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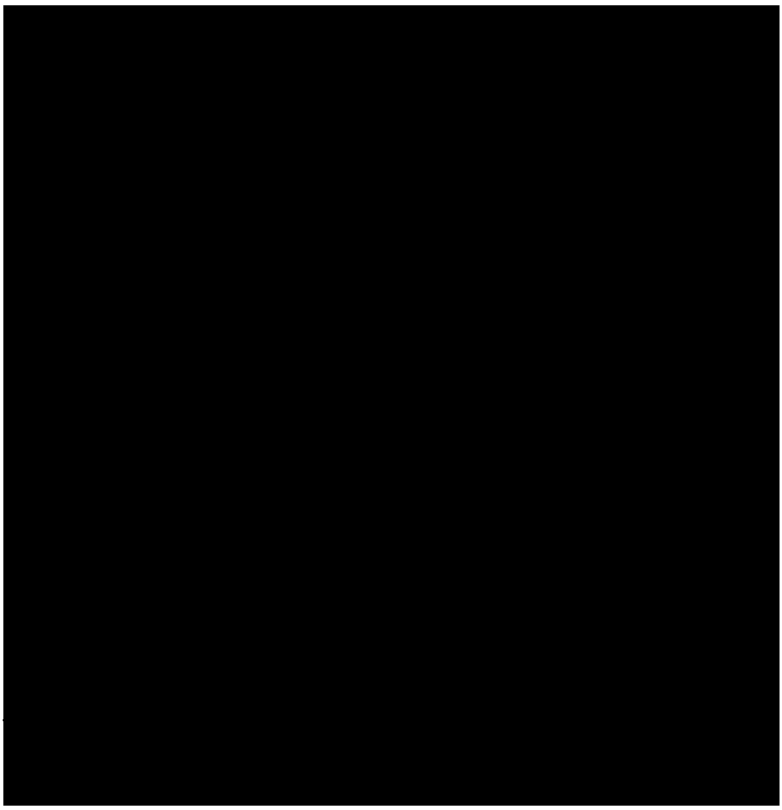

McCombs v. McCombs.

5-1046 295 S. W. 2d 774

Opinion delivered December 3, 1956.

Etheridge & Sawyer, DuVal L. Purkins, and *D. A. Bradham,* for appellant.

William S. Arnold and *Williamson & Williamson,* for appellee.

J. Seaborn Holt, Associate Justice. This litigation involves the ownership of 2,470.99 acres of farm lands in Ashley County. Appellants, A. P. McCombs and Eugenia McCombs, are husband and wife and A. P. McCombs was the brother of R. B. McCombs who died February 13, 1932. Appellee, Cleone R. McCombs, was the wife of R. B. McCombs. R. B. McCombs left surviving his widow, appellee, and two children, who have now reached their majority. At the time of R. B. McCombs' death he was heavily involved in debt and hopelessly insolvent, owing about $250,000. Appellee, as beneficiary, collected approximately $80,000 on life insurance of her husband. At the time of R. B. McCombs' death, A. P. McCombs was also heavily in debt and insolvent, owing approximately $75,000, and owned the lands here involved. The First National Bank of El Dorado, Arkansas, however, held a first mortgage against these lands for $42,863.03 and the R. B. McCombs' estate, held a second mortgage in the amount of $32,899.07. The bank foreclosed its mortgage; was awarded a judgment for $42,863.03 and R. B. McCombs' estate was given a judgment for $32,899.07 on its second mortgage subject to the first mortgage of the bank. A sale of these lands was ordered and had. Cleone McCombs, appellee, was the purchaser at this sale for $20,000. The sale to her was duly confirmed by the trial court, a commissioner's deed (dated March 2, 1933) to her ordered, executed and approved, and appellee took possession of all these lands immediately thereafter in 1933 and has farmed, asserted and exercised ownership from 1933 to the present time, a period of some 23 years. Her deed was duly recorded. She has paid the taxes on this property each and every year following her purchase. She paid for the upkeep and repairs on the houses and barns on these lands. Each year since she acquired this property, A. P. McCombs, under a written recorded rental

contract with appellee, has farmed the property as her tenant and under the contract agreed to pay to her one-fourth of the cotton and one-third of the corn as rental.

The present suit was filed by A. P. McCombs and wife in which they sought specific performance of an alleged oral agreement or contract alleged to have been entered into between A. P. McCombs and appellee, Cleone R. McCombs, just prior to the purchase of the property by appellee at the foreclosure sale above. By this alleged agreement appellant claims that appellee agreed to buy the property at the foreclosure sale and to reconvey the legal title back to A. P. McCombs upon his repayment to her of his indebtedness due under the foreclosure decree through which appellee acquired title to the lands in question. On a trial, after an extended and patient hearing, the court found all the issues against appellants and dismissed their complaint for want of equity. This appeal followed.

For reversal appellants, in effect, first contend that the trial court erred in denying their prayer for specific performance of the alleged oral agreement, and second, that the court erred in refusing to hold, on the evidence presented, that a constructive trust resulted or was created under which appellant would be the beneficiary and in this connection appellant says: ". . . in cases where general rules and principles do not furnish an exact measure of justice between the parties, the court governs itself as far as it may by general rules and principles; but at the same time withholds and grants relief, according to the circumstances of each particular case. That is, upon the principle of constructive trust created by law." After a review of the record presented, we have concluded that the trial court was correct in denying both of appellants' contentions and in dismissing their complaint for want of equity.

Before appellants' contentions above could be sustained they have the very heavy burden imposed upon them of producing evidence to sustain these contentions that is clear, cogent and convincing and practically beyond a reasonable doubt. Our rule in a long line of cases

is to the following effect: ". . . we have many times held that a court of equity may grant specific performance of a parol contract to convey land only where the evidence of the agreement is clear, satisfactory and convincing. *McKie* v. *McClanahan,* 190 Ark. 41, 76 S. W. 2d 971; *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926. The same rule of evidence holds true as to the establishment and enforcement of a constructive trust . . . Sometimes it is expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact,' and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing' and sometimes expressed as requiring it to be 'clearly established' . . . Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands." *McNutt* v. *Carnes,* 213 Ark. 346, 349 and 350, 210 S. W. 2d 290.

This court said in the case of *Walk* v. *Barrett,* 177 Ark. 265, 267, 6 S. W. (2d) 310, in the matter of a parol contract, "The rule of law applicable in such cases is that, before a court of equity may grant specific performance of a parol contract to convey lands, the evidence of such agreement must be clear, satisfactory and convincing. It must be so strong as to be substantially beyond reasonable doubt." In *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793, we said: "It is a well settled principle that, while trusts resulting by operation of law may be proved by parol evidence, yet the courts uniformly require that such evidence be received with great caution, and that it be full, free and convincing." Here, in addition to the above evidence, appellee stoutly denied that any agreement such as appellant claims was ever entered into between her and A. P. McCombs at any time. A. P. McCombs testified that the alleged agreement was entered into in December 1933 at appellee's home in Little Rock, Arkansas. It appears that no witnesses were present. In each of the yearly recorded rental contracts which A. P. McCombs entered into with

appellee, he admitted her ownership of the property and that he was occupying as her tenant, in other words, the relationship of landlord and tenant clearly existed. In his income tax returns it appears that A. P. McCombs credited himself under deductions with one-fourth cotton paid to Cleone McCombs on lands involved and continued to make similar deductible claims through the years of his tenancy. He showed no deductions for depreciation for farm houses and barns from 1936 through 1952. Without attempting to detail more of the testimony we have concluded that appellants have fallen far short of meeting the burden of proof imposed upon them to sustain either of their contentions. Appellants' actions here speak much louder than their words.

Courts are reluctant when, as here, there is sought to be impressed upon the lands involved (which lands were conveyed to appellee by a solemn deed) a trust, especially after the intervention of more than twenty years. We said in *Griffin* v. *Griffin,* 200 Ark. 794, 141 S. W. 2d 16: "In the well considered case of *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94, Justice HART said that the misrepresentation which will create a trust must be made before or at the time the legal title is acquired by the promisor, so that if the deed of January 2, 1905, did not create a trust, the subsequent promise of Marvin to convey his sister 20 acres of the land did not create one. Courts are reluctant — and should be — to impress trusts upon lands conveyed by deeds absolute in form, especially, where, as in this case, many years have intervened before that attempt is made, and will not do so in such case, or, for that matter, in any case, unless the testimony tending to establish the trust is clear, satisfactory and convincing, as we said to be necessary in the Armstrong case, *supra.* (*Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88). We have many cases to this effect, the latest being that of *Maloch* v. *Pryor,* 200 Ark. 380, 139 S. W. 2d 51." A constructive trust (which appellant claims existed here and under which A. P. McCombs would be the beneficiary) can arise only by reason of a fraudulent misrepresentation

or action before or at the time the legal title is acquired by the alleged promisor (appellee here).

Finally, appellants say that they ". . . are entitled to relief because R. E. Wiley, who represented appellee and other adverse parties to appellants' interests in the 1932-33 foreclosure suit, also, assumed to and did act as attorney for appellants in that suit and failed to legally and equitably protect their right of redemption." In effect, appellants charge that Mr. R. E. Wiley (now deceased) represented A. P. McCombs and appellee, Cleone R. McCombs, in the bank foreclosure suit above (1932-1933) and therefore represented conflicting interests. We find that the great preponderance of the evidence in this case is against this contention. Mr. Wiley, a highly respected attorney at the bar of this court, represented appellee in the foreclosure proceedings and appellant testified positively that in the foreclosure suit he was "advised and assisted" by Mr. G. C. Ledbetter, an attorney of Hamburg and that Mr. Ledbetter was his attorney in the foreclosure suit. Throughout A. P. McCombs' testimony he refers to Mr. Wiley as "the attorney for Cleone and my brother's estate (meaning R. B. McCombs' estate)." It appears that he had only one conference with Mr. Wiley and as to it says: "I decided to go up to Little Rock and talk with Mr. Wiley because I knew he was my brother's attorney and he was looking after my sister-in-law's affairs and her children and I knew he was the one to go to talk to." He learned from Mr. Wiley that appellee "was going to buy this debt of the First National Bank for forty thousand dollars." He says that Mr. Wiley, an attorney for Mrs. Cleone McCombs and the R. B. McCombs estate, said that he had talked with Mr. Loughborough as attorney for Mrs. Hardy (who was involved in the foreclosure suit and not a party here) and that "they" (Mr. Loughborough and Mr. Wiley) "would try to work out a plan together that would protect my lands and give me a chance to redeem my lands and if I would cooperate with them, that they felt like that they both would assure me with this cooperation that I would get protection and have a chance to

redeem my three places, the Dean, Files and Wimberly places.''

Appellee testified positively that she had not authorized Mr. Wiley to make any such agreement, and we think the great preponderance of the testimony supports her, and further, that the evidence shows that Mr. Wiley made no such agreement with appellant. The law is well settled that an attorney, as here, employed to conduct litigation involving property, has no implied or apparent authority by reason of his employment, to bind his client in regard to the subject matter of the litigation except with respect to matters of procedure. In *Cullin-McCurdy Const. Co.* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S. W. 1023, we said: ''There was no testimony offered to show that (attorney) Denman had any authority to act for appellee, further than to prosecute the suit as an attorney, and it was not within the scope of his authority as attorney to compromise with appellant, or to release the latter from liability or to forfeit that liability by making a new contract with another to assume it.'' ''It is a general principal that an attorney cannot by virtue of his general authority as attorney, bind his client by any act which amounts to a surrender or waiver in whole or in part of any substantial right of the client, . . .'' 5 Am. Jur., § 70, p. 300. ''The implied authority of an attorney to make stipulations is ordinarily limited to matters of procedure in the management or prosecution of the action. He cannot without special authority dispose of or adjust the substantial rights of his client by compromise or otherwise,'' 132 Am. State Reports, p. 156. ''An attorney employed under a general retainer cannot waive any of the substantial rights of his client without the latter's consent, nor make any executory contract in relation to his client's rights, nor in general, compromise them by any voluntary act of his own,'' Anno. 76 A. L. R. p. 1461.

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

Opinion delivered December 3, 1956.

[Rehearing denied January 14, 1957.]

[redacted]

Herrn Northcutt, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

J. SEABORN HOLT, Associate Justice. In this action appellant sought to collect from appellee an income tax in the amount of $2,842.75. From a decree holding, in effect, that appellee was not subject to the tax comes this appeal. The facts were stipulated and were not in dispute. Appellee was organized under the laws of Utah and is located, with its principal place of business, in California; it owns refrigerator cars which it leases to various railroads throughout the United States; and some of its leased cars, on which appellee paid *ad valorem* tax, moved interstate coming through Arkansas on rail lines of carriers connecting with roads that operated cars leased from appellee. Appellee had no office in Arkansas, had no property in Arkansas with a permanent situs, had no agent or employee in Arkansas, and transacted no business in Arkansas. No shipments of merchandise in cars of appellee originated in this state.

The income of appellee, on which Arkansas bases its right to tax, was derived solely from contracts made in other states for the hire or lease of appellee's cars and used by the contractees in interstate transportation of perishable products. All cars of appellee were delivered to the contractees outside of Arkansas and appellee had no control as to where such cars would be used. There appears to be no question as to the amount of the income tax due Arkansas, if any is due to be paid. The amount of the tax here was based on the percentage of cars moving on carrier lines in Arkansas as applied to the various items of gross income and expenses realized by appellee from all sources applicable to its refrigerator cars, and, of the total cars belonging to appellee in operation in 1954, 0.5435 percent moved within the confines of Arkansas and such percentage was used by appellee in applying to the various items of gross income and expenses in its income tax report.

The issues presented, says appellee, are: "I. The Arkansas Income Tax Law does not impose an income tax on appellee. II. If any such tax is imposed by the law it is unconstitutional and deprives appellee of its property without due process of law, and is an improper burden upon Interstate Commerce."

I.

Does the Arkansas Income Tax Law impose an income tax on appellee? We hold that it does. The Commissioner of Revenues of Arkansas bases the state's right to recover the income tax here imposed on § 84-2003, Ark. Stats. 1947. Subsection (c) of this section provides: "(c) *On income of Arkansas property of nonresidents.* A like tax is hereby imposed and shall be assessed, levied, collected, and paid, annually, at the rates specified in this section upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned, and from every business, trade or occupation carried on in this State by individuals, corporations, partnerships, trusts or estates, not residents of the State of Arkansas; and

each such non-resident as defined herein shall file income tax returns with the State of Arkansas and pay the tax without distinction, or incident to the laws of such nonresident's resident state; it being the specific intention of the General Assembly that the tax shall be collected from property owned and from the conduct of every business, trade or occupation, whether or not the individuals, corporations, partnerships, trusts or estates are qualified to do business in the State of Arkansas and whether or not such business, trade or occupation shall be conducted in interstate commerce; provided, however, that the payment of the tax shall be based upon net income properly allocated as net income arising from the ownership of property and the conduct of business, trade or occupation in the State of Arkansas . . . (Acts 1929, No. 118 § 3, p. 573; Pope's Digest, § 14026; Acts 1947, No. 135, § 1, p. 319)." Our holding (in 1944) in the case of *McLeod, Comm. of Revenues* v. *Memphis Natural Gas Company,* 207 Ark. 879, 183 S. W. 2d 927, and the principles of law there announced are controlling here. In that case, on facts similar in effect to those presented here, wherein the appellee, a non-resident corporation, owned and operated property in Arkansas — a gas pipe line several miles in length running from Louisiana across the southeast corner of Arkansas into Mississippi at Greenville — we had occasion to construe and apply the above § 84-2003, sub-section (c) as it then existed prior to its amendment by our 1947 Legislature. In 1944 this sub-section (c) provided: "(c) A like tax is hereby imposed and shall be assessed, levied, collected, and paid, annually, at the rates specified in this section upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned, and from every business, trade or occupation carried on in this State by individuals, corporations, partnerships, trusts or estates, not residents of the State of Arkansas." The remainder of this section was added in 1947 and is now in force.

In the McLeod Case above, prior to the amendment, we held: "1. Taxation — Income Taxes. — Appellee,

a foreign corporation not authorized to do business in this state transporting gas through its pipeline from Louisiana fields across the southeast portion of this state selling gas to a distributor to be sold to consumers, is liable for the income tax imposed by the income tax law. Pope's Digest § 14026 (c) (Now § 84-2003) 2. Interstate Commerce —It was not the purpose of the commerce clause of the Constitution of the United States to relieve those engaged in interstate commerce of their just share of the tax burden, merely because the tax incidentally increased the cost of transacting the business. 3. Interstate Commerce — Taxation. — Even if the business of a foreign corporation were wholly interstate commerce, a non-discriminatory tax imposed by a state upon the net income derived from within the state is not prohibited by the commerce clause of Constitution of the United States, whether the corporation has a commercial domicile in that state or not. 4. Taxation — Income Taxes. — Appellee, owning a pipe line and transporting gas across this state which it sells to a distributor to be sold to consumers, is liable for the tax imposed by the statute (Pope's Digest, § 14026) on the net income derived from the business transacted in this state, although it is not commercially domiciled here." In the present case the entire net income tax, on which appellant bases its right to recover in this action, is derived from the non-resident appellee's property, — its cars —, which it owned and which were operated on railroad lines in Arkansas and the tax assessed appears to be on net earnings justly attributable to Arkansas, and certainly we think the authority to impose and enforce such a tax, which we upheld in the McLeod Case, was made even stronger by the above amendment which the Legislature added in 1947 (subsequent to the McLeod opinion) and in which it expressed in no uncertain terms its intent to continue to impose and collect an income tax on non-resident corporations in a situation such as we have here. This sub-section (c) as now constituted says that: ". . . each non-resident corporation . . . shall file income tax returns . . . and pay the tax," without regard to the laws of the state in which such

non-resident resides, ". . . it being the specific intention of the General Assembly that the tax shall be collected from property owned . . . whether . . . the corporations are qualified to do business in the State of Arkansas, or whether such business . . . shall be conducted in interstate commerce; provided . . . that the payment of the tax shall be based upon net income property allocated as net income arising from the ownership of property and the conduct of business . . . in the State of Arkansas." As indicated, we hold that appellee falls within the provisions of the statute and is subject to the tax.

II.

As pointed out above, the imposition and collection of this income tax was declared constitutional in the McLeod Case. We there said: "But appellee insists that its net income in Arkansas is derived wholly from Interstate Commerce, and that if the Arkansas Income Tax Act of 1929 is construed to apply to appellee's income, it is unconstitutional and void as being in violation of the commerce, the due process and the equal protection clauses of the Constitution of the United States. We sustained the constitutionality of this act in *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. 2d 1000 . . ."

We conclude that the trial court erred in directing a refund of the money so paid by appellee to appellant and accordingly the decree is reversed and the cause dismissed.

DR. PEPPER BOTTLING CO. OF NEWPORT *v.* WHIDDEN.

5-1087 296 S. W. 2d 432

Opinion delivered December 3, 1956.

[Rehearing denied January 7, 1957.]

Williamson & Williamson, and *Kaneaster Hodges,* for appellant.

Murphy & Arnold, for appellee.

ED. F. MCFADDIN, Associate Justice. This case was tried before the Circuit Judge without a jury, and the

plaintiff[1] recovered a judgment for $3,000 for injuries claimed to have been received when a bottle of carbonated beverage exploded. The Trial Court stated:

"Since the Supreme Court of Arkansas positively and unequivocally stated that the *res ipsa loquitur* doctrine should be applied in the State of Arkansas in the Hicks[2] case, and it is the recollection of the court it was again applied in the Mattice[3] case, and there are no recent decisions altering the Supreme Court's declaration to that effect, then the law as laid down in those two cases by the Supreme Court of Arkansas is the law in Arkansas as pertaining to this type of action.

"The Court finds as a fact from the testimony of Von Dean Whidden that there was an explosion; that the injury of which she complains was the result of that explosion, or phrased differently, that the explosion was the proximate cause of that injury. The Court further finds as a fact there was no negligence on the part of the plaintiff. The Court further finds as a fact that there was no intervening cause by the plaintiff, nor does the record show there was an intervening cause set in motion by any other individual. And applying the *res ipsa loquitur* rule, the court finds for the plaintiff in the amount of $3,000."

Appellant brings this appeal, presenting seven points for reversal. We group these points:

I. The appellant says: "The physical facts demonstrate that the bottle did not break from internal pressure." Viewing the evidence in the light most favorable to the appellee[4], the following facts appear: Von Dean

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[1] The action was filed by Luther Whidden, as father and next friend of Von Dean Whidden, a minor, but we speak of the little girl as the "plaintiff" or the "appellee".

[2] This is *Coca-Cola Bottling Co.* v. *Hicks*, 215 Ark. 803, 223 S. W. 2d 762.

[3] This is *Coca-Cola Bottling Co.* v. *Mattice*, 219 Ark. 428, 243 S. W. 2d 15.

[4] This is our rule in testing the sufficiency of the evidence to sustain the verdict or findings of fact from the Circuit Court. *Harrison* v. *Rosensweig*, 185 Ark. 281, 47 S. W. 2d 2; *Potashnick* v. *Archer*, 207 Ark. 220, 179 S. W. 2d 696; *Albert* v. *Morris*, 208 Ark. 808, 187 S. W. 2d 909.

Whidden was a little girl eleven years old in 1950. Her father, Luther Whidden, had a country grocery store and purchased carbonated beverages from the appellant, Dr. Pepper Bottling Company of Newport, Arkansas (hereinafter called "Dr. Pepper Company"). The bottles containing the carbonated beverages were filled, charged, capped and crated by the Dr. Pepper Company; and then delivered and stacked in Luther Whidden's store by the Dr. Pepper Company. On July 11, 1950, Von Dean Whidden was standing near the stacked crates of bottles, and one of the bottles containing a carbonated beverage ("strawberry soda pop") exploded, hurling a piece of glass that struck and cut Von Dean's bare foot and inflicted painful injuries thereto. The theory of the plaintiff was that the Dr. Pepper Company had been negligent in the bottling of the carbonated beverage, that such negligence caused the explosion and resulting damages, and that under the rule of *res ipsa loquitur* she should recover, unless Dr. Pepper Company proved itself free from actionable negligence.

There were only two witnesses who attempted to tell how the injury occurred: they were the little girl, Von Dean; and her mother, Mrs. Whidden. Von Dean said that the bottle that broke was in the top case of the stack and that she was about four feet from the bottle when it exploded.

"Q. How did the bottle get from the case in which it was setting, over in your foot?

A. Well, it exploded. When it exploded it just flew over.

Q. It flew across there?

A. Well, it blowed up, flew over and hit my foot . . .

Q. What part of the bottle hit your foot?

A. Top part.

Q. Did you observe the top part; did you see it?

A. Yes . . .

Q. Did you hear a noise?

A. I don't remember.

Q. You don't remember hearing a noise?

A. No . . .

Q. Do you know and do you remember whether or not you and your brother or anybody else in your presence, touched that bottle in any way?

A. They had not."

Mrs. Whidden testified:

"A. . . . I was in the back tending to the berries. She went to crying in the front part of the building. There is just a doorway in between and the curtains were pulled back. I ran in there and asked what was wrong and she told me, 'A bottle blowed up.' Half of it was still in the case and the other half with the top on it and was laying there by her.

Q. How far was it laying from her foot?

A. Right by her. I would say that close to her (indicating).

Q. That close is three or four inches?

A. Yes, that would be about right.

Q. Was her foot bleeding?

A. It sure was . . .

Q. You didn't hear a noise? . . .

A. I didn't hear the bottle."

The appellant says that Von Dean's and Mrs. Whidden's description of ". . . two whole parts of the broken bottle demonstrates that it had not exploded, but that, rather, it was broken by an external blow"; and the appellant says that the testimony of these witnesses should be disregarded as contrary to physical facts and the law of physics: citing *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062; *Platt* v.

Owens, 183 Ark. 261, 35 S. W. 2d 358; and *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768.

But in *Alldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571, we discussed in some detail this matter of physical facts and physical laws:

" 'So frequently do unlooked-for results attend the meeting of interacting forces that courts, in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other.'

"Regarding the defendant's first assignment, about incontrovertible physical facts in this case, it is not for us to substitute our conclusions for those of the jury, unless the physical facts demonstrate beyond a doubt that the verdict was erroneous. We cannot so declare in this case."

We conclude that in the case at bar we cannot say as a matter of law that it would have been impossible for a bottle to explode and the top part of the bottle to be hurled four feet, just as the witnesses stated. The Court saw these witnesses and believed what they said, and we cannot say that their testimony was physically impossible to be true.

II. *Res Ipsa Loquitur.* Appellant says: "The evidence is insufficient to establish an explosion for application of *res ipsa loquitur* doctrine." What we have said in disposing of appellant's first point applies here also. It must be borne in mind that there was evidence (1) that there had been no moving or handling of the bottles or crates from the time and place where Dr. Pepper's delivery man placed them a few days earlier; and (2) that the bottle was still in the same case when it exploded and injured the plaintiff. The evidence offered by the plaintiff placed the burden on the defendant of proving itself free from negligence under the *res ipsa loquitur* doctrine.

The appellant says: "There was no finding by the Court that defendant was negligent." We have previously copied two paragraphs from the judgment of the Trial Court. The answer to the appellant's contention is found in the Court's finding that there was an explosion and that no intervening cause had been set in motion by the plaintiff or anyone else. As stated in the Hicks case and the Mattice case, cited by the Trial Court, and as reiterated in our more recent case of *Coca-Cola Bottling Co.* v. *Jones,* 226 Ark. 953, 295 S. W. 2d 321 (Case No. 1027, decided Nov. 12, 1956), the burden shifted to the defendant, Dr. Pepper Company, to prove itself free of negligence in manufacturing the carbonated beverage and in the selection of the bottle. The Trial Court's application of the facts in this case to the *res ipsa loquitur* rule was correct.

III. *Alleged Errors In The Trial And The Amount Of The Judgment.* There are three of these points:

A. In the trial some reference was made to a letter to an insurance company; and appellant says that the judgment should be reversed because of such reference. But it must be remembered that this case was tried before the Judge without a jury. Even if there had been a sufficient objection to this insurance reference, certainly the Judge had judicial ability and discretion to refuse to allow any such reference to influence him. In 56 A. L. R. 1418 there is an Annotation concerning the effect of statements that the defendant carried liability insurance; and in that Annotation, at page 1487, it is stated:

"However, the rule that the introduction of evidence to show that defendant in a personal-injury case is protected by indemnity insurance is a ground for new trial does not apply in a case tried by a judge without a jury, or at least, if in such case the affirmative answer of the witness is afterwards struck out as incompetent and irrelevant, it will be treated as error without prejudice."

We have held that in some instances the instruction of the Trial Court to the jury will remove the effect of

the error. (See *Adams* v. *Summers,* 222 Ark. 924, 263 S. W. 2d 711.) Certainly the Trial Court could remove the same effect of error from his own mind. So we find no merit in appellant's contention on this point.

B. In the trial, a witness stated that Mrs. Whidden had told him *two days* after the injury about how Von Dean was hurt; and appellant claims that this self-serving evidence was inadmissible and necessitates reversal. A careful reading of the record convinces us that the witness was merely distinguishing between two conversations about five years apart; that the effect of what the witness said was not of sufficient importance to justify a reversal; and that from the way the matter came about in the record, any error was invited by appellant.

C. The Trial Court gave judgment for the plaintiff for $3,000; and appellant claims that this amount is excessive. We find no merit in this contention. The plaintiff suffered an injury to her foot and tendons. Besides the suffering, pain and injury in 1950[5], she was later compelled in 1955 to have an operation to correct the adhesion of the tendons; and medical and hospital expenses exceeded $209. The child suffered at intervals during the 5-year period and the attending physician testified that the operation did not completely relieve the pain. The child testified that she was continuing to suffer at the time of the trial on February 20, 1956. In view of all of the evidence, we do not regard the verdict as excessive.

IV. *Newly Discovered Evidence.* Finally, appellant claims that it was entitled to a new trial on account of newly discovered evidence. This new evidence was in the form of a booklet, written and published in 1939 by F. W. Preston, entitled, "Bottle Breakage — Causes and Types of Fracture." In the hearing on the motion for new trial, the officer of the Dr. Pepper Company testified that he had been in the bottling business some twenty or twenty-five years, and that the treatise

[5] The injury was on July 11, 1950, and this action was filed October 13, 1955, and the cause was tried on February 20, 1956; but there is no suggestion of any plea of limitations in this record.

by F. W. Preston is ". . . known as the bible. As I expressed it a while ago, the supreme court . . . This treatise is written by the man who heads the laboratory."

This article was published in February, 1939; and yet appellant's witness claimed that he did not know of this article until after the trial of February 20, 1956. The testimony certainly shows a lack of diligence: a booklet as important as a "bible" should have been familiar to one in the bottling business in far less than seventeen years from the date of publication. In the absence of a showing of diligence, the Trial Court did not abuse its discretion in refusing the motion for new trial. *Sellers* v. *Harvey,* 222 Ark. 804, 263 S. W. 2d 86; *Stockton* v. *Baker,* 213 Ark. 918, 213 S. W. 2d 896.

Affirmed.

Mr. Justice WARD not participating.

INC. TOWN OF EMERSON *v.* ARK. PUBL. SERV. COMM.

5-1098 295 S. W. 2d 778

Opinion delivered December 3, 1956.

McKay, McKay & Anderson and *Lasley & Lovett,* for appellant.

John R. Thompson, H. W. McMillan, and *Chas. C. Wine,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is an appeal from a judgment of the Pulaski Circuit Court dismissing a petition to review an order of the Arkansas Public Service Commission, hereinafter called "Commission." Appellants, who were the petitioners and intervenors below, are Union Telephone Company and the town of Emerson, Arkansas, and will be respectively referred to as "Union" and "Emerson."

Ray Bradley owned and operated the Emerson Telephone Exchange under a franchise from Emerson and an indeterminate permit from the Commission on June 11, 1951, when he applied to the Commission for a certificate of convenience and necessity to furnish telephone service to a "rural area"[1] in Columbia County which embraced Emerson and adjacent rural territory including the smaller rural communities of Atlanta, Mt. Pisgah and Walkerville.

Southwest Arkansas Telephone Cooperative, Inc., hereinafter called "Cooperative" is a non-profit telephone corporation organized under Act 51 of 1951 (Ark. Stats. Secs. 77-1601 to 77-1639) for the purpose of engaging in and furnishing telephone service to rural areas. On July 22, 1953, Cooperative secured an option from Mrs. Ray Bradley and T. H. Bradley, owners of the Emerson Telephone Exchange, to purchase said exchange and telephone properties for $7,000.

On February 18, 1954 the Commission approved Bradley's application and entered an order issuing a certificate of convenience and necessity to service the rural area in question. On June 7, 1954, the town council of Emerson, which had a population of 523, passed an ordinance granting a franchise to Cooperative to con-

[1] By Ark. Stats. Sec. 77-1602 (9) "Rural Area" means any area located outside the boundaries of any town, city or village having a population in excess of 2500.

struct and maintain a telephone exchange in the town. On July 20, 1954, Cooperative exercised its option to purchase from the Bradley's subject to approval of the Commission. On November 11, 1954 the Emerson council repealed the ordinance passed June 7, 1954, because Cooperative had not filed written acceptance of the franchise within 90 days.

