from the measure, and, when necessary for that purpose, a liberal interpretation will be warranted."

In our opinion, not only does the construction of the hospital and emergency units in this case fall within the intent and purpose of said constitutional amendment but this arrangement apparently effectuates this intent and purpose in an excellent manner.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* CLAYTON, STATE TREASURER.

5-1075 292 S. W. 2d 77

Opinion delivered July 2, 1956.

W. R. Thrasher and *Dowell Anders,* for appellant.

Tom Gentry, Attorney General, *James L. Sloan,* Chief Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Act No. 248 of the Acts of the General Assembly of Arkansas for 1951 provides for participation by employees of the State and its political subdivisions in the benefits provided by the federal Social Security Act. Employees of the State Highway Department, in accordance with Act No. 427 of 1955, elected to participate in the social security program. The State Comptroller fixed January 1, 1955 as the effective date of coverage of the employees by the Social Security Act. The Highway Commission did not agree with the 1955 date, and fixed the date on January 1, 1956. The Comptroller insisted on January 1, 1955, and the Commissioners filed this action to enjoin the State Treasurer and State Comptroller from using

Highway funds in connection with participating in social security coverage.

The facts are stipulated as follows: "It is hereby agreed by the parties hereto that: (1) That under the authority of Act 427, Ark. Acts of 1955, the employees of the State Highway Department did on November 14, 1955 hold a referendum on the question of whether they should be excluded or included under an agreement between the State and the Federal Government authorized by Act 248 Ark. Acts of 1951 which extended to State Employees Social Security coverage. The result of the referendum was that the employees favored Social Security coverage.

"(2) On December 29, 1955, the Governor executed his certificate to the Secretary of Health, Education and Welfare as to the results of the election as provided by Sec. 2(b) of Act 427 of 1955.

"(3) On January 3, 1956 a printed form, dated December 30, 1955, called 'Agreement' and executed by the State Comptroller as the 'State Agency' was received by the Highway Department from the State Comptroller with instructions that said agreement was to be executed by the Contracting Officer for the Arkansas State Highway Department for the purpose of extending Social Security coverage to the Highway Department employees. Item 'J' on said agreement fixed the effective date of the agreement and was received by the Highway Department with the effective date typed thereon as 'January 1, 1955.'

"(4) On January 4, 1956, the Director of the Highway Department replied to the State Comptroller's letter saying that the subject of the agreement would be submitted to the Highway Commission at its next meeting on January 25, 1956, and indicating that the January 1, 1955, effective date might not be acceptable.

"(5) On January 5, 1956 Modification No. 124 to the Arkansas State Social Security Agreement was approved for the State of Arkansas by the State Comp-

troller and then submitted to the Secretary of Health, Education and Welfare to extend Social Security Coverage to the Arkansas State Highway Department employees with the effective date thereon as January 1, 1955. This modification is shown as approved by the Federal Agency on January 27, 1956.

"(6) On January 25, 1956, the State Highway Commission, by Minute Order No. 1257, authorized the State Highway Director to enter into an agreement with the State Comptroller to extend Social Security coverage to Highway Department employees and fixed the effective date as January 1, 1956.

"(7) On January 26, 1956 the 'Agreement' was returned to the State Comptroller with Item 'J' the effective date thereon 'January 1, 1955' being struck out and the date 'January 1, 1956' inserted."

The defendants demurred; the demurrer was sustained, and the Highway Commissioners have appealed.

Act No. 248 of 1951 designates the State Comptroller as the "state agency," and Section 3(a) of the act provides: "The State Agency, with the approval of the Governor, is hereby authorized to enter on behalf of the State into an agreement with the Federal Security Administrator, consistent with the terms and provisions of this Act, for the purpose of extending the benefits of the Federal old-age and survivors insurance system to employees of the State or any political subdivision thereof with respect to services specified in such agreement which constitute 'employment' as defined in Section 2 of this Act. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the State Agency and Federal Security Administrator shall agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that: . . . " It is clear that Act 248 gives the Comptroller authority, with approval of the Governor, to enter into

an agreement with the federal security administrator as to the effective date of coverage of the employees of the State or any of its political subdivisions.

Appellants contend that the Highway Department is a political subdivision of the State, and that, under Section 5(a) of Act 248, the Comptroller is compelled to approve the date submitted by the political subdivision, and, further, that the Comptroller, under Section 5 (6b), has no authority to change the date selected by the Highway Commissioners. Section 2(f) of Act 248 defines a political subdivision as follows: "The term 'political subdivision' includes an instrumentality of a State, or one or more of its political subdivisions, or of a State and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the State or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the State or subdivision." The Highway Department is not a juristic entity, and, furthermore, Highway Department employees are employees of the State. Moreover, political subdivisions have been defined as that "they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately within their territory for the pecuniary benefit of the people there residing." *Allison* v. *Corker*, 67 N. J. L. 596, 52 A. 362, 60 L. R. A. 564.

It is also contended by appellants that Amendment No. 42 to the Constitution of Arkansas makes the Highway Department a political subdivision. The amendment creates the Highway Commission and provides for the appointment of Commissioners by the Governor. It defines the duties of the Commissioners and fixes their terms of office. But in no way does the amendment make the Highway Department a political subdivision of

the State. Employees of the Highway Department are employees of the State of Arkansas, as distinguished from employees of a political subdivision of the State; their salaries are paid by the State Treasurer on warrants prepared and signed by the State Auditor.

Appellants further contend that the coverage for the employees cannot be made retroactive to January 1, 1955 for the reason that to do so would require the payment by the State, of an obligation from a prior biennium, from the current biennium appropriation. The appropriation that is being spent at present is for the 1955-57 biennium. The State's obligation to the federal government did not become due until January 27, 1956. By Act 220 of 1955 the General Assembly appropriated $1,500,000 to carry out requirements of the federal Social Security Act. Hence, the payment which became due January 27, 1956 was in the present biennium.

The court's decree sustaining the demurrer is correct, and is therefore affirmed.

McLAUGHLIN *v.* COFFEY.

1041 293 S. W. 2d 455

Opinion delivered July 2, 1956.

Lloyd Darnell, for appellant.

Earl J. Lane, for appellee.

PER CURIAM: The appellant did not file the assent required by Sub-section 2 of Section 27-2101 Ark.

Stats., and it is too late to file it now. (See *Osborn* v. *LeMaire,* 82 Ark. 490, 102 S. W. 372.) The appeal is dismissed for lack of final judgment; and the case is still pending in the Garland Circuit Court for new trial on all issues. Mr. Justice ROBINSON dissents because he thinks that the appellant should be allowed to file the assent at this time in this Court.

SIMMONS *v.* KLEMME.

5-1060 291 S. W. 2d 801

Opinion delivered July 2, 1956.

Barrett, Wheatley, Smith & Deacon, C. M. Buck and *Oscar Fendler,* for appellant.

Marcus Evrard, L. V. Rhine, E. J. Butler, John Watkins, James M. Gardner and *Taylor & Sudbury,* for appellee.

PER CURIAM: B. S. Simmons filed suit in the Chancery Court, Chickasawba District, of Mississippi County to obtain possession of 30 shares of stock in the Dell Compress Company. The material allegations in his complaint, together with numerous exhibits attached thereto, are to this effect: Mrs. Virginia K. Klemme sold and delivered 30 shares of stock in said compress company to H. Noble Gill for $7,500, which amount was paid by Gill; Mrs. Klemme filed a suit in the said chan-

cery court against Gill, et al. to set aside said sale and to recover possession of her stock; After said suit was filed Mrs. Klemme entered into a contract with him (Simmons) in which she agreed to prosecute her suit to a final determination and, if she was successful in regaining the stock, to sell the stock to him (Simmons) for $15,000; Mrs. Klemme dismissed, with prejudice, her cause of action against Gill and accepted from Gill an additional $7,500 for her stock; Gill, as an officer in the compress company, made false representations to Mrs. Klemme in procuring the sale of her stock to him, and; Gill holds said stock as trustee for Simmons. The prayer was for specific performance by Klemme and to have Gill declared a trustee for Simmons.

The chancellor issued a Temporary Order restraining Gill and others from disposing of the stock pending the final outcome of the litigation. Later Gill filed a motion to dissolve said Temporary Order and to dismiss Simmons' complaint for failure to state a cause of action. The chancellor treated this motion as a demurrer to Simmons' complaint, dissolving the Temporary Order and dismissing the complaint. Upon Simmons executing a $25,000 bond the chancellor issued a Supersedeas Order holding the stock *status quo* pending the final outcome of an appeal to the Supreme Court.

Simmons, not wishing to rely altogether on the Supersedeas issued by the chancellor, applied to some of the judges of this court and secured a Temporary Order superseding the action of the chancellor in dissolving its Temporary Restraining Order and dismissing the complaint. The question therefore presented to this court is whether said Temporary Order shall be dissolved or made permanent.

It is the opinion of this court that the Temporary Supersedeas heretofore issued, as stated above, should be dissolved for the reason that Simmons' complaint does not state facts sufficient to constitute a cause of action. The sale of the stock in question by Mrs. Klemme to Gill had been fully carried out and the stock delivered.

Simmons' contract with Mrs. Klemme gave him the right to purchase the stock from Mrs. Klemme only in event she recovered the stock, through litigation, from Gill. This she did not do. The rule applicable in this kind of a case is well stated in 77 C. J. S. 824, Section 114 — *Actions for Rescission,* in these words: "In an action by the seller to rescind for fraud, a person who has contracted to purchase the property when, and if, it is recovered back from the buyer will not be allowed to intervene." A note to the above citation refers to *Mulready* v. *Pleeny, et al.,* (*Meagher* v. *Mulready*), 252 Mass. 379, 148 N. E. 132. The facts in the cited case are very similar to the facts in this case, and Mulready occupied the same relative position as Mrs. Klemme and Meagher occupied the same relative position as Simmons. The case involved the right to rescind a sale of stock and Meagher contended that he had a sufficient interest in the suit to enable him to intervene. The court said: "Mrs. Mulready had, at most, only the right to rescind the contract because of fraud practiced on her. The right could not be assigned or transferred. A mere naked right to set aside a contract on the ground of fraud is not assignable. Meagher was not defrauded. To permit him to litigate for a fraud practiced on his assignor would be against public policy. Such a right 'is not a marketable commodity.' "

We have carefully read the authorities cited by the petitioner herein to sustain our Temporary Order, but we find nothing in such citations contrary to the conclusion we have reached.

The Temporary Supersedeas heretofore issued is dissolved, as of this date and is not to be reinstated by the filing of a petition for rehearing herein.

DILLARD *v.* STATE.

4848 293 S. W. 2d 697

Opinion delivered October 1, 1956.

[redacted]

W. E. Billingsley and *E. H. Lamore,* for appellant.

Tom Gentry, Attorney General and *Paul C. Rawlings,* Assistant Attorney General, for appellee.

LEE SEAMSTER, Chief Justice. Arnold Dillard has appealed from the judgment of the Fulton Circuit Court, based upon a jury verdict, which found him to be guilty of violating the provisions of Ark. Stats. 1947, § 41-3202, and assessed the punishment there prescribed.

The appellant, for reversal, contends that the Court erred in the following points:

(1) In refusing to instruct a verdict of "not guilty" upon motion of defendant made at close of State's case (Tr. p. 18).

(2) In refusing offered instruction No. 1 defining the terms "prostitution" and "sexual intercourse." In refusing offered instruction No. 2 defining the doctrine of "Ejusdem Generis" in construction of statutes. In refusing offered instruction No. 3, that sexual intercourse is not lewdness, prostitution or assignation, and is not indecent or obscene per se.

(3) In failing and refusing, "upon the Court's own motion," to declare § 41-3202 of Ark. Statutes not sufficiently definable to support a criminal conviction and/or to support the information upon which defendant was tried.

The facts (about which there is very little dispute) are that the appellant, on November 19, 1955, registered at a tourist court near Salem in Fulton County under a fictitious name and address. He was accompanied by a married woman, not his wife; but he registered them as man and wife, rented a cabin, and the two of them stayed in the cabin alone the remainder of the night. They left the tourist court together the next day.

The appellant contends that this conduct was not a violation of the law because only one incident was charged or proven. Section 41-3202, Ark. Stats. 1947, which is Section 2 of Act 240 of 1943, makes it a misdemeanor for any person to enter or remain in any house, place, building, tourist camp or other structure for the purpose of prostitution, lewdness or assignation. Section 41-3203, Ark. Stats. 1947 is Section 3 of the same Act, and it defines lewdness for the purpose of the act as: "The term 'Lewdness' shall be construed to include any indecent or obscene act." One definition by Webster's dictionary of the word "indecent" is "morally offensive."

The General Assembly by passing this law intended, among other things, to make it unlawful for any person to do what the appellant did in this case, whether one incident or several. No one could successfully contend that the acts of the appellant in this case were decent or morally right.

The Court properly instructed the jury as to the law in such cases. The evidence is sufficient to sustain the verdict of the jury.

The judgment is affirmed.

TROTTER, ADMINISTRATRIX *v.* OZARKS RURAL ELECTRIC COOPERATIVE CORP.

5-972 294 S. W. 2d 498

Opinion delivered October 1, 1956.

[Rehearing denied November 5, 1956.]

[redacted]

Hardin, Barton, Hardin & Garner, for appellant.

Wade & McAllister and *Barber, Henry & Thurman,* for appellee.

J. SEABORN HOLT, Associate Justice. By this appeal appellant, Marjorie Trotter, Admx., challenges the judgment of the trial court sustaining appellee's demurrer to her complaint, and dismissing her complaint, upon her refusal to plead further. In testing the complaint on demurrer, we must treat all allegations that are well pleaded to be true.

Appellant's allegations in her complaint here were, in effect, that she is the widow of Earl Trotter and at the time of his death both were residents of Benton County, Arkansas; that appellee, Ozarks Rural Electric Cooperative Corporation, is an Arkansas corporation with its principal office in Fayetteville, Arkansas; that Earl Trotter, while employed by the Killoren Company,—in the course of his employment,—was negligently killed near Stilwell, Oklahoma; that Killoren Company of Appleton, Wisconsin, entered into a contract with appellee (Ozarks Rural Electric Coop. Corp.) whereby they agreed to build a transmission line between Evansville, Arkansas and Stilwell, Oklahoma; and that appellee was at "the time and place" selling electric service to its cus-

tomers along said proposed transmission line. It appears that appellant conceded to be true the following facts, (Admission of Fact under Act 335 of the 1953 Legislature) upon which her complaint was based, and the trial court considered them as allegations in the complaint. "1. That plaintiff, Marjorie Trotter, is the duly appointed Administratrix of the Estate of Earl E. Trotter, deceased, and that she was so appointed by the Benton County Probate Court. 2. That the defendant, Ozarks Rural Electric Cooperative Corporation, is a cooperative, organized under the laws of the State of Arkansas, with its principal place of business at Fayetteville, Arkansas. 3. That Killoren Company is a construction company, maintaining its principal place of business at Appleton, Wisconsin, and that at the time of the accident more specifically referred to in plaintiff's complaint, and which occurred on July 29, 1954, Killoren Company was engaged in the construction and erection of electric transmission lines between Stilwell, Oklahoma, and Evansville, Arkansas, said lines being constructed for and on behalf of defendant, Ozarks Rural Electric Cooperative Corporation. 4. That Construction Contract No. 23X, dated April 16, 1953, between Killoren Company and Ozarks Rural Electric Cooperative Corporation, together with Amendments Numbered 1, 2, and 3, are the written contracts between Ozarks Rural Electric Cooperative Corporation and Killoren Company and were the contracts under which Killoren Company and its employees were working on July 29th, 1954. 5. That said contract above referred to specifically required Killoren Company to carry Workmen's Compensation Insurance for the protection of its employees and for the protection of the Ozarks Rural Electric Cooperative Corporation; that said contract above referred to further provided that Killoren Company would hold Ozarks Rural Electric Cooperative Corporation harmless from any and all claims, losses, or damages which might arise by reason of the performance of the terms and provisions of said contract; and that a photostatic copy of the pertinent provisions of said contract above referred to, are attached hereto and made a part of this Request for Admission of Facts as though

set forth herein word for word. 6. That pursuant to the foregoing Contracts, Killoren Company did proceed with the work called for thereunder, which said work in itself, was of an extrahazardous nature. 7. That in the performance of the Contract, Killoren Company did employ Earl Trotter, deceased, and said Earl Trotter at the time of his death on July 29, 1954, was an employee, acting in the course and scope of his employment with Killoren Company and that he lost his life when he came in contact with an energized line, which line Killoren Company was erecting for Ozarks Rural Electric Cooperative Corporation. 8. That before entering into the performance of said Contract, Killoren Company, pursuant to the terms thereof, did obtain standard form of Workmen's Compensation Insurance through Maryland Casualty Company, which said company was and is qualified to do business in the State of Oklahoma. 9. That the accident in question occurred at or near Stilwell, Oklahoma, and immediately thereafter, that plaintiff Marjorie Trotter, as widow of the said Earl E. Trotter, Deceased, and as Guardian for Jo Ann Trotter, minor child of the said Earl E. Trotter, deceased, being the surviving widow and sole surviving heir at law of the said Earl E. Trotter, deceased, did apply for, collect and receive the maximum amount being paid by Maryland Casualty Company, Workmen's Compensation carrier for Killoren Company. 10. That the amount collected by the said Marjorie Trotter, as widow of the said Earl E. Trotter, Deceased, and as guardian for Jo Ann Trotter, minor child of the said Earl E. Trotter, deceased, amounted to the total sum of Thirteen Thousand Five Hundred Dollars ($13,500.00). 11. That the foregoing amount so collected resulted from the death of the said Earl E. Trotter on July 29, 1954, which is one and the same accident as that referred to in plaintiff's complaint." Appellee's demurrer alleged that the complaint failed to state facts sufficient to constitute a cause of action for the reason that plaintiff's (appellant) exclusive remedy was under the Oklahoma Workmen's Compensation Act.

We have concluded that the demurrer was properly sustained and that the judgment of the trial court was

correct and should be affirmed. Appellant relies on two points: "1. The law of Arkansas allows this action, and the trial court erred in sustaining appellee's demurrer. 2. Assuming for the purposes of argument that Oklahoma law applies, still said law permits this action and the trial court erred in sustaining appellee's demurrer." Here it is conceded that the death of appellant's intestate occurred in Oklahoma, therefore, any right to recover and the measure of damages must be tested by the laws of that state, *American Railway Express Co.* v. *Davis,* 152 Ark. 258, 238 S. W. 50; *Magnolia Petroleum Co.* v. *Turner,* 188 Ark. 177, 65 S. W. 2d 1. It is also undisputed that the Killoren Company, in accordance with its contract with Ozarks Rural Electric Cooperative Corporation, secured the payment of compensation benefits that might accrue to a workman employed by Killoren Company and who might suffer accidental injury or death arising out of and in the course of his employment, and also secured and kept in force a workmen's compensation insurance policy. Section 11—(1&2) of 85 Oklahoma Statutes 1951 provides: "1. In the absence of provisions to the contrary in any contract with an independent contractor, such independent contractor shall be conclusively presumed to have agreed, as a part of the terms of the contract, that he will comply with the Workmen's Compensation Laws of this State, and in case of a failure to do so, the person procuring such work to be done by independent contractors may declare such failure a substantial violation of the contract, and terminate the same at his or their option. All unpaid balances due under such contract, or so much thereof as may be reasonably necessary, may be retained as indemnity against compensation claims under the Workmen's Compensation Act of this State. The independent contractor shall, at all times, be liable for compensation due to his direct employees, or the employees of any subcontractor of such independent contractor, and the principal employer shall also be liable in the manner hereinafter specified for compensation due all such employees. Provided, however, that for the purposes of this Act, a lessor or sub-lessor shall be deemed not to be one having an interest in the subject matter, the principal employer,

contracting employer, employer, general, intermediate, or immediate, independent contractor or intermediate contractor, of the lessee or of any subsequent sub-lessee, or of the employees of the lessee or of any subsequent lessee, including the employees of the sub-contractors of the lessee or of any subsequent sub-lessee. 2. The person entitled to such compensation shall have the right to recover the same directly from his immediate employer, the independent contractor or intermediate contractor, and such claims may be presented against all of such persons in one proceeding. If it appears that the principal employer has failed to require a compliance with the Workmen's Compensation Law of this State, by his or their independent contractor, then such employee may also proceed in the same investigation or case against such principal employer. If it shall be made to appear in such proceeding that the principal employer has failed to require a compliance with this Act by his independent contractor then such principal employer shall be liable for all such injuries to employees of his independent contractor, or the subcontractor of such independent contractor. If it appears in such proceeding that the principal employer is liable for compensation under the terms of this Act, and the subcontractors of the independent contractor and their sureties, are also liable, then judgment or order shall be issued against all of such parties and execution may be issued therefor, but such execution shall first be enforced against those found liable other than the principal employer, and will be enforced as against the principal employer only for the residue of such claim after exhausting the execution against others liable therefor. Payment of the compensation found due by any of the persons liable therefor, shall be complete satisfaction of the claim as to other parties, but any person secondarily liable for such compensation shall have a cause of action against the person primarily liable for the recovery of any payment made on account thereof." It is perfectly clear that this Oklahoma Workmen's Compensation Law provides the exclusive remedy to recover by claimant, appellant, whose husband was killed in that state while engaged in a hazardous employment, as here, as against an employer,

principal contractor or sub-contractor. Under the above sections Ozarks Rural Electric Cooperative Corporation was clearly a principal employer and in no sense a third party, and appellant, claimant, is precluded from filing a tort action against Ozarks after having voluntarily availed herself of the Oklahoma Workmen's Compensation Act above (which appears to be more favorable than our own compensation act) and has received the maximum payments thereunder.

The Supreme Court of Oklahoma in the case of *Mid-Continent Pipe Line Co.* v. *Wilkerson,* 200 Okla. 335, 193 P. 2d 586 in construing the above sections of the Oklahoma Workmen's Compensation Law held: "Headnote 1. Employee's right of action for injuries arising out of and in course of hazardous employment and jurisdiction of courts thereover, with certain exceptions, are abrogated by Workmen's Compensation Law (85 O. S. 1941 § 1 et seq.). Headnote 2. Same—Principal employer not liable in tort for injuries to employee of independent contractor. Liability of the principal employer under the terms of the Workmen's Compensation Law of this state to provide compensation for injuries to an employee of an independent contractor is exclusive, and such employee is without right to maintain action in tort against the principal employer on account of such injuries."

As recent as 1954 the United States District Court, Western District of Oklahoma, 146 F. Supp. 217, had occasion to construe the above sections of the Oklahoma Workmen's Compensation Law in a case wherein the facts were, in effect, on all fours with present case. The opinion in that case contains this language:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 5998 Civil

Robert E. Woody ..... Plaintiff

v.

Union Equity Co-op. Exchange,
a Corporation ..... Defendant

National Painting Corporation.....Third Party Defendant
State Insurance Fund, Compensation Ins. Carrier

Memorandum

"The plaintiff, a resident of Missouri, brought this action to recover damages for personal injuries due to the alleged negligence of the defendant, an Oklahoma corporation.

"The undisputed facts disclose that the defendant, Union Equity Co-Operative Exchange, on March 23, 1953, entered into a contract with the National Painting Corporation for the painting and water-proofing of its grain elevator. The plaintiff, Robert E. Woody, was one of the employees of the National Painting Corporation and on July 15, 1953, was engaged in the course of his employment in the performance of the work to be done upon Union Equity's elevator. While so engaged he suffered an accidental injury while riding upon Union Equity's manlift, a revolving composition belt with foot platforms used to enable employees to ascend and descend from one floor to another.

"In its contract Union Equity required National Painting Corporation to secure the payment of compensation benefits which might accrue to a workman employed by National Painting Corporation who suffered an accidental injury arising out of and in the course of employment by procuring and keeping in force a Workmen's Compensation insurance policy by an approved insurer. On the day in question, National Painting Corporation had such Workmen's Compensation insurance policy in force and effect.

"This court, therefore, concludes that it lacks jurisdiction of this case and the action should be dismissed. The subject matter and the parties fall squarely within the provisions of the Oklahoma Workmen's Compensation Act, Title 85 O. S. A. Union Equity with whom National Painting Corporation held its painting contract was a principal employer within the meaning of Section 11 (2) of Title 85 O. S. A. Since Union Equity was a

principal employer, under the Oklahoma decisions it cannot be subject to suit at common law by an employee of an independent contractor, which was the status of Woody, the plaintiff herein. *Mid-Continent Pipe Line Co.* v. *Wilkerson* (Okla. 1948), 200 Okla. 335, 193 p. 2d 586; *Deep Rock Oil Corporation, et al.* v. *Howell,* Judge (Okla. 1948), 200 Okla. 675, 204 p. 2d 282; *Jordan* v. *Champlin Refining Co. et al.* (Okla. 1948), 200 Okla. 604, 198 p. 2d 408.

"Under such circumstances, Union Equity's only liability would be that fixed by the Act in the event it failed to require the independent contractor to carry compensation insurance for the protection of its employees. I think Woody's only remedy is before the State Industrial Commission."

As indicated, since appellant has been fully compensated under the Oklahoma Compensation Act, above, and her only remedy was under that Act, we must and do affirm.

[redacted]

BLANKENSHIP *v.* STATE.

4852 293 S. W. 2d 702

Opinion delivered October 1, 1956.

[redacted]

Eugene Coffelt, for appellant.

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

ED. F. MCFADDIN, Associate Justice. Ben Blankenship was convicted of possessing intoxicating liquor for sale in a dry county; and his punishment was fixed at a $300.00 fine (§ 48-901 Ark. Stats.). On appeal he argues only one assignment,[1] which is the sufficiency of the evidence to sustain the verdict.[2]

Benton County is a "dry" county, and Washington County is a "wet" county. The evidence discloses that Blankenship drove to Washington County and purchased some liquor. Just as he was nearing his home in Benton County, the officers stopped him and searched his car and found sixteen bottles of whiskey, each of one-half pint size. Each bottle was separately wrapped; and there were eight bottles in one sack and eight in another. Blankenship operated a filling station and small store in Benton County; and it was shown, without objection: (a) that he had previously been convicted for the illegal sale of liquor; and (b) that he had the reputation of being a bootlegger.

Blankenship insisted that he had purchased the sixteen bottles of liquor for his own use. He argues that § 48-922 Ark. Stats. establishes a presumption that the possessor of *more* than one gallon of liquor in a dry territory has such quantity for purpose of sale. Because of this Statute, Blankenship insists, that since he had *not more* than one gallon of liquor, there is no presumption that he had it for purpose of sale. But, regardless of the said Statute or presumption, the jury had the right, under the evidence here, to find that Blankenship had the sixteen bottles for purpose of sale. The presumption made by § 48-922, concerning the possession of more than one gallon of liquor, does not prevent prosecution when the possessor has for purpose of sale only one gallon or less.

---

[1] In misdemeanor cases, all assignments not briefed and argued are waived. See *Fields* v. *State,* 219 Ark. 373, 242 S. W. 2d 639.

[2] The appellant made a motion for an instructed verdict at the close of the State's case. When the motion was denied, he introduced no evidence, so did not waive his motion. See *Reeves* v. *State,* 222 Ark. 77, 257 S. W. 2d 278.

Our language in *Freeman* v. *State,* 214 Ark. 359, 216 S. W. 2d 864, is apropos to the present case:

"Whether appellant possessed the liquor for the purpose of sale or merely for his personal use was a matter for the jury to determine under the facts and circumstances. The purpose for which liquor is possessed or kept may be shown by circumstantial evidence. *Milton* v. *Ft. Smith,* 175 Ark. 694, 1 S. W. 2d 45. The jury had a right to consider the amount of liquor and the number and size of the containers in which it was found in determining whether appellant would likely procure and possess a gallon or two gallons of whiskey for his personal use in pint containers. Under § 14140 of Pope's Digest the jury also had a right to consider appellant's reputation for engaging in the illegal liquor traffic in determining his guilt or innocence of the charge. *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713; *Harris* v. *City of Harrison,* 211 Ark. 889, 204 S. W. 2d 167; *Gray* v. *State,* 212 Ark. 1023, 208 S. W. 2d 988. It is true that proof of such reputation standing alone is insufficient to sustain a conviction. *Richardson* v. *State,* 211 Ark. 1019, 204 S. W. 2d 477. We hold that the evidence was legally sufficient to go to the jury on the question as to whether appellant illegally possessed the liquor for the purpose of sale, and that the court did not err in refusing to instruct a verdict for appellant."[3]

Affirmed.

[3] For other cases to the same effect, see *Huffman* v. *State,* 222 Ark. 319, 259 S. W. 2d 509; and *Eoff* v. *State,* 218 Ark. 109, 234 S. W. 2d 521.

JACKSON *v.* STATE.

4853 293 S. W. 2d 699

Opinion delivered October 1, 1956.

Jameson & Jameson, for appellant.

Tom Gentry, Attorney General, *Paul C. Rawlings,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Associate Justice. The defendant has appealed from a judgment of conviction for the crime of grand larceny as a second offender under Ark. Stats. § 43-2328. The jury fixed the punishment at 2 years in the penitentiary. The first and principal question raised is whether the trial court erred in admitting evidence of the contents of a certain telegram offered by the state.

R. L. Reese is the owner of Reese Tie Company which purchased a Home-Lite chain saw for $274.18 from B. F. Thomas & Son in Fayetteville, Arkansas, on January 20, 1956. This saw was taken from the tool house of the company in Fayetteville on the night of February 9, 1956. A Home-Lite chain saw found in the possession of defendant on February 20, 1956, had a motor number P12465 but the serial number had been removed. Mr. Reese testified he had an invoice showing the serial number of the stolen saw and sent a telegram to the Home-Lite company giving them the serial number on the invoice; that the Home-Lite company sent him a telegram in reply stating that the motor number of the saw corresponding to the serial number sent in was P12465; and that he could identify the saw as belonging

to his company only by means of the information contained in the telegram. Defendant objected and excepted to the action of the trial court in permitting the witness to testify to the contents of the telegram and in admitting the saw in evidence. There was no testimony other than the contents of the telegram sufficient to identify the saw found in defendant's possession as the property of the Reese Tie Company.

The court erred in admitting the contents of the telegram. Written communications such as telegrams which are relevant to the issues are ordinarily admissible in evidence, provided their admission does not violate any of the exclusionary rules of evidence, such as the hearsay evidence rule. 20 Am. Jur., Evidence § 954; Wharton's Criminal Evidence (12th Ed.) § 570. But the rule excluding hearsay testimony extends to written as well as oral statements, and evidence otherwise incompetent as hearsay is not admissible because it is written or printed. 22 C. J. S., Criminal Law, § 719. Testimony of the kind involved here was called "pure hearsay" and its admission held to constitute prejudicial error in *Christian* v. *State,* 174 Ark. 357, 295 S. W. 368. In that case a bigamy conviction was reversed where the prosecuting attorney, in order to show that defendant's wife was living, was permitted to testify that he sent a telegram to her in Kansas and received a telegram in reply purportedly signed by her.

Defendant also contends the trial court erred in overruling his motion to quash the information made at the beginning of the trial. The information properly charged defendant with the theft of the saw in question and further alleged that it constituted a second offense in that defendant had been previously convicted of grand larceny in the Circuit Court of Madison County, Arkansas. It is argued that the information was fatally defective because it failed to charge that defendant had been previously discharged from the penitentiary, either upon compliance with the sentence or upon pardon or parole, as provided in Ark. Stats., § 43-2328, *supra.* In view of the liberal rules relating to form and contents of indictments and informations set forth in Ark. Stats.

§ 43-1006 and other sections of Initiated Act No. 3 of 1936, we hold the allegations of the information sufficient in the absence of a motion for bill of particulars. This was the effect of our holding in *Robbins* v. *State,* 219 Ark. 376, 242 S. W. 2d 640 where 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."

The information in the case at bar does charge the prior conviction and the omission complained of should have been reached by motion for bill of particulars under our statutes.

Moreover, the defendant freely admitted the former conviction on direct examination and that he had been released from the penitentiary on parole after serving part of the sentence. It is held generally that on a charge of a second or subsequent offense, where the accused confesses the fact of the prior conviction, it is unnecessary for the state to prove such fact. See cases cited in 58 A. L. R. 80.

Defendant also contends that error was committed in the giving of Instruction No. 11 relating to proof of similar offenses, because the jury's consideration of such matters was not restricted to offenses closely connected in point of time to the act charged. The motion for new trial contains no assignment of error directed to Instruction No. 11 and the question in all probabilty will not arise on retrial.

We find no prejudicial error involved in the other assignments of error. On account of the error in admitting the testimony of R. L. Reese concerning the contents of the telegram from the Home-Lite company, the judgment is reversed and the cause remanded for a new trial.

AFFHOLTER *v.* MCCARLEY.

5-1013 293 S. W. 2d 698

Opinion delivered October 1, 1956.

Collins, Edwards, Core & Collins, for appellant.

George E. Steel and *Don Steel,* for appellee.

GEORGE ROSE SMITH, J. This suit was brought by the appellant to recover judgment upon three promissory notes, totaling $500, and to foreclose a vendor's lien securing the debt. The chancellor found the cause of action to be barred by the five-year statute of limitations. Ark. Stats. 1947, § 37-209. The only question presented is whether that finding is against the weight of the evidence.

The three notes were executed in 1919 by N. E. and Lena Townsend, in connection with the purchase of 160 acres of land. The notes matured serially in 1923, 1924, and 1925. The appellee bought the encumbered land from the Townsends in 1923 and expressly assumed the debt. The appellant's husband, C. A. Affholter, acquired the notes on a date not shown by the record and had held them for some thirty years when he died in 1952. This suit was filed by his widow in 1954.

In our opinion the preponderance of the proof shows that the appellee paid the interest on the notes until Affholter's death; so the debt is not barred. Affholter, who was the postmaster at Vandervoort, kept the three notes pinned together in his safe at the post office.

From 1923 through 1939 Affholter indorsed annual payments of interest on all three notes; thereafter he used only one note for the indorsements. Mrs. Affholter identifies her husband's handwriting and says that he made the notations as soon as the payments were received — "He didn't leave it until tomorrow." This evidence alone would bring the case within the principle that proof of indorsements made before the statute of limitations has run is sufficient to make a *prima facie* case for the plaintiff. *Brown* v. *Hutchings,* 14 Ark. 83.

There is, however, much additional testimony tending to show that the interest was paid from year to year. The appellant testified that the appellee made payments in person and sent other remittances by mail. Another witness, Imogene Smith, testified that during Affholter's last illness she made, at his direction, the final indorsement on the notes, which Affholter then initialed. From time to time Affholter unquestionably wrote to the county collector to be certain that the taxes were being paid on the land which secured the debt. Two of these inquiries, one made in 1942 and the other in 1946, were introduced in evidence. In 1954, after Affholter's death, the appellant wrote to the appellee about the debt. In his reply McCarley did not deny the validity of an obligation which he now says had been repudiated more than twenty years earlier. He merely said: ". . . if you care to see me about the notes you mentioned would be glad to see you and come to a better understanding about them."

The only substantial proof contradicting the appellant's persuasive evidence is the appellee's own testimony. He admits that he made payments by mail for several years, but he says that he called on Affholter in 1933 at the very latest and told Affholter that he was through with the notes and would not be responsible for them any further. McCarley offers no reason for his decision to repudiate a debt that he had recognized for ten years, but he testifies that his creditor acquiesced in the matter and made no additional demands for payment.

We do not consider that the appellee's testimony ovecomes the plaintiff's *prima facie* case. McCarley's version of the transaction cannot be reconciled with Affholter's careful making of indorsements for almost twenty years after the debt had supposedly been disavowed. It cannot be reconciled with the undisputed fact that Affholter continued for many years to verify the tax payments. It leaves unexplained McCarley's failure to take a forthright position in response to the letter he received from Mrs. Affholter in 1954. On the whole case we are convinced that the weight of the evidence lies with the appellant.

Reversed and remanded for the entry of a decree granting the relief prayed.

NATIONAL CASUALTY CO. *v.* JOHNSON.

5-1025 293 S. W. 2d 703

Opinion delivered October 1, 1956.

Talley & Owen and *Robert L. Rogers II,* for appellant.

Martin, Dodds & Kidd, for appellee.

PAUL WARD, Associate Justice. Appellee, Beryl Johnson, recovered judgment, based on a jury verdict, against appellant for loss of time [as a school teacher], medical expenses, and penalty, in accordance with the provisions of an insurance policy.

The Insurance Company seeks a reversal on two grounds, viz: (a) The condition complained of by appellee was existing at the time the policy was issued, and; (b) Appellee did not give notice of the accident as provided for in the policy. For the purposes of this opinion there is no dispute about the facts, and both issues raised by appellant were properly presented to the trial court and to this court.

In 1952 appellee had an ulcer on her left leg, resulting in an operation for varicose veins, and in a skin graft in August of that year. Apparently the condition continued to exist to some extent throughout 1952 and 1953. On November 1, 1953 appellant issued to her the policy in question after its agent had contacted her personally.

Appellee contended that a few days after January 1, 1954 she had an accident — that the shoe rubbed her left foot and that her condition became so bad that she went to the hospital on the 8th. On the 16th she wrote appellant to the effect that she was sick. This is the notice which appellant claims does not comply with the provisions of the policy.

Following the above notice appellant sent appellee a "Preliminary Blank for Sickness" which she filled out on March 10, 1954 and returned. Item No. 10 of this blank [as filled out by appellee] reads: "My sickness was ruptured blood vessel and ulcer on foot." On May 4, 1954 appellant wrote appellee a letter denying liability on the ground that the condition complained of existed before the policy was issued.

On June 17, 1954 appellee filed her suit against appellant based on sickness. This complaint was amended in response to a motion by appellant, and finally, on April 26, 1955 appellee, for the first time, alleged that her condition was the result of an injury or accident suffered on or about January 8, 1954.

(a) It appears clear to us that appellant is not entitled to a reversal on the ground that the condition complained of existed before the policy was written. This suit was filed and tried on the theory of an accident, not sickness, and there is no contention by appellant that the accident complained of occurred before November 1, 1953, the date of the policy. Neither is there any contention by appellant that its policy contained no accident provision.

(b) The question of whether appellee had in fact suffered an accident is a close one, but we need not be concerned with it here. This question was presented to the jury by instructions to which appellant interposed only general objections, and appellant does not here contend there was no substantial evidence to support the instructions or the verdict of the jury.

The question of the sufficiency of the notice is a more difficult one. In this connection the policy provides:

"This policy provides indemnity for loss of life, limb, sight or time resulting from accidental bodily injury effected directly, and independently of all other causes and sustained while this policy is in force (hereinafter referred to as 'such injury') and for loss of time caused by sickness commencing while this policy is in force (hereinafter referred to as 'such sickness')."
It also provides:

"Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In the event of accidental death, immediate notice thereof must be given to the Company."

The only specific notice given by appellee to appellant was the letter she wrote on January 16, 1954 while in the hospital. It reads:

"Am sorry to have to advise you that I was taken ill on January 6, 1954. I was taken to St. Vincents

Infirmary on order from my doctor on January 8, 1954. Cause of disability: excessive bleeding from an ulcer on left foot, my policy number is . . ."

Appellant ably argues that the notice in this case, referred to being "ill," was not sufficient to notify it that appellee had suffered an accident, and therefore was not a compliance with the requirements of the policy on notice. In support of this contention appellant cites *American Central Life Insurance Co.* v. *Palmer,* 193 Ark. 945, 104 S. W. 2d 200, quoting that portion of the opinion where it approved this statement:

". . . the reason for holding that the stipulation for notice is of the essence of the contract is to enable the insurer to investigate the circumstances while the matter is yet fresh in the minds of all, and to make timely defense against any claim filed."

Also our attention is called to the statement in 45 C. J. S., page 1219, Sec. 98, where, among other things, it is said:

"*Contents of notice.* The notice should contain particulars sufficient to identify insured, should state that the injury or death was the main result of accident, and should state the cause of the accident."

We take it the commentator might well have included "sickness" [as well as "accident"] if the occasion demanded. Included also in the statement copied by appellant are these expressions: "Substantial compliance with the provisions of the policy as to notice is sufficient," and "A notice giving the best information available at the time is sufficient."

While we do not find that the exact question presented here has ever been before this court, and while the answer to it is not made crystal clear by a study of the numerous decisions dealing generally with the question of notice, we have reached the conclusion that there was a substantial compliance with the provisions of the policy in this instance.

The courts and text-writers appear agreed that, in general, the purpose of notice is to afford the insurer

an opportunity to make adequate investigation for a defense, in the event of litigation, and to prevent fraud. When a notice has served this purpose it should not be used as a technical defense to prevent justice. 29 Am. Jur., Sec. 1100 [Insurance-Purpose and Necessity] states:

"The purpose of a provision for notice and proofs of loss is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, and to prevent fraud and imposition upon it."

A statement to the same effect is found in 45 C. J. S., page 1231, under the sub-head of "General Principles" as related to notice where "notice" is distinguished from "proof of loss":

"The object of notice is to acquaint insurer of the occurrence of the loss, so that it may make proper investigation and take such action as may be necessary to protect its interests. The object of the proofs is to furnish insurer with the particulars of the loss and all data necessary to determine its liability and the amount thereof."

Another reason why courts require only a substantial compliance by the insured is that the insurer chooses the language in its policies and the realization that the average person is not able to make fine technical distinction. It will be noted, from the quotation copied above relative to notice, that it is not made clear that the cause of the disability [whether accident or sickness] must be stated. Moreover the facts in this case present a situation where, in all probability, appellee could not tell definitely just what caused her disability.

It is therefore our opinion that the notice herein was a substantial compliance with the provisions of the policy, and that appellant was not deprived of the opportunity to make an investigation, prepare its defense, and prevent a fraudulent claim. Certainly, the proof fails to show that appellant was so deprived.

Affirmed.

DIXIE FURNITURE COMPANY *v.* DEASON.

5-986 293 S. W. 2d 706

Opinion delivered October 1, 1956.

[redacted]

Dinning & Dinning, for appellant.

Harold Sharpe and *Ted McCastlain,* for appellee.

SAM ROBINSON, Associate Justice. This is a personal injury case growing out of the explosion of Butane gas. The issues are whether the evidence is sufficient to sustain a jury finding of negligence on the part of appellants, and whether appellees are guilty of contributory negligence.

The sequence of events leading up to the injury of appellees is as follows: The appellant, Dixie Furniture Company, sold to Howard Shields a quantity of furniture, including a Butane gas range for the kitchen. This stove was installed in a house at Brinkley, Arkansas rented by Shields from N. D. Early. Later, Shields decided to move from Brinkley and notified appellant company to repossess the furniture, including the stove. In response to Shields' notice, on the 22nd day of September, the appellant sent two employees, Charles Maness and Charles Butler, to get the furniture and stove.

On October 5, appellee, Mrs. Helen Deason, rented the house from Mr. Early where Shields had lived; she moved to the place on October 6. The house was piped for gas, with a gas heating stove in the living room, one in the bathroom, and a gas connection in the kitchen. Prior to the time she moved into the Early house Mrs. Deason had never used gas. She owned an oil cooking stove and this stove was placed over the gas pipe in the kitchen by the men she had employed to move her household belongings. Mrs. Deason cooked on her oil stove that night. The next day she had the gas company send out a man to examine the stoves in the living room and bathroom; she could see that the handle which turned the living room stove on and off was missing. She also wanted the hot water tank lighted. Jim Burdshall, an employee of the gas company, came out to do this work. The butane gas had been cut off at the tank in the yard. Burdshall examined the stoves in the living room and the bathroom, turned the gas on at the butane tank in the yard, and then attempted to light the butane hot water heater. He turned on the gas at that fixture and struck a match to light it; when he did, there was an explosion, and both Burdshall and Mrs. Deason, who was standing nearby, were burned. They both recovered judgment against the appellant furniture company and against Early, owner of the house. Early has not appealed.

The points relied on by appellant on appeal are: First, "Insufficiency of the evidence offered by the appellees at the close of their testimony as well as at the close of all the testimony to submit a question of negligence to the jury." Second, "Contributory negligence on the part of the appellees based upon their own testimony which would bar a recovery."

The evidence is convincing that the gas pipe for the cook stove was open and uncapped, and the gas escaping from the open pipe caused the explosion. The evidence is equally convincing that Shields, the former occupant of the house, on the one hand, or Maness and Butler, employees of the furniture company, on the other hand, disconnected the stove and failed to put a cap on the

open end of the gas pipe. Shields testified positively that he did not disconnect the stove; that he notified the furniture company that they could repossess the furniture and stove, and then he left town and was not in Brinkley that afternoon when the furniture company sent for and obtained the stove. On the other hand, Maness and Butler, employees of the furniture company, testified that they did not disconnect the stove; that when they got to the house where the stove was located, the stove had been disconnected and moved out into the center of the floor. The correct version of what occurred was within the province of the jury to determine. The jury had the advantage of being able to observe the witnesses and their demeanor, and was in a much better position than this court is to judge the credibility of the witnesses.

Negligence is the doing of that which an ordinarily prudent person would not do under the circumstances, or, the failure to do that which an ordinarily prudent person would do under the circumstances. With the gas pipe for the cook stove uncapped and open only a few feet from the hot water heater, an explosion would be almost certain to occur if the gas were turned on and a flame produced to light the hot water heater without discovering the uncapped pipe; and that is exactly what occurred here. Appellant correctly states the law to be that negligence cannot be presumed, but must be proved; here, it was proved. Circumstantial evidence leads to the conclusion that either Maness and Butler, or Shields, disconnected the cooking stove and failed to cap the gas pipe. There is no contention on any one's part that the pipe was capped when the stove was removed, but that the cap had been removed by vandals or thieves during the 16-day period that the house was vacant, between the time that Shields moved out and Mrs. Deason moved in. But Maness and Butler, and Shields, simply say they did not disconnect the stove. Of course, without the stove being disconnected, no cap could be placed on the pipe. The jury found that appellants' employees, Maness and Butler, did disconnect the stove and failed to put a cap on the open gas pipe; and it was a question

for the jury to say whether an ordinarily prudent person would have left the pipe uncapped, depending on the next occupant of the house discovering the uncapped condition of the pipe before turning on the gas.

Whether the failure to put a cap on the pipe was the proximate cause of the injuries was a question of fact for the jury. In *Federal Compress & Warehouse Company* v. *Free,* 190 Ark. 969, 82 S. W. 2d 253, this court quoted with approval from *Helena Gas Company* v. *Rogers,* 104 Ark. 59, 147 S. W. 473, as follows: "The question of proximate cause, as this court has already said, is not one of science or legal knowledge, and is a question ordinarily for the jury, to be determined as a fact from the particular situation, in view of the facts and circumstances surrounding it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments. *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 584, 134 S. W. 1189. * * * It is not necessary that the effect of the act or omission complained of would in all cases, or even ordinarily, be to produce the consequences which followed, but it is sufficient if it is reasonably to be apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner, or, in other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated as likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen. *Pulaski Gas Light Co.* v. *McClintock, supra*; *Foster* v. *Chicago, R. I. & P. Ry. Co.,* 127 Iowa 84, 102 N. W. 422, 4 Am. & Eng. Ann. Cas. 150; *Baltimore & Ohio Rd. Co.* v. *Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597."

There was also a question for the jury as to whether appellees were guilty of contributory negligence in failing to discover that the pipe was uncapped, and the jury found in favor of appellees on that issue. This court

cannot say as a matter of law that either Mrs. Deason or Burdshall was guilty of contributory negligence in failing to discover the open pipe.

Affirmed.

BORNSTEINE *v.* WILLIAM R. MOORE DRY GOODS COMPANY.

5-996 294 S. W. 2d 52

Opinion delivered October 8, 1956.

[Rehearing denied November 5, 1956.]

Harold Sharpe, for appellant.

Mann & McCulloch; *Canale, Glankler, Montedonico* and *Boone & Loch*; and *Norton & Norton,* for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by the appellants, Irvin Bornsteine and Aaron Paul, from a decree of the St. Francis Chancery Court which was rendered in favor of the appellees, William R. Moore Dry Goods Company and others. The appellees are creditors of Fred Zuckerman, a party who sold the appellants a retail store located in Hughes, Arkansas. The trial court held the sale by Zuckerman to appellants to be void by failure to comply with the terms and provisions of the Arkansas Bulk Sales Act—Ark. Stats. Sections 68-1501 to 68-1504.

For reversal, the appellants contend: (1) The lower court was not within its jurisdiction in granting a Temporary Enjoining Order; (2) The lower court did not have jurisdiction to hear a case on its merits seven days after the filing of the complaint; and, (3) a. There is not a preponderance of competent evidence to support the finding and decree of the trial court, b. There was a substantial compliance with Arkansas Bulk Sales Law.

The facts reveal that on December 31, 1955, the appellants, by their agent, C. S. Scott, entered into a written contract with Fred Zuckerman to purchase the stock and fixtures of the retail store operated by Zuckerman in Hughes, Arkansas. Upon execution of the contract, the appellants made a down payment of $1,000 as earnest money and agreed to pay the balance of the purchase price, in the sum of $7,000, within ten days. On January 4, 1956, the appellants paid the balance owing on the contract, whereby Zuckerman executed and delivered a bill of sale for the store to appellants. Appellants took possession of the store and operated it as a retail store until January 13, 1956, when appellees filed this suit to have the sale set aside and the assets of the store subjected to the payment of appellees' debts, as creditors of Zuckerman.

The written contract and bill of sale were signed and sworn to by Zuckerman, and each contained a provision to the effect that Zuckerman covenanted and warranted the property sold by him to be free and clear of any and all debts of the seller and that there were no liens

or encumbrances, either present or contingent, upon said properties. This was not a substantial compliance with the Bulk Sales Law. Furthermore the evidence reflects that the appellants made no *bona fide* effort to ascertain whether Zuckerman had any creditors before closing the sale.

We find that the trial court correctly held the sale in this case to be void as to the creditors under the provisions of the Arkansas Bulk Sales Law. The evidence reveals that no full and detailed inventory was made and preserved ten days before the sale. The seller did not give to the purchasers, ten days before the sale, a written statement, under oath, listing the names and addresses of creditors, with the amount of the indebtedness due or owing to each. The purchasers did not notify the creditors, ten days before the purchase was completed, of the proposed sale and the price, terms and conditions thereof.

The Chancery Court has jurisdiction to appoint a receiver, upon the application of a creditor, to subject any property or fund to his claim, under the provisions of the Arkansas Bulk Sales Law—Section 68-1503, Ark. Stats., 1947 and also Section 36-112, Ark. Stats. 1947.

The appellants entered their general appearance at the hearings on January 20, 1956 and January 27, 1956, and subjected themselves to the jurisdiction of the court at that time, the appellants introduced their witnesses, cross-examined the appellees' witnesses. The appellants did not request further time to produce additional evidence, but closed their case and made no objection to the proceedings. No issue was made on this question before the trial court and it is too late to raise the issue here. *Rollans* v. *Douglas,* 221 Ark. 256, 252 S. W. 2d 833; *Stroud* v. *Crow,* 209 Ark. 820, 192 S. W. 2d 548.

We find the trial court is sustained by a preponderance of the evidence and that there was not a substantial compliance with the Arkansas Bulk Sales Law in this case. The decree and orders of the trial court are affirmed.

TAYLOR *v.* CITY OF PINE BLUFF.

4849-4850 (Consolidated) 294 S. W. 2d 341

Opinion delivered October 8, 1956.

[Rehearing denied November 12, 1956.]

Kenneth C. Coffelt, for appellant.

Wilton E. Steed, for appellee.

J. SEABORN HOLT, Associate Justice. These two cases have been consolidated here for our consideration.

No. 4849

A jury found appellant guilty of having kept his grocery store open on Sunday in violation of the provisions of § 41-3802 Ark. Stats. 1947, and assessed a fine of $25. For reversal appellant relies on two points: "1. The enforcement officers are arbitrarily enforcing the statute against this appellant, thereby violating his constitutional rights under Amendment 14 of the Federal Constitution. 2. It is necessary for appellant's grocery

store, and grocery stores generally, to remain open on Sunday."

This case is controlled by our recent opinion in the case of *Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 672. In the present case, appellant admitted that he was keeping his grocery store open on Sunday but sought to justify his act by asserting that he was being arbitrarily discriminated against and also that he was justified in operating his store on Sunday by virtue of the provisions of § 41-3803, Ark. Stats. 1947, which provides: "Charity or necessity excepted.—Charity or necessity on the part of the customer, may be shown in justification of the violation of the last preceding section." All these issues were submitted to the jury under proper instructions and we hold that there was substantial evidence to support their verdict. Appellant also says: "The Court will take judicial knowledge of the situation in Pine Bluff with reference to the discrimination issue, and the only thing we can do is to ask the Court to reverse itself in the case of *Taylor* v. *City of Pine Bluff,* as decided in this Court April 30, 1956." This contention is clearly untenable. "In order that a matter may properly be a subject of judicial notice, it must be 'known'—that is, well established and authoritatively settled. It is clear that uncertainty or difference of belief in respect to the matter in question, will operate to preclude judicial notice thereof. Matters of which the Court will take notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized." 20 American Jurisprudence, p. 50. We decline to overrule our former opinion. Affirmed.

No. 4850

In case No. 4850 appellant seeks the reversal of a similar charge of having kept his grocery store open on another Sunday and upon a trial, at which the same issues were raised as in Case No. 4849 above, the trial court at the conclusion of all the evidence presented by

the parties directed the jury to return a verdict of guilty and a fine of $100 was assessed by the jury. For reversal appellant relies on the same points as in Case No. 4849 above. We find no evidence in the record that it was necessary for appellant to keep his store open on Sunday or any evidence of any arbitrary discrimination against him. The trial court correctly directed a verdict of guilty in the circumstances. "It is the settled rule in this State that, in a misdemeanor case where the punishment is by fine only, the circuit court, having the power to set aside a verdict of acquittal, also has the power to direct a verdict of guilty, where the facts are undisputed and where guilt is the only inference that can be legally drawn from them," *Huff* v. *State,* 164 Ark. 211, 261 S. W. 654. Affirmed.

GOFF-MCNAIR MOTOR COMPANY, INC. *v.* PHILLIPS MOTOR COMPANY, INC.

5-994 294 S. W. 2d 342

Opinion delivered October 8, 1956.

[Rehearing denied November 12, 1956.]

Rex W. Perkins and *E. J. Ball,* for appellant.

Price Dickson and *W. B. Putman,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a contest as to priority between (a) the holder of a retained

title on a motor vehicle and (b) a mechanic who worked on the vehicle. The controversy involves the effect of § 75-160 and § 75-161 Ark. Stats. on § 51-412 Ark. Stats.

In 1953 Goff-McNair Motor Company, Inc. (hereinafter called "Goff-McNair") sold an automobile to Tom Laney and duly retained title[1] for the unpaid purchase money. The car was damaged in a collision in January, 1954 and Laney had Phillips Motor Company, Inc. (hereinafter called "Phillips") make necessary repairs to the extent of $135.92, which is the lien claim of Phillips. On February 11, 1954, Laney obtained possession of the car without Phillips' knowledge or consent; and on February 17, 1954, Phillips filed its mechanic's lien claim in the Circuit Clerk's Office, in accordance with § 51-401 *et seq.* Ark. Stats. A few days later, Goff-McNair — under its title contract — repossessed[2] the car from Laney for the delinquent balance of $480.44 due on the title retaining contract. Phillips filed suit in the Chancery Court to enforce its mechanic's lien, which it claimed to be superior to the title retaining contract held by Goff-McNair. The Chancery Court decided for Phillips; and the case is here on appeal.

We conclude that the holding of the learned Chancery Court was erroneous because it failed to give full effect to § 51-412 Ark. Stats. and our holdings in the cases of *Powell* v. *Pacific Finance Corp.,* 216 Ark. 884, 227 S. W. 2d 965; and *Terrell* v. *Loomis,* 218 Ark. 296, 235 S. W. 2d 961. The said Statute and cases definitely state that the rights of the holder of a retained title (as was Goff-McNair in the case at bar) are superior to the rights of the one (as Phillips here) claiming under the mechanic's lien law.

To overcome the aforesaid Statute and cases, the appellee says: (a) that possession was wrongfully obtained from Phillips so that the case is to be determined as if

[1] It is not claimed that Goff-McNair initially failed to duly retain title to the car.

[2] The repossession was by a finance company then holding the title contract and note, but the finance company delivered the note, contract and car to Goff-McNair on being compensated for the note.

Phillips still had possession of the car; and (b) that Phillips' possession makes such rights superior to those of Goff-McNair because of § 75-160 *et seq.*[3] Ark. Stats.

Regardless of the first contention of Phillips, we conclude that Phillips is in error in its second contention. Section 75-160 Ark. Stats. is a portion of Act No. 142 of 1949, which is an Act relating to motor vehicles and providing, *inter alia,* for the issuance of certificates of title thereto. It is not an Act creating new liens for mechanics; but rather prescribing how rights and titles might be protected by possession or filing for recordation. The language in Sections 75-160 and 75-161, relating to "possession" was to show how liens could be preserved, and was not to create new liens by mere possession. Even if Phillips had all the time retained possession of the car, we conclude that the title of Goff-McNair under § 51-412 Ark. Stats. would be superior to Phillips' mechanic's lien. The cases of *Powell* v. *Pacific Finance Co.* and *Terrell* v. *Loomis* (*supra*) support this conclusion.

The decree of the Chancery Court is reversed and the cause is remanded, with directions to enter a decree in favor of Goff-McNair.

---

[3] The pertinent language of § 75-161 Ark. Stats. is: ". . . except such liens . . . as may be authorized by law dependent upon possession. . . ."

JACKSON, EXECUTOR *v.* BOWMAN, GUARDIAN.

5-1009 294 S. W. 2d 344

Opinion delivered October 8, 1956.

[Rehearing denied November 12, 1956.]

A. M. Coates and *John C. Sheffield,* for appellant.

David Solomon, Jr., and *D. S. Heslep,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit by an insane widow to set aside a decree of divorce granted her husband shortly before his death in January, 1954.

W. T. Jackson and Arwilda Bowman were married May 12, 1931 in Phillips County, Arkansas, where they lived together until she became mentally incompetent and was committed to the State Hospital on March 31, 1937. Jackson was duly appointed and served as guardian of his wife's person and estate until shortly before his death at the age of 72 and no children were born to the marriage. W. T. Jackson was a farmer and owned lands jointly with his brother, C. J. Jackson, in whose home he lived for several years prior to his own marriage. After his wife was committed to the State Hospital he continued to reside in his own home and carry on his farming operations until July, 1953, when he became

ill and was removed to the home of his brother, C. J. Jackson, in West Helena, Arkansas. His physician testified that he was then suffering from "cerebral arteriosclerosis" and "senile dementia" and was mentally incapacitated but perhaps had lucid intervals.