On December 6, 1954, the Bradleys and Cooperative filed their joint application with the Commission requesting approval of the sale of the Emerson Telephone Company to Cooperative together with all rights granted the Bradley's under their certificate of convenience and necessity. This was done after a detailed engineering study and economic feasibility survey of the area in question had been made. On March 2, 1955, Union filed with the Commission its petition to reopen and set aside the order for allotment of the area to Bradley issued on February 18, 1954, and for the reallocation of said area to Union instead. On March 2, 1955, Union also filed its petition to intervene in the joint application of Cooperative and the Bradleys and requested its dismissal on the ground that it was contrary to the public interest. On April 12, 1955, Emerson filed an intervention joining in the request of Union. The various applications, petitions and interventions were consolidated for a hearing before the Commission which began May 10, 1955, and lasted for several days.

On June 16, 1955, the Commission entered an order approving the joint application of Cooperative and the Bradleys and denying the petition and application of Union. In approving allocation of the area in question to Cooperative as being in the public interest and granting it a certificate of convenience and necessity to construct and maintain telephone facilities in the area, the Commission made extensive findings. It found that Union did not propose to render telephone service to the entire area in question as proposed by Cooperative; that the agreed sale price of $7,000 was considerably more than the actual value of the properties involved; that the total price should not be reflected in the rate base of

Cooperative which would be required to enter $3,500 thereof in a surplus account, and that the balance over and above the value of the properties remaining in service after reconstruction should be amortized over a period of 10 years by charges to operations; that the fee of $50.00 which Cooperative proposed to charge new members is unreasonably high and a uniform fee of $10.00 is reasonable and adequate for all members; and that it is in the public interest to allow Cooperative to issue membership certificates, capital stock and evidences of indebtedness necessary to secure a loan of $294,000 by the United States through the Rural Electrification Administration for construction of the facilities.

The evidence also discloses that for the past several years the properties of the Emerson Telephone Company have deteriorated and that the service is poor. Service to some former patrons in the area adjacent to Emerson had been discontinued and many others in that area desired service. Citizens in and outside of Emerson held several mass meetings at which prospective telephone patrons "signed up" for membership in Cooperative and offered to subscribe for its stock. At one meeting 114 signed and paid a $10.00 deposit on the membership fee requested by Cooperative. The citizens of Emerson had become impatient for improved service in the Fall of 1954 when Union first became interested in the project and a mass meeting was held in Emerson attended by about 75 people at which representatives of Union and Cooperative spoke and there was a vote taken with 34 voting in favor of Union and 10 for Cooperative. Shortly thereafter the town council of Emerson granted a franchise to Union subject to approval of the Commission.

Union is an established company and operates exchanges in several towns in three counties with about one-third of its 2,150 phones in rural territory. Its schedule of proposed rates was slightly lower than those proposed by Cooperative but the latter's coverage of the less populous rural territory adjacent to Emerson was substantially more complete. Union's president testified that a considerable portion of this area could not be

served upon any favorable or economical basis. Both applicants intended to reconstruct the entire facilities in Emerson and the adjacent area under contracts let upon competitive bidding and on borrowed capital which was available to Cooperative from the REA at a substantially lower rate of interest than Union planned to pay the banks. While there was some evidence that the existing facilities of the Emerson exchange were worthless and useless, the president of Union placed a net value of $2,517 on the properties and there was other evidence that a part of the equipment could be used in reconstruction and expansion of the facilities.

Cooperative owns and operates four exchanges in Miller County near the area in question under authority granted by the Commission in 1952. While its financial statement of December 31, 1954, showed an excess of $11,000 in liabilities over assets, it earned $644 after expenses during the first quarter of 1955 and prospects for future earnings were considered favorable. Union's net earnings were greater and its investment per station was considerably less than that anticipated by Cooperative. Union estimated it would have 180 telephone customers in the area it proposed to serve in five years after cutover to dial service while Cooperative estimated it would have 320 customers in the broader area it proposed to serve at that time.

Appellants filed their appeal or petition to review the Commission order in Pulaski Circuit Court pursuant to Ark. Stats. Sec. 73-233. The instant appeal is from the circuit court judgment of May 22, 1956, dismissing appellants' petition and finding that the Commission had regularly pursued its authority; and that no constitutional rights of the appellants had been violated.

It is well settled by our decisions that the Commission is clothed with broad legislative and administrative powers and that a review of its findings and orders by either the circuit court or this court, on appeal, is considerably limited in its extent. Ark. Stats., Sec. 73-233 (d) provides that such review shall not be extended further than to determine whether the Commission has reg-

ularly pursued its authority, including a determination of whether the order under review violated any right of the complainant under the U. S. or State Constitutions. However this does not mean that the courts cannot inquire beyond mere formality when other provisions of the statute are considered along with Sec. 73-233, *supra.* In this connection we have repeatedly held that if the Commission's order is supported by substantial evidence, free from fraud, and not arbitrary, it is the duty of courts to permit it to stand, even though the courts might disagree with the wisdom of the order. *Department of Public Utilities* v. *Arkansas-Louisiana Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213; *City of Fort Smith* v. *Southwestern Bell Telephone Co.,* 220 Ark. 70, 247 S. W. 2d 474; *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission,* 226 Ark. 225, 289 S. W. 2d 668.

While appellants do not contend the order under review violated their constitutional rights, they insist that it is unreasonable, arbitrary and illegal; and that the findings set out therein are not supported by any evidence. Appellants say the Commission exceeded its statutory authority in authorizing Cooperative to issue notes and other evidences of indebtedness; that under the undisputed evidence Cooperative is hopelessly insolvent; and that the order is particularly arbitrary as applied to the people of Emerson proper because they will have to wait longer for improved service and pay higher rates than would be the case if the application of Union had been approved.

The principal purpose of the Legislature in the enactment of Act 51, of 1951 is perhaps best expressed in the emergency clause (Sec. 41) which reads: "It is found that there are many rural areas, as herein defined, in the State of Arkansas without local telephone service; that the Federal Government has made provision for the financing of cooperative non-profit corporations for the purpose of furnishing telephone service to said areas; that there is an urgent demand from those living in said areas for telephone service; that there is no provision for the organizing of such corporations for said

purpose; and that this act is necessary for the preservation of the public peace, health, and safety, an emergency is therefore declared, and this Act shall take effect and be in force from and after its passage."

Regardless of our own appraisal of the wisdom of the Commission's order, we conclude that it is supported by substantial evidence and that it is not based on arbitrary or illegal action. It is understandable why the inhabitants of Emerson proper now prefer the services of Union and if their interests alone were at stake we might readily agree that the Commission acted both unwisely and arbitrarily. It is also easy to understand why Union can offer more attractive rates by declining to serve a substantial portion of the less populous rural territory, adjacent to Emerson. The problem of the Commission was to determine the best interests of the people of the whole area in question. Viewed from that standpoint its findings and conclusions are supported by substantial evidence. The judgment of the circuit court is accordingly affirmed.

SMITH *v.* SMITH.

5-1070 295 S. W. 2d 790

Opinion delivered December 3, 1956.

O. W. Pete Wiggins, for appellant.

Quinn Glover and *Wayne Foster,* for appellee.

George Rose Smith, J. In this case the appellant, by her complaint, and the appellee, by his cross-complaint, sought a divorce. The chancellor entered a decree which dissolved the marriage without specifying which party was at fault. It was further found that Smith had expended more than $3,000 in his wife's business, that this advance was not a gift, and that after offsetting all deductions he was entitled to judgment for $1,800. The plaintiff does not ask for alimony, but she appeals from that part of the decree relating to the property.

The parties were married on November 27, 1954, which was eighteen days after they first met. Smith was then living in Memphis and had engaged in a number of occupations at one time or another. Mrs. Smith was an established businesswoman, owning and operating a retail lumber company in North Little Rock, where the couple made their home during their brief married life. Smith had had a week or two of experience in an ornamental iron shop in Memphis, and he suggested that such a shop be built upon the land which Mrs. Smith owned in connection with her lumber company. The appellant agreed to the proposal upon the understanding that her husband would be able to finance the construction.

The weight of the evidence indicates that Smith contributed a total of $3,000 to the building and equipment of the iron shop, which ultimately cost more than $6,000. Purchases of materials and equipment in excess of Smith's contribution were made on Mrs. Smith's credit, and she was still heavily indebted for such items at the time of the trial. The shop was completed in December, 1954, and had been in operation for only a month or six weeks when the parties separated about the middle of February, 1955. Smith returned to Memphis and was living there when the case was tried.

If the question were that of stating an account of the parties' various receipts and disbursements, it might be hard to say whether Smith profited or lost by his marriage to the appellant. He undoubtedly advanced $3,000 toward the construction of the iron shop. He may have

invested an additional $700 in the venture, and he gave his wife a diamond ring worth from $200 to $650. On the other hand, Smith received his board and room during the time the couple lived together, and his father also lived in the home for about six weeks. Smith did at most two or three days of work during the period of the marriage; his father declined the appellant's offer of employment. Smith received as a gift from his wife a diamond stickpin which her uncontradicted testimony indicates to be worth about $2,000. He also sent to Memphis about $300 worth of material from the lumber company, and he may have used a $1,000 bank loan, which Mrs. Smith eventually repaid, for the payment of debts that he owed at the time of the marriage.

The issue, however, is not that of reimbursing Smith for any pecuniary loss he may have suffered; for a husband is under the legal duty of supporting his wife. His advancements for the improvement of her property are presumed to be gifts, and that presumption can be overcome only by clear and convincing evidence. *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212; *James* v. *James,* 215 Ark. 509, 221 S. W. 2d 766. Here the proof falls decidedly short of rebutting the presumption. The appellee does not suggest in his testimony that his contribution was intended to be a loan or to create a partnership in the iron shop; it was just "a husband and wife proposition." This meager testimony is insufficient to overcome the powerful presumption that the transaction constituted a gift.

With respect to the property settlement the decree is reversed and the appellee's cross-complaint dismissed.

TRI-COUNTY DRAINAGE DIST. *v.* MORRISON.
EAST ST. FRANCIS DRAINAGE DISTRICT NO. 1 *v.*
TRI-COUNTY DRAINAGE DISTRICT.

5-930; 5-931 295 S. W. 2d 781

Opinion delivered December 3, 1956.

No. 5-930. *Henry S. Wilson, Rieves & Smith,* for appellant;

Norton & Norton, E. J. Butler, and *Mann & McCulloch,* for appellees.

No. 5-931. *Norton & Norton, E. J. Butler & Mann & McCulloch,* for appellants;

Henry S. Wilson and *Rieves & Smith,* for appellees.

PAUL WARD, Associate Justice. These two cases were consolidated for trial in the court below, and they were consolidated in this court for the purposes of briefing and presentation, although there is only a slight connection between the two of them. In this opinion we find it more convenient to discuss each case separately.

CASE NO. 930

In order to understand the issue presented by this appeal it is necessary to make a brief background state-

ment. Appellant, Tri-County Drainage District, was organized in 1914 embracing lands in Crittenden County, Cross County, and St. Francis County. The drainage construction was completed about 1916, and all bonded indebtedness was retired several years ago. In 1947 the Legislature passed Act 371, sometimes referred to as the Separation Act. Generally speaking this Act permitted a county in the original district to withdraw therefrom and exist as a separate district. Section 1 of said Act 371 (Ark. Stats. § 21-577) provided for the separation of a county from the original district when the original district had "no outstanding unpaid bonds or other evidences of indebtedness." Section 3 of said Act 371 (Ark. Stats. § 21-579) sets forth how this separation may be effected. In this section one of the showings that must be made by the county seeking to withdraw or separate is "that all *obligations* of the district have been paid in full." (emphasis supplied.)

A few years ago St. Francis County withdrew from the original Tri-County Drainage District under the provisions of said Act 371, and now exists as East St. Francis District No. 1.

This litigation was instigated by appellees who were residents of Crittenden County and landowners of that county in the original district, who sought to withdraw from the original district in accordance with said Act 371.

It is not disputed that the original district has no outstanding unpaid bonds or any other evidences of indebtedness, except that contended for by appellants as hereafter set out.

After a hearing in the Circuit Court of Crittenden County, the presiding judge granted the separation asked for, and appellants have appealed.

It is the contention of appellants that appellees were not entitled to invoke the provisions of said Act 371 because they were unable to make the showing required

by Section 3 thereof as heretofore set out. This contention on the part of appellants is based on the following situation: At the time the present litigation was instituted there was already pending before the same court the litigation involved in Case No. 931. In the latter case the testimony shows that the commissioners of the original district had attempted to obligate the district to pay its attorney a fee of $3,500 and its engineer a fee of $3,500. The conclusion reached by appellants, therefore, is that the original district has "obligations" which have not been paid in full.

We are not in agreement with the above contention made by appellants. We note, first, that appellees take the position that the two items of "indebtedness" mentioned above are not established claims against the district, but that said items are merely a contingent claim pending on the outcome of the litigation in Case No. 931. We make no effort to resolve this dispute between appellants and appellees, but base our conclusion herein on another ground.

We think Section 1 of Act 371 of 1947 (Ark. Stats. § 21-577) is controlling in this case relative to the kind of indebtedness from which the district must be free before Crittenden County (in this instance) will be permitted to separate. The section referred to above sets forth the condition relative to indebtedness under which a county is entitled to be separated from the original district. The condition there stated is that the original district shall "have no outstanding unpaid bonds or other evidences of indebtedness . . ." Section 3 of Act 371 of 1947 (Ark. Stats. § 21-579) sets forth the procedure for effecting a separation. This section, among other things, provides that the petitioners must show "that all obligations of the district have been paid in full . . ." It is clear to us that this section must be read and construed in connection with Section 1 of said Act 371, and that it refers to the kind of indebtedness therein mentioned. It further appears that the language used in said

Section 1 was not meant to include the kind of indebtedness relied on here by appellants, to-wit: The attorney and engineering fees. It is obvious that such indebtedness or fees cannot be classified as "outstanding unpaid bonds," nor does it appear logical to us that they should be classified as "evidences of indebtedness." The adoption of the appellants' contention would practically amount to a nullification of Act 371 of 1947, because it would always be easy for the original district, if it so desired, to keep itself at all times obligated for some small unpaid bill. It is not reasonable to suppose that the Legislature, after setting up the separation provisions contained in said Act 371, meant to leave open such an easy method of defeating its purposes.

It is our conclusion, therefore, that the trial court was correct in permitting Crittenden County to separate from the original district, and its action in so doing is affirmed.

CASE NO. 931

This litigation began on February 22, 1955 when the commissioners of Tri-County Drainage District filed a petition, pursuant to Ark. Stats. § 21-533 and § 21-581, asking for a levy of taxes against the lands in the three counties comprising the original district for the purpose of doing certain work on the drainage system. Preparatory to the filing of this suit the commissioners hired an engineer, Mr. C. H. Bond, to prepare a set of plans detailing the work to be done. The litigation was resisted by the East St. Francis District No. 1 and certain landowners in those portions of the district which lie in St. Francis and Crittenden Counties. The trial court, after hearing much testimony relative to the nature of the work proposed, deleted large portions of the engineer's plans and approved the levy of taxes as to the remaining portion.

The St. Francis District and the said landowners have appealed from the judgment of the trial court and

the Tri-County District has cross-appealed, contending that the original plans of the engineer's should have been approved by the court.

A brief statement of facts presenting the background to this litigation will help to understand the issues presented on this appeal. Tri-County Drainage District (hereafter referred to as Tri-County) was organized in 1914 under the provisions of Act 279 of 1909 (Ark. Stats. § 21-501, et seq.) comprised of lands in Crittenden, Cross and St. Francis Counties. The drainage system, completed in 1916 at a cost of approximately $800,000, is quite extensive, consisting of so-called main canals together with numerous laterals, and drains in a southerly direction from Crittenden County through Cross and St. Francis Counties, and empties into the St. Francis River. A few years ago the landowners in that portion of the original district lying in St. Francis County, as mentioned previously, secured a separation from the district.

A careful reading of Act 279 of 1909 under which Tri-County was organized and of Act 371 of 1947 reveals, generally speaking, that after a county is separated from the original district the portion of the original district lying in the separated county can elect its own commissioners and function as a separate and independent district for the purpose of maintaining the ditches in that county, etc., and that thereafter the original district has no power to impose assessments on the lands in the separated portion *except* that power which it retains or is granted under a provision contained in Section 5 of said Act 371 (Ark. Stats. § 21-581). This provision reads as follows: ". . . the Circuit Court in which the original district was organized 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.'' (emphasis supplied.) It is admitted that the original district was organized in the Circuit Court of Crittenden County. Again, generally speaking, much of the dispute in this litigation revolves around the correct interpretation of the above quoted passage.

Appellants ably and earnestly insist that the decision of the trial court levying an assessment on all the lands in the original district should be reversed for five different reasons, to-wit: 1. The notice of hearing was defective; 2. The project is not authorized by Ark. Stats. § 21-533; 3. The order of the trial court violates Act 371 of 1947 (Ark. Stats. § 21-577, *et seq.*); 4. The project is not feasible, and; 5. The burden of proof has not been met by the petitioners.

1. *Notice.* Ark. Stats. § 21-533 pursuant to which the petition herein was filed, provides: ''Upon the filing of such petition, notice shall be published by the clerk for two (2) weeks in a newspaper published in each of the counties in which the district embraces land, . . .'' It is not disputed in this case that a notice was published for the time provided by said statute, setting forth the date on which ''any property owner in the original Tri-County Drainage District seeking to resist such additional levies may appear and urge his objections thereto.'' Appellants' objection to this notice is that it does not give the description of each parcel of land in the district or describe the boundaries of the district. It is our opinion that this objection is not well taken. We are dealing here with a district that has already been organized and not with the creation of a new district. Section 21-533 above mentioned is a part of the Act under which the original district was organized, and the first part of this section specifically states that ''the district shall not cease to exist upon the completion of the drainage system but shall continue to exist for the purpose of preserving the same, of keeping the ditches clear from obstruction, and of extending, widening or deepening the

ditches from time to time as it may be found advantageous to the district." It must be noted of course that appellees contend that the court's order merely goes to "keeping the ditches clear from obstruction" and cleaning them out, and not to extending or widening, etc. If appellees are correct in this view, then we can see no objection in the form of notice used in this case. Upholding their contention that the notice was not good appellants cite *Mahan* v. *Wilson,* 169 Ark. 177, 273 S. W. 383; *Crane* v. *Siloam Springs,* 67 Ark. 30, 55 S. W. 955, and; *Cox* v. *Drainage District No. 27 of Craighead County,* 208 Ark. 755, 187 S. W. 2d 877. The first two cited cases dealt with the formation of new districts, and the last cited case dealt with the digging of new and additional ditches and are therefore not controlling in this case. It was said in the *Crane* case that "It is important that this notice should be given in the manner and within the time prescribed by the statute; . . ." We think that has been done in this case.

2. It is next contended by appellants that the work sought to be done by the petitioners is not authorized by Ark. Stats. § 21-533. It seems that appellants must admit, because it is so stated in said section, that the original district is authorized to levy assessments for the purpose of preserving the drainage system and keeping the ditches clear from obstruction. They contend however that the work contemplated by the commissioners herein (as approved by the court) amounts to additional work which is not authorized by said section, and therefore governed by Ark. Stats. § 21-520 which requires a petition filed by a majority in numbers, acreage and value of the owners of the land within the district. Appellants rely on the opinion in the *Indian Bayou Drainage District* v. *Walt,* 154 Ark. 335, 232 S. W. 575, where it was held that the commissioners had no right under Section 21-533 to do the proposed work. The work there however was quite different from the work here contemplated, as the language of the court shows. It was said by the court in that case: "The proposed canal which

the commissioners now propose to dig is not an extension of the canal originally constructed, nor widening or deepening of ditches that were already completed, but it is in very truth . . . *a new and independent drainage canal.*" (emphasis supplied.) If, therefore, the work approved by the court in this case on the drainage system amounts to a "new and independent drainage canal," or even (in view of the restrictive language in Act 371 of 1947) such work amounts to more than preserving the drainage system and cleaning out the ditches the trial court should be reversed, but if the contemplated work as approved by the court amounts only to preserving the drainage system and cleaning out the ditches we must hold to the contrary. As stated before the extent of the work authorized is one of the principal points of the controversy and is to be considered later.

3. The argument that the order of the trial court violates Act 371 of 1947, presented by East St. Francis District No. 1, rests on two points, one of which, at least, is difficult to resolve with complete satisfaction. These points are: (a) Whatever power the Circuit Court of Crittenden County has to levy a tax upon the lands in the East St. Francis District No. 1 can be exercised only upon petition by the commissioners of that district, and not upon a petition by the commissioners of the original district, and; (b) the work authorized by the trial court in this case extends further than cleaning out ditches "so as to provide an adequate outlet for the entire drainage system."

(a) Assuming for the sake of argument, at this point, that the work authorized by the trial court amounts only to cleaning out and preserving the proper ditches, then it appears clear to us that the commissioners of the original district are the proper parties to instigate this litigation. That the commissioners of a drainage district, such as Tri-County Drainage District, are the proper and legally authorized parties to look

after its affairs and institute and control litigation of the district admits of no argument. Section 22 of Act 279 of 1909 (Ark. Stats. § 21-533) specifically provides that "the District shall not cease to exist upon the completion of its drainage system, but shall continue to exist . . ." for certain purposes. This existence of the District was not terminated by Act 371 of 1947. On the other hand Section 5 of said Act 371 (Ark. Stats. § 21-581) specifically provides "that the Circuit Court in which the original district was organized (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 certain purposes. It is true that the first portion of Section 5 of said Act 371 provides that after the separation of a county the power of the original district to levy a tax on the land in the county so separated for the purposes provided in Ark. Stats. § 21-533 shall cease, yet the same section later qualifies this in the manner stated above. It makes no difference therefore whether the power granted to the original district and to the Circuit Court of Crittenden County be treated as a reservation of power in the original district or whether its a power granted under the provisions in Section 5 of said Act 371. If the commissioners of East St. Francis District No. 1 were the only ones who could invoke the jurisdiction of the Circuit Court of Crittenden County it would lead to a novel situation. Section 5 of Act 371 gives the Circuit Court of Crittenden County the authority to levy a tax not only on the lands in St. Francis County but on the lands in Cross and Crittenden Counties, and it is unreasonable to believe that the Legislature meant to give the commissioners in the first mentioned county control over the affairs of the last mentioned counties. If the occasion arose where work needed to be done in all three of the counties then, under appellants' contention, St. Francis County could prevent it by merely refusing to act. It is true, of course, if the St. Francis District desired to levy a tax on its own landowners, its own commissioners could

properly take the initiative. It is our conclusion therefore that the commissioners of the original district were the proper parties to instigate this litigation.

(b) The next contention by appellants, that the work authorized by the trial court extends further than cleaning out ditches so as to provide an adequate outlet for the entire drainage system, presents the principal question on this appeal, and, as stated above, it is a difficult one to resolve. Any authority which the original district or the Circuit Court of Crittenden County has to levy a tax on the lands in St. Francis County which were in the original district is contained in the last portion of Section 5 of said Act 371. That power must have been used by the Circuit Court of Crittenden County (in the language of the statute) "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." So, we agree with appellants that the trial court must be reversed if the work approved by it either (b-1) amounts to more than a "cleaning out process," as the quoted words are properly interpreted, or (b-2) in including more ditches than necessary to provide an adequate outlet for the entire drainage system of the original district, as that phrase is properly interpreted.

Before attempting to resolve the issues above designated as (b-1) and (b-2), it is pertinent here to view as a whole the intent and purpose of the statutes involved, and particularly Section 21-581 of Ark. Stats. The purpose of any drainage system, of course, is to drain water off land to make it productive. To effect this purpose a drainage system must be kept cleaned out so it will function. In most systems, and particularly the Tri-County District, there are so-called main ditches and lateral ditches, although the distinction may sometimes be hard to make or define. When the Legislature passed Act 371 (Section 5 of which is Ark. Stats. § 21-581) it was cog-

nizant of the extent and nature of the Tri-County District and also of the things we have just mentioned. From this we deduce, generally, that the intent of the Act was to permit a separate county to handle its own affairs insofar as possible, but, realizing the importance to the entire district of the main canals, chose to place the burden of their maintenance on it, and not on the individual counties, leaving to the latter (when separated) the burden of maintaining lateral ditches. The burden placed on Tri-County District therefore was to effectuate the above general purpose, and, in doing so, we cannot believe the Legislature meant to give it an impossible task or to restrict it with technicalities that would defeat the general purpose of the Act. In other words as we view Act 371 it is impracticable of application unless a reasonable latitude of discretion and judgment is allowed the courts and the commissioners of Tri-County District.

(b-1) Viewed in the above light, we have concluded that the work approved by the trial court amounted to no more than a necessary "cleaning out process" of the ditches. The engineer, Bond, admitted that his plans called for a slope of 1-1/2 to 1 for some of the ditches when the Ayers' plans called for a 1 to 1 slope. However it must be remembered that these ditches were dug nearly 40 years previously and had never been cleaned out. Erosion over this period had changed the banks, and we must assume in the absence of proof to the contrary, that Bond's plan was the most feasible and economical. We can see no justification in spending more money merely to restore the original ditches to a mathematical certainty. In this connection we have considered other objections raised by appellants — such as that some ditches are being widened — but they fall in the general classification of the one previously discussed, and none of them justify a reversal, in our opinion.

(b-2) Likewise we conclude that the evidence supports the trial court's order designating the main ditches to be cleaned out, and, in particular, that it does not include more ditches than necessary "to provide an adequate outlet for the entire drainage system of the original district."

Although, as heretofore mentioned, the commissioner's original plans called for work amounting to approximately $400,000 on a large number of ditches, the trial court approved work amounting to approximately $130,000 on some 6 or 7 ditches which, for lack of use of a better word, we will call main or principal ditches. The court in its order designated in minute detail the ditches which he approved. It will suffice, we think, to describe these ditches in a general way, and in doing this we refer to one of the exhibits which is a map of the entire drainage system showing all of the ditches in the original district. The first ditch begins at approximately the north side of the district in Blackfish Bayou in Section 2, Township 7 North, Range 5 East and thence in a southerly direction along said Bayou for a distance of approximately 8 miles; the second ditch apparently begins at the south end of Blackfish Bayou and runs southwest and thence west for approximately 3 miles to where it enters into Blackfish Lake; the third ditch leads from the west side of Blackfish Lake at a point approximately 3 miles from the north end thereof and runs west and southwest for a distance of approximately 2 miles; the 4th and 5th ditches appear to be a continuation of the third ditch and continue in a southwesterly direction to the outlet of the drainage system for a distance of several miles; the 6th ditch empties into Blackfish Lake on the east side thereof and extends east approximately one mile and a half to join with other ditches; the 7th ditch apparently drains Shell Lake running from the southeast end thereof for a distance of approximately one mile to the south and empties into ditch No. 3 described above, and; there is another ditch which apparently runs due north and south for a dis-

tance of approximately a mile and enters into ditch No. 7 on the north side. The numbers which we have given to these ditches were not so numbered in the court's order.

The difficult question presented therefore is whether the trial court misinterpreted the meaning of the provision in Section 5 of Act 371, copied above, and included more ditches than were authorized by said Act. To illustrate that there are grounds for different views of the meaning of this section, we note that while appellants feel that too many ditches were included yet appellees, on cross-appeal contend, that not enough ditches were included. In presenting the view that too many ditches were included in the court's order appellants draw an analogy between the "adequate outlet for the entire drainage system" to the main outlet for the sewer system of a house, stating that the latter "is the final house-sewer or drain from the point where it has received the last water from the minor drains serving the numerous fixtures higher in the system." From this analogy, we take it, appellants contend that the trial court should have included only the southern-most portion of the main ditch which empties into the St. Francis River, and that it should have excluded all of the above numbered ditches except possibly 4 and 5. This we think is a strained and unreasonable construction of the language of the statute referred to above when we consider the drainage district as a whole and the purpose for which it was constructed. Under the narrow construction it appears clear to us, from a view of the map referred to above, that large portions of the lands in the northern part of the district in Crittenden and Cross Counties would not be properly drained. After giving careful consideration to the language in Section 5 of said Act 371 (Ark. Stats. § 21-581) copied above, we are forced to the conclusion that the Legislature did not intend to limit the original district to cleaning out only the southern-most portion of the main drainage canal, but rather to give the original district full power and

authority to clean out all of the (existing) ditches necessary, not only to provide an adequate outlet, but an adequate outlet for the entire drainage system. We are convinced this could not be done under the construction insisted on by appellants.

While the question under consideration has not heretofore been before this court, we did have occasion in the case of *Park Corporation of Arkansas* v. *Tri-County Drainage District,* 226 Ark. 357, 290 S. W. 2d 18, to consider said Act 371 in many of its aspects. We said there "that the spirit if not the exact manner 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 Counties.*" (emphasis supplied). Even though it might be urged that the above was *dictum* in the cited case, yet our judgment with respect thereto is the same now as it was then.

It is objected that Jeka Slough was not a part of the Ayers' plan but is in the plans prepared by Mr. Bond. That may be true but we do not find that it was approved by the court. Attention is called to the fact that the court approved the "cleaning out" of Blackfish Bayou, and that it was no part of the original plans. This seems to be true, but we do not think it calls for a reversal of this case. The map referred to above shows that part of the original system drained into the north end of Blackfish Bayou and out at the south end into a main canal. This Bayou was not shown as a part of the original plans because no work was done on it. Nevertheless it appears to be an important link in the drainage system. It is now (after 40 years) full of trees and debris and must be cleaned out before the water from the canal north of it can reach the final outlet.

(4 & 5) We are not convinced by appellants' argument that the project is not feasible. This again is a matter that must be left largely to the discretion and good judgment of the commissioners and the trial court as above indicated. It may be that when this project is completed the drainage system may not function entirely satisfactorily. Even Mr. Bond admits this possibility. But if that be the case, the fault must lie, not so much with the poor judgment or abuse of power by the courts, as with the inherent difficulties in adjusting the applicable statutes to the existing situation. It appears also that there is a probability that within the next 8 or 10 years the Federal Government will do part of the proposed work at a saving to the landowners, but we are unable to say the court and the commissioners acted unwisely in refusing to wait on that eventually happening.

In view of what we have said heretofore, we deem it unnecessary to discuss further the burden of proof. Appellees have, we think, produced sufficient evidence to sustain the action of the trial court, and it is hereby affirmed.

In affirming the trial court on direct appeal we have already set forth reasons from which it follows that appellees' cross-appeal must be denied.

Affirmed on direct appeal and cross-appeal.

Justice McFaddin dissents in part.

Opinion delivered December 3, 1956.

George Howard, Jr., for appellant.

Tom Gentry, Attorney General; *Paul C. Rawlings,* Assistant Attorney General, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Eugene Swagger, a boy nineteen years of age, pleaded guilty to the charge of assault with intent to kill and was given the maximum sentence of 21 years in the penitentiary. Later, after having been committed to the penitentiary, he filed a motion to set aside the judgment of conviction and order of commitment on the ground that he was not represented by counsel at the time he entered the plea of guilty.

On the night of April 13, 1956, S. R. Cady was shot and seriously injured. He was in his home, and the shot was fired through a window from the outside. The next morning, April 14, Swagger was arrested. On Friday, April 20, the Prosecuting Attorney filed an information in Circuit Court charging him with assault with intent to kill. Monday morning, April 23, the defendant pleaded guilty to the information and was sentenced to 21 years in the penitentiary. He was committed to the

prison, and on May 29, 1956 he filed a motion to vacate the judgment.