Upon moving to the C. J. Jackson home, and prior thereto, legal advice was sought to effect some arrangement whereby all of W. T. Jackson's property at his death would go to his brother and none to his insane wife, or her people, except that she would be properly maintained the balance of her life. On July 21, 1953, W. T. Jackson filed suit for divorce on the ground of incurable insanity of his wife. Although the appointment of a guardian ad litem for the insane wife was asked for in the complaint none was appointed and no pleadings were filed in her behalf. A summons for Arwilda Jackson directed to the sheriff of Pulaski County was served upon the superintendent of the State Hospital. On October 23, 1953, the depositions of the superintendent and another physician at the hospital were taken to the effect that Arwilda Jackson was permanently insane and that the estimated cost of her maintenance at the hospital was $45 monthly.

On July 30, 1953, W. T. Jackson executed a will by mark leaving all his property to his brother, C. J. Jackson, on condition that the latter, or his heirs, make proper provision for the maintenance of Arwilda Jackson as long as she lived. On August 1, 1953, W. T. Jackson was taken to a hospital in Memphis, Tenn., where he remained three days and an attending physician was of the opinion that he was then mentally incompetent.

On December 3, 1953, a decree was entered in the divorce suit brought by W. T. Jackson granting him a divorce on the ground of incurable insanity of his wife and directing him to pay the State Hospital $45 monthly for her support and maintenance. On December 28, 1953, C. J. Jackson filed a petition in the Phillips Probate Court seeking his appointment as guardian of the person and estate of W. T. Jackson due to the latter's mental incompetency and the petition was granted on January

4, 1954. The bond of C. J. Jackson as such guardian was dated December 4, 1953. W. T. Jackson died January 30, 1954.

Ardelia Bowman, a niece of Arwilda Jackson, filed a petition in the Phillips Probate Court on February 22, 1954, asking that she be appointed guardian of the person and estate of her aunt and the petition was granted, after due notice, on March 8, 1954. The instant suit to set aside the divorce decree entered December 3, 1953, was then filed by Ardelia Bowman as such guardian on March 10, 1954. The verified petition alleged invalidity of the divorce decree because no guardian ad litem was appointed for the insane defendant and the testimony of a Phillips County physician was not produced as required by statute. It was further alleged that W. T. Jackson was himself insane and such fact concealed from the court when the decree was entered and that the defendant wife, therefore, had a meritorious defense to the suit. A copy of the verified petition was served on the attorney of record for W. T. Jackson and upon appellant, C. J. Jackson, as executor of the estate of his deceased brother.

After motions to quash service and dismiss the guardian's petition to set aside the divorce decree were filed by appellant, as executor, and overruled by the trial court, a response was filed in which the allegations of the petition were denied. The court's jurisdiction to entertain the suit was also challenged because of the lapse of the term in which the decree was rendered, and it was alleged that the divorce proceedings were "in substantial compliance with the statutes." Trial resulted in the entrance of a decree on September 28, 1955, setting aside and vacating the divorce decree of December 3, 1953. In said decree the court found:

"1. That the petition to vacate and set aside the decree of this Court of December 3, 1953 wherein W. T. Jackson was granted a divorce from the defendant, Arwilda Jackson should be granted as the same is voidable if not absolutely void for the reason that the defendant Arwilda Jackson at the time the suit was filed, and for

many years prior thereto, and was on December 3, 1953, when the decree of divorce was granted, an incurable and permanently insane person, and that a guardian ad litem was not appointed by the Court for the said insane defendant to defend said cause on her behalf.

"2. That the trial on December 3, 1953 was in effect an *ex parte* proceeding in that no defense of any kind was made for the incompetent defendant, Arwilda Jackson, although the plaintiff, W. T. Jackson, at that time was her legal guardian; that even though service of summons was had, upon the Superintendent of the State Hospital, where the defendant was confined and had been confined for many years, the defendant had no guardian ad litem appointed by the court to defend the action for her and the decree was entered against the defendant as though by default."

Appellant first contends the chancellor erred in refusing to quash the service of process in the instant suit which was had by serving copies of the petition upon him as executor of his deceased brother's estate and also upon the attorney of record for W. T. Jackson in the divorce proceedings. On this point appellant argues that, as executor, he had no interest in the divorce suit by his brother and that proceedings to vacate a divorce decree simply will not lie after the death of one of the parties. This presents an interesting question upon which there appears to be some division of authority. There is considerable support, especially in earlier cases, for the broad rule that the courts have no power to vacate a default judgment or decree of divorce after the death of the plaintiff. However the weight of authority, and all the later cases, support the general rule that the court has the power to set aside a default decree of divorce even after the death of one of the parties in a proceeding instituted by the survivor, if property interests of the survivor are affected by the default decree. 17 Am. Jur., Divorce and Separation, Sec. 462; 157 A. L. R. 53; 22 A. L. R. 2d 1323. We concur in this view. The property interests of the insane survivor here are vitally affected by the default decree. Also the service upon C. J. Jackson, who was executor of the estate of W. T. Jack-

son and apparently his sole heir at law, and upon the attorney of record for W. T. Jackson in the original divorce action, constituted sufficient and proper notice to allow the trial court to act on the motion to vacate. This was the effect of our holding in *State* v. *West,* 160 Ark. 413, 254 S. W. 828.

The next contention for reversal is that the trial court lost jurisdiction to hear the instant suit upon the expiration of the term at which the challenged decree was rendered. Appellant relies upon *Dobbs* v. *Dobbs,* 225 Ark. 397, 282 S. W. 2d 812. We there held that the court's inherent discretionary power to grant a motion to set aside a default divorce decree filed during the same term of the court ended with the lapse of the term, in the absence of sufficient proof of a ground to vacate it under the statute applicable after the expiration of the term. Ark. Stats. Sec. 29-506. So here, the principal issue is whether appellee has made a case for vacation of the 1953 divorce decree under said statute. In this connection we have held that a judgment by default may be set aside under the 7th subdivision of Sec. 29-506, *supra,* where the defendant was not served with summons. This subdivision of the statute authorizes the vacation of a judgment for "unavoidable casualty or misfortune preventing the party from appearing or defending." See *Jermany* v. *Hartsell,* 214 Ark. 407, 216 S. W. 2d 381, and cases there cited.

The 1953 divorce suit was instituted by W. T. Jackson on the ground of three years separation, without cohabitation, by reason of the incurable insanity of his wife under the 8th subdivision of Ark. Stats. Sec. 34-1202, which provides for service of process upon the duly appointed and acting guardian of the insane spouse, or upon a duly appointed guardian ad litem for such insane spouse, and upon the superintendent or physician in charge of the institution where the insane spouse is confined. Statutes like this are strictly construed. 17 Am. Jur., Divorce and Separation, Sec. 152. It is also provided in Ark. Stats. Sec. 27-830 that the defense of an action against a person adjudged to be insane must be

by his regularly appointed guardian, or a guardian ad litem, and that no judgment can be rendered against him until after a defense by one or the other. Sec. 27-826 also prohibits the appointment of a party to such an action as guardian ad litem to defend for the insane defendant. W. T. Jackson was the duly appointed guardian of his insane wife when he filed the suit and no guardian ad litem was appointed to defend for her. In this situation the statute clearly contemplated service upon both the superintendent of the State Hospital and a guardian ad litem. The fact that the insane wife was not represented by a guardian ad litem upon whom service could be had rendered the decree against her voidable and subject to direct attack on the ground of unavoidable casualty under Sec. 29-506, supra. While appellee's verified complaint did not specifically plead an unavoidable casualty, the facts alleged and proved brought the instant proceedings clearly within the purview of that subdivision of the statute.

We are also of the opinion that appellee alleged and proved a meritorious defense to the 1953 divorce action in that W. T. Jackson was himself mentally incompetent at the time he filed the suit. In the absence of a statute so authorizing it, it is the general rule that an insane person cannot institute an action for divorce since the right to do so is regarded as strictly personal to the aggrieved spouse and no matrimonial offenses automatically effect a dissolution of the marriage. See cases cited in an annotation on the question in 19 A. L. R. 2d 182. Other annotations to the same effect are found in 70 A. L. R. 964 and 149 A. L. R. 1284. In addition to the medical testimony already referred to, there are numerous facts and circumstances which indicate that W. T. Jackson was incompetent and incapable of exercising a proper or intelligent discretion in such a delicate and purely personal matter either at the time of the institution of the suit or the rendition of the default decree.

Neither do we agree with appellant's final contention that appellee acted in bad faith and from a purely selfish motive in maintaining the instant suit. The interest of the insane widow in the property of her deceased

husband as well as in lands owned by her separately fully warranted the guardianship and maintenance of the instant suit which was duly authorized by the Phillips Probate Court. It follows that the chancellor's action in vacating the divorce decree of December 3, 1953 is correct, and the decree is accordingly affirmed.

CARTER *v.* OSLIN.

5-985 293 S. W. 2d 890

Opinion delivered October 8, 1956.

Paul K. Roberts, for appellant.

D. A. Clarke and *C. T. Sims,* for appellee.

PAUL WARD, Associate Justice. This litigation began when appellant, Ed Carter, filed a petition in the Chan-

cery Court of Drew County to force appellee, E. A. Oslin, to permit him the use of a lane which ran east from appellant's land across forty acres of land belonging to appellee. Appellant's contention was that he had an agreement with appellee that he could use the lane in lieu of using an old road which ran through the middle of the forty.

After a lengthy hearing the chancellor made numerous findings of fact in favor of appellant but refused to grant the relief prayed for, for one particular reason, wherein we think the chancellor fell into error, calling for a reversal. This will be discussed later.

Since we agree with all of the findings and conclusions of the chancellor except in the one instance noted above, we deem it unnecessary to set forth the testimony in detail.

The factual situation presenting the issue here to be decided can be briefly and summarily stated. Appellant is a part owner and in control of eighty acres of land on which he lives, and he also partly owns and controls a tract of pasture land which lies approximately a mile and a quarter south and slightly to the east. For many years appellant used an old prescription road, hereafter called the Old Road, largely for the purpose of driving his cattle to the open range and to his pasture land, which Old Road ran east approximately through the middle of a forty acre tract of land adjoining on the east and thence a short distance to a county road which runs north and south.

In 1940 or 1941 appellee bought the forty acres of land mentioned above together with other land lying south of appellant's homestead. Soon after appellee bought this land he placed a fence around the said forty but left gates where the Old Road intersected the east and west boundaries. Appellee maintained said fence and gates for a period of more than seven years and still so maintains them. However he allowed appellant to continue the use of the Old Road until about the year 1954 when, as appellant contends, the agreement referred to above was made.

There are some other matters covered by the pleadings and testimony which we think need to be mentioned only briefly. Old Road No. 4 runs in a northeasterly and southwesterly direction across appellant's eighty acres and also across appellee's land lying to the south. It appears from the testimony that this road is not usable during certain seasons of the year particularly because it crosses certain streams and the bridges are in a state of disrepair. Appellant built a cattle guard across this road to which appellee objects, but the chancellor held, and we think properly so, that this cattle guard was sufficient and need not be removed. Appellant it seems had placed certain obstructions in this road which the chancellor correctly ordered him to remove. In our opinion the chancellor correctly held also that this particular road had been practically abandoned by the public but that it could possibly be used in the future.

In a carefully prepared statement the chancellor found that the public had lost all right to use the Old Road mentioned above because appellee had maintained the fence and gates for a period of more than seven years; he found that some time in 1954 there was an agreement reached by the appellant and appellee that appellant would help erect fences for a lane leading from the southeast corner of his homestead and running along the south portion of appellee's forty acre tract and that appellant, in lieu of using the Old Road, could use the lane as a passage way for his cattle, and; that appellant's relinquishment of the right to use the Old Road constituted the necessary consideration for appellee's agreement to allow him to use the lane. The chancellor also found that appellant's right to use the lane was personal to him and that it would not constitute an easement on appellant's land. In our opinion the testimony fully justifies the findings of the chancellor, however we will later refer to the testimony establishing the agreement.

After making the above findings in favor of appellant, the chancellor refused the relief prayed for by appellant. This conclusion rested on a single point of law, and we think the chancellor fell into error. Although the chancellor was convinced that an agreement regard-

ing the lane was reached by the parties and was convinced that the consideration for this agreement was adequate, he took the view that appellant's right to use the lane as a passage way was subject to be terminated at any time by appellee, consequently holding that appellee had a right to place gates at each end of the lane and refuse to allow appellant to use the same.

We think this case is controlled largely by *Chaney* v. *Martin,* 205 Ark. 962, 171 S. W. 2d 961. The issue and the facts in the two cases are very similar. In the cited case Martin, like appellant here, had used a prescription right of way which he gave up for the use of a new passage way provided by Chaney. In resolving the issue in favor of Chaney this court said:

"We do not deem it necessary to decide whether the proof in this case justified the finding that appellee had acquired by prescription an easement along the old route used by him in crossing appellant's land. Regardless of whether appellee had acquired such right, it is shown by the evidence that appellant recognized this right to the extent that he provided for appellee a new right-of-way across his land, and the evidence further shows that appellee accepted this new route and used it for several months. Appellee thereby surrendered any prescriptive right to use the old route that he might have possessed. This exchange of routes, accompanied by surrender of the old route and acceptance and continued use of the new route by appellee, as was shown by the evidence in this case, was effective, even in absence of any writing to evidence the agreement. 'An oral grant (of an easement) will be upheld where it is accompanied by consideration, action in reliance on the grant, and by the grantee's being permitted the granted use.' "

It may be noted also that in the present case there is an element of consideration on the part of appellant that did not exist in the cited case, for here Carter donated his time and labor to help provide the lane.

All the testimony, facts and circumstances convince us that it was not the intention of the parties in this case that appellee would have the right to stop appellant from

the use of the lane at any time he desired, and it is sure that appellee makes no such contention. It is unreasonable to believe that appellant would have given up the right of way he had and contribute his time and labor in erecting fences if he knew or thought appellee could revoke the agreement at his whim. It is the more reasonable view that the parties construed the agreement at the time as giving appellant the right to use the lane as long as it was needed by appellant, and the construction placed on the agreement at that time must be given to it now. See *Continental Insurance Company* v. *Harris,* 190 Ark. 1110, 82 S. W. 2d 841. When appellant was asked if he and Mr. Oslin had any time limit on how long the lane could be used, he replied: "We put the lane through there. It was supposed to be indefinite."

Appellee, however, strongly denies that he made any agreement with appellant to allow him to use the lane instead of using the Old Road mentioned above. We have carefully reviewed this testimony and we think it supports the chancellor's finding that such an agreement was reached. Appellant says positively that he and Mr. Lassiter, a renter on Oslin's place, had such an agreement with appellee, that he talked with Oslin personally about it and that Oslin made the agreement. Lassiter corroborates appellant in all respects except that he says he did not know how long the agreement was to run. It is not disputed that appellant and Lassiter did furnish their time and labor, that the fences for the lane were actually built, that Oslin knew about it, and that Oslin permitted the appellant and Lassiter to use the lane for the intended purpose for some seven or eight months — until Lassiter moved off Oslin's farm.

Appellant's brief in this case contains only an abstract of the pleadings and the findings and conclusion of the chancellor and asks this court for a reversal on the ground that the chancellor made a misapplication of the law. As was quoted with approval in the case of *Mount* v. *Dillon,* 200 Ark. 153, 138 S. W. 2d 59, ". . . a judgment cannot be supported by conclusions of law inconsistent with the facts found, and the findings of fact will prevail over conclusions of law."

We mention the above because appellee requests us to charge appellant with the cost of printing 79 pages of abstracted testimony in accordance with the provisions of Rule 9 (e) of this court. It is our opinion that this request should not be granted for the reason that it was not necessary for appellant to include in his abstract this additional testimony. In appellant's Notice of Appeal he states: "Plaintiff does not appeal from any finding of fact made by the court." Nor did he include any testimony in his "Designation of Contents." Appellee was the one who designated the testimony.

In accordamce with what has heretofore been said, the decree of the trial court is reversed on the point indicated and the case is remanded with direction to enter an order compelling appellee to move the obstructions from the lane in question and to permit appellant to use the same for the passage of his cattle. In all other respects the decree of the chancellor is affirmed.

PERKINS *v.* PERKINS.

5-1020 293 S. W. 2d 889

Opinion delivered October 8, 1956.

Claude E. Love, for appellant.

L. B. Smead and *Robert C. Compton,* for appellee.

SAM ROBINSON, Associate Justice. The parties were formerly husband and wife, and this is a contest between them over the custody of their son, Keith Randall Perkins, now about five years of age. The chancellor granted custody to the mother, and the father has appealed.

The appellant, James H. Perkins, and appellee, Wilma Faye Perkins, were married in 1946; their son was born in 1951. James went into the Army while they were living in Dallas, Texas, and at a time when he was stationed in Korea it was agreed that Wilma would join him, and that Mr. and Mrs. W. H. Perkins, the parents of appellant, would keep the child for the parties. The child was turned over to appellant's parents in August 1953, but Wilma did not go to Korea. Later, Wilma and James became estranged, and on November 1, 1954, he filed suit for divorce in the Union Chancery Court. While Wilma was still living at Dallas, she agreed that James should have custody of the child. However, the record is convincing that she understood the agreement to be that he was to have temporary custody only. She was not working at the time, and James was sending her no money whatever; hence, she was in no position to care for the child. James was granted an uncontested divorce on the grounds of desertion and awarded custody of the child on November 19, 1954. Subsequently, Wilma visited the child monthly, and traveled about 600 miles each trip to do it. On August 25, 1955, she filed a petition asking that she be granted custody of the child. Her petition was granted, and James H. Perkins has appealed.

It is appellant's contention, first, that there has been no change in conditions which would warrant a change in custody; and, second, that appellee agreed prior to the decree of the divorce that appellant should have custody of the child, and that ties of love and affection have developed between the child and his grandparents which should not be disturbed.

We cannot say the chancellor was in error in granting the mother the custody of the child. There is nothing in the record indicating that the mother is not a proper person for the care and custody of her little boy.

Moreover, she is a highly intelligent and capable person. She has a good job where she earns $325 a month, with a bonus at Christmas-time equal to one month's pay. She is well situated in Dallas to care for her son. Likewise, it appears that the child's grandparents, with whom he lives, are good people and have a good home, and are giving the child proper care and attention; but, custody of the child was not awarded to the grandparents in the first instance. The father was granted custody, however he is not in a position to have the child with him; he is in the Army and may be transferred from place to place on a moment's notice; he is unmarried, and if he should marry again it is entirely possible that his new wife might not welcome the little boy.

It is true that there are ties of love and affection between the child and his grandparents. But, it is a matter of common knowledge that usually there is no love like a mother's love; this is a law of nature that is almost invariable, and unless there are compelling reasons for giving some one other than the mother custody of a small child, it should not be done. Here undoubtedly, the mother loves her little son with all her heart, and there is no good reason why she should not have custody of him. At the time the decree was rendered granting the father a divorce and giving him custody of the child, the mother had no income and was not situated so that she could care for the child. But now, she has an income of $325 per month which enables her to maintain a comfortable home, and with the money the father must pay for support of the child, as ordered by the court or may be hereafter ordered in accordance with the circumstances of the parties, the little boy will have a good home with his mother, and this is as it should be.

Affirmed.

Mr. Justice McFaddin concurs.

CROWLY *v.* THORNBROUGH, COMMISSIONER OF LABOR.

5-1113 294 S. W. 2d 62

Opinion delivered October 15, 1956

Mehaffy, Smith & Williams and *B. S. Clark,* for appellant.

Tom Gentry, Attorney General, *Roy Finch,* Asst. Atty. General, for intervenor.

LEE SEAMSTER, Chief Justice. The appellant, J. C. Crowly, proceeding as a taxpayer, instituted this suit in the Pulaski Circuit Court, Third Division. The complaint was filed pursuant to Act 274 of 1953, praying for a declaratory judgment and asking that the court enter a holding that Act 115 of 1955, is unconstitutional and void in violation of the constitutional rights of the appellant and other taxpayers similarly situated.

The appellants' complaint alleged that Act 115 of 1955 was unconstitutional and void due to the following reasons:

"(a) It delegates legislative power to the Commissioner contrary to and in violation of the Constitution of the State of Arkansas, particularly Article 5, Section 1, as amended by Amendment No. 7, and Article 4, Sections 1 and 2; and Article 1, Section 1 of the Constitution of the United States, in the following instances:

"(1) It adopts as a standard the minimum prevailing wage scales as determined and as will be determined in the future by the Secretary of Labor of the United States thereby making the operation of the Act subject to future federal administrative ruling.

"(2) It is incomplete in that the adoption of the minimum prevailing wage scales as determined and to be determined in the future by the Secretary of Labor of the United States affords no adequate standard to guide the Commissioner and leaves the Commissioner as the sole determinant of its extent and operation.

"(b) It violates Article 2, Section 18, Article 2, Section 3, and Amendment 14 of the Arkansas Constitution; and the Fourteenth Amendment to the Constitution of the United States in the following instances:

"(1) Section 3 exempts 'highways, and streets and/or bridge construction,' thereby favoring this type of construction over other types and creates an arbitrary and unreasonable classification which is discriminatory in effect.

"(2) The Secretary of Labor of the United States only determines the prevailing wage rate for areas in which a federal project is contemplated. Consequently, the Act discriminates as to those areas in which the Secretary of Labor has made no determination. Moreover, many of the determinations made by the Secretary of Labor in Arkansas are out of date and the operation of the Act would discriminate as to these areas.

"(3) Section 1 insofar as it provides that the minimum wage shall be based on the prevailing wages for corresponding classes of laborers and mechanics employed on 'projects of a character similar to the contract work in the particular area in which the work is performed' is vague and uncertain because it is impossible to determine what constitutes 'projects of a character similar,' and it is impossible to accurately determine what constitutes the 'area in which the work is performed.' "

The appellee demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action. Thereafter, the appellee amended his demurrer to include that the court has no jurisdiction and appellant had no legal capacity to sue. The Attorney General for the State of Arkansas intervened in the suit and was allowed to file a written brief.

On February 15, 1956, the trial court entered its order overruling the appellee's amended demurrer as to the question of jurisdiction of the court. The court sustained the original demurrer in holding that Act 115 of 1955 was constitutional in every respect and dimissed the complaint. This appeal follows.

For reversal, the appellant lists the following points:

"I. The Act delegates legislative power to the Commissioner of Labor contrary to and in violation of the Constitution of the State of Arkansas and the Constitution of the United States.

"A. The Act Delegates Legislative Power to the Federal Government.

"B. The Act Is Incomplete In That It Affords No Adequate Standards.

"II. The Act is unconstitutional because it violates Article II, Section 18, Article 2, Section 3, and Amendment 14 of the Arkansas Constitution; and the Fourteenth Amendment to the Constitution of the United States.

"A. The Act Creates an Arbitrary and Unreasonable Classification which is Discriminatory in Effect.

"B. The Act Discriminates as to Those Areas in Which the Secretary of Labor Has Made No Determination.

"C. The Act Is Vague and Uncertain."

Act 115 of 1955 provides for minimum prevailing wages to be paid on certain state, county, municipal or other taxing agencies public construction projects. Briefly stated, the Act requires that the advertised specifications for every contract to which the state, any county, city or town, or any taxing agency is a party, for construction, alteration, and/or repair of public buildings or works, and which contract involves employment of mechanics and laborers, shall contain a provision stating that the minimum wages to be paid shall be based upon the wages that will be determined by the Secretary of Labor of the United States to be prevailing for the corresponding classes of laborers and mechanics on projects of a character similar to the contract work in the particular area in which the work is to be performed. Every contract shall contain a stipulation that the contractor shall pay such workers the wage rates in the advertised specifications. The wage scale shall be posted by the contractor in a prominent spot at the job site.

The Act also provides that if a contractor does not pay the advertised wage rate, then the difference between that paid and the advertised wage rate which should have been paid shall be withheld by the contracting officer or agency from amounts due the contractor.

Section 3 of the Act provides that the Act does not apply to highway, street and/or bridge construction, it being the specific intent to exempt this type of construction.

Section 4 of the Act provides "it shall be the duty of the Arkansas State Department of Labor to procure and maintain, at all times, the latest and most current information from the Secretary of Labor of the United

States concerning minimum prevailing wages for the various classes of laborers and mechanics for all the various areas in this State, and to furnish such information to all persons upon request therefor.''

Section 7 of the Act provides that the purpose and intent of the Act is to provide and establish minimum prevailing wage scales on all public works involving the aforesaid agencies and because the Secretary of Labor of the United States maintains such information pursuant to the Davis-Bacon Act and this information is accurate and readily available and will provide for uniformity.

Section 8 of the Act provides that if the contracting officer or agency finds that any laborer or mechanic employed by the contractor is being paid a rate of wages less than called for by the contract, the contracting officer or agency may, by written notice to the contractor, terminate the right to proceed with the work and hold the contractor or his sureties liable to the agency for any excess costs occasioned thereby.

On September 20, 1955, the Arkansas State Labor Department adopted rules and regulations under the alleged authority to do so under the provisions of Act 115 of 1955. Rule 1 (B) defines ''area'' as follows:

'' 'Area': Area as used by these rules shall consist of an area established by the Commissioner of Labor, at the time the request for such establishment is made, and shall be based upon determination of wage rates in area where Secretary of Labor of United States has not established rates.''

Rule 2 makes an area determination as follows:

''It having been determined that the Secretary of Labor of the United States makes a determination of wage rates in a particular area in Arkansas only when a project is contemplated therein and a request is made for a determination involving said project by another Federal Agency; and further that many wages rates furnished the Department of Labor of the State of Arkansas are obsolete due to the expiration of the date such rate was established; the Commissioner of Labor of the State of

Arkansas herein assumes the analogous authority of the Secretary of Labor of the United States as to the extent that he shall establish the minimum prevailing wage determination in such above referred areas as follows:

"A. The establishment of a minimum prevailing wage rate in a county in which the Secretary of Labor has not specifically established a minimum rate shall be based upon the proximity to the labor market area having the most similar and comparable crafts and skills already established by the Secretary of Labor of the United States in which said county is situated.

"B. When a written request is made upon the Commissioner of Labor for the State of Arkansas under the provisions of Acts 1955, No. 115, for a determination of rates in the locality referred to in Section 2A above, the Commissioner of Labor shall be given ten days after the receipt of such request to make such determination; provided, however, that if such determination has already been made for such locality then only in that event such rates shall be provided forthwith."

Act 115 attempts to fix a minimum wage to be paid on certain State, county, municipal or taxing agency public construction or works. A provision exempts highway, street and/or bridge construction.

The Act provides that "the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages that will be determined by the Secretary of Labor of the United States to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the particular area in which the work is to be performed."

The findings of the State Labor Department show that "the Secretary of Labor of the United States makes a determination of wage rates in a particular area in Arkansas only when a (Federal) project is contemplated therein and a request is made for a determination involving said project by another federal agency; and further that many wage rates furnished the Department of

Labor of the State of Arkansas are obsolete due to the expiration of the date such rate was established."

The Act fails to establish a standard or formula by which a wage scale may be formulated; but rather delegates to the Secretary of Labor of the United States the right to fix the minimum wage scale to be paid in a particular area of this State. The State retains no control over the Secretary of Labor of the United States, therefore the Act violates Article 4, Sections 1, 2 and Amendment 7 to our State Constitution. Numerous decisions from other states have held similar legislation to be an unconstitutional delegation of legislative authority to an agency of the United States Government. *Hutchins* v. *Mayo,* 143 Fla. 707, 197 So. 495, 133 A. L. R. 394; *Smithberger* v. *Banning,* 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686; *State* v. *Gauthier,* 121 Me. 522, 118 A. 380, 26 A. L. R. 652; *Holgate Bros. Co.* v. *Bashore,* 331 Pa. 225, 200 A. 672, 117 A. L. R. 639

Act 115 contains no provision for the establishment of prevailing minimum wage rates for those areas in which the Secretary of Labor of the United States has made no determination or those areas in which previous determinations have become obsolete and out-of-date. For this reason the Act discriminates as to those areas, since there is no standard or formula by which such wage rate may be determined, thereby making the Act local or special in its effect. This discrimination violates Amendment 14 to our State Constitution.

The Act is vague and indefinite in that it fails to define "a particular area." To a County Judge, his area would be his County; to a Mayor, his area would be a municipality; and, to school directors, their area would be their school district. By the provisions of the Act, it is impossible to accurately determine what constitutes the "area in which the work is performed." The Act fails to confer on any agency the authority to determine facts necessary for fixing the limits of any particular area.

The rules and regulations adopted by the Arkansas Department of Labor, with reference to said Act 115,

are void, due to the fact the Act failed to authorize the making of such rules and regulations.

In the case of *Connaly* v. *General Construction Company,* 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126, the court held that a similar statute was so uncertain, both in the use of words "current rate of wages" and "locality," as to deprive contractors of their property without due process of law.

For the reasons stated above, we find that Act 115 of 1955 and the rules and regulations adopted by the Arkansas Department of Labor pertaining thereto are unconstitutional and void.

Reversed and remanded.

RITCHIE GROCER COMPANY *v.* SANDERS.

5-997 294 S. W. 2d 54

Opinion delivered October 15, 1956.

O. E. Gates and *Gaughan, McClellan & Laney,* for appellant.

Wayne Jewell, for cross-appellant and *Robert C. Compton, Walter L. Brown* and *J. Bruce Streett,* for appellee.

J. Seaborn Holt, Associate Justice. Prior to November 9, 1953 appellee, B. M. Ritchie, operated a mercantile business at Hampton, Arkansas, and on this date he sold the business, fixtures and merchandise to W. D. Sanders. On this same day Ritchie took Sanders' note for $8,100 payable in sixty monthly installments of $135 each and to secure payment of the note Sanders executed a chattel mortgage covering the fixtures, which were particularly described, and "also, my entire stock of merchandise, now in my store in the Ritchie Building, and that which may hereafter be stocked from time to time in said building, in Hampton, Arkansas." This mortgage was duly recorded and at the time it was executed both B. M. Ritchie (mortgagee) and Sanders (mortgagor) owed no debts.

Sanders took over the business on November 9, 1953 and proceeded to operate it until February 17, 1954, when he delivered the fixtures and merchandise back to Ritchie and thereafter Ritchie operated the business, selling and disposing of the merchandise and stock in the regular course of retail trade. During the time that Sanders operated the business he purchased groceries and merchandise from appellants, Ritchie Grocer Co., South Arkansas Grocer Co., and Robert Mays Wholesale Grocer Co., which merchandise he co-mingled with his stock for retail sale and at the time when he delivered the merchandise and fixtures back to Ritchie, he, Sanders, was indebted to Ritchie Grocer Co. in amount of $749.51, South Arkansas Grocer Co. in amount of $566.48 and Mays Wholesale Grocer Co. in amount of $438.06. When Sanders delivered the stock of merchandise and fixtures back to Ritchie (February 17, 1954) no effort was made to comply with our bulk sales law, § 68-1501-1504 incl., Ark. Stats. 1947.

When appellants learned that Sanders had returned the business and merchandise to B. M. Ritchie, as indicated, they filed the present suit against Sanders and Ritchie, in which they alleged that when W. D. Sanders transferred and delivered to B. M. Ritchie his entire stock of merchandise and fixtures on February 17, 1954, there was no compliance with the bulk sales law and that such delivery of said stock of goods was in fraud of creditors; that Sanders was wholly insolvent and had made no provisions to pay his accounts to appellants or to his other creditors, and prayed for the appointment of a receiver to take possession of the stock of goods, merchandise and fixtures, to be administered for the benefit of Sanders' creditors. At this point it appears that by agreement B. M. Ritchie was allowed to execute a bond in the amount of $2,000 to protect the creditors of Sanders, which was done, and the receiver, previously appointed by the court, was authorized to return the fixtures and merchandise to B. M. Ritchie. Appellee Sanders filed answer and cross complaint. A trial resulted in a decree holding that the delivery of the stock of goods, merchandise and fixtures from W. D. Sanders to B. M. Ritchie was not in violation of the bulk sales law; that Ritchie was not responsible to the creditors of Sanders under the bulk sales law; and that there was "no liability on the part of B. M. Ritchie and his surety on the bond set forth in the court's order of March 10, 1954. The court finds that the receiver has collected some accounts owing to W. D. Sanders and has received other monies and has incurred expenses in performing his duties as receiver, and that a final settlement should be made and the receiver discharged," . . . and decreed "that the plaintiff, Ritchie Grocer Company have judgment against the defendant, W. D. Sanders in the sum of $749.51 with interest from March 23, 1955; that South Arkansas Grocer Company have and recover judgment against the defendant, W. D. Sanders, in the sum of $566.48 with interest from March 23, 1955; that Robert Mays Wholesale Grocer Company have and recover judgment against the defendant, W. D. Sanders in the sum of $438.06 with interest from March 23, 1955; that the cross complaint of W. D. Sanders against B. M. Ritchie and against Ritchie Grocer

Company and South Arkansas Grocer Company be, and the same is dismissed for want of equity; that the cross complaint of B. M. Ritchie against Ritchie Grocer Company and South Arkansas Grocer Company be, and the same is dismissed for want of equity; that the plaintiff's complaint and the intervention of Robert Mays Wholesale Grocer Company as against B. M. Ritchie be dismissed for want of equity and that the bond in the sum of $2,000 given by B. M. Ritchie with John Dawson as surety thereon, be and the same is cancelled and held to be of no effect and the title to the stock of goods, merchandise and fixtures referred to in the complaint be quieted and confirmed in the defendant, B. M. Ritchie, as against all parties in this suit."

For reversal appellants stoutly contend that "the transfer and delivery of the stock of goods, merchandise and fixtures by the debtor, W. D. Sanders, to B. M. Ritchie was a violation of the bulk sales law, and that B. M. Ritchie thereby became a receiver of said stock of goods, merchandise and fixtures for the benefit of the creditors of W. D. Sanders," and that since Sanders was insolvent at the time of the transfer "and being indebted to B. M. Ritchie, the transfer of his assets consisting of the stock of goods, merchandise and fixtures to B. M. Ritchie was a fraud upon these plaintiffs who were his creditors," and that the court erred in denying appellants, and the creditors, recourse against the bond of the receiver, B. M. Ritchie.

After a review of the record we have concluded that in the circumstances here the trial court erred in holding that the provisions of our bulk sales law were inapplicable to the transfer of the stock of groceries and the decree must be reversed for this reason. The chattel mortgage covering the specifically described fixtures, we hold to be valid and binding, in fact, appellants do not appear seriously to contend otherwise. It is undisputed, as indicated, that at the time these fixtures were mortgaged neither Ritchie nor Sanders owed any debts. Our bulk sales law, § 68-1501-1504, Ark. Stats. 1947 applies to the sale, *transfer,* mortgage or assignment in bulk or any part of a stock of merchandise, otherwise

than in the ordinary course of trade and in the regular prosecution of the business of the seller, and any transfer, mortgage or assignment shall be void against the creditors of the seller, transferrer, mortgagor or assignor unless certain provisions set out in the law are complied with. Here we have the attempt of the mortgagor, Sanders, to transfer and deliver back to Ritchie his stock of merchandise in satisfaction of his pre-existing debt to Ritchie, at a time when Sanders had incurred the above debts to appellants, wholesale grocers. Since our bulk sales statute above applies to any "*transfer*" we hold that the transfer here, in satisfaction of a pre-existing debt, violated the terms of our bulk sales statute. This appears to be the majority view of the courts in construing bulk sales statutes. In Michigan Law Review, Vol. 35 (1936-37) p. 748, where many cases are collected, we find this language: "A majority of courts, however, give a much broader scope to these laws [bulk sales] and ascribe to them the additional purpose of securing equality among creditors. In conformity with this view, the bulk sales laws are held applicable to a preferential transfer on the theory that one purpose of the statute is to give all creditors of the transferror an ample opportunity to protect their interests before the consummation of the transfer, otherwise the purpose of the act will be defeated. A transfer of goods is none the less a preferential transfer because it is made to one from whom the identical goods were previously purchased and because it is made in acquittance of the obligation incurred by such purchase. That is, if *S* sells goods to *B* who subsequently returns them to *S* because of his inability to pay therefor, such a return is a preferential transfer on the part of *B*."

Sanders has cross appealed and contends that he is entitled to a judgment against B. M. Ritchie for the amount by which he alleges that the inventory of the stock of goods, which he turned back to Ritche, showed a value exceeding Sanders' indebtedness to Ritchie. The chancellor, however, found against him on this contention and we are unable to say that the preponderance of the testimony does not support the chancellor's finding.

He also argues that "Sanders' Accounts Receivable" were wrongfully seized and he is entitled to have the accounts returned to him and damages for their wrongful seizure. We hold that the evidence does not support his claim for damages in this connection, but we think in the circumstances that his accounts which remain uncollected should be returned to him. Since, it appears that $77.40 was collected on these accounts, Sanders should also be awarded a judgment for this amount [$77.40].

We hold that the appointment of the receiver in the circumstances was not error. The proof showed that Sanders was insolvent when he transferred the stock of goods back to B. M. Ritchie. Since this transfer was made in violation of our bulk sales law, we hold that B. M. Ritchie is accountable to the creditors of W. D. Sanders, therefore, it was proper and, in fact, necessary that a receiver be appointed to take charge of the assets for the benefit of all the creditors of the insolvent debtor, Sanders. The order of the court directing the receiver, Harold Johnson, to release the fixtures and stock of goods to B. M. Ritchie upon the conditions set forth in the $2,000 bond of Ritchie, appears to have been done in the interest of expediency and the creditors. Accordingly, the decree is reversed with directions to declare the chattel mortgage, given by Sanders to B. M. Ritchie, invalid as far as the stock of goods is concerned; that the transfer of the stock of goods by W. D. Sanders to B. M. Ritchie violated the terms of our bulk sales law above and to hold B. M. Ritchie accountable under his bond to appellants for the full amount of their claims against W. D. Sanders, and for any further proceedings consistent with this opinion.

ROWE *v.* DICKERSON.

5-1003 295 S. W. 2d 305

Opinion delivered October 15, 1956.

[Rehearing denied November 19, 1956.]

Jack Yates and *Harper, Harper & Young,* for appellant.

Wiley W. Bean, Taylor & Cravens and *Mark E. Woolsey,* for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation results from a traffic mishap in the City of Clarksville. Appellant Rowe's car struck the car driven by appellee Dickerson, and the Jury awarded Dickerson damages. Only two questions are presented on this appeal.

I. *Rowe's Motion For An Instructed Verdict.* Rowe claims that the Trial Court erred in refusing his motion for an instructed verdict. It is Rowe's contention that Dickerson was guilty of contributory negligence as a matter of law. Viewing the facts in the light most favorable to the appellee,[1] it appears: (a) that Rowe was driving East on Main Street; (b) that his speed was between 30 and 45 miles per hour in a school zone where the speed was restricted to 15 miles per hour; (c) that Dickerson, driving North on Rogers Street, came to a complete stop before entering Main Street; (d) that Dickerson turned left to go West on Main Street; (e) that Dickerson then observed Rowe approaching rapidly from the West on Main Street; (f) that Dickerson came to a com-

[1] As is our established rule: see *Crownover* v. *Alread School Dist.,* 211 Ark. 449, 200 S. W. 2d 809; and *Black & White Co.* v. *Doville,* 221 Ark. 66, 251 S. W. 2d 1005.

plete stop before crossing the center line of Main Street; (g) that it appeared that Rowe was attempting to pass Dickerson on Rowe's left side rather than on Rowe's right side; (h) that the right front of Rowe's car struck the left side of Dickerson's car, causing the damages and injuries later to be discussed.

Rowe argues that Dickerson was guilty of contributory negligence as a matter of law, in stopping in Rowe's right hand traffic lane, and that such negligence is a complete bar[2] to Dickerson's recovery. But the testimony reflects that Rowe was proceeding at a rapid and unlawful speed; that Dickerson was keeping a good lookout; and that it appeared that Rowe was about to cross to Rowe's left and pass in front of Dickerson's car. Under such evidence, it was a question of fact whether Dickerson — confronted by an emergency due to Rowe's excessive speed — should have speeded up to get across the South side of Main Street, or should have stopped to leave the North side of Main Street open for Rowe to use, since it appeared that he was headed in that direction. In *Coca-Cola Bottling Co.* v. *Doud,* 189 Ark. 986, 76 S. W. 2d 87, we held that when a person is confronted with a sudden emergency created by the negligence of another, the course of conduct adopted is to be measured by what the ordinary prudent man would do in an emergency, rather than what he might do on more mature deliberation. It was for the Jury to decide whether, under the emergency created by Rowe's rapid speed, Dickerson pursued the proper course in stopping as he did. See also *East* v. *Woodruff,* 209 Ark. 1046, 193 S. W. 2d 664. We, therefore, hold that the Trial Court correctly denied the motion for an instructed verdict.

II. *Amount Of The Verdict.* Dickerson recovered $4,000 for personal injuries;[3] and Rowe claims that this verdict is grossly excessive. A study of the record discloses that Dickerson's evidence is very meager as to

[2] Because of the date of this traffic mishap, it is apparently conceded by all parties that this case is governed by our old rule (that contributory negligence was a complete bar) rather than our new comparative negligence statute, which is Act No. 191 of 1955.

[3] The firm of J. W. Dickerson recovered $181.37 for damages to its vehicle, and that verdict is not questioned on this appeal.

many matters usually found in a case like this one.[4] The record does, however, disclose that Dickerson suffered a whiplash syndrome[5] as a result of the collision. The attending physician testified that Dickerson had great pain in the left arm, left shoulder, the cervical spine and neck, marked swelling and a large abrasion midway between the shoulder and elbow of the left arm; that there was no evidence of a fracture of the bone, but that the pain was extremely severe; that later a small tumor of scar tissue had to be removed; that Dickerson was placed in the Baptist Hospital in Little Rock, where such operation took place.

The doctor also testified that, in his opinion, for the first four months Dickerson suffered up to a 25% injury of the entire body and that, in his opinion at the end of a year, Dickerson's disability would be from 8% to 10% of the body as a whole; *and that such disability would be permanent.* It was furthermore shown that Dickerson had lost considerable time from his work and was unable to work even at the time of the trial. Dickerson was a grocery salesman and delivery man and was 54 years of age at the time of the injury. The Jury had a right to consider his age, his residual disability, and the pain that he had suffered and would continue to suffer.

In view of all of the foregoing, we cannot say that the verdict, even under the meager evidence, is grossly excessive. That is the test. See: *Missouri Pacific R. Co.* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812; and *Missouri Pacific R. Co.* v. *Peters,* 220 Ark. 657, 249 S. W. 2d 304.

Affirmed.

---

[4] For instance: (a) nowhere in the record can we find any figure as to how much Dickerson was earning at the time of the mishap; (b) Dickerson had an operation in a Little Rock hospital, but the amount of the hospital and surgeon's charges are not shown in the record.

[5] The physician testified that it was what was commonly called a "whiplash neck, which is a name given injuries of this type of painful areas or a complexus of symptoms."

5-1040 294 S. W. 2d 57

Opinion delivered October 15, 1956.

Marcus Evrard and *James M. Gardner,* for appellant.

Taylor & Sudbury, for appellee.

Minor W. Millwee, Associate Justice. This is an action by appellee, Mrs. Lois Jefferies, against appellants, Anita Elizabeth McWaters, a minor, Mrs. Banetta McWaters and Langston-McWaters Buick Company to recover damages arising out of an automobile collision in the city of Blytheville, Arkansas on February 20, 1954. Trial before the circuit court without a jury resulted in a judgment for appellee in the sums of $1,500 for personal injuries and $400 for property damage.

For reversal appellants contend there is no substantial evidence to support the judgment and that appellee was guilty of contributory negligence as a matter of law. In determining the sufficiency of the evidence on the questions of the negligence of appellants and the contributory negligence of appellee, we must consider it in the light most favorable to appellee. It is also well settled that where a case is tried before a judge sitting as a jury, his finding on a question of fact is as conclusive on appeal as a jury verdict and will not be disturbed if supported by any substantial evidence. *Pate* v. *Fears,* 223 Ark. 365, 265 S. W. 2d 954.

According to appellee's testimony she was driving her Buick automobile west on Main Street in the 600 block on the afternoon in question when a Nash car belonging to Langston-McWaters Buick Company and being driven by the minor appellant, Anita Elizabeth McWaters, pulled in front of appellee. The McWaters girl was on a mission for her mother, Banetta McWaters, to the home of her grandmother who lived on the south side of Main Street in the 1,000 block. The two cars were traveling between 20 and 25 miles per hour with appellee's car about two or three car lengths behind the other car. When appellants' car reached a point opposite the driveway to the grandmother's residence it stopped suddenly and without a signal or warning of any kind for the purpose of turning into the driveway and appellee's car struck the rear of appellants' car resulting in the damages for which judgment was rendered. Oncoming traffic to her left and a line of trees on her right prevented appellee from turning to avoid the collision which occurred as she applied her brakes.

Appellee was 55 years of age and had been driving 37 years at the time of the collision. The McWaters girl was 14 years of age and driving without a license. There were two other young girls on the front seat with her.

The foregoing evidence on behalf of appellee was disputed only to the extent that the occupants of appellants' car testified that the McWaters girl turned on her blinker signal light indicating her intention to make a left turn into the driveway before she came to a normal stop several seconds before the collision. This was stoutly denied by appellee. There is an absence of any evidence that appellants' driver looked back or into the rear-view mirror before making the stop.

The trial court, sitting as a jury, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. When the conflicting evidence in this case is viewed in the light most favorable to appellee, we find it substantial and sufficient to support the trial court's finding that the negligence of appellants' driver

was the sole and proximate cause of the collision and consequent damages to appellee. The judgment is accordingly affirmed.

SHIPLEY *v.* CAMPBELL, EXECUTOR.

5-894 294 S. W. 2d 59

Opinion delivered October 15, 1956.

Harold Sharpe, Wood & Smith, Wesley Wood and *Morriss, Morriss, Boatwright & Lewis,* for appellant.

Mann & McCulloch and *Giles Dearing,* for appellee.

GEORGE ROSE SMITH, J. This is a contest of the will of Mary Lee Mann, who died in 1953 at the age of seventy-five. Her estate, valued at more than $250,000, consists principally of a large farm in Cross and St. Francis counties. By the will in question, which was executed in 1952, the testatrix made several specific bequests and then left the remainder of her estate to Fred Thomas, who had been her farm manager since 1948. The de-

cedent's heirs at law are fourteen cousins, thirteen of whom are the contestants. The other cousin, Lee Ola Roberts, received a legacy under the will and has not joined in the contest. The trial court, rejecting the contestants' assertions of testamentary incapacity and undue influence, admitted the will to probate.

On the issue of testamentary capacity it is the appellants' contention that Mary Lee Mann became mentally incompetent at some time between 1937 and 1941 and was thereafter continuously insane until her death in 1953. In developing this theory the contestants introduced a great deal of testimony about occurrences long before the making of the will in 1952. The proponents' proof is also extensive in its range, so that the record presents a detailed account of the last sixteen years of Mrs. Mann's life.

Mary Lee Mann was born on the farm now in controversy, but she was orphaned in childhood and was brought up by relatives in Whiteville, Tennessee. She and Arthur Mann were married in 1912 and lived together devotedly until his death in 1941. From about the year 1926 the couple made their home in San Angelo, Texas, where Mann was engaged in business. During her earlier years in Texas Mrs. Mann is described as having been markedly antisocial and apparently interested only in her husband.

In 1937 Mrs. Mann began to show the effects of heart trouble and arteriosclerosis, from which she suffered for the rest of her life. Her weight fell from about 170 pounds to about 115 pounds. The contestants offered much testimony to show that Mrs. Mann became very critical of every one except her husband, extremely careless in her dress, and exceedingly stingy in all money matters. There is also proof that the testatrix was deeply shocked by the unexpected death of her husband in April of 1941. Her grief is portrayed as having been altogether abnormal; it is said that for years she habitually stayed up at night, talking to her husband's picture, and slept during the day.

In the latter part of 1941 Mrs. Mann returned to Whiteville and lived there until 1948. She then moved to Wynne, Arkansas, and bought a house jointly with her cousin and cousin-in-law, Iva and Gary Flowers. The three lived together until March, 1951, but the arrangement did not prove to be a happy one. Mrs. Mann eventually brought suit to cancel the contract and was upheld by the courts. *Flowers* v. *Mann,* 219 Ark. 397, 242 S. W. 2d 840. From March to July of 1951 the testatrix was quite ill and spent the greater part of that period in the clinic at Wynne. When she was able to leave the hospital she moved to the farm and lived with Fred Thomas and his wife until her death on December 15, 1953. The will now in question, which was the last of several wills made by Mrs. Mann, was executed on March 30, 1952, after she had been at the farm for about eight months.

As we have said, the appellants contend that the testatrix was an insane woman, without lucid intervals, for at least the last twelve years of her life. In our opinion the weight of the evidence is against this contention and establishes the existence of testamentary capacity when the will was executed. We find it impossible to reconcile the theory of continuous insanity with the undisputed proof of what Mrs. Mann actually accomplished during the years in question.

Upon her husband's death in 1941 Mrs. Mann acted as the executrix of his will and appears to have performed her duties satisfactorily. She later conveyed her San Angelo home to her sister-in-law, Ona Mann Runkles, who now testifies that Mary Lee was mentally incompetent when she executed that deed.

When Mrs. Mann left Texas she transferred her substantial bank accounts to Arkansas. Here she maintained two bank accounts and made deposits and withdrawals. There are in the record some 300 checks that she wrote between 1941 and November, 1953 — the month before her death. Many represent business transactions, such as the payment of insurance premiums and the semi-monthly salary of her former farm manager. She paid off a mortgage that encumbered the farm at her husband's

death. She required her farm manager to send the tenants' rent notes to her in Whiteville and returned them for collection when the crops were about to be gathered. She invested $25,000 or more in the Wynne Federal Savings and Loan Association after having discussed the matter with her banker and with the president of the association, who says that she first asked "a lot of intelligent questions" about the institution. After moving to Wynne the testatrix contributed about $4,000 for the purchase of a pipe organ for her church at Whiteville.

The record contains a number of letters, in Mrs. Mann's handwriting, that give every indication of having been written by a person of normal intelligence. Before Mrs. Mann went to Wynne to live she wrote to Mrs. Flowers and asked her to find a suitable house. The decedent paid almost the whole consideration for the home that was bought jointly with Mr. and Mrs. Flowers, but they now question her capacity to enter into the agreement. We need not enumerate many other transactions that are described in the testimony.

Strongly confirming Mrs. Mann's soundness of mind is the testimony relating to the actual execution of the will. Her banker, W. W. Campbell, states that he and his wife visited Mrs. Mann about every two months while she was living at the farm. During those visits she seemed alert and cheerful. A week or so before the drafting of the will, as the Campbells were leaving, Mrs. Mann told Campbell that she wanted to talk to him about her will at the first opportunity. On Sunday, March 30, she had Thomas telephone Campbell and ask him to come to the farm. Assuming that the will was to be discussed, Campbell took with him his brother-in-law, Burk Mann, a local attorney. When they arrived Campbell went in alone and found that Mrs. Mann did desire to make a will. He explained that he had brought Burk Mann, and, while this attorney was not related to the testatrix' deceased husband, Arthur Mann, the testatrix knew him by reputation and said there was no one she would rather have. Campbell then called Mann into the house.

Mrs. Mann discussed the proposed will in detail with the attorney. She had already prepared a memorandum of the various bequests, including the devise of the farm to Fred Thomas. Mann went over the memorandum with her, item by item, and, as his client wanted the will drawn at once, went into another room and wrote the will. At Mrs. Mann's suggestion Lee Horton, who lived a few miles away, was called to witness the will, along with Burk Mann. The latter says that he asked the testatrix whether Fred Thomas and his wife had any intimation about what she was doing for them, and she said: "Not the least bit." The memorandum, concededly in Mrs. Mann's handwriting, was introduced in evidence and is one of the most convincing indications of the testatrix' mental capacity.

Although the testimony of the lay witnesses preponderates rather decidedly in favor of the decedent's sanity, the contestants introduced six physicians who expressed the opinion that Mrs. Mann lacked testamentary capacity. Four of these witnesses, however, had never seen the testatrix and based their opinion upon a fifty-page hypothetical question. This question does not contain an impartial summary of all the testimony; it presents the contestants' proof in its most favorable aspect and disregards almost all of the proponents' evidence. In these circumstances the expert opinions do not materially strengthen the contestants' case. On the other hand, the opinions of the physicians who actually treated Mrs. Mann are in conflict.

On the issue of undue influence we are similarly of the opinion that the contestants failed to sustain their burden of proof. There is no direct evidence of undue influence on the part of Fred Thomas and his wife, but the appellants urge that the circumstantial evidence is sufficiently strong to invalidate the will on this ground. They argue that the residuary devise to Thomas, to the exclusion of the testatrix' blood kin, is an unnatural disposition of the estate, and they stress the opportunity that the Thomases had for the exercise of a sinister influence upon Mrs. Mann while she was living with them at the farm.

The testatrix' disposition of her property does not seem as unnatural as the appellants would have us believe. Mrs. Mann's heirs, under the statute of descent and distribution, are fourteen cousins. She was undoubtedly fond of one of them, Mrs. Roberts, who helped rear Mrs. Mann in Whiteville and who receives in excess of $12,000 under the will. The other thirteen live in various places — elsewhere in Tennessee, in Massachusetts, Missouri, Texas, and Arkansas. It is not shown that Mrs. Mann had ever met all these scattered cousins or had any especial affection for them. Three of the thirteen testified at the trial, but none of them had seen the testatrix for more than four years before her death. One of the three had seen Mrs. Mann only three times in her life, for about an hour on each occasion. On the basis of those brief visits the witness says she considered her kinswoman to be of unsound mind, but she gives no plausible reason for this conclusion. Inasmuch as the testatrix undoubtedly had the privilege of leaving her property to any one she chose, her failure to make these contestants the beneficiaries of her will cannot be regarded as strong circumstantial proof of undue influence.

It is certainly true that Mr. and Mrs. Thomas had an excellent opportunity to sway the testatrix during the eight months preceding the execution of the 1952 will. Mrs. Mann was then in frail health, did not venture beyond the front porch, and was dependent upon the Thomases for all her needs. Yet she was not kept in seclusion; she had many business and social visitors while she was living with the Thomases. It is argued, however, that the existence of undue influence is the only reasonable explanation for Mrs. Mann's exceptional generosity toward one who was not related to her and had merely been the manager of her farm for a few years.

This argument is pretty well rebutted by the terms of the next to the last will that the testatrix executed. This will was signed and attested at the Wynne clinic on April 30, 1951. It was prepared by Mrs. Mann's attorney, Giles Dearing, who was representing her in the litigation with Mr. and Mrs. Flowers. There is no good

reason to think that the 1951 will did not correctly reflect the testatrix' wishes at that time.

By the earlier will Mrs. Mann left all her real property to Mrs. Roberts for life, with remainder in fee "to my good friend Fred Thomas." As Mrs. Roberts was then past eighty years of age the remainder to Thomas was very nearly the equivalent of the fee simple. It is significant that the facts now strongly urged to support the charge of undue influence did not exist in April, 1951. Mrs. Mann had not then lived in the same home with the Thomases. To the contrary, for the preceding three years she had resided with her cousin, Iva Flowers. During those years the Thomases took the trouble to visit Mrs. Mann several times a week and to bring gifts of fresh food from the farm. There is proof that Mrs. Mann preferred living with the Thomases to living with her cousin. There is proof that she was happy while in their care. Theirs was perhaps the only real kindness that Mrs. Mann received from anyone after the death of her husband. The fact that her recognition of that kindness may seem to have been unduly liberal is not a sufficient reason for declaring her will to be invalid.

Affirmed.

HUNTER *v.* JOHNSTON.

5-1015 294 S. W. 2d 49

Opinion delivered October 15, 1956.

Don Steel, for appellant.

Nabors Shaw, for appellee.

PAUL WARD, Associate Justice. Mrs. Lilly Davis Hunter died in 1953, leaving as her only heirs one daughter and two sons — William, Helen and Percy. Found among her papers were two notes signed by Percy and his wife, Juanita. One for $2,000 and one for [a balance of] $500. For the purposes of this opinion it may be stated that appellants admit liability on the notes and also admit they used the borrowed money to help purchase and improve a homestead in Polk County.

This suit was instituted in chancery court by Helen and William against Percy and his wife to recover judgment for two-thirds of the amount due on the notes, and to impress a lien therefor on the homestead. The chancellor granted the relief prayed for, and appellants here seek a reversal on two grounds, viz: (a) The chancery court had no jurisdiction and (b) the evidence does not justify the granting of a lien. We disagree with appellants on the first point but agree with them on the other point.

(a) Although we might agree that the motion to transfer to circuit, based on the original complaint, was proper, yet, from a practical standpoint it would be of no benefit to appellants for us to so hold at this time, and it would only result in a loss of time and money. The original complaint, in our opinion states no ground for equitable relief, but later an amendment to the complaint was filed which, in the absence of further objections, justified the chancellor in permitting the parties to fully develop the matter of a lien.

(b) We conclude however that it was error for the trial court to decree a lien on the homestead in favor of appellees.

The complaint, in substance, alleges that the $2,000 was used by Percy to purchase the homestead and that the $500 was used to improve it. The amended complaint alleges that the deceased advanced the $2,000 to appellants ". . . with the understanding and relying upon the representations made by the defendants to Mrs. Lilly Davis Hunter that as soon as the defendants sold their home in Florida they would repay her the amount she had advanced on the purchase price of these lands . . ."; and "that . . . in 1951 the defendants sold their Florida property but failed to repay the $2,000 . . ."

Appellees were unable to offer any direct evidence of an oral or written agreement whereby the deceased was to have a lien on either the property in Polk County or the property in Florida. William did say that his mother told him "she let him [Percy] have the money for the purchase" of the Polk County property. Percy also gave this testimony:

"Q. What did these two defendants do to defraud your mother?

A. The only thing is what she said. They come up there and borrowed the money with the understanding they were to pay when they sold the property in Florida, and the property had been sold."

* * *

"Q. But she never did indicate to you that the Polk County land was security for that indebtedness, did she?

A. No, sir, she did not."

Helen's testimony on this point was:

"Q. Do you recall, Mrs. Johnston, when your mother loaned your brother Percy the $3,000?

A. No, sir, I did not know a thing about it for two years afterwards."

Perhaps the most significant evidence offered by appellees regarding the Florida property was the introduction of a letter written by the deceased, dated October 13, 1953, in which, among other things she states: "You said you would sell your Florida home and pay me . . . You said you would pay me the ins. just like the loan had and that you would sell your Florida home and pay me back in a short time." Two things should be noted regarding this letter. One is that it fails to state at what time appellant made the alleged promise, and, too, it appears likely the letter was never sent to appellants. They say they never received it, and William says "I found it in her belongings," referring to his mother.