He alleges in the motion:

"(1) That he is 19 years of age and has never been previously convicted of a crime; that he has completed nine years of schooling; that he resided on a farm with his grandmother who is a widow and is 68 years of age; that he was not financially able to employ an attorney to represent him and that the court did not appoint an attorney to represent him, nor was he advised of his right to counsel; that he was not permitted to communicate with his grandmother while confined in the Jefferson County Jail; that his bond was set at $5,000; that he is not in fact guilty of an assault with intent to kill, as charged in the information filed against him on the 20th day of April, 1956, by the Prosecuting Attorney for the 11th Judicial Circuit; and that he was not advised and did not know the full consequences of his plea at the trial of this matter on the 23rd day of April, 1956, and that he hereby requests that he be permitted to withdraw the plea of guilty and enter his plea of not guilty. That he was improperly induced and encouraged to enter the plea of guilty. (2) The defendant hereby requests that the court permit him to submit testimony to show that he is not guilty of the charge and also requests permission to submit evidence to show that he was improperly induced and encouraged to enter a plea of guilty. (3) That the defendant's mental condition was not brought to the attention of the court in view of the fact that he was not represented by counsel. (4) The defendant contends and alleges that he was deprived of one of his fundamental rights without due process of law in that he was not represented by counsel, and that this in essence was in contravention of the Constitution and laws of the State of Arkansas, and the due process clause of the Fourteenth Amendment to the Federal Constitution." After a hearing, the trial court overruled the motion and Swagger has appealed.

Article 2, Section 10, of the Constitution of Arkansas provides that in all criminal prosecutions the accused

shall enjoy the right to be heard by himself and his counsel. Ark. Stats. § 43-1203 provides: "If any person about to be arraigned upon an indictment for a felony, be without counsel to conduct his defense, and shall be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two (2) who shall have free access to the prisoner at all reasonable hours." The Fourteenth Amendment to the Constitution of the United States provides that no State shall "deprive any person of life, liberty or property without due process of law."

The defendant had not been in trouble previously, and knew nothing about lawyers or court procedure. At the hearing on the motion to vacate the judgment, he testified to facts substantially as alleged in his motion. The Prosecuting Attorney, in response to questions by the Court, testified:

"Q. I will ask you to state whether or not the Court advised with you prior to the entering of a plea of guilty regarding this matter?

A. Yes sir.

"Q. Did you confer with this man, if so, what was stated to him about pleading guilty or not?

A. If the Court please, I did confer with the man in the jail and I told him at that time that he could enter a plea as stated from the stand and that I would get him 21 years — that it was immaterial to me whether he entered a plea or not, that he could get a lawyer and we would have a trial if he cared to have it. In the morning when he was in Court for arraignment and when he entered a plea I simply approached him at the bench, (interrupted).

"Q. I want to ask to interrupt you please and ask you if the Court asked you to check with him on that occasion?

A. The Court did.

"Q. Go ahead.

A. I conferred with him at that time and asked him if he was still in the attitude of pleading guilty — if he were, when the Court arraigned him and asked him if he was guilty or not guilty to simply enter a plea of guilty.

"Q. I will ask you if before he entered a plea of guilty you discussed it with the Court and if you advised the Court the nature of the crime and so on?

A. I did."

The Prosecuting Attorney was called back for cross examination and further testified:

"Q. Mr. Mullis, I believe you stated that you conferred with this man in the jail several times, at least twice, concerning a plea?

A. That's right.

"Q. Did you inquire into his financial standard?

A. No. I told him that the Court would appoint a lawyer for him if that is what you are getting at.

"Q. Did you ask him about his relatives?

A. I did not.

"Q. Did you ever meet his aunt?

A. I did not. As I recall I never saw her until she was in the Courtroom that morning.

"Q. You did not inquire whether he had relatives in Pine Bluff?

A. I did not."

The Court stated: "The Court wants to put this in the record — that in this case as in all cases of a grave nature like this the Court conferred with the Sheriff's force, with the Prosecuting Attorney and satisfied himself that the man was guilty as indicated by what the proof would have been before he permitted him to enter his plea of guilty. The Court was advised by the Prosecuting Attorney as he has testified and when the man

was brought into open court he was advised of the crime that he was charged with and the information was read to him and he was asked then if he was guilty and he stated that he was and wished to enter a plea of guilty."

The record does not show that the Court personally informed the defendant that a lawyer would be appointed to represent him if he so desired. On cross examination, the Prosecuting Attorney stated that he had informed defendant while in jail that a lawyer would be appointed for him, but the defendant's response, if any, to such communication is not shown, and it does not appear that the defendant fully understood the Court would appoint a lawyer to represent him, and no lawyer was appointed.

We have held that it is within the discretion of the Court as to whether the defendant would be permitted to withdraw a plea of guilty. *Adams* v. *Plummer, Judge,* 213 Ark. 209, 209 S. W. 2d 868. But, in *Williams* v. *State,* 163 Ark. 623, 260 S. W. 721, we held that where there are grounds for believing that the defendant is not capable of conducting his own trial, the Court should not permit the trial to proceed without the defendant having the aid of counsel. In the *Adams* case, appellant alleged in his motion that he was deprived of his liberty without due process of law, but it was pointed out by this court that the petitioner offered no evidence in support of the motion. In the case at bar, appellant did produce evidence as to the circumstances surrounding his plea of guilty. It was shown that he is a negro boy, nineteen years of age, and is practically illiterate although his petition alleges he has gone to school; that he lives with an aunt 68 years of age; that during the few days he was held in jail, between the time he was arrested and the time he entered a plea of guilty, his aunt tried to visit him, but the jail authorities would not permit her to do so. True, the Prosecuting Attorney told the defendant while he was in jail that on a plea of guilty he would get him a sentence of 21 years in the penitentiary. But, it appears that perhaps the accused did not know that 21 years was the maximum sentence he could receive. In

fact, the record indicates that the accused may have thought that he could be sentenced to a longer term of imprisonment.

The proposition of whether the failure to appoint counsel for an indigent defendant was a violation of the due process clause of the Fourteenth Amendment has been before the courts many times. In most instances, since the decision in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357, the courts have held it to be error to permit a young, inexperienced person to plead guilty to a serious charge where he has no attorney. In the *Johnson* case, speaking of the defendant, the court said: "He requires the guiding hand of counsel at every step in the proceedings against him . . . The determination of whether there has been an intelligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused . . . The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." However, the court is not bound in every case to appoint counsel. *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595. But, in *Uveges* v. *Pennsylvania,* 335 U. S. 437, 69 S. Ct. 184, 93 L. Ed. 127, it was held that where the gravity of the crime and other factors — such as the age and education of the defendant, and the nature of the offense charged, and the possible defenses thereto — render criminal proceedings without counsel likely to result in injustice, the accused must have legal assistance, "whether he pleads guilty or elects to stand trial, whether he requests counsel or not . . . Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation." The defendant was charged with burglary.

In *Gibbs* v. *Burke,* 337 U. S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686, the defendant in a State court did not request counsel and was permitted to try his own case. Several errors were committed prejudicial to the defendant. After conviction, the State Supreme Court denied the issuance of a writ of *habeas corpus.* The United States Supreme Court granted *certiorari;* appointed an attorney to represent the defendant and granted the petition for writ of *habeas corpus.* The court said: "There have been made to this Court without avail arguments based on the long practice as to counsel in state courts to convince us that under the Fourteenth Amendment a state may refuse to furnish counsel even when needed by the accused in serious felonies other than capital. Our decisions have been that where the ignorance, youth, or other incapacity of the defendant made a trial without counsel unfair, the defendant is deprived of his liberty contrary to the Fourteenth Amendment. Counsel necessary for his adequate defense would be lacking."

In *Willey* v. *Hudspeth,* 162 Kan. 516, 178 P. 2d 246, the Supreme Court of Kansas held that it was error to permit a 17 year old boy to plead guilty to the charge of breaking and entering in the night-time when he did not have the benefit of counsel. There, the court said: "When the petitioner, as a boy only 17 years of age, stood before the court, under the laws of this state he could not have entered into a valid contract obligating himself; he could not have voted; he could not have married without the consent of a parent; he could not, alone, without a guardian or next friend, have been heard to say anything in the court room in a civil action which would have been binding upon him. Should we say, in such circumstances, that the only thing he could have done alone, with legal significance, was to have pleaded guilty to a felony in a court of law?" And the court quoted from *State* v. *Oberst,* 127 Kan. 412, 273 P. 490: " 'In the case before us the defendant was a 17 year old boy . . . The one thing this youngster needed more than anything else before pleading guilty to such a horrifying accusation was consultation with and the advice of a good lawyer.' . . .

Since the failure to appoint counsel for the petitioner in the present case and to require that the petitioner consult with such counsel deprived the court of jurisdiction to render judgment, it follows that the judgment entered upon the plea of guilty was void."

In *Zeff* v. *Sanford, Warden,* 31 F. Supp. 736, it is pointed out that the court discussed the case with the Prosecuting Attorney and others to determine the sentence that should be imposed, and then permitted the defendant to plead guilty without the benefit of counsel. In a *habeas corpus* proceeding, it was held that counsel should have been appointed for the defendant even though it appeared that the judge, who had already been advised of the petitioner's desire to plead guilty, was trying to ascertain all of the facts available concerning petitioner and his crime in order that a just sentence might be imposed.

And, in *Howington* v. *State,* 30 Okla. Cr. 243, 235 P. 931, the Criminal Court of Appeals of Oklahoma set aside a judgment of conviction entered on a plea of guilty although the defendant was told of his rights.

In *Wade* v. *Mayo,* 334 U. S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647, the court said: "There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment."

It is our conclusion that in the facts and circumstances of this case the plea of guilty should not have been accepted without the defendant having benefit of counsel, and, in accepting the plea, the defendant's rights under the Fourteenth Amendment were violated.

The State contends that since the defendant had been committed to the penitentiary the court lost juris-

diction to set aside the judgment. This is ordinarily true. *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005. But where, as here, the judgment is void because of the want of due process of law, it has no force and effect, and can be vacated at any time. It is said, in *United States* v. *Bozza,* 155 F. 2d 592, where sentence for a void act may be superseded by a new sentence: "It is no hindrance that the correction — even when it entails a greater punishment — occurs after sentence has been partially served or after the term of court has expired."

The petitioner is not entitled to his absolute freedom, but it is ordered that the judgment and sentence on his plea of guilty be set aside and that he be placed in the custody of the Sheriff of Jefferson County that appropriate proceedings against him may be taken.

Reversed.

Mr. Justice McFaddin concurs.

Justices Millwee and Ward dissent.

Paul Ward, Associate Justice (dissenting). Although I agree with practically everything that is said in the majority opinion and particularly with the construction placed on the several cases cited therein, I am unable to agree with the exact manner in which the majority reached its final conclusion, nor, am I able to agree with the final conclusion itself.

On the last page of the majority opinion appears this paragraph: "It is our conclusion that in the facts and circumstances of this case the plea of guilty should not have been accepted without the defendant having benefit of counsel, and, in accepting the plea, the defendant's rights under the Fourteenth Amendment were violated."

It strikes me that the majority in reaching the above quoted conclusion by-passed one important question. It is: Does the evidence show that appellant did not have the capacity [mental or otherwise] to waive the offer of counsel? I have read carefully the decisions of the United

States Supreme Court cited in the opinion together with additional opinions: *Williams* v. *Kaiser,* 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; *De Meerleer* v. *Michigan,* 329 U. S. 663, 67 S. Ct. 596, 91 L. Ed. 584; and; *Rice* v. *Olson, Warden,* 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367. The rule announced by all of these decisions pertinent to the question involved in this case, may, as I understand it, be stated in this way: Every person who is charged with or tried for a criminal offense and who is unable to provide counsel, is, under the Federal Constitution, entitled to have an attorney appointed by the court, *unless* he waives the offer of counsel. The cases go on to explain that the question of waiver of counsel may be raised several different ways. For example: (a) If the accused is not advised of his right to have counsel, then it follows that he has not waived it, and (b) if the accused is so lacking in mental capacity that he is unable to waive the offer of counsel then it cannot be said that he has waived it, or (c) if [as in the case of *Gibbs* v. *Burke, Warden,* 337 U. S. 773, 69 S. Ct. 1247, 93 L. Ed. 1686] during a *trial* some legal question arises which the accused [even though of full age and sound mind] could not possibly comprehend, then he cannot be said to have waived counsel and his rights have been violated.

Therefore, it appears to me, that in every case of this nature a fact question is presented. The point which I here try to stress is amplified in the *Rice* case, *supra,* where the court said: "It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel." Applying the rule above announced I view the cause under consideration in this manner: Appellant was advised by the prosecuting attorney of his right to have counsel appointed by the court, and evidently did not accept it, and I am not convinced that appellant did not have sufficient mental capacity to understand what he was doing when he refused the offer. In this connection, I hold to this view: If the evidence regarding appellant's mental capacity poses a

close question, then I would resolve the doubt, if any, in view of the finding of the trial court. Any other procedure, it seems to me, would be impracticable, unreasonable, and contrary to established procedure. In all other fact matters this court defers to the discretion and sound judgment of the trial judge, so why not in this instance. So, I would affirm.

ARK. POWER & LIGHT CO. *v.* MCGOWAN, ADMR.

5-1088 296 S. W. 2d 420

Opinion delivered December 10, 1956.

Holmes & Holmes and *House, Moses & Holmes,* for appellant.

John W. Elrod and *Max M. Smith,* for appellee.

LEE SEAMSTER, Chief Justice. This suit was brought by the appellee, Homer E. McGowan, Administrator of the Estate of Billy E. McGowan, deceased, to recover damages for personal injuries and resulting death of decedent, which was caused by deceased coming in contact with appellant's high-powered electrical transmission line. The trial resulted in a verdict and judgment against appellant for $11,450. This appeal follows.

For reversal, the appellant cites two points (1) the Court should have directed a verdict for appellant, and (2) there was insufficient proof of pecuniary loss to support a verdit.

The record reveals that Billy E. McGowan was temporarily employed by Texas Eastern Transmission Corporation for the purpose of performing general maintenance work for his employer at "Station G" near Kingsland, Arkansas. The mechanical facilities of "Station G" are completely encircled by a fence in the general shape of a rectangle.

The appellant, Arkansas Power and Light Company, owns and maintains a 110,000 volt electrical transmission line which leaves a three pole structure south of the above described enclosure, passes over the western side of the enclosure in a northerly direction to a three pole structure situated inside said enclosure where the transmission line terminates and from which termination point current is fed into a Texas Eastern electrical sub-station. The sole purpose of this transmission line is to serve "Station G."

Near the southwest corner of the enclosure there is situated a boilerhouse, belonging to Texas Eastern, which is about 18 by 40 feet in size, running parallel with and located east of the transmission line at a point about midway along the span of the line. A smokestack extends upward from the west side of the roof of the boil-

erhouse, the top of the stack being over 35 feet above the ground. The transmission line is 31 feet above the ground. Three guy wires support the smokestack, two of said guy wires being anchored in concrete to the ground, the anchors being in a line approximately parallel with and alongside the west side of the boilerhouse.

On June 8, 1955, Billy E. McGowan and three of his fellow employees were painting the smokestack on the boilerhouse. They painted the north side of the smokestack by placing an aluminum extension ladder, consisting of two 20 foot sections, which had been extended to the desired length against a point on the north side of the stack. Thereafter, McGowan and two of the employees who were situated on the ground, the fourth employee being on the roof of the building, discussed the manner in which to move the ladder to the west side of the building. They pulled the ladder away from the smokestack and boilerhouse without reducing its length; carried it around to the west side of the building, placed the foot of the ladder on the ground and proceeded to raise the ladder to lean it against the west side of the smokestack. One man held the ladder, two other men pushed the ladder up from the ground, and the fourth man, on the roof, pulled on a rope fastened to the ladder.

As the ladder reached or approached an upright position it came near enough to the transmission line to become charged with electricity so as to become a conductor, resulting in an electrical shock to Billy McGowan and his fellow employees. Billy McGowan died as a result of this electrical shock.

The appellee contends that the proximate cause of McGowan's death was due to the carelessness and negligence of the appellant as follows:

"1. By maintaining its 110,000 volt line with insufficient clearance with reference to said building and its attachments.

"2. By maintenance of its line at an unreasonable and dangerous distance from said building and its attachments, constituting an inexcusable hazard for workmen.

"3. By permitting said line to sag at a place unnecessarily close to said building and its attachments rendering the working conditions in, around, and about the building and its attachments unsafe and negligently exposing workmen to unnecessary and unreasonable risk by reason of the proximity of the line to said building and its attachments.

"4. By failure to use ordinary care by not complying with the standards generally recognized in the electrical industry to inspect and maintain its lines in a reasonably safe condition commensurate with the standards required for the safety of workmen and others.

"5. That the appellant failed and neglected to use ordinary care commensurate with the danger to be reasonably expected by maintaining and failing to move its lines a reasonable distance from the building and its attachments as required by the minimum standards and safety regulations governing the maintenance of electrical transmission lines in Arkansas.

"6. That the defendant was negligent by failure to place or cause to be placed near its high voltage transmission line where Billy McGowan was injured and killed a warning sign for the benefit of the deceased or other workmen of the nature and character of the defendant's line concerning its danger and proximity to the place where the deceased was required to work, and the failure to place such warning sign is contrary to standards usually required in the utility industry in connection with ordinary electrical construction where hazards may exist."

Appellant answered with a general denial of the allegations contained in the complaint and set up a defense of contributory negligence on the part of decedent, Billy E. McGowan.

E. E. Blankenship, chief operator for Texas Eastern Transmission Corporation's "Station G," testified that he was supervising the work of Billy McGowan, Donald Hillman and A. C. Gibson on the date of the accident. He and the three employees were performing general maintenance work, which included the painting of the smokestack. The employees were using an aluminum extension ladder consisting of two 20 foot sections.

Blankenship further testified that he climbed this ladder and fastened it to the smokestack, in order to make it steady. The ladder had been extended approximately five or six feet. McGowan then ascended the ladder and spray painted the north side of the smokestack. After McGowan completed this portion of the operation, he descended to the ground so that he might help move the ladder to the west side of the building.

The ladder was lowered to the ground after the north side of the smokestack was painted and without reducing its extended length, the three employees carried the ladder to the west side of the building. Blankenship remained on the roof of the building so that he might help place the ladder against the west side of the smokestack. Three guy wires help support the smokestack. Two of these guy wires run from a point near the top of the stack to a point on the ground near the building. One of these two runs in a northwesternly direction and the other runs in a southernly direction.

Blankenship testified that McGowan and the other two employees, in moving the ladder from the north side of the building to the west side of the building, carried the ladder around outside of the northwestern guy wire, with the intention of "walking" the ladder up to a point on the west side of the smokestack. One of the men threw Blankenship a rope, which was attached to the ladder and he was steadying the ladder with the rope as they walked the ladder up. The ladder was in a straight line with the west side of the smokestack. When the ladder reached an undetermined height or position, there was a flash like a flash of lightning, which knocked the rope out of Blankenship's grasp and burned his hand.

Blankenship testified that he knew that appellant's electrical transmission line was situated near the building, but he did not know its height and did not realize that the ladder was near the line; that there was no sign on the building or guy wires warning of a high tension line and appellant corporation had never warned him or instructed him about the use of ladders around the lines.

Paul Zander, a consulting engineer, testified that the National Electrical Safety Code sets forth formulas and tables whereby determination can be made of required clearances of electrical wires from buildings, attachments and various objects; that the distances from the electrical transmission lines of appellant to the building and its attachments are in violation of the Code; that the least horizontal distance from the electrical transmission to a guy wire anchor of the smokestack was 7 feet, 3-3-4 inches; that this distance was 5 feet, 2-1-4 inches less than the minimum distance required by the Code; that the height of the electrical transmission lines was 31 feet above ground level and the height of the smokestack was 35 feet above ground level; that the span of the electrical transmission lines, between poles, was 393.33 feet.

There was introduced into evidence a plat and blueprint of the Texas Eastern Transmission "Station G." The plat and blueprint, which was prepared by Paul Zander, gave various measurements and distances of the transmission building, smokestack, guy wires and anchors, and electrical transmission wires.

D. B. Windsett, an electrical consulting engineer, testified that he visited the site of "Station G" and prepared blueprints and drawings showing various distances and measurements at the scene of the accident. When asked if these distances violated the National Electrical Safety Code, the witness stated:

"A. Based upon my interpretation of the Code and based upon the interpretation that these guy wires are a part of the building, these guy wires do fall within the distances or within the clearances which are specified by the Code and are less than those specified by the Code."

The following then transpired:

"Q. Would you explain to the jury in detail, citing sections of the Code, and pointing them out, explain how you arrived at that conclusion, step by step?

"A. In arriving at these clearances and also my interpretation of the Code it is based on the following sections of the National Electric Safety Code: Under Section 20, Rule 200, B, 'These rules are not complete specifications but are intended to embody the requirements which are most important from the standpoint of safety to employees and the public.' Rule 202, which are 'Minimum Requirements,' it states: 'The rules state the minimum requirements for spacings, clearances, and strength of construction. More ample spacings and clearances or greater strength of construction may be provided if other requirements are not neglected in so doing.' There is a footnote on that particular section, which reads: 'Some of these minimum values are exceeded in much existing construction; service requirements frequently call for stronger supports and higher factors of safety than the minimum requirements of these rules.' Section 211: 'Installation and Maintenance.' 'All electric supply and communication lines and equipment shall be installed and maintained so as to reduce hazards to life as far as practicable.' Rule 214-A, 'Current-Carrying Parts. To promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electric supply lines, such parts shall be arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons.' Any basic clearance calculations are based on the following rules and tables: '234-C,' which is headed 'Clearances from Building.' '1. General. Conductors shall be arranged and maintained so as to hamper and endanger firemen as little as possible in the performance of their duties.' No. 4, 'Conductors Passing by or Over Buildings,' (a). Minimum Clearances. Unguarded or accessible supply conductors shall not come

closer to any building or its attachments (balconies, platforms, etc.) than listed below . . ."

The witness then explained step by step his method of determining the required horizontal clearance under the facts involved in this lawsuit and states such clearance to be 13 feet 8 inches.

That distance as set forth in the Code is the minimum requirement. When asked if it was considered good practice in the industry to post warning signs and if it is usually and generally accepted that warning signs should be posted, warning of high voltage overhead at a station like "Station G," the answer was:

"Either warnings or other safety guards." Such as "any type of fence that would keep them out of the direct line of contact with high voltage lines." I paid no particular attention to the fences around "Station G." In my opinion, those fences would not keep unauthorized persons on the ground away from high voltage lines. It was not similar to fences put around substations. I have observed the various and sundry signs and have put up some warning in the nature of warning signs. It is neither expensive nor impractical in placing the warning sign there. I would place it most anywhere around the vicinity of that particular line. It wouldn't make any difference as long as it was where it could be seen. The burn in the ladder introduced in evidence was caused in my opinion by direct contact with electricity. To make working conditions safe around that building I would make the recommendations to bring it up to minimum Code requirements. There are only two apparent things in my opinion that could be done to bring it in compliance. One would be to move the building and the other would be to move the line.

There was a stipulation by and between the parties "that the National Electrical Safety Code contains the guiding principles for overhead line construction practice, that Code having been prescribed for guiding principles for such practice by Rule and Regulation of the De-

partment of Public Utilities (now Public Service Commission) of Arkansas."

Carroll H. Walsh, an electrical engineer employed by appellant testified that he had recently inspected the premises of "Station G," that appellant corporation has to design its facilities to comply with the National Electric Safety Code and they must use the Code.

Carroll H. Walsh, C. E. Bathe and George D. Pollock, Jr., all electrical engineers and witnesses for appellant, testified that they had inspected the premises of "Station G," that appellant corporation designs its facilities to comply with the provisions of the National Electric Safety Code; that based upon the blueprints prepared by engineer Paul Zander showing distances and measurements, and testimony adduced at the trial, the electrical transmission lines, as located, are in compliance with the Code. They further testified that the electrical industry does not make a practice of placing warning signs (of high voltage lines) on transmission lines such as the one located at "Station G." It was their opinion that Section 234 (c) of the Code (Clearance from Buildings of Conductors) has reference to distance from buildings and not space from buildings. Bathe further testified that in his opinion the word "attachments," as used in the Code, had reference to balconies, platforms or any structure that a man could stand upon.

The substance of appellant's contention is that the trial court should have found as a matter of law that appellant was not negligent; that deceased was guilty of contributory negligence and in either event, the court should have directed a verdict in its favor.

The above question has been before this court many times and under various circumstances. In the instant case the appellant was in sole control of its power line, which ordinarily carried an electrical charge of 110,000 volts. The only blueprints and plans, of measurements and distances between the transmission lines and the building and smokestack, were those that were introduced into evidence as prepared by Paul Zander.

The strict compliance or non-compliance with the abstract safety rules of the Code still leaves a factual question of negligence to be determined, under conditions shown to exist by the conflicting evidence in this case. There is no dispute that the guy wires on the west side of the building were anchored to the ground at a point slightly in excess of 7 feet, from a point on the ground directly beneath the transmission line. The evidence reveals that such attachment could be an obstruction to workmen performing maintenance work on the smokestack, particularly near the top of the smokestack which was four feet higher than the transmission line. The general provisions of the Code require electric companies to use a high degree of care and to so construct their facilities as to eliminate hazards to workmen and all other persons who may lawfully be near their power lines.

The evidence reveals that the employees of Texas Eastern deemed it necessary to carry the ladder on the outside of the anchored guy wires in order to raise it against the smokestack. The foreman, Blankenship, was situated on the roof of the building. He had hold of a rope that was attached to the ladder and was assisting his men in raising the ladder to the smokestack, when a flash occurred, resulting in an electrical charge and resulting death of Billy McGowan. Testimony reveals that the ladder either contacted the uninsulated transmission line or came near enough to it so as to cause the electricity to arc to the ladder.

In the case of *Futrell* v. *Arkansas-Missouri Power Corp.*, 104 Fed. 2d 752, the court said:

"(1) It is elementary that in considering a motion to direct a verdict the testimony and all inferences that reasonably may be drawn therefrom must be accepted in the light most favorable to the plaintiff. *Adams* v. *Barron G. Collier, Inc.*, 8 Cir., 73 F. 2d 975.

"(2) It likewise is elementary that an issue of negligence generally is a question for the jury and only where all reasonable minds must reach the same conclusion from

the facts does it become one of law for the Court and Justify the direction of a verdict. *Glynn* v. *Krippner,* 8 Cir., 60 F. 2d 406; *May Department Stores Company* v. *Bell,* 8 Cir., 61 F. 2d 830.

"(3) An electric company, because of the very nature of its business, is required to use a high degree of care in the erection, maintenance, operation and inspection of its plant and equipment used in the generation and transmission of electricity for the protection of those likely to come in contact therewith. *Dierks Lumber & Coal Company* v. *Brown,* 8 Cir., 19 F. 2d 732; *Arkansas Light & Power Company* v. *Cullen,* 167 Ark. 379, 268 S. W. 12; *Arkansas General Utilities Company* v. *Shipman,* 188 Ark. 580, 67 S. W. 2d 178."

In the case of *Arkansas Power and Light Co.* v. *Hoover,* 182 Ark. 1065, 34 S. W. 2d 464, this Court said:

"Moreover, this instruction was erroneous and should not have been given. We have repeatedly held that it was the duty of the company to keep its appliances in safe condition and that either the wires must be kept insulated, or must be so located as to be, comparatively speaking, harmless. If the company does not choose to properly insulate a deadly wire of its maintenance, it must place the same under ground, at a high altitude, or at some inaccessible place.

"We said in a recent case: 'The authorities appear to be unanimous in holding that there is no such duty, (to insulate all wires) but the cases do hold, as we understand them, that this duty must be performed, or other sufficient safety methods employed to prevent contact with wires conveying the current at such places as danger of contact may reasonably be anticipated.' *Ark. P. & L. Co.* v. *Cates,* 180 Ark. 1003, 24 S. W. 2d 846."

The facts in the case at bar are similar to the facts in the case of *Arkansas-Missouri Power Company* v. *Davis,* 222 Ark. 686, 262 S. W. 2d 916. In that case the electric wire, carrying 33,000 volts, had been installed by the power company in 1936. A sign-board was constructed nearby on private property in 1946. The sign-

board was situated approximately 4 feet from the power line. Davis received serious electrical burns when he lost control of an aluminum ladder which he was attempting to hook to the signboard and it came in contact with the electric wire. Two expert witnesses testified to the effect that in their opinion the clearance of the power line was insufficient to comply with the accepted standards of the engineering profession and the electrical industry. In that case this Court held,

"We think the testimony of Harvill and Zander was sufficient to take the case to the jury on the question of whether the defendant power company was negligent in permitting the electric line to remain within about 4 feet of the signboard after the construction of the board. The testimony of these two witnesses is one of the distinguishing features between this case and the case of *Arkansas Power & Light Co.* v. *Lum,* 222 Ark. 678, 262 S. W. 2d 920. It might be asked, how can it be said that the power company should have anticipated the very thing that did happen, but that the injured party be relieved from any duty to foresee what might happen even though he realized the dangerous qualities of electricity. The answer is that the questions of negligence and contributory negligence were peculiarly within the province of the jury to decide, there being sufficient evidence to justify the submission of both issues."

In the instant case, there were two expert witnesses who testified for the appellee and three expert witnesses who testified for the appellant. Their testimony is in sharp conflict as to whether the appellant exercised due care in the maintenance of its power line at the place where the accident occurred. The two expert witnesses for appellee testified that appellant's power line was not maintained in compliance with the standard code as adopted by the State and which is utilized by the electrical industry. The experts testifying for the appellant state that in their opinion the line does comply with the minimum standards of the Code. It is apparent that this conflict in testimony makes it a case

for the jury to determine from all the facts in the case whether the appellant was negligent.

The evidence also discloses that the deceased was a new hand, working under the supervision of a foreman and with older and more experienced workmen. In order to paint the smokestack, it was necessary to raise and place the ladder against the smokestack. The foreman, Blankenship, testified that he knew that the transmission line was there but did not realize the ladder was high enough to come close to the line; that he did not recall anyone from appellant corporation ever instructing them about the use of ladders around the transmission lines and that there were no signs on the building or guy wires, warning of a high tension line. Blankenship also testified that he did not warn his co-workers to be careful with the ladder around the transmission lines.

Witness Gibson testified that he was not conscious of any danger and that there was nothing to warn him of the proximity of the transmission lines to the building and smokestack. He also testified that the guy wires were anchored to a concrete foundation, which they had to get around with the ladder in order to paint the west side of the smokestack.

There is a complete lack of evidence to show that deceased had knowledge of any existing danger or knew of the close proximity of the transmission lines. Whether the deceased was using ordinary care for his own safety or whether he was guilty of contributory negligence, was a question for the jury to determine under the facts in the case. In *Arkansas-Missouri Power Company* v. *Davis, supra,* a case similar to the instant case, we held:

"In the circumstances we cannot say that Davis was doing something which an ordinarily prudent person would not have done; nor can we say that in the same or similar circumstances an ordinarily prudent person would not have lost control of the ladder.

"'What will constitute contributory negligence on the part of the person injured must depend upon the circumstances of each case. If from those circumstances reasonable men might differ as to whether the person did or did not exercise ordinary care, the question must be left to the jury for its determination.' *St. Louis & S. F. Railroad Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850. See also *Capitol Transportation Co.* v. *Carter,* 204 Ark. 295, 161 S. W. 2d 746, and *Bush, Rec.,* v. *Jenkins,* 128 Ark. 630, 194 S. W. 704."