On the other hand, Percy and his wife both state positively that they merely borrowed the money from Percy's mother, and that nothing whatever was said at that time about the Florida property or about her having a lien on the Polk County property. Moreover, their version of what took place appears reasonable. Percy, a career air force pilot, retired in 1947, and in the meantime had purchased a home in Florida. At one time while he and his wife were stationed at Fort Worth his mother visited him. On occasions Percy's mother expressed the hope they would make their home near her in Polk County. In 1950 they visited Mrs. Hunter at her home in Polk County and Percy told her he had found a place in that county which suited them but did not have sufficient money to buy it. Mrs. Hunter thereupon volunteered to loan them some money to help buy the place, and they accepted the loan. They say Mrs. Hunter did not even want a note, but they insisted, and the notes are in the handwriting of Percy's wife. No due date is shown on the notes. Within seven months after appellants bought the home in Polk County, the house and furniture burned. Thereupon Percy's wife went to Florida and sold their home for $1,217.63 [their equity], and they used this money to repair and refurnish their home in Polk County. They do not deny owing the notes.

Under this factual situation appellees are not entitled to have a lien impressed on appellants' home in Polk County. There is no evidence that Percy and his

wife agreed to give Mrs. Hunter a lien, or that they tricked or defrauded her into making the loan, or that she expected any security for the advancements other than the notes and their promise to repay.

Generally speaking, before equity will create or impress a lien in a situation similar to the one here presented, either it must appear there was some agreement to that effect, or there must be a showing of deceit or fraud. The first alternative is recognized in 53 C. J. S. at page 840, where it is stated: "An equitable lien may arise from an express contract whereby a party promises to transfer, or indicates an intent to charge or appropriate, particular property as security for an obligation. No special form of contract is essential, provided the intent of the parties to create a lien is clearly expressed." The second alternative is treated in the same volume at page 844. After stating that an equitable lien may arise independently of any express agreement, based on considerations of right and justice and on an obligation or duty to be enforced, it is stated: "However, the tendency is to limit rather than extend the doctrine of constructive liens, and, in order that such a lien may be claimed, either the aid of a court of equity must be requisite to the owner so that he can be compelled to do equity or there must be some element of fraud in the matter as a ground of equitable relief."

In this case the evidence falls short of establishing either an agreement that the deceased was to have a lien on the land, or that she was induced to make the loan by deception or fraud. It shows merely a voluntary loan of money.

Part of the money loaned by the deceased was used by appellants to make improvements on the land. Under facts much more favorable to appellees than obtain here, we held in *Butterfield* v. *Butterfield,* 79 Ark. 164, 95 S. W. 146, that no lien was created.

Neither did the loan of money for part purchase price of the land create a lien in favor of the lender under the facts in this case. Frequently the situation suggesting an

equitable lien is akin to that indicating a resulting trust. Both were discussed, on the same factual basis, in *Travis* v. *Neal*, 199 Ark. 236, 134 S. W. 2d 515 in language appropriate here. Mrs. Travis, who had paid for land which her husband and a Mr. Davis had purchased, sought to have a resulting trust or a lien declared. As to the former the court, said: "No elements of a trust appear under the conditions testified to by the parties. There was no mistake, no unconscionable conduct that by any stretching of the imagination could be treated or considered as a fraud. There was no abuse of confidence or of the relations of the parties one to another." In denying a lien it was said: "On the other hand we find no evidence that would warrant the court in declaring a lien on this property. There was a lien on the property in favor of Hubbard, and Mrs. Travis might well have been the beneficiary of that lien had she desired to claim it against the land at the time she now insists she furnished the money to pay the notes. She could have had Mr. Hubbard assign to her the notes, contract and mortgages, and since she was a stranger to the contract, in no sense a party to it, she could have enforced whatever lien Hubbard had against the land. She elected not to do that and, of course, in the payment for this property, according to her own testimony, she was a volunteer when she paid over the money."

Accordingly, the cause is reversed and remanded with directions to cancel the lien, but in all other respects the decree of the trial court is affirmed.

COMMISSIONER OF LABOR, C. R. THORNBROUGH *v.* DANCO CONSTRUCTION COMPANY.

5-1052 294 S. W. 2d 336

Opinion delivered October 22, 1956.

Harlin J. Perryman, on reply brief, only, for appellant.

John B. Thurman, Mehaffy, Smith & Williams and *B. S. Clark,* for appellee.

LEE SEAMSTER, Chief Justice. On January 10, 1956, appellant, C. R. Thornbrough, Commissioner of Labor for the State of Arkansas, served a subpoena on appellee, Danco Construction Company, commanding its representative to appear in the offices of the State Labor Department on January 13, 1956, and show cause for appellee's failure to produce certain books and payroll records which had been requested by the Commissioner. The subpoena also directed appellee to produce its payrolls and other records, showing the name, address, and occupation of each person employed by appellee on the waterworks extension project at Camden, Arkansas; and further, the daily and weekly hours worked by each such person, and the wages paid each pay period to each such person.

On January 13, 1956, the appellee filed a Petition for Writ of Certiorari in the Pulaski Circuit Court, Third Division, seeking a review of the Commissioner's actions, and on the same day the Commissioner filed a Petition for Attachment on the subpoena. The appellee filed an answer to the Petition for Attachment, alleging that Act 115 of 1955 was not applicable to the project referred to in the subpoena since the waterworks extension project was not a taxing agency.

The matters were consolidated and on March 22, 1956, the trial court entered an order dismissing the cause, holding that the Camden Municipal Waterworks System, under operation by the Waterworks Commission, was not a taxing agency within the purview of Act 115 of 1955. This appeal follows.

For reversal, the appellant alleges that there is no requirement that a municipality, city, or town or other agent of the state be a taxing agency in order to come within the application of Act 115 of 1955.

At the outset we are confronted with an insufficient abstract by appellant, and have concluded that the order of the trial court must be affirmed for this reason. The appellant has failed to abstract the record in this case as required by Supreme Court Rule 9 (d) and consequently this court is not afforded an understanding of the questions to be resolved. In this case appellant did not abstract the pleadings or the decree, and there is nothing in the entire brief upon which the judges of this court could confidently say that the decree of the trial court should be reversed. The several judges of this court are not required to make an individual search of the record, particularly in the absence of proper references thereto, in order to arrive at a decision, and it certainly is not practical to do so.

Constitutional questions are never decided unless necessary, however, we feel that it is necessary to point out that this court recently held that Act 115 of 1955 was unconstitutional. See *Crowly* v. *Thornbrough, Commissioner of Labor,* Ark., 294 S. W. 2d 62.

Accordingly the decree of the trial court is affirmed.

KIRK *v.* ROACH.

5-1054 294 S. W. 2d 335

Opinion delivered October 22, 1956.

Caldwell T. Bennett, for appellant.

Williamson & Williamson, for appellee.

J. Seaborn Holt, Associate Justice. At an annual school election held March 17, 1956, appellee, (contestee), received 126 votes for school director and appellant, (contestant), received 107 votes. On March 28, 1956, appellant filed a contest alleging in his complaint that 24 votes, which he listed and described separately, cast for appellee were illegal and void and when purged appellant would have a majority of the legal votes cast and should be declared elected. Summons on the complaint was issued March 28, 1956, served April 2, 1956, and on April 9, 1956, appellee, Roach, filed a "motion to dismiss for want of jurisdiction." This motion was based upon the alleged failure of contestant, Kirk, to give notice of contest to contestee as set out in § 3-1205 Ark. Stats. 1947, which is Sec. 71, Act 34 of 1875. A hearing was had on this motion April 16, 1956, and the court sustained appellee's motion and dismissed appellant's cause of action, for failure to serve notice as set out in § 3-1205 above. This appeal followed.

For reversal appellant says: "This appeal raises but one point or one issue for decision. Querie: Is it necessary to comply with the notice provision of Sec. 3-1205 Ark. Stats. 1947, which is also Sec. 71 of Act 34 of 1875 — when Section 3 of Act 366 of 1951, expressly provides that the procedure in a school directors election contest shall follow the procedure set out in Act 34 of 1875, Section 68 (Ark. Stats. 1947, § 3-1204)?" Contestant (appellant) stoutly contends that Act 366 of 1951 provides the form and procedure for contesting elections of school district directors and that the notice set out in § 3-1205 above is not required. We hold that this contention of contestant must be sustained.

Act 366 of 1951 is short and unambiguous, it provides: "Section 1. If the election of any member of a county board of education or member of a school district board of directors be contested it shall be before the circuit court of the county wherein the contested office exists. Section 2. All actions to contest such election shall be commenced within twenty (20) days after the election at which any such person was elected. Section 3. Actions to contest election of county and dis-

trict school officers shall follow the procedure set out in Act 34 of the Arkansas Acts of 1875, Section 68 (Ark. Stats., 1947, Sec. 3-1204). Section 4. It is hereby declared that the purpose of this Act is to divest county boards of education of jurisdiction to hear and determine school election contests and to vest such jurisdiction exclusively in the circuit courts. Section 5. All laws and parts of laws in conflict herewith are hereby repealed." This act very clearly and unmistakably provides the forum for school election contests to be in the circuit court, divests county boards of education of jurisdiction, and fixes the time for filing contests "within 20 days after the election." It specifically directs that all contests of school district officers shall follow the procedure set out in Section 68 of Act 34 of the Arkansas Acts of 1875 [Ark. Stats. 1947, § 3-1204]. This section 68 [now, as indicated, § 3-1204 Ark. Stats. 1947] provides: "All actions or proceedings for contests as herein mentioned shall be by complaint filed in the circuit court as other actions at law, in which the contestant shall plainly and fully set forth the grounds upon which the contest is found, and upon the trial of the same, he shall be confined to such grounds as are therein mentioned, but may amend the same in such manner and upon such terms as do not prejudice his opponent etc." The intention of the Legislature that Section 68 [the only section of Act 34 of 1875 referred to] be the procedural guide is unmistakable. Neither Section 71 [now § 3-1205 Ark. Stats. 1947] relied on by appellee, nor any other section in Act 34 of 1875 is referred to. To make doubly sure that the Legislature's intent was that Section 68 should be followed, as to procedure, this Section 68 of Act 34 of 1875 is pointed out as now being § 3-1204, Ark. Stats. 1947, and further, all laws in conflict with the provisions of Act 366 were specifically repealed. It is clear to us that appellant has literally followed the provisions of Act 366 above, in this contest of a school director's election, and that the trial court erred in holding otherwise, accordingly, the judgment is reversed and the cause remanded.

5-1034 295 S. W. 2d 309

Opinion delivered October 22, 1956.

[Rehearing denied November 26, 1956.]

[redacted]

Clifton Bond, for appellant.

Paul K. Roberts, for appellee.

J. SEABORN HOLT, Associate Justice. This suit was brought by appellee (C. L. Ripley) against appellant (Arnold Vickers) to recover $863.01 alleged due and unpaid on an open account for poultry feed and supplies furnished to Vickers. Vickers' answer alleged: "That the defendant denies each and every material allegation of the plaintiff's complaint. Further, that the defendant specifically states that the complaint and the itemized statement of the account attached thereto are neither just nor correct and erroneously state the amount, if any, which the defendant might owe." A jury trial resulted in a verdict for appellee in amount of $578.67 and this appeal followed. Appellee has cross appealed.

For reversal appellant relies on this one point: "The records of account upon which the claim of the plaintiff-appellee is based were prepared by the appellant who denies their validity, accuracy and correctness, and, therefore, are incompetent in evidence to sustain the verdict and judgment against the defendant-appellant."

The evidence shows that appellee, Ripley, is a dentist, in active practice, in Warren, Arkansas, and also was the owner and operator of the Rainbow Feed Mills there. The manner in which appellant secured the feed and supplies here involved was first to go to appellee's dental office, procure a key to appellee's feed store, then proceed alone to the store, unlock the door, select what he wanted, load it on his truck, make out sales ticket for the feed received, then leave the ticket on a desk in the store, close and lock the door and drive off with his purchase. Appellee would later pick up the sales ticket and enter the account in a ledger.

The question presented was one of fact, for the jury to determine what amount, if any, appellant owed appellee for the feed and supplies purchased and received from appellee. The trial court, after instructing the jury that the burden of proof was on appellee, correctly instructed them, at appellant's request, "If you find that the entire account upon which suit is brought is not just, accurate or correct then your verdict shall be for the defendant, and, if any part of the account is not just, accurate or correct then your verdict shall be for the defendant as to that part which is not just, accurate and correct."

Appellee testified, in effect, that Vickers purchased feed and supplies from him during the period of time from August 9, 1954 to January 13, 1955 and was indebted to him in the amount of $863.01; that Mr. Vickers would come to his office and get the key, unlock the feed house, get his feed, and make a ticket and either bring the key to him or give it to the filling station boy. That was the reason the tickets were made out by Mr. Vickers. Mr. Vickers would leave the tickets on the desk, already made out with the amount of feed; that he, appellee, was his own bookkeeper and would pick up the sales slips and enter them in his ledger. Appellant testified, in effect, that he owed nothing on the account; that he had paid appellee all he owed him. Thus, the issue of the correctness of the account was presented to the jury. The evidence further shows, as indicated, that appellee made up his ledger sheets of appellant's account of indebtedness

to appellee from a large number of sales tickets prepared by appellant, or his authorized agent, and furnished to appellee.

Appellant testified that he did not deny the validity of any specific sales ticket among the 36 offered in evidence by appellee. Quoting from appellant's testimony: "Q. Then the signature or writing on the ticket as to the amount or name would either be in your handwriting, the handwriting of Mr. Hubert Godwin, your brother-in-law, or the handwriting of your wife? A. Yes, sir. Q. Then actually you may have gotten some of the feed where the ticket was not in your handwriting; is that correct? A. That's right. Q. Therefore, in looking at these, in pointing out the fact that it was your handwriting or it was not your handwriting, it doesn't necessarily mean that you are denying that particular ticket, is that correct? A. That is correct."

The ledger account, or memorandum, made and kept by appellee was admissible in evidence for either of two reasons: first, it was made up by appellee from sales tickets or invoices admittedly prepared by appellant himself, or his agent, which were, in effect, admissions against his own interest and come within the exception to the hearsay rule; and, second, we hold that this record account, or memorandum, in the circumstances here, was made by appellee in the regular course of business and admissible in evidence under § 28-928 Ark. Stats. 1947 [Pocket Supplement] which provides: "In any court of record of the State, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter, etc."

We hold that there was substantial evidence to support the jury's verdict and accordingly we must and do,

under our rule, affirm the judgment, *Coffer* v. *State*, 211 Ark. 1010, 204 S. W. 2d 376.

The appellee on his cross appeal contends that: "The jury acted without substantial evidence to support their finding that appellant did not owe the $863.00." We do not agree to this contention. What we have said above applies also to this contention. As pointed out, on conflicting and substantial testimony, the jury found that $578.67 was all that appellant owed appellee and in the circumstances it is beyond our province to set this verdict aside. Finding no error, the judgment is affirmed on both direct and cross-appeal.

[redacted]

MONROE *v.* MONROE.

5-1033 294 S. W. 2d 338

Opinion delivered October 22, 1956.

[redacted]

Denman & Denman, for appellant.

F. C. Crow, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study of § 34-1801 Ark. Stats. The ques-

tion is whether, under the said Statute, the exclusive owner of a life estate may, against the resistance of the remainderman, obtain an order from the Chancery Court for the sale of the entire title of the land and a partition of the proceeds.

The facts are stipulated: William Edward Monroe died intestate, seized and possessed of certain lands in Hempstead County. He was survived only by (a) his widow, the appellee, Mrs. Sleetie S. Monroe, and (b) his son, Bryan Monroe. The estate of William Edward Monroe was duly administered by the Hempstead Probate Court; and a tract of fifty-eight acres of land was set aside to Mrs. Sleetie S. Monroe as her dower. Later Mrs. Monroe filed the present petition in the Hempstead *Chancery* Court alleging: that she was the life tenant (by virtue of her dower) of the fifty-eight acre tract; that Bryan Monroe was the sole remainderman; that the land was not producing any appreciable amount; that Mrs. Monroe desired the fifty-eight acres sold and the proceeds divided.[1] The Chancery Court held that the life tenant was entitled to such a partition; and this appeal challenges that decree.

We reach the conclusion that § 34-1801 Ark. Stats. does not support the decree of the Chancery Court. Mrs. Monroe, as the life tenant under dower, is in *exclusive possession* of the fifty-eight acres, and Bryan Monroe owns the remainder. He has no right to any possession during the life of Mrs. Monroe. Our partition statute envisages that two or more persons are *at the same time* entitled to possession. The present statute (that is § 34-1801 Ark. Stats.) has an interesting history. With slight changes in verbiage,[2] it existed from the Revised Statutes of 1838 down to the first amendment of it, which was Act 92 of 1941. In 1929, in the case of *Phillips* v. *First National Bank,* 179 Ark. 605, 17 S. W. 2d 298, we said of this partition statute as it then existed:

[1] Under Act 122 of 1951 of the Arkansas Legislature, it is easy to establish the value of a life estate.

[2] These changes are shown in the Annotator's note following the section in the present volume of Ark. Stats. Annotated of 1947.

"Our statute, § 8091, C. & M. Digest, provides: 'Any person desiring a division of land held in joint tenancy, in common or in coparceny, shall file in the circuit court a written petition,' etc. Appellee did not claim to hold in joint tenancy, in common, or in coparceny. The complaint did not state a cause of action for partition, as it failed to allege such an interest in the land as would justify partition."

Since Mrs. Monroe was neither a co-tenant nor joint tenant with her son, Bryan Monroe, she could not have obtained partition under the law as it existed in 1929. Again, in *Krickerberg* v. *Hoff,* 201 Ark. 63, 143 S. W. 2d 560, we said in 1940: "While it is true that there can be no partition where one holds the life estate in property with sole right to its possession, and the remainder in another, this is not the situation here." The quoted language shows that at the time of the decision in that case (October, 1940), the holder of the life estate could not obtain partition against the remainderman.

Since 1940 there have been two amendments to our partition statute, and the original statute and the amendments are contained in § 34-1801 Ark. Stats. The first of these amendments was Act 92 of 1941, and it amended the statute to allow partition among the remaindermen, subject to the life estate of another. We will later discuss this amendment in detail. The second amendment was Act 161 of 1947; and was to allow, in certain instances, the partition of estates held by entirety.[3] Appellant says that the effect of the words "or otherwise" in the said Act 92 of 1941 was to allow partition in a case such as the one at bar. In ordinary type we show below, the statute as it existed prior to the 1941 amendment; and in italicized type, we show the amendatory language:

"Any person *having any interest in and* desiring a division of land held in joint tenancy, in common or in

[3] The caption of that Act reads: "AN ACT to Amend Section 10509 of Pope's Digest of the Statutes of Arkansas, As Amended by Act 92 of the Acts of the General Assembly of 1941, by Including Therein Persons Holding Real Estate Under An Estate by the Entirety, Where Such Persons Have Been Divorced, and for Other Purposes."

coparceny, *absolutely or subject to the life estate of another or otherwise,* shall file in the circuit *or chancery* court a written petition . . ." etc., etc.

We hold that the addition of the underscored words was to allow the partition of property by *remaindermen,* subject to the life estate of another; and we hold that the words "or otherwise" modified and referred to the life estate of another and did not refer to "in joint tenancy, in common or coparceny." Our present holding follows the case of *Goodlett* v. *Goodlett,* 209 Ark. 297, 190 S. W. 2d 14, decided in 1945, which was after the 1941 amendment. In that case, Mr. Justice ROBINS, in affirming a partition decree, used this language:

"The lower court granted her, not the entire property for her life but, only an undivided one-third interest for her life therein, and the remaining share was vested in appellant, thus creating such a tenancy in common between her and appellee as would authorize partition. 40 Am. Jur. p. 90, § 107."

Thus we recognized, *after the* 1941 *amendment,* that there could be partition only when two or more persons were entitled to possession, and that the exclusive possession of the life tenant would not support partition against the remainderman.[4] We made reference to 40 Am. Jur. p. 90; and that text, on p. 92, cites many cases to support this rule:

"The decided weight of authority is to the effect that statutes authorizing chancery to partition property between coparcenors, joint tenants, or tenants in common, do not permit one who has a life tenancy only, so that there is no relation of co-tenancy between himself and his remaindermen, to compel partition as against

[4] In the case of *McGee* v. *Hatcher,* 217 Ark. 402, 230 S. W. 2d 41, we reiterated that the right of *present possession* between parties is essential to maintain partition. The fact that a remainderman may be entitled to partition where the life tenant is committing waste (see *Smith* v. *Smith,* 219 Ark. 304, 241 S. W. 2d 113) does not lead to a holding that the life tenant can force a partition against the will of the remainderman, who is certainly not injuring the property. Where the land is being sold and the entire proceeds reinvested by court order or in trust, then a different factual situation is presented. See *Wing* v. *Wing,* 212 Ark. 960, 208 S. W. 2d 776. Partition was not sought in that case.

such remaindermen, since such a statute in no way eliminates the element of cotenancy, which, in the absence of statutory elimination, is indispensable to an action for partition."

It is well to remember that under § 62-717 Ark. Stats., where dower is about to be allotted in the probate court and it is found that the dower cannot be allotted out of the real estate without great prejudice to the widow and heirs, then the probate court may, upon proper showing, sell the real estate free from the dower and pay the widow her proper part of the proceeds in lieu of dower. But, in the case at bar, Mrs. Monroe alleged that the dower had been allotted to her by the probate court. We, therefore, hold that the widow, having taken dower in the probate court, cannot later go in the chancery court and obtain sale of the fee against the remainderman.

It therefore follows that the decree of the Chancery Court is reversed and the cause is remanded, with directions to dismiss the complaint for partition.

MIXON *v.* BARTON LUMBER & BRICK COMPANY.

5-1032 295 S. W. 2d 325

Opinion delivered October 22, 1956.

[Rehearing denied December 3, 1956.]

Max B. Reid and *Davis & Davis,* for appellant.

Barrett, Wheatley, Smith & Deacon and *William B. Howard,* for appellee.

MINOR W. MILLWEE, Associate Justice. The question presented is whether a judgment rendered in a prior action in federal court was *res judicata* in appellant's instant suit in the Craighead Chancery Court for dissolution of a corporation and distribution of its assets.

The Barton Lumber & Brick Company of Jonesboro, Arkansas, was organized for the purpose of conducting a lumber and brick business. P. C. Barton was organizer and principal stockholder of the corporation which eventually acquired valuable farm lands and other proper-

ties now valued at approximately $500,000. Prior to his death in 1940 P. C. Barton had acquired and transferred all the stock in the corporation to his six daughters and two sons who became the principal stockholders. Three of the stockholders, Mrs. Alma B. Mixon, who is the appellant here, Mrs. Arabella B. Robinson and Mrs. Annie B. Henderson became dissatisfied with the manner in which the affairs of the corporation were conducted. In June, 1952 they employed by letter contract the law firm of Davis & Davis of Memphis, Tennessee, for the purpose of taking steps to effect a dissolution of the corporation and distribution of its properties to the stockholders. Subsequently Mrs. Mixon and Mrs. Robinson, who lived at Jonesboro, employed the law firm of Reid & Roy of Blytheville, Arkansas, to join the Davis firm in representing their interests in the undertaking.

On December 21, 1952, the two firms employed by the three stockholders filed an action in the U. S. District Court, Jonesboro Division, by Mrs. Annie B. Henderson, who resided in Louisiana, against the Barton Lumber and Brick Company and W. F. Barton, a principal stockholder, to dissolve the corporation and distribute its assets among the stockholders. After setting out the respective interests of the several stockholders, the complaint alleged that the corporation had been engaged for many years in certain *ultra vires* activities which were detrimental to plaintiff and other stockholders; that a minority of the stockholders felt they were being deprived of their legal rights; that there was great dissension between the majority and minority stockholders and the latter were of the opinion that such dissension would continue in the future. It was further alleged that the corporation should be dissolved, its debts and costs of dissolution paid and the remaining assets distributed among the stockholders in proportion to their respective interests; and that W. F. Barton should be required to account for monies received for the use of lands leased by him for several years from the corporation. There was a prayer for an accounting for the use and benefit of the corporation and that the corporation be dissolved and its

assets distributed among the stockholders as their interests might appear.

After continuous negotiations over a period of several months between counsel representing the respective parties and their clients, a compromise settlement was worked out and agreed to by all the parties in the latter part of 1953 based upon a partial liquidation of the corporation and distribution of certain of its assets to Mrs. Henderson, Mrs. Robinson and Mrs. Mixon. Mrs. Henderson furnished counsel her proxy to represent her at a stockholders meeting to effect the partial liquidation. At this meeting it was found to be necessary to also hold a meeting of the board of directors of the corporation to consummate the settlement, but Mrs. Henderson, who was a board member, refused to waive notice of a called meeting or to further participate in the consummation of the settlement. She also refused to further prosecute the suit filed by her in the U. S. district court. At a pretrial conference in that case on January 26, 1954, the court announced his intention to try the case during the week beginning February 8, 1954 unless it was dismissed in the meantime. Counsel then filed a motion on behalf of Mrs. Henderson to permit her to take a voluntary nonsuit without prejudice. The court, acting in the exercise of its discretion in such matters, refused to entertain such motion unless Mrs. Henderson paid fees in the sum of $1,250 to defendants' attorneys. Mrs. Henderson refused to make such payment whereupon counsel, acting on her behalf, moved that the action be dismissed with prejudice and this was done.

On July 31, 1954, Mrs. Alma B. Mixon, the present appellant, filed the instant suit in the Craighead Chancery Court against the Barton Lumber & Brick Company and the other seven stockholders of the corporation. The complaint, with minor exceptions, embraced essentially the same allegations and prayer for relief as that filed by Mrs. Henderson in the U. S. district court. All the defendants except Mrs. Robinson and Mrs. Henderson joined in a separate answer on September 9, 1954, making certain admissions and denials and pleading estoppel, limitations, laches and *res judicata* on account of

the prior action by Mrs. Henderson in federal court. On January 31, 1955, said defendants, who are the appellees here, filed a motion to dismiss the complaint, alleging: "At the time of the filing of the Henderson suit in Federal Court this plaintiff, Alma B. Mixon, was represented by the same counsel under joint contract of employment with Mrs. Henderson and that the Henderson suit was brought as a class action for the benefit not only of Mrs. Henderson but of this plaintiff, Alma B. Mixon, by reason of the disposition of the Henderson suit in Federal Court the issues raised by plaintiff's pleading in this court are *res adjudicata.*

"These defendants move for dismissal of the complaint herein for the further reason that this plaintiff Alma B. Mixon is estopped to maintain this action by virtue of her participation and by the action of her counsel in the class action brought by Annie B. Henderson in the United States District Court as above set out."

The chancellor took the motion under advisement after a hearing and on February 11, 1956, entered a decree dismissing the complaint and finding that the decision in the Henderson suit in federal court was *res judicata* as to appellant who was estopped to maintain the instant suit.

The issue is the correctness of the able chancellor's determination that the judgment of the U. S. district court in the suit by Mrs. Henderson was *res judicata* as to appellant's right to maintain the present suit. In several cases we have approved the following definition from 30 Am. Jur., Judgments, Sec. 161: "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." In reference to the doctrine in Sec. 162 of the same work, the author says: "It is not, however, to be applied so rigidly as to defeat the ends of justice; there are exceptions to it based upon important reasons of policy."

Since appellant was neither a party to the former suit nor technically in privity with her sister in that action, she would not be barred from maintaining the instant suit unless her actions and conduct, and that of her attorneys, have placed her within a recognized exception to, or expansion of, the foregoing general rule.

In support of the chancellor's action appellees earnestly contend the facts here are such as to bar the appellant under the rules applicable either to persons participating in litigation or persons virtually represented as a class by a party or parties of record. Appellees particularly rely on *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579, where we approved the following statement from 30 Am. Jur., Judgments, Sec. 227: "The strict rule that a judgment is operative, under the doctrine of *res judicata,* only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties." In the 1956 Cumulative Supp. to the foregoing section, p. 116, there is the following addendum: "An essential condition recognized expressly by most of the cases for the application of the rule is that the prosecution of the action or the defense by the nonparty, or his assistance or co-operation with the party, must have been for the promotion or protection of some interest of his own which would otherwise be prejudicially affected. And another condition frequently, but not always, attached to the application of the rule is that such person had the control or a right of control over the litigation, with the privilege of exercising all the rights of a party of record, such as the right to introduce evidence, examine and cross-examine witnesses, and appeal from the decision of the court, etc. . . ." Numerous cases are collected in an exhaustive annotation on the question in 139 A. L. R. 10.

The doctrine of virtual or class representation is set forth in 30 Am. Jur., Judgments, Sec. 228, as follows: "There are cases in which such a number of persons in interest may be made plaintiffs or defendants as will fairly represent the interests of all standing in like character and responsibility. While the general rule is that no person is bound by a judgment except those who are parties or stand in privity with others who are parties, there is an exception to the rule, of equal authority with the rule itself, in the case of persons who are virtually represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of *res judicata* in favor of all who are thus represented, and a judgment against the parties representing the general class is operative against those represented. This doctrine does not depend upon statutory provisions; it is a rule of common law, founded on convenience and necessity. It is based upon the theory that the persons joined and not joined have a common interest, that the parties joined may be depended upon to bring forward the entire merits of the controversy as a protection to their own interests, and that the persons not joined as parties are sufficiently represented by those who are joined. It should be noted that where the reason for the rule does not exist, the rule itself will not be enforced, and if, under the actual facts of a case, the interests of those not joined are antagonistic to those of the parties who would represent them, the former will not be concluded by a judgment against the latter. The same rule has also been applied where the interests of persons not joined were not considered or protected by the court in rendering judgment."

The general rule applicable to suits by stockholders is stated in 50 C. J. S., Judgments, Sec. 794, as follows:

"A judgment in a representative stockholder's suit brought on behalf of the corporation or of all other stockholders similarly situated is a binding adjudication of the corporation's rights, and concludes other stockholders who had an opportunity to, but did not, join or intervene, unless it is shown that the judgment was ob-

tained through fraud or collusion. However, a judgment or decree in a minority stockholder's suit, not shown to be a representative or class suit on behalf of all other stockholders similarly situated, is not *res judicata* of the right of other stockholders to sue for similar relief, especially where different questions are raised by the two suits; and a recovery by a stockholder for an individual loss does not estop him subsequently to sue in a representative capacity . . ." As the annotator points out in 129 A. L. R. 1042: "Although there are a large number of cases in which it has been held that a particular judgment or decree rendered in an action by or against a corporation was *res judicata* in a subsequent action by or against a stockholder or stockholders of the corporation, the broad conclusion that under all circumstances a corporation so represents its stockholders in litigation in which it is involved that they are privy thereto and the judgment or decree rendered therein is *res judicata* in subsequent litigation involving them, is not justified."

In *Crow Creek Gravel & Sand Co.* v. *Dooley,* 182 Ark. 1009, 33 S. W. 2d 369, this court recognized the rule to the effect that the doctrine of virtual representation, by which parties may be bound by a judgment although not parties to the suit, is based on the theory that they are sufficiently represented by those who are parties on the record, and that the latter will fairly represent the interests of all standing in like character and responsibility. Also in *Lightle* v. *Kirby,* 194 Ark. 535, 108 S. W. 2d 896, we followed the equally well settled rule that a judgment or decree in a purported class suit is not *res judicata* or a bar as against persons who are not actual parties thereto, where the parties named to represent them asserted rights or had interests in the subject matter that were adverse or hostile to them. See also *Connor* v. *Thornton,* 207 Ark. 1113, 184 S. W. 2d 589, and cases from other jurisdictions to the same effect cited in 132 A. L. R. 753.

The parties to the suit by Mrs. Henderson in federal court were neither numerous nor unknown. The diversity of citizenship arising by virtue of her Louisiana res-

idence was the only basis for federal jurisdiction, all other parties and this appellant being residents of Arkansas. While appellant was not a party and filed no pleadings in that action, it was filed for her benefit and she and her attorneys admittedly participated in negotiations calculated to effect a disposition of the case favorable to the rights and interests of the minority stockholders.

An application of the foregoing legal and equitable principles leaves no doubt but that the termination of the former action would have barred appellant's maintenance of the instant suit if the dismissal had taken place after a trial on the merits. It is also true that as to Mrs. Henderson the dismissal with prejudice amounted to an adjudication on the merits sufficient to support the plea of *res judicata.* This would also be true as to appellant if Mrs. Henderson had not suddenly changed her mind and assumed a position antagonistic and hostile to appellant and the other minority stockholder. In other words, the Henderson suit was instituted and conducted as a class action down to the point where the plaintiff suddenly and without explanation rejected the compromise settlement previously agreed to, abandoned her suit and, in effect, joined her adversaries. In doing so she asserted interests in the subject matter adverse and antagonistic to the class she purported to represent. In these circumstances it would be manifestly inequitable and unjust to say that appellant has had her day in court.

But appellees say it was incumbent on appellant to intervene in the Henderson suit if she wished to save her rights. Ordinarily the right to intervene in an action does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation, under the doctrine of *res judicata.* 30 Am. Jur., Judgments, Sec. 220. Nor is it by any means certain that the federal court would have permitted either an intervention or the substitution of the appellant as party plaintiff where the only ground for federal jurisdiction was eliminated by a dismissal that appellant was powerless to prevent. In none of the cases cited by appellees in support of this argument do we find a sudden

change of position by the party who purported to represent the particular class.

The decree is accordingly reversed and the cause remanded with directions to overrule the motion to dismiss the complaint.

McILWAIN v. STATE.

4851 294 S. W. 2d 350

Opinion delivered October 22, 1956.

Claude F. Cooper, Harry E. McDermott, Jr., and *Spitzberg, Mitchell & Hays,* for appellant.

Tom Gentry, Attorney General and *Ben J. Harrison,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. The appellant was charged by information with having unlawfully possessed marijuana on November 9, 1954. The information also in-

voked the habitual criminal statute by asserting that the accused had been convicted in Texas of assault with intent to rob and had been convicted by a federal court in Tennessee of having been an unlawful transferee of marijuana. The court instructed the jury in the language of Act 258 of 1937, which provided that the unlawful possession of marijuana should be a felony. The jury returned a verdict of guilty and fixed the punishment at seven years imprisonment.

In his motion for a new trial the accused correctly pointed out that Act 258 of 1937, which made the offense a felony, had been expressly repealed by Act 62 of 1953. He further asserted in this motion that the prosecution was barred by the one-year statute of limitations applicable to misdemeanors. Ark. Stats. 1947, § 43-1603. After a hearing upon the motion the court reduced the sentence to one year in the penitentiary, apparently on the theory that the accused could be considered as having been convicted of a second offense either under the habitual criminal statute or under the Uniform Narcotic Drug Act. This appeal followed.

Inasmuch as the information was not filed until about fifteen months after the commission of the offense, the plea of limitations, if well founded, is decisive. It is settled that the one-year period allowed for the prosecution of misdemeanors is more than an ordinary statute of limitations; it goes to the court's power to try the case and may be raised for the first time in the motion for a new trial. *Williams* v. *City of Malvern,* 222 Ark. 432, 261 S. W. 2d 6. Hence the question is whether the appellant's offense constitutes a misdemeanor or a felony.

In view of the repeal of the 1937 act pertaining to marijuana the only pertinent statute is the Uniform Narcotic Drug Act. It provides that any person "violating any provision of this act" shall be punishable for the first offense by confinement in jail for not exceeding six months and for a subsequent offense by imprisonment in the State prison for not exceeding one year. Ark. Stats. § 82-1020. The appellant has not previously been

convicted under the Arkansas statute and is therefore a first offender under the language quoted above. Since an offense punishable by not more than six months in jail is only a misdemeanor, Ark. Stats., §§ 41-103, 41-104, it follows that a first offense under the Uniform Narcotic Drug Act is not a felony.

Nor does the habitual criminal statute have the effect of converting a misdemeanor into a felony. That statute, being Act 228 of 1953, appears as Ark. Stats., §§ 43-2328 to 43-2330. Although it encompasses prior convictions in the federal courts and in other state courts, it is clear that the statute is applicable only when both the prior and present convictions are for felonies. Throughout the act the references are to offenses "punishable by imprisonment in the penitentiary," which is the statutory definition of a felony. Ark. Stats., § 41-103. In the emergency clause the legislature declared that "a number of persons who commit felonies have previously been convicted of felonies," etc. The habitual criminal statute increases the maximum penalty for a second felony conviction, but it does not purport to raise the grade of a second offense by transforming a mere misdemeanor into a felony. Thus the appellant's crime remains a misdemeanor, and the plea of limitations is a complete defense.

Reversed and dismissed.

LANCASTER *v.* STATE.

4854 294 S. W. 2d 348

Opinion delivered October 22, 1956.

Gordon H. Sullivan, for appellant.

Tom Gentry, Attorney General and *Paul C. Rawlings,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant, Clayton Vernon Lancaster, was charged with first degree murder, and after a two-day trial the jury returned a verdict of guilty of voluntary manslaughter and fixed the punishment at five years imprisonment in the penitentiary. He was sentenced by the court in accordance with the verdict of the jury.

Appellant prosecutes this appeal on the ground that the trial court failed to admonish the jury [as required by Ark. Stats. § 43-2122] "Not to permit anyone to speak or communicate with them on any subject connected with the trial . . ." before the court announced a recess. The record on which this appeal is based contains no testimony that was taken at the trial, but contains the Motion For New Trial and the objections and exceptions made by appellant's attorney.

The record discloses that appellant objected on three different occasions that the trial court had allowed the jury to recess on three different occasions without instructing the jury in accordance with the statute above mentioned. We will concern ourselves only with the facts and circumstances surrounding the first recess since it presents the strongest case in favor of appellant's contention.

Eleven jurors were in the jury box when the available jury panel was exhausted, and thereupon additional jurors were summoned to appear in court. For this reason the court took a recess. Immediately after the trial was resumed the following proceedings occurred:

"Mr. Robinson: Let the record show that upon the panel being exhausted, a recess was called by the Court to allow the summonsing of additional jurors and that at the time eleven persons had been accepted by both the

State and the defendant; that these eleven jurors were allowed to separate and were not admonished by the Court not to discuss the matter among themselves or allow anyone to discuss the case with them, as required by statute. I think it is necessary to call it to the Court's attention and I object to this at this time and ask that a mistrial be declared.

The Court: Overruled.

The defendant objected to the above ruling of the Court and at the time asked that his exceptions be noted of record, which was accordingly done.

Mr. Holt: Let the record show that this was a recess of approximately thirty minutes and not an adjournment."

The same contention was made in appellant's motion for a new trial, but no testimony was taken on the motion.

In asking this court to reverse the trial court, appellant relies on Ark. Stats. § 43-2122 and on *Johnson* v. *State,* 68 Ark. 401, 59 S. W. 34, taking the position that the statute is mandatory, and that when the jury was allowed to separate it placed the burden on the State to show, by testimony, no juror was subjected to the opportunity for influence to be exerted on him. We agree with appellant in the above contention provided it is confined to a situation where the jury is allowed to separate after an "adjournment" as specified in the last line of the statute, above mentioned, which reads:

"The jury, whether permitted to separate or kept in charge of officers, must be admonished by the court that it is their duty not to permit anyone to speak to or communicate with them on any subject connected with the trial, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express any opinion thereon until the cause is finally submitted to them. This ad-

monition must be given or referred to by the court at each adjournment."

On the other hand it is the contention of the State that, in the case of a "recess," the burden is on the appellant [in this case] to show, by testimony, such an opportunity for influence was presented, and that [as conceded] no such testimony was offered by appellant.

After careful consideration we have concluded that the State's position is sound and reasonable, and that it is supported by precedent.

In the case of an "adjournment," as the statute specifies, where the jurors are allowed to go to their respective homes or places of business for extended periods, it is presumed [without further proof] that ample opportunity is afforded for the exercise of influence on them. Thus, it is logical and reasonable that the State [in this case] should bear the burden of overcoming such presumption. But, in the case of a "recess," the situation is different, and the presumption is and should be just the reverse. It is common practice, especially in lengthy trials, for the court to recess for short periods. In this event the jurors are not expected to go to their homes or places of business, but they are expected to remain in the vicinity of the court and under the scrutiny of the court and its officers, and, if there is any departure from this expectancy, the burden should be on the complaining party to show it by testimony.

The decisions of this and other courts have sustained the view we have expressed above. In *Ince* v. *State,* 77 Ark. 418, 88 S. W. 818, we said:

"One of the jurors is shown to have left the jury box during the progress of selecting the jury (after he had been accepted as a juror) and occupied for a short while a seat among the audience. This was before the completion of the jury and presentation of the case, and it is not shown that this juror was subjected to any improper influence."

We find the same view expressed in *Carlton* v. *State,* 109 Ark. 516, 161 S. W. 145, in these words:

"The separation of the juror from his fellows while the trial was temporarily suspended during the thunder storm is not shown to have been prejudicial to the rights of the appellant . . . No testimony was offered to show that the juror, while absent from his fellows, was guilty of any conduct prejudicial to appellant."

In *People* v. *Witt,* 170 Cal. 104, 148 P. 928, the court said:

"The only possible error here was the failure of the court to admonish the jurors when one was allowed to retire for a moment, in the manner prescribed for each adjournment by section 1122, Penal Code, as to not talking about the case or allowing any one else to talk to them about it, etc. Under the circumstances, no one probably thought of the necessity of such an admonition for this brief retirement of one of the jurors into another room. If error was committed here, it must be said of it, as was said in *People* v. *Coyne, supra,* of the failure of the court to admonish the jury upon an adjournment, that the error is technical, and not of the importance to demand a reversal of the judgment and a new trial."

We fully recognize it is important that courts adhere to the provisions of Ark. Stats. § 43-2122. We also realize that appellant's contention here [if it had been substantiated by testimony] presents a border line case, and we do not recommend the action of the court in this instance as standard procedure in the future. The important thing is that the jury should not be subjected to outside influence. It is not important whether the influence is exerted during an "adjournment" or a "recess." The only distinctive difference between the two is a matter of procedure as above indicated.

Affirmed.

Justice Robinson not participating.

4847 295 S. W. 2d 365

Opinion delivered October 22, 1956

[Rehearing denied November 26, 1956.]

Martin, Dodds & Kidd, for appellant.

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

SAM ROBINSON, Associate Justice. Appellant appeals from a conviction of violating Section 17 of Act 416 of the Acts of the General Assembly of the State of Arkansas for the year 1941, Ark. Stats. § 84-2317, which provides: "Except as herein provided, it shall be unlawful for any person to receive or have in his possession, for sale, consumption, or any other purpose, any

cigarettes upon which the tax prescribed by this act [§§ 84-2301-84-2331] has not been paid, and to the package containing which proper stamps prescribed by this act have not been affixed. The absence of the proper stamps from any container of any cigarettes shall be notice to all persons that the tax has not been paid and shall be *prima facie* evidence of the nonpayment of such tax. Provided, that the provisions of this section shall not be construed to apply to distributors and common carriers as hereinbefore defined." It is conceded that no Arkansas tax has been paid on the cigarettes and that appellant is not a distributor or a common carrier.

The appellant is a resident of Hills Corner, Wisconsin, and owns a 1 1/2 or 2 ton Ford Truck. During the summer of 1955, he went into the trucking business and transported a load of candy from St. Louis to Texas; on his return trip he hauled watermelons. In August 1955, he purchased in St. Louis 173 cases of cigarettes for the price of $16,429.47. He transported these cigarettes in his truck from St. Louis to a point on Highway 67 at Newport, Arkansas, where he was arrested and charged with violation of the above mentioned statute. He was fined $200, and the 173 cases of cigarettes he had in his truck were confiscated and sold to the highest bidder for $15,628.68. The proceeds of the sale of the cigarettes are being held in the registry of the court pending this appeal.

First, appellant contends that Act 416 provides no penalty for the violation of Section 17 thereof. However, Section 17 clearly states that it is unlawful to do the thing appellant is charged with doing, and § 41-105, Ark. Stats., provides: "Where the performance of any act is prohibited, or the performance of any act is required, by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or requiring such act or duty, or in any other section or statute, the doing of such prohibited act, or the neglect of such required act or duty, shall be deemed a misdemeanor." And § 41-106 provides: "Every person who shall be convicted of any misdemeanor,

the punishment of which is not defined in this or some other statute, shall be punished by imprisonment, not exceeding one [1] year, or by fine not exceeding two hundred and fifty dollars [$250] or by fine and imprisonment both." When all three sections are read together it is clear that the appellant, if guilty at all, is guilty of a misdemeanor and subject to the penalty as set out in § 41-106; and § 84-2327, Ark. Stats., provides for the confiscation and sale of the cigarettes upon conviction of any defendant charged with the violation of any of the provisions of Act 416 of 1941.

Next, appellant says that he was transporting cigarettes in interstate commerce; that cigarettes are legitimate articles of commerce, and that the State has no power to punish him for his act. Article 1, Section 8, Clause 3 of the Constitution of the United States provides: "The Congress of the United States shall have power [Cl. 3] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Appellant is correct in his contention that cigarettes are legitimate articles of commerce. *Austin* v. *Tennessee,* 21 S. Ct. Reporter 132. And, the evidence is overwhelming to the effect that the cigarettes were being transported in interstate commerce; in fact, there is no substantial evidence to the contrary. The appellant bought the cigarettes in St. Louis, Missouri. He entered the State of Arkansas on U. S. Highway 67, near Corning, Arkansas, and there is no evidence that he stopped any place in Arkansas except at the revenue station at the port of entry. There he paid taxes on the gasoline that he would use in traveling through this State to the State of Texas, and he made full disclosure of the fact that his cargo consisted of cigarettes. While still traveling on Highway 67, in Newport, Arkansas, he was stopped by a State Policeman, and arrested. He had reached no destination; he was traveling on a highway that goes from Missouri on the north to Texas on the south.

The State contends that the appellant had reached his destination because he stated, on cross-examination, that he would have sold the cigarettes in Arkansas if he

could have made a 3% profit. Appellant's intention is not controlling. The test to be applied in determining the guilt or innocence of the accused is whether the cigarettes had actually reached a destination in the State of Arkansas. There was no break in the continuity of transit. In *Missouri Pacific Railroad Company* v. *Schnipper,* 51 F. 2d 749, the court said: "It is well established that the question as to whether the continuity in transit of a movement in interstate or foreign commerce is broken by an interruption at an intermediate point is not controlled by the character or method of the billing of the shipment nor by the fact that the exact ultimate destination in another state or country may or may not be known at the time of shipment . . . Nor does the mere fact that the goods may be under the control of the owner at the point of interruption with power in the owner there to withdraw or divert the goods from the interstate or foreign movement take the goods out of interstate or foreign commerce . . . ."

The States "may not tax property in transit in interstate commerce." *Minnesota* v. *Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131. The early case of *Brown, et al.* v. *State of Maryland,* 12 Wheat 419, 25 U. S. 419, 6 L. Ed. 678, appears to hold that no tax can be levied on an interstate shipment as long as the articles remain in the original packages; that imported articles can be held in the original packages, without being mingled with other property, and then sold without the payment of any license or tax, but later cases hold that the imported property is subject to a tax after it reaches a destination. *Sonneborn Brothers* v. *Cureton,* 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095; *American Steel & Wire Company* v. *Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538; *Brown* v. *Houston,* 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257; *Woodruff* v. *Parham,* 8 Wall. 123, 19 L. Ed. 382.

It appears that all of the cases upholding the levy of a tax by a state, where an interstate commerce question is involved, base the constitutionality of the tax on the fact that the transported property had come to rest at a destination. The State cites *Wiloil Corporation* v. *Com-*

monwealth of Pennsylvania, 294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838, as sustaining the proposition that the State has the right to tax the cigarettes involved here. In that case, the court said: "Our decisions show that, if goods carried from one State have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction." It will be noticed that the State's right to tax is contingent upon the property having reached a destination.

We quote from some of the cases:

"We are decidedly of the opinion that even though plaintiff Klugsberg was engaged in interstate commerce, yet when the cigarettes were finally delivered by the salesmen to the respective purchasers and the purchase money was paid to the salesmen, they ceased to be in interstate commerce and became a proper subject for taxation under the provisions of the Cigarette Law." *Sheppard* v. *Musser,* 127 Tex. 193, 92 S. W. 2d 219. In the case at bar, the cigarettes had not been delivered to any one; the owner had just brought them into the State of Arkansas from the State of Missouri; they were in transit in a truck traveling on a public highway.

"Surely when the tobacco company in Kansas sent cigarettes by C. O. D. mail to Brooks in Oklahoma and he paid the C. O. D. charges and took them to his place of business, the delivery was complete." *Ex Parte Winn.,* 61 Okla. Cr. 1, 64 Pac. 2d 927.

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of the property within the State and is thus subject to its taxing power." *Minnesota* v. *Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131.

"Furthermore, the tobacco in suit was not seized while being transported in interstate commerce. The interstate shipment had come to an end. The property

had come to rest within the State and was held at the warehouse of the carrier subject to the pleasure of the owner." *Supervisor of Public Accounts* v. *Twelve Cases of S. T.*, La. App., 172 So. 364.

The cigarettes involved in the case at bar were, without a doubt, being transported in interstate commerce at the time they were seized by an officer of the State of Arkansas. The defendant was convicted of possessing cigarettes on which the State tax had not been paid. The State has no authority to levy a tax on property while it is being transported in interstate commerce. Therefore, the cause is reversed, with directions that it be dismissed.

Justices HOLT and MILLWEE dissent. Mr. Justice MCFADDIN concurs.

ED. F. MCFADDIN, Associate Justice (concurring). I agree with the majority that this case should be reversed; but I submit that it should not be reversed on the issue of interstate commerce. Rather, the reversal should be because of the entire absence of any evidence that any offense was committed by the appellant.

I. *Interstate Commerce.* The majority opinion says that the cigarettes were moving in interstate commerce and, therefore could not be taxed. In the matter of tax exemption because of interstate commerce, the test is not merely whether there was interstate commerce, but the test is whether the tax is a *burden* on interstate commerce. In the case of *McLeod* v. *Memphis Natural Gas Co.*, 207 Ark. 879, 183 S. W. 2d 927, the natural gas was certainly moving in interstate commerce, and yet the tax was sustained. There are many other cases involving interstate commerce in which the tax was sustained; so I thoroughly agree with the dissenting opinion that the reversal should not be on the basis of interstate commerce. In short, I see no need to rest the opinion on the complex issue of interstate commerce, when the case could be decided on the simple issue of no evidence of law violation.

II. *Absence of Evidence of Any Offense.* My reason for reversing this case is because a careful reading of the record discloses no evidence of an offense committed by the appellant. He openly and frankly stopped his truck and disclosed its contents at the entry port and stated his destination to be Texas. Then he proceeded along U. S. Highway No. 67 toward Texas, and when he was arrested he was still on U. S. Highway No. 67 headed toward Texas. He had committed no offense. The statute here involved (§ 84-2317 Ark. Stats.) makes the offense: ". . . it shall be unlawful for any person to . . . have in his possession for sale . . . any cigarettes upon which the tax prescribed by this Act has not been paid". The appellant had the cigarettes in his possession. Did he have them in his possession for sale? Where is the evidence that he ever intended to sell the cigarettes in Arkansas without paying the tax? I submit there is none. Here is all the record contains on the vital question:

"CROSS-EXAMINATION

"Q. As a matter of fact were you taking them to Houston?

"A. Probably the first place.

"Q. Why wait and go to the state line?

"A. There was supposed to have been more money involved.

"Q. You were supposed to get more in Texas than Arkansas?

"A. I should have realized two or three percent on the load.

"Q. If you could have gotten three in Arkansas, you would have sold them, would you not?

"A. Yes, sir.

RE-DIRECT EXAMINATION

"Q. Where had you started when you came into Arkansas.

"A. I was going to Texas.

"Q. Had you intended to stop in Arkansas?

"A. No, sir."

It will be observed that appellant was asked if he could have gotten three percent profit on the cigarettes in Arkansas, would he have sold them; and he said yes. The State did not ask him if he would have sold them without paying the tax. He was merely asked if he could have gotten three percent, would he have sold the cigarettes. On that one question and answer the State contended in the oral argument before this Court that appellant admitted that he possessed the cigarettes in Arkansas for the purpose of illegal sale. I submit that he made no such admission. He merely said that he would have sold them, but do we presume that he was going to violate the law? I understand the State still has the burden of proving the guilt of the accused beyond a reasonable doubt; and I submit that that one question and answer on cross-examination does not constitute any admission of guilt.

Suppose while driving down the highway at 25 miles an hour in a lawful manner, a person should be arrested for speeding and when the case came up for trial it was shown that he had been going 25 miles an hour; but suppose the prosecuting attorney asked him on cross-examination, whether, under any circumstances he would have gone faster than 60 miles an hour and he answered in the affirmative. Did the answer that he might, under some circumstances, have gone faster than 60 miles an hour prove that he had been speeding at the time and place when he was arrested? No. A hypothetical question, as to what one might do at some other time and place, but had never done, is no evidence of what one *did* at the time and place for which he is being tried. This simple illustration shows that the appellant in this case had not violated any law; and so his conviction should be reversed. But it should be on the factual issue rather than on the issue of interstate commerce.

J. SEABORN HOLT, Associate Justice (dissent). In my view, if the majority opinion stands its effect will be far-reaching and open the doors to bootleggers of cigarettes and also liquor, [the liquor traffic tax and transportation of liquor, § 48-921, 48-925, 48-934, Ark. Stats. 1947]. At the outset I want to point out that the majority opinion, in the last paragraph, states that "the State has no authority to levy a *tax on property* while it is being transported in interstate commerce." It is not my understanding that we are dealing here with a tax on property. The cigarette tax is not a tax on property but is an excise, or a tax on the privilege of holding or possessing cigarettes for personal use or for any other purpose in the State of Arkansas. § *84-2304, Ark. Stats. 1947* provides: "There is hereby levied the following excise or privilege tax, etc." "There is a material distinction between an excise and a property tax. An excise tax has been defined to be a tax imposed upon the performance of an act, engaging in an occupation, or the enjoyment of a privilege. It is usually imposed directly by the legislature, without an assessment, while a property tax is ordinarily computed upon valuation and levied either where the property is situated or at the owner's domicile, etc." [*Head* v. *Cigarette Sales Co.,* 188 Ga. 452, 4 SE 2nd 203].

As I read this record the facts are practically undisputed. Appellant, after procuring 173 cases of cigarettes for himself in St. Louis, Missouri, and loading them into his personally owned truck, entered Arkansas where he was arrested for violation of § 84-2317 Ark. Stats. 1947 which prohibits the possession for one's own use or any other purpose, cigarettes upon which the Arkansas cigarette tax has not been paid. At the time of his arrest he admitted that he had not paid the cigarette tax required. He was not a common carrier, was not a licensed Arkansas dealer, wholesaler, distributor or retailer, had no federal interstate commerce permit and carried no bill of lading. There was no consignee for the cigarettes. He said he was on his way with his cargo to Texas, and, in effect, that he proposed to dispose of them anywhere

along the route in Arkansas if he could find a buyer that would net him a 3% profit. He had no one in mind either in Arkansas or Texas to whom he would sell the cigarettes. In these circumstances the majority hold that "beyond a doubt" these cigarettes, when appellant was arrested, were being transported in interstate commerce; had not come to rest in this state; and that the tax imposed by Arkansas was a burden on interstate commerce and, therefore, unconstitutional. It seems to me that it would be splitting hairs for us to say in the circumstances here that this cargo of untaxed cigarettes, which defendant had in his possession in Arkansas, had not, in effect, come to rest, and thus take it out of interstate commerce, just because the defendant was apprehended before he had actually sold any of the cigarettes in Arkansas. I think the direct and circumstantial evidence in this case was substantial and supports the judgment of the circuit court. It is undisputed, that defendant every foot of the way on his proposed journey through Arkansas was ready, willing, and intended to dispose of his cigarettes or any part thereof in Arkansas to anybody who might care to buy. Are we going to say that it was necessary in these circumstances for the State of Arkansas to trail defendant every inch of the way through the State in order to catch him in the act of a sale, when the *mere possession* of the untaxed cigarettes is illegal. ". . . the immunity in case of an article transported from another state depends upon whether the tax challenged regulates or burdens interstate commerce. While a tax which discriminates against goods transported in interstate commerce is invalid, a state tax upon merchandise brought in from another state or upon its sales, whether in the original packages or not, after it has reached its destination and is in a state of rest, is lawful if the tax is not discriminating in its incidence against the merchandise because of its origin in another state." *11 Am. Jur., Commerce,* § *56.* ". . . Also, in the absence of congressional legislation, a state may constitutionally impose taxes, enact inspection laws, quarantine laws, and, generally, laws of internal police, even though the enactments may have an incidental effect upon interstate commerce . . ."

11 Am. Jur., Commerce, § *23.* As I see it, whether the appellant was legally transporting the cigarettes in question across the state line, is not a question of law, but one of fact, the evidence was conflicting as to the ultimate destination of the cigarettes and whether they were being transported interstate.

In the Georgia case above, the supreme court of that state, in construing a cigarette statute similar in effect to our own, had this to say: "Under a proper construction of the statute, the tax is not laid upon the privilege of receiving cigarettes in this State, but is levied upon the privilege of retaining, keeping, holding, or possessing them for personal use, after they have been . . . brought into this State, the essential requirement being that any person . . . within one hour . . . after having brought the same within the State of Georgia, as the case may be, and before the same, or any part thereof, are used or consumed, cause the same to have the requisite denomination and amount of stamp or stamps to represent the tax due thereon affixed as stated . . . we think it is a tax for the privilege of holding or possessing for personal use after receipt or acquisition by any means. This seems to be the necessary conclusion, in view of the provision that if the cigarettes are not stamped as required, the person acquiring them 'shall within one hour after receipt of such products, or after having acquired possession thereof, or after having brought the same within the State of Georgia, as the case may be, and before the same, or any part thereof, are used or consumed,' cause the requisite denomination and amount of stamps to be affixed. The tax is therefore an excise upon the privilege of use, or of holding or possessing for use, and not upon receipt. As was stated in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 57 S. Ct. 524, 526, 81 L. Ed. 814, 'The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.' "

So I conclude that there was some substantial evidence to support the judgment in this case and I would affirm. Mr. Justice MILLWEE joins in this dissent.

COULTER *v.* O'KELLY.

5-1026 295 S. W. 2d 753

Opinion delivered October 29, 1956.

[Rehearing denied December 17, 1956.]