In the case of *Coatney* v. *Southwest Tennessee Electric Membership Corp.,* Tenn. App., 292 S. W. 2d 420, the court held that it was a question for the jury to determine whether or not the plaintiff was guilty of contributory negligence in coming into contact with defendant's high voltage line, even though plaintiff had been warned of the presence of the line.

The appellant also contends that there was insufficient proof of pecuniary loss to sustain a verdict and judgment for $5,000. The evidence shows that decedent had worked during the school vacation period in 1955 and had contributed $590 to the family fund, which decedent and his parents utilized as needed. The decedent had always worked and in prior years had contributed a portion of his earnings to his parents. The amount of the judgment is approximately $100 per year to each of his parents over a period of their life expectancy. We find that the determination as to the allowance of this item was a question for the jury. The amount of the judgment is not excessive.

Affirmed.

J. I. CASE COMPANY *v.* BOOTHE.

5-1096 296 S. W. 2d 894

Opinion delivered December 10, 1956.

[Rehearing denied January 21, 1957.]

Rose, Meek, House, Barron & Nash, Phillip Carroll, and *J. B. Reed,* for appellent.

Frances D. Holtzendorff and *J. F. Holtzendorff,* for appellee.

J. SEABORN HOLT, Associate Justice. On March 20, 1954, Anderson Brothers, hardware dealers in Carlisle, Arkansas, sold to Boothe a J. I. Case combine for $7,731.49, and Boothe executed a title retaining note and sales contract for said purchase price. Anderson Brothers

and Boothe discounted this note and contract to a bank at Hazen, and both endorsed it with recourse. The note was to be paid in installments, and when endorsed to the bank the principal of the note had been reduced to $5,130.00 plus interest to maturity, which interest amounted to $512.86. Anderson Brothers had purchased the combine from a J. I. Case dealer in Memphis, Tennessee, and they were furnished a J. I. Case warranty on the machine, which contained these provisions, material here: "ALL NEW CASE PRODUCTS ARE SOLD SUBJECT TO THE FOLLOWING WARRANTY—J. I. Case Company, hereinafter called 'Company,' warrants each new case product . . . 1. To be well made of good material and to be durable with good care . . . 2. If properly set up, adjusted, and operated by competent persons, to be capable under ordinary conditions of doing the work for which it is designed. (a) If upon operation by the purchaser in the manner aforesaid for two days any Case product shall fail to fulfill such warranty, written notice thereof shall be given at once to the dealer from or through whom the same was purchased. If the dealer does not remedy the defect within two days after notification, then immediate written notice of the defect particularly describing the same, specifying the time of discovery thereof and the time of notification to the dealer shall be given by registered letter to J. I. Case Company at its branch house having jurisdiction over such dealer's territory, after which notice reasonable time shall be given to the Company to either send a competent person to remedy the defect or suggest by letter the remedy of the defect, if it be of such a nature. If the product is found by the Company to be defective in material or workmanship, then the Company will see to it that the defect is remedied, otherwise, purchaser agrees to pay the expenses incurred by the Company with reference thereto and in any event purchaser agrees to render necessary and friendly assistance without compensation. (b) If, after such notice and opportunity to remedy the difficulty, the Company fails to make the product fulfill the warranty, the part that fails shall be returned immediately by the purchaser, free of charge,

to the place from whence it was received and the Company notified thereof at its Branch House aforesaid, whereupon the Company shall have the option to furnish another machine or implement or part in place of the one so returned which shall fulfill the warranty, or to cause to be returned the money and notes or proportionate part thereof received for such machine or implement or part and no further claim shall be made. (c) Failure to give notice, or the use of any Case product after the two (2) day limit aforesaid without giving such notice, or failure to return such product or part as aforesaid shall be conclusive evidence of due fulfillment of the warranty . . ."

The sales contract and note above, under which Anderson Brothers sold the combine to Boothe, contained the above J. I. Case warranty. The J. I. case dealer in Memphis was J. I. Case's authorized dealer-agent and representative to sell combines, all of which carried the J. I. Case warranty. Boothe failed to pay anything on the note, and carry out the sales contract held by the bank, and the bank on April 5, 1955, sued him and Anderson Brothers. Boothe answered, and in a cross-complaint made the J. I. Case Company a defendant, relied on the standard warranty above, alleged breach of said warranty in that the combine was defective, would not work, and, in effect, was worthless, and prayed for judgment against both Anderson Brothers and J. I. Case, jointly and severally. Anderson Brothers answered, denied giving any warranty and also alleged that the notice provision in the warranty had not been complied with, and counter claimed against Boothe for recovery on an open account and note. J. I. Case answered and denied giving a warranty, and alleged that even though Case had given a warranty, Boothe had not complied with its terms as to giving Case the notice required. Boothe replied to Case and alleged that Case had waived the warranty as to notice.

On a trial it appears that all defendants, Boothe, Case and Anderson Brothers, conceded that the Bank was entitled to a judgment in the amount of $5,130, on

the note and sales contract sued on, and interest; and judgment was given against Boothe and Anderson Brothers. The cause was then tried to a jury on the issues as to the remaining parties, Boothe, Anderson Brothers and Case, which resulted in the following verdict: "We, the jury, find for Harry Boothe against J. I. Case Company and Anderson Brothers in the sum of $4,474, and also we find for Anderson Brothers against Boothe on the side note in the amount of $1,402.64 with 10% interest from October 10, 1955, and $109.65 for the open account. /s/ S. E. Greenwalt, Foreman." This appeal followed.

For reversal J. I. Case says that: The court erred in permitting in evidence a warranty which was attached to the note and sales contract given to the bank, which warranty was different from the general J. I. Case warranty above that went with the combine; that Case was not a party to this changed or new warranty and not bound by its terms. Case further says: ". . . The form containing the J. I. Case Company warranty was discarded and a new warranty was given (to the bank). This warranty . . . recites on its face that it is the only warranty given. Said warranty was given by Anderson Brothers without the authority of and in violation of its dealer's contract with the J. I. Case Company . . ." We see no merit to this contention. Regardless of the warranty attached to the note and sales contract given to the bank, the bank secured a judgment against Boothe and Anderson Brothers only, it sought no judgment gainst J. I. Case Company. It must be borne in mind that the J. I. Case warranty which admittedly went with the combine, bound the J. I. Case Company, its dealer in Memphis, who sold to Anderson Brothers in Carlisle, and bound Anderson Brothers who sold to Boothe, so Anderson Brothers and Case are clearly liable on this warranty to Boothe, unless Boothe violated certain conditions of said warranty, as alleged by appellants.

Without attempting to detail the evidence, we hold that there was ample substantial evidence to warrant the finding of the jury that the combine was defective and

would not perform. Appellants say: "Assuming that the Case warranty is applicable, appellee did not comply with the notice provisions in Paragraph 2 (a), (b) and (c)." Whether the notice as to defects was given as required, or if not given waived by appellants, was a question of fact for the jury under proper instructions. Appellee presented evidence tending to show that notice was given and further that such required notice had been waived. Appellants make no serious contention that Anderson Brothers had continual notice of the defective condition of the combine, nor that they made approximately 30 or more efforts to repair the machine without success. Boothe continued to complain to Anderson Brothers that the machine did not work, Anderson Brothers called an agent and representative (R. J. Plunk) of J. I. Case in Memphis, Tennessee, on the telephone in regard to the defective condition of the machine, and after this telephone conversation further attempts to make the machine work, as directed by Plunk, Case's representative in Memphis, utterly failed. In *J. I. Case Threshing Mach. Co.* v. *Gidley,* 28 S. D. 101, 132 N. W. 711, we find: "(10) It is well settled that, if the seller or his authorized agent acts on the notice received and undertakes to remedy the defects, it is a waiver of the objection that the notice was not in proper form, or was not given in proper time. The theory of the cases is that as the notice is for the benefit of the seller, if he acts on it, he waives any objection thereto." There was substantial evidence that Boothe complied with the Case warranty by offering to return the machine to the seller at its place of business in Carlisle (Anderson Brothers) from whom he purchased it. When asked concerning Boothe's offer to return the combine to him, Arlie Anderson, of Anderson Brothers, testified: "A. He didn't ask me to take it back. He offered to return it. Q. He offered to return it and you didn't accept his offer. A. I told him it would work a financial hardship on us if we did." From this the jury was warranted in finding, as it must have, that the return of the machine under the warranty had been waived. There was evidence that Boothe was induced to retain the machine beyond the time stated in

the warranty by reason of the continued and repeated attempts and promises by Anderson Brothers to repair the machine and put it in proper condition. The knowledge, — which the testimony shows, — of Anderson Brothers, an authorized representative and agent of the Case Company, that the machine was defective and would not perform was notice to the company.

On the facts presented by this record we hold that there was substantial evidence presented to support the jury's verdict and the judgment returned. We find no error in the instructions given by the court. Accordingly, the judgment is affirmed.

Justice George Rose Smith not participating.

Tesch *v.* Miller.

5-1081 296 S. W. 2d 392

Opinion delivered December 10, 1956.

Gordon H. Sullivan and *Harry C. Robinson,* for appellant.

George W. Shepherd, for appellee.

J. SEABORN HOLT, Associate Justice. There is involved in this action the ownership of a deposit, in the amount of $3,016, in the Commercial National Bank of Little Rock, Arkansas. Herman Tesch Woita died testate June 28, 1954. He was survived by a brother, Otto L. Tesch, a sister, Anna B. Ewing, and Mildred Jones Miller, a niece. Under his will he gave to Otto, Anna and Mildred equal shares in certain pieces of real estate. He also provided that: "All the rest and residue of all personal property of which I may die possessed, I also give, devise and bequeath to the above mentioned three persons, except that if I should own an automobile at the time of my death, then I give, devise and bequeath said automobile to my niece, Mildred Jones Miller." The will designated Mildred Jones Miller, executrix, to serve without bond.

Mildred Jones Miller had lived with the deceased, at intervals, for about four years prior to his death. There was evidence that she and her uncle were very close and she testified that he was like a father to her. For approximately six months preceding his death she was his nurse at his home and at the hospital and it appeared that he wanted no one else to wait on him. The deceased was suffering with cancer from January 1954 until his death.

The record reflects that on May 3, 1951, Herman Tesch Woita (the deceased) accompanied his niece, Mildred to the Commercial National Bank, Little Rock, Arkansas, and there with the advice of an employee of the bank (Miss Clark) set up a joint bank account with right of survivorship. The signature card furnished by the bank, which both signed provided:

". . . SIGNATURE

Mr. /s/ Herman Tesch Woita

Mr. Herman Tesch-Woita

By /s/ Mildred Jones Miller

ADDRESS: 901 Welch St., City.

AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON
Above please find 2 duly authorized signatures, which you will recognize in the payment of funds or the transaction of other business in our account.

/s/ Herman Tesch Woita

. . .

Miss Miller authorized to sign 5-3-51. She is niece of H. Tesch-Woita.''

Upon the death of Herman Tesch Woita there was a balance left in the above account of $3,016, which the appellee, Mildred Jones Miller, claimed, as the survivor of the above joint account. Upon a trial the Probate Court sustained her contention, and held that she was entitled to this money. She further contended that she was entitled to $872 for alleged services in nursing and caring for the deceased in his last illness. This claim for services was denied by the trial court.

The case comes to us on direct appeal of appellants and the cross-appeal of appellee. Appellants, Otto L. Tesch and Anna B. Ewing, contended in the trial court, and here on appeal, that this joint bank account should have been declared the property of the estate; that the decision of the Probate Judge does not meet the requirements of a joint bank account with right of survivorship as laid down by this court as to: unity of interest; unity of title; unity of time; and unity of possession; and that the evidence does not support appellee's contention that a joint bank account with right of survivorship was created.

We have concluded that the decree of the trial court should be affirmed on both direct and cross appeal. Our statute, Ark. Stats. 1947, § 67-521 provides: ''Deposits in two names. — When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as

joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the person so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them; and such payment and the receipt of acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of such joint tenants not to pay such deposit in accordance with the terms thereof. (Acts 1937, No. 260, § 1, p. 928; Pope's Dig., § 727a.)" Under the clear and unambiguous terms of the signature card we hold that a joint account with right of survivorship was set up and clearly intended by the deceased. Miss Veneta Clark (Secretary, Commercial National Bank) testified: "Q. (Mr. Shepherd) Now, according to this signature card, Miss Clark, Mrs. Miller was authorized to sign on account May 3rd, 1951? A. That is right. Q. She is the niece of Herman Tesch-Woita, as typed on the card? A. Yes, sir. Q. Who typed it on there? A. I did, myself. Q. Did you talk to Mr. Tesch-Woita about the effect of this, just what he was doing? A. Yes, I did. Q. I wish you would tell the Court the conversation between you. A. As far as I can remember it. Q. Was Mrs. Miller present at the time? A. Yes, both Mr. Tesch-Woita and Mrs. Miller were there. Q. Tell the court what your conversation was with him, what was said. A. He told me he wanted his niece, Mrs. Miller, to sign on a joint account. I brought the card out, he signed it, then he said, 'I want Mrs. Miller to have this money without any trouble.' So I had him sign it then I stamped the notation on it that made it a joint survivorship account. Q. Did you explain that to him? A. Yes, sir, I did. Q. Do you remember that conversation? A. Yes, sir, it was just the way I told you. Q. Did he ask you what the effect of it would be? A. No, he simply said he wanted his niece to have his money after he died, without any trouble, without having to go to court about it. Q. Did you explain to him what a joint account meant? A. Yes, I told him that once

she signed it as a joint account that either one could draw it out the same as the other, that she had as much authority over it as he did. Q. Now, that is all that is on that signature card, the two signatures and quote 'as joint tenants with right of survivorship and not as tenants in common.' A. Yes, sir. Q. There is nothing said about paying after death on that card? A. Oh, no." There was testimony from a number of other witnesses tending strongly to corroborate Miss Clark. Herman Tesch Woita, in a letter to his brother and sister, dated April 9, 1953, said: "As before stated Mildred is joint signer with me to get into the box at ANY TIME. She also is joint signer with me on a savings account I have in the same bank. She and her signature can cash that savings account at ANY TIME."

Following the two signatures on the card is, as indicated, the written statement "as joint tenants with the right of survivorship and not as tenants in common." There was nothing on this card directing, or, even indicating, that this account should be ineffective until the death of the deceased, Herman Tesch Woita. This fact clearly distinguishes this case from *Powell* v. *Powell,* 222 Ark. 918, 263 S. W. 2d 708, strongly relied upon by appellants. For in the Powell case we said: "The signature card reads: 'Title of account, S. F. Powell, Almedia Powell, W. E. Powell.' These names were inserted by Lynch, and the three authorized signatures are appended. But to the right of these signatures, with a bracket cutoff, there was written: 'After death of S. F. Powell.' "

The principles of law announced by this court in the case of *Pye* v. *Higgason,* 210 Ark. 347, 195 S. W. 2d 632, are applicable and controlling here. Under facts similar, in effect, to the present case, we held: "Banks and Banking—Joint Accounts.—Money deposited in bank in the names of two persons jointly with right of survivorship is a joint deposit and, on the death of one of the parties, the survivor becomes entitled to the whole. 2. Statutes.—Section 727a. Pope's Digest, was enacted for the purpose of declaring the relationship of the parties

to a joint bank account and fixing the right thereto on the death of one of the parties. 3. Joint Tenancy.—Survivorship is one of the results of joint tenancy. 4. Joint Tenancy—Right of Survivor.——Where appellee and deceased had a joint bank account with right of survivorship, appellee became, on the death of the other joint depositor, entitled to the whole, and appellants as collateral heirs of deceased have no right or title thereto.' The headnote in this same case as reported in 195 S. W. 2d 632 is in this language: "Where bank deposits were made in names of intestate and his niece as a joint account payable to either of them, and, in event of death, payable to the survivor, deposits did not become property of intestate's estate on his death but passed by operation of law to the niece as the survivor of a joint tenancy. Pope's Digest 727a (which is our § 67-521 of 1947 Ark. Stats. Anno.)"

As to appellee's claim for services rendered in nursing her uncle, the burden was on her to prove that such services were rendered under a contract, either expressed or implied. We think she has failed to sustain this burden, on the evidence presented. It appears that her uncle was rather generous in providing for her. There is a strong presumption that such services were gratuitous, since they were rendered by one member of the family for another. The rule is stated in *Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898, in this language: "The presumption is that services rendered by members of the same family, and especially between father and son, are gratuitous. Such services are enjoined by the reciprocal duties of the family relation, and are always presumed to have been prompted by natural love, rather than by the promise or the hope of pecuniary reward. 'Courts are reluctant to infer a pecuniary recompense from the performance of filial or parental duties such as humanity enjoins.' Hence the burden is upon him who claims a money recompense for personal services performed, whether voluntarily, or upon the request of the other, to establish a contract, expressed or implied, for such consideration. Page on Cont. p. 1183, § 788; Schouler, Dom. Rel. § 269; Rodgers on Dom. Rel.,

§ 483; 1 Beach on Contracts, § 655; *Reynolds* v. *Reynolds,* 92 Ky. 556; *Zimmerman* v. *Zimmerman,* 129 Pa. 229; In re *Kirkpatrick's Estate,* 34 S. C. 255. See also *Lewis* v. *Lewis,* 75 Ark. 191 . . ."

Affirmed on both direct and cross appeal.

McCartney *v.* Merchants and Planters Bank.

5-1047 296 S. W. 2d 407

Opinion delivered December 10, 1956.

Kaneaster Hodges, for appellant.

Fred M. Pickens, Jr., for appellee.

Ed. F. McFaddin, Associate Justice. The question here posed is whether the Probate Court abused its discretion in appointing the appellee Bank as guardian of the person and estate of Mrs. Edith Dollman, an incompetent lady of middle age.

The appellant — a sister of Mrs. Dollman — sought to be appointed; an adopted son of Mrs. Dollman also sought to be appointed; the Court, on its own motion, appointed the appellee Bank; and appellant brings this appeal listing three points for reversal:

"(1) Section 57-608 of the Arkansas Statutes gives preference in the appointment to the relatives of the ward by blood or marriage.

"(2) The welfare and best interests of the ward require the appointment of the petitioner, Mrs. Ray McCartney.

"(3) It was an abuse of discretion, assuming there was such in the court, to appoint a stranger as guardian of the person and estate in preference to a qualified blood relative under the circumstances of this case."

I. *Appellant's Points* 1 *And* 3 — *Statutory Preference And Court's Discretion.* It is unnecessary to give all the details about the life of the unfortunate lady, who is a hopeless mental case and has been for many years. The appellant is her sister and over all the years has shown continuous loving care for the afflicted lady. On the other hand, the adopted son has let years pass without seeing his mother or inquiring of her condition. As between the appellant and the adopted son, the appellant is infinitely better qualified to be appointed. When the Chancellor was faced with this dispute between the sister and the adopted son, the Chancellor selected the appellee as a neutral third party; and appellant says this violates the statutory preference given relatives.

Our statute on preference in granting letters of guardianship is found in § 57-608 Ark. Stats. The statute gives a preference to the parents of an unmarried minor, and then says: ". . . the Court shall appoint as guardian of an incompetent the one most suitable who is willing to serve, having due regard to . . . (d) the relationship by blood or marriage . . ." It will be observed that the quoted statute does not make an ironclad order of priority in a situation like the one here: rather, the statute leaves it to the Court to select that person as guardian, the appointment of whom would be for the best interests of the incompetent. Appellant relies on the case of *McLain* v. *Short,* 144 Ark. 600, 224 S. W. 428; but that case involved the guardianship of minors as between a grandparent and a stranger; also it was decided before the passage of our present statute, which is Act No. 140 of 1949. In short, we hold that the appellant had no statutory preference in this case.

This holding also disposes of appellant's third point regarding the abuse of discretion. Since the statute gave no ironclad order of preference, the Court was, of course, authorized to exercise its discretion in selecting a guardian, having in mind always the best interests of the ward; and, unless it be shown that the Court was in error in determining the best interests of the ward, then there was no abuse of discretion.

II. *Appellant's Point* 2 — *Welfare And Best Interest Of The Ward.* We reach the conclusion that the Probate Court did not abuse its discretion in the appointment of the appellee. There was a sharp dispute between two relatives — a sister and an adopted son; and the Chancellor had the right to select a neutral third person.[1] In 25 Am. Jur. 23, the general rule is stated:

"Subject to statutory restrictions, the selection of the person to be appointed guardian is a matter which is committed largely to the discretion of the appointment court, and an appellate court will interfere with the exercise of this discretion only in case of a clear abuse."

In 21 A. L. R. 2d 880 there is an annotation entitled: "Priority and preference in appointing guardian of an incompetent." It is there recognized as a general rule:

"Consanguinity is considered a recommendation in the selection of a guardian for an incompetent, and will not be disregarded except upon strong grounds, the presumption being that the next of kin of the incompetent will be more likely to treat the latter with patience and

[1] In making his decision, the Chancellor said: "This seems to be a family argument, and you have introduced a long and imposing array of outstanding business men of the community, and they all say — and I have listened closely to their testimony, and they all say — that both of these petitioners here would be, according to their opinions, capable, competent and fit to manage the estate and property involved in this action.

"However, I have always found that particularly in *non compos mentis* cases a bank has a great many advantages over an individual in that it is at all times impartial and in the estate it has the advanages of the business acumen; and in view of the fact that . . . both sides of the house of the estate do business with the Merchants and Planters Bank that bank will be appointed.

affection than will a stranger; so, the usual practice is to appoint as guardian of the incompetent one of the next of kin or other close blood relatives, or their nominee, or at least to consider them seriously in making the appointment."

But, after stating the general rule as above quoted, the annotation cites many cases to sustain the following as a limitation on, or qualification of, the general rule:

"As intimated above, the court is not necessarily bound to appoint next of kin or close relatives or the nominees of such blood relatives, for the court, keeping in mind the principle of law that the best interests of the incompetent are paramount, may, in the exercise of the discretion confided in it with respect to the appointment of guardians, appoint a stranger where to do so would be for the best interests of the incompetent in view of such factors as the adverse interests of the relatives and the incompetent, lack of business ability of the relative, and various other matters further to be noted."

The record here reflects that Mrs. McCartney has, over the years, looked after her unfortunate sister. The supervisor of the institution where the lady is being treated testified that Mrs. McCartney made regular visits and that the incompetent sister loved such visits and looked forward to them. The former guardian admitted that he relied on Mrs. McCartney's advice and counsel; and all of the testifying brothers and sisters of the incompetent preferred Mrs. McCartney and stated that she was the one that had really best looked after the incompetent during the years. So, if Mrs. McCartney should desire to be named guardian of the person of her sister, this present proceeding would not be an absolute bar to

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"MR. HODGES: Your Honor, does that mean of the person?

"THE COURT: It has been handled that way with Mr. Ben White. I don't think the Bank would have any objection. I don't know where there would be any conflict. I do not know whether it would be an advantage or a disadvantage to have someone appointed as personal guardian; but if Mrs. McCartney would like to be appointed guardian of the person, that could be done.

"MR. HODGES: We are not amending our request. We are just asking the Court to clarify its finding. You will please note our objections and exceptions to the ruling, and we pray an appeal to the Supreme Court of Arkansas."

such application: the matter will then be open for the Probate Court to decide in its discretion. The point is: we cannot say that the Probate Court was in error in deciding this case as it did under all of the facts and circumstances disclosed by this record and in view of the sharp contest between the appellant and the adopted son of the incompetent lady.

Affirmed.

HOWELL *v.* VAN HOUTEN.

5-1099 296 S. W. 2d 428

Opinion delivered December 10, 1956.

Ted McCastlain, for appellant.

Frances D. Holtzendorff and *J. F. Holtzendorff,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study of certain portions of Act No. 351 of 1955. The basic issues are (a) the power of the Circuit Court to render a default judgment, without notice, in a county other than that in which the action is pending; and (b) the right of the defaulting defendant to have such judgment set aside without being required to allege

and show a meritorious defense to the original cause of action.

On November 28, 1955, appellee, Van Houten, filed action in unlawful detainer against appellant, Howell, in the Circuit Court for the Northern District of Prairie County, in which county were situated the lands alleged to be so unlawfully detained. Service was obtained on Howell on December 1, 1955, and she made a bond to retain possession of the land. The bond was approved and filed. The terms of the Circuit Court for the Northern District of Prairie County are the third Monday in March and September of each year (§ 22-310 Ark. Stats.).

The record indicates that the Circuit Court was not in session in the Northern District of Prairie County at any time from December 1, 1955 until the beginning of the March, 1956 term, which was March 19th. On that day, when Howell's attorney appeared in open court for his client, he learned — for the first time — that a default judgment had been granted in favor of Van Houten on February 23, 1956, and that the default judgment had been placed of record on February 25, 1956. Howell then filed, on March 24, 1956, her "Motion to Vacate Judgment."[1] The motion was heard in open court on March 28th; and the Court found and declared these facts:

[1] The motion recited, *inter alia*: "That on the 28th day of November, 1955, the plaintiff in the above numbered cause filed suit against her for the possession of certain lands described in his complaint; that the defendant posted bond as required by law and retained possession of the lands pending the trial of same at the regular Term of said Court which convened on the 19th day of March, 1956; that the Judge of said Court, the Hon. W. J. Waggoner, signed a judgment by default against the defendant in Vacation, at Lonoke, Arkansas on the 23rd day of February, 1956; that said default judgment was not entered of record until the 25th day of February, 1956 in the office of the Circuit Clerk in and for the Northern District of Prairie County . . .

"That subsequent to the date of the default judgment, and the entry of same, the defendant employed counsel to represent her in said cause, and on the 19th day of March, 1956 for the first time learned of the default judgment for possession which appeared in Judgment Record Book "G" at page 564 of the records of the Prairie County Clerk; . . .

"Defendant states: that the default judgment entered against her on the 25th day of February, 1956 is absolutely void and should be set aside for the following reasons:

"That on the 23rd day of February, 1956 said cause of action pending in the Prairie County Circuit Court was presented for judgment to the Court in Vacation in Chambers in Lonoke, Arkansas, Lonoke County; and it appearing that the defendant had failed to file any defense to said cause of action rendered judgment against the defendant for possession of the lands described in Plaintiff's complaint same being entered of record on the 25th day of February, 1956 in the office of the Circuit Clerk of Prairie County for the Northern District. The Court finds that the Plaintiff did not give any notice to the defendant, or her attorney that said cause would be presented to the Court for judgment in Lonoke County, the residence of the judge of said Court . . ."

After making such findings the Circuit Court denied Howell's motion to vacate the default judgment; and Howell has appealed, claiming that "the default judgment rendered against appellant in Lonoke County in an action pending in Prairie County is null and void, in the absence of any notice to appellant."

Appellee, Van Houten, claims: (1) that the order of the Circuit Court overruling the motion to vacate is not a final order from which appeal may be taken; and (2)

"a. The judgment is void because of the Judge of said Court in Vacation signed said judgment without the County, or in Lonoke County, outside of the county in which said cause of action was pending; and therefore Act 49 of the Acts of 1955 relied upon by plaintiff is not applicable.

"b. The judgment is absolutely void under the provisions of Section three (3) of Act 351 of the Acts of Arkansas for the year 1955 which provides not less than 15 days notice to the defaulting party. This section provides that said notice shall be in writing, setting forth the action proposed to be taken and the time and place of presentation, and shall be by registered mail with return receipt requesed. A copy of said notice together with the postal written return receipt shall be filed with the Clerk of the court in which the action is pending.

"Defendant states that no notice was given to her as required by law and that said judgment should be by the Court set aside and held for naught, and that she be given time to file a defense in said action; that unless said void judgment is set aside her rights of possession will be prejudicially affected.

"WHEREFORE, defendant prays that her motion be set down for hearing at a time convenient for the Court, and that upon final hearing the judgment herein mentioned be set aside, and that she be permitted to file herein a defense to said cause of action."

that the default judgment against Howell is not null and void.

I. *Finality Of Judgment Against Howell.* Certainly insofar as appellant Howell is concerned, the default judgment is final until vacated. We do not know what defense Howell may have to the unlawful detainer action; but we do know that until the default judgment be set aside, Howell has no right or power to make such defense. So as to Howell, the default judgment on Van Houten's unlawful detainer action is final; and Howell is the only appellant in this Court. See *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S. W. 2d 1110, and cases there cited.

II. *Validity Of The Default Judgment Against Howell.* Act No. 351 of 1955 (§ 29-410 Ark. Stats.) is the only statute that is claimed to empower a Circuit Judge to render a default judgment when the Judge is not actually holding court [2] in the county in which the cause is pending. As to the constitutionality of that statute, we need not here express any opinion because in this case there was no notice given, as required by the statute. Section 3 of said Act 351 says:

"Upon default by failure to file a defense as required by Section 126 of the Civil Code, as amended, the complaining party may present his cause of action for judgment thereon . . . to the court in vacation of the trial judge upon not less than 15 days notice to the defaulting party. Said notice shall be in writing, setting forth the action proposed to be taken and the time and place of presentation, and shall be by registered mail with return receipt requested. A copy of said notice together with the postal written return receipt shall be filed with the clerk of the court in which the action is pending."

As heretofore copied, the Trial Court found: "The Court finds that the plaintiff did not give any notice to

[2] Section 3 of Act 49 of 1955 (§ 29-401 Ark. Stats.), in referring to judgment by default, says that it is to be rendered "by the court"; and that means when the judge is actually holding court at the proper place. See *Williams* v. *Reutzel,* 60 Ark. 155, 29 S. W. 374.

the defendant, or her attorney that said cause would be presented to the court for judgment in Lonoke County, the residence of the judge of said court." Thus, there was no compliance with the notice provision of said Act 351. The words of Justice BATTLE in *Williams* v. *Reutzel,* 60 Ark. 155, 29 S. W. 374, are apropos:

"It has often been held by this court that 'the meeting together of the judge and officers of a court, at the place, but not at the time, fixed by law for holding the court, was not a court under our constitution and law, but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void.' *Dunn* v. *State,* 2 Ark. 252; *Brumley* v. *State,* 20 Ark. 77; *Scott* v. *State,* 22 id. 369; *Ex Parte Jones,* 27 id. 349; *Chaplin* v. *Holmes,* 27 id. 414; *Graham* v. *Parham,* 32 id. 687; *Grimmett* v. *Askew,* 48 id. 155; *Neal* v. *Shinn,* 49 id. 227. This rule is applicable to the proceedings of a court held at a place not authorized by law. The object of the law in both cases is the same. That object is certainty, and to prevent a failure of justice by reason of parties concerned or affected not knowing the time or place of holding courts."

There could be no "court" of the Northern District of Prairie County in session in Lonoke County; and the notice required by Section 3 of the Act 351 was not given; so the purported default judgment of February 23, 1956 was null and void.

III. *Howell's Failure To Allege A Meritorious Defense To Van Houten's Complaint.* Appellee points out that in the motion to vacate the default judgment, Howell did not allege a meritorious defense; and appellee insists that a party seeking to set aside a default judgment must not only allege a valid defense but must also make a *prima facie* showing of such defense; and appellee cites such cases as *Ragland* v. *Rhoads,* 215 Ark. 64, 219 S. W. 2d 639; and *Merriott* v. *Kilgore,* 200 Ark. 394, 139 S. W. 2d 387.

We hold that the rule recognized in these cited cases is not applicable to a case like the one at bar, because,

here, the purported default judgment was rendered without a court being duly in session. In *State* v. *West,* 160 Ark. 413, 254 S. W. 828, a judgment was rendered in vacation, which situation was not then allowed by law. When the State (against which the judgment had been rendered) filed a motion at the next term of the court to set aside the vacation judgment, it was contended by the opposing party that the State had to comply with § 6290 C. & M. Digest (which is now § 29-506 Ark. Stats.) prescribing the procedure for setting aside a judgment after the term. We held that such section had no application to a proceeding to set aside a void judgment rendered at a time not authorized by statute, saying:

"We do not think, however, that the State's right to proceed to vacate the judgment is created by § 6290 of the Digest; nor do we think that the procedure is controlled by that section, or by § 1316 of the Digest. In fact, this is not a statutory proceeding, but is a special proceeding, instituted for the purpose of calling to the attention of the court the invalidity of the purported judgment, for the reason that it was rendered in vacation . . . This proceeding is therefore an exercise of that continuing power which courts have over their judgments to find and declare that what purports to be a judgment is, in fact, no judgment at all; . . ."

In the case at bar, we conclude that the order of the Circuit Court of the Northern District of Prairie County, under date of March 28, 1956, refusing to set aside the default judgment against appellant, Howell, should be reversed and this cause remanded to the Circuit Court with directions to set aside the said default judgment and for further proceedings not inconsistent with this opinion.

SHAW *v.* KEESHIN POULTRY CO.

5-1091 296 S. W. 2d 400

Opinion delivered December 10, 1956.

[redacted]

J. Wesley Sampier, for appellant.

Harper, Harper & Young, for appellee.

MINOR W. MILLWEE, Associate Justice. On October 1954, appellant, Jess R. Shaw, filed a claim with the Arkansas Workmen's Compensation Commission seeking compensation for disability on account of an accidental injury which he allegedly sustained on or about April 15, 1953, while employed by appellee, Keeshin Poultry Company, at Rogers, Arkansas. Hearings before a single commissioner and the full Commission resulted in a finding that the injury occurred in April, 1952 rather than in 1953 as claimed by appellant, and was, therefore, barred by the two-year statute of limitations (Ark. Stats., Sec. 81-1318 a(1)). On appeal to circuit court the findings and order of the Commission dismissing the claim as filed out of time were affirmed.

Is the Commission's finding that the injury occurred in April, 1952, supported by sufficient competent evidence? That is the sole issue.

It is undisputed that appellant sustained an injury to his leg when he fell from a truck while assisting other employees in loading it with coops on the occasion in question, and that he continued to work thereafter until September 4, 1954. Appellant's foreman, James O. Shad-

dox, was at the plant when the accident occurred. He testified he hired appellant in March, 1952, and the accident happened about two or three weeks later; that appellant fell from a Reo truck which became "tail-heavy" when fully loaded; and that the company traded the Reo truck for a White truck, which had a longer wheel base, in August, 1952. Max Elliott, another employee, who was present at the time, gave testimony similar to that given by Shaddox. Frank Hall, manager of the poultry plant, testified from company records that appellant worked more or less continuously from March, 1952 until September 4, 1954; and that the company traded the Reo truck in for the White truck on August 25, 1952.

The testimony of Shaddox and Elliott was corroborated by that of appellant's witness, Dr. Coy Kaylor, who stated that he treated appellant in 1954 when the latter gave him a history of having fallen from the truck on or about April 15, 1952, and that he did not see a doctor until about a year later.

Appellee testified the injury occurred on or about April 15, 1953, when he fell from the White truck. Several of the appellant's fishing and hunting companions testified they noticed him limping from an injury on trips in 1953 but observed no such indications on similar trips in 1952. Two former fellow employees, who were not present at the time of appellant's injury, stated it happened a few weeks before a fire which occurred at the plant on June 14, 1953.

The date of appellant's injury was purely a question of fact to be determined by the Commission on sharply disputed evidence. Under our settled rule the Commission's finding on this issue will not be disturbed on appeal when supported by substantial evidence. *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Mechanics Lumber Co.* v. *Roark,* 216 Ark. 242, 224 S. W. 2d 806. While we are mindful of the rule that a broad and liberal construction should be accorded the Workmen's Compensation Law, and doubtful cases resolved in

favor of compensation, we are unable to say the Commission's finding is unsupported by sufficient competent evidence. The judgment of the circuit court is, therefore, affirmed.

CARRIER *v.* BECK, COUNTY JUDGE.

5-1100 296 S. W. 2d 446

Opinion delivered December 10, 1956.

[Rehearing denied January 7, 1957.]

Marvin Brooks Norfleet, for appellant.

Hale & Fogleman, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a contest in which each party has avidly avoided a hearing on the merits and sought instead to outmaneuver the other in the pleadings. It now appears that appellee has won the final skirmish.

On June 7, 1955, appellant, W. H. Carrier, filed a petition for a writ of *certiorari* to quash an order of the Crittenden County Court purporting to remove him from office as a commissioner of Road Improvement District No. 7. Appellant alleged he was the duly appointed,

qualified and acting commissioner and that the removal order entered by appellee, Milton R. Beck, as county judge was void because it was rendered without notice and without a public hearing. Appellee filed a demurrer to the petition asserting as one of the grounds therefor that it did not state facts sufficient to justify the issuance of the writ. The demurrer was sustained by the circuit court on July 6, 1955 and, upon appellant's refusal to plead further, the petition was ordered dismissed. On appeal to this court we reversed with directions to overrule the demurrer filed by appellee. *Carrier* v. *Beck,* 225 Ark. 753, 285 S. W. 2d 326. Our mandate directed that the cause be "remanded to said Circuit Court with directions to overrule the demurrer and for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered."

When appellant filed a motion for judgment on the mandate on remand, appellee filed a motion for time to prepare and file a response to the petition for *certiorari.* Appellant then filed a motion to strike appellee's motion on the ground that any judgment rendered upon such response would be inconsistent with our opinion on the first appeal because, "any defenses which would be attempted to be set up in or by any such response were known or could have been known to respondent before this cause was first tried in this court upon its merits." After a hearing on the motions the circuit court entered an order on the mandate on February 26, 1956, overruling appellee's demurrer to the petition for *certiorari* and granting him 15 days within which to file a response and overruling appellant's motion for judgment conforming to the mandate and motion to strike appellee's motion.

On March 8, 1956, appellee filed a response to the petition for *certiorari* in which he admitted the challenged order was made without notice to appellant and that it did not purport to remove him because of neglect of duty, incompetency or malfeasance, but denied all other allegations of the petition. On May 4, 1956, appellant filed a motion to strike the response on the grounds that (1) any judgment rendered thereon would

be inconsistent with our former opinion, (2) it stated no defense, and (3) the former proceedings and judgment amounted to a decision on the merits and are *res judicata* of all matters asserted in the response. On the same date appellant filed a demurrer to the response on the grounds that it did not state facts sufficient to constitute a defense and that the court was without jurisdiction to determine any issue sought to be presented therein.

After a hearing on May 7, 1956, the trial court overruled appellant's demurrer and motion to strike appellee's response to the petition for *certiorari*. The instant appeal is from a judgment dismissing the petition upon appellant's refusal to plead further and his election to stand upon his motion to strike and demurrer.

For reversal appellant contends the trial court erred in failing to sustain his motion for judgment on the mandate and motion to strike appellee's motion for time to respond, as well as his demurrer and motion to strike appellee's response. It is argued that the judgment on the former appeal amounted to a final adjudication on the merits; that appellee's demurrer to the petition for *certiorari* admitted all allegations of the petition; that the response filed by appellee having admitted that the removal order was made without notice to appellant was thereby rendered void; and that appellee has not, and can never, set up any valid defense to the petition by way of response or otherwise unless he can show that such defense was either not known to him or not available when he filed the demurrer.

In making these contentions we think appellant has misconstrued the office or function of a demurrer and has overlooked a material allegation of the petition for *certiorari* which was denied in the response filed by appellee. In the recent case of *Isgrig* v. *City of Little Rock,* 225 Ark. 297, 280 S. W. 2d 891, this court approved this statement from 41 Am. Jur., Pleadings, Secs. 204 & 207: "A demurrer is the method of raising an objection to the sufficiency in law of a pleading. It may be filed either by the plaintiff or the defendant to test the other's

pleadings for defects therein apparent on the face of such pleadings. * * * A demurrer does not raise any question of fact or a mixed question of law and fact, but questions of law only; and it is erroneous for the Court, in passing on the demurrer, to determine a disputed question of fact."

As Judge Robins pointed out in *Jones* v. *The National Bank of Commerce,* 207 Ark. 613, 182 S. W. 2d 377: "While it is said that, for the purpose of testing the legal sufficiency of a pleading, a demurrer admits the allegations of the pleading, it has never been held that by filing a demurrer to a pleading a party is thereby precluded from ever disputing the allegations of the pleading to which the demurrer was filed. 'The admissions by demurrer are only for the purpose of passing upon the sufficiency in law of the pleading demurred to, and they are not evidence, nor an absolute admission dispensing with proof upon the trial on the merits." 49 C. J. 442."

One who relies on a demurrer is, of course, held to admit the facts stated in the pleading demurred to when he elects to stand on the demurrer and refuses to plead further after it is overruled. *Krickerberg* v. *Hoff,* 201 Ark. 63, 143 S. W. 2d 560. "Where, however, the party whose demurrer is overruled pleads over, as for example, where the defendant who has demurred to the plaintiff's pleading files an answer denying the allegations of the declaration, petition, or complaint, the decision on demurrer is not conclusive of the plaintiff's right to relief, for where the demurrer is overruled the implied admission has served its purpose; the demurrer does not admit the facts for purposes of evidence in the case." 41 Am. Jur., Pleadings, Sec. 254.

A hearing is contemplated on a petition for *certiorari* under our statute (Ark. Stats., Secs. 22-302 and 22-303) and the right of a respondent to demur to the petition has been recognized. *Warren* v. *McRae,* 165 Ark. 436, 264 S. W. 940. Upon the overruling of a demurrer, the demurring party may answer or reply under Ark. Stats., Sec. 27-1118.

In support of his contentions appellant cites many cases in which a party refuses to plead over and elects to stand upon his pleading after a demurrer thereto has been overruled and the resulting judgment is held to be final and conclusive. But appellee did not elect to stand on his demurrer to the petition for *certiorari* after it was overruled. On the contrary he elected to file a response in which he admitted certain allegations and denied others. Among those denied was the allegation that appellant was, and at all times mentioned in the petition had been, the duly appointed, qualified and acting commissioner of Road Improvement District No. 7 of Crittenden County. Appellant claimed the right to office under Act 55 of the 1919 Road Acts which specified certain prerequisites before one could qualify as a commissioner. Appellee's denial constituted a valid defense and cast the burden on appellant to prove the allegation in order to prevail in the case. Instead he refused to proceed or plead further and elected to stand on his demurrer and motion to strike the response after they were overruled. By such action he admitted the truth of appellee's denial that he was a duly appointed, qualified and acting commissioner of the district. This is the effect of the decision in *Smith, Adm.,* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776, where we held that a denial in an answer is not subject to demurrer when it presents an issue on material allegations.

The judgment is affirmed.

SHORT *v.* MAULDIN.

5-1092 296 S. W. 2d 197

Opinion delivered December 10, 1956.

J. B. Reed, for appellant.

Madrid Lofton, for appellee.

George Rose Smith, J. This boundary line dispute is in substance a suit for the possession of land, which was tried without objection in a court of equity. The single question is whether the boundary between the parties' tracts is a straight line or a crooked one. The chancellor entered a decree declaring the line to be straight, which resulted in the dismissal of the appellant's complaint.

At the trial all the facts were stipulated. W. A. Gatewood formerly owned the 92.74 acres across which the disputed boundary runs. Gatewood sold the east forty acres to J. W. Thomas, and, after Thomas's death, his widow and heirs conveyed that tract to the appellant Short, on April 6, 1949.

In October of 1951 it was agreed by Gatewood, the Thomases, and Short that the two deeds mentioned above did not describe exactly the land that Gatewood intended. Gatewood and Short employed a surveyor and went upon the land to survey and mark Short's tract. All four corners of the tract were correctly established and marked. The survey coincided with fence rows along the north, east, and south sides, but there was no visible indication of the west line, which is now in controversy.

It is stipulated that the surveying party intended to, and attempted to, mark a straight line from the established southwest corner to the established northwest corner of the Short tract. The surveyor, however, used only a pocket compass to run the line, which is a quarter of a mile long. The boundary was marked by stakes where it crossed open land and by blazes where it went

through woodland. When the survey was completed Gatewood declared that the line just chained, blazed, and staked would forever be the line between Short's land and the land lying immediately west of it. Short agreed, and on the following day Gatewood executed a deed to Short containing the new description. This deed is not in the record, and we must assume that it purported to describe a straight line, as the plaintiff has not met the burden of proving the contrary.

Gatewood and Short took possession of their respective parcels, did not question the blazed line in the woods, and cultivated their fields up to the turnrow that replaced the row of stakes. In 1953 Gatewood sold his tract to the defendant Mauldin, who also respected the marked line until about the end of 1954. Mauldin then contended that the boundary was not straight and took possession of a small area on Short's side of the visible line. This suit to recover possession was filed by Short on June 8, 1955. The record does not show that the line now claimed by Mauldin is in fact straight, but this omission is immaterial, not only because the burden of proof was on Short but also because the decree merely declared that the disputed boundary is a straight line.

In seeking a reversal the appellant relies upon the familiar rule that when the true location of a boundary is uncertain or in dispute the adjoining landowners may fix the line by oral agreement followed by possession, even though their possession pursuant to the agreement does not continue for the statutory period of seven years. *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661. It is accordingly contended that the agreement between Gatewood and Short, which was confirmed by possession for slightly more than three years, established the line marked on the ground as an agreed boundary.

This contention overlooks the fact that a boundary line agreement may involve an unconscious mistake as well as a conscious one. In the usual case of an oral agreement with respect to an unascertained or disputed boundary the parties realize that they do not know the

location of the true line as determined by the controlling government survey. They deliberately take the possibility of mistake into account and jointly assume the risk that the agreed line may not coincide with the true line. In at least a figurative sense their agreement and ensuing possession constitute an accord and satisfaction of their dispute. Subsequent proof that the agreed line differs from the true line does not afford a basis for relief on the ground of mutual mistake, for that possibility of error was consciously considered and is the very matter that the agreement undertook to foreclose.

It is not to be supposed, however, that boundary line agreements are uniquely immune from the operation of ordinary rules governing the effect of unconscious mutual mistake. To the contrary, they exemplify the broad principle that, although the parties to a transaction may agree that it is to be final and not to be affected by a mistake, the agreement may nevertheless be rescinded, "as in the case of all agreements, if the basis upon which it was made is mistaken." Rest., Restitution, § 11. We have recognized that this broad principle applies to contracts of accord and satisfaction, *Jewell* v. *General Air Conditioning Corp.*, 226 Ark. 304, 289 S. W. 2d 881, and we have applied it to a boundary line agreement resulting from unconscious mutual mistake. *Randleman* v. *Taylor*, 94 Ark. 511, 127 S. W. 723, 140 A. S. R. 141. In the latter case it was said: "The evidence in the case at bar shows that appellant and appellee agreed upon a boundary line under the belief that it was the true line, when in fact it was not . . . In short, it was an erroneous line agreed upon by mistake. In such cases the agreement is not binding, but may be set aside by either party when the mistake is discovered, unless there is some element of estoppel which prevents him."

In the present case Gatewood and Short went upon the land with the conscious purpose of correcting the description in the earlier deeds. They accomplished that purpose by establishing the four corners of the Short tract and by the execution of a deed conforming to those corners. As far as is shown by the stipulation of facts,

both assumed that the surveyor had marked the west boundary in accordance with their joint intention that the line be straight. It was upon that tacit premise that the staked and blazed line was agreed to. There is nothing to indicate that either party deliberately took into account the possibility that the surveyor had made an error, for that was not the matter that they were consciously attempting to set at rest. In these circumstances their mutual mistake was an unforeseen one and may be corrected by either party at any time before their ensuing possession has ripened into title.

Affirmed.

Cossey *v.* House.

5-1105 296 S. W. 2d 199

Opinion delivered December 10, 1956.

Fitton & Adams and *Arnold M. Adams,* for appellant.

John B. Driver and *N. J. Henley,* for appellee.

George Rose Smith, J. By this suit the appellants, Coy Cossey and his wife, seek to recover a strip of land which they claim by adverse possession. The appellee Clem House is the record owner of the property. The chancellor found that the plaintiffs' control of the disputed strip has not been of sufficient nature or of sufficient duration to invest them with title by adverse possession. The court accordingly dismissed the appellants' complaint.

The strip in controversy may be described as the north two and a half chains of a forty-acre tract owned by House. In 1924 House bought this tract; he has lived on it ever since. During all that time a few cleared acres in the north part of the forty have been under fence. On the northern edge of the cleared land this fence runs about two thirds of the way across the forty and is two and a half chains south of the north line of the forty acres. Thus the area now in controversy lies for the most part between the fence and the north boundary of House's land. House has paid the taxes upon his forty acres throughout the period of his ownership.

In weighing the appellants' claim of adverse possession we must take as a starting point the fundamental rule that "a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side. That loss would occur only if his neighbor should take possession of the strip and hold it for the required period of years." *Brown Paper Mill Co., Inc.* v. *Warnix,* 222 Ark. 417, 259 S. W. 2d 495. Hence the bare fact that the disputed strip lies outside the fence does not affect House's legal title to the land. It was incumbent upon the appellants, as the plaintiffs in the case, to show by a preponderance of the evidence that they have acquired the title by adverse possession.

The chancellor was right in holding that this burden of proof was not sustained. In 1945 Coy Cossey bought the forty-acre tract lying immediately north of House's land. The tract so acquired by Cossey was completely wild and uninclosed. It is doubtless true that Cossey assumed, as other witnesses in his behalf assumed, that the fence along the north edge of House's cleared land marked the boundary between the two forty-acre parcels, but a mere subjective belief cannot transfer the title to land. *Ball* v. *Messmore,* 226 Ark. 256, 289 S. W. 2d 183. There is also testimony that House himself considered the fence to be on the line, but the chancellor accepted House's statement that he did not know where the line was until its location was determined by a survey in 1952.

To sustain their assertion of title by prescription the appellants were required to prove that they had actual, physical, continuous, hostile possession of the disputed strip for seven years. That proof is lacking. Soon after his purchase in 1945 Cossey cut the timber all the way down to House's fence without any objection from House, who was in fact employed to assist in skidding the logs. But, as we have said, House did not then know where the line was. In about 1947 Cossey planted a strawberry patch on some three quarters of an acre on his side of the fence and tended it for four or five years. There is no other proof of physical possession of the property on the part of the appellants; so it cannot be said that they exercised dominion over the land for a continuous period of seven years.

Affirmed.

ROBINSON *v.* WOODARD.

5-1093 296 S. W. 2d 672

Opinion delivered December 10, 1956.

[Rehearing denied January 7, 1957.]

John R. Thompson and *W. M. Buttram,* for appellant.

Hanson & Green and *McMillen, Teague & Coates,* for appellee.

PAUL WARD, Associate Justice. Appellee, Oklahoma Furniture Manufacturing Company, a corporation, located at Guthrie, Oklahoma is engaged in manufacturing furniture. This furniture is sold, and shipped by trucks, to retail dealers in a large number of states. On return trips to Guthrie the trucks carry raw materials to be used by the Company in the manufacturing process. For the purposes of this opinion we will assume (what appears to be a fact) that the furniture is carried in a large trailer-truck which is pulled by a detachable truck-tractor.

The owner and driver of one of these tractors was appellant, A. D. Woodward. On May 16, 1955, while on his way from Granada, Mississippi to Guthrie, Oklahoma with a trailer load of merchandise belonging to appellee Company, Woodward was arrested in West Memphis, Arkansas by enforcement officers of appellants. When first accosted by the officers Woodard exhibited an "equipment lease agreement" between himself and the company (to be later discussed), and after examining the same the enforcement officers arrested him for violation of Act 397 of 1955 because neither of the appellees held a permit or a certificate of convenience and necessity from the Arkansas Public Service Commission. By agreement this criminal case was continued indefinitely.

The Manufacturing Company had the same kind of lease agreement with others that it had with Woodard, and when said enforcement officers threatened to continue to arrest the operators of similar trucks (meaning tractors and trailors) carrying merchandise under the same circumstances above mentioned, appellees, on May 27, 1955, filed their complaint in the Chancery Court of Pulaski County asking for a declaratory judgment and

for a restraining order against appellants. After a hearing on April 17, 1956 the chancery court entered a decree in favor of appelles, finding that the appellant furniture Company was a *bona fide* private carrier and that appellee Woodard was not a "motor carrier" (or contract carrier) under Act 397 of 1955.

On appeal from the above decree appellants base their contention for a reversal on two grounds, to-wit: 1. The appellee, Woodard, is operating as a motor carrier in violation of Acts 367 of 1941 and 397 of 1955, and; 2. Act 397 of 1955 does not unduly burden interstate commerce and does not invade a field of regulation preempted by the Federal Motor Carrier Act.

1. We agree with appellants that Woodard was, under the facts and circumstances of this case, operating as a motor carrier (which includes a "contract carrier") in violation of the acts mentioned above. Section 5 (a) 8 of Act 367 of 1941, Section 5 (a) (8) of Act 397 of 1955 and Ark. Stats. § 73-1758 (a) (8) are exactly the same and read as follows:

"The term 'contract carrier by motor vehicle' means any person not a common carrier included under Paragraph 7, Section 5 (a) (this section) of this Act who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights, or any other arrangements, transports passengers or property by motor vehicle for compensation."

Section 5 (a) (9) of said Act 367 defines motor carrier in these words: "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle." Section 5 (a) (d) of Act 397 of 1955 gives this definition of the term "motor carrier": "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle, and any person performing for hire transportation service without authority from the commission." Section 22 (b) of Act 397 of 1955 (Ark. Stats.

§ 73-1775 (b)) further defines a "motor carrier" as follows:

"Any person who by lease or otherwise permits the use of a motor vehicle or vehicles by other than a carrier holding authority from this Commission, and who furnishes in connection therewith a driver or drivers, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of such vehicle or vehicles, during the period of such lease or other device, shall be deemed a motor carrier."

Section 5(a) (14) [Ark. Stats. § 73-1758 (a) (14)] defines a "private carrier" as any person engaged in transportation by motor vehicle upon public highways, of persons or property, or both, *but not as a common carrier or a contract carrier.* Ark. Stats. § 73-1764 provides that no person shall engage in the business of a contract carrier over any of the public highways of this state unless he has a permit issued by the commission, and appellees have stipulated that no such certificate has been issued to Woodard, or other drivers.

The principal question for decision then is whether Woodard (and others bearing the same relationship to the Manufacturing Company) is a "contract carrier" (or a "motor carrier"), it being conceded that Woodard is not a common carrier. The answer to this question depends upon the correct interpretation of the relationship that existed between Woodard and the Manufacturing Company under the provisions of the lease agreement which we now consider.

For some years prior to January 24, 1955 the furniture company made its deliveries in equipment owned by it and driven by their own employees, but this proved unsatisfactory and so on the date mentioned an "equipment lease agreement" was entered into between the Manufacturing Company as lessee and Woodard as lessor —being the same agreement used thereafter and with other drivers. Among other things this agreement states; the lessor is the owner of certain motor vehicle equipment

(which we understand to be a truck-tractor) which the company hereby leases; the consideration going to the lessor is based on 14 cents or 15 cents per mile, depending on certain circumstances therein mentioned; lessor is bound to keep a mileage report which the company may audit and correct in favor of either party in event that it does not conform to the highway mileage; the truck-tractor is to be operated only by the lessor, or, in event of illness or disability by someone selected by the lessor and approved by the Company; the lessor is obligated to pay all operation costs including the cost of gasoline, oil, grease, repairs, maintenance, anti-freeze and such other costs as may be incident to the operation and maintenance of said equipment; the lessor is obligated to keep the equipment in first class operating condition, and must keep the equipment clean and washed with sufficient frequency, and if lessor fails to comply the Company has the right to cancel the agreement; the Company has the right to direct the use of the leased equipment in connection with its business and to designate the trips and routes; the Company is not liable to lessor for wear, tear, and depreciation on the leased equipment, and will not be liable for any damage caused by the equipment by accident, theft, or fire, etc.; the Company has the right, at its discretion, to take out insurance covering the property transported by said leased equipment, but the Company is not obligated to carry collision, fire, theft or any other type of insurance for the account of the lessor, and if the lessor carries insurance it shall be at his sole cost; the lessor at his own expense must procure Oklahoma Commission license plates to be used on said equipment; if the lessor only furnishes a tractor and uses a company trailer he is liable to the extent of $250 for any damage, other than wear and depreciation, occurring to the trailer, and; either party shall have the right to cancel the lease agreement for any reason upon giving 30 days written notice to the other party.

Appellee, Oklahoma Furniture Manufacturing Company, earnestly insisted that it is a private carrier and that Woodard is merely its employee, and that, therefore

neither had to secure a certificate of necessity and convenience or a permit from the Arkansas Public Service Commission. It further insists that the lease agreement is *bona fide* and not a ruse to evade the Commission's regulations. We concede that the Company used no bad faith in making the arrangements it did, but that is not the decisive issue. Sure, there is nothing illegal or wrong in the lease agreement *per se*. The vital question for decision is: Do the terms of the lease agreement prevent Woodard from being a "contract carrier" under the statutes and the facts in this case? This question, we think, must be answered in the negative.

In the case of *Public Service Commission* v. *Lloyd A. Fry Roofing Company,* 219 Ark. 553, 244 S. W. 2d 147, where, under facts that cannot be materially distinguished from the facts here, we held against appellees' contention. In the cited case J. R. Boshers occupied essentially the same status, under a lease agreement, that Woodard does here, and we held that Boshers was a contract carrier. The statute defining a "contract carrier" was the same when the *Fry* case was decided in 1951 as it is now, except that *evasion* has been made more difficult by the passage of Section 22 (b) of Act 397 of 1955 above copied.

In view of the *Fry* decision, *supra,* we deem it necessary here only to call attention to the material portions of the lease agreement to the ones in this case. There: Boshers owned the truck-tractor and leased it to Whittington who in turn leased it to the Fry Roofing Company; Boshers was to furnish gas, tires and other up-keep of the tractor; the lease agreement could be cancelled, by either party, merely by written notice (5 days) to the other; and; Boshers had to drive his own tractor. The reasons, and the supporting decisions, given in the *Fry* case are equally applicable in this case, and it would serve no useful purpose to repeat them here. We conclude that Woodard was a "contract carrier" and therefore is required to secure a permit from appellants.

2. Likewise, the decision in the *Fry* case, as affirmed by the United States Supreme Court, compels us

to hold the regulatory acts sought to be enforced against Woodard (and other drivers similarly situated) are not a burden on interstate commerce.

The opinion in the *Fry* case on appeal to the United States Supreme Court, 344 U. S. 157, 97 L. Ed. 168, 73 S. Ct. 204, on this point said: "The finding that the arrested drivers own and operate their trucks for hire makes them contract carriers as defined in the State Act. The state asserts no power or purpose to require the drivers to do more than register with the appropriate agency." Then, after noting that State and Federal authorities were obligated to cooperate on matters relating to interstate commerce, the court further said: "In this situation our prior cases make clear that a state can regulate so long as no undue burden is imposed on interstate commerce, and that a mere requirement for a permit is not such a burden."

Since there is nothing in the record before us to show that the Arkansas Public Service Commission has attempted or will attempt to impose any burdensome conditions to the granting of a permit to Woodard, we are bound to agree with appellants' view.

We are not convinced by appellees' argument that Section 22 (b) of Act 397 of 1955 is unconstitutional. They make this argument with the proviso that said section has the effect of changing the Company's status as a private carrier. The answer to this argument is; the equipment lease agreement and not Section 22 (b) effected the change in the Company's status. Having already concluded that Woodard is a contract carrier forecloses the possibility of the Company being a private carrier of the same merchandise.

Reversed.

Justice George Rose Smith dissents.

DARDANELLE WATER CO., INC. *v.* HAMILTON.

5-1085 296 S. W. 2d 416

Opinion delivered December 10, 1956.

Caviness & George, for appellant.

Williams & Gardner, for appellee.

SAM ROBINSON, Associate Justice. This suit was filed by appellee, John L. Hamilton, against the appellant, Dardanelle Water Company, for damages alleged to have been sustained by Hamilton due to a leak in one of the water company's pipes. It is alleged that the water from the leaking pipe undermined the foundation of a building owned by Hamilton. There was a judgment in the sum of $4,000 for the plaintiff, Hamilton, and the water company has appealed.

First, appellant stoutly contends that there is no substantial evidence to sustain a finding that the building was damaged by the water leaking from the pipe. The building is located in Dardanelle; it is shown that the soil where the building is located is very sandy and that it does not constitute a firm foundation. The building was constructed about 1910 as an automobile service station. The southeast corner of the building is supported by a column resting on a rock foundation. To facilitate the operation of the building as a service station, the south-

east corner of the building, for some distance, both to the north and to the west, was not enclosed. Later, about 1932, this part of the building was enclosed by a brick wall with large glass windows. Undoubtedly, there has been considerable damage to the building caused by a settling of the foundation on which rests the column supporting the southeast corner. Appellant contends that this settling of the foundation was not caused by the flow of water from the leaking pipe, but was due to an insufficient foundation in the first instance. On the other hand, the appellee contends that the foundation settled due to a leak in the pipe, and to the failure of the water company to promptly stop the leak upon discovering the condition that existed. The issue was submitted to the jury, and there was a finding that the damage to the building was due to the negligence of the water company. We must sustain the judgment if there is any substantial evidence to support it.

Here, we cannot say the evidence fails to meet that test. It was shown that a leak in the water pipe, only a few feet from the building in question, was discovered by Mr. Hamilton, and that the water company was notified; that it did not make repairs for about 48 hours, and that the leak was of such magnitude that a pump was required to keep the water out of the hole dug for the purpose of repairing the pipe.

Mr. Hamilton testified that Mr. Green, manager of the water company, told him that he knew the water had caused part of the damage. Mr. Barney McKinzie, a contractor, testified that if water were permitted to run around the foundation for any length of time it would cause a settling. It was further shown that the water company did not have the necessary parts on hand to make the repairs, thereby causing the delay. In addition, there is evidence that a hole 6 or 7 feet square by about 3 1/2 feet deep was dug near the corner of the building; that the walls of the hole were not shored up, permitting the sides to slough away and the sandy soil to fall away from the foundation. It was shown also that after the repairs had been completed and the leak stopped there

was a hole under the sidewalk next to the building. Mr. McKinzie testified that he had repaired the building in 1953, and that there had been a sinking of the pier since that time. The pictures introduced in evidence show that the sidewalk adjoining the building has sunk several inches. There does not appear to be any undue weight on the sidewalk, and it does not appear to depend on the foundation under the pier for support. Evidently, the washing away of the dirt by the leak in the pipe caused the sinking in the sidewalk, and the same thing could very easily have caused the settling of the foundation supporting the corner of the building. We cannot say the jury was not justified in reaching that conclusion.

The appellant contends that the $4,000 judgment is excessive. Mr. McKinzie, a contractor, testified that he examined the damage to the building and put in about an hour and a half making an estimate of the cost of the necessary repairs; he arrived at the figure of $4,000. It is true he stated this was a rough estimate, but nevertheless, after giving the matter due consideration, it was his opinion it would cost $4,000 to make the repairs.

Appellant complains that the court erred in permitting a witness to explain the facts and circumstances surrounding his giving of a statement. The witness, A. B. Rainwater, testified for the plaintiff. In an attempt to discredit him, he was questioned by counsel for appellant with reference to a signed statement given by Mr. Rainwater prior to the trial. On re-examination by the plaintiff, he was questioned concerning the facts and circumstances surrounding his giving of the signed statement. He was asked:

"Q. February 29, 1955 — Did they give any reason why they wanted this statement?