Leffel Gentry and *U. A. Gentry,* for appellant.

McMillan & McMillan, J. R. Wilson and *Thomas E. Sparkes,* for appellee.

LEE SEAMSTER, Chief Justice. The appellants, Murray Whitfield Coulter and George Prothro Coulter, filed this action in the Dallas Chancery Court on April 13, 1954, to quiet title to certain lands located in Dallas County, Arkansas. Certain stipulations were introduced in the record. At the close of appellants' testimony and

upon motion of appellees, the trial court dismissed the complaint for want of equity. This appeal follows.

The appellants alleged in their complaint that they owned three separate 80 acre tracts of land located in different sections of Dallas County. The appellees were all made defendants to the complaint and were called upon to show what interest, if any, they claimed in the lands. The appellees, W. P. Sturgis, C. F. Sturgis, L. Weems Trussell, J. R. Wilson and Mabel I. Wilson, his wife, all filed answers and cross-complaints.

The above named appellees contended as their sources of title, that they owned two of the 80 acre tracts of land by reason of deeds from the State Land Commissioner and payment of taxes for 17 years. The Land Commissioner issued his deeds on the strength of a tax title due to the fact that the taxes were not paid on said tracts in the year 1933, and the lands were sold to the State as delinquent tax lands.

The appellees further contend, as to one of the above mentioned 80 acre tracts, that E. W. Prothro conveyed the land to Frank Cathey and they were successors in title to the said Frank Cathey.

The appellants answered the cross-complaints and admitted that said appellees, or their predecessors in title, had acquired tax deeds from the State Land Commissioner. However, the appellants contend that the sale of the lands for taxes was void for several reasons set out in appellants' pleading.

The other appellees filed separate answers setting up the defense that they were innocent purchasers for value of the lands and that they were in actual possession of said lands. They also claimed that they and their predecessors in title had been in open, notorious, continuous and peaceable possession of said lands for more than fifteen years and had made valuable improvements upon the respective tracts of land.

The appellants introduced in evidence three deeds of record. Two deeds were from W. A. G. Woodward, Trustee in Bankruptcy of the Estate of Harris Brothers, to

E. W. Prothro, as grantee. In these two deeds the grantor conveyed "all my right, title and interest as such trustee (including all rights vested in E. T. Hays, Trustee, under a deed of trust dated April 15, 1931, executed by John R. Harris, Neil M. Harris, W. L. Harris, Versa Sue Harris, Sweet Harris, and John R. Harris, as guardian of C. C. Harris, and recorded in Record Book Vol. 'G. G.' page 418, of the records of Calhoun County, Arkansas and free and clear of any claim on the part of the estate of John R. Harris, bankrupt)." The first of these deeds was dated August 17, 1933, and filed for record in Dallas County on September 5, 1933; the second deed was dated August 28, 1933 and filed for record in Dallas County on October 29, 1955.

The third deed was from E. W. Prothro, conveying the above mentioned lands to the appellants. This deed was dated August 28, 1933, and was filed for record in Dallas County on October 29, 1955, after the commencement of this suit. Each of the three deeds mentioned above, also conveyed other lands not here in question. None of the deeds mentioned contained a warranty of title.

There was also introduced into the record the birth certificates of the two appellants, for the purpose of showing that the suit had been brought within the time provided by law after appellants had reached their majority.

The record also reveals that the parties stipulated to the following:

(1) W. P. Sturgis and C. F. Sturgis acquired the North Half of the Northeast Quarter . . . by deed from L. Weems Trussell now of record in Book 33, page 292 and paid therefor the sum of $2,400 (Tr. 100).

(2) W. P. Sturgis and C. F. Sturgis acquired the South Half of the Southeast Quarter from J. R. Wilson by deed of record in Book 20, page 5 and paid therefor the sum of $750 (Tr. 101).

(3) The defendants Sturgis acquired the property for a valuable consideration and without notice either

actual or constructive of the claims of the plaintiffs or either of them.

(4) The record of payment of taxes shown by the certificate of Ed Baker and which shows the payment of taxes for the years 1937 through 1953, inclusive, by Sturgis Brothers or their predecessor in title (Tr. 98 and 99).

(5) It is stipulated between plaintiffs' attorney and attorney for defendants John O'Kelly and Mary O'Kelly and Bruce McAlister and Grace McAlister that these named defendants are *bona fide* purchasers of the West Half of the Northwest Quarter, Section 20, Township 10 South, Range 14 West in Dallas County, Arkansas, are now in possession of this tract of land, claiming to be the owners of the same.

The records set out in the stipulations were introduced in evidence. At the close of appellants' testimony and upon motion of appellees, the trial court dismissed the cause for want of equity.

For reversal, the appellants contend:

"1. Plaintiffs made out a *prima facie* case;

"2. The mere prior recording of the deeds to the defendants without showing that the grantors had title and the right to convey would not, within itself, give priority over plaintiffs' holding under an unrecorded deed from the rightful owner;

"3. The burden was not on plaintiffs to prove that the deed from E. W. Prothro to Frank Cathey was a forgery until the defendants put the deed in evidence. When, and if, the deed was introduced, the plaintiffs had the right to rebut the evidence by showing the invalidity of the deed."

The stipulations admit that defendants are *bona fide* purchasers of the tracts of land; that defendants O'Kelly and McAlister are in possession of their tract of land; and, that the Sturgises and predecessors in title had paid taxes, for more than 15 years, on the wild and unimproved tracts of land. This makes a presumption of

law that the Sturgises have a title to the land. See Sec. 37-103, Ark. Stats., 1947.

The above mentioned statute was upheld in the case of *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193. In this case the title was quieted in Scheid due to the fact that he had paid the taxes on wild and unimproved land for more than 15 years, as against the record owners of the land.

The appellants contend that since they were minors during the time appellees acquired their title and also since they brought their suit within three years after attaining their majority, that they have a right to maintain this suit. This contention would be correct if appellants introduce sufficient proof to show they have title to the land.

The appellants further contend that had the appellees introduced the Cathey deed, they were prepared to show the deed was a forgery. Also, that had appellees introduced their tax deed, appellants were prepared to show that said deeds were void.

The stipulations admit that appellees have such a title to the lands so as to make this case an adversary suit, since it shows that appellees are *bona fide* purchasers and in possession, or have paid the taxes on the wild and unimproved land for more than 15 years. The law is well settled in this state, that appellants would have to recover on the strength of their own title, and not on the weakness of appellees' title. *Greer* v. *Vaughan,* 128 Ark. 331, 194 S. W. 232; *McClelland* v. *McClelland,* 219 Ark. 255, 241 S. W. 2d 264; *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690; *Sanders* v. *Baker,* 217 Ark. 521, 231 S. W. 2d 106; *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610; *Allen* v. *Phillips,* 87 Ark. 185, 112 S. W. 403; *Cook* v. *Ziff Colored Masonic Lodge No.* 119, 80 Ark. 31, 96 S. W. 618.

To sustain their case, the appellants, as plaintiffs, introduced in evidence a deed to the tracts of land from E. W. Prothro to appellants and deeds to E. W. Prothro from the Trustee in Bankruptcy of the Harris bankrupt

estate. There is no evidence that appellants, or their predecessors in title, owned the property. Neither is there evidence that any of them were ever in possession of any of the tracts of land involved herein. There is a total lack of evidence that appellants, or their predecessors in title, ever paid any taxes on any of said tracts of land. There was a complete lack of action, upon the part of appellants or their predecessors in title, to demonstrate their ownership of the tracts of land. This court has held this to be insufficient to justify a decree quieting title in the petitioners. *Rushing* v. *Thompson,* 208 Ark. 248, 185 S. W. 2d 941.

In the early case of *Wilson* v. *Spring,* 38 Ark. 181, this court said:

"But we are unable to see how a purchaser of lands, under an execution sale, or attachment, against Constant A. Wilson, and without any showing of how said Constant himself acquired title, can make a *prima facie* case in favor of one who must succeed upon the strength of his own title, against one who claims from a different source. A deed gives *color* of title, but is not even *prima facie evidence* of title against a stranger without showing title in the grantor, and several successive transfers cannot alter the case. Nor can lapse of time, until aided by the statute of limitations. There is absolutely no proof at all of title in Constant A. Wilson, to the lands in 29 at the time of the levy and sale to Clark." This case was cited with approval in *Gingles* v. *Rogers,* 206 Ark. 915, 175 S. W. 2d 192. See also *Sanders* v. *Boone,* 154 Ark. 237, 242 S. W. 66, 33 A. L. R. 461 where petitioner testified he purchased land from a certain individual and received a deed to the land, but he did not show that his vendor was the owner of the land nor had any interest therein. The court in this case reversed a decree quieting title in the petitioner.

To be entitled to a decree quieting title, in an adversary suit, the plaintiff must deraign title from the government or from someone who is shown to be owner of the land by possession and/or payment of taxes. In the case of wild and unimproved land, there must be shown

a payment of taxes. *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610, and cases there cited. See also *Chavis* v. *Taylor and Co.,* 211 Ark. 252, 200 S. W. 2d 507.

As to the 80 acre tract of land claimed by appellees under the Cathey deed, appellants contend that they are not required to deraign title further than to Prothro, the common source of title. That contention would be correct if appellees had relied only on the title obtained from Cathey. However, the appellees also claimed title by reason of a tax title and by payment of taxes on the wild and unimproved lands for more than 15 years. Since each of such claims is not derived from a common source of title, the appellants still have to prove title in themselves, by deraigning title to the government or to some one shown to have been the owner of the land. This question was determined by this court in *Eickhoff* v. *Scott,* 137 Ark. 170, 208 S. W. 421, where we held that if the defendant had shown a title independent of the common source of title, the plaintiff would have to recover on the strength of his own title.

In the case of *Wood* v. *Freeman-Smith Lumber Company,* 109 Ark. 499, 160 S. W. 396, this court held:

"Whenever plaintiff and defendant both deraign title from the same source, the plaintiff usually need not go behind this source to prove his title. * * * Where the defendant can show a better title outstanding and has acquired it, the rule ceases to apply. Where the defendant is allowed to impeach the common source of title, he must establish that he himself has acquired a superior title, and, except to this extent, he is not permitted to invoke the rule that the defendant can defeat the plaintiff by showing a better title in a third person."

The appellants also insist that by their pleadings they denied the appellees' assertion that a tax deed had been issued. It is accordingly argued that in the orderly course of proof it was sufficient for the appellants to deraign their title to the common source and that it was not incumbent upon the appellants to attack the validity of the tax title until that title had first been established by the appellees. We are not convinced, however, that

the existence of the tax deed was denied. In the appellants' first answer to the appellees' cross-complaint the appellants unqualifiedly admitted the issuance of the tax deed. After a number of amendments to the various cross-complaints had been filed the appellants filed what is styled an "answer to cross-complaint." In this pleading the appellants denied "each and every allegation of said cross-complaint and of each of the amendments thereto." This pleading was filed long after the time for answering the cross-complaint and without leave of court. It does not purport to be in substitution for the original answer to the cross-complaint. In these circumstances we do not think that the belated general denial should be treated as a withdrawal of the previous admission that the tax deed had been issued. Thus the appellants are in the position of having admitted that the appellees had a title in addition to the common source, and it was necessary for them to prove the invalidity of that additional title in order that *prima facie* title in themselves would be sufficient.

Since the appellants failed to prove title in themselves, the decree of the trial court in dismissing appellants' cause of action is affirmed.

BROWN *v.* DAVIS.

5-1198 294 S. W. 2d 481

Opinion delivered October 29, 1956.

Van Johnson and *Shaver, Tackett, Jones & Lowe,* for appellant.

Avin E. Johnson and *A. P. Steele,* for appellee.

J. Seaborn Holt, Associate Justice. This appeal comes from a decree of the Miller Chancery Court entered October 6, 1956, which denied appellants' petition for review of the action of the County Clerk of Miller County in certifying the sufficiency of a petition filed by certain qualified electors in said county for a local option election and which decree denied appellants' prayer that the Miller County Board of Election Commissioners be enjoined and restrained from causing to be placed upon the ballots to be used in Miller County in the general election, November 6, 1956, the question proposed by the sponsors of the petition.

For reversal appellant relies on the following points: "1. The Chancellor erred in dismissing plaintiff's complaint and in denying the restraining order prayed for. 2. The Chancellor erred in ruling that the Clerk made a certification of the sufficiency of the peti-

tion, whereas the alleged 'certification' was insufficient in law. 3. The Chancellor erred in ruling that Act 15 of 1955 did not repeal all provisions of Initiated Act No. 1 of 1942 except such as pertain to the 'preparation' of the petition. 4. The Chancellor erred in ruling that, since the adoption of Act 15 of 1955, it does not take a county initiative act under the I. & R. Amendment No. 7 to chance a 'wet' county into a 'dry' one. 5. The Chancellor erred in saying that appellants contend that Act 15 intended to and did abolish for all practical purposes local options on the liquor question in Arkansas. 6. The Chancellor erred in his construction of the term 'preparation,' as used in Act 15, 1955. 7. The Chancellor erred in ruling that it was not necessary to set out in the petition the proposed initiative act containing a proper or sufficient title or an enacting clause. 8. The Chancellor erred in ruling that the failure of the County Clerk to submit a ballot title to the County Board of Election Commissioners and to give the notice of election required by Act 4, 1935, was not fatal, and in ruling that a title can hereafter be so submitted and that the notice can be hereafter published. 9. The Chancellor erred in holding that Sec. 4 of Act 4, 1935 (§ 2-305 Ark. Stats.), does not apply to the petition in question as it is not a county initiative petition within the meaning of Amendment No. 7. 10. The proceedings for the proposed election are insufficient in law for reasons not heretofore covered or commented upon by the Chancellor, though briefed and argued."

Proceeding under the provisions of our I. & R. Amendment No. 7 to the Constitution of the State of Arkansas, Initiated Act 1 of 1942, and the recent Act 15 of 1955, the following steps in this case were taken as recited in the chancellor's findings: "The undisputed evidence shows that on September 5, 1956, there was filed with the County Clerk of Miller County a petition composed of several identical parts, purporting to be signed by more than 15% of the qualified electors of said county, as shown by the poll tax records, seeking a Local Option Election in Miller County under the provisions of Initiated Act No. 1 of 1942, as amended by Act 15 of

1955 . . . On September 14, 1956, the County Clerk executed a certificate wherein he certified as to the sufficiency of the petition, and later sent such certificate, and other papers, to the Miller County Board of Election Commissioners, including a copy of the petition. In addition, and prior thereto, the clerk had also certified the sufficiency of the petition to the Miller County Court, and on September 14, 1956, the county court made and entered an order wherein that court also found the petition sufficient and ordered the County Board of Election Commissioners to cause said Local Option Election to be held on the regular biennial election date of November 6, 1956. The County Court order, among other things, directed that the ballot contain the question: 'FOR the manufacture or sale of alcoholic liquors.' 'AGAINST the manufacture or sale of alcoholic liquors.' That was the ballot title, or question, proposed in the body of the petition as circulated. A copy of this County Court Order was also sent to the Board of Election Commissioners by the County Clerk.

"Plaintiffs have conceded in oral argument before this Court that the petition in question was prepared in accordance with the original provisions of Initiated Act No. 1 of 1942, but contend that such petition does not meet the requirement of that Act as now amended by Act 15 of 1955. So the disposition of this lawsuit will turn on the meaning of Act 15 of 1955 and the effect that the enactment of such measure has had on the provisions of Initiated Act No. 1, *supra.*"

At the outset we point out that we have consistently held that local option elections, as here, are not initiated measures within the meaning of Amendment 7 but are in the nature of a referendum measure. In the case of *Yarbrough* v. *Beardon and Phillips* v. *Foreman,* 206 Ark. 553, 177 S. W. 2d 38, we said "Amendment No. 7 to the constitution has no application. This is not an initiated act as provided for in that amendment. It is merely a submission to the legal voters of the county on the question of the sale of liquor, and is more in the nature of a referendum than an initiative petition, etc." Act 15 of 1955 provides: "An Act to fix the time for holding cer-

tain elections; and for other purposes. Be it enacted by the General Assembly of the State of Arkansas: Section 1. Local option elections, to determine the legality or illegality of the manufacture, sale, bartering, loaning, or giving away of intoxicating liquors, shall hereafter be held only on the regular biennial November general election days. Section 2. Every petition for a local option shall be prepared in accordance with Initiated Act No. 1 of 1942, and it shall be filed, and the subsequent proceedings thereupon shall be had and conducted, in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto. Section 3. All laws and parts of laws in conflict herewith are hereby repealed. Section 4. Whereas, under the present laws local option elections can be called and held at special elections; and, whereas these elections can be held on regular biennial general election days and thereby save the counties the expense of these elections; now, therefore it is determined by the General Assembly that an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

The legislative purpose or intent in this Act 15 is clear. Its primary purpose is to change the date of holding local option elections to the regular biennial November election days; in other words, special local option elections are prohibited. In Section 2 it expressly provides that petitions for local option elections must be prepared in accordance with the provisions of Initiated Act No. 1 of 1942, and all subsequent proceedings thereupon shall be had and conducted in the manner provided for county initiative measures by I. & R. Amendment No. 7 to the Constitution of Arkansas. This could only mean, we think, that petitions should be prepared and that procedure followed in accordance with our construction of Act 1 of 1942. Had the legislature intended to repeal any part of Act 1 of 1942 or to change local option elections into intiative acts, it would have been very easy for it to have so declared. The legislature is pre-

sumed to take knowledge of the decisions of this court when enacting legislation.

The decree of the trial court contains these further recitals, which we hold the record supports and to which we agree. "Under the clear wording and intent of Act 15, *supra,* the provisions of the I. & R. Amendment, and its enabling act, did not come into play (or affect this petition) until said petition was filed with the County Clerk. Up to that time, the petition was and is governed by Initiative Act No. 1 unaffected by the provisions of Sections 2 and 3 of Act 15, *supra.* However, after such petition was filed with the County Clerk, 'subsequent proceedings thereon shall be had and conducted, in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution and enabling acts pertaining thereto.' This means simply that while the local option petition under Act 1, *supra,* as amended, is not an initiative measure within the meaning of the I. & R. Amendment, still after such local option petition is prepared in accordance with Initiative Act No. 1 of 1942, and filed with the County Clerk, thereafter in order to get the question on the ballot at the regular biennial November general election in an orderly way such petition shall be handled in the same manner, and the same procedure followed, as if it were in fact a county initiative measure. Though different in nature, the same procedure insofar as getting the question on the ballot is concerned, must be followed after said petition is filed with the Clerk. That is what Section 2 provides.

"Plaintiffs contend that the petition in question should not have been referred to the County Court after it was filed with the Clerk. That point is immaterial insofar as this particular case is concerned, for the proof shows that the County Clerk actually did certify the sufficiency of the petition to the County Board of Election Commissioners in line with the provisions of the I. & R. Amendment. [The sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk, as the case may be, subject to review by the Chancery Court. I. & R. Amendment No.

7, Constitution of Arkansas]. The County Court also followed the provisions of Initiated Act No. 1 of 1942. So, insofar as this particular petition is concerned, it was handled both ways.

"The proof does show that the County Clerk has not, as yet, taken some of the steps required by Amendment No. 7, and its enabling act, in regard to this petition. For example, the petition recites, to-wit: 'that the ballot title of such proposition be as follows: 'FOR the manufacture or sale of intoxicating liquors.' 'AGAINST the manufacture or sale of intoxicating liquors.' and that title has not been submitted by the County Clerk to the Board of Election Commissioners, as required by Sec. 2-303 and 2-306 Arkansas Statutes (Act 4 of 1935). The Notice of the Election (previously given by the Sheriff under the provisions of Act 1, *supra*) but now required of the Clerk under Section 2-304 Ark. Statutes (Act 4 of 1935) has not been given. However, neither omission is fatal at this time for both can still be performed by the Clerk . . . The omissions, however, are not fatal at this time."

Accordingly, the decree is affirmed.

MYERS *v.* SNIDER.

5-1055 294 S. W. 2d 495

Opinion delivered October 29, 1956.

Alonzo D. Camp, for appellant.

Wood & Smith, for appellee.

ED. F. MCFADDIN, Associate Justice. In seeking a reversal the appellant contends that: (a) the Chancellor's findings are against the preponderance of the evidence; and (b) the findings are inconsistent.[1]

We give the salient facts: appellee, Snider, had owned for many years a tract of about two acres fronting on the basin cut-off of White River at DeValls Bluff. He was willing to allow some of his friends to have cottages on his land. Accordingly, on May 1, 1950, Snider gave appellant Myers an instrument reading:

"I agree to lease to Mr. George Meyers part of my ground at DeValls Bluff, Ark. to put a small house on for 5 years at 25 Dollars per year. I agree that Mr. Myers may move his building at any time from my ground that he may want to. This lease is not transferrable. This lease in carbon copy. Signed: Elijah Snider."

Myers moved a cottage, 16 x 24 feet, on the Snider land and paid the required annual rent. Later Myers placed of record a "contract of sale and rent,"[2] dated June 13, 1950, wherein Snider purported to sell to Myers the entire two acres for payments of $25 per year for 99 years. When he learned that Myers was claiming more than what was specified in the lease of May 1, 1950, Snider brought the present suit, alleging that the purported "contract of sale and rent" was a forgery; and, if not a forgery, then the contract was void for uncertainty

[1] Appellant used this language in his points relied on: "I. The decree itself reflects inconsistent findings of fact treating of the same essential matter—the lease—and prejudicially affecting substantial rights. "II. The decree, based upon either set of contradictory findings of fact, is unsupported by any substantial evidence."

[2] This was the printed form of "Contract of Sale and Rent," being numbered "Form 886", and being in general use in this State.

and material alterations. The prayer of the complaint was that the recorded "contract of sale and rent" should be declared void and cancelled of record.

Myers asserted the complete validity of the "contract of sale and rent" and, by cross complaint, sought the full enforcement of that contract.[3] At the trial Myers admitted that certain parts of the "contract of sale and rent" were never agreed to. We list his admissions:

(a) The "contract of sale and rent" definitely recited that if Myers paid $25 per year for 99 years and fulfilled all the other provisions of the contract then, at the expiration of the 99 years, Snider was to execute to Myers a warranty deed conveying the premises. Myers admitted that Snider never agreed to deed him the property, even though such language was plainly contained in the printed contract.

(b) The "contract of sale and rent" stated that Myers was to pay all taxes on the land, and upon failure to pay the taxes promptly when due, all of Myers' claims under the contract would be *ipso facto* forfeited. Myers claimed that there was no agreement requiring him to pay the taxes, even though the contract so provided.

(c) The "contract of sale and rent" described the property in Prairie County in this language: "That parcel of land and appurtenances thereon now owned by Elijah Snider of DeValls Bluff, Arkansas, as per record title of said lands, and known as 'Snider's Fish Dock' " Following said description someone attached to the instrument a paper, of sixteen typewritten lines, containing a definite description of certain property in metes and bounds. Myers admitted that such typewritten addenda had never been a part of the contract; and there was no satisfactory explanation of this addenda. Myers did not pray for reformation of the uncertain description in the original contract and the proof failed to establish that Snider owned "Snider's Fish Dock."

In the light of the admissions by Myers, and in consideration of other evidence in the record, the Chancery

[3] Among other relief prayed by Myers there was ". . . that cross-complainant's rights under said lease be quieted and confirmed."

Court found, *inter alia*: (1) that the "contract of sale and rent" ". . . is void because it does not express the agreement of the parties"; and (2) that the "contract of sale and rent" ". . . was breached by the defendants[4] in that they failed to pay taxes, and that as a result of such breach a forefeiture occurred . . ."

We have carefully examined the record and conclude that the Chancery Court was correct. In praying that his possession and title be quieted to the premises described in the "contract of sale and rent," Myers had the same burden as one who seeks specific performance. In *Lacey* v. *Bennett,* 210 Ark. 277, 195 S. W. 2d 341, we held that one seeking specific performance of a contract must prove (a) the essentials of a valid and binding contract; and (b) that he had at all times been ready, able and willing to perform his part of the contract. See also *Fox* v. *Hutton,* 142 Ark. 530, 219 S. W. 28; and *Moody* v. *Kahn,* 174 Ark. 1072, 298 S. W. 353.

Tested by the holdings in the foregoing cases, it is clear that Myers failed to show himself entitled to any relief. By his own admissions, the "contract of sale and rent" — as to sale and as to payment of taxes — did not express the agreement that he seeks to enforce; so there was no meeting of the minds of the parties in regard to a valid and binding contract. Furthermore, even if we assume that the "contract of sale and rent" was definite and binding, nevertheless Myers admits that he has entirely failed to perform his part of the contract as regards the payment of taxes: so he did not show himself to have been at all times ready, willing and able to perform the contract that he says was signed and acknowledged and placed of record. Without considering the other matters urged by Snider, it is clear that the Chancellor was correct in his decree.

Affirmed.

---

[4] *Myers' wife was a nominal defendant.*

5-1023 294 S. W. 2d 493

Opinion delivered October 29, 1956.

A. D. Chavis, for appellant.

G. V. Head and *William S. Arnold,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit to vacate a decree rendered May 16, 1938 by the Chancery Court of Ashley County, Arkansas, foreclosing a mortgage executed by L. E. Croswell and wife to The Federal Land Bank of St. Louis.

Appellant, Harry Croswell, is an heir of L. E. Croswell who was mentally incompetent and confined in the State Hospital for Nervous Diseases at Little Rock, Arkansas on October 20, 1937, when the Federal Land Bank filed the foreclosure suit. L. E. Croswell died May 17, 1951, while still confined in the hospital and the instant suit to vacate the 1938 foreclosure decree was brought by appellant on December 9, 1953. Originally

appellees, A. James Linder and wife, present owners of the land in question, and Herbert Woods, a mortgage holder, were made party defendants. Linder and wife answered the complaint and filed a third party complaint against Frances Bankston and wife who had conveyed the land to the Linders. The Bankstons then answered and filed a third party complaint against the Federal Land Bank who had acquired the land at the foreclosure sale in 1938 and conveyed it to the Bankstons in 1941. Demurrers by the appellant to the third party complaints were sustained and the Bankstons and the Federal Land Bank were stricken from the proceedings as parties. Subsequently the Linders demurred to the complaint on the ground that the court was without jurisdiction since the necessary parties for determination of a motion to vacate were not before the court. The demurrer was overruled and the case proceeded to trial resulting in a decree dismissing appellant's complaint with prejudice.

Although appellant attacked the 1938 foreclosure decree on numerous grounds, the principal and controlling issue is the sufficiency of the service of process upon L. E. Croswell in that suit. The record discloses that L. E. Croswell was adjudicated mentally incompetent by the Ashley County Court on August 29, 1937, and so remained until his death in 1951. No regular guardian was ever appointed and he was confined in the State Hospital for Nervous Diseases in Pulaski County on October 27, 1937. On that date process in the foreclosure suit directed to the sheriff of Pulaski County was served by him upon "L. E. Croswell in person" and upon E. D. Fletcher, superintendent of said hospital.

Ark. Stats., Sec. 27-337, reads as follows:

"*Service on insane persons.* — Where the defendant is a person judicially found to be of unsound mind, the service must be upon him and upon his guardian; if there is no guardian, upon his wife, or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he may be confined. *Provided,*

when such defendant is confined in an institution for the insane maintained by the State or Federal Government, then he may be served by service of a copy of the process upon the superintendent or keeper of such institution and service upon his guardian if there be a guardian'' (Italics supplied). The proviso in italics was added to the original statute by Act 140 of 1951. The section as quoted, without the proviso, was in effect in 1937 when L. E. Croswell was served with process.

Appellant contends no valid service could be had upon an incompetent in 1937 unless made upon both the incompetent in person and his regular guardian; and that, if the incompetent defendant is outside the county in which suit is brought, valid service cannot be had by service upon him and also upon the asylum keeper. The contentions are without merit. Under the statute in effect in 1937, service was necessary upon the incompetent and upon his guardian, if he had a guardian. If no guardian had been appointed, service was required upon the incompetent and upon his wife, or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he was confined. Since L. E. Croswell had no guardian, the service upon him in person and upon the superintendent of the State Hospital was in strict and literal compliance with the requirements of the statute. This is the effect of our holdings in *Wilder* v. *Wilder,* 208 Ark. 521, 186 S. W. 2d 933, and cases there cited.

Appellant also argues that the order appointing a guardian *ad litem* in the 1937 foreclosure suit was void because it was made prior to personal service upon the incompetent defendant. It is true that, under Ark. Stats., Sec. 27-830, a guardian *ad litem* cannot properly be appointed until after personal service upon the incompetent. However, the record here discloses that L. E. Croswell was personally served with process on October 27, 1937, and the order appointing the guardian *ad litem* was entered February 23, 1938.

There are several reasons why the appellant cannot prevail in his contention that the 1938 foreclosure decree was obtained by fraud practiced by the Federal Land

Bank under the fourth subdivision of Ark. Stats., Sec. 29-506. While the complaint alleged that the bank fraudulently failed and refused to credit the mortgage debt with payments and other credits on behalf of L. E. Croswell, and that the bank and guardian *ad litem* concealed such matters from the court throughout the litigation, these allegations were not sustained by the proof. Even if the trial court's conclusion on the amount of the mortgage indebtedness in the original suit was reached on false or perjured testimony, that fact alone would not afford a sufficient basis for vacating the decree for fraud under the statute. As the court stated in *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517: "The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself." See also, *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234, and cases there cited.

The amount of the mortgage indebtedness was one of the issues involved in the 1938 foreclosure suit. Since the only fraud alleged in the instant suit related to the truth or falsity of the testimony adduced on this issue in the original action, it amounted to intrinsic fraud and not to such extrinsic fraud as is required to vacate a decree under the statute.

The record reflects that the court had jurisdiction of the person of L. E. Croswell and the subject matter of the 1938 foreclosure suit; and that a guardian *ad litem* was duly appointed who fully and competently represented the incompetent defendant in an action to which no meritorious defense has been shown. The decree dismissing appellant's complaint is, therefore, affirmed.

BRADLEY LUMBER CO. OF ARK. *v.* CHENEY, COMM'R OF REVENUES.

5-1057 295 S. W. 2d 765

Substitute opinion delivered December 10, 1956.

[Original opinion delivered October 29, 1956.]

Davis & Allen, for appellant.

J. E. Gaughan, John H. Lookadoo, Hendrix Rowell, and *Herrn Northcutt,* for appellee.

George Rose Smith, J. This is a bill in equity by which the appellant seeks to enjoin the Commissioner of Revenues from enforcing a regulation issued under § 1 of Act 100 of 1955 (Ark. Stats. 1947, § 84-2107). It is asserted that Act 100 was not constitutionally passed by the General Assembly and that in any event there is no statutory authority for the imposition of a severance tax upon rough lumber as distinguished from timber. The chancellor held Act 100 to be constitutional and dismissed the appellant's complaint.

Section 1 of Act 100 requires, in substance, that a purchaser of severed natural resources must ascertain whether the severance tax thereon has been paid and, if not, must withhold the amount of the tax from the purchase price. The appellant, in attacking the validity of the act, offers proof to show that, although the bill as introduced in the House of Representatives was amended by that body, the Governor signed the bill in its original form, without the amendment. It is accordingly argued that the bill which the Governor approved is not the same bill which was passed by the legislature.

The undisputed proof is to this effect: The bill, as introduced in the House on January 20, contained a clause authorizing the Commissioner of Revenues to prepare a formula for determining the severance tax upon saw timber that had been converted into lumber. On February 3 the House adopted an amendment which provided that this formula should be prepared by the State Forestry Commission. On February 8 the bill was read for the third time and passed by the House. The entry in the House journal with reference to the final passage of the bill refers to the measure merely as "the bill," without mentioning the amendment previously adopted; so the journal does not affirmatively reflect that the House approved the measure in its amended form. The bill was then sent to the Senate, which passed it on February 11. The Senate journal, like that of the House, refers merely to "the bill." As signed by the Governor the meas-

ure does not contain the amendment adopted by the House on February 3.

These facts are not sufficient to establish the invalidity of the act. When a bill is signed by the Governor and deposited with the Secretary of State, there arises a presumption that every requirement for its passage was complied with. *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92. This presumption cannot be overcome by the silence of the legislative journals unless the constitution requires the journals affirmatively to show the action taken. There is no requirement in the constitution that either house keep a record of its action upon amendments to a pending bill; all that is required is a record of the vote cast upon final passage of the measure. Const., Art. 5, § 22. It is therefore entirely possible — and the presumption arising from the Governor's approval requires us to assume — that in the interval between February 3 and February 8 the House receded from the amendment without recording its action in the journal. The point was so decided, upon similar facts, in *Chicot County* v. *Davies,* 40 Ark. 200, and *Perry* v. *State,* 139 Ark. 227, 214 S. W. 2d 2. Those cases control this one.

Nor is the presumption overcome by the fact that the House's action in receding from the amendment should, under the House's own rules of procedure, have been recorded in its journal. Subject to the restrictions imposed by the constitution each branch of the legislature is free to adopt any rules it thinks desirable. It follows, both as a matter of logic and as a matter of law, that each house is equally free to determine the extent to which it will adhere to its self-imposed regulations. For this reason it was held in *Railway Co.* v. *Gill,* 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452, that the validity of an act is not affected by the legislature's disregard of its own rules, the court saying: "The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter

entirely subject to legislative control and discretion, not subject to be reviewed by the courts."

The determination that Act 100 is valid is practically a complete answer to the appellant's alternative contention. We do not construe either Act 100 or the Commissioner's regulation thereunder as an attempt to collect a severance tax upon rough lumber as such. The tax is levied upon the severing of timber and timber products. Ark. Stats., § 84-2102. Act 100 and the regulation in question merely supplement the existing statutes by requiring specified processing mills, in connection with their purchases of such timber and timber products, to withhold from the seller any amount of tax that is still owed to the State. It is suggested by a paragraph in the appellant's brief on rehearing that the appellant construes the regulation as an attempt to require a purchaser of rough lumber to pay a tax thereon even though the severance tax has already been paid upon the timber from which the lumber was made. We do not so interpret the regulation, nor does the Commissioner make any such contention in his pleadings or in his brief. Act 100 is intended to provide a more efficient method of collecting unpaid severance taxes; if the Commissioner should attempt to construe the act as authority for the collection of a new and independent tax upon lumber his conclusion would clearly be erroneous.

Affirmed.

McCURRY *v.* WILSON.

5-1196 294 S. W. 2d 485

Opinion delivered October 29, 1956.

Odell Pollard and *Yingling & Yingling,* for appellant.

J. E. Lightle, Jr., and *Ike Murry,* for appellee.

GEORGE ROSE SMITH, J. This is a taxpayer's suit by which the appellee, Jack Wilson, seeks to prevent the county board of election commissioners from submitting, at the coming general election, the question of whether the manufacture and sale of intoxicating liquors shall be prohibited in White county. The chancellor held the petition for a local option election to be legally insufficient and accordingly enjoined the county board from putting the issue upon the ballot.

The appellee's main contention is that Act 15 of 1955 (Ark. Stats. 1947, §§ 48-824, 48-825) requires that every petition for a local option election be cast in the form of an initiated county measure. Since the petition in the present case complies only with § 1 of Initiated Act No. 1 of 1942 (Ark. Stats., § 48-801) it is argued that the petition is for this reason legally insufficient. This contention is rejected in the companion case of *Brown* v. *Davis, supra,* page 843, also decided today, in which we hold that the petition may be drafted in compliance with the 1942 statute and that Act 15 of 1955 merely governs the procedural steps to be taken after the petition is filed with the county clerk.

In one respect, however, the present case differs from its companion and presents an additional issue for determination. White county is one of the few counties in the state which are neither completely wet nor completely dry. No intoxicating liquor can be legally sold in White county, but the sale of light wine and beer is permitted in a number of precincts in the county. In view of this situation it is argued that a petition calling for a clear-cut choice between the legalization of hard

liquor and the complete prohibition of all intoxicants will necessarily mislead and confuse the electorate, since there will be no way for a voter to express his preference for the moist condition that now exists in the county. Upon this theory the appellee argues that the petition for the election should have been limited to the submission of the question whether the manufacture and sale of light wines and beers would be permitted or prohibited.

However much this argument may appeal to a sense of abstract fairness, its fallacy lies in the fact that the statutes undeniably permit fifteen percent of the qualified voters to call for an election of the type now contemplated. Some twenty years ago White county adopted its present state of modified prohibition, under the terms of a 1933 act that was subsequently strengthened by Act 173 of 1939. Ark. Stats., §§ 48-518 and 48-823. But in 1942 the voters of the state as a whole adopted the initiated act upon which the present petition is based. This act defines intoxicating liquor as including any beverage containing more than one half of one percent of alcohol by weight. Ark. Stats., § 48-802. It then expressly declares that the act shall be so construed as to permit the qualified voters in any area "at one election to determine whether or not all alcoholic beverages, including all kinds and types of whisky, beer, and wine, shall be manufactured or sold . . ." Ark. Stats., § 48-806. In the face of this unmistakable language it cannot be reasonably supposed that the present petition is not authorized by law.

Reversed, the mandate to issue immediately.

WASHINGTON NATIONAL INSURANCE COMPANY *v.* COMMISSIONER OF INSURANCE, HARVEY G. COMBS.

5-1048 294 S. W. 2d 486

Opinion delivered October 29, 1956.

Burton P. Sears and *Rose, Meek, House, Barron & Nash,* for appellant.

Perry V. Whitmore, for appellee.

PAUL WARD, Associate Justice. This controversy arises out of a complaint made by Mr. John Greene, a life insurance agent, to Harvey G. Combs, State Insurance Commissioner, charging the Washington National Insurance Company with unfair trade practices in that said Company had violated certain provisions of Ark. Stats. § 66-1701 to § 66-1713. As provided in the said statutes, the Commissioner heard testimony by both sides and ruled that the Washington National Insurance Company (hereinafter sometimes referred to as the Company) was guilty of acts amounting to unfair trade practices, and ordered it to cease and desist from engaging in such acts. This cause is now on appeal from the Chancery Court of Pulaski County which sustained the Commissioner's findings.

Factual Background. For a better comprehension of the issue here involved we set forth below the events and circumstances leading up to the filing of the charges above mentioned, including therein only such facts as are uncontroverted.

John Greene is an insurance agent and for something like 25 or 30 years he has been so engaged, during which time he has represented different companies. In 1948 he learned that Dr. George S. Benson, President of Harding College at Searcy, was starting a drive to raise $1,000,000 for the support of his college, and Greene, who was an agent for the Washington National Insurance Company at the time, persuaded Dr. Benson and his college board to take out a term insurance policy in the amount of $1,000,000. For writing this business Greene received a commission of $6,781.41. It is shown that in 1937 one of the general officers of the company had made a donation to Harding College and that he and other officers had consistently contributed liberal amounts to the college in the years that followed. Sometime after this policy was issued Greene became dissatisfied with the commission which he received from the Company and, motivated by this dissatisfaction perhaps or if not then for other reasons, had a falling out with the Company, resulting in a severance of relationships. Following this, some two or three years later,

Greene filed a complaint against the company before the Insurance Commissioner and asked that their license be revoked. The Company's license was not revoked and Greene states that he asked the Commissioner not to do so, but he also states that he recognizes that just making the charges is one of the worst things that could happen to an insurance company.

In the early part of 1955 Greene learned that Dr. Benson was fixing to start another campaign to raise $2,000,000 for the college. He called on Dr. Benson and asked to write him an insurance policy for $1,000,000. Dr. Benson was agreeable to the idea but stated that he desired the Washington National Insurance Company to be given the business. Greene explained that he had made inquiry of Mr. Roy Reagan, local general agent for the Company, and of Harvey G. Combs, the Insurance Commissioner, and that he had learned that the company could not write the policy in question, principally for the reason that Benson was 56 years old, or one year over the limit. At Dr. Benson's suggestion Greene contacted Dr. L. M. Graves in Memphis and Mr. C. L. Ganus in New Orleans (President and Past President of the Board of Trustees). In each instance Graves and Ganus were agreeable to the idea but each of them expressed the desire that if possible the business should be given to the Company. In each instance it was explained by Greene that the Company could not write the policy. After Greene had obtained an application blank signed by Benson for the insurance policy and after he had received checks from Benson for the premium, it was learned by Dr. Benson that the Company was able and willing to write the policy. Thereupon it was agreed by Benson, Graves and Ganus that the application and checks given Greene should be cancelled and the policy given to the Company, and Greene was notified to this effect.

The Statutes. Section 66-1703 states that no insurance company shall engage in any trade practices which is defined by the Act to be "an unfair method of competition or an unfair or deceptive act or practice . . ." The following section defines 8 different classifications

of "unfair methods of competition and unfair and deceptive acts." Although, as hereafter shown, the complaint against the Company in this instance makes no definite charge by reference to the statute it is assumed that such was the intention. Sub-section 4 refers to coercion or intimidation tending to result in unusual restraint or, a monopoly in, the insurance business; Sub-section 7 forbids discrimination between individuals of the same class and expectation of life in the rates charged and in the general provisions of the policy, and; Sub-section 8 prohibits the rebate of premiums. Section 66-1707 provides that if the Commissioner finds that any insurance company has violated any provisions of the act he shall order it to cease and desist from so doing. The act also provides that the findings of the Commissioner shall be sustained if they are supported by substantial evidence.

The Commissioner's Findings. The findings of the Commissioner, consisting of 8 pages in the record, discuss at great length certain phases of the testimony which, in our opinion has no direct bearing on the guilt or innocence of the Company. It concludes with ordering the Company to "cease and desist from engaging in such methods of competition, acts, and practices as was resorted to in procuring the policy . . ." in question. It does not specify what section of the statute the Company is supposed to have violated. However after a careful reading of the Commissioner's findings we have concluded that the Company is charged with engaging in unfair trade practices for the following reasons and in the following particulars: (a) The Company was guilty of "unfair treatment to agents and unfair dealings between (insurance) companies"; (b) The Company is "guilty of committing an act of coercion or intimidation in this case"; (c) The Company offered to give the agent's commission to Harding College, and; (d) The Company was not qualified to write the policy in question.

In our opinion there is no substantial evidence to show that the Company was guilty of any of the charges mentioned above. In fact it seems to us that it was

apparent to the Commissioner that the testimony was not entirely satisfactory. In one instance the Commissioner in discussing the amount of commission the Company allowed its agent in this case, stated: "I feel that the above evidence is sufficient to convince any one that something took place along the line that has not been fully disclosed." Again, in reference to the charges as a whole, the Commissioner stated: "I am convinced that an inducement and a consideration within the meaning of Section 66-1704, Ark. Stats. 1947, entered into Washington's issue of the 1955 policy which has not been fully disclosed . . ."

(a) It is not clear to us just what the Commissioner had in mind with reference to unfair treatment to agents. In this connection he stated: "The very life and existence of the insurance business depends upon fair treatment to agents and their dealings between companies. I cannot place my stamp of approval upon the Company's actions in this matter. To the contrary I consider such actions as unfair and deceptive and unlawful." If the reference is to the fact that the Company's general agent, Roy Reagan, received only $600 commission for writing the policy in question, we cannot see where that has any bearing on the question of unfair trade practices, and it surely does not adversely affect policyholders. Certainly it was of no concern to Greene or Benson. Reagan was not a writing agent, and the undisputed testimony is that he did practically nothing to secure the business and that the $600 was satisfactory to him. If the reference is to the unfair treatment accorded Greene by the Company, then we can find no evidence to support the charge. If Benson in any way misled or mistreated Greene that would be a matter of concern to them only. The undisputed evidence in this case shows that Greene well knew he did not and could not represent the Company, and the Company was in no way obligated to him at any stage of the proceedings. The testimony fully discloses that there can be no question about this fact.

(b) Coercion. We can find absolutely nothing in the testimony to substantiate the charge that the Com-

pany coerced Benson or the Board of Trustees of Harding College to take out the insurance policy in question. Again the testimony is undisputed that the Company had written Benson in 1948; officers of the Company had in years past made liberal donations to Harding College; The Company did nothing to induce Benson to take out this policy; Dr. Benson, Dr. Graves and Mr. Ganus all stated that they wanted the Company to have the business, and this is verified by Greene, and; The business was handed to the Company without any solicitation or effort on its part.

(c) It is charged that the company (presumably in violation of sub-section 8 of Section 66-1704 of the Ark. Stats.), in order to secure this business gave or promised to give the commission (presumably payable to an authorized writing agent) to Harding College. The only testimony that in any way substantiates this charge is Greene's statement that Benson said that the Company said it would give the commission to the college. It is disclosed that this statement by Benson was made in connection with a telephone call which Dr. Benson made after the policy had already been given to the Company in an effort to accommodate Greene. Either at Greene's request or upon Dr. Benson's own initiative he called an official of the Company in Chicago and asked him if he would be willing to give the commission to Greene. The official's reply over the phone was to the effect that he wanted nothing to do with Greene and, furthermore, that if he was going to give the commission to anybody he would prefer to give it to Harding College. Dr. Benson and all of the officials of the Company that testified state positively that no commission was given to Harding College as a result of this policy being written. All the facts and circumstances discredit the implication of the hearsay testimony given by Greene. At the time the question of commission was raised the Company had already been given the policy: The Company was under no obligations to Benson or the college, but, on the other hand Benson was under obligations to the Company for past donations; there is absolutely no evidence in the record that the college did in fact receive the commission—

all the evidence being just to the contrary, and; why, if the Company had already given the commission to the college, would Benson have asked that it be given to Greene?

(d) As we read the record it is abundantly clear that the Company was qualified to write the policy in question and that it violated no provision of the statute in doing so. Although the Company's rate book on file with the Insurance Commissioner did not contain the description of the policy of this kind for a person 56 years old (one year older than shown in the rate book), the uncontradicted testimony shows clearly that this Company and many other companies have the right, and make it a practice, to deviate in some respects from the rate book in special cases such as the one presented here. Mr. Mullins, Vice President of Washington National Insurance Company, stated that it was common practice among all insurance companies, in unusual instances, to change or modify standardized policies so long as they adhered to the rate which had been filed; that his company is consistently issuing policies that are over the specified limits both as to ages and amounts; that this is pretty much standard practice; that 95 per cent of the 800 life insurance companies operating in the United States will occasionally, and many of them quite frequently, make exceptions to their published underwriting practices. He also stated that insurance companies had the right to make certain changes without notice. Mr. Greene himself acknowledges that the rate book of one of his own companies — The New York Life — contains this clause: "Company's premium rates, policy values, underwriting limitations and rules are subject to change without notice with respect to policies issued thereunder."

It seems clear to us that the premium charged by the company in this case was based on the schedule of rates which it had in force at the time. The Company's schedule, shown in the record and a part of the policy in question, shows a schedule of rates from age 20 to 69. According to this schedule the premium for $1,000 for a

person 56 years of age is $23.64. From this it follows that the premium on a policy for $1,000,000 would be $23,640 which is the amount charged in this instance by the Company.

As indicated above the statutes in question define 8 separate and distinct classifications of unfair practices. Also we have stated that the alleged charges preferred against the Company in this instance were somewhat general and not definitely classified according to the statute, but we have discussed them above as being so classified. Section 66-1709 deals with unfair practices and unfair methods of competition which are not defined in the statute. We see no occasion for discussing the charges under this classification. If however the charges were considered under the latter classification it would require more evidence to sustain them as provided by paragraph (d) where it is stated that the Commissioner's findings must be supported by the weight of the evidence.

In our consideration of this case we recognize the duty and responsibility of the Insurance Commissioner to protect the general public against unfair practices by Insurance companies, and that he was merely trying to discharge that duty in this case. On the other hand we are forced to recognize that the charge against the Company in this case is a serious one and should not be sustained on suspicion or innuendoes but should be supported by substantial evidence. Mr. Greene, a man of vast insurance experience, admits that there is nothing more damaging to an insurance company's reputation or standing than to have a complaint lodged against it with the Insurance Commissioner. We recognize that Mr. Greene demonstrated ingenuity and expended considerable time and effort in attempting to write this insurance policy in the companies which he represented, and that he received no remuneration therefor, but this constitutes no lawful reason for punishing the Washington National Insurance Company. In our view it is immaterial that Mr. Greene was sincere in representing to Dr. Benson and the members of the Board of Trustees that

the Washington National Insurance Company could not legally write the policy they desired. We can understand why he thought the whole matter should be brought to the attention of the Insurance Commissioner for a full investigation, and we have no inclination to criticize him for doing so. On the other hand charges and investigations alone do not convict.

Reversed and dismissed.

Justice McFaddin disqualified and not participating. Justice George Rose Smith not participating.

Justice Millwee (dissenting). I would affirm the findings and orders of the Insurance Commissioner and the Chancellor. In reversing their actions the majority conclude there was no evidence to support the charges filed. This is not surprising since they accept the testimony of the Company's officers and other witnesses as "uncontroverted," and "discredit" the evidence offered by John H. Greene as "hearsay" and supported only by "suspicion or innuendoes".

Despite the lopsided view of the testimony by the majority, a few facts are crystal clear. Even the majority concede that Mr. Greene expended much money, time and effort in negotiating with the College for the policy in question. The representation by Mr. Greene that the Company did not write the type policy desired by the College was made after the most painstaking inquiry and research and in perfect good faith. Not only did he check the Company's rate books including its current filings with the Insurance Department but he verified such information by checking the leading insurance manuals. In addition, and to be certain, he made the same inquiry of the Company's general agent at Little Rock and the latter admitted that he told Mr. Greene that the Company did not issue the policy.

But: Who wound up with the agent's fee or commission for writing the policy finally issued and that Mr. Greene worked so hard and diligently to earn? The very same general agent who had led Mr. Greene to believe that the Company did not write the policy, and

who, in reference to the commission, frankly stated: "I had done nothing to earn it." It is true that the fee paid was much less than a normal commission but Mr. Greene had every right to believe the Company donated the balance of a normal commission to the College just as the agent, Ferguson, indicated it would. Like the Commissioner, I consider such actions on the part of the Company, "Unfair, deceptive and unlawful," under our statute. For such actions the Company has been neither convicted nor penalized but is only mildly reprimanded and warned to cease and desist. Instead of repudiating the efforts of Mr. Greene, the Commissioner and the Chancellor to keep the life insurance business in this state clean, this court should be anxious and ready to uphold them. I, therefore, respectfully dissent.

BROWN *v.* BENNETT.

5-1038 294 S. W. 2d 492

Opinion delivered October 29, 1956.

R. H. Peace, for appellant.

William H. Drew, for appellee.

SAM ROBINSON, Associate Justice. The appellant, A. T. Brown, filed this suit to confirm title in him to 5 acres of land he claims as an oral gift from his brother, H. R. Brown, who died in 1950. The appellees, Gladys P. Brown and Marjorie Brown Woods, are the widow and daughter, respectively, of H. R. Brown. In 1951, they

conveyed to appellee, A. R. Bennett, 80 acres of land which includes the 5 acres in issue here. After considering all of the evidence, the chancellor dismissed the complaint.

Appellant testified that his deceased brother gave him the 5 acres in question, but his testimony is so confused and contradictory that it is hard to follow. He describes the land he claims his brother gave him as being one acre wide, but in his complaint he describes it as being one-half acre wide. He says he built a house on the land, but the house in question is on the land of Garfield Brown, another brother. At another point, he testified he built the house before the time he claims W. R. Brown gave him the land. Appellant contends that he was in possession of the land at the time appellee Bennett purchased it from the widow and daughter of W. R. Brown, and that such possession was notice of his claim of ownership; but the house where appellant contends he lived at the time is not on the land bought by Bennett.

Mrs. Bertha Rice, Mrs. Etta Brown and Mrs. Alice Quinn, sisters of appellant, testified in effect that H. R. Brown, during his lifetime, told them he had given 5 acres of land to their brother, A. T. Brown.

The evidence is not convincing that A. T. Brown made any substantial improvements on the 5 acres he now claims as a gift from his brother. This court said, in *Akins* v. *Heiden,* 177 Ark. 392, 7 S. W. 2d 15: "This court is committed to the rule that an oral gift of land is not enforceable unless there is actual possession delivered, followed by the making of valuable improvements by the donee." Citing "*Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *Brown* v. *Norvell,* 96 Ark. 609, 132 S. W. 922; *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359; and *Hunt* v. *Boyce,* 176 Ark. 303, 3 S. W. (2d) 342."

Appellee Bennett testified that he had no notice whatever that A. T. Brown was claiming ownership of any part of the 80 acres at the time of his purchase from the widow and daughter of W. R. Brown. Bennett also says that some time after his purchase of the

land he was inspecting a house on the property he bought when A. T. Brown came over and said "the womenfolk" owed him $4,000 for looking after W. R. Brown's stock during his last illness, and, at that time, A. T. Brown made no claim whatever as to owning any part of the land.

When all of the evidence is considered, it appears that the chancellor's decree is correct and is, therefore, affirmed.

GRUBBS *v.* ROWLAND, COUNTY CLERK.

5-1205 296 S. W. 2d 201

Opinion delivered October 30, 1956.

Clifton Bond, for appellant.

John F. Gibson and *Ike Murry,* for appellee.

LEE SEAMSTER, Chief Justice. The appellant, as a citizen and taxpayer of Bradley County, Arkansas, has appealed from a decree of the Bradley Chancery Court, directing the County Clerk to amend his Certificate of Sufficiency of a petition calling for a local option election. The court also ordered "that the Board of Election Commissioners of Bradley County, Arkansas shall cause to be held a local option election and shall place upon the general election ballot to be voted on November 6, 1956, the following words and/or phrases, 'For the manufacture or sale of intoxicating liquor' — 'Against the manufacture or sale of intoxicating liquor.' "

For reversal, the appellant contends: (1) The calling of the election is barred by the two year statute of limitations set out in Arkansas Statute 48-802; (2) The Petition praying for an election is not prepared in compliance with Initiated Act No. 1 of 1942 as amended by Act 15 of 1955.

It is stipulated by the parties that a local option election, on the wet and dry issue, was held in Bradley County, Arkansas, on August 7, 1954; that the county had permitted the sale of intoxicating liquors before the election but voted dry at said election; that due to a contest of that election, intoxicating liquors were sold in the county until February 6, 1956, when the licenses and permits for sale of intoxicating beverages were cancelled by the Department of Alcoholic Beverage Control, pursuant to a decision and judgment of the Arkansas Supreme Court.

The controlling statute in this case is Arkansas Statutes, Section 48-802, which provides, in part: "If at said election a majority of the electors voting at said election vote 'For the Manufacture or Sale of Intoxicating Liquors,' then it shall be lawful for the Commissioner of Revenues of the State of Arkansas to continue to issue licenses, or permits, for such manufacture or sale within

said designated territory as if no election had been held. If a majority of said electors voting at said election vote 'Against the Manufacture or Sale of Intoxicating Liquors,' then it shall be unlawful for the Commissioner of Revenues of the State of Arkansas, or any county or municipal official to issue any license, or permit, for the manufacture, sale, barter, loan or giving away of any intoxicating liquor as defined in this act, for at least two (2) years, and thereafter, unless the prohibition shall be repealed by a majority vote as provided for in Section 1 (48-801) of this act. In either case, a period of two (2) years at least shall elapse before another election on the same subject may be held in the territory affected. * * * "

The language of the above mentioned statute clearly states that a period of two years shall elapse before another election on the same subject may be held in the territory affected. In other words, it is lawful to have a local option election every two years provided there is a substantial compliance with the statute.

The Local Option Petition filed herein recites, "We the undersigned legal voters of Bradley County, Arkansas, pray that an election be held in Bradley County at the regular general election to be held in said county on November 6, 1956, as to whether or not license shall be granted for the manufacture, sale, bartering, lending and giving away intoxicating liquors in Bradley County, Arkansas."

The language contained in the petition is in substantial compliance with Section 48-801, Arkansas Statutes, which is Section 1 of Initiated Act No. 1 of 1942. The only variance in language is that the petition says, "lending" and the Act says "loaning." However, this slight variance of language does not affect the legality of the petition.

The petition further set out that it was "An Act to Legalize the Manufacture, Sale, Bartering, Lending and giving away of Intoxicating Liquor within Bradley County, Arkansas." The trial court held that portion of the

petition invalid, due to the fact there is a general law in this State which governs the manufacture and sale of intoxicating liquors. This general law is held in abeyance when a county votes dry and is reactivated when a county votes wet. A county cannot pass a local law while a general law covering the same subject is in effect.

The trial court correctly decreed that the County Clerk should amend his certificate to the election board to eliminate the question of the initiated local act from the ballot. The court was also correct in holding that the local option issue should be certified to the Board of Election Commissioners to be voted upon under the designation, "For the manufacture or sale of intoxicating liquors, or, Against the manufacture or sale of intoxicating liquors."

The petition was found to contain signatures of more than fifteen percent of the legal voters of Bradley County and there is no question raised as to the sufficiency of the petition in this regard.

We hold that fifteen percent of the legal voters of any county can call a local option election, at the time of any general election, by filing a petition within the time provided by law, with the County Clerk praying that an election be held to determine whether or not license shall be granted for the manufacture, sale, bartering, loaning or giving away of intoxicating liquor. If the Clerk finds that fifteen percent or more of the legal voters in said county have duly signed the petition it is his duty to certify the sufficiency of the petition to the County Board of Election Commissioners and they are required to place the question on the general election ballot in the following way, "For the manufacture or sale of intoxicating liquor" and "Against the manufacture or sale of intoxicating liquor."

Local option elections may be held at the time of holding the general elections, which is every two years.

Decree affirmed.

BROYLES *v.* SUMMERS.

5-1031 294 S. W. 2d 766

Opinion delivered November 5, 1956.

Terral & Rawlings, for appellant.

Reed Williamson, for appellee.

LEE SEAMSTER, Chief Justice. On September 11, 1954, the appellants, Paul E. Broyles and Elizabeth Broyles, his wife, through their agent, F. W. Broyles, contracted to sell a house and lot in Jacksonville, Arkansas to appellees, W. J. Summers and Alma Summers, his wife, for the consideration of $3,000. Under the terms of the purchase agreement appellees paid $100 down and agreed to pay $50 per month beginning October 20, 1954, until a total of $500 had been paid, with interest, at which time the appellants were to execute a deed to appellees and retain a lien for the balance of the purchase price. The appellees took possession of the property and made the

monthly payments in accordance with the terms and conditions of the contract, up to and including the payment of May 20, 1955.

Thereafter, on June 20, 1955, the appellees, with full knowledge and permission of the appellants, assigned the contract to one Tony Liemke, Jr. and Betty Liemke, his wife. The appellees executed and delivered a warranty deed to the Liemkes, whereby appellees conveyed their interest in the property for a consideration of $350; $100 being paid down and a lien retained for the balance. The deed further provided that the Liemkes assume and agree to pay the unpaid balance due appellants by appellees under the terms of the purchaser's agreement. The Liemkes executed a note to appellees in the sum of $250, whereby the vendors lien on the land was acknowledged.

The record reveals that the Liemkes made one payment — June 20, 1955 — to the appellants, for which they received proper credit. On July 20, 1955, the Liemkes delivered to appellants a check for the July payment, but before appellants could cash the check the Liemkes notified them that they had stopped payment on the check and did not intend to make any further payments. After the Liemkes had notified appellants of their intentions, they gave to appellees (1) the purchase agreement, (2) the warranty deed to the land, and (3) the key to the house.

The appellees contend that on July 23, 1955, they delivered to appellants their check for the July payment, said check being accepted and retained over night by appellants and returned the next day with the explanation that appellants had decided to re-possess the property.

The record reveals that when appellees made their May 20, 1955 payment, they had paid a total of $500 on the principal and according to the terms of the contract of sale they were entitled to a warranty deed from the appellants. The purchaser's agreement provided that appellants were to retain a vendors lien for the unpaid balance and would furnish an abstract of title certified

to the date of the agreement showing merchantable title. The appellants failed to comply with these provisions of the contract.

On August 8, 1955, the appellees tendered to appellants the entire balance due under the purchaser's agreement. This payment was refused by appellants and appellees placed the money in escrow for the benefit of appellants.

The appellees filed the instant suit in Pulaski Chancery Court, Second Division, on September 2, 1955, requesting specific performance on the sales contract. The trial court entered a decree in favor of appellees, ordering specific performance of the contract. This appeal follows.

For reversal, appellants cite the following points:

"First: The Summers had assigned all of their interest in the property to the Liemkes.

"Second: The Summers had executed and delivered to the Liemkes their warranty deed conveying the property to the Liemkes.

"Third: Pursuant to a sale of the property by the Summers to the Liemkes, and in consideration thereof, the Summers surrendered possession of the property to the Liemkes who later cancelled the contract of sale and returned the property to the Broyles."

We find that the trial court was correct in ordering specific performance on the contract.

(1) The appellees and the Liemkes, by mutual consent, effectively rescinded their contract and the assignment of the sales contract. The verbal rescission of the assigned contract coupled with delivery thereof, was a complete re-assignment of the contract. The appellees were the real parties in interest. *Chapman and Dewey Land Company* v. *Wilson,* 91 Ark. 30, 120 S. W. 391.

(2) The deed executed by appellees to the Liemkes was not effective due to the fact that it was not effec-

tive until appellants complied with the terms of the contract and issued a deed to appellees.

(3) The Liemkes would have no authority to cancel the sales contract with appellants. They had failed to pay appellees for their interest in the contract and appellants had never released the appellees from the unpaid balance due on the contract. Furthermore, the appellants had breached the terms of the contract by failing to issue a deed to the appellees.

The preponderance of the evidence shows that the Liemkes never attempted to cancel the sales contract with appellants, but to the contrary turned the contract back to the appellees, whom they had not paid. Appellees retained a lien on the property for the balance due them by the Liemkes. The appellees were not in default and never in any way breached the sales contract with appellants.

We find that appellants are required, under the terms of their contract with appellees to make and deliver to appellees a warranty deed to the land. They will also be required to furnish appellees an abstract of title showing a merchantable title to the land. When appellants have complied with these provisions, they will be entitled to the balance of the purchase price.

The decree is affirmed.

DEPOTTY *v.* DEPOTTY.

5-1037 295 S. W. 2d 330

Opinion delivered November 5, 1956.

[Rehearing denied December 3, 1956.]

Van Johnson, for appellant.

LeRoy Autrey and *Kennis K. Williams,* for appellee.

J. Seaborn Holt, Associate Justice. This is an action by appellant seeking to annul his marriage to appellee. From a decree denying and dismissing his prayer for annulment comes this appeal.

There appears to be little if any dispute as to essential facts. The parties were united in marriage in the border city of Texarkana on the Arkansas side by a duly ordained minister, whose credentials are not questioned, and the marriage was solemnized in the presence of witnesses according to the forms and customs of the church to which the minister belonged. The parties were fully competent to marry. Prior to the marriage requisite blood tests were had. They lived together for some 16 months prior to the present suit, holding themselves out as husband and wife. Prior to the marriage it appears undisputed that appellant borrowed from his wife approximately $3,000, which he had not repaid at the time of the marriage. It appears that all requirements for a valid marriage under our marriage statutes, § 55-201—55-236, Ark. Stats. 1947, were fully complied with, except the marriage license used was obtained on the Texas side of Texarkana in Bowie County, Texas. The parties at all times, until discord arose shortly before divorce proceedings were filed, lived together in good faith, cohabited as husband and wife, and believed that their marriage was legal.

The question presented for our determination, says appellant, is "whether residents of this state may legally contract marriage in this state with a license issued by a foreign state." Arkansas Statutes § 55-201 provides for the procurement of an Arkansas license by those contracting marriage. But we have no statute providing that a marriage is void where no license is obtained.

Here, a marriage license was issued by the State of Texas, but no Arkansas license was acquired. If § 55-201 is mandatory, the marriage is void. On the other hand, if the statute is merely directory, the marriage is valid. The appellant, in his contention that the statute is mandatory relied largely on *Furth* v. *Furth,* 97 Ark. 272, 133 S. W. 1037. The issue in that case was whether a common law marriage is valid in this State. In dealing specifically with that issue, the court said: ". . . we hold our statutes regulating and prescribing the manner and form in which marriages may be solemnized are mandatory and not directory merely. In short, we hold that the doctrine of so-called common law marriages has never obtained or become a part of the laws of this State." In the *Furth* case, there was no marriage ceremony of any kind, whereas, in the case at bar, there was a ceremonial marriage performed by a duly qualified minister.

Although there are some cases to the contrary, the great weight of authority holds that marriage license statutes are merely directory. In *Feehley* v. *Feehley,* 129 Md. 565, 99 Atl. 663, the court said: "There are differences of judicial opinion in various jurisdictions as to what are the essential features of a marriage under the rules of the common law, but the courts are generally in accord upon the proposition that a statutory provision for a license to marry shall not be regarded as mandatory, and vital to the validity of a marriage, in the absence of a clear indication of a legislative purpose that it should be so construed." The Supreme Court of Nebraska said in *Melcher* v. *Melcher,* 102 Neb. 790, 169 N. W. 720: "A marriage may be annulled when one of the parties is under the age of legal consent at the suit of the parent entitled to the custody of such minor . . . But that no license was obtained or that the license was obtained fraudulently is no ground for the annulment of a marriage." "Compliance with license statutes is not generally essential to the validity of a marriage, at least in the absence of statutory provision expressly making it so essential," 35 Am. Jur. 195. "Statutes in the various jurisdictions usually require a

license to be obtained. While, according to some authorities, such a statute is mandatory and a marriage performed without the required license is void, the general rule with regard to the construction of such statutes is that they are directory merely, and do not destroy the validity of a marriage contracted contrary to their provisions, unless it is provided, expressly or by necessary implication, that the marriage shall be invalid." 55 C. J. S. 857. A long list of cases from many different states are cited in support of the text. We believe the better view is that of the majority.

Affirmed.

Justices McFaddin and Millwee dissent.

Justice Ward concurs.

Paul Ward (concurring). My concurrence in this opinion springs from the hope that it will not in the future be misconstrued. It should be obvious to everyone that it deals with an important and sacred item of our social structure.

In the first place, it is unthinkable that this court should hold it has absolutely no power to decree valid a marriage in some extreme situation that might hereafter arise. For instance, let's suppose that these people had lived together for 40 years and had been blessed with several children who in turn had married and reared children. For this court to hold that they were never married would portend consequences of serious magnitude.

On the other hand I feel sure that this court does not desire to announce categorically that a marriage license is not necessary, or to put its stamp of approval upon mere cohabitation and dignify that relationship with the status of a legal marriage. Such is not the intent of the opinion in this case.

I feel sure that the opinion in this case intends only to approve a marriage relationship [without license] only where; (a) the parties engaged in a ceremony substantially in compliance with that prescribed by the

statutes; (b) the parties to the ceremony acted in good faith and believed that they were complying with all the provisions of our statutes; (c) they consummated the ceremony by cohabitation, and; (d) the proof of (a), (b), and (c) mentioned above is clear and convincing.

It is my thought that, in this opinion, our court has gone further than it has ever gone before in approving what might be termed a ceremonial marriage. It is easy to invision how this new power assumed and sanctioned by the court could be misconstrued and mis-applied.

Therefore, it seems to me that the majority opinion should have laid more stress on the items above mentioned, and, I think, it should have pointed out that this court will look with disfavor on a "marriage" without a license and will sanction it only if unusual circumstances and the social welfare clearly dictate such action.

ED. F. MCFADDIN, Associate Justice (dissenting).

The majority opinion in this case will have a far-reaching effect on our marriage laws. It not only nullifies a portion of our Statutes, but also over-rules our cases and creates confusion and uncertainty regarding marriages. So I am compelled to dissent.

The validity of a marriage — in the absence of any questions of public policy in the domiciliary state—is determined by the law of the state wherein the marriage is contracted. So Arkansas has the right—in fact, the duty—to determine what is a valid marriage in this State. Our laws—as found in § 55-201 *et seq.* Ark. Stats.—provide for the issuance of a license, form of the license, applicants being required to take blood tests, sobriety, waiting period, performance of the marriage ceremony, and returning of the certificate of marriage to the issuing County. In short, up to the date of this case, if anyone had wanted to see about a marriage, the information could have been found in the office of the county clerk wherein the marriage license was issued. Hereafter where will we look for the recording of a marriage performed in Arkansas? According to this opinion, we will have to

look in one of the county clerk's offices in Texas. We might just as well have to look in Oregon, Maine, California or Mexico, and then consult every preacher in Arkansas to see if he had performed such a marriage in this State on a license issued in some other state. No record of such a ceremonial marriage in Arkansas on a license from another state could be found in any county courthouse in Arkansas.

There have existed for many years throughout the States of the American union two types of marriages: (a) a common-law marriage; and (b) a licensed (or statutory) marriage. A common-law marriage exists when a man and woman agree to live together and publicly do so. A licensed marriage—or statutory marriage—exists when a man and woman obtain a license from the proper authority to become husband and wife and then have a ceremony of marriage and return the certificate of marriage to the proper recording office. By Act No. 127 of 1875 (now found in § 55-201 Ark. Stats.), the Arkansas Legislature provided:

"All persons hereafter contracting marriage in this State are required to first obtain a license from the Clerk of the County Court of some County in this State."

It will be observed that this Statute says all persons contracting marriage *in this State;* and it says that such persons are *required* to first obtain a license; and it says that such license must be obtained from the Clerk of the County Court of some County *in this State.* Now, in the case at bar, the license was obtained from the County Clerk of a County in Texas; and so these parties did not comply with the law. In the case of *Furth* v. *Furth,* 97 Ark. 272, 133 S. W. 1037, the Arkansas Supreme Court in 1911 held that a common-law marriage could not be validly contracted in this State and furthermore held that compliance with our Statutes "is mandatory". Judge Hart used this language in this opinion:

"Because the marriage relation is the source from which arises the home and the family, we have concluded

to decide this question, rather than pass upon the preponderance of the evidence in the case . . .

"It will be seen that, before the common law was adopted here, statutes had been enacted which regulated marriages, and which prescribed the manner and form in which they might be solemnized. Such statutes having directed that marriages should be solemnized in a particular manner before certain authorized persons, that way is exclusive; *and we hold our statutes regulating and prescribing the manner and form in which marriages may be solemnized are mandatory and not directory merely.*" (Italics our own.)

That case of *Furth* v. *Furth* has remained the cornerstone of our marriage law; and we cited it with approval as late as *Woods* v. *Bell,* 218 Ark. 307, 236 S. W. 2d 63, decided in 1951. But in the present case the majority holds that our Statute which says that a license is required, is not *mandatory,* even though we held in *Furth* v. *Furth* as above quoted, our Statutes ". . . are mandatory and not directory merely."

To sustain its conclusions in the case at bar, the majority says: "Although there are some cases to the contrary, the great weight of authority holds that marriage license statutes are merely directory." Of course there are some cases to the contrary; but the point is that the Arkansas Supreme Court has directly held that our marriage license statute is *mandatory;* and so I make the point that the present majority opinion over-rules our cornerstone case on the necessity of a marriage license being issued in this State. To sustain its holding, the majority cites only two cases and two general statements of the law. I discuss each of these:

1. The first case that the majority cites is *Feehley* v. *Feehley,* 129 Md. 565, 99 Atl. 663, L. R. A. 1917 (c) 1017. Here is the salient portion of the headnote to the case in 99 Atl. 663:

"Where two Catholics, who had been divorced, called in a priest, who went through a ceremony intended to be

an essential feature of the new marital agreement into which the parties were entering, the priest and the man and woman understanding that he was officiating in order that they might live together in lawful wedlock, the validity of the remarriage was not open to question."

There are several reasons why this Maryland case should not even be persuasive in Arkansas; but one reason is sufficient to give, because it is shown in the opinion itself. It is this: the Maryland Court said in *Feehley* v. *Feehley* that it could reach the conclusion there reached because, under the laws of Maryland, the marriage statutes were directory and not mandatory[1]. But in Arkansas we have held that our marriage license statutes are mandatory; and we cannot continue to hold the marriage license statutes mandatory and follow a Maryland case based on the opposite holding. I submit that this Maryland case is absolutely no authority for an Arkansas Court to hold that people can get a license in Texas and have the marriage ceremony performed in Arkansas; and that is the point which the majority is holding in the case at bar.

2. The second case cited by the majority to sustain its conclusion is that of *Melcher* v. *Melcher*, 102 Neb. 790, 169 N. W. 720, 4 A. L. R. 492. But it must be remembered that common-law marriages are recognized in Nebraska[2]; so certainly a ceremonial marriage without a license would be recognized. The Nebraska case is no authority to justify the over-ruling of *Furth* v. *Furth*.

3. The majority next cites from 35 Am. Jur. 195 this quotation: "Compliance with license statutes is not generally essential to the validity of a marriage, at least

[1] Here is some of the language from the Maryland opinion: ". . . the courts are generally in accord upon the proposition that a statutory provision for license to marry should not be regarded as mandatory . . ."; and again: "The principle that such provisions are directory only has been adopted in jurisdictions where a religious ceremony is not regarded as an essential element of a marriage according to the common law, and it would seem that in a state like our own, where this additional sanction and safeguard is required, there is even stronger reason for the rule that the validity of such a marriage should be sustained."

[2] That common-law marriages are recognized in Nebraska can be learned by consulting an Annotation in 39 A. L. R. 538; and also by consulting Keezer on "Marriage and Divorce", 3rd Ed., page 1065 *et seq.*

in the absence of statutory provision expressly making it so essential." To sustain that text, cases are cited from a number of American jurisprudents, some of which recognize a common-law marriage and others of which hold that the requirement for a marriage license is directory and not mandatory. I find no case which recognizes the validity of a ceremonial marriage as coming from a State that holds the marriage license is mandatory; and that is exactly what we held in *Furth* v. *Furth.* The majority failed to cite 35 Am. Jur. 204, wherein the text reads: "In a number of jurisdictions, the statutory requirements as to the manner and formalities of marriage are regarded as mandatory, and a common-law marriage is not valid"; and the first case cited to sustain that statement is the Arkansas case of *Furth* v. *Furth.* Furthermore, it is interesting to note that the tendency of states is to abrogate the validity of common-law marriages by statute. For instance, in 35 Am. Jur. 206, the Statutes of California, Illinois, Kentucky and Louisiana are mentioned to sustain the statement that in some states the common-law marriage was first adopted by the courts but later abrogated by the statutes. In the present case, the majority is nullifying our Statute.

4. Finally, the majority, to sustain its holding, cites from 55 C. J. S. 857, to the effect that the general rule is that marriage license statutes are directory merely. Let us admit that most states so hold, and that many states also recognize the common-law marriage. The point is that in Arkansas since 1875 the law has been that persons desiring to be married in this State "are required to first obtain a license" from the Clerk of the County Court "of some County in this State"; and let it be remembered that in *Furth* v. *Furth* we held that Statute to be mandatory. The majority is now saying that even though the Statute was mandatory, still the marriage was valid.

As I see it, the majority is recognizing a hybrid state of marriage. Where is the authority for this Court to put validity into such a hybrid marriage? Let us agree

that it is an act of hardship to hold that these parties to this record are not married; but, if so, let the majority build some equitable estoppel in this one case rather than start us out on a new form of hybrid marriage. Merely because these particular parties were ignorant of the law is no excuse for upsetting our entire law regarding marriages. Ignorance may be bliss; but it does not excuse non-compliance with mandatory provisions of the law.

For the reasons herein given, I respectfully dissent.

BRUCE *v.* NICHOLAS.

5-1216 294 S. W. 2d 772

Opinion delivered November 5, 1956.

Frank Sloan and *W. B. Howard,* for appellant.

Ponder & Lingo, for appellee.

ED. F. MCFADDIN, Associate Justice. The appeal in this Court was filed on October 29, 1956, and both sides were heard on the same day when the appellants presented their petition for an order to stay the election, set for November 6, 1956, on the issue of county seat removal. On October 30th, the Clerk of this Court notified the litigants:

"The Court voted that the election in this case, set for November 6th, be stayed and that no election be held on that day on the question of county seat removal. No bond is required as a condition of such stay. This decision is effective immediately; but the Court will deliver a formal opinion in this case on November 5th."

The present is the opinion above mentioned. By Act No. 85 of 1887, the General Assembly of Arkansas divided Lawrence County into two judicial districts to be called the "Western District" and the "Eastern District." Trial courts in the Western District were to ". . . continue to be held at the county seat at Powhattan, as now provided by law"; and trial courts in the Eastern District were to be held ". . . in the town of Walnut Ridge, at a place to be provided hereinafter by the citizens of said District." On October 1, 1956, there was filed in the County Court of Lawrence County by appellees (proponents of Walnut Ridge), a petition purporting to be signed by more than one-third of the qualified voters of all of Lawrence County, and praying for an election to be held in said County on the question of moving the county seat of Lawrence County from Powhattan to Walnut Ridge. This was a proceeding for county seat removal under § 17-201 *et seq.* Ark. Stats., which is the general statute for county seat removal. On October 2, 1956, the County Court made an order calling the election as prayed in the petition and ordered the election to be held at the same time as the General Election on November 6, 1956.

As soon as the appellants (proponents of Powhattan) learned of the order calling the election, they employed counsel and on October 16, 1956, these appellants filed in the County Court their "Remonstrance and Petition to Set Aside Purported Order Calling For Election." Among other things, they claimed:

(1) That the Walnut Ridge petition for the election on the question of county seat removal was a proceeding under § 17-201 *et seq.* Ark. Stats.; that said law was not applicable to a county that already had two county seats, as they claimed Lawrence County had in the Eastern and Western Districts under Act No. 85

of 1887, as aforesaid; and that the only proceeding that could be had in Lawrence County would be under § 22-126 *et seq.* Ark. Stats., which relates to the method in which extra judicial districts may be abolished in a county.

(2) That, even if the proceeding instituted by Walnut Ridge under § 17-201 *et seq.* Ark. Stats. was proper, nevertheless, the petition filed in the County Court was insufficient because it was not signed by the required one-third of the qualified voters of Lawrence County. The appellants listed in excess of six hundred alleged signers who, according to appellants, were not qualified voters; and on this point appellants substantiated their allegations by the affidavit of a person who had checked the list of signers against the applicable poll tax book.

Thus appellants raised a question of law and a question of fact.[1] On October 16th the County Court denied the prayer of the remonstrants (proponents of Powhattan); but granted them an appeal to the Circuit Court of Lawrence County. The case was promptly filed in the Circuit Court on the next day; and a few days later appellants filed a petition in the Circuit Court for temporary restraining order to stay the election until the case could be heard on its merits.

The Circuit Judge of the Third Circuit, of which Lawrence County is a part, is the Honorable Andrew Ponder; and Judge Ponder was engaged in holding court in another county of the District, so appellants were unable to get a trial of the case or a hearing on their petition for temporary restraining order until they appeared before the Circuit Judge, Honorable Andrew Ponder, in chambers in Jackson County on October 25th, and sought to obtain from him an order staying the election until they could be heard on the merits. Judge Ponder refused the stay because of his understanding[2] of some of

[1] Appellants raised other questions which may be considered on trial below, but which we do not list here.

[2] Judge Ponder used this language: "Assuming, without deciding, that remonstrants have made a *prima facie* showing, the court rules that the *Ellis* v. *Hall* decision of the Arkansas Supreme Court is controlling; and, therefore, a *prima facie* case, if made, is insufficient to justify the court in granting a stay of said election."

our language in one of the opinions in the case of *Ellis* v. *Hall,* 221 Ark. 25, 251 S. W. 2d 809. This refusal by Judge Ponder was on October 25, 1956; and on October 29, 1956, the appellants (proponents of Powhattan) filed their appeal in this Court and prayed a temporary stay of the election until the case could be heard; and on October 30th we made the order first copied herein.

It is a fundamental idea of justice, originating in the Anglo-Saxon Law and incorporated in the English Common Law, and existing in our legal system today, that a litigant is entitled to a day in court[3] and, upon exercising diligence, is entitled to a hearing of his case before judgment is rendered foreclosing his rights. In the case at bar, should the election take place and the vote favor removal, then the question of the sufficiency of the petition to call the election *might*[4] become moot, and appellants would be deprived of their day in court on the sufficiency of the petition; so the law envisages time for a day in court on the hearing of the sufficiency of the petition. The appellants did not have such an opportunity in the County Court because the petitions were filed one day and the order made the next day and their remonstrance was over-ruled on demurrer and without a hearing on the merits. The appellants have been diligent and yet, within the short time in this case, have been unable to obtain a trial on the merits. If they had been guilty of any delay, the situation might be different; but we find no lack of diligence by the appellants.

[3] That the idea of summons before trial originated in Anglo-Saxon Law is fully shown by Professor W. S. Holdsworth on page 103 of Volume 2 of his "History of English Law." That the idea of a day in court came to us from the Common Law and is ingrained in our legal system is expressed in the case of *Old Wayne Mutual Life Assn.* v. *McDonough,* 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. Rep. 236. For other cases discussing this fundamental idea, see "Day in Court" in "11 Words and Phrases," page 119.

[4] In *Beene* v. *Hutto,* 192 Ark. 848, 96 S. W. 2d 485, it was held that in all cases arising under the Initiative and Referendum Amendment, the holding of the election rendered moot all questions as to the sufficiency of the petitions. As to whether this same rule is applicable in elections not within the scope of the Initiative and Referendum Amendment, we do not now decide; but see *Horn* v. *White,* 225 Ark. 540, 284 S. W. 2d 122; and *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d 26.

This case can be heard in the Circuit Court on its merits in a very short time and then, if the questions of law and fact be decided in favor of Walnut Ridge, an election can be called at any time. This is not one of those cases where the election can only be every two years and at the same time as the General Election. We express no opinion on either the legal or factual questions here presented. What we are saying is that the appellants are entitled to have the case heard on its merits prior to the election; and, because of such views, we granted the stay of election.

Now we remand the cause to the Circuit Court, thoroughly confident that the Honorable Circuit Judge will hear the cause on its merits with prompt dispatch, so that all parties, with diligence, may have a day in court with right of appeal, and all within time to hold the election if the law and the facts show that such election should be held.

DuPriest *v.* Anthony.

5-1029 294 S. W. 2d 769

Opinion delivered November 5, 1956.

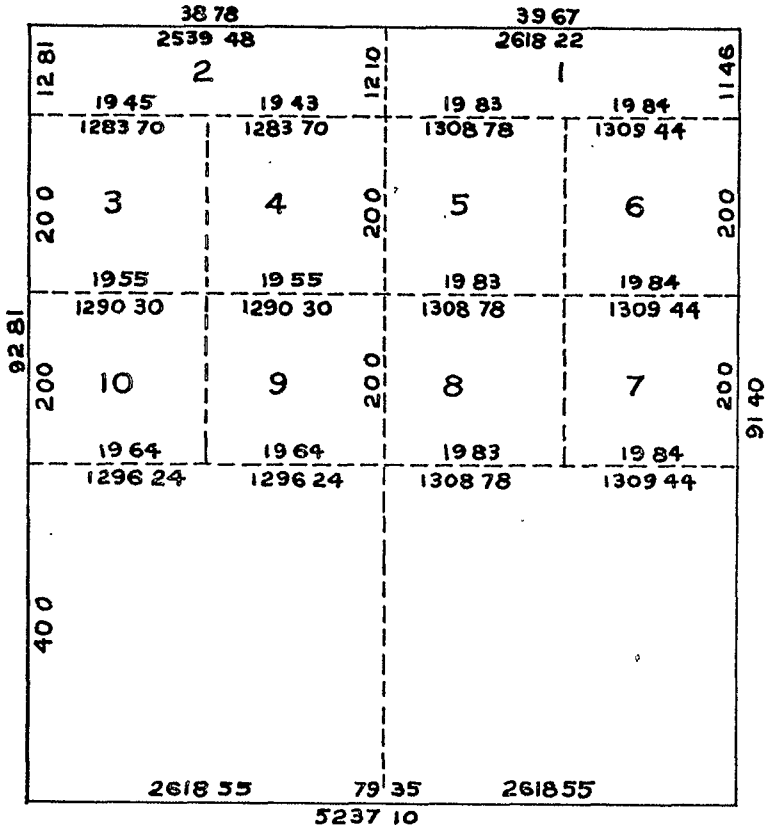
Keith, Clegg & Eckert, for appellant.

Walter L. Brown and *Robt. C. Compton,* for appellee.

Ed. F. McFaddin, Associate Justice. This is a boundary line dispute, and the only point urged by the ap-

pellants is that the finding of the Chancery Court is against the preponderance of the evidence.

Section 1, Township 16 South, Range 16 West in Union County, Arkansas, is an irregular-size section. A standard section is 80 chains — or 5,280 feet — on each side. According to the Government plat, the Section 1 here involved is 92.81 chains on the West side, 79.35 chains on the South side, 91.40 chains on the East side and 78.45 chains on the North side. We reproduce a copy of the Government survey of said Section 1:



SECTION 1 TOWNSHIP 16 SOUTH RANGE 16 WEST

It will be noticed that in the South part of the section there are two approximately regular-size *quarter-sections,* but the North part of the said Section 1 was

surveyed into seven *lots* numbered as shown on the plat. The appellees had an oil and gas lease on Lot 5, and drilled a commercially producing well at a location that they admittedly thought was on Lot 5 and located 16.6 feet East of the West line of Lot 5. But appellants contend that in fact the well is located on Lot 4: so the dispute is as to the boundary line between Lots 4 and 5.

A number of surveyors testified. All admitted that the Northwest corner of said Section 1 is definitely established. The appellees' three surveyors began at the said Northwest corner of Section 1, and, by using the distances shown in the Government survey, located the well in Lot 5. Appellants concede that if the Government survey is correct, then the well is actually located in Lot 5 and the appellees should prevail.

But appellants' surveyors insist: that the Government survey of Section 1 is erroneous; that the East line of Section 1 is actually located 84 feet East of the East line as shown on the Government survey; that when the East line of Section 1 is established as they (appellants' surveyors) contend, then there is an overage of 84 feet (as between the Government survey and the appellants' survey) in the East-West size of Section 1; that under the existing Standard Surveyors' Rules[1], the overage is apportioned between the various tracts; that the result of such apportionment would be to move the dividing line between Lots 4 and 5 a distance of approximately 42 feet to the East[2]; and that this moving of the dividing line would put appellees' well in Lot 4 instead of Lot 5, since, according to the Government survey, the well is only 16.6 feet East of the line.

[1] Appellants cite us to the Manual of Surveying Instructions of 1947, issued by the U. S. Department of Interior, and say that on page 362 of the Manual the following appears: "Existing original corners cannot be disturbed. Consequently discrepancies between the new and those of the record measurement will not in any manner affect the measurements beyond the identified corners. But the differences will be distributed proportionately within the several intervals along the line between the corners."

[2] In *Luther* v. *Walker*, 175 Ark. 846 (styled *Luther* v. *Denny* in 1 S. W. 2d 6), we discussed in considerable detail the method of apportionment regarding overage and underage in surveys. See also 11 C. J. S. 739.

Thus it is apparent that the basic questions are: (a) whether the appellants proved the Government survey to be wrong; and, if so, (b) whether the error is enough to move the dividing line between Lots 4 and 5 far enough to the East to put the appellees' well in Lot 4. Other questions were presented in the pleadings in the Trial Court[3], but are unnecessary to consider here because the Trial Court held that the appellants' proof was not sufficient to establish that the Government survey was erroneous; and we conclude that the Chancery decree should be affirmed because appellants have not established in this Court that the findings of the Chancery Court are against the preponderance of the evidence.

The correctness of the Northwest corner of Section 1 was admitted, and the appellants' witnesses gave their version of the location of the East line of Section 1. The Government survey shows the Northeast corner of Section 1 to be 5177.7 feet East of the *Northwest* corner; but appellants contend that the Northeast corner is 5261.7 feet East of the *Northwest* corner. Thus appellants move the East line of Section 1 a distance of 84 feet and say the Government survey is erroneous. To make their case, the appellants used the testimony of three surveyors:

(a) Mr. Goodwin testified that he began his survey at an iron pipe which he understood to be located at the Southeast corner of *Lot 6*. He says that he was told by Mr. McDonald and Mr. Nutt that this iron pipe was on the East line of Section 1. Mr. McDonald was not called to verify the statement, but Mr. Nutt (appellees' surveyor) completely denied making such a statement. So Mr. Goodwin's testimony primarily depends on whether the iron pipe was actually on the East line of Section 1. Mr. Goodwin admitted that he found no monument on the ground to place the section line where he did except the said iron pipe. He said he had been advised by other surveyors that the iron pipe was on the East line; and he

[3] These related to appellees' plea of laches against appellants, and appellees' right of removal of machinery and recovery of the amount of benefits the appellants would enjoy from appellees' efforts.

stated that such location tied in with other surveys. Mr. Goodwin was a candid witness and attempted to tie his survey into adjoining sections. Still, it must be recognized that unless the iron pipe from which he started was actually located on the East line of Section 1, instead of 84 feet East of such line, then his testimony does not disprove the Government survey.

(b) Mr. Williams, another surveyor, testified that he checked Mr. Goodwin's survey and found it to be correct; but Mr. Williams' testimony is no stronger than Mr. Goodwin's because it likewise depends on whether the iron pipe used as the starting point, is actually on the East line of Section 1 or is located 84 feet East of the East line of Section 1.

(c) Mr. Methvin, another surveyor, likewise used the iron pipe at the Southeast corner of Lot 6 as a starting point. He said that Mr. McDonald and Mr. Nutt told him that the pipe was on the East line of Section 1. As aforesaid, Mr. McDonald was not called to verify the statement, and Mr. Nutt completely denied making the statement. No surveyor made any reference to the original field notes in the State Land Office. These show: (a) an actual survey — with references to ground monuments — made in 1837 in regard to the East boundary line of Section 1; and (b) a like survey, with like references, made in 1839 in regard to the South boundary line of Section 1. The plat herein copied was prepared from such field notes; and if the field notes had been used by either set of surveyors to check against the ground monuments, then the testimony of the surveyors would have been more valuable.

It would serve no useful purpose to quote at length and in detail from the testimony of the appellants' surveyors. We are convinced that they are all honest men. But the point is that the Government survey is *prima facie* correct. (See *Little* v. *Williams,* 88 Ark. 37, 113 S. W. 340, affirmed by the U. S. Supreme Court, 231 U. S. 335, 58 L. Ed. 256, 34 S. Ct. 68.) The burden was on the appellants to disprove the Government survey. The Chancery Court, after having heard the testimony of

the appellants' surveyors and that of the three surveyors of the appellees, reached the conclusion that the testimony of appellants' surveyors was not sufficient to establish that the Government survey was in fact wrong; and on appeal we cannot say that the finding of the Chancery Court is against the preponderance of the evidence.

Affirmed.

SOUTHERN WOODEN BOX, INC. *v.* OZARK HARDWOOD MANUFACTURING CO.

5-1063 294 S. W. 2d 761

Opinion delivered November 5, 1956.

Frierson, Walker & Snellgrove, for appellant.

J. M. Smallwood, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant, Southern Wooden Box Inc., brought this action against appellee, Ozark Hardwood Manufacturing Co., to recover damages for the alleged breach of a contract for the sale of cottonwood lumber. In its answer appellee denied that a binding contract was ever concluded between the parties by reason of appellant's failure and refusal to execute and transmit a written confirmation which was a condition precedent to the existence of the contract.

This appeal is from judgment based on a verdict in favor of appellee.

The only error urged is the trial court's refusal to direct a verdict for appellant. In determining the sufficiency of the evidence to support the verdict we must, of course, consider it in the light most favorable to appellee.

Appellee had about 700,000 feet of cottonwood lumber for sale near Batesville, Arkansas, in November, 1954. Joe D. Mills, appellee's manager at Clarksville, contacted Joe Blindman, manager of appellant at Jonesboro, with reference to a sale of the lumber which consisted of three grades: (1) FAS (first and select); (2) No. 1 common; and (3) No. 2 common. It was then agreed that appellant would take all the No. 2 common and better at a price of $60 per thousand delivered at Jonesboro. After two loads of lumber were shipped under the verbal agreement, Blindman called and told Mills that he would not take any more because the percentage of No. 2 lumber was running higher than estimated.

On December 10, 1954, Blindman called Mills and told him appellant was interested in buying the No. 1 and better cottonwood lumber. According to Mills it was agreed that appellant would pay $70 per thousand for the No. 1 and better lumber estimated at 300,000 to 400,000 feet and that each party would furnish the other a written confirmation of the verbal telephone agreement. The reason assigned by Mills for requiring written confirmation was the fact that Blindman had cancelled their previous order which had not been confirmed in writing. On the date of the telephone conversation, Mills wrote Blindman, as follows:

"Acknowledge our telephone conversation to date regarding the 4/4 Common & Better Cottonwood we have on our yard near Batesville, Arkansas.

We acknowledge your verbal order for 300,000 to 400,000 bd. feet of the 4/4 No. 1 & Better Cottonwood rough Air Dried at $70 per thousand delivered to Jonesboro on our trucks.

We will deliver first load Wednesday, December 15th then one load Thursday and Friday, December 16th and 17th.

As per our telephone conversation we would like to start delivering five loads per week.

Thanking you for the nice order."

Mills made the first shipment on December 15, expecting the written confirmation by appellant. When it failed to arrive the next day he called Blindman requesting the confirmation which Blindman promised to furnish immediately. Acting on this promise additional shipments were made on December 16th and 17th. Blindman called Mills on December 29, 1954, and asked him if further deliveries were going to be made and was again advised that Mills had not received the written confirmation. Upon Blindman's representation that it would be forthcoming, two more loads were shipped the first part of January, 1955.

When Blindman called Mills again on January 13, 1955, to ask about further shipments, Mills told him he had never received the written order and that no future shipments would be made. This conversation was repeated in February, 1955, when Blindman came to appellee's office at Clarksville. Mills heard no more about the matter until April 18, 1955, when Blindman called and was again told that no more shipments would be made. Appellee introduced toll tickets showing the various telephone calls about which he testified. Blindman admitted that he requested written confirmation by Mills of the verbal agreement of December 10th, but denied that he was also to furnish such confirmation.

While Blindman denied that he ever agreed to furnish written confirmation of the agreement of December 10th, appellant concedes that, for the purposes of argument here, it must be assumed that such confirmation was made a condition of the agreement and that none was ever furnished, aside from the fact that appellant paid for the shipments made. However, appellant earnestly contends that appellee waived the condition re-

quiring written confirmation by appellant by making shipments without receiving it and accepting payment for said shipments. Reliance is had on such decisions as *Parker* v. *Carter,* 91 Ark. 162, 120 S. W. 836, and *Vieth* v. *Mushrush Lumber Co.,* 167 Ark. 669, 269 S. W. 44. These cases hold that a contract not required to be in writing is valid if signed by one of the parties and is accepted or adopted by the other party. The crucial issue here is whether the question of appellee's waiver of, or acquiescence in, the failure to furnish the written confirmation is one of law for the court or one of fact for the jury.

Even in the case of a written contract duly executed by both parties, this court has repeatedly held that parol evidence is admissible to prove that it was not to be a complete and binding agreement until certain conditions precedent have been fulfilled. *Barr C. & P. Co.* v. *Brooks-Ozan Mer. Co.,* 82 Ark. 219, 101 S. W. 408; *American Sales Book Co.* v. *Whitaker,* 100 Ark. 366, 140 S. W. 132, 37 L. R. A. (N. S.) 91; *Worthen* v. *Stewart,* 116 Ark. 294, 172 S. W. 855; *Reynolds* v. *Ashabranner,* 212 Ark. 718, 207 S. W. 2d 304. In the *Reynolds* case we said: "The situation here is not that of a waiver of a condition precedent stated in the written contract; rather, it is the waiving of a condition precedent to the coming into existence of the contract. See 17 C. J. S. 792 on 'Conditions Precedent.' In 13 C. J. 791, in discussing the waiver of a condition precedent in actions concerning contracts, the general rule is stated: 'The question as to whether a condition precedent has been performed is purely one of fact to be determined by the jury under the evidence. And the same has been held to be true of the question as to whether the performance of such condition has been waived, but the jury should be properly instructed as to the law.' See, also, 17 C. J. S. 1297."

Unquestionably, if appellee had accepted the several shipments of lumber without any insistence on its right to a written confirmation and without any promise by appellant to furnish it, then appellee would be held to have waived the condition. According to Blindman that

is exactly what happened, but Mills denied it and stated that each shipment was made and payment therefor accepted in reliance on Blindman's repeated assertions that the written confirmation would be forthcoming. Under this and other conflicts in the testimony, the trial court correctly held that the questions, whether written confirmation was required before the contract became effective, and whether appellee waived the performance of such condition, were issues of fact properly determinable by a jury. These issues were submitted under clear and proper instructions and the verdict of the jury is supported by substantial evidence.

Affirmed.

STUDDARD *v.* WALTER C. HUDSON, INC.

5-1039 295 S. W. 2d 637

Opinion delivered November 5, 1956.

[Rehearing denied December 10, 1956.]

Talley & Owen and *William L. Blair,* for appellant.

Hendrix Rowell, for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by Walter C. Hudson, Inc., and its trustee, to foreclose a deed of trust upon certain land in Pulaski county. The deed of trust was executed by the appellant, Elizabeth Studdard, to secure a loan of $11,200 and to secure any future indebtedness to Hudson either incurred by Miss Studdard herself or indorsed by her. The appellant makes two defenses to the suit: (*a*) She has assertedly

not been given credit for a cash payment of about $4,800 made by her brother, O. O. Studdard, and (*b*) the transaction is void for usury. The chancellor rejected both defenses and entered a decree for the plaintiffs, awarding judgment for the unpaid balance of $5,358.35 and foreclosure of the lien.

The first defense presented a question of fact. Walter C. Hudson testified that his company made the original loan of $11,200 on February 23, 1952, and took the deed of trust as security. In June of that year Miss Studdard wrote to Hudson, asking that additional advances be made to her brother and to W. C. Potts, whose notes Miss Studdard promised to indorse. According to Hudson, he later made loans to Studdard and Potts, the notes were indorsed by Elizabeth Studdard, and these items are part of the debt sued upon.

Miss Studdard and her codefendants, O. O. Studdard and Potts, insist that her indorsement was obtained by fraud after the Studdard-Potts notes had been paid in full. They say that in September, 1953, Hudson held notes for $4,800 signed only by O. O. Studdard and Potts. According to their testimony, O. O. Studdard then paid the notes with cash, but Hudson persuaded Miss Studdard to fabricate her letter of June 19, 1952, and to indorse the paid notes, in order that Hudson might prosecute a claim for fire insurance upon some of Miss Studdard's property that had burned. Hudson denies the truth of this testimony.

One version or the other is manifestly false. We cannot say that the chancellor was wrong in electing to credit the plaintiffs' testimony. Hudson's narrative, on the one hand, puts no strain upon one's credulity. It describes an ordinary business transaction and is corroborated by all the written evidence. Miss Studdard admittedly wrote the letter that is ostensibly dated June 19, 1952; she admittedly indorsed the Studdard-Potts notes. Hudson's account with Miss Studdard involves many items of receipt and disbursement; its accuracy is questioned only with respect to the cash payment allegedly made by O. O. Studdard.

The appellants' testimony, on the other hand, is not equally easy to believe. The defendants say that O. O. Studdard paid more than $4,800 to Hudson without taking a receipt or requiring the surrender of the notes that were being paid. Studdard says that the money came from a settlement made with him by an insurance company in connection with a lawsuit in Texas. Studdard offered to furnish proof establishing the fact that such a settlement had been made, but the proof was never supplied. This omission is especially significant; for the chancellor expressed his interest in the matter, and it would obviously be easy to prove beyond doubt the making of a substantial settlement with an insurance company. That the settlement did not take place is indicated by the testimony of Hudson's secretary, who produced an office memorandum of a telephone call received from Studdard about a year after the date of the asserted cash payment of $4,800. This memorandum tends to show that Studdard was still expecting to obtain a settlement in the Texas litigation.

The claim of usury may be answered in a few words. The notes are not usurious on their face, as they bear interest at six percent per annum, until maturity and thereafter at ten percent per annum, and that is all the complaint demands. The appellants contend, however, that in making the original loan of $11,200 Hudson agreed to advance an additional $5,800 later on to pay a prior mortgage, that this additional advance was not made, and that the prior mortgage was eventually satisfied from the proceeds of a fire insurance policy held by Miss Studdard. In listing the charges and credits to the account with Hudson the appellants' counsel give Miss Studdard credit for the payment of the prior mortgage but do not charge the amount of that mortgage as part of her debt to Hudson. This method of accounting is evidently incorrect; for if the payment of the prior mortgage is to be entered on one side of the ledger as to the credit to the account the amount of the mortgage must of course be recognized on the other side as a part

of the indebtedness. When this error is eliminated the plaintiffs' claim falls short of usury by several thousand dollars.

Affirmed.

BRAGG *v.* HALL, SECRETARY OF STATE.

5-1182 294 S. W. 2d 763

Opinion delivered November 5, 1956.

Robert L. Rogers II, for plaintiff.

Tom Gentry, Attorney General, for defendant; *Wood & Smith,* for intervenor.

George Rose Smith, J. This is an original action in which the plaintiff attacks the sufficiency of a petition to initiate a constitutional amendment prohibiting pari-mutuel betting. The complaint asserts that the petition is not signed by the required number of qualified electors. The sponsors of the proposed measure have intervened to defend their petition. Questions of fact being presented, we appointed a member of the bar, Riddick Riffel, as the court's master to take the testimony. Supreme Court Rule 17. After the litigants had presented their evidence the master found the petition to be sufficient and recommended that the court dismiss the complaint. The case is now submitted upon the plaintiff's exceptions to the master's report.

It is agreed that 33,513 valid signatures are required for the petition to be sufficient. As filed with the Secretary of State this petition contained 39,885 signatures. The master made a definite finding that 518 of these names should be rejected, for various reasons not questioned by either side. The master expressed himself as being in doubt about 4,015 additional names which were not to be found in the poll books filed by the sponsors of the petition. The master pointed out, however, that even if these names were eliminated the petition would still have 35,352 valid signatures — 1,839 more than the minimum number required. The master accordingly found the petition to be sufficient. In questioning that conclusion the plaintiff insists that the master should have rejected the 4,015 signatures about which he was doubtful and should have decided other issues in the plaintiff's favor.

1. We agree with the plaintiff's contention that the 4,015 names must be deleted. Upon resting his case the plaintiff had shown that those names were not to be found in the poll tax lists filed with the Secretary of

State by the sponsors of the petition. This proof made a *prima facie* case and shifted to the proponents the burden of showing that the persons in question were qualified electors. *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547. Instead of adducing evidence to show that the challenged signers were in fact qualified, the intervenors contented themselves with contending that the poll books had not been authenticated in the manner required by law. The intervenors, however, had originally filed these books with the Secretary of State and had thereby impliedly represented that he might rely upon them in determining the sufficiency of the petition in the first instance. In these circumstances the intervenors have had the benefit of the information contained in the lists and are estopped to question their authenticity at a later stage in the proceedings. See *McCollum* v. *Price,* 213 Ark. 609, 211 S. W. 2d 895. Hence the plaintiff's *prima facie* showing as to these 4,015 names was not overcome, which leaves the petition with the above mentioned margin of 1,839 signatures.

II. The petition consists of many counterparts circulated by different canvassers. The original complaint alleges that counterparts containing 16,415 names should be disregarded for the reason that more than twenty percent of the signatures upon each of these parts are invalid. The master in effect held this allegation to be demurrable and struck it from the complaint. The plaintiff excepts to this ruling.

The master's decision was correct. The plaintiff does not charge conscious and deliberate fraud on the part of the canvassers; he simple asserts that any particular part of the petition must be discarded in its entirety if it is shown that as many as a fifth of its signatures are not good. This contention rests upon the provisions of Ark. Stats. 1947, § 2-210, which relates to the initial examination of the petition by the Secretary of State. The statute provides in substance that if it appears beyond a reasonable doubt that twenty percent of the signatures upon a counterpart are not genuine and should have been so recognized by the canvasser, the Secretary of State shall require the sponsors to prove

that the other signatures on the counterpart are genuine. If the petition is then found to be insufficient the sponsors are given thirty days in which to remedy the defect. The statute clearly does not have the broad scope that the plaintiff attributes to it. Not only does it apply by its terms to the Secretary of State alone; it also contemplates flagrant defects that should have been known to the canvasser. It is not a basis for saying as a matter of law that in subsequent litigation the contestants can annul an entire counterpart merely by showing that a fifth of the signers are not qualified electors.

III. Two counterparts are challenged for the reason that their circulators completed the verification thereto in the State of Texas. We perceive no reason for holding this procedure to be illegal. There is no requirement in the constitution or in the statutes that the affidavit be executed in Arkansas. We uniformly recognize the validity of out-of-state oaths and acknowledgments in the case of depositions, deeds, mortgages, etc. To apply a different rule to initiated petitions might well disenfranchise Arkansas citizens who happened to be out of the state when the petitions were being circulated.

IV. In 773 instances a canvasser signed his own counterpart, as a petitioner, before taking it before a notary public and completing the verification. It is contended that this practice is just as ineffective as a notary's attempt to take his own acknowledgment. The analogy, however, is unsound. In no instance did the canvasser attempt to administer an oath to himself; he merely signed the petition and then took the required oath before a qualified third person. All that is demanded by the constitution is that the circulator swear that "all the signatures . . . were made in the presence of the affiant, and that to the best of the affiant's knowledge and belief each signature is genuine, and that the person signing is a legal voter." Amendment 7. That the canvasser has himself signed the counterpart does not render the affidavit in any respect untrue. There can be no good reason for denying to the can-

vasser the privilege of signing the same petition that he asks others to sign.

V. The remaining exceptions to the master's report do not require extended discussion. Because this court stated in *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72, that the verity of a counterpart is not destroyed by proof "that at least one signature is not genuine," the plaintiff suggests that such verity should be held to be destroyed whenever *more* than one signature is shown not to be genuine. The master did not consider that this argument requires refutation, nor do we. There are two other exceptions, both directed to issues of fact, but together they involve the validity of only 1,066 signatures. As a decision in the plaintiff's favor upon both issues would not overcome the proponents' margin of 1,839 signatures we deem it unnecessary to pass upon these questions of fact.

The master's report is approved and the complaint dismissed for want of equity.

PAYNE *v.* STATE.

4846 295 S. W. 2d 312

Opinion delivered November 5, 1956.

[Rehearing denied December 3, 1956.]

Wiley A. Branton, for appellant.

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

PAUL WARD, Associate Justice. Appellant, Frank Andrew Payne, was charged by information with the murder of J. M. Robertson on October 4, 1955. A jury found him guilty of murder in the first degree and fixed his punishment at death by electrocution. For a reversal, appellant sets forth a number of objections and alleged errors in his Motion for New Trial. We have given careful consideration to each one of the above assignments, some of which will be disposed summarily, but we will discuss hereafter in some detail only those assignments of error which appear to have merit and those upon which appellant places the greatest emphasis.

1. The trial court overruled appellant's motion to quash the information, and two grounds are here relied on to show error.

(a) It is contended by appellant that Amendment No. 21 to the Constitution of this State, substituting an information by the prosecuting attorney for an indictment by the grand jury, violates the 5th and 14th Amendments to our Federal Constitution. This question has already been passed on contrary to appellant's contention (as admitted by appellant) in the case of *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131 and affirmed in *Smith & Parker* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24. We now assert, as was stated in the latter mentioned case in referring to the former mentioned case, that: "There is no reason at this time to re-examine and restate our conclusions reached in the case above. That opinion is controlling on this case."

(b) Notwithstanding the above, appellant makes the further contention that the information in this case should have been quashed because it is undisputed that it was issued before there had been a preliminary hearing. In support of this contention appellant apparently relies on Ark. Stats. § 43-806 which provides that when a defendant has been held to answer at a preliminary examination the prosecuting attorney may file an information. The section referred to is a part of Act 160 of the Acts of 1937 which was passed to implement Amendment No. 21 referred to above and was not meant

to be a limitation on the powers granted by the amendment. This court definitely settled the question against appellant's contention in the *Penton* case, *supra,* at page 513 of the Arkansas Reports, where it was stated:

"The principle distinction between provisions of § 1 of Amendment 22 to the Constitution of Arkansas, and the provision of California's Constitution authorizing prosecutions under information, is that as a condition precedent to the validity of prosecutions on information in California, there must have been examination and commitment by a magistrate. Omission of this requirement from the Arkansas Amendment does not deprive the accused of the rights of due process guaranteed under the Constitution of the United States."

Our Amendment No. 21 (referred to above as 22) says nothing about a preliminary hearing.

2. It is ably and earnestly insisted that the trial court erred in admitting in evidence a confession made and signed by appellant. This argument is based on the contention that appellant was mistreated and that he was induced by fear and intimidation to make the confession. After careful consideration we are unable to agree with appellant.

Robertson was killed about 6:00 P. M. on Tuesday, October 4, 1955, and appellant was arrested the next morning and placed in the city jail at Pine Bluff. He was taken early the next morning, October 6th, to Little Rock for a lie detector test and was returned to Pine Bluff that afternoon and replaced in the city jail. The next day, October 7th, at about 1:00 P. M. he was taken to the county jail and his confession was made, signed and witnessed at about 2:00 P. M. Later that same afternoon he was taken, presumptively for security purposes, to the county jail at Dumas where he spent the night but was returned to Pine Bluff on the following morning. On examination appellant testified that he was not given anything to eat, that his clothes were taken away from him, that (in effect) he was threatened with the result of mob violence if he did not confess and that some of his relatives were arrested. He stated

that while in the jail at Dumas he was reminded of the fate of a Negro boy in Mississippi. We here note that appellant was a Negro, 19 years of age.

A great deal of testimony was taken relative to the alleged threats and mistreatment, and the circumstances attending the confession. A careful consideration of this testimony convinces us that the confession was properly allowed in evidence. Several witnesses were present when the confession was made and they all testified that, at no time, were there any threats or any mistreatment of the appellant. In the confession itself appellant states that he was not in any way mistreated. The State Police Sergeant who took appellant to Little Rock admits that they took his shoes and socks off before they left Pine Bluff and that they removed his pants and shirt after he arrived at Little Rock, all for the purpose of laboratory examinations. The sheriff admits that shortly before the confession was actually given he merely informed appellant that there were several people outside the jail. His explanation was that appellant had already indicated he wanted to make a confession and the sheriff thought it would be better to have the confession made in private, having in mind the safety of appellant. Any statement that might have been made to appellant while in jail at Dumas could not have influenced his confession which had already been made the day before. Before the trial court decided to admit appellant's confession in evidence he heard voluminous testimony, in chambers, from all of the officers and people who had been in contact with appellant during his period of confinement before the confession was made. All of them deny that appellant was mistreated in any way or that he was in any way threatened. This procedure was approved in *McClellan* v. *State,* 203 Ark. 386, 156 S. W. 2d 800, and we are convinced that the confession was properly introduced in evidence. It is true that some of appellant's relatives were arrested soon after he was taken into custody but, as explained, this was done in an effort to prevent the money which appellant was supposed to have taken from the deceased from being disposed of.

3. While Sergeant Buck Halsell was on the stand the prosecuting attorney asked this question. "Sergeant Halsell, I believe you stated that you were active in the investigation of the murder of J. M. Robertson. A. That's right." The attorney for appellant objected to the question on the ground that "it hasn't been established there was a murder yet." The prosecuting attorney replied that "I believe it was established in his opening statement." The court then instructed the attorneys to go ahead and there were no further objections. We are not convinced that this incident materially prejudiced the rights of appellant or that it calls for a reversal. It is reasonable to suppose that the jury understood that the prosecuting attorney was merely asking the witness if he had been active in the investigation of the death of Robertson.

4. After the State had rested its case late in the afternoon the court recessed for 5 minutes in order to take up some motions presented by the defendant. After this was done the attorney for appellant made this statement:

"Mr. Branton: The defendant at this time notes that it is a quarter of five and the defendant requests that the Court recess until tomorrow morning to allow the defense attorney time to consult with his client and further prepare for the defense of the defendant in this case.

The Court: I think we ought to finish this testimony this evening if we can—if we can't, well, all right; I think you are entitled to a few minutes, but not the rest of the day and tonight.

Mr. Mullis: If the Court please, I object to that motion — I would like to get the testimony in for this reason, there are several witnesses here now who are being held and are holding up another Court.

The Court: The Court is familiar with that. If you want a few minutes we will get out and let you have your client and let you do what you want to, but I think

we should finish this testimony this afternoon, this afternoon or tonight, if we can.

Mr. Branton: I would like a few minutes.

The Court: I rule we are going to finish the testimony if we can.

Mr. Branton: I object to the ruling of the Court as to the recess."

Under this state of the record we see no error in the court's refusal to grant a recess until the following day. It will be noted that appellant's attorney gave no special reason for asking the court to adjourn other than to consult with his client and further prepare for his defense. It was not stated or shown in what way appellant would be prejudiced by the court's refusal to grant the recess. This court in the case of *Edwards* v. *State,* 171 Ark. 778, 286 S. W. 935, held that it was not error for the court to refuse a postponement of a trial for a few hours until some of defendant's witnesses should arrive, where the defendant had announced ready for trial without such witnesses being present.

5. After both sides had rested, but before the case was submitted to the jury, late in the afternoon the court permitted the jurors to separate and go to their several homes. It is objected by appellant that this was error although he admits that it is a matter of discretion with the court. Ark. Stats. § 43-2121 specifically provides: "The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate . . . " In *Hamilton* v. *State,* 62 Ark. 543, 36 S. W. 1054, this court said: "Permitting the jury in a murder case to separate before the case was finally submitted to them is not reversible error where no prejudice is shown." It is not disputed that no such prejudice is shown here.

In this connection it is also contended that the court did not properly admonish the jury before they separated, but we think no reversible error appears. This contention is based on Ark. Stats. § 43-2122 which provides

that before each adjournment the jury must be admonished by the court "that it is their duty not to permit any one to speak to or communicate with them on any subject connected with the trial . . ." In this instance the court stated to the jury: "Remember, don't discuss the case and don't permit anyone to discuss it with you; . . ." It was not until after the jury had left the court room that appellant made any objection. It was only then that appellant's attorney made this statement: "For the record I want to object to the jury being permitted to separate for the night." We think the admonition given by the court was a substantial compliance with the statute. The record shows that the court had previously, on occasion of adjournment in this case, given the jury a full and complete admonition, and he started this one with the word "remember." If appellant thought the admonition given by the court was not sufficient, he should have so indicated at the time.

6. At the close of all of the testimony appellant made a motion for a directed verdict of not guilty which was overruled by the trial court and this is assigned as reversible error. In this connection the argument is made that the evidence is not sufficient to support the verdict of the jury. There is not merit in this contention.

We have already concluded that appellant's confession was properly introduced in testimony. In this confession he admitted that he took an iron rod and hit the deceased over the head and knocked him to the floor and then hit him several more times, and then he took money out of the cash drawer. Even without this confession there is much evidence to support the jury's verdict. Evan Reed, an employee of the deceased at the Bluff City Lumber Company, testified that he left the company office about 5:30 P. M. on the day Robertson was killed, and that the deceased and appellant were the only ones there when he left. He returned 10 or 15 minutes after 6 o'clock and found Robertson lying on the floor dead or dying. In a short while the officers found some of appellant's clothes at his residence located at 805 Birch

Street with blood stains on them. Appellant pointed out to a witness where he got the metal rod and where he placed it after he had struck the deceased. When the officers took appellant to his home, appellant told them where they would find the money. He stated that it was hidden in a piano and upon searching the piano the officers found $444. The evidence shows that this was approximately the amount which the deceased had in his office at the time. There can be no question we think, about the sufficiency of the testimony to support the jury's verdict of murder in the first degree.

7. *Discrimination.* The point which appellant stresses forcibly and ably, and which merits the closest scrutiny, is that the Negro race was discriminated against in the selection of the jury panel which tried him. His motion to quash the jury panel, and testimony supporting the same, mentions two grounds upon which error is predicated in the court's refusal to grant his motion; (a) discrimination against his race in the selection of the jury commissioners, and (b) discrimination in the selection of the jury panel.

(a) There is no merit in appellant's contention that no Negroes were selected as jury commissioners at the term previous to the one at which he was tried, or for many years previous thereto. This question was decided by this court against appellant's contention in the case of *Maxwell* v. *State,* 217 Ark. 691, 232 S. W. 2d 982. At page 694 of the Arkansas Reports we said: "Appellant further contends that he was discriminated against within the meaning of the 14th Amendment because there were no Negroes on the jury commission. We know of no rule making this requirement and the suggestion must be rejected."

(b) In support of appellant's contention that his race was discriminated against in the selection of the jury panel which tried him, substantially the following facts were disclosed: Prior to 1947 and for many years no Negroes had been placed on the regular panels of the petit jury; Since 1947 29 Negroes had served as regular members of the petit jury, during which years there

were three panels on which no Negroes served and the most that served any one year was 6; Approximately 30 per cent of the qualified electors in Jefferson County are Negroes. In addition to this, testimony of the jury commissioners who selected the panel of jurors for the term at which appellant was tried was introduced. One commissioner stated he felt that he should not select any one for the jury that he did not know and that he was limited in his knowledge of the people whom he was trying to select. He further stated: "I have lived in this county for 57 years; I think I would be as well qualified to select either white or black as anybody else." "Q. Do you know very many Negroes who would be qualified for jury service? A. I think so." It appears that he actually recommended one of the two Negroes who was selected on the panel. The second commissioner stated that he knew quite a few colored people and that he had been doing business with them quite awhile although he knew that all of them would not be qualified or eligible for jury service. The third commissioner stated that he felt that there should be some Negroes on the panel but hadn't given any thought as to whether they should be selected on a proportional basis.