A. Yes, they wanted to try to settle."

Counsel for defendant objected, and the court stated: "I think he has a right to explain the facts and circumstances surrounding the execution of it, and the jury can draw their own conclusions as to its credibility." After

two additional questions were asked, the court then ruled that the witness could not testify as to what some third party told him. Appellant contends that the evidence violated the rule against showing an offer to compromise. We do not think this was the effect of the testimony. The witness was merely stating the circumstances surrounding his giving of a signed statement; there was no showing that there was any attempt to make a settlement. In fact, the witness had no interest in the building, no reason why anybody would be attempting to make a settlement with him at all.

The appellant further maintains that the court erred in refusing to give certain requested instructions. We have carefully examined all of the instructions given and refused, and there was no error. The jury were properly instructed on every issue.

Affirmed.

BECK *v.* DEFIR.

5-1101 296 S. W. 2d 396

Opinion delivered December 17, 1956.

W. H. Howard and *D. A. Clarke,* for appellant.

John F. Gibson, for appellee.

LEE SEAMSTER, Chief Justice. This suit in ejectment was filed by appellants in the Desha Circuit Court. The complaint alleged that appellees were in wrongful possession of a certain 160 acre tract of land situated in Desha County, Arkansas, and prayed judgment for possession of said property.

The record reveals that the land in question is situated in the Southeast Arkansas Levee District. This District was created by Act 83 of the 1917 Acts of the General Assembly of Arkansas. The question here involves the construction of Section 9 of said Act.

The appellees claim title to the land by reason of a County Clerk's tax deed dated November 12, 1946, and recorded by appellees the same day. The issuance of the Clerk's deed was based upon a sale made in November, 1944, for the taxes assessed against said land for the year 1943, and payable at the regular time for payment of taxes in the year 1944. The appellees bid the land in at the collector's sale for taxes. Upon the expiration of the two year redemption period after sale, the clerk deeded the land to appellees.

The taxes levied were the levee district taxes and a $2.00 fencing district tax. A tax deed for such taxes has the same force and effect as a tax deed for other regular taxes, where the sale is to an individual. The individual must pay the sum of his bid at the time of the sale.

Appellee, R. M. DeFir, Jr., had lived with his father on this land since 1933, with the exception of such times as he served in the armed forces of the United States or was away working. Originally the appellee and his family were living on the land as tenants of the owner. The owner had died and appellee and his father's family remained on the place. After procuring the tax deed they continued to live on the land and farm it as their own. They were living there when the instant suit was filed.

The appellants claim title to the land by reason of a deed from the Southeast Arkansas Levee District, dated May 4, 1954, and recorded in the county on May 5, 1954. The Levee District claimed the right to convey the land to appellants by reason of a clerk's deed dated September 26, 1951, and recorded in the county on April 9, 1952. This deed was issued by reason of a sale of the land for taxes in November, 1943. The taxes assessed against the land were for the year 1942.

Act 83 of 1917 provides that "At the sale by the collector for delinquent taxes, if there be any lands, railroads, tramroads, telephone, telegraph, electric light and power lines delinquent for levee taxes which are not bid in by individuals for the taxes, penalty and costs, the same shall be bid in by said Southeast Arkansas Levee District for such taxes, penalty and costs, provided said Southeast Arkansas Levee District shall not be required to pay its bid until after the expiration of the time for redemption from said sale."

The Act further provides that the Levee District must pay the other taxes, aside from levee taxes, before it is entitled to a deed from the County Clerk. Under no circumstances is the Levee District required to pay any sum for the purchase of the land at the tax sale; but only after the two year period of time allowed for redemption had expired.

The Act further provides that immediately after receiving the deed to lands in the District, the Levee District shall file suit to confirm its tax title in the Chancery Court of the County where the lands are located and proceed to a confirmation decree as in tax title cases by individuals. The Act contains a provision that any owner may come in at any time before final decree of confirmation and show title, whereby the Court may permit redemption of such lands upon payment of the amount paid out by the Levee District, with interest at 10%, costs and 25% for attorney fees.

In the instant case, at the time of the trial, the Levee District had never filed, in the Desha Chancery Court, a suit to confirm its tax title in the land here involved. The Levee District could only convey to appellants such title as it had procured. Its title was subject to redemption by any individual owner at any time before the confirmation decree, confirming its tax title, was finally entered of record.

The parties waived a jury and the trial court made the following findings of fact and law:

"FINDINGS OF FACT"

"1. The following described lands situated in the County of Desha, State of Arkansas, to-wit:

The Southeast Quarter (SE 1/4) of Section Seven (7),

Township Thirteen (13) South, Range Three (3) West, forfeited in the name of D. U. Browning for the 1940 County, State and Levee Taxes in the year 1941.

"2. Pursuant to Act 83 of 1917 the Southeast Arkansas Levee District purchased the lands at the sale held by the Clerk in 1941.

"3. In 1942 the Levee Tax was again delinquent and the Southeast Arkansas Levee District purchased the above described lands at the collector's sale.

"4. The Levee Tax was again delinquent and R. M. DeFir, Jr. purchased the above described lands in 1943.

"5. Pursuant to the purchase by R. M. DeFir, Jr. a 'Clerk's Deed of Tax Sale' was issued to R. M. DeFir, Jr. by the Clerk of the County Court of Desha County, Arkansas, on November 12, 1946.

"6. Edgar C. Gannaway, Clerk of the County Court of Desha County, Arkansas, did by his 'Clerk's Deed of Tax Sale' on the 27th day of July, 1951 convey to the Southeast Arkansas Levee District the above described lands as a result of the sale made in 1941 pursuant to Act 83 of 1917.

"7. Edgar C. Gannaway, Clerk of the County Court of Desha County, Arkansas, did by his 'Clerk's Deed of Tax Sale' dated September 26, 1951 convey the above described property to the Southeast Arkansas Levee District for the non-payment of taxes for the year 1942 which sale was pursuant to Act 83 of 1917.

"8. The Southeast Arkansas Levee District, by and through Edgar C. Gannaway, its duly authorized Attor-

ney-in-Fact did by its Quitclaim Deed dated May 4, 1954, convey the above described property to R. L. Beck and C. G. Dunne by paying to said Levee District the sum of $105.98, taxes, costs and penalty, and by paying therefor into the County Treasury the sum of $501.05 for all back taxes up to and including the purchase with the exception of the 1943 Levee Tax which was paid by R. M. DeFir, Jr. The plaintiffs have since paid all taxes accruing and accrued amounting to $75.34."

"Conclusions of Law"

"1. The defendant, R. M. DeFir, Jr. took possession of the above described lands on, and under, his Clerk's Deed of Tax Sale on November 12, 1946, and the plaintiffs are precluded in bringing this action under Arkansas Statutes, § 34-1419. Under Section 9 of Act 83 of 1917 the defendant may at any time before final decree of confirmation show his title to the above described lands and the Court may permit redemption.

"2. The district's liens for the 1941 and 1942 taxes merged with the purchase by R. M. DeFir, Sr. at the collector's sale in 1943, pursuant to which the defendant R. M. DeFir, Jr. was issued a Deed on November 12, 1946.

"3. The plaintiffs have expended the sum of $576.39 for general and special taxes since the purchase by the defendant in 1943, and said plaintiffs be, and they are hereby given a judgment against the defendant, R. M. DeFir, Jr., with interest at the rate of six (6%) per cent per annum from date of expenditure until paid, and are hereby given a lien on the above described lands for such expenditures."

The appellants contend the court erred in holding the two year statute on adverse possession applicable in this case. Whether this statute is applicable or not is immaterial as far as this case is concerned. The appellees are in possession of the land, under color of title, the clerk's tax deed. Under the provisions of Section 9 of said Act 83, the appellees have the right to redeem the

land from appellants by paying the amount set out by the provisions.

This Court held in *Wimberly* v. *Norman,* 221 Ark. 319, 253 S. W. 2d 222, that a valid clerk's tax deed vests in grantee all right, title and interest of the former owner.

In the case of *Luebke* v. *Holtzendorff,* 203 Ark. 141, 157 S. W. 2d 770, this Court held:

"It was said, in the early case of *Woodward* v. *Campbell,* 39 Ark. 580, that 'Statutes providing for redemption from tax sales always receive a liberal construction. Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle the party holding it to redeem . . .' That holding has since been followed and reaffirmed in numerous cases where the right of redemption was questioned, one of the most recent being the case of *McAllister* v. *Wright,* 197 Ark. 1156, 127 S. W. 2d 645."

Finding no error, the judgment is affirmed.

ROGERS *v.* LAWRENCE.

5-924 296 S. W. 2d 899

Opinion delivered December 17, 1956.

[Rehearing denied January 21, 1957.]

[redacted]

Pickens & Pickens, for appellant.

Wayne Boyce, for appellee.

LEE SEAMSTER, Chief Justice. The appellee, Mrs. Lawrence, filed this action against the appellant, Mrs. Rogers, seeking to recover damages for personal injuries sustained when Mrs. Rogers' car struck and injured Mrs. Lawrence. The answer alleged that Mrs. Lawrence was injured accidentally while a guest of Mrs. Rogers and, therefore, could not recover because of the Arkansas guest statute. The guest issue was submitted to a jury; and a verdict returned for Mrs. Lawrence. The appellant presents several assignments, one relating to the guest issue, another relating to instructions, and another relating to the *voir dire* examination of the jury panel.

The first point for decision is the guest issue. Mrs. Lawrence, a lady past seventy-eight years of age, and living in Jackson County, went to Crittenden County in September, 1953, to visit friends there. She was visiting in the home of Mrs. Brewer when appellant, Mrs. Rogers, and another lady, came by to get Mrs. Brewer and Mrs. Lawrence to go to see Mrs. Rogers' new home. When the four ladies were seated in the car, Mrs. Rogers was driving with Mrs. Brunson beside her in the front seat; and Mrs. Brewer and Mrs. Lawrence were in the rear seat, with Mrs. Lawrence seated on the right. As they drove through the business district, after visiting at Mrs. Rogers' new home, Mrs. Lawrence requested that they stop at Mr. Holt's store so she could tell him goodbye, as she was leaving the next day for Jackson County.

Mrs. Rogers drove up parallel with the curb just one store away from Holt's store and stopped the car and Mrs. Lawrence stepped from the car to the street, ready to step up on the sidewalk. Just then, the car directly in front of Holt's store drove away, and Mrs. Rogers said: "O. D. Cox is pulling out; I believe I will pull up"; and Mrs. Rogers began to move a car length for-

ward. But in some way — either by the door or the fender hitting her — Mrs. Lawrence was knocked down by Mrs. Rogers' car and received the injuries involved in this case. Mrs. Lawrence stated the following:

"Mrs. Rogers pulled in parallel to the curb to park and stopped the motor. I opened the rear door of the car which opens toward the back of the car and stepped out. I had both feet on the ground (pavement) and I was not touching the car when Mrs. Rogers said, 'I think I will pull up a little bit' and stepped on the gas and the car door hit me on the right side. I was facing west and the car was facing south. I was knocked down between the curb and the car striking the left hip."

There is no need to recite the other testimony because, on an appeal like this one, we accept the evidence strongest to the appellee's case. See *Harrison* v. *Rosensweig,* 185 Ark. 281, 47 S. W. 2d 2; *Potashnick Local Truck System, Inc.,* v. *Archer,* 207 Ark. 220, 179 S. W. 2d 696; *Albert* v. *Morris,* 208 Ark. 808, 187 S. W. 2d 909.

Appellant claims that under her own testimony, Mrs. Lawrence was a guest in Mrs. Rogers' car and cannot recover because of our guest statutes. Appellee says it was a question of fact for the jury to decide: (a) whether Mrs. Lawrence had left the car when she was injured; and (b) whether the stop at Holt's store was merely a part of a journey or was in itself such a complete stop as to suspend the guest relationship until Mrs. Lawrence should re-enter the car.

We have two guest statutes in Arkansas, being Act No. 61 of 1935 (now found in § 75-913 Ark. Stats.) and Act No. 179 of 1935 (now found in § 75-915 Ark. Stats.). The latter is the one most strongly relied on by the appellant; and the germane portion of it reads:

"No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, without payment for such transportation, nor the husband, widow, executors, administrators, or next of kin of such person, shall have a cause of action for damages against such owner or operator, or other persons

responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the willful misconduct of such owner or operator."

In 3 Ark. Law Review at page 101 there is a comment on cases from various states involving the guest statute; and also in 1 Ark. Law Review at page 50 there is an article on the Arkansas guest statute. In addition, we have several cases on these statutes, but none decides the question here posed. Some of our more recent cases are: *Corruthers* v. *Mason,* 224 Ark. 929, 277 S. W. 2d 60; *Derrick* v. *Rock,* 218 Ark. 339, 236 S. W. 2d 726; *Stewart* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901.

Since the Act 179 uses the words "transported or proposed to be transported," "entering" or "leaving," it is that statute on which the appellant most relies on her claim that the Trial Court should have instructed a verdict for her. We seldom have a case in which both sides show the research and diligence that has been exhibited in the case at bar. Learned counsel for appellant has favored us with a brief giving the statute and decision from each and every state in the Union that has a guest statute in any way resembling our statute; and also numerous text books and law review articles are referred to in the brief. Since the oral argument, we have discovered an annotation in 50 A. L. R. 2d 974, which volume was not distributed until after the argument.

But in the final analysis the issues are simply these: When the guest has left the vehicle, intending to later re-enter after transacting other matters, can the Court say, as a matter of law, that the intention to resume the journey makes the guest relationship continue while the guest is entirely away from the car? Again, should the Court leave it to the jury to decide whether, under the facts in each particular case, the guest relationship was terminated when the guest had both feet on the ground and was not touching the car?

We believe the jury should have been allowed to decide the fact question, just as was done in the case at bar. The guest statute is in derogation of the common law and is to be strictly construed. *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30; *Arkansas Valley Rural Electric Company* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538; *Whittecar* v. *Cheatham,* 226 Ark. 31, 287 S. W. 2d 578.

The "guest statutes" were enacted to prevent collusive suits. *Ward* v. *George, supra.* Certainly there was no collusion in the case at bar; and when we give the guest statute the strict construction that we have held proper, then it seems clear that the jury should have decided whether Mrs. Lawrence continued as Mrs. Rogers' automotive guest even when out of the car to go into a store. Someone must say as a fact when the automotive guest status ceased after Mrs. Lawrence left the car, had both feet on the ground and had ceased to be in contact with the car. Our system of jurisprudence leaves fact questions such as these to the jury. In the recent case of *Whittecar* v. *Cheatham,* 226 Ark. 31, 287 S. W. 2d 578, decided March 5, 1956, we said: "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." Therefore, the Trial Court was correct in refusing appellant's motion for an instructed verdict.

As to appellant's assignment regarding the requested instructions, little need be said. It would unnecessarily prolong this opinion to give these instructions *in extenso.* Appellant insists that each of her instructions 4 to 8, inclusive, should have been given; but we find that the Court covered the correct portion of these instructions in its own instructions 1, 6, 8 and 9 and in defendant's instructions 1 and 2.

Finally, appellant claims that the Court committed fatal error in permitting the attorney for the appellee to ask the venire of prospective jurymen these questions:

"1. Are you now, or have you been, employed as an adjuster by any liability insurance company?

"2. Do you, or any of you, own stock in or have any financial interest in any insurance company that has automobile and liability insurance?

"3. Are you now, or have you been in the past, employed as an adjuster for any liability insurance company?"

We have held that the trial court has discretion in allowing questions like this to be asked on *voir dire* (see *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167); and we are of the opinion that the trial court did not abuse its discretion in the case at bar. The questions here asked were not materially different from those permitted in *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. 2d 243. Furthermore, we have recent cases all on the same point. See *Mo. Pac. Transp. Co.* v. *Talley,* 199 Ark. 835, 136 S. W. 2d 688; *Certiorari* Dismissed by U. S. Supreme Ct., 311 U. S. 722, 85 L. Ed. 470; 61 S. Ct. 5; *Brundett* v. *Hargrove,* 204 Ark. 258, 161 S. W. 2d 762; and *Dedmon* v. *Thalheimer,* 226 Ark. 402, 290 S. W. 2d 16.

Finding no error, the judgment is affirmed.

Justices Holt, Smith and Ward dissent.

J. Seaborn Holt, Associate Justice (dissenting). All concede that the present case is one of first impression here. Under our guest statutes, as pointed out in Volume 3—Arkansas Law Review No. 1, p. 101: "In effect, the exact limits of the host-guest relationship in Arkansas are as yet undetermined."

Under § 75-913 Ark. Stats. 1947 (of 1935) no guest, had a cause of action against the owner or operator of an automobile for damages unless the automobile was being operated willfully and wantonly in disregard of the guest's rights. That section was amended by § 75-915 Ark. Stats. 1947 (enacted at the same term) and provided: "No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, . . . shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal in-

jury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the willful misconduct of such owner or operator." It seems clear to me that the legislature in the latter section (75-915) intended to add a greater protection to the driver or operator of an automobile while carrying anyone gratuitously (or as a guest) not only while such guest was in the car but while entering the car or while "leaving such motor vehicle."

"The primary purpose of statutory construction is to ascertain the intention of the legislature, not only from the language used but also from the reason and necessity for the act, the evil sought to be remedied and the objects and purposes sought to be obtained by it . . . The words of a statute will be interpreted according to their common and popular acceptation and import unless that interpretation will defeat the manifest intent of the legislature . . . A situation which is within the object, spirit and meaning of a statute is regarded as within the statute although not within the letter . . ." *Tallios* v. *Tallios,* 350 Ill. App. 299, 112 N. E. 2d 723.

The undisputed evidence in this case is to the following effect: Appellee (Mrs. Lawrence) was a visitor in the home of Mrs. Brewer, and Mrs. Rogers (appellant), Mrs. Brewer's friend, proposed to transport Mrs. Lawrence, as her guest, from Mrs. Brewer's home out to Mrs. Rogers' new home (which Mrs. Rogers wanted appellee to see) and then to return Mrs. Lawrence back to Mrs. Brewer's home. In the course of this journey, at Mrs. Lawrence's request, Mrs. Rogers stopped her car within a few inches of the curb for the purpose of allowing appellee momentarily to interrupt the journey and get out of the car to say goodbye to a friend, before she, Mrs. Lawrence, terminated her visit with Mrs. Brewer (which she intended to do on the following day). When the car stopped, Mrs. Lawrence opened the rear right hand door of the car, stepped to the pavement, a few inches from the curb, and before she could step from the pavement to the curb, Mrs. Rogers started the car forward and some part of the car, either the door or

fender, struck Mrs. Lawrence, knocked her down and injured her. In other words, appellee had not gotten far enough away from the car, in the act of leaving it, to avoid being struck by it. As I see it, there is no escape from the conclusion that appellee was injured while leaving the motor vehicle for the specific purpose of temporarily interrupting the journey and then to re-enter the car and complete the journey. In these circumstances, I think, it was the legislative intent that she was still a guest at the time and could not recover. It seems obvious to me that the legislature, to make it more difficult for collusive suits and to further restrict grounds for recovery against owners and drivers of automobiles, found that the first section above (75-913) was not broad enough and did not afford sufficient protection, and that Section 75-915 was enacted for this purpose.

The Supreme Court of Kansas in *Marsh* v. *Hogeboom et al.,* 167 Kan. 349, 205 P. 2d 1190 (1949) in construing its guest statute which provided: "8-122b. Right of guest to collect damages from owner or operator. That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle," in circumstances similar to those presented here, held: "Where motorist took guest by automobile to guest's home, guest alighted from automobile and took hold of right door handle of automobile to close door, and motorist then negligently started up, catching guest's hand on door handle, throwing guest to the ground, and causing injuries, she was still a 'guest' within meaning of automobile guest statute at time she was injured and could not recover from motorist, in absence of showing of gross and wanton negligence."

In *Head* v. *Morton,* 302 Mass. 273, 19 N. E. 2d 22, the Supreme Judicial Court of Massachusetts, where the facts were: [plaintiff] "I was in the air. I had not left

the sidewalk. I had not left anything. My right foot was in the air, and my left foot was on the curbstone, and I was starting into the car in that motion," held in favor of the defendant and said: "If the relationship of 'host' and 'guest' as these words are commonly used, had come into existence at the time of the plaintiff's injury, she cannot recover . . ." We think that the case at bar comes within the rule stated in *Ruel* v. *Langelier,* 299 Mass. 240, 12 N. E. 2d 735, where it was said, 'Coming now to the case before us, it must be clear that the degree of the defendant's duty does not depend upon the physical position of the plaintiff at the moment of the accident, or upon whether she was then in the defendant's automobile or outside of it, or upon whether in everyday language she would be described as a guest. The degree of the defendant's duty depends upon whether the act of the defendant claimed to be negligent was an act performed in the course of carrying out the gratuitous undertaking which the defendant had assumed.' . . ." In another Massachusetts case, *Ethier* v. *Audette,* 307 Mass. 111, 29 NE 2d 707, the facts were even stronger for the plaintiff than in the present case, but in that case the court held: "1. Automobiles—Where defendant gratuitously undertook to transport plaintiff home, they decided to stop at restaurant for purpose of purchasing food to be eaten by both at plaintiff's home, plaintiff alighted from automobile, motor was not turned off and door was left open, and plaintiff, without having entered restaurant, returned and stood with one foot on running board, and was injured when defendant's foot slipped from clutch and automobile suddenly moved, plaintiff remained a 'guest' of defendant, who therefore was not liable in absence of gross negligence, notwithstanding plaintiff did not intend to re-enter automobile at the time and had returned merely to ask defendant to accompany plaintiff into the restaurant. . . ."

In this day and age, when an estimated 60 million automobiles are on the streets and highways, with practically every family in the nation owning one or two automobiles, if the majority opinion stands, in my opinion,

a car owner will hesitate before offering a friend or neighbor a free ride. The risk would seem too great. Personal injury suits will no doubt multiply and liability insurance rates advance—the very things that our legislature seemed determined to discourage.

I would reverse and dismiss.

Justices SMITH and WARD join in this dissent.

HICKINBOTHAM *v.* WILLIAMS, CHANCELLOR.

4864 296 S. W. 2d 897

Opinion delivered December 17, 1956.

[Rehearing denied January 21, 1957.]

Kenneth Coffelt, for petitioner.

Bailey, Warren & Bullion, for respondent.

J. SEABORN HOLT, Associate Justice. On July 9, 1956 the City of Little Rock duly enacted Ordinance 10206 which prohibited the operation of grocery stores and meat markets on Sunday. The ordinance contained these provisions: "Section 1. That it shall be unlawful for any person or persons, firm, corporation or association within the corporate limits of the City of Little Rock,

Arkansas, on the first day of the week, commonly called Sunday, to open to the public, or to sell, or offer to sell, give away, or dispose of, in any manner from any grocery store, building or establishment where groceries, fruits or vegetables or articles ordinarily sold from a grocery, fruit or vegetable store or stand; or to open any meat market, sell, offer to sell or give away from such meat market any meats or other products ordinarily sold or handled in meat markets; and all such grocery stores and meat markets shall be closed on said day; provided, however, that nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath, and in pursuance of such observation, shall close and keep closed their store or meat market on the seventh day of the week, commonly known as Saturday. Section 2. That any person, persons, firm, corporation or association violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be fined not less than Twenty-Five Dollars ($25.00) nor more than One Hundred Dollars ($100.00) for each separate offense. Section 3. That each Sunday which such grocery store and/or meat market is opened to the public for purposes prohibited in Section 1 of this ordinance shall be deemed a separate offense. Section 4. That all ordinances or parts of ordinances in conflict herewith are hereby repealed." Section 5 was an emergency clause. Petitioner Hickinbotham, who had on many Sundays prior to the enactment of said ordinance operated his grocery store on the sabbath, continued to keep open and operate on practically every Sunday since the enactment of the ordinance.

Plaintiffs, some 20 in number, who operated retail grocery stores in Little Rock, on behalf of themselves and all others similarly situated, filed suit in Pulaski Chancery Court August 17, 1956, seeking to enjoin appellant from continuing to open and operate his grocery store on Sunday. Plaintiffs alleged, in effect, that appellant's consistent and continual violation of the above ordinance amounted to a public nuisance and damaged their civil property rights and privileges. Hickinbotham filed one

general and two special demurrers to the complaint, in which he questioned the constitutionality of the ordinance and the jurisdiction of the Pulaski Chancery Court to enjoin him under the allegations of the complaint. On a hearing the court overruled the demurrers, whereupon the plaintiffs (retail grocers) asked for a temporary restraining order, which the court granted on the following morning, and after plaintiffs had given a bond, which was approved and filed, Hickinbotham continued his practice to open and operate his grocery store on Sunday. Subsequently and on September 18, 1956, the court ordered petitioner to show cause why he should not be punished for contempt of the court for willful disobedience of the court's order. On a hearing, Hickinbotham was adjudged guilty of contempt for having kept his store open on Sunday, September 16, 1956, in violation of the court's order, and his punishment fixed at a fine of $50.00 and a term of ten days in jail.

Petitioner has filed in this court "Petition for Writ of *Certiorari*" alleging: "Petitioner alleges that all of the judgments, orders and decrees for temporary restraining order, and the judgment holding petitioner in contempt of court is void. They are void because the Chancellor has no jurisdiction to enter, or cause to be entered, any such orders, judgments or decrees, as herein referred to, or either of them. The judgments, orders and decrees violate the constitutional rights of petitioner under both the Arkansas Constitution and U. S. Constitution. They violate the Arkansas Statutory rights of the petitioner. Petitioner, therefore, alleges that because of the above and foregoing facts, which the petitioner alleges to be true, he is now being unlawfully and wrongfully punished under the Chancellor's decree holding him in contempt of court, which judgment and decree is now being enforced." We hold that this writ must be denied.

The above ordinance is constitutional. It is based on our basic statute, Ark. Stats. 1947 § 41-3802-3, and is consistent with this statute. In a similar situation in the case of *Taylor* v. *City of Pine Bluff,* 226 Ark. 309, 289

S. W. 2d 679, wherein Taylor was convicted under the above basic statute for having his grocery store open on the sabbath, we held the above statute constitutional. We there said: "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. 321; *State* v. *Towery,* 239 N. C. 274, 79 S. E. 2d 513, appeal dismissed, 347 U. S. 925. 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 Pulaski Chancery Court had jurisdiction under the complaint, which, as indicated, alleged that petitioner's acts amounted to a nuisance and damaged their civil property rights. We so held in *State ex rel. Atty. Gen.* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327.

Petitioner's remedy in the circumstances was by appeal, whether the trial court's decree punishing petitioner for contempt was right or wrong, it was petitioner's duty to obey it as long as it remained in force. See *Stewart, et al.* v. *State,* 221 Ark. 496, 254 S. W. 2d 55. Also see *Carnes* v. *Butt, Chancellor,* 215 Ark. 549, 221 S. W. 2d 416. In the latter case we said: "Where a Court has jurisdiction of the subject matter and the person, it may exercise its apparent power, even though error is committed in doing so, a matter not reached for consideration here. The principle upon which the trial Court in this case proceeded was that facts in support of the plaintiff's allegations were yet to be developed, and the defendants likewise were entitled to be heard in opposition to the plaintiff's charges of illegal picketing. But during the interim allowed for the bene-

fit of each side, the defendants arbitrarily concluded that the Court was wrong in issuing the injunction, hence it could be disobeyed without penalty. The law is otherwise. The proper procedure would have been to obey the order until a higher court passed upon its validity." Whether petitioner here should be enjoined on final hearing would depend upon the evidence presented upon a trial of the issues. There has been no such trial. In the oral argument before this court, Counsel stated there had been a trial and decree since the present action was filed here, and that an appeal from that decree is now being prosecuted to this court.

Accordingly, the writ is denied.

TANKERSLEY BROTHERS INDUSTRIES, INC. *v.* CITY OF FAYETTEVILLE.

5-1104 296 S. W. 2d 412

Opinion delivered December 17, 1956.

Hardin, Barton, Hardin and *Garner; Dickson & Putman,* and *Ray Trammell,* for appellant.

A. D. McAllister, Jr., and *Glen Wing,* for appellee.

J. SEABORN HOLT, Associate Justice. This is a suit by the City of Fayetteville, Arkansas, and two property owners to require the removal of a building constructed under a permit from the City, and to enjoin other uses

of its property by the defendant alleged to be in violation of zoning ordinances.

Defendant, Tankersley Brothers Industries, Inc., is a wholesale distributor of frozen foods with its principal warehouse and place of business at Fort Smith, Arkansas. In September, 1954, it desired to open a place of business in Fayetteville where it purchased a lot described as the South 180 feet of Lot 5, Block 12, A. L. Trent's Revised Plot of the City Park Addition to the City of Fayetteville. The lot was in the "E" Commercial Zone and bounded by College Avenue on the East, Pollard Avenue on the West and Prospect Street on the South. The property on both sides of College Avenue is zoned and used essentially for commercial purposes while the property opposite and across the street from defendant on Pollard and Prospect is in the "C" multiple Family Residence District.

On September 13, 1954, defendant filed its application for a building permit for the erection of a "one-story masonry commercial building" 20 ft. x 20 ft. to be located on its lot at 818 Pollard Avenue. The application provided that all work and building set-backs would conform to the ordinances of the City. There was attached to the application a plot plan of the proposed building showing a 10-foot set-back of the building from the East line of Pollard Avenue. An application for certificate of occupancy also filed with the application stated it was made for a commercial building located in the "E" Commercial Zone and the First Fire Zone and listed the use to which the premises were to be put as "Office and Cold Storage." A permit duly granted by the City Council was issued September 24, 1954 and construction commenced shortly thereafter was completed early in December 1954, when defendant began business operations.

Defendant's business consisted primarily of the sale, storage and distribution at wholesale of frozen and refrigerated foods to grocery stores, restaurants and other retail establishments in Fayetteville and other cities and

towns in that area. A small amount of sales are made directly to consumers but at wholesale prices. The products are usually transported by truck from defendant's Fort Smith warehouse to the building in question for storage and distribution in two trucks maintained by defendant at the Fayetteville place of business. The building consisted of a small office and a storage room 12 ft. x 20 ft. in which refrigeration equipment was installed. It was constructed to face Pollard Avenue with the West wall about 5 ft. from the street and a concrete platform or dock 5 ft. x 20 ft. and 1 ft. high running from the front of the building to the street line.

The plaintiffs, Glen Wing and Dr. Fount Richardson, maintain their homes across the street from defendant's lot, with the Wing residence on Pollard Avenue facing the Northwest corner of defendant's lot and Dr. Richardson's residence facing Prospect, but set back a considerable distance from the street. Shortly after defendant commenced operations, they complained to the City Building Inspector about trucks parking in the street and obstructing traffic in the area. On December 10, 1954, the City Inspector wrote a letter to defendant informing it of the complaints and the fact that a zoning ordinance required off-street parking and loading areas and requested immediate compliance with the ordinance. Defendant immediately constructed a driveway from Pollard Avenue on its lot north of its building and between said building and a small rock residence located on the north portion of its lot.

There were further complaints made to the City Inspector about the continued parking of trucks in Pollard Avenue and defendant's use of the concrete dock adjacent thereto in loading and unloading its products. However, no further complaints were made to defendant until April 11, 1955, when the City Attorney wrote defendant that he had reviewed city building and zoning ordinances at the request of interested property owners and wished to advise defendant of its apparent violations of said ordinances in five particulars: (1) conduct-

ing a business not authorized for "E" Commercial District; (2) failing to provide off-street parking and loading facilities; (3) failing to set back the front wall of the building 10 feet from the street; (4) building the concrete dock in violation of the permit; and (5) failing to front the building on College Avenue instead of Pollard Avenue. The letter also suggested that defendant contact the City Inspector regarding an immediate compliance with applicable ordinances otherwise appropriate legal action would be taken.

On April 27, 1955 the City and the two individual property owners filed the instant suit asserting in substance the alleged violations mentioned in the City Attorney's letter, and that the operation of the business constituted a public and private nuisance. They prayed for a mandatory injunction to remove the building or that defendant be enjoined from the present use of its property and from using the concrete dock adjacent to Pollard Avenue. The defendant admitted application for and issuance of the permit and construction of the building under supervision of the city's agents but denied other material allegations of the complaint. It also alleged that its place of business being upon College Avenue was in fact in a business area regardless of zoning ordinances; that the City had full knowledge of the use to which the building was to be put when it issued the permit and plaintiffs should be estopped to question either the manner of construction or use of the building. Trial resulted in a decree denying the prayer for removal of the building but enjoining defendant from operating its wholesale business therein and requiring that off-street loading facilities be provided and used. It was also decreed that defendant front its building upon and conduct operations from the College Avenue side of the building but using Pollard Avenue for ingress and egress in carrying out said operations. Defendant has appealed, and plaintiffs have cross-appealed from that portion of the decree denying a mandatory injunction for removal or relocation of said building.

Defendant paid $7,500 for the lot in question and spent $6,000 in the construction of the building. The construction was observed by the City Inspector who approved the 5 ft. set-back line, because such construction was permissible under the First Fire Zone ordinance which he understood took precedence over the regular zoning ordinance, and counsel for plaintiffs was of the same view at the trial. Plaintiffs stood by without making any further complaint to defendant and without making any complaint relative to the character of business being conducted for four months after defendant commenced operation of its wholesale business.

We have concluded that the trial court was correct in denying appellee's prayer for removal of the building but was in error in limiting appellant's operations to the College Avenue side of the building, and, also was in error in denying appellant the right to operate its wholesale business. Appellant applied for and was granted a permit by the City to erect this small building for commercial purposes in a commercial zone, and proceeded to construct such building at a cost of some $6,000, under the supervision of the city's agents. We find no evidence of any fraud on the part of appellant. It was permitted to operate a wholesale business for more than 4 months after the building was completed without complaint by the City. We hold that the City has stood by too long and is now equitably estopped to have the building removed or to deny appellant the right to operate wholesale. As indicated, while the trial court confined appellant's operations to the College Avenue side, it, however, allowed appellant access to the building over Pollard Avenue. We hold, in the circumstances, that appellant, in addition to the privilege to operate on College Avenue, should also be permitted to operate its business in the ample space immediately north of its building, and to this end should be permitted to construct on its driveway north of the building a platform or loading dock. With this right, in addition to the loading and unloading privileges allowed on the College Avenue side, we think that it would make no material differ-

ence whether appellant operated retail or wholesale. It seems obvious to us that there would be even less congestion operating wholesale than there would be operating retail.

The rule which we hold applicable here is stated by the text writer in 58 American Jurisprudence, § 184, p. 1040: "On the other hand, there are cases in which a municipality has been regarded as equitably estopped from revoking a building permit. Indeed, where the permit is properly obtained, the weight of authority is that it may not be revoked arbitrarily, particularly where, on the faith of it, the owner has incurred material expense. Hence, there are a number of cases in which the revocation of a permit on the ground of the violation of a zoning regulation has been regarded as improper. This result has been reached where, in good faith, and in reliance on the permit, money has been expended and substantial steps have been taken, such as the purchase of real estate, the execution of contracts for the purchase of land or other property or for other purposes, the employment of an architect or surveyor, the demolition of buildings, the excavation of land, and the installation of equipment." Also in 43 Corpus Juris, § 380 p. 349: "As a general rule, a building permit has none of the elements of a contract and may be changed or entirely revoked, even though based on a valuable consideration, if it becomes necessary so to change or revoke it in the exercise of the police power. Applicant's property is not exempt from the operation of subsequent ordinances and regulations legally enacted by the corporation, as for instance, his property may be subject to an ordinance or regulation extending the fire limits. But when once the proper authorities grant a permit for the erection or alteration of a structure, after applicant has made contracts and incurred liabilities thereon, he acquires a kind of property right on which he is entitled to protection; and under such circumstances it is generally held that the permit cannot be revoked without cause or in the absence of any public necessity for such action . . ." See 62 C. J. S. § 227, p. 521.

The decree, therefore, is modified so as to permit appellant to operate wholesale and to construct a loading and unloading platform immediately north of its building, and as so modified is affirmed.

Justices McFaddin and Millwee dissent as to modification.

Barber *v.* Jones.

5-1103 296 S. W. 2d 404

Opinion delivered December 17, 1956.

Barrett, Wheatley, Smith & Deacon, for appellant.

Frierson, Walker & Snellgrove, for appellee.

Ed. F. McFaddin, Associate Justice. The only question on this appeal is whether the jury verdict of $5,500 was excessive. We have concluded that it was not excessive; and a mere per curiam opinion to that effect might be sufficient. But such would neither explain our reasons to the litigants nor aid as a precedent in future cases. Hence this opinion; because an opinion has the two-fold purpose of explaining to the litigants the decision of the Court and becoming a precedent as an aid to the bench and bar.

Appellee, Grady H. Jones, brought action in the Poinsett Circuit Court against appellant, Mrs. W. R. Barber, to recover for personal injuries sustained in an automobile accident, which occurred on December 21, 1955, when a vehicle driven by appellant collided with a vehicle driven by appellee. Appellee alleged that he had sustained a badly wrenched back and that the injury ag-

gravated a pre-existing condition. He alleged physical pain, mental anguish, expenses, loss of earning capacity, and permanent injuries. The case was tried to a jury on May 14, 1956, under instructions given by the Court, to which there were no objections[1] by appellant. In answer to specific inquiries, the jury found that appellee was not negligent and that the negligence of the appellant was the proximate cause of the collision. As aforesaid, the jury verdict for appellee was $5,500; and the only question on this appeal is whether the verdict is excessive.

Dr. Barnett testified that he examined Grady Jones on December 23, 1955 and again on May 7, 1956. The first examination was about two days after the collision and Jones was at that time in pain. The doctor said:

"A. My diagnosis on the first occasion was myositis acute, due to trauma and it was not mentioned in my impression, but it was mentioned in the general write

[1] The Court instructed the jury, as to damages, as follows: "You are instructed that if by your findings the plaintiff, Grady Jones, is entitled to recover in this action, you may consider as his recoverable damages such a sum of money as you find from a preponderance of the evidence will reasonably compensate him for his injuries. You may take into consideration any pain and physical and mental suffering undergone by Mr. Jones, either at the time of the collision or afterwards as a result of the injuries sustained in the collision, together with any pain and mental or physical suffering which he may hereafter sustain as a result of said injuries and you may take into consideration the permanency, if any, of any bodily injury which he sustained in the collision. In addition, you may take into consideration any medical expenses or liability that Mr. Jones has incurred or may in the future be reasonably expected to be incurred by him resulting from his injuries, for medical care, hospitalization, x-rays, other expenses of this character, and in addition thereto, any wages, if any, you find from a preponderance of the evidence he has lost as a result of this accident and the probable future loss of wages, if any. If you find that the plaintiff is entitled to recover under the instruction hereto given you, and if you find that the plaintiff had a pre-existing back injury, at the time of this collision, and that the pre-existing condition was inactive or dormant or that plaintiff had fully recovered therefrom and that the plaintiff was otherwise in good physical condition, or if you further find from a preponderance of the evidence that the pre-existing injury was activated or aggravated as a result of the accident in this suit, then you are told that this plaintiff is entitled to recover for the full amount of damages which ensued as a result of this collision, notwithstanding his previous condition. In determining the damages, you are told that in so doing you are to base your estimates upon that which is established by the evidence and that which is reasonably to be inferred therefrom. You should not resort to speculation or mere surmise, but your findings must conform to that which is reasonably determinable from the evidence before you."

up that there was a residual of an old ruptured inter vertebral disc that had been treated by surgery in 1947.

Q. Do you know where that disc was located?

A. I have been unable to specifically locate the site of surgery.

Q. What is myositis?

A. It is an inflammatory process of muscle.

Q. Is pain associated with myositis?

A. Yes.

Q. What course of treatment did you prescribe for Mr. Jones?

A. Some sedation, some exercises and some heat therapy . . .

Q. Did you find from your examination a partial obliteration of the lumbar lordotic curve?

A. Yes.

Q. What would this indicate?

A. Muscle spasm.

Q. Was muscle spasm present when Grady Jones' back was first examined by you?

A. Yes, to a moderate degree.

Q. Muscle spasm is caused by what?

A. Trauma, infection, are two primary causes.

Q. Basing your answer on your examination of Grady Jones, what would you say caused the muscle spasm in his back?

A. Trauma."

Dr. Barnett also testified that Jones had a restriction of motion anteriorally of approximately 50%; and it was the doctor's opinion that this restriction was caused by the recent trauma. As to the examination of

May 7, 1956, the doctor stated that Jones was still suffering from myositis and was still suffering pain.

It was admitted that several years prior to the present injury, Jones had suffered an injury that resulted in surgery for a ruptured inter vertebral disc in 1947 at Kennedy General Hospital in Memphis; and it was the appellant's contention that all of the present pain and suffering that Jones had was due to the original injury and not to the injuries received in the automobile collision here involved. On this point Dr. Barnett testified:

"A. At the time of the first examination I did not feel that his complaints at that time were the results of the old injury. I thought it was a result of the trauma involved two days previously.

Q. You did not see him again until May 7, 1956?

A. That is right.

Q. What was your impression on that occasion?

A. Myositis, chronic and residuals of an old ruptured inter vertebral disc.

Q. I believe you stated on that occasion he complained of numbness?

A. Yes, sir.

Q. On the second occasion?

A. Yes, sir."

Several witnesses testified as to Jones' ability to perform full work prior to the 1955 injury here involved. He was employed at the Burton Garage in Marked Tree. Prior to the injury of December 21, 1955, Jones had been able to drive a truck and lift and unload his burdens; and had earned $45.00 a week. When he returned to work after the injuries here involved he was not able to lift any weight and had to take a cashier's job at only $25.00 a week; thus having a loss of earnings of $20.00 a week. His employer said that his old job was open for him whenever he could take it, but that Jones was un-

able to do his old work. His employer also testified that Jones was in bad condition and his physical appearance indicated that he was not able to do the work. Other witnesses also testified. One said that Jones had lost weight; that it was a hard job for him to get up and down the steps when he was going to church; and that his physical appearance had deteriorated.

That Jones expended $89.00 in drug and doctor bills; that his earnings had diminished $20.00 per week; and that he had experienced pain and suffering, are all undisputed matters. He is 37 years of age. The jury saw him and observed his demeanor on the witness stand. The jurors knew that a normal, healthy man 37 years of age has a reasonable expectancy; and that a man whose earning capacity had been reduced $20.00 a week would lose over $1,000 a year in earning capacity. Here was a man 37 years of age who had lost that amount and had experienced pain and suffering which were continuing at the time of the trial almost six months after the injury. As practical men of common sense — and that is what jurors are supposed to be — the jury returned a verdict for $5,500; and under the evidence offered we cannot say that such verdict is excessive. No new principles of law are involved. This case calls for application of the rule on verdicts reflected in some of our cases like *Phillips Motor Co.* v. *Rouse,* 202 Ark. 641, 151 S. W. 2d 994; *Mo. Pac.* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812; *Ozan Lbr. Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182; and *Rowe* v. *Dickerson,* 226 Ark. 780, 295 S. W. 2d 305.

Affirmed.

HORTON *v.* CITY OF MARSHALL.

5-1090 296 S. W. 2d 418

Opinion delivered December 17, 1956.

Walker & Villines and *Virgil D. Willis,* for appellant.

N. J. Henley, for appellee.

ED. F. MCFADDIN, Associate Justice. The question here posed is the legal right of the appellant — city marshal — to demand a salary of $175.00 per month from the City of Marshall, Arkansas, which is a city of the second class. We have several recent cases involving the matter of salaries for city marshals in cities of the second class. Some of these cases are: *Thomas* v. *Sitton,* 213 Ark. 816, 212 S. W. 2d 710; *Conner* v. *Burnett,* 216 Ark. 559, 226 S. W. 2d 984; *Sitton* v. *Burnett,* 216 Ark. 574, 226 S. W. 2d 544; *Berryville* v. *Binam,* 222 Ark. 962, 264 S. W. 2d 421; and *Augusta* v. *Angelo,* 225 Ark. 884, 264 S. W. 2d 321. Reference to these cases gives the background of applicable law.

This case was tried before the Circuit Judge without a jury, and the record contains the Circuit Judge's opinion, from which we copy pertinent portions:

"The plaintiff, Bunyan Horton, was elected City Marshal of the City of Marshall at the general election in November, 1954, and thereafter was duly qualified and assumed the duties of his office on January 1, 1955. His

predecessor in office was Clyde Hensley. On January 20, 1953 the City Council adopted a resolution to pay the said Clyde Hensley the sum of $175.00 per month salary and this salary continued throughout the remainder of his two year term. On January 4, 1955 the City Council adopted a resolution to pay the plaintiff $175.00 per month salary. This salary was paid plaintiff through the month of June, 1955. On June 7, 1955 the City Council adopted a resolution to pay the plaintiff at the rate of $100.00 per month, and this salary was paid through December, 1955. At its December, 1955 meeting the City Council adopted a resolution to discontinue paying the plaintiff any salary from city funds, as of January 1, 1956.

"The plaintiff is asking that the defendants be directed by Writ of Mandamus to pay him the rate of $175.00 per month throughout the entire term of two years for which he was elected. On the other hand the defendants ask that the plaintiff be required to reimburse the City for all amounts paid to him as City Marshal.

"Basically the City Marshal is entitled only to the fees provided by statute. The City is under no legal obligation to pay the City Marshal any salary, but has the authority to do so. Above the statutory fees the Marshal is entitled only to such salary as is legally provided by the Council . . . It follows then that the City Council is under no legal obligation to continue paying plaintiff's salary at the rate of $175.00 a month or any other amount . . . It, therefore, follows that the plaintiff's petition for Writ of Mandamus should be dismissed and that the defendants should take nothing from the plaintiff by reason of their cross-complaint."

I. *The Direct Appeal Of Horton.* The opinion of the Circuit Judge clearly states the issues. The appellant, as marshal of a city of the second class, is an officer[1]; and his salary as such marshal could neither be increased nor diminished during his term of office (see

[1] See § 19-1103 Ark. Stats. and *City of Augusta* v. *Angelo,* 225 Ark. 884, 286 S. W. 2d 321.

§ 19-907 Ark. Stats.). The appellant took office on January 1, 1955, and it was not until January 4, 1955 that there was passed the resolution attempting to fix his salary at $175.00 a month. If this was to be a salary as marshal, then it is void under our statute and cases. So the judgment is affirmed on direct appeal.

II. *Cross-appeal Of The City Of Marshall.* This has given us most serious concern. When we hold — as we do — that the statutory fees as city marshal were what the appellant was drawing when he took office, it follows that any money paid him for *services as marshal,* in excess of such statutory fees was an increase "during the term" and within the inhibition of § 19-907 Ark. Stats., which says in part: ". . . the emoluments of no officer[2] whose election or appointment is required in this Act shall be increased or diminished during the term for which he shall have been elected or appointed."

But the January 4, 1955 resolution of the Council (which resolution is brought in the record by stipulation) shows that appellee, Horton, was paid this $175.00 per month for his services as night watchman, separate and apart from his office as city marshal. The resolution was adopted on January 4, 1955 and said "that they hire him and he will go to work January 5, 1955 at 2:00 P. M. and work until 2:00 A. M. . . ." It is beyond argument that the City Council could not "hire" Horton as city marshal on January 4th because he had already taken office on January 1st; so the act of hiring necessarily related to some other work than that of marshal. Furthermore, the fact that Horton was to work 12-hour shifts as night watchman is shown by the hours designated. In short, the hiring on January 4, 1955 was a month to month hiring; and the City had a right to discharge Horton as night watchman at the close of any month, just as was done. The $175.00 per month salary as night watchman was separate from the statutory

[2] Both in *Barnes* v. *Williams,* 53 Ark. 205, 13 S. W. 845, and *Thomas* v. *Sitton,* 213 Ark. 816, 212 S. W. 2d 710, we held that this statute was applicable to city officials; but in neither of those cases was there the question of the right of the city to recover amounts previously and erroneously paid.

emolument as marshal. Horton rendered services as night watchman and can keep the money paid him for such services.

Affirmed on direct appeal and cross-appeal.

Mr. Justice ROBINSON concurs.

HOLBERT *v.* SLAUGHTER.

5-1117 296 S. W. 2d 402

Opinion delivered December 17, 1956.

J. F. Wallace and *George E. Pike,* for appellant.

L. A. Hardin and *J. M. Smith,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is an action to recover damages for personal injuries sustained by appellee, Horace Slaughter, while working on a rice farm belonging to appellants, F. O. Holbert and W. S. Holbert, and being managed by appellant, Max B. Files. There was a verdict and judgment in appellee's favor for $2,000.

The only contention for reversal is that the evidence is insufficient to sustain the jury's findings that appellee was an inexperienced person and that appellant, Max B. Files, negligently instructed appellee to get into the grain cart in which he was injured. In determining

this issue we must, of course, view the evidence in the light most favorable to appellee.

The only persons present at the time of the incident were appellee and the appellant, Max B. Files. According to the testimony of appellee he was hired by appellants on September 29, 1954, to assist in harvesting the rice crop on the Holbert Farm. The next day appellee and Files began harvesting the rice about 1 p. m. Files was operating the combine and appellee was driving a tractor pulling a grain cart into which the rice was being conveyed from the combine. They had worked two or three hours when a rain cloud came up and the grain cart was pulled to the side of a truck for the purpose of unloading the rice from the cart to the truck before it rained. This operation is performed by means of a power take-off running from the drive shaft of the tractor to an open auger at the bottom of the grain cart which lifts and carries the rice to the truck.

Upon reaching the truck Files threw the power take-off into gear and proceeded to get into the truck to shovel the rice back as it came from the grain cart. It had commenced raining which caused the rice to stick to the sides of the large hopper of the grain cart and prevented it from feeding into the auger at the bottom of the cart. Files told appellee to get into the cart and try to get the rice out. Appellee got into the cart and held to the side with his hands as he tried to push the wet rice with his feet. As he did so, he lost his handhold and slipped with one foot going into the auger which was covered with rice. His foot was so badly mangled that it had to be amputated.

Appellee was 20 years of age at the time of his injury. He had reached the 9th grade in school and served in the U. S. Air Force for a time. While he was reared on a farm and had previously operated tractors and other farm implements, he testified he had never driven a tractor with a grain cart attached to it before and had never previously worked with a grain cart and had not seen inside the cart in question; and that he had never been warned by Files, or anyone else, as to the danger of

getting into a grain cart. Files denied that he ordered appellee to get into the cart and stated he had warned him of the danger of doing so. He also stated the first time he knew an accident had occurred was when he scooped up two of appellee's toes and the bottom of his boot. Other witnesses testified they had previously seen appellee driving a tractor with a grain cart attached to it.

In many cases we have held that where an employee, by reason of his youth or inexperience, does not fully realize or appreciate the danger of a particular service he is directed to perform, it is the employer's duty to give proper instructions and to warn him of patent as well as latent dangers; and that before the inexperienced servant can be presumed to have realized the danger and assumed the risk it must be shown that he was instructed and warned of it. *Arkansas Midland Ry. Co.* v. *Worden,* 90 Ark. 407, 119 S. W. 828; *Ideal Cement Company* v. *Hardwick,* 208 Ark. 163, 185 S. W. 2d 266. Where, as here, there is a sharp dispute in the testimony on such issues, the questions of whether appellee was an inexperienced servant and appreciated the danger of his employment as well as the questions of whether Files negligently directed him to get into the grain cart, or had warned him against it, were for the jury. *Southern Cotton Oil Company* v. *Spotts,* 77 Ark. 458, 92 S. W. 249; *A. J. Neimeyer Lbr. Co.* v. *Brame,* 136 Ark. 564, 207 S. W. 35; *Chickasaw Cooperage Co.* v. *McGraw,* 144 Ark. 138, 221 S. W. 1057; *Woodley Petroleum Co.* v. *Willis,* 172 Ark. 671, 290 S. W. 953; *Pekin Wood Products Co.* v. *Mason,* 185 Ark. 166, 46 S. W. 2d 798. The evidence adduced by appellee is sufficient to sustain the jury's determination of these questions in his favor under instructions which are not questioned, and we find no merit in appellants' assertion that appellee's testimony is contrary to the physical facts, or that it is otherwise insufficient to sustain the verdict.

Affirmed.

BRYANT STAVE & HEADING COMPANY *v.* WHITE.

5-1095 296 S. W. 2d 436

Opinion delivered December 17, 1956.

Shaw, Jones & Shaw, for appellant.

Mark E. Woolsey, for appellee.

MINOR W. MILLWEE, Associate Justice. This is an appeal from a judgment of the Franklin Circuit Court affirming an award by the Arkansas Workmen's Compensation Commission in favor of the appellee, Herman White, for an "accidental injury" allegedly sustained by him while employed by the appellant, Bryant Stave & Heading Company, at its plant in Ozark, Arkansas.

The facts are undisputed. Appellee is 44 years old and has been employed in sawmill and other timber work for several years. In June, 1951 he was working for a lumber company when he sustained a back injury diagnosed as a ruptured intervertebral disc for which he was awarded a ten percent permanent-partial disability to the body as a whole by order of the Commission in December, 1951. He recovered sufficiently to resume work shortly thereafter and his back had given him no further trouble when he began work for appellant, Bryant Stave & Heading Co., on March 20, 1954. In the meantime he had worked for another company for about

one and one-half years. He worked continuously for the appellant until March 30, 1955, with the exception of a brief period when the mill was closed down.

During his entire employment with the appellant, appellee was engaged in loading stave bolts, with the aid of a helper, by lifting them upon wagons about three to three and one-half feet high. The bolts were from white oak timber about 38 inches long and weighed from 75 to 250 pounds each. In loading the bolts it was necessary that the two men lift some of them higher than their heads. Appellee had been assisting in loading bolts in the usual manner on March 30, 1955, until about 1:30 P. M. when he noticed a pain in his right side, leg and back. He first thought it was merely a "catch" in his back but the pain persisted and increased in intensity until he reported it to his foreman. The next morning he could hardly get out of bed and his doctor placed him in the hospital where he was "put in traction" and remained 12 days.

The doctor diagnosed appellee's injury as a narrowing of the intervertebral disc between the fourth and fifth lumber vertebrae and as an aggravation of the pre-existing injury of the same nature received in 1951. He also testified that such aggravation of the pre-existing injury was caused by appellee's work in lifting and loading the stave bolts. Appellee experienced no external, fortuitous accident such as falling, stumbling or dropping a bolt on the day in question and, as far as he could tell, there was no more unusual strain than on other days.

On these undisputed facts the Commission found that appellee's pre-existing injury was aggravated by his performing the usual duties in his customary manner; and that appellee thereby suffered an accidental injury to his back which arose out of and in the course of his employment and resulted in temporary total disability for an indeterminate period. In short, that appellee suffered a compensable accidental injury to his back while performing the usual duties of his employment in his

customary manner without any unusual strain or other external fortuitous happening.

For reversal of the circuit court judgment affirming the award made by the Commission, appellant earnestly insists there can be no accidental injury in a workmen's compensation case in the absence of a showing of unusual exertion, strain or other external fortuitous happening which causes or brings about the injury. Now it is settled by our cases that the aggravation of a preexisting physical condition is compensable if occasioned by accidental injury. *Murch-Jarvis Co.* v. *Townsend,* 209 Ark. 956, 193 S. W. 2d 310. So the sole issue here is whether a disabling back strain suffered by a claimant while doing his usual work in the customary manner, and without any external fortuitous happening, constitutes a compensable "accidental injury" within the meaning of the Arkansas Workmen's Compensation Law (Ark. Stats., Cum. Suppl., Secs. 81-1301 to 81-1349).

Two sections of our statute are pertinent to the present issue. Sec. 81-1302 (d) reads: " 'Injury' means only accidental injury arising out of and in the course of employment, including occupational diseases as set out in Section 14 (Sec. 81-1314) and occupational infections arising out of and in the course of employment." Sec. 81-1305 provides in part: "Every employer shall secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment, without regard to fault as a cause for such injury; provided that there shall be no liability for compensation under this Act where the injury or death from injury was solely occasioned by intoxication of the injured employee or by willful intention of the injured employee to bring about the injury or death of himself or another." These provisions are precisely the same as those set out in the original Act 139 of 1939.

In reference to the term "accidental injury" it seems apparent that the adjective "accidental" refers to and modifies the noun "injury," and does not refer

to the cause of the injury. There is no statutory requirement that the cause of the injury itself must have also been an accident. What the statute says is that the injury itself must have been accidental, that is, unforeseen and unexpected. When the two sections are read together, it is apparent that "accidental injury" means every injury to an employee arising out of and in the course of his employment except those injuries caused by his intoxication or by his willful intention to bring about the injury or death of himself or another.

The issue presented here has been the source of much controversy and litigation in the courts of this country as well as those in England where compensation acts originated. Before considering our own cases, we deem it appropriate to review these authorities. The terms "accidental injury" or "injury by accident" appear in most compensation acts. The English courts have given the term a liberal construction and have consistently held that an employee sustains an injury "by accident" if either the cause or the result of the injury is unexpected, unforeseen or unintended. *Fenton* v. *Thorley Co., Ltd.,* A. C. 443 (House of Lords); *Clover, Clayton & Co.* v. *Hughes,* A. C. 242, 3 B. W. C. C. 275. In other words, the English courts hold that an unexpected result from usual or customary exertion, even though there is no unexpected or fortuitous cause, constitutes a compensable accident.

A very substantial majority of the courts of this country have adopted and followed the English rule and hold that an injury is accidental where either the cause or the result is unexpected or accidental, although the work being done is usual or ordinary. In Schneider, Workmen's Compensation Text, Perm. Ed., Sec. 1446, it is said: "It is held in some states that where the ordinary exertion or straining of the employee's usual work causes the unexpected and disabling event or injury or accelerates or hastens its consummation, that in itself constitutes a compensable accident because the injury and disability is due to the employment." The author lists

21 states, including Arkansas, as supporting this rule and then states: "In other states disability or injury resulting from the ordinary and usual strain or exertion of the employment, whether great or small, which may accelerate an existing infirmity does not constitute a compensable accident, unless there was an accident in the cause, or an abnormal strain or exertion." Eleven states are then listed as following the minority view.

The foregoing text statement was published in 1946. An analysis of many later cases cited in the 1956 Pocket Supplement to Sec. 1446 shows that several additional states have since adopted the majority view, while a few of those listed as supporting the minority rule have done an about face on the question. For instance, Arizona was originally listed as supporting the minority rule under the decision in *Pierce* v. *Phelps Dodge Corp.*, 42 Ariz. 436, 26 P. 2d 1017, which was overruled in 1944 in *In re Mitchell,* 61 Ariz. 436, 150 P. 2d 355. Also North Carolina listed as following the minority rule apparently adopted the usual-strain and unexpected result theories in *Smith* v. *Cabarrus Creamery Co.,* 217 N. C. 468, 8 S. E. 2d 231.

In Larson, Workmen's Compensation Law, Sec. 38.00 the various holdings are summarized as follows: "The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions cause collapse from heart weakness, back weakness, hernia and the like, the injury is held accidental. A very substantial minority of jurisdictions require a showing that the exertion was in some way unusual, or make other reservations, but this line of decision causes difficulty because of the constant necessity of drawing distinctions between usual and unusual strains."

At Sec. 38.20 of the same work the author says: "A clear majority of jurisdictions now hold that when usual exertion leads to something actually breaking,

herniating, or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental. So we find an overwhelming majority compensating for hernia, and a substantial majority compensating for cerebral hemorrhage, arterial or blood-vessel rupture, ruptured aneurism, apoplexy, ruptured appendix, herniated intervertebral disc, stomach rupture, dislocated kidney, dislocated cervical cord, and detached retina, even when the exertion or conditions producing the change were not out of line with the ordinary duties of the job." See also, 58 Am. Jur., Workmen's Compensation, Secs. 195 and 255; Horovitz on Workmen's Compensation 88; 9 N. A. C. C. A. 43. A few of the leading cases supporting the majority rule are: *Derby* v. *Swift & Co.*, 188 Va. 336, 49 S. E. 2d 417; *Gray* v. *Employers Mut. Liability Ins. Co.*, (Fla.) 64 So. 2d 650; *Walter* v. *Hagianis*, 97 N. H. 314, 87 A. 2d 154; *Gray's Hatchery & Poultry Farms* v. *Stevens*, 46 Del. 191, 81 A. 2d 322; *Liberty Glass Co.* v. *Guinn*, (Okla.), 265 P. 2d 493; Brown's Case, 123 Me. 424, 123 A. 421, 60 A. L. R. 1293; *Purity Biscuit Co.* v. *Industrial Commission*, 115 Utah 1, 201 P. 2d 961.

We now turn to our own cases. In *Harding Glass Co.* v. *Albertson*, 208 Ark. 866, 187 S. W. 2d 961, a glass cutter suffered a heat prostration from ordinary exposure which aggravated a previous heart condition. In accepting the majority rule we said: "While appellants cite authorities holding to the contrary, we think the better rule, and the one supported by the great weight of authority is that a heat prostration which resulted as here, and was sustained by a workman or employee, while engaged in the employment, and which grew out of the employment, whether due to unusual or extraordinary conditions or not, is deemed an accidental injury and compensable, and we so hold." In that case we also approved the following statement by Judge Parker in *Baltimore & O. R. Co.* v. *Clark*, 59 Fed. 2d 595: " 'The statute provides that the 'term "injury" means accidental injury or death arising out of and in the course of employment.' 33 U. S. C. A., § 902. It says

nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute . . ."

This statement from Schneider, Workmen's Compensation Text, Sec. 1328, was likewise quoted with approval in the *Albertson* case: "The majority of the American courts follow the English rule as set out in the case of *Clover, Clayton & Co.* v. *Hughes* (1910), A. C. 242: 'An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or condition of health.'" Other cases to the same general effect are: *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31; *Frank Lyon Co.* v. *Scott,* 215 Ark. 274, 220 S. W. 2d 128; *Quality Excelsior Coal Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38; *Tri-States Construction Co.* v. *Worthen,* 224 Ark. 418, 274 S. W. 2d 352.