The argument is advanced that the above factual situation makes a *prima facie* showing of racial discrimination for many years previous to the date of the trial, citing the case of *Green* v. *State,* 222 Ark. 222, 258 S. W. 2d 56. We do not agree. In the *Green* case it was shown that no Negro had been selected on the regular jury panel for the past 30 years, but that is not the situation here. It is shown by the testimony that the 29 Negroes who had actually served on the jury panel since 1947 did not include all the Negroes who had been selected for service. On the other hand it was shown that many others, the number undisclosed, had been selected but had not served for different reasons. The burden therefore was not on the State but on the appellant to introduce testimony showing discrimination.

We think the testimony tending to show discrimination in the case under consideration is weaker to sustain appellant's contention than that shown in the case

of *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, where the court held that no discrimination existed. The cited case came to us from Jefferson County where it was tried in 1947 as a time when no Negroes had previously been selected for jury service. In holding that there was no discrimination the court, at page 223 of the Arkansas Reports, had this to say:

"But the proof in this record shows that the three Negroes were members of the regular panel of petit jurors called in the present case. They were V. T. Price, R. D. Doggett and Prince Swaizer. They were members of the regular panel, and numbered 7, 10 and 12 in the examination of jurors for trial in this case. There is no evidence even tending to show that the jury commissioners selected these three Negroes or any other members of the jury panel for any purpose other than to truly comply with the law of the land."

Based on the testimony of the jury commissioners mentioned above appellant strongly insists that this case is controlled by *Cassell* v. *Texas,* 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839, and should therefore be reversed. Here again we are unable to agree with appellant's contention, because we think the two cases are distinguishable on the facts. In the *Cassell* case at page 287 the court makes clear the basis of its decision where it stated: "Our holding that there was discrimination in selection of the grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on the grand jury list, the commissioners said that they knew none available who qualified; at the same time they said they chose jurymen only from those people with whom they were personally acquainted." The court further said, at page 290, "The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes . . . is discrimination in violation of petitioner's constitutional rights." In the case under consideration no such lack of knowledge is shown.

We have given careful consideration to the other objections, not discussed above, raised by appellant and

find no ground for reversal in any of them. Appellant objected to the introduction of photographs which were shown to the jury on a screen but this was a matter which rested largely in the discretion of the trial judge and we find no abuse of that discretion in this case. The same thing can be said in answer to appellant's objection to the introduction in evidence of certain articles of clothing and the iron rod heretofore mentioned. Appellant stated that he was not allowed a public trial because several Negroes were not allowed to enter the court room. Following an objection by appellant's attorney in this connection the trial judge stated that he saw no vacant seats and overruled the objection. In the absence of testimony to the contrary we must assume that the trial judge was correct and that he did not abuse his discretion.

Finding no reversible error the judgment of the trial court is affirmed.

Affirmed.

WHALEY *v.* CRUTCHFIELD.

5-1051 294 S. W. 2d 775

Opinion delivered November 5, 1956.

Surrey E. Gilliam and *Melvin E. Mayfield,* for appellant.

McKay, Anderson & Crumpler, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a judgment in the sum of $1,500 in favor of appellee, Todd Crutchfield, for damages, to an automobile he owned, which occurred in a collision with an automobile owned and operated by appellant, Charles Whaley. Crutchfield is in the automobile business at Magnolia; at the time of the collision one of his automobiles was being driven by his employee, Grady England. Whaley and England were proceeding in opposite directions. Crutchfield alleges that Whaley negligently cut to the left in front of England, Crutchfield's employee. Whaley denied the allegations of the complaint and pleaded contributory negligence on the part of England.

Appellant first argues that the trial court erred in giving Instruction No. 1 requested by appellee. The instruction is as follows: "You are instructed that the laws of the State of Arkansas provide that 'No person shall turn a vehicle from a direct course upon the Highway unless or until such movement can be made with reasonable safety and then only after giving a clearly visible signal of intention to turn continuously during no less than the last 100 feet of travel by the vehicle before turning. Failure to comply with the laws of this State

may be considered in connection with all of the other testimony in the case in determining whether or not a party is negligent."

Appellant says a signal to turn is necessary only in the event another car may be affected. Without a prolonged discussion of this point, suffice it to say that here, another car was affected. Appellant also contends that the last sentence of the instruction assumes there was a failure to give a signal to turn. We think the instruction might be construed by a jury as assuming that the signal was not given; hence, on re-trial, the instruction should be framed so as to eliminate this objectionable feature.

The following is Instruction No. 3, given at the request of appellee: "If you find by a preponderance of the evidence that the defendant was negligent and that said negligence was the sole proximate cause of the collision then you shall return a verdict in favor of the plaintiff as against the defendant." This is a binding instruction.

Appellant maintains that the instruction is defective in three particulars: First, that it authorizes the jury to find for the plaintiff if the defendant is guilty of any negligence, and does not confine the jury to a consideration of the negligence alleged in the complaint only. Even if the instruction is defective in this respect, it is not inherently erroneous on that account, and no specific objection was made calling the court's attention to the error now urged in that regard. "A general objection to an instruction not inherently erroneous is insufficient." *Carmichael, Admx.* v. *Mercury Motors,* 224 Ark. 553; 275 S. W. 2d 15. Further, it is claimed that the instruction assumes there was negligence on the part of appellee, but we do not think the instruction is bad in that respect. *Nolan* v. *Haskett,* 186 Ark. 455; 53 S. W. 2d 996. As his third proposition, appellant contends the instruction is fatally defective because it is a binding instruction, which tells the jury to find for the appellant on certain conditions, and that it is inherrently erroneous because it ignores the defense of con-

tributory negligence asserted by the appellee. Where an instruction is inherently erroneous and binding, it cannot be cured by a correct instruction. The court said, in *Holmes* v. *Lee,* 208 Ark. 114, 184 S. W. 957, "Where an instruction directs the jury to find for the plaintiff if stated conditions concur, but fails to say that contributory negligence is a defense, (as to which there is appropriate proof), it is inherently wrong and cannot be cured by correct instructions separately given." In the case at bar, there was evidence of contributory negligence on the part of England, appellee's employee. Therefore, the instruction should have included the defense of contributory negligence. Appellee maintains that the instruction is not erroneous because it uses the term "sole proximate cause," but we see no practical distinction between "the proximate cause" and "the sole proximate cause."

Over appellant's objections, appellee was permitted to prove declarations of a third party made at the scene of the collision. After appellant's objections were overruled, the witness, Grady England, was questioned by appellee's attorney with reference to statements made by a third party.

"Q. Now, what did she say?

A. She says, 'Uncle Charley, I told you that you was going to get in trouble driving like this. You see this man is directly in his lane, and he couldn't help but hitting you.'

Q. What did Mr. Whaley say?

A. Now, I don't remember him saying anything.

Q. As far as you know he didn't say anything.

A. That's right."

The third party declaration was not admissible in evidence; it was hearsay, and, as such, was not admissible unless the declaration came within one of the exceptions to hearsay rule. If the evidence is admissible, it would be on the theory that it was an implied admission

on the part of appellee. One of the requisites for the admission of declarations of third parties is whether "the statement is made under such circumstances and by such persons as naturally call for a reply." 20 Am. Jur. 480. Here, the person who is alleged to have made the statement is not identified. True, she addressed appellant as "Uncle Charley," but for all the record shows, everybody in the community may have called him "Uncle Charley." The appellant had just been in a collision where considerable damage was done; in all probability, he was somewhat excited at the time. Perhaps he knew the woman who is alleged to have made the statement, but, on the other hand, he may not have known her. There is no showing that the woman saw the collision or knew anything about how it occurred. In these circumstances, we do not believe the appellant was called upon to make a reply. "Whether the circumstances are such as to call for a reply is a question for the court." *Pulver* v. *Union Investment Company,* 279 F. 699.

Lastly, there is the contention that the court erred in refusing to permit Whaley to prove the replacement cost of the automobile to Crutchfield in determining the measure of damages. Appellee Crutchfield proved that the retail market value of the car, immediately before the collision, was $3,211, and the value immediately after the collision was $1,001. Appellant Whaley offered to prove that the wholesale cost of the automobile to the appellee was not in excess of $2,409.27, and that the car could be replaced by appellee for that amount. But, the court refused to permit such evidence to go to the jury. The jury were instructed that the measure of damages was the difference between the market value immediately before and immediately after the collision occurred. In the situation presented here, the measure of damages is the difference between what the wholesale price of the car, delivered to appellee, would be immediately before the collision and the market value immediately after the damage occurred. Ordinarily, the measure of damages is the retail market value of the property immediately before the damage occurs, and immediately thereafter. *Southern Bus Company* v. *Simpson,* 214 Ark. 323, 215

S. W. 2d 699. But, that rule does not apply where the property involved is part of a stock in trade of a business concern. In *Sedgwick on Damages,* 9th Edition, Volume 1, § 248a, it is said: "When in the ordinary case a value is to be found for a single thing, the value is what that single thing would sell for; which amounts to the retail value of it. But when a court is dealing with a stock of goods held for sale, or even with a portion of such a stock, the value to be found is its value as a stock or part of a stock of goods, that is, its wholesale value, without the profit of resale which enters into the retail value; for at the time of valuation that profit has not yet been earned, or, to put the matter in another way, the process of distribution, which brings the goods into the hands of the consumer and thus gives them their final increment of value, has not yet taken place."

And the court said, in *John Blaul & Sons* v. *Wandel,* 137 Iowa 301, 114 N. W. 899, "We think the Court also erred in allowing the jury to take into count the retail price of the flour in determining its value. The flour being a merchantable commodity and not having been paid for, defendant could have suffered no damage from the wrongful taking of it save the expense of replacing by the purchase of other flour of the same quality in the quantity taken. He was not entitled to have from the plaintiffs the price for which he might have sold the flour in the ordinary course of business at retail."

Our own case of *General Fire Extinguisher Company* v. *Beal-Doyle Dry Goods Company,* 110 Ark. 49; 160 S. W. 889, involves the damage to a stock of merchandise. There, the court said: "The market value of the goods to appellee immediately before the injury was what such goods would have cost in the usual markets where same could have been purchased, plus the expense or cost incident to shipping them to appellee's place of business, and the market value immediately after such goods were damaged was what the goods could have been sold for in the market where the goods were held for sale." Here, Crutchfield is in the automobile business; the car damaged was a new one which was taken

out of stock by Crutchfield's salesman merely for the purpose of showing it to a prospective purchaser. In these circumstances, the measure of damages is the difference between the wholesale market value of the car immediately after the collision and the wholesale value, plus delivery charges, immediately before the damage occurred.

We have examined the other points argued by appellant, but find only the errors indicated herein.

Reversed and remanded.

WARD, J., concurs.

PAUL WARD, Associate Justice (concurring). I agree with the result reached by the majority in reversing this case because I do not think the testimony of Grady England was admissible in evidence.

However I do disagree with the majority opinion in two respects as set out below.

1. In my opinion Instruction No. 3 given at the request of appellee was not erroneous. My knowledge of the meaning of the English language impels me to conclude that the word "sole" as used in the instruction was sufficient to leave no doubt in the minds of the jury that there could be no other proximate cause than that of the defendant's negligence, and that consequently it did not ignore the defense of contributory negligence which was adequately set forth in other instructions.

2. In my opinion the instruction on the measure of damages given by the court and set out in the majority opinion is a correct and proper instruction, i. e. the difference between the market value of the automobile immediately before and after the collision occurred. It is conceded that this would have been the proper instruction if the damaged automobile had belonged to a member of the general public rather than to an automobile dealer.

It seems to me that the majority in announcing the rule it did—the difference between the wholesale market value of the car immediately before and after the colli-

sion—failed to take into consideration that the car was not completely destroyed. I concede that where goods, belonging to a retailer, are completely destroyed the measure of damages is as stated by the majority. On the other hand, where such goods are only damaged, the proper rule is the general rule first announced. There are several reasons supporting my contention.

In the first place, the *General Fire Extinguisher* case [cited by appellant] does not sustain the rule announced by the majority. In that case the court announced the correct rule as to the measure of damages, *where goods are injured but not totally destroyed;* as follows: "If you find for the plaintiff you will assess its damages at such sum as you may find from the evidence to be the difference between the market value of the goods injured or damaged . . . immediately before they were damaged and the market value thereof immediately after they were damaged."

In the second place, it is my contention that the same figure would be arrived at regardless of whether market value or wholesale value is used. A simple example will suffice to explain. If it costs $100 to replace the fender on an automobile, this figure would be the damage done to the automobile, if a fender is knocked off, regardless of whether the automobile belonged to an individual or a car dealer.

In the third place, it seems to me that the rule announced by the majority would be hard if not impossible to apply. Just what is meant by the wholesale value of a damaged automobile. So far as I know there is no such thing, but if there is then it is obvious that there are only a few people in the State of Arkansas who know what it is and who would be available to testify in an ordinary collision suit.

5-1038 295 S. W. 2d 307

Opinion delivered November 12, 1956.

Claude F. Cooper and *Frank C. Douglas,* for appellant.

Taylor & Sudbury, for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by appellant from a decree of the Mississippi Chancery Court, Chickasawba District, which held that "under the said Will of Joseph C. Hargett the said John G. Hargett took a vested remainder in the real property of the said Joseph C. Hargett and not a contingent remainder, as contended by Intervenor; the Court further finds that under said Will of John G. Hargett this vested remainder of John G. Hargett in the real property of Joseph C. Hargett was devised to respondent (appellee) Beulah Joan Hargett." Intervention of Jesse John Hargett, appellant herein, was dismissed.

The parties stipulated that the sole question before the Court was a question of law, whether John G. Hargett acquired a vested remainder or a contingent remainder in the lands in question, under the will of Joseph C. Hargett.

The pertinent parts of Joseph C. Hargett's will are as follows:

"Fourth: To my beloved wife Ellen McKewon Hargett I will during her lifetime all my real and personal property wherever found or situated that I may own at the time of my death. I believe in the future of land value in Mississippi County and it is the purpose of this will that neither my wife nor my executrix above named dispose of any of my real estate that I die seized or possessed of during the life of my wife Ellen McKewon Hargett. I desire that my wife have the proceeds of said real estate, that she use the same as a home, that she keep up and have paid the yearly payments to the Federal Land Bank and all taxes against said land and that she have, for her own use and enjoyment, the balance of the proceeds of said land. * * *

"It is further provided that at the death of my wife Ellen McKewon Hargett that the estate then remaining shall be divided between all my children in the manner provided by law, but it is the intention of this Will that none of my children nor their heirs, to-wit: Willie Hargett who died leaving Bessie Hargett and J. L. Hargett, Jack Hargett, John Hargett, Beatrice Hargett, Lorene Hargett and Belva Hargett, have none of my estate until the death of my said wife, Ellen McKewon Hargett, * * * ."

The appellant, Jesse John Hargett, is a son of John G. Hargett, deceased, who in turn was one of the children of Joseph C. Hargett, deceased. John G. Hargett's death occurred prior to the death of his mother, Ellen McKewon Hargett.

John G. Hargett's last Will and Testament is as follows:

"Know all men by these presents:

"That I, John G. Hargett of Blytheville, Arkansas being of sound and disposing mind and memory and being above the age of twenty-one (21) years do make and publish this my Last Will and Testament hereby revoking all wills by me heretofore made.

"First: I direct that all my just debts and that the legacies hereinafter mentioned be paid out of my estate.

"Second: To my children Jesse John Hargett and Frances Charlene Maynard, I give nothing.

"Third: To my wife, Beulah Joan Hargett, I give all my property, real and personal.

"Fourth: I constitute and appoint my wife, Beulah Joan Hargett sole Executrix of this my will.

"In witness whereof, I have hereunto set my hand this the 12th day of April, 1950 in the presence of F. E. Warren and R. L. Banister who attest the same at my request."

It is appellant's contention that Joseph C. Hargett intended that none of his heirs should take a vested interest in his property at the time of his death, but rather that the heirs should take a contingent interest until the death of his wife, Ellen McKewon Hargett, then the property would go to the living children and to the children of any deceased child at the time of the death of his wife. Therefore, John G. Hargett died before his mother, and at the time of his death he had no vested interest in the estate of his father which he could give to his wife (appellee) by Will.

The question of what determines a vested or contingent remainder has been determined by this Court in many cases. In the case of *Lawrence* v. *Lawrence,* 225 Ark. 500, 283 S. W. 2d 697, the will provided that "I further direct at the death of my wife that my estate shall pass to my two said children * * * ." The Court held that this language created a vested remainder in the two children. Other cases, in which this Court has held that language in a will similar to the one at bar created a vested remainder are, *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387; *Black* v. *Bailey,* 142 Ark. 201, 218 S. W. 210; *McKinney* v. *Dillard and Coffin Co.,* 170 Ark. 1181, 283 S. W. 16; *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584; and *Timmons* v. *Clayton,* 222 Ark. 327, 259 S. W. 2d 501.

The rule is that an estate will vest at the death of the Testator unless a later time of vesting is clearly expressed by the words of the Will or by necessary implication therefrom. The law favors the vesting of estates as early as possible. *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *McCarroll* v. *Falls, supra.*

In the case of *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810, this Court discussed at length the distinction between a vested remainder and a contingent remainder. We said: "There are two kinds of remainders, vested and contingent. Blackstone defines them as follows: 'Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed in the future) are where the estate is invariably fixed, to remain to a determinate person after the particular estate is spent. * * * Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event.' 2 Bl. Com. 168."

The language contained in Joseph C. Hargett's will merely stated the law as to the rights of life tenants and remaindermen. The will in this case stated how the life tenant was to enjoy the property, and also that the remaindermen were to have none of the property until the death of the life tenant.

A remainder is vested when it is limited to an ascertained person or persons, with no further condition upon the taking effect in possession, than the termination of the prior estate. See 33 Am. Jur., p. 525.

The remaindermen interest, in this case, was ready to take effect immediately upon the death of the life tenant. The designation of the remaindermen was definite and certain. The will of Joseph C. Hargett created a vested remainder interest in the persons named as remaindermen in his will.

John G. Hargett was one of the remaindermen named in the will of his father. Upon the death of his father his interest was vested and he had a right to

dispose of his interest as he saw fit. Under the will of John G. Hargett, this vested interest was devised to his wife, Beulah Joan Hargett.

Decree affirmed.

JARRETT *v.* JARRETT.

5-1058 295 S. W. 2d 323

Opinion delivered November 12, 1956.

Willis & Walker, for appellant.

N. J. Henley, for appellee.

J. SEABORN HOLT, Associate Justice. The parties here were married in 1915 and to this union eight children were born, seven, having reached their majority, are now living. August 1, 1955, appellee, Mrs. Jarrett, filed suit for divorce alleging indignities and cruel treatment and asked for a property settlement, alimony and attorney's fees. On a trial a decree of divorce was granted to appellee, a property settlement ordered, along with allowance of alimony and attorney's fees. A satisfactory adjustment of the personal property appears to have been made, but appellant complains about that part of the decree affecting an eighty acre farm on which the parties resided and had made their home for a great many years. The decree contained this recital: ". . . the court finds and holds that the Plaintiff should be awarded the exclusive possession of the farm land with home thereon described in the pleadings for a period of

three years from December 28, 1955, and that during such period of time the Plaintiff shall be required to pay the taxes upon said land. The court finds that the land is not susceptible of division in kind without great prejudice to the parties and that same should be sold by the clerk as commissioner of the court on the first Monday of January, 1959 . . . The possession herein awarded to the Plaintiff is upon the condition that she occupies the property as her home, and should she abandon the property as her home prior to the expiration of the three year period the property shall be ordered sold promptly by the court upon appropriate petition and showing of such abandonment . . . The court retains jurisdiction of this cause and the parties for the purposes of effecting a sale of the lands, a division of the proceeds of such sale, and enforcing the property rights and the alimony award." Appellant says: "There is no dispute that this land was purchased by the husband during coverture and that appellee has her rights of dower and homestead therein and that they are not susceptible of division in kind, etc.," and further that: "The only point involved in this appeal is whether the lower court erred in postponing the sale of the lands for three years, or was it bound to order an immediate sale under § 34-1214, Arkansas Statutes."

We hold that the court did not err in postponing the sale for three years, as indicated. Our rule is well established, through a long line of our cases, that courts, when granting decrees of divorce, may award possession of the homestead to either of the parties for such time and upon such conditions as appear to be equitable. We said in *Biddle* v. *Biddle,* 206 Ark. 623, 177 S. W. 2d 32, "An examination of our own cases clearly discloses that courts granting decrees of divorce may award the possession of the homestead to either of the parties for such time and upon such terms and conditions as appear to be equitable and just. Such is the effect of our decisions in the cases of *Heinrich* v. *Heinrich,* 177 Ark. 250, 6 S. W. 2d 21; *Watson* v. *Poindexter,* 176 Ark. 1065, 5 S. W. 2d 299; *Woodall* v. *Woodall,* 144 Ark. 159, 221 S. W.

463; *Johnson* v. *Commonwealth Bldg. & Loan Ass'n,* 182 Ark. 226, 31 S. W. 2d 136; *Wilkerson* v. *Hoover,* 192 Ark. 337, 91 S. W. 2d 274."

Finding no error, the decree is affirmed.

BOSWELL *v.* GILLETT.

5-940 295 S. W. 2d 758

Opinion delivered November 12, 1956.

[Rehearing denied December 17, 1956.]

Williams & Gardner and *J. M. Smallwood,* for appellant.

Robert J. White, for appellee.

Ed. F. McFaddin, Associate Justice. Each of the three litigants was dissatisfied with the Chancery decree, so we have both direct appeals and cross-appeals; and for easy identification we will refer to the parties by name rather than by legal designation.

For some time prior to 1946 Mrs. Mattie Boswell owned a building in Russellville in which the Malco Theatres, Inc. operated a picture show. Mrs. Boswell was an elderly lady and depended on her son, Cledys Boswell, for advice in business matters. E. R. Gillett, of Memphis, Tennessee, was the owner of a number of picture shows, and he desired to dispossess Malco Theatres, Inc. and operate a picture show under his own control in the said Boswell building.

On January 7, 1946, E. R. Gillett, as first party, and Cledys Boswell, as second party, entered into a memorandum agreement (approved and signed by Mrs. Mattie Boswell), which provided, *inter alia*: (a) that proceedings would be prosecuted to evict Malco Theatres, Inc., from Mrs. Boswell's building, and all expenses of such litigation would be paid by Gillett; (b) that when possession of the building had been obtained, Gillett and Cledys Boswell would then rent the building from Mrs. Boswell at $150 per month and Gillett and Cledys Boswell would operate a picture show in the building with Cledys Boswell as manager at a salary of $50 per week; (c) that E. R. Gillett would furnish all money for

equipping and furnishing the picture show and would provide funds for the said Gillett-Boswell enterprise.[1]

The Malco Theatres, Inc. was finally ousted from the Boswell Building (see *Malco Theatres, Inc.* v. *Boswell,* 211 Ark. 143, 199 S. W. 2d 606); and in May, 1947 Mrs. Mattie Boswell executed a contract to E. R. Gillett and Cledys Boswell, which, *inter alia,* leased them the building for five years at a rental of $150 per month. Also in May, 1947, E. R. Gillett and Cledys Boswell entered into a "partnership agreement" for the operation of the picture show in the Boswell building, which partnership agreement incorporated in it the memorandum agreement between the parties, as previously mentioned.

The Gillett-Boswell enterprise named its theater the "Main Theater" and began operations in May, 1947, and continued operations until December 27, 1948, when a fire in the projection room damaged the projection equipment and screen and also caused slight damage to the building. Being unable to contact Gillett by phone to tell him of the fire, Cledys Boswell wrote Gillett a letter under date of December 28, 1948, informing him of the fire and asking instructions. Receiving no reply from that letter, Cledys Boswell wrote Gillett another letter under date of March 4, 1949, again asking instructions. No reply was made by Gillett to either letter because there had been a "falling out" between Gillett and Boswell in July, 1948, as will be mentioned later. Gillett continued to pay Mrs. Boswell her rent at $150 per month from January, 1949 until April 30, 1952, which

[1] This is the salient language of the contract: ". . . (e) The party of the first part (Gillett) contemplates the investment of and installation of sufficient equipment in said building to operate a first class picture show at his own expense; for that purpose he agrees when possession of said building is obtained, to deposit such funds as may be necessary to equip and operate said picture show, and such deposit shall be in a joint account, and all funds derived from the operation of said picture show business shall be deposited by the party of the second part (Cledys Boswell) in such joint account. (f) After said picture business is in operation, and a surplus is accumulated from its operation and deposited in said joint fund, the party of the first part shall have the right to withdraw from said surplus, as his needs may require, and at such times as he may desire, the funds advanced by him until he has been entirely repaid for all funds advanced by him; provided, however, that at no time shall the surplus funds be reduced below $1000.00 for necessary operating expenses."

was the end of the five-year lease term. The equipment of the Main Theater continued in Mrs. Boswell's building until April 28, 1955, but she received no rent for the building after April 30, 1952.

The Main Theater never resumed operations after the fire of December, 1948; and on August 3, 1950, Gillett filed the present suit against Mrs. Mattie Boswell and Cledys Boswell, alleging, *inter alia*: (a) that the failure of the picture show to operate after the fire was due to Cledys Boswell; and that Mrs. Mattie Boswell's lease on the picture show should be extended from the date of the final decision in this case for a period of time equal to the time from the fire to the final decision and should be held to be assignable. As against Cledys Boswell, Gillett also prayed that the Gillett-Boswell partnership be dissolved, that the lease and all equipment be sold and an accounting made, and that Cledys Boswell be liable for one-half of the losses of the partnership. Mrs. Boswell, by answer and cross-complaint, sought rent at $150 per month for all the months from May 1, 1952. Cledys Boswell, by answer and cross-complaint, denied any liability for any loss suffered by Gillett and sought judgment for salary as manager at $50 a week from December, 1948 (the date of the fire) until final adjudication of the case. For a variety of reasons best known to the litigants, the case dragged in court for several years and it was not until August 11, 1955, that a decree was entered in the Chancery Court. As aforesaid, all parties have appealed; and we now discuss the main phases of the case.

I. *The Controversy Between Mrs. Mattie Boswell And Gillett.* By amendment filed in January, 1951, Gillett alleged that Mrs. Boswell had refused to agree to any assignment of the lease contract because she was under the influence of her son, Cledys Boswell. By amendment filed in October, 1952, Gillett said that he had been ". . . required to pay under said lease the monthly rentals to and including the date of expiration thereof . . . "; and prayed ". . . judgment be entered in favor of the plaintiff as the equities therein shall determine."

The Chancery Court found that Gillett had paid Mrs. Boswell the rent of $150 per month from January 1, 1949 to April 30, 1952 (the expiration of the five-year term); that the building had not been repaired; that in its damaged condition the building was worth only $100 per month for such time; and that Gillett should, therefore, recover $50 per month from Mrs. Boswell for the forty months from January, 1949 through April, 1952, during which time he had paid her rent at $150 a month. Accordingly, the Chancery Court rendered judgment against Mrs. Boswell in favor of Gillett for $2,000. Mrs. Boswell has appealed on that item and also on the failure of the Court to award her judgment against Gillett for rent from May 1, 1952 (the end of the five-year contract period), until April 28, 1955, when the building was vacated by removal of the picture show equipment. Gillett has cross-appealed because the Court only allowed him a return of $50 per month instead of $75 per month for the forty months that he paid the rent, his theory being that Mrs. Boswell knew that he was a partner with Cledys Boswell, and, as such partner, he should only pay half of the rent. It is Gillett's contention that, because of the relationship between Mrs. Boswell and her son, Cledys Boswell, she was at all times in the same situation as Cledys Boswell and liable for failure to allow the lease to be assigned.

We find no merit in any of Gillett's claims against Mrs. Mattie Boswell. The record reflects that he knew of the close relationship between Mrs. Boswell and her son and used that relationship as a leverage to dispossess Malco Theatres, Inc. from the building: he promised Cledys Boswell a salary of $50.00 per week so that Cledys Boswell would persuade his mother to dispossess Malco and to rent the building to the Gillett-Boswell enterprise. There was no obligation on the part of Mrs. Boswell to permit the Gillett and Cledys Boswell enterprise to as-

sign the lease.[2] Gillett recognized her right to refuse assignment, and month by month sent her his personal checks to pay the rent; so he cannot claim that she denied him any of his contract rights.

There are several reasons why the Trial Court was in error in holding that Mrs. Boswell should return to Gillett any of the money that he had paid her for the rent from January 1, 1949 to April 30, 1952: but one reason is sufficient to state. Gillett had *voluntarily* paid Mrs. Boswell the rent during all of these forty months. He testified: "Q. What was your intention after you got this report of the condition of the building? A. I had no intention of doing anything but to pay this $150 a month." Elsewhere, he said that with the theatre not running he was losing only $150 per month (i. e., the rent), whereas, if the theatre had been operating, he would have lost $1,000 a month. Thus, Gillett voluntarily paid Mrs. Boswell the rent each month; and one who voluntarily makes payments without mistake of fact or fraud, duress, coercion or extortion, cannot recover them. *Ritchie* v. *Bluff City Lbr. Co.,* 86 Ark. 175, 110 S. W. 591; *North Cross* v. *Miller,* 184 Ark. 463, 43 S. W. 2d 734. See Annotation in 53 A. L. R. 949 on the subject: "Right to Recover Money Voluntarily Paid . . ." etc.

Gillett claims that Mrs. Boswell did not repair the theatre building after the fire and, therefore, that she should not be allowed to collect the full rent. But Gillett knew of the damage when he was paying the rent each month and he made no claim that the building should be repaired. Furthermore, the damage to the building was slight. Gillett could have had the repairs made if he so desired and could have claimed the expense of such repairs against Mrs. Boswell. Such would have been his measure of damages. See *Young* v. *Berman,* 96

[2] The lease contract of 1947 — in which Mrs. Boswell was first party and Cledys Boswell and Gillett were second parties — contained this language: "It is further agreed and understood by and between the parties hereto that the parties of the second part, nor either of them, their administrators, successors or assigns, may assign or sublease the premises herein or any part thereof, during the term herein specified or any extension thereof, unless such assignment or subleasing is agreed to by the party of the first part, her administrators, successors or assigns, in writing endorsed hereon."

Ark. 78, 131 S. W. 62; *Johnson* v. *Inman,* 134 Ark. 345, 203 S. W. 836; and *Dugan* v. *Browne,* 187 Ark. 12, 58 S. W. 2d 426. Gillett never claimed any forfeiture of the lease because of Mrs. Boswell's failure to repair. Since he voluntarily paid the rent each month, he should not be allowed to recover any part of such payments.

From May 1, 1952 until the building was vacated on April 28, 1955, the Trial Court refused to allow Mrs. Boswell any recovery for rent against Gillett. Instead, the Trial Court gave her judgment against Cledys Boswell only. We hold that Mrs. Boswell was entitled to judgment against Gillett individually for $75 per month — one-half of the rental value — for such period of time; and was also entitled to judgment against Cledys Boswell individually for $75 per month — the other half of the rental value — for such period of time.

So, as between Mrs. Mattie Boswell's estate[3] and Gillett, we reverse and set aside the $2,000 judgment that the Trial Court awarded Gillett against her; and we remand the case to the Chancery Court with directions to enter judgment for Mrs. Boswell's estate against Gillett individually for $2,700, being calculated at $75 per month from May 1, 1952 until April 28, 1955; and also with directions to render judgment in favor of Mrs. Boswell's estate against Cledys Boswell for a like sum of $2,700, being the other half of the rent from May 1, 1952 until April 28, 1955. The estate of Mrs. Mattie Boswell will also recover all costs paid by Mrs. Boswell or her estate in all courts.

II. The *Controversy Between Gillett And Cledys Boswell.* The Chancery Court found and decreed: (a) that Cledys Boswell and Gillett were never partners in the Gillett-Boswell enterprise; (b) that Cledys Boswell should pay into the Registry of the Court the sum of $755.30 received on fire insurance policies for the damage to the projection room and equipment and held by

[3] During the pendency of this case in the Supreme Court, and after the filing of her brief herein, Mrs. Boswell departed this life intestate. The administrators of her estate have been duly substituted, so the judgment herein for her is for the administrators of her estate.

him in a separate account; (c) that Cledys Boswell was entitled to judgment against Gillett for $1,000 for salary of $50 per week for only five months from the time of the fire; (d) that Gillett should receive all of the $7,000 from the sale of the picture show furnishings and equipment which had been sold by consent of all litigants in April, 1955, and paid into the Registry of the Court; and (e) that each party (Gillett and Cledys Boswell) should pay his own costs.

Gillett and Cledys Boswell have each appealed. Gillett insists: (a) that he and Cledys Boswell were partners; (b) that an accounting would show that Gillett lost approximately $24,000 net in the Boswell-Gillett venture, even after deducting the $7,000 received from the equipment; (c) that Gillett should have judgment against Cledys Boswell individually for one-half of the said loss, or a net judgment of approximately $11,700; and (d) that Gillett should have judgment against Cledys Boswell for damages at $500 per month from the time of the fire until the end of the lease since Cledys Boswell persuaded Mrs. Mattie Boswell to refuse her consent to the lease assignment. Cledys Boswell claims: (a) that he is entitled to a salary of $50 per week from the fire until possession of the building was returned to Mrs. Boswell in April, 1955; (b) that Gillett, instead of Cledys Boswell, was liable for the rent from May 1, 1952 to April 28, 1955; and (c) that Cledys Boswell should recover his costs.

A. *As To The Partnership Questions.* The Chancery Court held that there never was a partnership between Gillett and Cledys Boswell; that there was merely an employment contract, even though the instrument was designated as a partnership agreement. Gillett insists that the Chancery holding was erroneous.

As aforesaid, in May, 1947, E. R. Gillett and Cledys Boswell signed a 3-page instrument designated as a "Partnership Agreement." By reference, it incorporated in it the memorandum agreement between the parties of January 7, 1946, wherein Gillett agreed to install ". . . sufficient equipment in said building to operate

a first class picture show at his own expense . . ." Cledys Boswell signed various papers designating the Main Theater to be a partnership between himself and Gillett: so certainly as regards third persons there was a partnership created to operate the Main Theater.

But as between the parties — Gillett and Cledys Boswell — was there a partnership *inter se?*[4] We think the answer to this question makes very little difference in the final result in this case because, even if there was a partnership *inter se,* still Gillett cannot recover from Cledys Boswell any amount that Gillett lost on the furniture and fixtures in the theater. The reason that Gillett is not entitled to judgment against Cledys Boswell, as in ordinary partnership cases *inter se,* is because the losses that Gillett claims in this case came about through Gillett's own wrong and in breach of the partnership relationship. In 47 C. J. 792, in discussing losses through the negligence or misconduct of a partner, cases from many states are cited to support the text: "But losses caused by the acts of a partner which amount to a breach of a partnership stipulation . . . or which are characterized by bad faith toward them (co-partners), must be borne by him alone." And again in 47 C. J. 1172, cases are cited to sustain this rule: "Losses due to a partner's breach of the partnership contract, . . . are to be borne by him exclusively." To the same effect, see 68 C. J. S. 538 and 68 C. J. S. 903, where other and more recent cases are cited to sustain the rule

[4] The "partnership agreement" of May, 1947 contained these additional salient provisions: "The said E. R. Gillett having advanced the necessary funds to finance both the litigation incident to obtaining possession of the building in which said Main Theater is installed, as well as the funds necessary for the alterations and improvements made in connection therewith, it is agreed and understood that out of the surplus accumulated in the above joint account he shall have the right to withdraw from time to time such sums as can be spared from said account until all the funds advanced by him have been repaid in full. Provided: that there shall be kept in said account the sum of at least One Thousand ($1000.00) Dollars to meet the rents and other current expenses incident to the operation of said theater . . . As soon as all the funds that have been advanced by the said E. R. Gillett have been fully repaid to him, then it is understood and agreed that the said E. R. Gillett and the said Cledys Boswell are thereafter to be the joint and equal owners of all the improvements made to the building in which said Main Theater is being operated, and the joint and equal owners of all the net profits derived from the operation of said theater . . ."

just quoted. A partnership is a relationship of trust and confidence and partners must observe the utmost good faith toward each other in all of their transactions from the time they begin negotiations with each other to the complete settlement of the partnership affairs. (See Gilmore on "Partnership," page 374).

And when a partner — such as Gillett in the case at bar — comes into a court of equity and seeks to recover judgment for losses, such partner must come in with clean hands and certainly cannot recover for losses caused by himself in breach of his duty and obligations as a partner. See Annotation 4 A. L. R. 83 discussing partnership cases. The evidence here shows that early in April, 1948 Gillett formed the plan to oust Cledys Boswell from the management of the picture show. Gillett had used Boswell to get the rent contract but Gillett decided to oust Cledys Boswell entirely. When the furniture and fixture notes were paid, Gillett had them assigned to a man named McFarland, who took orders from Gillett. Without any information from Gillett to Cledys Boswell (who had been using the proceeds of the picture show to pay on the notes), McFarland went to Russellville and informed Cledys Boswell that he (McFarland) owned the Main Theater and had bought everything from Gillett.

When Cledys Boswell refused to surrender his managership to McFarland, Gillett went to Russellville and sought to compel Cledys Boswell and his mother to agree to the assignment of the lease and the sale of the Main Theater. When Cledys Boswell refused, Gillett left the meeting and never spoke to Cledys Boswell again; and that is the reason that Cledys Boswell could get no response from Gillett after the fire in December, 1948. Furthermore, it is shown that the theatre could have been put back in operation within twenty days; but Gillett would never authorize any repairs to be made. Instead, he did just as he testified as heretofore quoted: "I had no intention of doing anything but to pay this $150 a month (rent)."

Were the actions of Gillett in these matters the actions of a partner toward a partner? Did he not breach the entire partnership contract — assuming it was a partnership *inter se* — when he assigned all the papers over to McFarland and tried to dispossess Boswell? The partnership agreement provided how Gillett could have effected a sale of his interest in the business:[5] that is, by giving Cledys Boswell the first right to acquire it. Gillett did not do that for the obvious reason that the sale of the partnership would not have carried with it the lease on the building and he could not compel Mrs. Boswell to agree to an assignment of the lease on the building. So Gillett violated the fiduciary relationship that should have existed between partners in order to try to "strong arm" Cledys Boswell and Mrs. Boswell into letting him have the building. The losses that Gillett suffered on his equipment came about through his own conduct and breach of the partnership contract; so he cannot recover a judgment against Cledys Boswell even if he were a partner *inter se*; and that part of the Chancellor's decree reached the correct result and is affirmed.

What we have just expressed, likewise disposes of Gillett's claim for damages against Cledys Boswell for $500 a month for his failure to persuade Mrs. Boswell to agree to the assignment of the lease contract.

B. *Cledys Boswell's Claim For Salary.* The Chancery Court allowed Cledys Boswell judgment against Gillett for $1,000 for salary as manager for twenty weeks after the fire. Gillett claims that Boswell was entitled to no salary after the fire; and Boswell claims that he was entitled to salary up to the final determination of the case. We cannot say that the Chancery Court was in error in the judgment that it rendered on this angle of

[5] The "partnership agreement" said: "It is mutually agreed and understood by and between the parties hereto that the agreements herein contained shall be binding upon each of said parties, their heirs, executors, administrators or assigns, so long as they desire to continue in the operation of said picture business. Provided that either of said parties may sell or dispose of his interest in said business, but should either desire to sell or dispose of his interest in said business, he shall give the other party the first right to acquire said interest at a price offered by any other *bona fide* purchaser. If the other party does not desire to purchase such interest, then he may sell to any other party agreeable to the remaining party to this agreement."

the case. Just because Gillett did not agree to continuation of the picture show after the fire was no reason why Cledys Boswell should sit still and do nothing. Within twenty weeks after the fire, Boswell certainly knew that he could get nowhere in his dealings with Gillett; and we think the Court allowed Boswell his salary for a reasonable time. Gillett certainly cannot complain of this salary allowance for twenty weeks, in view of all that we have heretofore said. Therefore, on this angle of the case, we affirm the decree of the Chancery Court.

C. *As To The Costs Between Cledys Boswell And Gillett.* The Chancery Court decreed that each of these parties should pay his own costs. We cannot tell from this record who was at fault in delaying this case so long. The Chancellor was in a better position to judge the determination of the costs than we are; and so we affirm the Chancery ruling as to costs between Cledys Boswell and Gillett, but with Mrs. Boswell's estate recovering all of her costs from Gillett.

The result is that the Chancery decree is affirmed in part and reversed in part; and the cause is remanded to the Chancery Court to enter a decree not inconsistent with this opinion.

Justices HOLT and MILLWEE dissent.

DOCKERY *v.* THOMAS.

5-1065 295 S. W. 2d 319

Opinion delivered November 12, 1956.

J. B. Reed, for appellant.

Talley & Owen and *Dale Price,* for appellee.

MINOR W. MILLWEE, Associate Justice. The question is whether appellee, William Earl Thomas, was engaged in an "employment" in "agricultural farm labor" at the time of his injury and, therefore, excluded from the benefits of the Workmen's Compensation Law. Sec. 2 C (1) of the Act (Ark. Stats., Sec. 81-1302 C (1)) provides in part: "Employment means: Every employment carried on in the State in which five (5) or more employees are regularly employed by the same employer in the course of business or businesses, except domestic service, agricultural farm labor . . ."

The facts are not in dispute. Appellee lives in Arkansas and is a licensed airplane pilot with long experience in the highly specialized activity of dusting or spraying crops by plane. Appellant, J. O. Dockery, is a resident of Stuttgart, Arkansas, where he owns and operates the J. O. Dockery Flying Service. In the operation of his business, appellant owns a fleet of planes which are used primarily in dusting or spraying crops all over the United States and are piloted by his employees on a percentage or commission basis.

In the Spring of 1954 appellant established a flying base at Clarksdale, Mississippi, near an area in which crops were plagued with an infestation of army worms.

Appellee was then employed as one of appellant's "duster pilots." On May 3, 1954, he was engaged in dusting an oat field belonging to one of the appellant's farmer-customers when the plane crashed and he received injuries for which he filed a claim for compensation before the Arkansas Workmen's Compensation Commission. A single commissioner and the full commission denied the claim on the ground that appellee was engaged in an employment in which he was performing "agricultural farm labor," within the meaning of the statute, at the time of his injury. On appeal to circuit court the order of the full commission was reversed. The court held appellee was not engaged in agricultural farm labor so as to exclude him from the benefits of the Compensation Act, and that the employment was covered by it.

Because of the difference in phraseology of workmen's compensation statutes and the varied local conditions and types of work respecting farming, no hard and fast rule can be laid down defining what particular kinds of work are within or without the several statutes. As the annotator points out in 35 A. L. R. 208: "The most that can be said is that an employee doing work for a farmer which is ordinarily incidental to farming as that occupation is generally understood is within the purview of the exclusion of farm laborers, unless, at the time of the injury, he was employed by a commercial concern under a contract to perform work for the farmer; while the doing of work not inherently farm work is not farm labor, though incidentally it may be at the instance of one actually engaged in farming."

In determining whether an employment is excluded from the provisions of the workmen's compensation statutes as "agricultural farm labor," or some similarly designated agricultural pursuit, the courts have used different tests. "In some cases, the character of an employment as agricultural, within the operation of the provision in question, has been determined by reference to the employment or industry as a whole, rather than by reference to the immediate or particular task or operation. In other cases, the character of the work actually

performed by the employee, and not the general occupation or purposes of the employer, has been made the test. Employees of independent contractors for the performance of work incident to farming operations have in many instances been held not to fall within the exception as to farm labor." 58 Am. Jur., Workmen's Compensation, Sec. 97. See also Larson, Workmen's Compensation Law, Sec. 53.33. It has also been held that in determining whether a claimant was employed in an agricultural pursuit at the time of an injury the Workmen's Compensation Act and all proceedings under it must be liberally construed with a view to effect the object of the law and to promote justice. *Mundell* v. *Swedlund,* 59 Idaho 29, 80 P. 2d 13.

In the two cases construing our exemption clause as to farm labor this court has apparently placed greater emphasis upon the nature and character of the employer's business than the character of the particular task performed by the employee at the time of injury. In *Gwin* v. *J. W. Vestal & Sons,* 205 Ark. 742, 170 S. W. 2d 598, a divided court held that a nightwatchman employed by a nursery to patrol and keep a constant temperature in the greenhouses was engaged in "agricultural farm labor" within the meaning of the Act. It was pointed out that claimant's employment was a necessary one in the employer's business of "floriculture or horticulture, which are embraced in the term agriculture." In *Great American Indemnity Co.* v. *Bailey,* 221 Ark. 469, 254 S. W. 2d 322, the claimant was employed by an incorporated cleaning establishment to look after horses, do other labor on a farm owned by the company and to work in the cleaning plant during rush hours. In holding that claimant was entitled to compensation benefits for injuries sustained in a fall from a tree while working at the farm, and that he was not an agricultural farm laborer within the meaning of the statute, the majority again stressed the character of the employer's business and the fact that the farm was maintained by the corporation for advertising purposes.

Although no case exactly in point with the facts here has been cited there are several decisions which in-

volve somewhat analogous situations. In *Maryland Casualty Co.* v. *Dobbs,* 128 Tex. 547, 100 S. W. 2d 349, the court held that one who was employed by an independent contractor engaged in the business of spraying citrus trees, but who had nothing else to do with the planting and growing of the trees, was not a "farm laborer" within the exemption clause of the Compensation Act. The court said such employee was too far removed from the tilling of the soil and the cultivation of trees to be a farm laborer within the meaning of the statute. The exemption has been denied in cases where the claimant was an employee of a farmer who engaged in threshing as a business and was injured while going about with the threshing machine. *Skreen* v. *Rauk,* 224 Minn. 96, 27 N. W. 2d 869.[1] The same result was reached where a farmer ground grain for himself and others and the employee claimant was injured while operating the grinder. *Hamilla* v. *Gade,* 278 N. Y. 502, 15 N. E. 2d 438. Other cases to the same effect are: *In Re Boyer,* 65 Ind. App. 408, 117 N. E. 507; *Roush* v. *Heffelbower,* 225 Mich. 664, 196 N. W. 185; *Industrial Commission* v. *Shadowen,* 68 Col. 69, 187 P. 926; *Oliver* v. *Ernst,* 148 Neb. 465, 27 N. W. 2d 622.

In the *Roush* case, *supra,* the court said: "We think that the legislature must have considered a farm laborer as one who is employed to do ordinary farm work, and not one engaged in the special business of going from farm to farm to thresh grain and husk corn with machinery not ordinarily used by farmers." See also, *Britton* v. *Industrial Comm.,* 248 Wis. 549, 22 N. W. 2d 525, where a crop duster employed by an uninsured airport operator was held entitled to recover compensation benefits from his employer but not from a canning company which entered into a contract with the airport operator to dust crops of farmers who had contracts with the canning company.

The employer-appellant is not a farmer but is an independent contractor engaged in the highly specialized and hazardous business of spraying and dusting crops

[1] Contra: *Cook* v. *Massey,* 38 Idaho 264, 220 P. 1088, 35 A. L. R. 200.

and other vegetation by plane. Appellee is a licensed commercial flyer with long experience as a "duster pilot," an occupation that could scarcely be classified as ordinary farm work. A direction for the performance of such a task by the ordinary agricultural laborer would doubtless come as a distinct shock. The fact that appellant's chief customer is the farmer upon whose farm the work is usually performed does not make the employment "agricultural farm labor" within the meaning of our statute. A different result might follow if appellee had been employed by the farmer who owned his own plane. The circuit court correctly determined that appellee was not engaged in an employment in "agricultural farm labor" at the time of his injury, and the judgment is affirmed.

[redacted]

WHITE *v.* AVERY.

5-1173 295 S. W. 2d 365

Opinion delivered November 12, 1956.

[redacted]

S. E. Gilliam and *Melvin E. Mayfield,* for appellant.

G. E. Snuggs, for appellee.

MINOR W. MILLWEE, Associate Justice. In advance of a submission of this case for a decision on its merits, appellees have filed a motion for a rule on the clerk to require him to docket and file their cross-appeal.

Section 2 of Act 555 of 1953 (Ark. Stats., Sec. 27-2106.1) provides that any party to an action may appeal by filing a notice of appeal within thirty days from the entry of the judgment or decree. In *General Box Co.*

v. *Scurlock, Comm. of Rev.,* 223 Ark. 967, 271 S. W. 2d 40, we held that the filing of a notice of appeal within the thirty days is a jurisdictional prerequisite to the perfection of a cross-appeal.

The question here is: If the last day of the thirty-day period for filing the notice of appeal falls on Sunday, may a party file the notice on the following Monday?

In *McNutt* v. *State,* 163 Ark. 122, 258 S. W. 1, this court had under consideration Ark. Stats., Sec. 43-2732, which provides that the transcript on appeal in misdemeanor cases may be lodged in this court within sixty days after the judgment. The court held that, in order to facilitate and not impede the constitutional right of appeal, a liberal rather than a rigorous rule should be applied by allowing the transcript to be filed on the following Monday when the last of the sixty days falls on Sunday. Speaking for the majority, Judge Hart said: "The Legislature will be presumed to have considered that Sunday is *dies non* in regard to judicial proceedings, and, in fixing a short time for appealing, to have considered that, in the computation of the time when the last day for filing the transcript falls on Sunday, it may be done on the next day. Some courts have expressly held that whenever, by rule of the court or an act of the Legislature, a given number of days is allowed to do an act, or it is said that an act may be done within a given number of days, the day in which the rule is taken or the decision is made is excluded, and if one or more Sundays occur within the time, they are counted, unless the last day falls on Sunday, in which case the act may be done on the next day. (Citing cases)."

A different conclusion was reached in *Clark* v. *American Exchange Trust Co.,* 189 Ark. 717, 74 S. W. 2d 974, where the statute in question provided a period of six months for lodging appeals in this court. In dismissing the appeal as filed too late where it was lodged on Monday following the last day of the six-months period, which fell on Sunday, the majority said: "The view here expressed does not conflict with the opinion of this

court in *McNutt* v. *State,* 163 Ark. 122, 258 S. W. 1. In the case last cited we were dealing with a statute which required an act to be done within a certain number of days, whereas the statute here under consideration requires the act to be done within a certain number of months, and this marks the difference in construction and interpretation as determined by practically all, if not all, the courts."

We are convinced of the soundness and justice of the rule announced in *McNutt* v. *State, supra,* as applied to the facts in the instant case. To require the notice of appeal to be filed on Saturday preceding the last day of the thirty-day period when that day falls on Sunday would be tantamount to requiring the notice to be filed within 29 days instead of thirty days as specified in the statute. Hence we conclude that the legislative intent was to exclude Sunday when the last day of the period fell on that day and to allow the notice to be filed the following Monday.

The clerk is, therefore, directed to file and docket appellees' cross-appeal. Appellants' motion to dismiss the cross-appeal on another ground is passed until the case is heard on its merits.

COCA-COLA BOTTLING COMPANY OF SOUTHEAST ARKANSAS *v.* JONES.

5-1027 295 S. W. 2d 321

Opinion delivered November 12, 1956.

Thomas E. Sparks, for appellant.

Arvin A. Ross, John R. Wood, L. Weems Trussell and *Nona L. Trussell,* for appellee.

George Rose Smith, J. This is an action by the appellee, who operates a small grocery at Dalark, to recover for personal injuries sustained when a bottle of Coca-Cola exploded just after he had placed it in an electric cooler. The jury fixed the plaintiff's damages at $4,500. It is contended by the appellant that the court erred in its instructions to the jury and that the verdict is excessive.

In defining the doctrine of *res ipsa loquitur* the court below gave verbatim the charge that was quoted as Instruction No. 3 in the opinion in *Coca-Cola Bottling Co. of Helena* v. *Mattice,* 219 Ark. 428, 243 S. W. 2d 15, 29 A. L. R. 2d 1379. This instruction tells the jury that the happening of the explosion is *prima facie* evidence of negligence "and shifts to the defendant the burden of proving that it was not caused by the negligence of the defendant." Although the instruction was approved in the *Mattice* case the appellant insists that the court's language was *dictum* and should be overruled.

Our former approval of this instruction was not mere *dictum.* The *Mattice* case was being remanded for a new trial on account of an error in another instruction, and it was therefore necessary to determine whether Instruction No. 3 might properly be given upon a retrial.

It was contended there, as it is here, that the jury should be told in so many words that the plaintiff's evidence shifts to the defendant only the burden of going forward with the evidence, as distinguished from the burden of proof in the whole case. We examined this issue in detail and, adhering to our prior decisions, held that the instruction in question does not cast on the defendant the burden of proving its freedom from negligence by a preponderance of all the evidence. We still consider that conclusion to be correct.

The appellant made a general objection to the trial court's instruction on the measure of damages. It is now insisted that the charge is inherently erroneous in permitting the plaintiff to recover "the damages which he may have sustained on account of the loss of net remuneration or earnings from his business . . ." The appellant argues that net remuneration must be taken to mean net profits; authority is then cited to show that lost profits are often not recoverable in personal injury cases.

We do not find the instruction to be inherently wrong, either upon this ground or upon two lesser grounds that are suggested in the appellant's brief. The plaintiff, who owned and conducted his own business, was incapacitated for several weeks by his injuries. His absence from the grocery store involved a financial loss that the jury were entitled to consider. Various phrases have been used to describe the compensable loss sustained when a self-employed person is disabled. We have said that "profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner." *St. Louis, I. M. & S. Ry. Co.* v. *Eichelman,* 118 Ark. 36, 175 S. W. 388. Much to the same effect is the statement that the damages are to be measured by the value of the proprietor's services during the period of his injury. Rest., Torts, § 924, Comment *c*; see also Damages 1935-1947, 61 Harv. L. Rev. 113, 164. In the case at bar the plaintiff did not attempt to prove a loss of profits in dollars and cents;

he merely established the length of time that he was kept away from his business. If the defendant believed that this element of damage could have been more accurately expressed by some language other than the court's reference to the loss of net remuneration or earnings from the business, the improved wording should have been offered in the form of a specific objection to the charge.

The amount of the award is not demonstrably excessive. The explosion threw shattered glass into the plaintiff's face and almost destroyed the sight of his left eye. He was confined to a hospital for five days and to his bed at home for another three weeks. The injury required a dozen trips to Little Rock for treatment and the wearing of a bandage for two months. At the time of the trial the plaintiff still suffered pain in the afflicted eye. An ophthalmologist testified that the vision in that eye is 20/260, which means that the appellee can see at a distance of 20 feet only what a person of normal vision can see at 260 feet. This physician says that the impairment is permanent and cannot be corrected by the use of glasses. In these circumstances an award of $4,500 is not unduly liberal.

Affirmed.

LIPSCOMB *v.* LIPSCOMB.

5-1080 295 S. W. 2d 335

Opinion delivered November 12, 1956.

Coleman & Mayes and *Barber, Henry & Thurman,* for appellant.

Cecil Grooms, for appellee.

George Rose Smith, J. In the court below the appellee was granted a divorce from her husband upon the ground of personal indignities. The decisive question presented by the appeal is whether the plaintiff's proof is sufficient to establish her cause of action.

The couple were married in 1936 and lived together until July of 1955. They have no children. There is no reason to believe that Mrs. Lipscomb ever gave serious consideration to the institution of a suit for divorce during the nineteen years that she lived with her husband. In her testimony, which is corroborated only sketchily, Mrs. Lipscomb describes a few quarrels of the kind that not infrequently occur between husbands and wives. There is no suggestion of physical violence on the part of Lipscomb, who seems at the worst to have been somewhat sullen on a number of occasions. Lipscomb earned a substantial income as a public accountant and provided a good home for his wife in Paragould. He also maintains a home for her parents in Little Rock, on which they make only the mortgage payments. It is evident that Mrs. Lipscomb is of nervous temperament; she suffered a mental breakdown in 1953 and was confined to the State Hospital for several months. This affliction, however, is not shown to have been the result of marital difficulties; rather, it seems to be a family weakness, as Mrs. Lipscomb's sister and younger brother have had similar experiences.

The parties' separation came about as the result of a visit which Mrs. Lipscomb paid to her sister, Edna McLaughlin, in Gardiner, Maine. In connection with this visit Lipscomb drove his wife as far as St. Louis, where they bought furniture for their home in Paragould.

After spending two days in St. Louis with her husband Mrs. Lipscomb went to Maine to visit the McLaughlins. In the early part of that visit she talked with her husband by telephone from time to time and received a birthday present from him.

Later on, however, Mrs. Lipscomb's brother-in-law made statements to her which undoubtedly led to the filing of this suit. Dr. McLaughlin told Mrs. Lipscomb that in December of 1953, and again in October of 1954, Lipscomb had discussed with him an affair that Lipscomb was having with a young girl in Paragould. According to McLaughlin, Lipscomb displayed a number of pictures that he had taken of this girl in the nude. McLaughlin's testimony is wholly uncorroborated and is denied by the appellant.

After receiving these disclosures Mrs. Lipscomb returned to Paragould without letting her husband know that she was coming. There she broke into the family home, gathered up her clothes, and went to live with her parents in Little Rock. She refuses to consider the possibility of a reconciliation or even to discuss the matter with her husband. The chancellor postponed the decision of the case in the hope of saving the marriage, but when that effort failed he granted the divorce upon the ground of personal indignities.

In our opinion the proof falls short of establishing a ground for divorce. The suspicion of adultery may be laid aside at the outset. That is not the ground alleged in the complaint, nor is that cause of action supported by the proof. Even if McLaughlin's testimony is accepted at face value it shows only an uncorroborated admission by a party to the suit — testimony upon which a divorce cannot be granted. *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098.

On the issue of indignities the statute requires that the offending spouse's conduct must have rendered the other's condition intolerable. Ark. Stats. 1947, § 34-1202. In retrospect Mrs. Lipscomb complains of various small grievances in the course of her married life, but there is no reason to think that the appellee found these

matters to be beyond her tolerance at the time. To the contrary, she accepted them without complaint and had no notion of a divorce when she left for the visit with her sister. It may be true, as the chancellor evidently believed, that the parties are not likely to live together again, despite the appellant's hopes of bringing about a reunion. But, as we pointed out in *Davis* v. *Davis,* 163 Ark. 263, 259 S. W. 751, such a situation does not warrant the granting of a divorce in the absence of proof that a statutory ground therefor exists.

Reversed and dismissed.

KAROLEY *v.* REID.

5-1076 295 S. W. 2d 767

Opinion delivered November 12, 1956.

[Rehearing denied December 17, 1956.]

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

Bailey, Warren & Bullion, for appellee.

PAUL WARD, Associate Justice. This is an appeal from an Order by the Pulaski Chancery Court, First Division, refusing to modify or change its former decree.

These same parties and subject matter were before this court in the case of *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322. Since all of the factual background is set forth in that case it will suffice here to make only a brief outline statement.

In the former opinion we held that the contract between the parties hereto (which contract is set out in full in that opinion) was valid and remanded the case

for further proceedings. In the original complaint Mrs. Karoley alleged that there was $3,000 due in back payments under the terms of the contract. Upon remand the case was retried upon the original complaint except that it was amended to show that there was $8,500 due on back payments.

Upon remand a hearing was held before the original chancellor. At the conclusion of this hearing on May 27, 1955 judgment was rendered in favor of appellant in the amount prayed for. This judgment, which appears in the record, contains, among other things, this finding by the chancellor; "that the relief prayed for by the plaintiff (appellant here) should be granted." Following the above, in the mandatory portion, the court gave appellant judgment for $8,500 together with interest thereon.

On September 12, 1955 appellant filed a motion before the chancellor who succeeded the original chancellor to reform the judgment entered on May 27th, in which motion she sought to have a judgment for specific performance. This motion was overruled on March 6, 1956 and appellant prosecutes this appeal.

It is our conclusion that the chancellor was correct in overruling appellant's motion to reform the judgment rendered on May 27, 1955. We have examined the complaint referred to above and it shows conclusively not to be a suit for specific performance, but only a suit to recover the back payments under the contract. The only statement which in any way referred to specific performance is in the prayer which reads as follows:

"Wherefore, plaintiff prays that the defendant be required to pay to the plaintiff any and all monies due pursuant to the terms of said contract and that the terms of said contract be, in all things, enforced specifically by this court; for costs and all proper relief."

Therefore the body of the complaint did not state a cause of action for specific performance, and the prayer did not supply the deficiency. In the case of *Hancock* v. *Simmons,* 223 Ark. 285 (at page 286), 265 S. W. 2d 537, we quoted with approval from a former decision of

this court the following: "We have held that the statement of facts in a complaint or cross-complaint, and not the prayer for relief, constitutes the cause of action."

Affirmed.

CY CARNEY APPLIANCE COMPANY, INC. *v.* TRUE.

5-1028 295 S. W. 2d 768

Opinion delivered November 12, 1956.

[Rehearing denied December 17, 1956.]

Little & Enfield and *Pearson & Pearson,* for appellant.

Vol T. Lindsey, for appellee.

PAUL WARD, Associate Justice. On September 29, 1953 appellees' dwelling and the contents thereof were destroyed and a number of shade trees were destroyed or damaged by fire. Appellees filed a suit against appellant, the Cy Carney Appliance Co., alleging the fire was caused by the negligence of Virgil Blakely, a company employee, in filling a butane gas tank near their home, causing the alleged destruction and damage in the total amount of $13,394.33. A jury verdict was returned in favor of appellees in the amount sued for, and this appeal follows.

For a reversal, appellant relies on four alleged errors committed by the court during the trial, and also on the ground that the testimony does not show proximate cause of the fire or negligence on the part of appellant or its agent. We will consider these five assignments of errors in the order they are presented to us.

1. Appellees' testimony shows that part of personal property consisted of certain articles which they had bought for their two minor children, such as a basketball, a baseball, bat, and glove. Mr. True, in speaking about an item of $750 for clothing, dresses, coats, hats, suits, and dress material, stated that some of it belonged to the boys. It is not denied that appellees bought and paid for all such articles.

It is contended by appellant that, since the boys were not made parties to the suit through a guardian or next friend (as provided in Ark. Stats. § 27-823) there could be no recovery for the articles in question. We do not agree with this contention. The parents were in fact the owners of these articles. They possessed all the incidents of ownership — they paid for them, they could have taken them away from the boys, and they could have sold them. While our attention has not been called to any decisions of this court announcing the above view, we do find such decisions from other courts. In *Semple School for Girls* v. *Yielding,* 16 Ala. App. 584, 80 So. 158, it was held that articles given to children by parents for support and maintenance remain the parents' property, though the children may have them in possession and may have a special property in them as to all the world except the parents. In *Dickinson* v. *Winchester,* 58 Mass. 114, 50 Am. Dec. 760, it was held that clothing purchased by a father for a minor son belongs to the father, and he may recover for its loss, unless it appears to have been absolutely given to the son, or unless the son has been emancipated. In Tiffany on Domestic relations—Sec. 140 page 386, it says that what is given to a child by his parents in the way of support and maintenance, and for the purpose of education, as clothing, school books, etc. belongs to the parent, and he may reclaim it, or recover damages for its injury.

2. While Mr. True was being cross-examined as to the value of his personal property he was asked: "Q. I will ask you whether or not you and your wife assessed that personal property in January, 1953 or immediately subsequent thereto?" His answer was: "Yes, Sir." When he was asked for the amount of the assessment, appellee objected and the court sustained the objection. This is assigned as error.

While we agree that this elicited information was, under the circumstances, admissible in evidence, yet we think no prejudice or reversible error appears, because appellant did not show what the answer would have been or what the assessment records would reveal. It

was so held in *Tidwell* v. *Southern Engine and Boiler Works,* 87 Ark. 52, 112 S. W. 152 where the court said: "It is not shown in record what the answers of appellant, as a witness in his own behalf, to the excluded question would have been. Therefore, no prejudice appears in the exclusion." A similar situation was presented in *City of Prescott* v. *Williamson,* 108 Ark. 500, 158 S. W. 770, and was disposed of in these words:

"It is not shown what the answers of any of the witnesses to any of these questions would have been. The appellant nowhere stated what it expected to prove by either of them. Conceding without deciding that the questions were proper, and that the answers thereto would have been competent testimony, we are not able to say that any prejudicial error was committed in refusing to allow the witnesses to answer them since the record does not disclose what their answers would have been."

3. Appellant objects to the rule (applied by the trial court) for the measure of damages as pertaining to *trees* and the *house,* and to Instruction No. 8.

Trees. The testimony of appellees was that valuable shade trees were destroyed, and that the market value of the farm, after the fire was $1,000 less than it was immediately before the fire because of said loss. The court instructed the jury that this was the proper measure of damages, and the court was correct. It was expressly so held in *St. Louis, Iron Mountain and Southern Railway Company* v. *Ayres,* 67 Ark. 371, 55 S. W. 159. At page 374 of the Arkansas Reports, this Court stated:

"As to the measure of damages for the destruction of the trees on the land by reason of the fire, we think the fifth instruction by the court announced the proper measure; that is, that the measure was the difference between the value of the land with the trees unburned and with the trees burned. This means the market value of the land. The trees were a part of the freehold, and could not be replaced in a short time, and only at considerable expense. *Coykendall* v. *Denkee,* 13 Hun, 260.

The destruction of the trees was a depreciation in the value of the land of which they were part, and it was competent to show by evidence what the land was worth before the destruction of the trees, and what it was worth after they were destroyed; and, this being shown, the *quantum* of damage was a matter of computation for the jury. 3. Sutherland on Damages, 612; *Coykendall* v. *Denkee,* 13 Hun, 260; *Railway Co.* v. *Combs,* 51 Ark. 324."

The same rule, as to the destruction of trees, was announced in *Bush, Receiver St. Louis, Iron Mountain and Southern Railway Company* v. *Taylor,* 130 Ark. 522, 197 S. W. 1172; and in the cases cited therein.

House. Appellees offered certain testimony, and apparently would have offered more had appellant not objected, to show the construction, size, condition and value of the house before it was destroyed. Appellant says this testimony was inadmissible, but we do not agree for the reasons set out below.

Instruction No. 8. In paragraph "B" of this instruction the court gave as the measure of damages (for loss of the house) the "cost to restore the dwelling house to its original condition, that is to say the cost of replacement." By "original condition" we take it that the court meant the condition it was in immediately before the fire, and will so consider it since no specific objection is made on that point.

Appellant's contention is that the instruction is erroneous, and that the true measure of damages is the difference between the market value of the farm (with the house on it) just before the fire and the market value just after the fire, considering loss of house only. We have given careful consideration to appellant's contention and to many of our decisions relating thereto, and, although there is a lack of a clearly defined distinction regarding the applicable rule in some instances, we cannot say the trial court's instruction here was wrong. In fact it appears to be the approved rule. The opinion in the *Bush* case, *supra,* discusses and defines the difference between the rule for the measure of damages for the loss of trees and for the loss of a house. In substance,

this case holds that if the value of the property destroyed depends upon its connection with the soil (as in the case of shade trees for instance) the measure of damages is the difference in the market value of the land before and after destruction, but, if the property destroyed can be replaced in substantially the same condition it was immediately before destruction, (as in the case of a house) then the measure of damages is the cost of replacement.

The *Bush* opinion was cited and followed in *Missouri Pacific Railroad Company* v. *Wood,* 165 Ark. 240, 263 S. W. 964. We think the rule announced in the *Bush* case is sound, although, as recognized in that opinion, its application may sometimes be difficult. We do not say at this time that the "before and after" rule should never, under any circumstances, apply to the destruction of a house or building, but we do hold it does not apply here under the facts of this case.

4. We do not agree with appellant that appellees' requested instruction No. 7 is in conflict with his own requested instruction No. 7. To understand appellant's objection in this matter it is necessary to briefly set forth these undisputed facts: Appellant's alleged negligence consisted in overfilling the small storage tank; This tank had on it two gauges — one called the "percentage gauge" primarily to show the owner (True) when it needed filling, and the other was called an "outage gauge" which allowed the fluid to run out of a very small tube when the tank was approximately 85% full, and was to be used by the filler of the tank as a matter of safety, and the percentage gauge was out of order at the time the tank was filled on this occasion.

In appellant's instruction the court told the jury appellee had not proven that the failure to repair the percentage gauge was the proximate cause of the fire. In appellees' instruction the court told the jury, in effect, that it could predicate negligence on appellant's act in filling the propane gas tank of the plaintiffs' too full with liquefied petroleum gas, over and above its normal and safe operating capacity. To this instruction, appel-

lant imposed a general objection. It clearly appears to us that the two instructions are not conflicting.

5. *Sufficiency of the evidence.* Finally it is earnestly and ably contended that the judgment of the trial court should be reversed and the cause dismissed because there is no evidence of negligence or proximate cause, but again we cannot agree.

Most of the evidence, except that relating to the cause of the fire, is undisputed.

Appellees lived on a farm in Benton County. Propane gas was used for heating and cooking. The gas was stored in two tanks near the dwelling — one tank had a capacity of 460 gallons and the other 1,000 gallons, each provided with two gauges as before stated. The percentage gauge on the small tank had been out of order for several days or weeks, and Mr. True had made this fact known to Bradley (the agent of appellant) and he said he told Bradley not to put any more gas in the small tank until the percentage gauge had been fixed. On August 28, 1953 (the day before the fire), however, some one (presumably Mrs. True) asked appellant to deliver gas to appellees' home. The next day about 10:00 A. M. Bradley, unlicensed to handle propane gas but an employee of appellant for 2 or 3 years in different capacities, arrived at appellees' home, in the absence of Mr. True, with the gas truck. He first put gas in the small tank and then in the large tank — a total of 542 gallons. Mr. True arrived before the large tank had been filled, and by about 11:30 A. M. Bradley had completed the filling operation.

At about 3:15 that afternoon Mrs. True lighted the oven in the kitchen stove and one burner on top, preparatory to baking a cake. Some 30 or 40 minutes later, while Mrs. True was standing in the kitchen door she saw a flame shoot out of the hole where the oven control had been located and from the top burner. Immediately the kitchen was afire and the whole house and contents were destroyed. It is not denied that normally there is only about 7 ounces of pressure in the feeder lines to the stoves and that such pressure was not suffi-

cient to cause the flames to shoot out in the manner above mentioned. Although the pressure in the storage tanks may be as great as 150 to 200 pounds, the pressure in the feeder lines ordinarily remains at approximately 7 ounces, because each storage tank is equipped with a regulator which reduces the pressure. There was nothing suggested that could have caused the flames to shoot out as they did here except excess pressure in the feeder lines.

It is the theory of appellees that Bradley must have filled the small tank too full, and that this caused the pressure in the feeder lines, while appellant contends that, because of the regulator, overfilling could not cause extra pressure in the feeder lines. The regulator was removed shortly after the fire, and an examination later by a state inspector showed that it was in no way out of order, and this testimony is not contradicted.

On the other hand, it is the contention of appellees that overfilling the tank with propane gas under pressure (as it is always necessarily done) will cause the fluid or gas to come in contact with the regulator in such a way as to, in turn, cause the regulator to "freeze," allowing the gas and pressure to extend into the feeder lines. Several experienced propane gas dealers testified to the above effect. This testimony, we think, constitutes substantial evidence to support the jury's finding.

The testimony on both sides relative to the proper handling of propane gas and as to the efficiency of the regulator to control pressure in the feeder line is voluminous and need not to be set out at length because a short resume will suffice to show that the jury's verdict is sustained by substantial evidence. For appellant, the Chief Technicians for the Boiler Inspection department of the Labor Department of Arkansas testified at great length as a specialist. The substance of his testimony was that the regulator was (when he examined it) in good condition, and that it would protect the pressure in the feeder lines in all events — even if the storage tank was filled completely. On the other hand it appears uncontradicted that safe practice required that the tank

should not be filled to more than about 85% capacity, and further that the purpose of the out gauge was to insure against doing so. On behalf of appellees, the following testimony was introduced: Mr. Chastain, a propane dealer, stated that he examined the small tank after the fire and it was too full, and that when the liquid is too high in the tank it will get into the feeder lines. Mr. Hugh Anderson, experienced in handling propane gas, said a tank could be filled to a point above the out gauge level to where the liquid could pass into the feeder lines, and that if the regulator "freezes" over from whatever cause the liquid and gas will go into the feeder lines and raise the pressure to that of the tank. Mr. Charles Gorum, with eleven years in the propane gas business, testified at great length, corroborating the witnesses previously named. It was up to the jury to believe that overfilling could not possibly cause extra pressure in the feeder lines as indicated by appellant's expert testimony, or to believe that it could as stated by appellees' witnesses.

Affirmed.

IRBY *v.* IRBY.

5-1036 295 S. W. 2d 634

Opinion delivered November 12, 1956.

[Rehearing denied December 10, 1956.]

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

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

SAM ROBINSON, Associate Justice. There are two points here. First, there is the question of whether an instrument which appears to be a deed on its face is, in fact, a mortgage. And second, if the instrument is a deed, as it appears to be, has the grantor reacquired the property by adverse possession?

The appellant, W. W. Irby, and the appellee, F. L. Irby, are brothers. We will hereafter refer to appellant as Walter and to appellee as Frank. They live in Union County. Frank is a doctor and Walter is a small farmer. Walter owned a 220 acre farm on which he cultivated about 67 acres. In 1923, a mortgage on the farm had matured, and the bank was threatening foreclosure. Walter gave to Frank what appears on its face to be a deed. In 1954, Walter filed this suit to quiet title in him, contending that the instrument he executed and delivered to Frank in 1923 is, in fact, a mortgage, and also claiming the property by adverse possession. There was a decree in favor of Frank, and Walter has appealed. There is no serious controversy between the parties as to the law. Both sides recognize that, to prove an instrument which appears on its face to be a deed is, in fact, a mortgage, the evidence must be clear, cogent and convincing. *Burns* v. *Fielder,* 197 Ark. 85, 122 S. W. 2d 160. *Grimes* v. *Evans,* 225 Ark. 770, 285 S. W. 2d 510.

Walter contends that in 1923, when the debt to the bank in the sum of $2,260.62 became due, the property was worth more than the indebtedness, and that he had made arrangements with another bank to refinance the loan, but that Frank stepped into the picture and agreed

that he would advance the money to pay off the bank, and charge no interest; that pursuant to this agreement Frank paid the bank and Walter gave to Frank the instrument which appears to be a deed, but which Walter contends is a mortgage. Walter also maintains that he was to repay Frank on or before some time in 1928, and, as evidence of the agreement that Frank would reconvey the property to Walter upon payment of the debt, Frank executed and delivered a "bond for title," which provided for a reconveyance of the property when the debt was paid; that later, the bond for title was destroyed when the house burned. Walter further contends that, in any event, since the year 1938 he has held the property by adverse possession and has acquired title in that manner.

Frank contends that in 1923 his father approached him with the proposition of paying the bank and taking up the mortgage to prevent a foreclosure; that the property was not worth more than the amount owed on it; that he refused to go along on that proposition but, later, he did agree to buy the property outright and let Walter and his family continue to live there until such time as Frank might decide to sell the place. He says the instrument in question is what it purports to be — a straight-out warranty deed with no strings attached — and that he executed no bond for title. Frank further says that at no time since he purchased the property has it been called to his attention that Walter claimed to own the place.

The record consists of over 480 pages and it would be impractical here to abstract all of the testimony. Frank and Walter testified, as above indicated. In addition, Walter stoutly maintains that his use of the property has been such as to be wholly inconsistent with anything other than ownership and is, therefore, strong circumstantial evidence corroborating his version of the transaction. His former wife corroborates him in saying that Frank executed a bond for title, however, she says that there was no due date of any money owed, whereas Walter says the bond for title provided the debt was to be paid by 1928. In addition, Walter pro-

duced evidence to the effect that he has rented some of the land to others. But, it is not uncommon for a tenant to sublet farming land. He produced evidence of the fact that on numerous occasions he sold timber from the land, but Frank testified that on one occasion Walter sold timber from the land in the sum of $1,108 and spent the money; and, since he could not deliver title to the timber, Frank had to go to his rescue and repay the $1,108 to the lumber company. Walter testified that he executed a lease to Calgo Oil Company and took a draft to pay Frank, but that the deal failed because Frank would not accept the money. But this testimony does not appear to corroborate Walter, for if Frank held only a mortgage Walter could have compelled him to accept the money. The house on the property was destroyed by fire and Walter, with the help of his neighbors, rebuilt it; but Frank furnished the material. Walter built fences and a small barn; he also constructed a water pond, but he used the property for many years without the payment of anything, even the taxes. There is conflict in the testimony as to who paid the taxes on the property for the first two years after the transaction between the parties, but there is no dispute about the fact that subsequent to the two year period Frank paid the taxes; this was for a period of about thirty years. Walter places great emphasis on the fact that in 1926 he executed a right-of-way deed to the Magnolia Pipe Line Company; but it is shown that Frank had no knowledge that such a deed had been executed until 1938, at which time the matter was taken up with Walter and he executed a disclaimer, or quittance, of any interest in the property.

Walter testified that in 1928 he had an opportunity to sell the timber for $2,800, which would have enabled him to pay the alleged mortgage, but that Frank talked him out of making the sale because the timber was worth more. Walter says that on another occasion he had an opportunity to get $26,000 for an oil and gas lease, but that Frank took over the negotiations and agreed that if he failed to consummate the lease he would pay to Walter $1,500. No lease was effected; Frank did not pay $1,500,

and Walter took no action. Walter says on another occasion he had a deal whereby he was to get $60,000 for a lease; that the $60,000 was put in escrow but Frank would not sign a quitclaim deed and hence the deal fell through. Again, Walter took no action to compel Frank to accept payment of the alleged mortgage indebtedness. Walter testified that on another occasion he was offered $500 per acre for the land; this would have amounted to $110,000, and Frank offered to sign a deed for $7,500, but when arrangement was made to pay the $7,500, Frank refused it. Walter took no action to compel Frank to accept payment of the alleged debt. Next, Walter says Frank offered to give a deed for the consideration of $1,000 per acre, but when an offer of $1,000 per acre was made — a total of $220,000 — Frank would not go through with the deal; and yet Walter did nothing to compel the acceptance of payment of the alleged mortgage, or to establish his alleged title until years later, after oil was discovered on the property. During all the time these alleged offers were made, Walter was a poor man in bad financial circumstances. If he testified truthfully about the alleged offers, the fact that he took no action to compel Frank to convey the property is entirely convincing that he knew Frank owned the property and could not be compelled to convey it. On the other hand, if Walter falsified about such alleged offers, his entire testimony is discredited, and it cannot be said he has proved his case by clear, cogent and convincing evidence. When Frank received the deed in 1923, he promptly recorded it, and thereafter he was the record owner. He states, however, that no one approached him about a lease until the year 1954, when he executed a lease to the Lawton Oil Company.

As to the point on adverse possession: Since it is being held that Walter is a grantor in possession, notice of the hostility of his claim must have been given to Frank before Walter could prevail on that point. "Where a vendor, after having executed a deed, remains in possession of the premises conveyed, he is presumed to hold in subordination to the title conveyed, unless there is affirmative evidence of a contrary intention;

and, where his occupancy and use are not manifestly inconsistent with the right of his grantee, notice of the hostility of his claim must in some way be brought home to his grantee before the statute of limitations will begin to run." *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541. "The rule is well established that 'retention of the possession of vendors after the execution and delivery of a deed is presumed to be in subordination of the title conveyed and the statute of limitations will not begin to run until notice of the hostility of their claim is actually given to the grantee.' " *Franklin* v. *Hempstead County Hunting Club,* 216 Ark. 927, 228 S. W. 2d 65.

The evidence is convincing that the only notice Frank ever had that Walter might be claiming to be the owner was in 1938. At that time, Frank was having the abstract examined with the view of negotiating an oil and gas lease. The abstract revealed that in 1926 Walter had given a right-of-way deed to the Magnolia Pipe Line Company. Walter was contacted about the matter; he went to the office of Frank's attorney and executed a disclaimer of any interest in the property. In the face of such circumstances it cannot be said that Walter was holding the property adversely. It does not appear that subsequent to the execution of the disclaimer Frank received any notice of adverse holding on the part of Walter.

Affirmed.

The Chief Justice and Justice MILLWEE dissent; Justice McFADDIN concurs.

SHEPHERD, ET UX. *v.* ADAMS.

5-1071 295 S. W. 2d 356

Opinion delivered November 19, 1956.

McMillan & McMillan, for appellant.

G. W. Lookadoo, for appellee.

LEE SEAMSTER, Chief Justice. This is an appeal by appellants from a decree of the Clark Chancery Court. The appellee has filed a motion to dismiss the appeal due to the fact that the record, on appeal, was not filed in the time required by law. The case has been fully briefed on both its merits and on the motion to dismiss.

The decree was rendered on January 18, 1956, and was filed with the Chancery Clerk on January 23, 1956. The notice of appeal was filed by appellants on February 6, 1956.

On March 22, 1956, appellants filed a petition with the trial court asking for an extension of time (until August 17, 1956) in which to file and docket the appeal. The court made an order, "That the time for filing and docketing the appeal in this cause be extended until four months from the date of the entry of the judgment or decree, towit: May 17, 1956." This order was filed with the clerk on March 22, 1956. The appellants filed the record with the clerk of this court on May 28, 1956.

Upon appellants' petition of June 5, 1956, the trial court granted an Order Nunc-Pro-Tunc for additional time in which to file and docket the appeal. The original order, made on March 22, 1956, specified an extension until four months from the date of the entry of the judg-

ment or decree, towit: May 17, 1956. The Order Nunc-Pro-Tunc changed this to read "that the time for filing and docketing the appeal in this cause be extended until four months from the date of the filing of the notice of the appeal, towit: until June 5, 1956."

This case is governed by the rule handed down in *West* v. *Smith,* 224 Ark. 651, 278 S. W. 2d 126 and *Southwest Casualty Insurance Company* v. *Wesson,* 226 Ark. 16, 287 S. W. 2d 575.

The substance of the holdings in the above cases, as applied to the facts in the instant case is to the effect that the trial court, on its motion, or on the petition of the party interested, may extend the time for filing the record and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or extended by a previous order.

The time fixed by the original order in this case had expired before the Nunc-Pro-Tunc Order of June 5, 1956, was granted. To be effective and in order to comply with the above decisions, the June 5, 1956 order should have been issued before May 17, 1956, the last date of the original extension.

The purpose of a Nunc-Pro-Tunc Order is to make the record reflect the transaction which actually occurred and which is not reflected by the record because of inadvertence or mistake. Its province cannot be extended to make the record show what ought to have been done. *St. Louis-San Francisco Railroad Company* v. *Hovley,* 196 Ark. 775, 120 S. W. 2d 14, and cases there cited.

A nunc-pro-tunc order cannot be used, under the circumstances appearing in this case, to extend the time for perfecting an appeal, if the time limitation has expired as herein stated. In the case of *West* v. *Smith, supra,* this Court said:

"The prevailing litigant in any case is entitled to know when the judgment becomes final. If the Trial

Court has fixed a time for the filing of the record on appeal and that time has expired then the prevailing litigant should be allowed to presume that the judgment is final in the absence of great unavoidable casualty. If four days after the time has expired the Trial Court can then grant a further extension, then three months after the time has expired the Trial Court can grant an extension; and no judgment would ever be final until seven months from the date of rendition in the Trial Court. That was not the purpose of the law; and in the interest of finality this Court should not exercise its inherent powers except in a most extraordinary situation."

The appeal is dismissed.

TERRY, ADMX. *v.* BURKS.

5-1077 295 S. W. 2d 354

Opinion delivered November 19, 1956.

J. B. Milham, for appellant.

Joe W. McCoy, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Curtis Burks, brought this action January 11, 1955, praying that a partnership between him and A. O. Terry (now deceased) be dissolved; that a receiver for the firm's business be appointed, "for settlement and accounting of firm's business and for winding up the partnership and for all proper relief." Appellant filed answer and cross-complaint. Upon a trial the court found: "That

prior to the date of his death the deceased partner, A. O. Terry had withdrawn from the partnership, all of his invested capital and that his net worth in the partnership at that date was a minus $2,561.89. That on the date of his death the said deceased partner, A. O. Terry, owned no rights in the partnership, but in reality the assets were the property of the plaintiff, Curtis Burks. Wherefore, it is ordered, adjudged and decreed that the cross-complaint of the defendant be dismissed, and that the defendant take nothing thereby. That plaintiff is the owner of the assets of said business." This appeal followed. For reversal appellant, in effect, argues that the findings and decree of the chancellor are against the preponderance of the testimony. We do not agree.

Appellant is the widow of A. O. Terry who died intestate December 25, 1954. In January 1954 A. O. Terry became engaged in the feed and fertilizer business in Malvern, and after operating the business until March 16, 1954, he sold a one-half interest to appellee Burks — on an estimated inventory of $4,300 clear of all debts — for a cash consideration of $4,300, thus, was formed a partnership in which each partner owned a one-half interest. Thereafter Terry operated the business until his death and appellant was appointed administratrix of his estate. Burks, as the surviving partner, continued operation of the business until January 1955 when, on his petition, he was appointed receiver of the partnership assets by the Hot Spring Chancery Court and proceeded to wind up the business. On November 10, 1955, appellant was by court order permitted, on her petition, to take her husband's (A. O. Terry) interest in the partnership assets. She took over this interest on December 27, 1954, on this latter date, December 27, 1954, merchandise, cash and assets of the partnership inventoried $24,485.54 and the liabilities approximated $17,-331.24, leaving assets of about $6,423.74. By this original audit and inventory, from the facts and records available at that time, the interest of Burks in the partnership appeared to be $2,713.87 and that of A. O. Terry $713.61. It later developed, however, from the testimony of witnesses at the trial that there were a large number of

undisclosed outstanding debts and claims against the partnership not shown in the first audit and a second or amended audit was made which we think, by a preponderance of the testimony, supports the chancellor's findings that appellant had no interest left in the partnership and was in fact indebted to it. We do not attempt to detail, or set out, the various claims established by the testimony against the partnership. As indicated, following the testimony at the trial, an amended audit was prepared by Mr. Baldridge, an accountant, and quoting from his testimony: "Q. According to your amended audit, what would be Mr. Terry's worth in the partnership? A. He would have nothing if the audit was submitted to the partnership. He owes the partnership $2,561.89. Q. When did you make this audit? A. The original audit was begun on the 27 December, 1954. We made the corrected audit today. We showed an analysis of the partnership in the original audit. Q. Do you also show analysis of the partnership in the amended audit? A. In the supplemental audit, we take the balance showing the partnership net worth in which it shows Curtis Burks $2,713.87 and A. O. Terry $713.61 and by introducing this supplemental audit we take 50% of the $745.-32 and the additional liabilities and make a reduction of each of $2,272.71 and in addition to the groceries and gas bills paid for A. O. Terry leaving $1,014.27 and we add back to the 50% of the over stated charge of taxes of $11.47 to Mr. Burks and $11.48 to Mr. Terry's account, leaving the partnership net worth as of December 27 of $452.63 to Curtis Burks and A. O. Terry deficiency of $2,561.89. Q. The records of the company as of December 27 with correction show that as the worth of the two respective partners as of December 27, 1954? A. That is correct." There was testimony of other witnesses tending to corroborate Mr. Baldridge.

Having concluded that the findings and decree of the chancellor are not against the preponderance of the testimony, the decree must be and is affirmed.

CANADIAN MINING COMPANY *v.* CREEKMORE, ET AL.

5-1053 295 S. W. 2d 357

Opinion delivered November 19, 1956.

Bethel & Pearce and *Lawson Cloninger,* Ft. Smith, for appellant.

Kay Wilson, Jr., and *Hill, Fitzhugh & Brizzolara,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellees, L. B. Creekmore and wife and Claude J. Pierce and wife, filed separate actions against appellant mining company on separate lease contracts on their respective interest in a fifty acre tract of land in Oklahoma. The interest of the Creekmore's was a one-eighth interest and that of the Pierce's a one-sixteenth interest. The Creekmores sought to recover $637, plus $1 a day from November 4, 1955 until judgment, alleged to be due under the terms of the lease contract and the Pierces sought a similar amount under their lease. The trial court consolidated the two suits and by agreement a jury

was waived and trial had before the court which resulted in judgments for appellees for the amounts prayed. There was no testimony introduced at the trial. There were before the court only the pleadings, the lease contracts as exhibits thereto, and concessions of the parties made at a pre-trial conference. The lease contracts involved are identical in material parts. Material provisions were: "1. This lease (Creekmore's) shall be in full force and effect for a term and period of five years from and after the date hereof, and as much longer as coal may be profitably produced, unless terminated sooner under its provisions. 2. Lessee agrees to commence operations on said land within one year from the date hereof, or, in lieu thereof, to pay to lessor annually, on or before the 18 day of August 1954, this operation shall terminate as to both parties unless the lessee on or before that date shall pay or tender to the lessor, . . . the sum of $5.00 per acre or $50.00 ($25.00 in the Pierce's lease) which shall operate as a rental and cover the privilege of deferring the commencement operations for twelve months from said date. In like manner and upon like payment or tenders the commencement of operations may be further deferred for like period of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privileges granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred. 3. Lessee agrees to pay to the lessors upon all coal mined, removed and sold from these premises a royalty of twenty-five cents per ton of 2,000 pounds, . . . provided that minimum royalties which may have been advanced at the rates per acre herein set forth shall be credited on royalty due for coal mined and sold . . . 5 . . . it shall be within the discretion of lessee to determine the rate and extent of production, inasmuch as such operation shall include other lands adjacent to or nearby, and it is agreed hereby that lessee shall not be obligated to maintain any minimum production requirements, or operate continuously once opera-

tions are commenced so long as the advance royalty payments set forth in Clause 2, above, are made . . . 8. In case lessee discontinues operations on the lands under this lease for a period in excess of 60 days consecutively at any one time then said lessee is to pay said lessor L. B. Creekmore ..... $1.00 per day for each and every day in excess of 60 days that operation on said lands are discontinued. Said charges are to cease whenever operations are resumed. 9. The right is hereby conferred upon lessee to cancel this lease upon thirty (30) days' written notice when the operation of removal of coal therefrom shall in his judgment become unprofitable and lessee shall be the sole judge as to when same is unprofitable."

For reversal appellant relies on these points: "1. The lessee was excused by payment of advance rentals under Paragraphs 2 and 5 of the lease from continuous operations. 2. Paragraph 8 of the lease provides for a penalty and is void and unenforceable. 3. Plaintiffs cannot recover because no actual damages were alleged."

The leases here were executed in Oklahoma, therefore, the laws of that state govern their construction. It is undisputed that appellant ceased mining operations on the property involved on December 7, 1953 and thereafter on December 1, 1955, gave notice to appellees canceling both leases. When the separate paragraphs of these lease contracts are considered together, as we must, we have concluded that there are no conflicts in any of their provisions and that they are clear and unambiguous. The primary and decisive question presented is whether Paragraph 8, when considered along with Paragraphs 2 and 5, imposes a penalty against appellant and therefore is void and unenforceable under the Oklahoma laws, or does it provide for liquidated damages or additional rental, which would make it valid, as appellees argue. The laws of Oklahoma provide: "Title 15, Sec. 213. Penalties Void. Penalties imposed by contract for any nonperformance thereof, are void. But this Section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used;

it merely rejects and voids the penal clauses. R. L. 1910, Section 974.

"Title 15, Sec. 214. Attempt to fix damages void except as provided. Every contract, by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section. R. L. 1910, Section 975.

"Title 15, Sec. 215. Amount presumed to be damages, provision for. A stipulation or condition in a contract, providing for the payment of an amount which shall be presumed to be the amount of damage sustained by a breach of such contract, shall be held valid, when from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. R. L. 1910, Section 976."

We hold that the burden was on appellant to show that a penalty was imposed on it by Paragraph 8 above when considered with Paragraphs 2 and 5, and that the $1 per day required to be paid by appellant to appellees for each day in excess of any sixty day period that operations on the land were discontinued was not intended to be and did not amount to liquidated damages or additional rental. We hold that appellant has not met this burden. As indicated, appellant was content to offer no evidence at all on this issue, or in the case. Only a question of law was presented for the court to be determined from the language and subject matter of these lease contracts and the intent of the parties.

Under Paragraph 2, if Paragraph 8 is ignored or unenforceable, then appellant had the right to dig a small amount of coal (or any amount) and thereby tie up the property involved for a period of five years by paying only the rental of $50 per year on the Creekmore lease and $25 per year on the Pierce lease. The trial court might well have found, and evidently did find in effect, that the $1 per day required under Paragraph 8 was no more than at least a part of the royalties to be paid to

appellees for each ton of coal mined under Paragraph 3 by appellant, and which appellees would have received had the mine on the leases been operated, and that this $1 per day bore a fair relation to the damages contemplated for all idle days in excess of 60 when the mine did not operate, and was either liquidated damages actually sustained or rental on the land. Courts abhor penalties.

The Supreme Court of Oklahoma in *Southern Motor Supply Co.* v. *Shelburne Motor Co.,* 172 Okla. 495, 46 Pac. 2d 562, reaffirmed its holding in *McAlester* v. *Williams,* 77 Okla. 65, 186 Pac. 461, wherein it construed the above sections of the Oklahoma statutes and used this language: "The question whether the amount stipulated to be paid upon failure of performance is to be treated as liquidated damages or as a penalty is, in its last analysis, still a question of law for the court, to be determined from the language and subject-matter of the contract, the evident intent of the parties, and all the facts and circumstances under which the contract was made. It would serve no useful purpose to review the numerous decisions of this court relating to this proposition, for, as hereinabove suggested, each case is determinable by the facts involved. The more recent trend of the decisions, however, is well stated in the case of *Larabee Flour Mills Co.* v. *Carignano* (C. C. A.) 49 F. 2d 151, 154: 'Furthermore, there is a distinct trend toward a relaxation of the rules as to liquidated damages. Courts have always abhorred penalties, and have looked closely to see that penalties were not masquerading as liquidated damages. And if the stipulation is in fact a penalty — if it bears no fair relation to the damage contemplated — it will not be enforced, no matter what it may be called. And if there is available an accurate and readily ascertainable method of fixing the damages, courts will assess the damages accordingly. In the complexities of modern business, breaches of contract involve more incidental but real damage than when business was less complicated; in later years, businessmen and associations of businessmen have been more desirous of contracting as to damage, in order that

their liability may be a known rather than unknown quantity. Responding to these changing conditions in the business world, the courts have been much less reluctant than formerly to enforce provisions for liquidated damage.' "

In its earlier opinion above referred to, 186 Pac. 461, the court had this to say in construing these same sections of the Oklahoma statutes: "Where the amount of the damages for the breach of a contract is uncertain and difficult of ascertainment, and the agreement discloses the intention of the parties to fix a sum certain as the liquidated damages, the contract will be enforced. The same rule is stated another way by the Circuit Court of Appeals of the Eighth Circuit in *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota,* 121 Fed. 609, 57 C. C. A. 635, as follows: 'When it is certain that some damages will result from delay in the performance of a contract, when those damages are incapable of exact ascertainment, or are based upon matters that are to a considerable degree uncertain, and when the amount stipulated is not, on the face of the agreement, out of all proportion to the probable loss, a contract to pay a sum certain for each day, week, or other definite period of delay beyond the time fixed by the contract for its fulfillment is a valid and enforceable agreement for the measurement of the damages, and is not a contract for a penalty.' "

We conclude, therefore, that the judgment of the trial court is correct and should be, and is, affirmed.

CHRISTENSON, ET AL. *v.* FELTON, ET AL.

5-1119 295 S. W. 2d 361

Opinion delivered November 19, 1956.

R. D. Smith, Jr., for appellant.

Ronald A. May, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study of the school laws of Arkansas in regard to the place of voting in school elections.

At the regular school election in March, 1956, in the Marianna School District,[1] the vote was certified as 441 votes for the tax and 428 votes against the tax. In due time, appellants filed action in the Circuit Court (under Act 403 of 1951) to contest the election; and alleged that many votes for the tax were void. The Circuit Court decided the case on the merits and found that there were 428 valid votes for the tax and 419 valid votes against the tax. The Circuit Court refused to void fifteen votes (for the tax) claimed by appellants to be illegal on the ground that in each instance the voter had failed to vote in his own ward or precinct. So the only question on this appeal is whether the Circuit Court was correct in holding that the said fifteen votes were valid. The Trial Court recognized that, as a legal proposition, a voter must vote in the ward or precinct in which he resides (see *Wilson* v. *Luck*, 203 Ark. 377, 156 S. W. 2d 795; and *Logan* v. *Moody*, 219 Ark. 697, 244 S. W. 2d 499); but the Court said at the beginning of the hearing: ". . . unless the definite precincts were laid off for the purpose of the election, any-

[1] The full name of this School District is "Marianna School District A". For convenience we refer to it as the Marianna District.

body in the School District could vote in any box in the District." Under the facts — or lack of facts — shown in the record in this case, we find the Trial Court's ruling to have been correct as regards the election here involved.

We have several Legislative enactments that bear on the question here posed:

(a) Section 2 of Act 319 of 1937 (now found in § 80-304 Ark. Stats.) says: ". . . and each school district, for the purpose of school elections only, shall be a political township."[2]

(b) Act 56 of 1949 placed the holding of school elections under the control of the County Board of Election Commissioners, and said: ". . . the general election laws, insofar as applicable, shall apply to school elections."

(c) Act 403 of 1951 says that the County Board of Election Commissioners ". . . shall designate all the polling places for each school district in its respective county . . ."[3]

Thus, under the 1951 Act, the Lee County Board of Election Commissioners *should have* designated the voting precincts for the Marianna School District. The voting precincts as used in other elections would not

[2] Appellants argue that this section of the law was impliedly repealed by acts which changed the town meeting form of elections to ballot elections; and appellants also argue that Act 56 of 1949 operated to repeal this quoted section. But any such changes did not change the nature of a school district. The word "township" has two meanings: (a) in land descriptions it is an area, as for instance, "Section-Township-Range"; (b) in governmental matters a township is a political subdivision; for instance, § 18-101 Ark. Stats. gives the County Court power to change township lines. School Districts are creatures of the Legislature, which has the right to give or take away powers. (See *State, ex rel. Atty. Gen.* v. *State Board of Education*, 195 Ark. 222, 112 S. W. 2d 18; *Sugar Grove School Dist.* v. *Booneville Special School Dist.*, 208 Ark. 722, 187 S. W. 2d 339; and *Wallace School Dist.* v. *County Board of Education*, 214 Ark. 436, 216 S. W. 2d 790.) So a school district, as a governmental subdivision, would be in the nature of a political township, even in the absence of a Legislative declaration. The subsequent legislation—herein mentioned—prescribing elections, etc. impliedly recognizes a school district as a political township.

[3] The Marianna School District here involved is in no county except Lee.

necessarily be the voting precincts in the school election. This is demonstrated by the map introduced in evidence. It shows that this school district embraces only a small fraction of the territory in each of Fleanor, Hampton, Union and Spring Creek Townships, which are townships set up by the County Court for general election purposes. For aught that appears in the record in this case — in fact, a study of the map inclines us to believe — the voting place for the general election in each of these named townships would be located entirely outside of the boundaries of the Marianna School District. In view of such a situation, the Act 403 of 1951 placed the duty on the County Board of Election Commissioners to designate the polling places for each school district, thereby recognizing that the polling places in school district elections would not necessarily be the same as in other general elections.[4]

The Marianna School District is a "political township" and the conduct of elections in such township is governed by the general election law. Under Act 403 of 1951 it became — and still is — the duty of the County Board of Election Commissioners to lay out and designate the voting precincts in the Marianna School District. Section 3-801 Ark. Stats., relating to the establishment and authorization of precinct boundaries in general elections, is the governing law.

So much for the duty of the Lee County Board of Election Commissioners. Was that duty fulfilled? As to the answer to that question, there is complete silence in the record before us. That there were several voting boxes in the Marianna School District at the time of this election is shown; but it is not shown that any of these boxes had been set up along precinct lines, as heretofore indicated. In the absence of such showing, how can we say that any voter voted in the wrong precinct? We cannot. The record before us presents this dilemma:

If the Lee County Board of Election Commissioners duly designated voting precincts in the Marianna School

[4] The Legislature has prescribed methods by which the boundaries of school districts may be changed.

District, the record here fails to show it; and so there is no showing that any of the challenged voters voted in the wrong precinct.

If the Lee County Board of Election Commissioners did not designate voting precincts in the Marianna School District, then such requirement — mandatory before the election — becomes directory[5] after the election, so that voters otherwise qualified will not be disfranchised by the failure of the Election Commissioners to perform certain duties.

On either horn of the dilemma, the Circuit Court judgment must be affirmed.

[5] There are many election laws that are mandatory before the election and merely directory after the election, so that voters will not be disfranchised by the failure of election officials to perform certain duties. *Henderson* v. *Gladish*, 198 Ark. 217, 128 S. W. 2d 257; and *Orr* v. *Carpenter*, 222 Ark. 716, 262 S. W. 2d 280; and see also 18 Am. Jur. p. 263.

CARTER *v.* MONTGOMERY, ET AL.

5-1079 296 S. W. 2d 442

Opinion delivered November 19, 1956.

[Rehearing denied January 7, 1957.]

Mann & McCulloch, for appellant.

Jack P. West, for appellee.

MINOR W. MILLWEE, Associate Justice. This action arose out of a collision between a bicycle being ridden by a 13-year old boy and an automobile driven by another boy of the same age on the streets of Forrest City, Arkansas on the night of October 31, 1955.

According to the proof Wiley Montgomery owned a 1929 Model Ford automobile his father had purchased for him. On the night in question he was accompanied by two other young boys in driving the car South on Division street while David Carter was riding his bicycle North on said street as the two vehicles approached the intersection of Division and Mississippi streets. The Montgomery boy was driving at a moderate rate of speed and upon reaching the intersection made a normal left turn off Division street into Mississippi street. As the car entered Mississippi street and had "about straightened up" the bicycle ridden by young Carter collided with the rear end or right rear side of the car knocking Carter and his bicycle several feet into Mississippi street. The Montgomery boy did not see the bicycle before the collision but a companion did and after some discussion as to just what had struck the car they returned to the scene of the accident after having driven several blocks down Mississippi street. David Carter could not remember anything that happened from the time he left a school house several minutes before the collision until sometime after the accident. The car was equipped with a horn, adequate brakes and headlights that were burning but there was no headlight on the bicycle.

In the action brought by appellant, Jack Carter, individually and as next friend of his son, David Carter, against appellees, Wiley and James Montgomery, for

personal injuries allegedly suffered by David Carter as a result of the collision, the trial court submitted special interrogatories to the jury pursuant to the Comparative Negligence Law (Act 191 of 1955). In response thereto, the jury found that the collision occurred without any negligence on the part of the appellees, Wiley Montgomery and James Montgomery, his father.

The principal contentions for reversal relate to the trial court's refusal to give Instructions Nos. 1 and 5 requested by appellants which read as follows:

"No. 1. You are instructed that, according to the uncontradicted evidence in this case, the defendant, Wiley Montgomery, was under the age of 14 years; and you are further instructed that under the laws of Arkansas, when a parent permits his child to drive a motor vehicle when that child is under the age of 14 years, the parent is guilty of negligence *per se* — that is, the parent becomes negligent by the mere fact of the act of permitting the under-age child to drive the vehicle.

"No. 5. The plaintiffs request the Court to instruct the jury that if they find from the evidence that the defendant Wiley Montgomery, was under the age of fourteen years at the time this collision took place, and if they find that the defendant, Wiley Montgomery, was driving the motor vehicle involved, in violation of Section 75-309 of the Arkansas Statutes, then such finding should be treated by them as negligence *per se* on the part of the defendant, Wiley Montgomery."

In refusing the two requested instructions the trial court instructed the jury on his own motion as follows:

"Section 75-309 of the Statutes of Arkansas is as follows: 'Persons not to be licensed. The department shall not issue any license hereunder: 1. To any person, as an operator, who is under the age of 16 years, except that the department may issue a restricted license as hereinafter provided to any person who is at least 14 years of age.'

"In view of that statute and in view of the fact that it is undisputed in the evidence in the record in

this case that the defendant, Wiley Montgomery, is under the age of 14 years and is the son of James Montgomery, and the further fact that it is undisputed in this record that James Montgomery, permitted the defendant, Wiley Montgomery, to drive the vehicle that night, any negligence you find on the part of the defendant Wiley Montgomery, will be imputed to the father, James Montgomery, under the law, and James Montgomery will be liable for any negligence and damages caused by his son, Wiley Montgomery."

As we understand appellants' contention it is that James Montgomery was not only guilty of negligence *per se* in permitting his boy to operate the car in violation of the statute, but was thereby rendered absolutely liable for any damages suffered by appellants irrespective of whether such negligence was the proximate cause, or one of the proximate causes, of the injury. In this connection it is further argued that if the parent is liable *per se* then the same liability should be imposed upon the child himself. Appellants rely on the recent case of *Richardson* v. *Donaldson,* 220 Ark. 173, 246 S. W. 2d 551, where we held that the parent of a child 16 years of age would not be liable for the child's negligence merely because he entrusted her with the car. In reaching that conclusion we discussed *Hoke* v. *Atlantic Greyhound Corp.,* 226 N. C. 692, 40 S. E. 2d 345, in which the court held a violation of a statute similar to Ark. Stats., Sec. 75-309, constituted negligence *per se* on the part of the parent. We then said in the Donaldson case: "In the case at bar, if Eloise Richardson had been under fourteen years of age (the prohibited age in this State), then her father, in allowing her to drive his truck, would have been guilty of negligence *per se* . . ." While this statement was *dictum* in that case, we adhere to it.

It follows that James Montgomery was guilty of negligence *per se* in the instant case and appellants' Requested Instruction No. 1 was correct as an abstract statement of the law and as far as it went. But the instruction, and others requested by appellants, ignored the question of proximate causation. Excellent articles relating to this question appear in 1 Ark. Law Rev. 275

and 4 Ark. Law Rev. 192. As the author points out in the article last cited, the North Carolina court did hold in the *Hoke* case that a violation of the statute was negligence *per se* but it further held that to be actionable such negligence must be the proximate cause, or a proximate cause, of the injury. This is also the view taken in most jurisdictions under similar statutes where the question has arisen. *Gossett* v. *Van Egmond,* 176 Ore. 134, 155 P. 2d 304; *Somerville* v. *Keeler,* 165 Miss. 244, 145 So. 721; *Laubach* v. *Colley,* 283 Pa. 366, 129 Atl. 88, *Wery* v. *Seff,* 136 Ohio St. 307, 25 N. E. 2d 692; *White* v. *Kline,* 119 Wash. 45, 204 P. 796; *Reid* v. *Boward,* 181 Va. 718, 26 S. E. 2d 27; *Wilcox* v. *Wunderlich,* 73 Utah 1, 272 P. 207.

The principle recognized in these cases was involved in *Mo. Pac. Rd. Co.* v. *Davis,* 208 Ark. 86, 186 S. W. 2d 20, where we approved this statement from 38 Am. Jur., Negligence, Sec. 166; "Regardless of whether the violation of a statute or ordinance is regarded as negligence, negligence *per se,* or evidence of negligence, the plaintiff, to be entitled to recover, must show a causal connection between the injury received and the violation of the statutory prohibition or mandate. In other words, he must show that the violation of the statute was the proximate cause of the injury. If the violation of the statute or ordinance by the defendant was not the direct and proximate cause of the accident, he is not liable for the injury of which complaint is made." See also, 5 Am. Jur., Automobiles, Sec. 361; 60 C. J. S., Motor Vehicles, Sec. 431c; Restatement, Torts, Sec. 431.

It is true that this court adopted a different approach to the problem in damage suits by minors employed in violation of the Child Labor Act (Ark. Stats. 81-701) for injuries suffered in the course of such employment. In *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S. W. 887, the court decided that the statute itself supplied the proximate cause, saying: "The employment of a minor in violation of the statute being negligence *per se* and the injury being caused by reason of the employment, such negligence is the proximate cause of the

injury." As the author of the first law review article cited above indicates, the effect of this holding is to remove such actions from the negligence field and place them in the absolute liability category. We are unwilling to extend that rule by applying it here. Suppose a drunken or reckless operator of one car negligently crashed into another being operated by an under-age driver in a careful and lawful manner, it would be manifestly unfair to hold the child's parent liable for damages sustained by the reckless operator. The evidence here fully sustains the jury's finding that Wiley Montgomery was free from negligence and no prejudicial error resulted in the trial court's refusal to give instructions that merely told the jury a violation of the statute constituted negligence *per se* without further requiring that such negligence be found to be the proximate cause of the injury or a substantial factor in bringing it about. The giving of Instructions 1 and 5 as requested by appellants would have confused issues that were properly submitted in the instructions given.

Appellants also say the court erred in refusing to give Paragraphs "G" and "H" of their Requested Instruction No. 3. Paragraph "G" set out Ark. Stats. Sec. 75-725 which requires that motor vehicles be equipped with a certain kind of horn in good working order and that the driver use it when reasonably necessary to insure safe operation. We find no prejudicial error in refusing this request since the car was equipped with a proper horn according to the testimony of the appellants' own witnesses and it is undisputed that young Montgomery had already made a normal turn into Mississippi street when the unlighted bicycle struck the rear of the car. Evidence is also lacking to show there was anything in the situation apparent to young Montgomery to warn him of such impending danger as to require the sounding of his horn as he approached the intersection.

Paragraph "H" set out Ark. Stats., Sec. 75-901 (a) which requires the driver of a car involved in an accident resulting in injury or death to stop and remain until he

has "fulfilled the requirements of Sec. 75-903." According to the proof Wiley Montgomery stopped and returned to the scene as soon as he realized what had happened and there is no showing that he failed to satisfy the requirements of Sec. 75-903. Moreover, a refusal to instruct on the statute does not amount to prejudicial error where the failure to comply with it bears no proximate relation to the cause of the collision. *Schlosberg* v. *Doup,* 187 Ark. 931, 63 S. W. 2d 337.

We find no prejudicial error, and the judgment is affirmed.

ARK. STATE RACING COMM. *v.* SOUTHLAND RACING CORPORATION.

5-1066 295 S. W. 2d 617

Opinion delivered November 19, 1956.

Wood & Smith, Little Rock, for appellant.

Goldstein & Smith, and *Barrett, Wheatley, Smith & Deacon,* for appellee.

W. H. Dillahunty, amicus curiae.

George Rose Smith, J. This is a suit by Southland Racing Corporation for a mandatory injunction to require the Arkansas State Racing Commission to issue to Southland a license for the operation of a greyhound race track in Crittenden county. The chancellor overruled the Commission's demurrer to the complaint and, upon the Commission's refusal to plead further, entered a decree for the plaintiff. Three issues of law are presented by the appeal.

First, it is contended that the Crittenden chancery court had no jurisdiction of the case, for the reason that the venue in actions against State boards must be laid in Pulaski county. Ark. Stats. 1947, § 27-603. Despite the settled rule that an objection to venue is waived by a defendant who enters his appearance by the filing of a demurrer, the appellant insists that a different rule for State officers was announced in *Arkansas Highway Com'n* v. *Holt,* 190 Ark. 868, 81 S. W. 2d 929.

We are unable to agree with this contention. The *Holt* case was decided in the interval during which it was held that the legislature could constitutionally consent to suits against the State Highway Commission — a view later rejected in *Arkansas State Highway Com'n* v. *Nelson Bros.,* 191 Ark. 629, 87 S. W. 2d 394. The *Holt* case did not involve, as this one does, the general statute fixing the venue of suits against public officers. There the court considered only an act applying specially to suits against the Highway Commission. Ark. Stats., § 76-232. By that act the legislature gave its consent to such suits but declared that they "shall be brought only at the seat of government, in Pulaski County." We held that the statute was a limitation upon jurisdiction and could not be enlarged by an entry of appearance on behalf of the Highway Commission.

The case at bar is not a suit against the State itself, which at the time of the *Holt* decision could be main-

tained only with the express consent of the legislature. Here Southland simply seeks a mandatory injunction to compel the performance of a ministerial duty — a common law cause of action that exists in the absence of statute. The statute providing that suits against State officers and boards must be brought in Pulaski county relates only to venue, not jurisdiction, and falls within the general rule that the issue of improper venue may be waived. In jurisdictions having similar laws it is held that the statutory venue is a personal privilege for the benefit of the public officer and may be waived by him. *Tullis* v. *Brawley,* 3 Minn. 277; *Howland* v. *Willetts,* 5 Sandf. 219, aff'd 9 N. Y. 170; *McConihe* v. *Palmer,* 76 Hun 116, 27 N. Y. S. 832. This rule is manifestly sound, for situations might often arise in which both parties would prefer, for reasons of convenience, to have the case tried in the county where the cause of action arose. We therefore hold that the question of venue is not a jurisdictional issue that can be asserted after the entry of the Commission's appearance.

Second, on the merits the principal issue is whether the Racing Commission has been invested with unlimited discretion to deny an application for a license when the applicant has met all the requirements exacted by the legislature. The governing statute reads as follows: "Any person, firm, association, or corporation, desiring to apply for a permit under this act must make known to the Commission the name of the person, firm, association, or corporation, and if a corporation, the State under which incorporated, the location where it is desired to conduct or hold a greyhound race meeting, and such other information as the Commission may require; also that they have a plant which is completed and ready for operation, and it will then be the duty of the Commission to inspect said plant at the expense of the applicant, and if the plant is found to be in good condition and completed, the Commission may grant the license provided the officers and directors are reputable citizens of the State of Arkansas and have filed the necessary bond as required in this act." Ark. Stats., § 84-2805.

The complaint alleges that Southland has complied with the statute in every particular, in that it has completed a plant at a cost of about one million dollars, that the Commission has inspected the plant and made no objection to it, that Southland has tendered the required bond, and that its officers and directors are reputable citizens of the State. The complaint avers, and the demurrer concedes, that in spite of Southland's strict compliance with the law the Commission has denied the application upon the ground "that the granting of a permit would not serve the best interests of the State of Arkansas."

The controversy centers upon the statutory provision that the Commission *may* grant the license: is the word "may" used in its permissive or in its mandatory sense? It is of course a familiar rule of statutory construction that "may" is to be construed as "shall" when the context of the statute so requires. *Washington County* v. *Davis,* 162 Ark. 335, 258 S. W. 324; *Viking Freight Co.* v. *Keck,* 202 Ark. 656, 153 S. W. 2d 163, 167. Indeed, this interpretation is so well known that it is uniformly recognized in dictionary definitions of "may." See Webster's New International Dictionary (2d Ed.); Funk & Wagnalls New Standard Dictionary (1949).

It goes without saying that in every instance the problem is that of ascertaining the legislative intent. In contending that the present statute evinces an intention to leave the matter wholly to the Commission's discretion the appellant stresses the use of the word "may" and relies strongly upon our decision in *Cook* v. *Glazer's Wholesale Drug Co. of Ark.,* 209 Ark. 189, 189 S. W. 2d 897. It is apparent, however, that the mere use of the word "may" cannot be conclusive, for then the term could never be construed as being mandatory. Nor is the *Cook* case parallel to this one. There the statute (Ark. Stats., § 48-301) was explicit in stating that the Commissioner of Revenues "is further given the discretion to determine the number of permits to be granted . . . and the person or persons to whom they

shall be issued." The issue in that case was the extent to which the courts might review the exercise of a discretion admittedly conferred by the statute. Here the question is whether discretionary power exists at all.

In the present case there are several reasons for concluding that the General Assembly meant its language to be mandatory. To begin with, the same section which provides that the Commission *may* grant the permit also provides that an appeal from the Commission's ruling may be taken to the chancery court. It is unnecessary to decide whether equity can constitutionally be vested with this power of review; the point is that the legislature meant to allow a right of appeal. Yet the appeal would necessarily be futile if the decision rested within the unfettered discretion of the Commission; there could be no issue for the chancery court to review. As the court said in *State ex rel. Brockett* v. *City of Alliance,* 65 Neb. 524, 91 N. W. 387, with respect to a similar provision in a liquor licensing law: "It would seem to be a vain and useless thing for the legislature to provide for an appeal from the action of the licensing board to the district court, and there have the case heard on appeal, and a proper judgment entered, if the discretion of the licensing body was unlimited, and to be exercised arbitrarily according to the uncontrolled will of that body."

Again, the act requires that the applicant must have completed the construction of its plant before the request for a license is submitted. It is hard to believe that the legislature meant for an applicant's necessarily substantial investment to depend ultimately upon the whim of the Commission. Such a law would be fairly certain to defeat its own purpose. A like situation was considered in *McLeod* v. *Scott,* 21 Ore. 94, 26 P. 1061, where every applicant for a liquor license was required to submit a majority petition of the legal voters in the precinct and to publish notice of the application. The statute recited that the county court then "may" grant the license. In holding the word to have been used in its mandatory sense the court said: "The petitioner must incur a considerable expense in securing the majority of the legal

voters of the precinct, and in the publication of his petition and notice as prescribed by the act. These requirements of the statute are of substance, and evince an intention on the part of the legislature that upon compliance with the terms of the act a license would issue."

Finally, by the statute the legislature has made the operation of a greyhound race track a lawful undertaking. Needless to say, the power to determine the state's policy in this matter rests with the legislature alone. Yet if the Commission is authorized to refuse a permit in the belief that its issuance would not serve the best interests of the state, it is evident that the Commission is free to nullify the policy that the General Assembly sought to put into effect. This identical issue has been presented in Arizona, where a dog racing act provides that if the Tax Commission finds after investigation that the applicant's reputation is good and that the plan submitted is not objectionable, the Commission "may" grant the application. An application complying in every way with the statute was rejected by the Commission, which found that "it was not for the best interests of the public at this time." The Supreme Court of Arizona held the statute to be mandatory and directed that the license be issued. *Brooke* v. *Moore,* 60 Ariz. 551, 142 P. 2d 211.

Thus there are persuasive reasons for thinking that the legislature used the word "may" in its imperative sense in the act now before us. There is little to support the contrary view except the bare use of the word itself. In these circumstances we cannot avoid the conclusion that the license must be issued upon a showing of literal compliance with every requirement that the law-making body saw fit to impose.

Third, it is contended in an *amicus curiae* brief that pari-mutuel betting upon dog races amounts to a lottery and is therefore prohibited by the constitution. Ark. Const., Art. 19, § 14. This question would ordinarily be presented by the case at bar, and for that reason we held in a per curiam order in Case No. 5-1143 that the same issue could not be litigated in the Pulaski chancery

court during the pendency of the present case. It was then assumed that the issue would be fully explored in the suit now before us, but that assumption proves to have been incorrect. Neither party to this case argues the question of constitutionality or even seeks a determination of that issue.

Upon the record in this case, which goes off on demurrer, we cannot make a final decision as to the validity of the act. An analogous question was considered in *Longstreth* v. *Cook,* 215 Ark. 72, 220 S. W. 2d 433, where it was held that pari-mutuel betting upon horse races is not a lottery for the reason that the outcome of the race is not solely dependent on chance, elements of skill being involved. It will be seen from the opinion that this conclusion was based upon a finding of fact rather than an abstract issue of law. In the case at bar this fact question has not been developed at all, and without proof we have no means of determining whether the result of a greyhound race depends upon something other than pure chance. At present we have no alternative except to say that the act is ostensibly constitutional, for it has not been shown to be otherwise. A definitive ruling, however, is reserved for the future.

Affirmed.

McFaddin, J., concurs.

Stewart-Morris Implement Co. *v.* Koenig.

5-1062 295 S. W. 2d 352

Opinion delivered November 19, 1956.

Norton & Norton, for appellant.

Mann & McCulloch, for appellee.

PAUL WARD, Associate Justice. Stated generally, the question presented by this appeal is: Does the trial court have discretionary power to set aside a judgment or decree rendered and entered at a previous term, where the motion to set aside the decree or judgment was filed during said previous term?

Most of the facts in this case are undisputed. On October 21, 1954, appellants filed a complaint in the Circuit Court of St. Francis County, asking judgment against appellee, F. S. Koenig, on a past due indebtedness arising out of the sale of merchandise. Appellee filed an answer on November 30, 1954, and a day or two later appellants filed a motion to make the answer more definite and certain. Following this there were several continuances or postponements until May 20, 1955 when the court entered a default judgment in favor of appellants and against appellee. On May 26, 1955 appellee filed a motion to vacate the judgment which had been rendered as before stated. On May 30, 1955 the statutory term of the circuit court expired. Later appellants filed a response to the motion to vacate and evidence was taken on the motion on June 8, 1955. Finally on February 15, 1956 the court announced its decision that the judgment rendered on May 20, 1955 should be set aside, and it was so ordered.

The question for our decision in this case is further simplified by the fact that appellee disclaims any attempt to proceed under the provisions of Ark. Stats. § 29-506, et seq. which set out 8 grounds or conditions under which a trial court is empowered, after term time, to vacate or modify a judgment.

The briefs by both parties present an able review of former decisions of this court relative to the power of a trial court, exclusive of the power granted in the statute above referred to, to set aside its decrees rendered at a prior term. It is ably insisted by appellants that the trial court has no such power and they say we have so

held, but it is just as ably insisted by appellee that the trial court does have this power and that it has never been explicitly denied by any of our decisions. After careful consideration of the arguments and decisions presented by each side we have arrived at the conclusion that the trial court has no such power, on its own discretion, to set aside such judgments after the lapse of the term at which they were rendered, and particularly that the trial court had no power in this case to set aside its judgment which was rendered in favor of appellants on May 20, 1955.

The recent decision of this court in the case of *Dobbs* v. *Dobbs,* 225 Ark. 397, 282 S. W. 2d 812, rendered October 17, 1955, is clearly in point and sustains appellants' contention in this case. There, a default divorce decree was entered during the April term of the court, and during the same term of the court the appellee filed a motion to set aside the decree. This motion was not presented to the court until the October term, at which time the chancellor set aside its original decree. On appeal this court reversed the trial court, using this language: "Although the appellee's motion was filed during the April term of the 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." Appellee attempt to detract from the force and applicability of the *Dobbs* holding as applied to the facts in the case under consideration by calling to our attention that the cases cited in the *Dobbs* opinion bear only on the question of consent. It seems to us however that if the trial court has no power or authority "even by consent" it is all the more apparent that the trial court would have no such power in the absence of the consent of the litigants.

Authority for the conclusion reached in the *Dobbs* case, supra, is found in many of our former decisions. In *Coulter* v. *Martin,* 139 S. W. 2d 688, (not reported in the Arkansas Reports) it was stated: "The contention of appellant is that the decree of January 24 became final when the term expired April 23 and that the court could not, at a subsequent term, modify the decree except in a

manner provided by law." In reply the court said: "Appellant correctly states the law to be that courts lose jurisdiction of judgments and decrees with lapse of the term at which they were rendered." In *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583, it was said: "The court lost control over the decree of July 23, 1946 with the ending of the April, 1946 term of court, and was without authority to vacate that decree at a subsequent term except in the manner, and upon the grounds, specified in Section 8246 and 8248, Pope's Digest, (Ark. Stats. § 29-506 and § 29-508) or by bill of review under the chancery practice. Many other cases could be cited to the same effect."

Appellee however interprets other decisions of this court as being in conflict with the rule which we have above announced but we think they are distinguishable in principle or fact. In *Metz* v. *Melton Coal Co.,* 185 Ark. 486, 47 S. W. 2d 803, the court set aside a default judgment after the term at which it was rendered where the motion was filed during term time. Apparently however the court in that case rested its decision on a statute which is not applicable here, as it appears from this language used by the court: "Our statute, however, expressly provides that a chancellor may deliver opinions and make and sign decrees in vacation in causes taken under advisement by him at a term of the court, and he may do this by the consent of the parties . . ." There is language used in the case of *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50, which appears to support the contention of appellee, but the final determination of the case was in accord with the *Dobbs* case, supra. Another case which might seem to support appellee's contention is *Young* v. *Young, Guardian,* 201 Ark. 984, 147 S. W. 2d 736, but it was distinguished in the *Wright* case, supra, on the ground that a verified motion to vacate the judgment was filed during term time. Whether that distinction is valid it is not necessary for us to say at this time. The petition to vacate in the case under consideration was also verified but, as we see it, that circumstance is immaterial. The reason is that a verified petition could only show a partial compliance with

the statutory procedure required under Ark. Stats. § 29-506, referred to above, but appellee in this case disavows any intention or proceeding under that statute.

It is our conclusion therefore that the rule announced in the *Dobbs* case, supra, is controlling here, and that the trial court had no power or authority on February 15, 1956, to set aside its judgment rendered at a prior term of court on May 20, 1955, on a motion which was filed during said prior term of court.

Reversed.

THOMASON *v.* THOMASON.

5-1086 295 S. W. 2d 622

Opinion delivered November 26, 1956.

G. W. Lookadoo, for appellant.

M. J. Thomason, pro se.

LEE SEAMSTER, Chief Justice. This is an action by the appellant against the appellee for divorce. The grounds alleged in the complaint are that appellee had offered such personal indignities to appellant as to render his condition in life intolerable. The case was heard before the Clark Chancery Court on March 12, 1956. At the conclusion of appellant's testimony and evidence the appellee demurred to the evidence by oral motion, whereupon the trial court sustained the demurrer and dismissed the case for want of equity. This appeal follows.

The appellant is 23 years of age and appellee is 21 years old. The parties were married June 24, 1950, and they separated January 8, 1956. During four and one-

half years of this marriage the appellant has served in the United States Armed Services.

Appellant testified that the difficulty between the parties arose shortly after he entered the armed services. The substance of appellant's testimony was to the effect that his wife was "running around with every Tom, Dick and Harry" while he was serving in the armed services outside of the State or while he was serving overseas; that when they lived together she nagged him all the time, would not let him out of her sight; that she would not clean the house and wanted appellant to wait on her hand and foot.

Appellant further testified that he was presently stationed at an air base in California and his wife, the appellee, had been living in Pike County, Arkansas during a great majority of the time that he had been in service; that he came home on furlough in January, 1956, and told his wife that he was through with her and would not take her back to California with him; that appellee told his mother she would kill him before she would let him return to California without her; that appellee packed her bags and went home to her mother but later returned and started nagging him again.

In response to questioning on cross-examination appellant admitted that he had been dating a woman while stationed in California; that he did not plan to marry this woman after he procured a divorce; that the appellee knew about his affair with this other woman and she packed her bags and left him while he was home on furlough in January, 1956; that he immediately thereafter filed the instant suit for divorce.

Appellant's mother testified that appellee lived at her home part of the time that appellant has been in service; that appellant wrote her that he wanted a divorce from appellee; that she and appellee went to see an attorney to see if they could keep her son from procuring a divorce; that she changed her mind about the divorce after appellee threatened to kill her son if he did not take appellee back to California with him; that their home life was not very peaceful, appellee fussed

at appellant a lot and wanted him to wait on her; that she did not think they could ever live together and be happy; that appellee's actions were all right while she lived with her.

We think this case is governed by the rule laid down in the case of *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225. There we said: "By the overwhelming weight of authority it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case."

Viewed from this angle we hold the appellant did make a *prima facie* case. *Coffey* v. *Coffey,* 223 Ark. 607, 267 S. W. 2d 499 and cases there cited. The appellee should be permitted to go forward with her evidence. The court can better decide the case when all the facts have been developed.

Reversed and remanded for further proceedings.

VOGLER *v.* O'NEAL.

5-1078 295 S. W. 2d 629

Opinion delivered November 26, 1956.

Barber, Henry & Thurman, for appellant.

Talley & Owen and *Dale Price,* for appellee.

J. Seaborn Holt, Associate Justice. Appellee, Earl O'Neal, brought this action against Ted Vogler, appellant, to recover compensatory and also punitive damages alleged to have resulted from the collision of an automobile driven by Vogler and one driven by O'Neal, on March 4, 1955. Specific acts of negligence on the part of Vogler were alleged in the complaint and in addition it was alleged that such acts were willful, wanton and malicious and entitled O'Neal also to punitive or exemplary damages. Appellee sought $50,000 as compensatory damages and $10,000 as punitive damages.

At the trial appellant (Vogler) admitted liability for compensatory damages and denied any liability for punitive damages. The jury returned a verdict for O'Neal for $10,739.45 compensatory damages and $12,000 as punitive damages. Thereafter the court, on its own motion, reduced the $12,000 verdict to $10,000 to conform to the prayer of appellee's complaint and judgment was rendered accordingly. This appeal followed.

Appellant for reversal relied upon the following points: "I. The lower court erred in giving plaintiff's instructions Numbered 1 and 3. II. The lower court erred in permitting witnesses Brown, Laird and Single-

ton to testify as to statements made to them by Vogler, and as to Vogler's physical condition hours subsequent to the time of the accident. III. The verdict as to compensatory damages is excessive and the result of passion and prejudice. IV. The verdict as to punitive damages is excessive and was the result of passion and prejudice."

We consider them in the order presented.

I

Instruction No. 1 provided: "You are instructed that the parties, both the plaintiff and the defendant, have agreed that Earl O'Neal is entitled to recover actual damages suffered by him from the defendant, Ted Vogler. You will find for Earl O'Neal in such sum as you find from a preponderance of the evidence, will reasonably compensate him for the injuries he sustained, if any; the pain and suffering he has suffered to date, if any, the pain and suffering he will suffer in the future, if any, the medical expenses he has incurred to date, if any, the medical expenses he will incur in the future, if any; permanent partial disability which he has suffered, if any. Upon these elements of damages, you will fix such sum as in your judgment you find from a preponderance of the evidence will reasonably compensate him for the injuries and damages he sustained, if any."

Appellant objected specifically, at the trial, to that part of the above instruction "which submits to the jury the recovery by plaintiff of future medical expense and future pain and suffering, if any," and he argues here that the instruction was "inherently erroneous in that it permitted the jury to assess damages for permanent disability and injury when there was no testimony in the record, nor was there any prayer in the complaint which would have justified this element of damages." The record reflects that there was a prayer for permanent disability and injury in the complaint. The complaint states: "Thereby causing serious, grievous, painful and permanent injuries to the plaintiff." We do not agree that this instruction was inherently erroneous and hold that it was a correct statement of the law with regard

to the measure of damages. We said in *Coca-Cola Bottling Co. of Arkansas* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771 that: "The measure of damages for a physical injury to the person may be broadly stated to be such sum, so far as it is susceptible of estimate in money, as will compensate plaintiff for all losses, subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, which he has sustained by reason of the injury, including compensation for his pain and suffering, for his loss of time, for medical attendance, and support during the period of his disablement, and for such permanent injury and continuing disability as he has sustained. Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are unsusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained." After a review of all the evidence, we hold that there was some substantial evidence that appellee has suffered permanent partial disability and will continue in the future to suffer pain and would incur future medical expenses. There was medical testimony supporting this view. Dr. Jones testified that when he reexamined O'Neal on March 28, 1956 he was complaining of injury to his left leg: "Q. And what does this injury to the left leg consist of? A. . . . At that time he was complaining of pain just above the outer aspect of the left knee . . . Q. You found it to be constant? A. Yes, sir. Q. Did you find any disability as a result of this knee? A. The disability would be the result of pain and complaint of pain he had. Mechanically there is no disability. From the standpoint of discomfort he experienced, yes. There was some degree of disability . . . Q. Would you estimate the disability? A. Five per cent as related to the leg or that would be the

reasonable estimation." Dr. Hundley testified that he treated O'Neal beginning March 27, 1955, that he had a fracture of the 3rd, 4th, 5th and 6th, 9th, 10th and 11th ribs, a fracture of the left scapula, or shoulder blade, that he was suffering great pain. Quoting from appellant's brief, Dr. Hundley testified: ". . . that his examination revealed some tenderness of the left paracervical area with extension of the cervical spine or neck being 75% normal, flexion 75% of normal; that side bending to the left was 50% of normal, to the right 75% of normal; that side bending of the cervical spine was accompanied by pain in the left side of the neck and left collar bone area; that rotation to the left was 50% of normal, to the right normal; . . . that flexion of the trunk was normal but bending backward was 75% of normal accompanied by pain in the chest . . . He again examined Mr. O'Neal on May 21, July 11, October 8, 1955, and on March 27, 1956, giving him medication for relief of pain as well as physical therapy. The last date he saw him was March 27, 1956. At that time he stated there had been no locking in the fingers, but he had had pain in his left ring finger and left thumb and the entire left arm was sore. He stated he had dizzy spells and was extremely nervous and had had headaches since returning to work. He also complained of a pulling sensation in his left leg . . . July 11, 1955, he returned to the office, stating that the left knee felt like something was cutting it and he could hardly walk at times . . . He continued to complain of neck and back pain and headaches . . . On October 8, 1955, examination revealed muscle spasm to the lower spine and tenderness . . . He returned to the office on March 27, 1956, stating that sometimes when he sits down, he can hardly get up because of pain in his low back . . . The physical examination revealed tenderness in the lumbar areas . . . As of March 27 he still found tenderness in the lumbosacral area. Flexion was normal but the extension or backward bending was limited about 50% of what it should be. As of the date of his last examination he continued to complain of pain . . . The last date he saw him was March 27, 1956.

Under our well established rule we must affirm when we find any substantial evidence to support the jury's verdict and in determining whether the evidence is substantial we must give it the strongest probative force that it will bear, in favor of appellee here. As indicated, we hold that it was sufficient on the evidence presented.

Appellant next complains that plaintiff's Instruction No. 3, to which he made only a general objection, is erroneous. That instruction was as follows: "If you find from a preponderance of this evidence that the defendant's negligent acts, if any, were committed wantonly or willfully, then you are told, if you find for the plaintiff in compensatory damages, you would then be justified to assess punitive damages in such amount as you may deem sufficient under the evidence, if any; to punish him for his misconduct, if any; and to serve as a proper warning to others." Appellant says "that this instruction was erroneous, in that it did not limit the amount of the recovery for punitive damages." Appellant, as indicated according to the record, was content to make a general objection only to this instruction, which cannot be sustained unless the instruction was inherently wrong, and we hold that it was not inherently erroneous. The record reflects that just before the instructions were given by the court, appellant's only reference to an instruction on punitive damages was in this language: "We feel the issues should be confined (1) to the measure of damage and, (2) as to whether or not there is sufficient evidence to justify an award of punitive damages in addition to the compensatory damages." As indicated, appellant made no specific objection to this instruction. No other instruction on the measure of damages was requested. In the circumstances the rule announced by this court in *Kirchoff* v. *Wilcox,* 183 Ark. 460, 36 S. W. 2d 667, is applicable. We there said: "An instruction was given on the court's own motion which reads as follows: 'If you find for the plaintiff your verdict should be: "We, the jury, find for the plaintiff," and assess whatever damages you think he is entitled to under the proof.' No other instructions on the

measure of damages was asked or given, and only a general objection was made to the instruction as given . . . The instruction does not contain any erroneous declaration of law and does not announce an improper rule by which to measure the damages. Its defect is that it does not furnish a correct guide to the jury as to the measure of damages, etc. . . . Here our attention is called to the fact that no specific objection was made to the instruction in the court below, and such is the state of the record . . . It is the settled practice in this State that a party cannot avail himself of an omission which he made no effort to have supplied in the trial court . . . Here, as in the preceding case, the remedy of the party is to ask additional instructions before the jury retires. So where the judge has laid down a proposition, which, in the abstract is clearly right, but there is something peculiar in the situation of the parties, or their relations to each other, which would require a modification of it, and which had escaped the attention of the judge, it is the duty of counsel to call his attention thereto."

II

We hold that no error was committed by the trial court in permitting witnesses Brown, Laird and Singleton to testify as to certain statements made to them by Vogler (defendant) — many hours after the mishap — as to Vogler's physical condition at the time the collision occurred. Witness Allison Brown was permitted to testify on behalf of appellee, that on the morning following the collision he was at appellant's home and appellant told him he did not remember any of the details of the mishap because he was intoxicated. Two other witnesses, Officers Singleton and Laird, over appellant's objection, were permitted to testify not only that appellant was intoxicated when they arrived at the scene of the collision but both witnesses were permitted to detail to the court appellant's condition after he had been confined in the Little Rock Municipal Jail and as to statements by the defendant made to them at that time. Officer Singleton further testified that appellant, Vogler, told

him that as he was leaving Walnut Ridge on his way to Little Rock he purchased two half-pints of whiskey and that he consumed these two half-pints. The testimony of these two witnesses was clearly admissible, we hold, since the statements were made to them by the defendant and, in effect, were against his own interest. "The acts and declarations of a party to a suit, when they afford any presumption against him may be proven by the opposing party. It is a well recognized rule of evidence that any statements which may have been made by a party to a suit against his interest, touching material facts, are competent as original testimony," *Collins* v. *Mack,* 31 Ark. 684. Also see *Covington* v. *Little Fay Oil Co.,* 178 Ark. 1046, 13 S. W. 2d 306.

III

We have concluded that the verdict for $10,739.45 — as compensatory damages — was not excessive in the circumstance. The evidence shows that appellee was in the hospital for 4 days, and was confined to his home over 2 months and had to sleep in a chair 31 nights. His doctor's bills amounted to $634.50, hospital $101.95 and ambulance $10 — a total of $746.45. He suffered great pain and will continue to suffer some pain and partial permanent disability. We cannot say that the jury's allowance of $10,739.45 as compensatory damages, while liberal, is excessive.

IV

We hold, however, that $10,000 allowed by the jury for exemplary damages was excessive and that this amount should be reduced to $5,000. From the testimony presented, the jury had this situation before it: Vogler bought two half-pints of whiskey in Walnut Ridge, drank them before he got to Little Rock, was traveling 60 miles per hour across the Main Street Bridge from North Little Rock to Little Rock; drove his car from the extreme west of the bridge across to the extreme east of the bridge and struck appellee; was so drunk he didn't recall any of the details of the accident; was so indifferent to O'Neal's injuries that he didn't

bother to see Mr. O'Neal after the accident until the day of the trial. In these circumstances, the jury was warranted in assessing in effect, Vogler's conduct as willful, and that he was exhibiting a wanton disregard for other people's rights.

In approving punitive damages, in a similar situation to that here presented, we announced the following principal of law in *Miller* v. *Blanton,* 213 Ark. 246, 210 S. W. 2d 293, 3 A. L. R. 2d 203, in which is cited with approval, the case of *Ross* v. *Clark,* 35 Ariz. 60, 274 P. 639, wherein the court said: " 'Punitive damages' are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate; they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants and others. Because they are an example as to what the law will do for such conduct when it results in injury to the person or property of others, they are sometimes called exemplary damages." "There is no fixed standard for the measurement of exemplary or punitive damages; the amount of the award is largely within the discretion of the jury or of the Court sitting without a jury, on the consideration of the attendant circumstance." 20 C. J. S. 126.

We can well understand that the jury here was justifiably outraged at the reckless and wanton conduct of this drunken appellant, and that it felt warranted in fixing his penalty high, as a warning to intoxicated operators of automobiles, however we have concluded, as indicated, that such penalty should not be greater than $5,000.

Accordingly the judgment for $10,739.45 compensatory damages is affirmed. The judgment for $10,000 punitive damages will be reduced to $5,000 and affirmed for this amount ($5,000) provided appellee, shall within 15 days from the date of this opinion enter a remittitur

in the amount of $5,000 as indicated. Otherwise this judgment as to punitive damages will be reversed and remanded.

Justice MILLWEE not participating.

MERRELL *v.* SMITH, SPECIAL ADMR.

5-1007 295 S. W. 2d 624

Opinion delivered November 26, 1956.

J. G. Sain, Tom Kidd, for appellant.

Shaver, Tackett, Jones & Lowe, for appellee.

J. SEABORN HOLT, Associate Justice. Appellants bring this appeal from a decree, upholding and admitting to probate, the will of Maymie E. Whitmore who died testate August 31, 1954. Appellants contested the will on several grounds, one, — and the only one now considered, — being that the testatrix had made an oral agreement with appellants to leave her property to them. At the trial in Probate Court appellants sought specific performance of this alleged agreement. This appellants could not do in a court of Probate, their remedy for specific performance is in a court of equity. "The Probate Court has no jurisdiction to grant equitable relief," *Carter* v. *Younger,* 112 Ark. 483, 166 S. W. 547. See also 57 Am. Jur. 158, § 180; Annot., 69 A. L. R. 88. While it properly admitted the will to probate, the Probate Court lacked jurisdiction to decide the issue of specific performance of the alleged oral contract. The case must be and is remanded with directions that it be transferred to equity for further proceedings.

AETNA CASUALTY & SURETY CO. OF HARTFORD, CONN. *v.* BRASHEARS.

5-1059 297 S. W. 2d 662

Opinion delivered November 26, 1956.

[Supplemental Opinion on rehearing delivered January 28, 1957.]

Lookadoo, Gooch & Lookadoo, for appellant.

McMillan & McMillan and *Otis H. Turner,* for appellee.

ED. F. MCFADDIN, Associate Justice. This action — by appellee against appellant — to recover damages for personal injuries brings to us: (a) a study of Act 46 of 1947 (now found in § 66-517 et seq. Ark. Stats.); and also (b) certain rulings of the Trial Court.

The Clark County Library (hereinafter called "Library") is owned and operated by Clark County, Arkansas; and during the times here involved the Library was insured by appellant, Aetna Casualty and Surety Company (hereinafter called "Aetna") against liability for damages arising from the operation of a bookmobile.[1] The appellee, Miss Melrose Brashears, was employed by the Library in distributing and collecting the books transported by the bookmobile. In September, 1953, while James Sherwood was engaged in driving the bookmobile on a public highway in Clark County, and while Miss Brashears was riding in the bookmobile in connection with her duties, the bookmobile left the highway and overturned, and Miss Brashears suffered serious injuries, the nature of which is not questioned on this appeal.

Miss Brashears filed this as a direct action against Aetna, claiming that her injuries had been caused by the negligence of the Library in (a) permitting an unsafe vehicle (bookmobile) to be operated on the highways; and (b) in permitting the vehicle to be driven by an incompetent driver.[2] Aetna, as the only defendant, filed a general denial, and also claimed (a) that the action could not be maintained; and (b) that the said Act 46 was unconstitutional. Trial resulted in a verdict and

[1] In the addenda section to Webster's New International Dictionary, printed in 1956, the word "bookmobile" is defined: "An autotruck with shelves of books serving as an itinerant library or bookstore." Clark County used its bookmobile to distribute and collect books throughout the entire County.

[2] Miss Brashears also alleged that James Sherwood was guilty of gross negligence in the operation of the vehicle, but the negligence of Sherwood was ruled out by the Trial Court and is involved only in the cross-appeal.

judgment for Miss Brashears for $6,000; and Aetna has appealed, presenting here thirteen points which we will group and discuss under suitable topic headings.

I. *Act* 46 *Of* 1947. Appellant says: (a) "The court erred in refusing to hold, as a matter of law, that § 66-517 was unconstitutional as far as applying to the case at bar . . ."; and (b) "The exclusions set forth in the policy show conclusively that appellee was not entitled to recover under the policy." Appellant argues that the Library, as a part of Clark County, could not be held liable for damages[3], and the appellant should not be required to pay anything to the appellee, since the policy only insured the County against being required to pay out money. Appellant also says that the Act is unconstitutional because it undertakes to make the appellant liable to pay out money on a contract different from the contract that the appellant issued to Clark County.

We see no merit whatever in the appellant's contentions under this topic. It is unquestioned that Aetna issued to the Library an automobile liability policy; and it is unquestioned that the Library is owned and operated by Clark County. Here are portions of the said Act 46, germane to this case:

"Section 1. When liability insurance is carried by any . . . subdivision . . . of the State . . . not subject to suit for tort, and any person . . . suffers injury or damage . . . on account of the negligence or wrongful conduct of any such . . . subdivision, its servants, agents or employees, acting within the scope of their employment or agency, then such person . . . so injured or damaged shall have a direct cause of action against the insurance company . . . with which said liability insurance is carried to the extent of the amount . . . provided for in said

[3] On page 213 of the transcript, the appellant's attorney said: ". . . this suit was against Clark County, and one of the terms of the policy sued on specifically said that the defendant was only liable for the legal damages that Clark County would be required to pay. Since the County cannot be sued, this issue should not have been submitted by the Court at all."

policy of insurance . . . and such insurer shall be directly liable to such injured person . . . for such damages to the extent of such coverage . . . and the plaintiff . . . may proceed directly against said insurer regardless of the fact that the actual tort-feasor may not be sued under the laws of this State."

Section 2 provides that the injured person is entitled to be informed of the name of the insurance company and the terms of the policy.

Section 3 provides:

". . . the terms and provisions of this Act shall become a part of any insurance policy so carried, regardless of the terms of the policy itself, and any limitation in any such policy restricting the right to recover to a judgment first being obtained against a tort-feasor not subject to suit shall be absolutely void and of no effect."

In 1 Arkansas Law Review, at page 215, there is a comment by Honorable Robert A. Leflar on said Act No. 46, from which we copy:

"Act 46 is intended to give some relief against the non-liability in tort of units and agencies of the State government and similar tort-exempt groups. The old English maxim that 'the King can do no wrong,' meaning that he could not be sued however much wrong he did, has been carried forward not only into the common law but into the Arkansas Constitution (Art. V, Sec. 20) which reads 'The State of Arkansas shall never be made defendant in any of her courts.' This governmental non-liability extends as well to the lesser units of government, such as school districts, counties, cities and the like, and improvement districts. It has even been extended to organizations other than agencies of government, such as non-profit co-operative corporations. The beneficiaries of this rule are not legally liable for injuries inflicted by the negligent operation of their fire wagons, school busses and garbage trucks, though the Standard Oil Company or any other employer would be liable for injuries inflicted under similar circumstances. The injured person's only remedy against the State is to

petition for an act of grace from the State Claims Commission, and even that remedy is unavailable[4] in the case of local units and agencies . . .

"Section 3 of the Act, however, operates prospectively, by providing that the terms of the Act shall become a part of all liability policies written for such tort-exempt agencies. This poses an interesting problem of third party beneficiary contracts. It has generally been agreed that the State can by statute permit its lesser agencies to be sued either in tort or contract, though such permission has not generally been given in Arkansas. Act 46 may be deemed a sort of indirect permission, whereby the agency is allowed to contract for such suits to be brought, not against itself, but against its contractual representative who is indemnified by premiums paid to the representative by the agency. As to contracts hereinafter made, it is possible that this device may be held to be effectual to give a cause of action to injured persons."

By said Act No. 46 the Legislature recognized that in this age of school busses, bookmobiles and other services rendered by State sub-divisions, and not dreamed of at the time of the adoption of the Constitution in 1874, it should be made possible for a State subdivision to carry some form of insurance to compensate anyone who might suffer damages through the negligence of the said State subdivision, or its servants, acting in the scope of their employment. So the Legislature duly adopted Act No. 46 of 1947, and Clark County — that is the Library — in 1952 paid the appellant the premium on the policy here involved; and the Act No. 46 says that the Statute is made a part of the policy and prevails over any language or fine print in the policy. Such a statutory provision is valid and enforceable as regards policies written after the effective date of the Statute. *Liverpool & London & Globe Ins. Co., Limited,* of Liverpool, England, v. *Payton,* 128 Ark. 528, 194 S. W. 503; *Barnett Bros.* v. *Western Assur. Co.,* 143 Ark. 358, 220 S. W. 465; *Fire-*

[4] In the comment in 1 Arkansas Law Review there are footnotes citing cases designed to support the various statements.

men's Ins. Co. v. *Little,* 189 Ark. 640, 74 S. W. 2d 777; and *Continental Casualty Co.* v. *Shankel,* 88 Fed. 2d 819.

The appellant makes the contention that, since Clark County could not be sued by the plaintiff, therefore, the appellant should not be sued either. Yet the appellant accepted premium money from Clark County to afford some sort of protection to somebody. If what the appellant urges is true and Clark County could not be sued, then what did the appellant give Clark County in return for the premium money? The Act 46 answers that question. Notwithstanding the fact that the provision of the policy is to indemnify Clark County for money it may pay out, the Act No. 46 says that the purpose of the policy was to afford a recovery by the injured person against the insurance company, the same as if the injured person could have sued Clark County.

There are many cases which recognize the power of a State to authorize a State subdivision to purchase insurance protection, just as in the case at bar. See *Michael* v. *St. Paul Mercury Indemnity Co.* (Ark.), 92 Fed. Supp. 140, involving our Act No. 46; *Baker* v. *Lagaly* (10th Cir.), 144 Fed. 2d 344, involving the Oklahoma Statute; and *Taylor* v. *Knox County,* 292 Ky. 767, 167 S. W. 2d 700, 145 A. L. R. 1333, involving the Kentucky Statute. In 145 A. L. R. 1336 there is an Annotation on the point. In some States, the suit is first against the State subdivision to liquidate the claim and then payment is compelled against the insurance company in a separate suit. See *Schulte* v. *Hartford Co.,* 102 Fed. Supp. 681, involving the Minnesota Statute. But in Arkansas, the Legislature authorized a direct proceeding against the insurance company, just as here. The appellant issued the policy in the light of our Statute and is bound by it; so there is no merit to the appellant's contentions under this topic.

II. *Assumed Risk And Contributory Negligence.* The appellant says: "The Court should have instructed the jury to find for the defendant after the introduction of all of the evidence because (a) plaintiff assumed the

risk, and (b) plaintiff was guilty of contributory negligence."

The law is well settled that whenever a fact question is made on assumption of risk or on contributory negligence, then such issue or issues should be submitted to the jury. On assumption of risk see *St. L. I. M. & S. Ry. Co.* v. *Hawkins,* 88 Ark. 548, 115 S. W. 175; and other cases collected in West's Ark. Digest, "Master and Servant," § 286 (1). On contributory negligence, see *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287; and other cases collected in West's Ark. Digest, "Negligence," § 136 (26). There was substantial evidence that the bookmobile was top-heavy and that this fact was known to the Library. Likewise, there was substantial evidence that the brakes had not been working properly and that this fact was known to the Library. Again, there was substantial evidence that the Library failed to make a sufficient investigation of the driver who had charge of the vehicle at the time it overturned. In short, there was sufficient evidence of the charges of negligence to carry them to the jury.

The evidence showed that Miss Brashears was a student, working for the Library in order to attend Ouachita College; that at the time of the accident, was was 21 years of age and had been self-supporting since she was eight years old; that her work on the bookmobile was to check out and receive books at the various places in the County; that she had no driver's license, never had one, had never driven a car, had never bought parts for a car, had never fixed a flat tire, and ". . . knew nothing on earth about automobiles except just riding in one." In the light of this testimony, it could not be said as a matter of law that she assumed the risk of the unsafe vehicle, or that she was guilty of contributory negligence when she did nothing but ride — not drive — in the bookmobile, at the direction of her employer. Her testimony made a case for the jury on assumption of risk and contributory negligence.

III. *Rulings In The Course Of The Trial.* The appellant has (a) one assignment relating to the Court's

statement of the case, (b) one assignment on the admission of evidence, and (c) eight assignments on instructions given or refused.

(a) In stating the case to the Jury, the Court said:

"Miss Brashears bases her plea for recovery upon the following allegations of negligence:

1. She contends the Bookmobile was in a 'run-down' and generally unsafe condition.

2. She contends the braking system was defective and caused the vehicle to veer sharply to the right when applied.

3. She contends the truck was loaded 'top-heavy' with books, making it unsafe to operate.

4. She contends that Sherwood was an incompetent, inexperienced and reckless driver and that the library was negligent in employing him.

5. She contends that the library officials negligently failed to acquaint Sherwood with the unsafe condition of the truck."

We find nothing wrong with the Court's statement. It had been testified: that the bookmobile was a 1947 Ford panel truck converted into a bookmobile by installing shelves; that when the books were on the shelves the vehicle was top-heavy; that the brakes had been defective; that two tires had been replaced; and that no substantial inquiry had been made as to Sherwood's ability to drive such a vehicle. In short, Miss Brashears and her witnesses had offered evidence on each of the numbered items; and the Court fairly listed her allegations.

(b) As regards the assignment on the evidence: when Miss Brashears was testifying, the following occurred:

"Q. When you got in the vehicle on September 9th, did you assume that the vehicle had been repaired?

A. I assumed the brakes were fixed."

The appellant duly objected to the question and answer; but we find no merit to the objection. Miss Brashears had testified that on September 8th the bookmobile had a blow-out, that two casings were ruined, and that there had been trouble with the brakes. She testified that two new casings were purchased, and that the bookmobile was taken to a garage the afternoon of September 8th; and then she was asked the question quoted above. In the light of the evidence about taking the vehicle to the garage, the purchase of new tires, and Miss Brashears' lack of knowledge about motor vehicles, certainly the ruling on the quoted question and answer was proper.

(c) As regards instructions: it would unduly prolong this opinion to discuss in detail each of the assignments regarding instructions given and refused. We have examined each and all of such assignments and find no ground for reversal.

IV. *Appellee's Cross-Appeal.* The appellee has cross-appealed because the Court refused to allow the jury to consider any claim the appellee might have that was based on the negligence of the driver of the vehicle. Since we are affirming the case on direct appeal, it is unnecessary for us to express any opinion concerning the cross-appeal.

Affirmed on direct appeal.

OPINION ON REHEARING

ED. F. MCFADDIN, Associate Justice. We are asked by appellant to clarify our opinion in regard to the insurance coverage. Appellant says that some language in the opinion leaves the impression that appellant was held liable under the policy here involved as though it were a Workmen's Compensation policy. We did not intend for the opinion to leave any such impression. The policy involved in this case was an automobile liability policy; and Miss Brashears recovered just as though she was a third person entirely unemployed by the library. The matter

of any exclusion applying because Miss Brashears was an employee of the library, was not an issue and therefore was not determined by the opinion.

Re-hearing denied.

CAMP *v.* PARK, ADMR.

5-1067 295 S. W. 2d 613

Opinion delivered November 26, 1956.

Ed E. Ashbaugh, for appellant.

John F. Park, Claude F. Cooper, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit by an attorney to enforce a lien upon certain estate funds for the payment of his fee under a written contract with a principal beneficiary of the estate.

Bertrand W. Willson died intestate in October, 1950, survived by his widow, Beatrice Willson, his mother, Janie Willson Gardner, a brother and a sister. The brother, H. B. Willson, was appointed administrator of decedent's estate which consisted of postal savings and other liquid assets worth $17,800. In November, 1950, H. B. Willson and Florene Willson, his sister, entered into an agreement with their mother, Mrs. Gardner, whereby the estate would be divided equally between them, or one-third each, after deductions of the widow's dower and allowances. Shortly after execution of the written contract H. B. and Florene Willson instituted suit for specific performance which was resisted by the mother. Trial in chancery court resulted in a decree upholding the agreement and directing specific performance. Mrs. Gardner then employed appellant, Alonzo D. Camp, to represent her in an appeal of the case to this court under a written contract executed June 5, 1951, which provided: "I hereby agree to allow said attorney fifty per cent of whatever is recovered in said case. No fee will be charged unless a recovery is had." On the appeal ably prosecuted by appellant we reversed and held the agreement invalid for fraud practiced upon Mrs. Gardner and directed dismissal of the suit for specific performance. *Gardner* v. *Willson,* 219 Ark. 787, 244 S. W. 2d 945. Under this decision rendered January 7, 1952, Mrs. Gardner became sole beneficiary of her deceased son's estate subject to the widow's dower right of one-half plus statutory allowances.

Shortly after we handed down our decision H. B. Willson offered for probate an alleged holographic will

under which his deceased brother left all his property to him. In order to protect his client's interest as well as his own, appellant represented Mrs. Gardner in resisting probation of the alleged will. After submission of briefs by counsel for both sides the probate court entered judgment on July 31, 1952, denying probate of the purported will and there was no appeal from said judgment.

H. B. Willson failed to render any accounting in the estate and defaulted on his administrator's bond of $10,000 in which Maryland Casualty Company was surety. In the latter part of 1952 appellant instituted proceedings in probate court for Mrs. Gardner and obtained a judgment against the administrator and surety. H. B. Willson was discharged and Hogan Oliver was appointed administrator in succession. Counsel for Oliver continued the demand for payment on the surety bond and after further investigation and negotiations the probate court ordered the surety to pay $10,000 into the registry of the court under its bond and this was done.

In the Spring of 1955 Mrs. Gardner discharged appellant and employed her present counsel. On May 5, 1955, she executed and filed in probate court a waiver and disclaimer of all her rights and interests as an heir and distributee in the estate of her deceased son. Appellant filed the instant suit in Chancery on May 24, 1955 to enforce either a statutory or equitable lien in his favor on the estate funds to the extent of $8,900 which he claimed as fees for his services under his contract with Mrs. Gardner. The separate answers of appellees, John F. Park, present administrator of the estate of Bertrand W. Willson, deceased, and Mrs. Gardner, denied generally the allegations of the complaint and asserted that assets of the estate were not subject to appellant's claim by reason of the disclaimer filed by Mrs. Gardner. The chancellor took the case under advisement following a trial on December 14, 1955.

On February 17, 1956, an order was issued in probate court on appellant's motion allowing him a fee of $750 for "legal services rendered the estate" and a check

for that amount was issued by the clerk to, and cashed by, appellant. This order was made without notice to appellees and the surety who appeared by their respective counsel in the instant suit and insisted that the probate order should have been made and entered as a final decree in the chancery suit, while appellant contended that the fee allowed was for his services in probate court only. After a hearing on March 9, 1956, the chancellor entered a decree denying appellant's prayer for a lien and stating that the $750 allowance was made on a *quantum meruit* basis and was for all his services rendered in both the probate court and the instant proceedings in chancery. This appeal is from that decree and there is no cross appeal by appellees.

We think the chancellor erred in holding that appellant was not entitled to a lien on the estate funds for the payment of his fee under the contract of employment executed by Mrs. Gardner. In our opinion it makes little difference whether the lien be enforced under our statute or as an equitable lien under the decisions. The statute (Ark. Stats., Sec. 29-132) in express terms gives the attorney a lien and interest in any judgment recovered for his client to the extent and in the amount to which he is entitled by contract, or, if no amount is fixed, a reasonable compensation for his services rendered. In *Osborne* v. *Waters,* 92 Ark. 388, 123 S. W. 374, the court held that when an attorney recovers a judgment for his client of the nature prescribed in the statute and takes steps to perfect his lien, he acquires an interest in the judgment of which he cannot be deprived after the judgment becomes final. While a client may dispose of his cause of action as he sees fit, if there are any proceeds from the litigation derived by settlement or final judgment the attorney has a lien thereon under the statute of which he cannot be deprived by the parties. *St. Louis I. M. & S. Ry. Co.* v. *Blaylock,* 117 Ark. 504, 175 S. W. 1170.

The equitable or charging lien of an attorney is based on the natural equity that a plaintiff should not be allowed to appropriate the whole of a judgment in

his favor without paying therefrom for the services of his attorney in obtaining such judgment. 7 C. J. S., Attorney and Client, Sec. 211. The following statement by the court in *Martin* v. *Schichtl,* 60 Ark. 595, 31 S. W. 458, has been quoted with approval in many subsequent cases: "Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement; and if, from the instrument evidencing the agreement, 'the intent appear to give, or to charge, or to pledge, property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.' " See also, *Walker* v. *Brown,* 165 U. S. 654, 17 S. Ct. 453, 41 Fed. 865; Pomeroy, Eq. Jur., Sec. 1235.

The authorities in general agree that the question whether an attorney's contingent-fee contract will give rise to an equitable lien in his favor on the fund recovered through his efforts is one of construction of the particular contract. The basic issue, in the absence of an express provision for a lien, is whether an intent that the fund recovered shall stand as security for payment of the fee sufficiently appears by implication. See cases cited in 143 A. L. R. 206 where there is an annotation to the leading case of *Button* v. *Anderson,* 112 Vt. 531, 28 A 2d 404. That case involved a contingent-fee contract similar to the one involved here, and the court said: "Where the parties have contracted that the attorney shall receive a specified amount of the recovered fund, such agreement will create an equitable lien on the fund in favor of the attorney to the extent of the amount stipulated. 5 Am. Jur. 394, Sec. 221; 6 C. J. 769, Sec. 366; 7 C. J. S., Attorney and Client, § 211." On the question of implication the court also stated: "Our first task is to determine whether the contract in question did create an equitable lien on the fund when received. It may be stated at the outset that such liens do not arise merely by virtue of a contract for a contingent fee. The test is whether the party contracting for the services sufficiently indicates an intention to make the fund described in the contract security for the debt. Such in-

tention need not be express, but may be implied from the terms of the agreement construed with reference to the situation of the parties at the time of the contract and by the attendant circumstances. If such intention appears, a lien is created, otherwise not. Or, to put it differently, it must appear that the other contracting party looked to the fund itself for payment and did not rely on the personal responsibility of the owner of the claim of which the fund was the result.'' Another similar case is *Winslow* v. *Becker,* 154 Or. 336, 58 P 2d 620, where there was an attempt to defeat the attorney's lien by the son of the widow-client inducing his mother to breach her contingent-fee agreement with her attorney.

Irrespective of statute, it has also been held that a lien may extend to attorney fees in suits arising from, and incidental to, the main cause, and that it is not essential that all the services for which a lien is claimed shall have been rendered before the same court. 7 C. J. S. Attorney and Client, Sec. 213b.

We cannot agree with appellees' assertion that appellant recovered nothing for his client and that his services were merely in defense of an existing right. Nor do we agree with appellant's contention that he is entitled to recover a fee of $8,900 which is fifty percent of the total gross assets of the estate. Under the trial court's decision in the first case upholding the agreement between Mrs. Gardner and the two surviving children, Mrs. Gardner would have been entitled to one-third of the estate after deduction of the widow's dower and allowances and the costs of administration. By reason of the successful appeal and resistance to other devices calculated to defeat her rights, Mrs. Gardner became entitled to the entire estate remaining after deduction of the widow's dower and allowances and the expenses of administration. While she had a right to discharge appellant and disclaim her interests in the estate she could not thereby defeat his right to his fee under the contract.

We therefore conclude that appellant had a lien for his fee under the employment contract to the extent of fifty percent of two-thirds of the estate assets remain-

ing after deduction of administration expenses and the widow's dower and allowances. In this connection it is noted that the widow is entitled to dower without deductions for any debts, claims or expenses of administration. *Dolton, Guardian* v. *Allen,* 205 Ark. 189, 167 S. W. 2d 893.

Appellees argue that the allowance of $750 by the chancellor, plus $135 additional which the evidence shows appellant received on his fee, amounts to more than he is entitled to receive under his contract with Mrs. Gardner. We are unable to determine the accuracy of this contention from this record. There is no proof as to the amount of the expenses of administration or the net value of the estate remaining after payment of such expenses and the widow's dower and allowances. While the only funds accounted for at the time of trial consisted of the $10,000 paid by the surety there was evidence that H. B. Willson had made several substantial payments to the widow before the payment by the surety. It was also indicated in the oral argument that H. B. Willson had rendered an accounting of some kind since the trial.

The decree is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

SUPERIOR IRON WORKS & SUPPLY CO. *v.* SAULSBERRY.

5-1073 295 S. W. 2d 626

Opinion delivered November 26, 1956.

Keith, Clegg & Eckert, for appellant.

T. O. Abbott and *Spencer & Spencer,* for appellee.

George Rose Smith, J. This suit was brought by the appellant to enforce a materialman's lien under what is sometimes called the Miners' Lien Law. Ark. Stats. 1947, §§ 51-701 to 51-710. By an amendment to the complaint the two appellees, Saulsberry and Beebe, were joined as defendants. Their demurrer to the amended complaint was sustained by the court below, upon the dual ground that no cause of action is stated and that in any event the claim against these appellees is barred by limitations. Since we have concluded that the chancellor's decision upon the question of limitations is correct it will not be necessary to pass upon the other issue.

Superior alleges that between November 21, 1951, and April 15, 1952, it furnished to Roberts Petroleum, Inc., some 31,000 feet of steel pipe, which we assume from the pleadings to have been intended for use in the drilling of an oil well. The purchase price for the pipe was not paid, and on May 6, 1952, Superior filed with the circuit clerk its verified claim for a lien upon the pipe. Ark. Stats., §§ 51-708 and 51-613. Ten days later the vendee filed a petition for an arrangement under the federal Bankruptcy Act; the debtor was adjudi-

cated a bankrupt on July 31, 1952. In the bankruptcy proceedings Superior attempted to assert a secured claim upon the basis of its materialman's lien; but it was ultimately decided, on January 26, 1954, that the bankruptcy court had no jurisdiction over the pipe. Superior was held to be an unsecured creditor, and such creditors received nothing in the bankruptcy proceedings.

In the meantime Superior had already filed, on April 3, 1953, the present suit in the chancery court of Union county. The original complaint named two corporate defendants, who were alleged to have removed part of the pipe from the premises on which it was to have been used. By an amendment filed on May 13, 1954, the appellees were made parties to the case. It was asserted that on February 7, 1952, Saulsberry had converted to his own use 3,312 feet of the pipe, without Superior's written consent, and that on April 30, 1952, Beebe had similarly converted 3,604.25 feet. The prayer was that the defendants be required to surrender possession of the pipe, together with the land or leasehold to which it might have been attached, and that the property so surrendered be sold for the payment of Superior's debt.

With respect to the period of limitations the Miners' Lien Law adopts the provisions of the mechanics' lien statute, which requires that suit be brought within fifteen months after the filing of the lien. Ark. Stats., §§ 51-708 and 51-616. Here the lien was filed on May 6, 1952, but the appellees were not sued until May 13, 1954. It is evident that the suit is barred unless there is some special reason for holding the fifteen-month limitation to be inapplicable.

Superior advances two theories to support its contention that the suit was filed in time. It is first pointed out that this complaint is based upon § 5 of the Miners' Lien Law (Ark. Stats., § 51-705), which provides that one holding property subject to the lien may not dispose of it without the written consent of the lienor, and that upon a violation of this provision the lienholder shall be

entitled to the possession of the property wherever found. It is shown that this authority for an action in conversion against third persons is peculiar to the Miners' Lien Law, there being no similar provision in the mechanics' lien statutes. Hence, says the appellant, "the statute of limitations governing the time for enforcement of the lien, which commences to run when the lien is filed, could have no application to an action for conversion, which runs from the act of conversion, and for the simple reason that the conversion might occur after the 15 months had expired."

This argument, although plausible, is not quite sound. The Miners' Lien Law specifically states that, "except as herein expressly provided," the lien must be enforced within the time allowed by the mechanics' lien statute. Ark. Stats., § 51-708. The act does not expressly provide a separate period of limitations for a suit for conversion under § 5; so by its literal language the statute requires that such an action be brought within fifteen months from the filing of the lien. Superior cannot be permitted to take advantage of a statutory cause of action without at the same time being subject to the restrictions imposed by the statute.

We do not agree with Superior's suggestion that this holding carries with it the possibility of an injustice to the lienholder. Certainly that is not true in the case at bar, for Superior alleges that both the conversions complained of occurred before its notice of lien was lodged with the circuit clerk. Hence Superior actually let the full fifteen months go by without filing its suit. On the other hand, if no conversion has yet occurred when the lienholder files his suit against the principal debtor, the lienor may protect himself by filing a notice of *lis pendens*. See Ark. Stats., § 27-501, which applies to suits involving either real or personal property. If the property should thereafter be converted by a stranger to the case, he would take subject to the outcome of the litigation. *Mitchell* v. *Federal Land Bk. of St. Louis,* 206 Ark. 253, 174 S. W. 2d 671. In those circumstances the lienholder would not have to resort to the special

cause of action that is conferred by § 5 of the Miners' Lien Law.

Superior's second contention is that the running of the fifteen-month statute of limitations was suspended by the bankruptcy proceedings instituted by its vendee, Roberts Petroleum, Inc. Section 11 of the Bankruptcy Act provides that the operation of any statute of limitations "affecting the debts of a bankrupt provable under this title" shall be suspended as therein stated. 11 U. S. C. A. § 29 (f). Section 391 of the act, applying specifically to debtor's arrangements, provides that all statutes of limitations "affecting claims provable under this chapter" shall be suspended during the pendency of the proceedings. 11 U. S. C. A. § 791.

It is evident that the present case does not come within the exact language of the federal law, for Superior's cause of action for the torts of Saulsberry and Beebe did not constitute a debt of Roberts Petroleum Inc., or a claim provable in the arrangement proceedings. It is argued, however, that Superior was required to prove its claim against Roberts as a condition precedent to the maintenance of an action against Saulsberry and Beebe. In this connection Superior relies upon the decision in *Cruce* v. *Mitchell,* 122 Ark. 141, 182 S. W. 530, where it was held that the original contractor is an indispensable party in a suit to fasten a mechanics' lien upon the landowner's property.

The reasoning followed in the *Cruce* case does not apply to the situation now presented. There the contractor was held to be an indispensable party because the mechanics' lien law makes it his duty to defend the action at his own expense. Ark. Stats., § 51-610. There is no similar requirement with respect to the cause of action conferred by § 5 of the Miners' Lien Law. Quite the contrary, that section provides that the lienholder is entitled to the possession of the property "and to have the same then sold for the payment of his debt, whether said debt has become due or not." Ark. Stats., § 51-705. Since the lienor is permitted to assert an independent cause of action against the converter before

the principal debt has even become due, there is no reason to say that the principal debtor is invariably a necessary party to the action. As far as the record before us shows, the pendency of the Roberts bankruptcy case did not prevent Superior from bringing its suit within fifteen months after the lien was filed.

Affirmed.

HOUSING AUTHORITY OF LITTLE ROCK, ARKANSAS
v. WINSTON.

5-1083 295 S. W. 2d 621

Opinion delivered November 26, 1956.

R. Ben Allen and *William L. Terry,* for appellant.

Gordon H. Sullivan and *Harry C. Robinson,* for appellee.

PAUL WARD, Associate Justice. The only question presented by this appeal is: Is there sufficient, competent testimony to support the chancellor's finding that appellees' property was worth $2,000?

On August 25, 1955 appellant, Housing Authority of the City of Little Rock, Arkansas, (authorized and existing under authority of Act 298 of 1937 and amendatory acts) filed a suit in the circuit court against Bordie Winston and his wife (together with many other property owners), asking that said appellees' property (Lot 1

Block 44, Granite Park Addition to Little Rock) be condemned and that the money damages for the taking of said property be ascertained.

Because of certain issues arising in the circuit court relative to title to said property and also a written agreement as to damages the cause was transferred to the chancery court. Upon hearing before the chancellor the two issues mentioned above were discarded and the chancellor heard testimony as to the value of the property in question, and thereupon found that said property was of the value of $2,000.

For a reversal, the two-fold contention of appellant is that appellees' witnesses were not qualified to testify as to the market value of the land, and also that the chancellor's finding as to damages is not supported by the weight of the evidence. We are unable to agree with appellant.

The court was correct in allowing appellees' witnesses to testify regarding the value of the property. Lester Lowery who owned the property in question previously stated that he was acquainted with the general market value of property in the Granite Mountain Addition and that he bought and sold property. Worthy Springer stated that he was well acquainted with appellees' property, that he had bought and sold property in that neighborhood several times, and that he had discussed the price of such property during the last few years with people who were buying and selling homes. This court has held that it rests largely within the discretion of the trial court to decide the competency of a witness to express an opinion as to the value of land. See *Bridgeman* v. *Baxter County,* 202 Ark. 15, 148 S. W. 2d 673, and *Fort Smith & Van Buren District* v. *Scott,* 103 Ark. 405, 147 S. W. 440. Also, in the last mentioned opinion the court approved this statement: " 'Intelligent men, who have resided a long time in the place and who are acquainted with the land in question and say they know its value are competent, although they are merchants or farmers, and have never bought and sold land in the place.' " Where witnesses had given testi-

mony relative to the value of real property, in *Ball* v. *Independence County,* 214 Ark. 694, 217 S. W. 2d 913, we said: "In the circumstances, we think, the court properly admitted testimony as to values to be established by the opinions of witnesses familiar with the property in question," and then we approved this statement: "The weight to be given the testimony of any one of the witnesses who expressed opinions would depend, of course, on the candor, intelligence, experience and knowledge of values on the part of the witness." We cannot therefore say that the trial court abused its discretion in admitting the testimony of appellees and their witnesses.

Nor are we able to say that the finding of the chancellor as to the value of appellees' property is against the weight of the evidence, although the testimony was conflicting. Appellee, Pearl Winston, stated that she gave approximately $700 for the property in March of 1953 and that since that date she had made numerous repairs to the house totalling an expenditure of around $500, that the property rented for $15 a month, that she had lived in the neighborhood 11 years and had bought and sold property in that community over the years and knew what her neighbors had sold property for, and that she thought the fair market value of her property was $2,500. In Mr. Lowery's opinion the lot alone was worth $600 and the house and lot was worth $2,000. Mr. Springer thought that $2,500 would be the fair market value. On the other hand one of appellant's witnesses placed the market value of the property at $1,000 and the only other witness agreed with him.

The chancellor who saw and observed the witnesses was in a better position than we are here to evaluate the testimony and reconcile the discrepancies, and we cannot say that his finding is not supported by the weight of the evidence.

Affirmed.

FULLER *v.* TERRILL.

5-1094 295 S. W. 2d 625

Opinion delivered November 26, 1956.

[redacted]

J. B. Milham, for appellant.

F. O. Butt, for appellee.

SAM ROBINSON, Associate Justice. This suit was filed by Billy and Marian Terrill to confirm their title to Lot 8, Block 168, Riley and Armstrong Survey, in the City of Eureka Springs, Arkansas. The appellant, C. A. Fuller, filed an intervention, claiming to be the owner. The issue is whether the Terrills have acquired title to the property by a deed from the State, coupled with the payment of taxes for more than seven consecutive years. The land is unimproved and uninclosed. Ark. Stats. § 37-102 provides: "Uninproved (unimproved) and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act (section) unless he and those under whom he claims shall have paid such taxes for at least seven (7) years in succession, and not less than three (3) of such payments must be made subsequent to the passage of this act."

The problem is whether the deed from the State to the Terrills constitutes color of title. If the deed does carry color of title, then the Terrills must prevail, there being no dispute about their having paid the taxes for more than the seven year period.

Lot 8 was conveyed to Fuller by the Crescent Hotel Company in 1925, and, in 1929, he got another deed to an interest in the property from A. G. Ingalls and his wife, Lelia Ingalls. In the year 1947 the County Clerk

of Carroll County certified that Lot 8 had been omitted by mistake from the list of property certified to the State in 1935 for non-payment of the 1931 taxes. Subsequently, the State Land Commissioner deeded the lot to the Terrills. The record is convincing that the taxes were paid for the year 1931 and that the property should not have been certified to the State as being delinquent for that year. In the circumstances shown here, the deed from the State Land Commissioner to the Terrills is void. But, even though it is void the question is, does it carry color of title; and we have held repeatedly that a void deed from the State Land Commissioner constitutes color of title. *Cayce* v. *Nordin, Trustee,* 221 Ark. 383, 253 S. W. 2d 338, citing *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681; *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S. W. 390; 11 L. R. A., N. S. 772; *McKewen* v. *Allen,* 80 Ark. 181, 96 S. W. 392; *Brandon* v. *Parker,* 124 Ark. 379, 187 S. W. 312; *Terry* v. *Drainage District No.* 6, *Miller Co.,* 206 Ark. 940, 178 S. W. 2d 857; and *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425.

The appellees have color of title even though their deed from the State is void, and, by the payment of taxes on wild and unimproved land for seven years under color of title, they acquired a valid title. Mr. Fuller has lost the lot by the law of adverse possession.

Affirmed.

[redacted]

[redacted]