While counsel for appellants concede the foregoing cases indicate our past adherence to the majority rule, they earnestly insist they have all in effect been overruled by some of our recent decisions in which we have affirmed the commission's denial of compensation because there was no evidence of a fortuitous event, overexertion or unusual work load. Appellants rely particularly on *Baker* v. *Slaughter*, 220 Ark. 325, 248 S. W. 2d 106; *Farmer* v. *L. H. Knight Co.*, 220 Ark. 333, 248 S. W. 2d 111; *Stallings Bros. Feed Mill* v. *Stovall,* 221 Ark. 541, 254 S. W. 2d 460; and *Duke* v. *Pekin Wood Products Co.,* 223 Ark. 182, 264 S. W. 2d 834. It is true that the only instances in which the concept of an increased work load, or unusual exertion, has been employed by this court in reversing the Commission's findings were when that body had refused to award compensation. However, it cannot be denied that we have also upheld the Commission's denial of claims for compensation in cases that cannot be easily distinguished

from this one on the facts. That confusion does exist is readily apparent from the majority, concurring and dissenting opinions in the *Farmer* and *Baker* cases, *supra.*

We agree that litigants, lawyers and members of the Commission are entitled to a definite and unequivocal settlement of the legal question here posed. In undertaking to do so, we see no valid reason for not aligning Arkansas with the decided weight of authority on the subject by adhering to our holding in *Albertson* v. *Harding Gas Co., supra,* and similar cases. In our opinion the majority rule is sound and supported by the better reasoned cases. As Justice WADE pointed out in *Purity Biscuit Co.* v. *Industrial Commission, supra*: "If an unexpected internal failure is an accidental injury, such failure caused by ordinary exertion is as much accidental as where caused by overexertion. It is even more clear that the internal breakdown is accidental, in that it is not expected, unintentional and undesigned, where it is caused by ordinary exertion than where it is caused by overexertion, because we cannot as readily expect that ordinary exertion will cause an internal failure as we can that overexertion will produce that result . . ."

"The fact that overexertion is more apt to cause an internal failure than is ordinary exertion is no reason why we should require proof of overexertion to sustain an award. To make such a requirement would be to change the substantive law because in some cases the proof may not be sufficient. In many cases the proof that the exertion did cause the injury might be conclusive but under such a rule the applicant could not recover because he did not show overexertion. In a borderline case where the other proof is the same it might well be that proof of ordinary exertion would not be sufficient to sustain a finding that the exertion caused the injury, where if overexertion were shown the proof might be sufficient. But there is nothing in the statute which would justify a holding that an injury is compensable where overexertion is shown but is not compensable

where only ordinary exertion is shown, provided that in both cases it is shown that the exertion causes the injury."

If we should adopt a requirement that the work or strain be unusual or extraordinary we would reject the construction put on our statute in the jurisdiction from which it was borrowed and read into the law a requirement which greatly increases litigation to determine the elusory difference between usual and unusual strain or exertion. We would also, in effect, recast upon the disabled employee the burden of the old common law defense of assumed risk in specific violation of the statute (Sec. 81-1304). This result is illogical and contrary to the spirit and purpose of the compensation law and the liberal construction that we have repeatedly resolved to give it. *Birchett* v. *Tuf-Nut Garment Mfg. Co.,* 205 Ark. 483, 169 S. W. 2d 574; 58 Am. Jur., Workmen's Compensation, Sec. 2.

Notwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short, that an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary. The judgment of the circuit court affirming the award is accordingly affirmed.

HERRON *v.* ARKANSAS WHOLESALE GROCERS ASSOCIATION, INC.

5-1102 296 S. W. 2d 409

Opinion delivered December 17, 1956.

Tom Gentry, Attorney General; *James L. Sloan,* Assistant Attorney General, for appellant.

Talley & Owen and *William L. Blair,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the wholesale grocers' association to enjoin the director of the State Board of Health from enforcing a regulation which prohibits the sale of artificially colored potatoes. The chancellor held that the applicable statute is too indefinite to be enforceable; he also found that artificially colored potatoes are not poisonous or otherwise injurious to health. Upon these findings the court enjoined

the appellant from interfering with the sale of colored waxed Irish potatoes in Arkansas.

We find no merit in the contention that the statute is too vague to be enforced. The section pertinent to this case was taken verbatim from the Federal Food, Drug, and Cosmetic Act. 21 U. S. C. A. § 342. It provides that a food shall be deemed to be adulterated "if any substance has been added thereto . . . so as to . . . make it appear better or of greater value than it is." Ark. Stats. 1947, § 82-1110 (b, 4). A statute such as this one must necessarily be phrased in rather general language, as it would manifestly be impossible for the legislature to enumerate with precision every possible instance of adulteration. Having clearly defined the types of adulteration that are forbidden, the legislature could properly authorize the Board of Health to adopt regulations within the scope of the statute. *State ex rel. Hale* v. *Lawson,* 212 Ark. 233, 205 S. W. 2d 204. The regulation now in question is brief and to the point: "(1) No artificially colored potatoes shall be sold, offered for sale, or stored for sale within the State of Arkansas . . . (3) The application of non-toxic polishing or coating materials to potatoes when such use does not conceal damage or inferiority, is not a matter of objection, providing such polishing or coating materials do not contain coloring agents."

The principal question in the case is whether the above regulation is an appropriate means of enforcing the statute; that is, does the application of a red wax coating to Irish potatoes make them appear to be better or of greater value than they really are? It is immaterial that the coating is not poisonous or injurious to health, for adulteration of that nature is prohibited elsewhere in the statute. Ark. Stats., § 82-1110 (a). It is settled by decisions under the federal law that the provision we are now considering is intended to prevent "economic adulteration," which makes a product, although not deleterious, appear to be better or more valuable than is actually the case. *United States* v. *Two Bags,*

Each Containing 110 *Pounds, Poppy Seeds,* C. C. A. 6, 147 F. 2d 123; *United States* v. 36 *Drums of Pop'n Oil,* C. C. A. 5, 164 F. 2d 250. Nor does it matter that the red wax is shown to be beneficial in protecting the potatoes against deterioration, for the same benefit can be attained by the use of uncolored wax, to which the Board of Health has no objection.

The great preponderance of the proof in this case shows that the coating or red wax is intended to, and does, make Irish potatoes appear to be better and of greater value than they are. It is shown that a freshly dug potato is reddish in color and contains about ninety milligrams of Vitamin C (ascorbic acid) to the pound. As the potato ages it tends to lose its color, and its vitamin content diminishes. According to the undisputed testimony, a new potato has both a greater monetary value and a greater food value than an old potato. The coating of red wax artificially preserves the original color of the potato and thus gives an old potato the appearance of a new one. It is true that experts in the produce business are able to detect the presence of artificial coloring, but the record shows clearly that the practice deceives a substantial part of the buying public. On the evidence before us there can be no doubt that the artificial coloring of potatoes is an adulteration of the type that the statute is intended to prohibit.

Other arguments made by the appellee need not detain us long. One of its witnesses expressed the fear that potatoes treated with uncolored wax might be hard to obtain, as the use of artificial coloring is widespread. Apart from the fact that expediency does not create a right to violate the law, the appellant's proof effectively refutes the suggestion that unadulterated potatoes are unavailable. There is testimony that various grocers in Arkansas have experienced no difficulty in complying with the regulation now complained of. It is also shown that the sale of artificially colored potatoes is prohibited in several other states, including California, Kansas, and Pennsylvania. It may safely be assumed that the

ordinary processes of supply and demand have not left the inhabitants of those states without potatoes that meet the requirements of their laws.

It is also said that there is no federal regulation prohibiting the transportation of artificially colored potatoes in interstate commerce; the Federal Food and Drug Administration seems to have devoted its principal attention to matters directly involving the public health. The lack of a federal regulation, however, does not prevent the state board from acting in the matter. Although the Board of Health is authorized to make its regulations conform to those issued by the federal agency, Ark. Stats., § 82-1119, the state statute does not indicate a legislative intention to confine the Board of Health to the exact field covered by the federal directives.

Reversed and dismissed.

STOKES *v.* STOKES.

5-1109 296 S. W. 2d 399

Opinion delivered December 17, 1956.

A. F. Barham and *Henry J. Swift,* for appellant.

Claude F. Cooper, for appellee.

GEORGE ROSE SMITH, J. This is an appeal from a decree granting the appellee a divorce, for personal indignities. When the plaintiff rested her case the defendant filed a demurrer to the evidence, which the court overruled. Stokes elected to stand on his demurrer and introduced no proof. He now contends that the plaintiff's testimony does not establish her ground for divorce and that it is not sufficiently corroborated.

In passing upon a demurrer to the evidence the chancellor must give the plaintiff's proof its strongest probative force and should sustain the demurrer only when the testimony would require a directed verdict for the defendant if the case were being tried before a jury. *Werbe* v. *Holt,* 217 Ark. 198, 299 S. W. 2d 225. It follows that if the defendant elects to stand on his demurrer the decree will be affirmed if supported by any substantial evidence. *Phillips* v. *Tramble,* 224 Ark. 359, 273 S. W. 2d 400. In the case at bar we cannot say that there is no substantial evidence to sustain the decree.

The parties were married in 1951 and separated three years later. The plaintiff testified that her husband would get drunk about every two weeks and would curse and abuse her. On one occasion he threatened her life with a pistol; on another he threatened to cut her with a pocket knife. The plaintiff's health was so affected by her husband's treatment that she had to consult a physician. In addition to the matters mentioned, the plaintiff says that her husband neglected her and admitted having been out frequently with other women. This testimony, which we have stated in the light most favorable to the appellee, is more than sufficient to justify the chancellor in granting a divorce on the ground of indignities.

Inasmuch as corroboration is required for the purpose of preventing collusive divorce suits, the rule is that the corroboration may be relatively slight when, as here, there is plainly no collusion involved. *Morgan* v.

Morgan, 202 Ark. 76, 148 S. W. 2d 1078. In the court below a police officer testified that the plaintiff, upset and crying, had appealed to him several times in connection with her marital troubles. A woman who stayed in the couple's home for almost two months says that Stokes refused to talk to his wife and indicated by his attitude that he hated her. When the record is considered as a whole we think the corroborative testimony meets the standard fixed by our previous decisions.

Affirmed.

PARKER *v.* HADLEY.

5-1017 296 S. W. 2d 391

Opinion delivered December 17, 1956.

Mahony & Yocum, for appellant.

Spencer & Spencer; Lawrence S. Morgan, for appellee.

PAUL WARD, Associate Justice. The only question presented by this appeal is whether the chancellor's finding is contrary to a preponderance of the evidence.

Alfred Hadley died several years ago seized of approximately 500 acres of land in Union County, leaving surviving him as his only heirs the following named three children: Alabama Parker, a daughter, and C. B. H. Hadley, a son (appellants herein); and C. Minor Hadley, a son. This, of course, gave each of the children of Alfred Hadley an undivided one-third interest in the above mentioned land.

C. Minor Hadley died in 1949, and later appellee, Lola Hadley, claiming to be the sole surviving heir of C. Minor Hadley, brought a partition suit in the chancery court against appellants asking for her share of the rents and profits accruing from said land, and that the land be divided in kind or that it be sold and the proceeds be divided equally among the three of them. Appellants' answer denied that appellee was the daughter of C. Minor Hadley. The trial court held in favor of appellee, hence this appeal.

Appellee was the illegitimate daughter of C. Minor Hadley who later, on February 22, 1947, married appellee's mother. For a reversal appellants rely on only one Point which they state as follows: "Lola Hadley was not recognized by C. Minor Hadley as his child." To state the question properly and in accordance with the arguments made by appellant, we think the Point should be stated in this way: Lola Hadley was not recognized by C. Minor Hadley as his child after his marriage to her mother.

The pertinent statute involved is Ark. Stats. § 61-103 which reads as follows:

"If a man have by a woman a child or children and afterwards intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

Both appellants and appellee correctly agree that there must be recognition after the marriage.

Also appellants and appellee agree that the statute requires proof of three things, to-wit: (1) The actual parentage of the putative father; (2) The putative father's marriage to the mother of the illegitimate child, and; (3) Recognition by the putative father, after the marriage, of the child as his. Appellants do not question the proof to establish (1 & 2) above.

After a careful examination of the record we have concluded that the weight of the evidence sustains the chancellor's finding that C. Minor Hadley, after his mar-

riage to appellee's mother, recognized her as his child. The only testimony introduced by appellants was that given by themselves, and it contains no positive evidence that appellee was not so recognized by C. Minor Hadley. On the other hand we have this testimony offered by numerous witnesses on behalf of appellee to the effect that C. Minor Hadley did, after his marriage to appellee's mother, recognize her as his daughter: Lizzie Roy, age 81, testified that she visited in the home of C. Minor Hadley after his marriage to appellee's mother, and that he told her he was going to try to get his girl (referring to appellee) home and help her; Mitchell Adams testified that he talked with C. Minor Hadley after his marriage to appellee's mother and that on one occasion Hadley stated that he was Lola's daddy and that he was going to send after her, and wanted to give her something; Arbella Twine stated that she talked with C. Minor Hadley, after the marriage, and that he said Lola (appellee) was his daughter and he wanted to make provision for her to have something after his death, and; Appellee testified that she received letters from C. Minor Hadley, after the marriage, addressed to her as "Dear Daughter," and signed "your father."

In view of the above we are forced to conclude that the finding of the chancellor was supported by the weight of the testimony.

Affirmed.

WHITE *v.* MADDUX, SPECIAL ADMR.

5-1106 296 S. W. 2d 679

Opinion delivered December 17, 1956.

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

Dobbs, Pryor & Dobbs, for appellee.

PAUL WARD, Associate Justice. On April 25, 1956 appellant, Billy Price White, and his wife, Patsy White, were riding in an automobile which collided with another automobile being driven by Robert J. Kilgore. As a result of this collision Robert J. Kilgore and Patsy White were killed, the latter instantly, and appellant was injured.

Appellant filed a complaint against Prentice Maddux, Special Administrator of the estate of Robert J. Kilgore, deceased, containing two separate counts. In the first count appellant asked for judgment for personal injuries suffered by him, and in the second count he asked for $50,000 damages, as the surviving husband and next of kin of his wife Patsy White, for the loss of companionship, services, and consortium of his wife, there being no pain and suffering.

Count No. 1 was heard by the court sitting as a jury, and appellant was awarded judgment from which there is no appeal. Appellee filed a demurrer to Count No. 2 which was sustained by the court, forming the basis of this appeal.

It is the contention of appellant that the court erred in sustaining the demurrer, and that Count No. 2 states a good cause of action under the provisions of Ark. Stats. (Suppl.) § 27-905 which read as follows:

"When a wife be killed in this State by the wrongful act, neglect or default of any person, company or corporation, the husband may have a cause of action therefor against such wrongdoer, and be entitled to damages for his mental anguish and for the services and companionship of his said wife in whatever amount the jury trying the cause may consider he is entitled to; provided suit be brought within two (2) years from the time said cause of action occurs, which action may be brought by and in the name of the husband."

The statute above copied is Section 1 of Act 39 of the Acts of 1949 and reads the same as Section 1 of Act 84 of the Acts of 1899 with the exception that it adds the words "for mental anguish and" after the word "damages" in the original Act.

On the other hand it is the contention of appellee that the cause of action set forth in Count No. 2, under Ark. Stats. § 27-905, does not survive against the administrator of Kilgore. The above contention of appellee, speaking generally, is based on the following: (a) Under the common law, a right of action against a tort feasor (Robert J. Kilgore) expires with the death of the tort feasor, and cannot be revived against the administrator of his estate, and; (b) The above common law rule is still in force in this state, and it has not been changed by statute respecting the cause of action under consideration.

(a) There appears to be agreement between the parties that at common law a right of action based on a tort dies with the tort feasor. This rule was definitely stated by this court in *Davis* v. *Nichols,* 54 Ark. 358, 15 S. W. 880. In speaking of the *Davis* case appellant says: "The court based its decision upon the old common law rule that the tort dies with the tort feasor . . ."

(b) So, the only question for decision is: Has the common rule above stated been changed in this state by statute in the kind of case now under consideration?

We do not agree with appellant's statement "that Section 27-905 Ark. Stats. Suppl. clearly and in plain language gives him a right to a cause of action against Kilgore's estate." The simple answer to the above statement by appellant is that there is nothing in said Section 27-905 which in any way changes the common law relative to the survivorship of a tort action against the administrator of the deceased tort feasor. What the said statute does do is give the husband a cause of action against a tort feasor for the *services* and *companionship* of his wife, but there is nothing in the statute repealing the common law which says that such a cause of action dies with the death of the tort feasor.

The issue in the case under consideration has been resolved against appellant by the opinion in the *Davis* case, *supra,* and it would serve no useful purpose here to reiterate and reconstruct the conclusion there reached. The only difference between the two cases is that, in the *Davis* case, the action was based on Ark. Stats. § 27-904, while, here, the action is based on § 27-905. There is no difference between the two sections as they bear on the legal principle involved, viz: The survival of an action against the administrator of a tort feasor. In the *Davis* case, brought under Ark. Stats. § 27-904, it was held there was no survival against the administrator, so, for the same reasons relied on there, we are forced to the same conclusion in this case where the action is based on Ark. Stats. § 27-905.

Ark. Stats. § 27-901 would sustain appellant's action here against the administrator except for one thing: Said section applies to "wrongs done to the person or property" of another. However, as explained in the *Davis* case and other cases cited therein, a husband's loss of the services and companionship of his wife does not amount to wrongs done to his person or property.

The final appeal appellant makes is that we overrule the *Davis* case, *supra.* A similar request was made and rejected in *Billingsley* v. *St. Louis, Iron Mountain and Southern Railway Company,* 84 Ark. 617, 107 S. W. 173, and we are furnished no good reason for overruling it at this time. This is peculiarly a matter that should be addressed to the legislature and not the courts.

The common law forms a substantial and an important portion of the laws of this state. A small part of that common law — that a tort action dies with the tort feasor — has been adopted by the legislature as the law of this state. Should we, by Judicial fiat, abolish that law, it would amount to more than a mere reversal of a former opinion. It would amount to an effort of this court to repeal an act of the legislature.

There is, however, some indication that the legislature does not desire to change the law. After this court

rendered its decision in the *Davis* case, construing § 27-904 as it did, the legislature thereafter (in 1899) passed § 27-905 without correcting the (alleged) defect in § 27-904 which the *Davis* opinion so clearly pointed out.

Affirmed.

ST. FRANCIS DRAINAGE DISTRICT *v.* AUSTIN.

5-1082 296 S. W. 2d 668

Opinion delivered December 17, 1956.

[Rehearing denied January 14, 1957.]

Cecil Grooms and *Kirsch, Cathey & Brown,* for appellant.

Oscar Fendler and *J. W. Steinsiek,* for appellee.

SAM ROBINSON, Associate Justice. This is a suit by appellees for damages to crops caused by the appellant, St. Francis Drainage District, using poison known as 2,4-D to kill willows growing on the drainage ditch right-of-way. Some of the poison drifted through the air and came in contact with some of the crops being grown by the appellees on land adjoining the drainage ditch. The cause was tried to a jury and there were verdicts totalling about $15,000 for appellees. The Drainage District has appealed.

The cause was submitted to the jury on the theory of whether the farmers, appellees, were entitled to recover under Article 2, Section 22, of the Constitution of Arkansas. The court instructed the jury as follows:

"Gentlemen of the jury, the plaintiffs, Austin, Reese, Riggs, Brown, Wells, Kitchen Farms Company, and Barnes bring this cause of action against the defendant St. Francis Drainage District to recover compensation for crops which they allege were taken or damaged for public use by the defendant Drainage District. The defendant Drainage District denies that said property was taken or damaged for public use within the meaning of the law applicable to this type of proceedings.

"You are instructed that Section 22, Article 2, of the Constitution of Arkansas reads: 'The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.' You are further instructed that the St. Francis Drainage District is legally required to maintain the drainage ditches in its drainage system and the law has given this district the right to take private property, if necessary, to perform maintenance work upon its ditches. Therefore, if you find from a preponderance of the evidence in this case that the action of the St. Francis Drainage District was necessary and proper and if you further find that the Drainage District or its employees in doing this maintenance work acted without negligence, and that while so acting or maintaining said ditches, it was necessary to actually take or damage property belonging to the plaintiffs for public use, then your verdict will be for the plaintiffs.

"On the other hand, you are told that a drainage district cannot be held liable for the damage caused by the negligence of its agents and employees. Therefore, if you find that the damage, if any, sued for by the plaintiffs resulted from the negligence of the agents or employees of the Drainage District, you are instructed that none of the plaintiffs whose damage, if any, was caused

by such negligence, can recover against the Drainage District."

The appellant contends that Article 2, Section 22, of the Constitution has no application because the crops were not damaged "for public use"; that the cause of action sounds in tort, and that, therefore, there can be no recovery against the Drainage District.

Appellees do not claim that the District is liable in tort. They say no tort was committed; that the jury so found; but they contend that the crops were damaged for public use, and, for that reason, the damage is compensable under Article 2, Section 22, of the Constitution. It is true the jury found that there was no negligence on the part of the District, its agents or servants. But, the poison was not intentionally sprayed on the crops, and there is no evidence that in spraying the willows, on the Drainage District right-of-way, it was inevitable that some of the poison would drift over onto the crops. In fact, it appears that the poison was used by the District in the years 1950 to 1953, inclusive, with practically no damage. There was just one small claim of $15.00 during those years; the appellees claim their crops were damaged in the year 1954.

It would be stretching the imagination to the breaking point to say that the District used the crops or used the land on which the crops were growing. By a process of elimination justified by the jury verdict, and the undisputed evidence, the poison must have drifted on the crops accidentally. This does not constitute a use of the crops by the District within the meaning of the Constitution. It would be entirely unreasonable to say that under the law of this State the District is *not* liable if its agents, servants and employees negligently permitted poison to get on the crops, but that the District *is* liable if the poison used by the District got on the crops accidentally. To say that the District would be liable for such an accident, would be to say that the District would be liable if one of its trucks accidentally ran into another car and damaged it.

Appellees have cited many Arkansas cases in their excellent brief, but, in our opinion, none of the cases sustain their position, bearing in mind that appellees' crops were not intentionally, inevitably, or negligently damaged, and the damage was not of a permanent nature. *Hot Springs Railway Co.* v. *Williamson,* 45 Ark. 429, was a suit for damages by a property owner against a private corporation for injury to private property caused by the construction of a railroad embankment down the center of a street. The injury to the Williamson property was of a permanent nature, and whatever was done cannot be said to have been accidental in any sense of the word.

McLaughlin v. *City of Hope,* 107 Ark. 442, 155 S. W. 910. This case went off on a demurrer which admitted the property involved had been rendered unsuitable for the operation of a mill due to the discharge of sewage in a stream used by the mill in its operation. The court said: "Since the City's action in constructing its sewer system so as to turn the sewage into said branch indicates an intention to acquire a permanent right to continue to use it and pollute the stream, the damages to the owner should be assessed upon that basis and as though the city were proceeding to acquire it under its power of eminent domain."

Hogge v. *Drainage District No.* 7, 181 Ark. 564, 26 S. W. 2d 887. A demurrer admitted the lands had been damaged for public use. Land had been flooded and the owner was entitled to compensation. The flooding of the land amounted to a taking, and the court emphasized the fact that the damage was of a permanent nature. Again and again in this case, the permanent feature of the damage is stressed; the court said: "There can be no doubt that obstructing a navigable or nonnavigable flowing stream and thereby flowing the water back upon the land of another is such damage as entitles the owner to compensation . . . If the levee and drainage district does not concede that damages will result from the construction of the improvement, an action for damages may be brought by the landowner, when the

improvement is constructed, to determine the question whether his lands will be permanently injured, and, if so, to recover the damages." Referring to a United States Supreme Court case, the court said: "The finding of the court was that it was not a case of temporary overflow but a condition of permanent injury from recurring overflows . . . Under the allegations of the complaint, the injury to the land was not temporary, but permanent . . . The levee and drainage district included dams and levees which obstructed the natural flow of the water, and caused it to flow back upon the lands of the plaintiff to their permanent injury."

Sharp v. *Drainage District No.* 7, 164 Ark. 306, 261 S. W. 923. There, it is pointed out that a landowner may recover for the flooding of his land. The damage was of a permanent nature, and part of his land was taken. It went off on demurrer. *Keith* v. *Drainage District No. 7 of Poinsett County,* 183 Ark. 384, 36 S. W. 2d 59. This is a flooding case, a permanent condition. The same case was again before the court in 185 Ark. 553, 48 S. W. 2d 236. *Road District No.* 6 *of Lawrence County* v. *Hall,* 140 Ark. 241, 215 S. W. 262. The land was actually taken and used. Public use is stressed. *Campbell* v. *Arkansas Highway Commission,* 183 Ark. 780, 38 S. W. 2d 753. It was held that a property owner is entitled to recover for permanent damage done to his property by the construction of a bridge. No accident was involved. *Miller Levee District No.* 2 v. *Wright,* 195 Ark. 295, 111 S. W. 2d 469. There was an actual taking plus permanent damage in the construction of a levee. Public use was present. *Sain* v. *Cypress Creek Drainage District,* 161 Ark. 529, 257 S. W. 49. Public use is involved. A permanent condition exists, and plaintiff's land is actually used for flooding.

Appellees rely heavily on *North Arkansas Highway Improvement District No.* 1 v. *Greer,* 163 Ark. 141, 259 S. W. 380. The District was authorized to take land for borrow pits and this is what it did. There was an actual taking and use by the District. Another case upon which appellees place considerable emphasis is *Gray* v. *Doyle,*

167 Ark. 495, 269 S. W. 579. There, embankments were constructed by the Improvement District which caused the water to back up on the property owner's land, causing permanent damage. The embankments were built to protect the lower landowners and were a part of the plan in constructing the drainage district. Permanent damage is stressed.

Appellees contend that *Drainage District No.* 16 *of Mississippi County* v. *Rouse,* 203 Ark. 723, 158 S. W. 2d 261, is directly in point, but we do not think so. In that case, a strip of private property measuring some 45 1/2 to 50 1/2 feet by 700 feet adjacent to the drainage district right-of-way was actually used by the District on which to put dirt removed from a drainage ditch. The District deliberately and intentionally used the property owner's land on which to place the spoil from a ditch which was being dug.

When all is said and done, and regardless of what this cause of action may be called, it sounds in tort. The Drainage District did not use appellees' land or crops; certainly the poison was not intentionally sprayed on the crops. Moreover, the evidence shows that it is not impossible or impractical to spray the willows on the Drainage District Property without damaging crops on adjacent land. When the possibility of a cause of action for damages due to an intentional act or to an inevitable result of an intentional act is eliminated, and that is the situation we have here, there remains only the possibility of an action in tort.

There are many laymen, lawyers and judges who believe that, in all fairness, the State, its political subdivisions and *quasi* public corporations such as improvement districts created by the State, should be liable for torts committed. But the law, holding otherwise, has been firmly established for many years. *Wood* v. *Drainage District No.* 2, *Conway County,* 110 Ark. 416, 161 S. W. 1057; *Board of Improvement Sewer District No.* 2 v. *Moreland,* 94 Ark. 380, 127 Ark. 469. In *Sewer Improvement District No.* 1 *of Sheridan* v. *Jones, Administrator,* 199 Ark. 534, 134 S. W. 2d 551, the court said: "If, when

and after the plant has been completed, it is so maintained or operated as to become a nuisance, relief must be obtained by suit to abate the nuisance." An action in tort would not lie. In *Jones* v. *Sewer Improvement District No.* 3 *of Rogers,* 119 Ark. 166, 177 S. W. 888, sewage was allowed to flow on adjacent property. The court held that an action in tort would not lie. Although the landowner had been damaged, injunction was the proper remedy.

Appellees' crops were not damaged for public use. The principles of eminent domain are not applicable, and, since under the law of this State an improvement district is not liable in tort, there can be no recovery. This conclusion may appear to be harsh, but it has been the law of this State for many, many years that neither the State, its political subdivisions nor *quasi* public corporations such as improvement districts, are liable in tort. Neither the General Assembly nor the people have seen fit to change the law in that respect, and it should not be done by this court.

Reversed and dismissed.

Justices HOLT and MCFADDIN dissent.

BROCK *v.* BATES.

5-1127 297 S. W. 2d 938

Opinion delivered January 7, 1957.

[Rehearing denied February 18, 1957]

L. A. Williams and *Richard Mobley,* for appellant.

Wiley W. Bean, for appellee.

ED. F. MCFADDIN, Associate Justice. In this suit — involving a roadway — the decree must be reversed because of a procedural point.

At the close of the plaintiffs' case, the Chancery Court sustained the defendant's demurrer to the plaintiffs' evidence and dismissed the complaint. Under the holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, and other cases,[1] the rule is that in passing upon such a demurrer the Court must give the evidence its strongest probative force in favor of the plaintiff and rule against the plaintiff only if such evidence, when so considered, fails to make out a *prima facie* case. In the case at bar, we believe that the plaintiffs' evidence, when so weighed, made a fact question requiring the weighing of evidence and the exercise of fact finding powers; and so we conclude that the decree should be reversed and the cause remanded, with directions to overrule the defendant's demurrer.

Appellants, Jack Brock, *et al.,* own lands, in Johnson County, that are located about one mile west of old Highway No. 64, which runs in a general north and south direction. Appellee Bates owns the land west of and along the highway. West of the Bates land, Buddy Brock owns land; and then further west are the lands of appellants. The road in question (called the Brock road) leaves old Highway No. 64 on appellee's lands and goes westerly through the lands of appellee and Buddy Brock to the house on appellants' lands about a mile west of old Highway No. 64. In 1955 appellee, Bates, erected

[1] Some of the cases following and applying the rule of *Werbe* v. *Holt* are: *Poynter* v. *Williams,* 218 Ark. 570, 237 S. W. 2d 903; *Thompson* v. *Murdock Acceptance Corp.,* 223 Ark. 483, 267 S. W. 2d 11; *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322; and *McCord* v. *Robinson,* 225 Ark. 177, 280 S. W. 2d 222.

and locked an iron gate across the Brock road where it leaves Highway No. 64. Appellants brought this suit in chancery to prevent the locking of the gate and the closing of the Brock road to the appellants.

Appellants offered evidence designed to show: that the Brock road had been in existence for over sixty years; that the appellants and their predecessors in title had, during all that time, traveled the Brock road across the Buddy Brock lands and the appellee's lands to old Highway No. 64; that originally the Brock road continued on westerly through appellants' land to a boat landing on the Arkansas River; that the portion of the road from the appellants' lands to the river had been discontinued; that since about 1906 there had been a "seasonal gate"[2] on the boundary line between the Buddy Brock lands and

[2] As regards the Brock road and the "seasonal gate" erected about 1906, Mr. Cecil Barger, who, up until about 1950, lived on the lands that the appellee now owns, testified:

"Q. Was it ever stopped up to keep the public from traveling it?

A. Not that I know of.

Q. Did you stop it up?

A. No.

Q. And you lived there until 1950?

A. That's right.

Q. Sometime back in 1936, or somewhere along in there, did you sign a petition to have that declared a County road?

A. I signed it—let's see—yes, I signed that petition.

Q. Did the County work that road?

A. They did.

Q. Until you left there, is that right?

A. Yes, sir . . .

Q. . . . That was on west of the house. It was a wire gap, wasn't it, or was it a gate?

A. Which one?

Q. Back over on the west there where you put it up.

A. When I put it up, I put up a wire gate.

Q. Was it what would be called a gap?

A. That's right.

Q. You didn't put a lock on it, did you?

A. No.

Q. You permitted everybody to use it?

A. That's right.

Q. Had no intention of cutting them off?

A. No, nothing only that one time.

Q. But you didn't do it then?

A. No, and I wouldn't today."

the appellee's lands, and, at another place on the Brock road, there had been a "wire-gap-gate";[3] that both of these gates had only been used about three months a year, and only to prevent cattle in the fields from going from one farm to another. It was also shown that the Brock road had never been dedicated as a State or County highway, but had existed by prescription for over sixty years.

In sustaining the defendant's demurrer, the learned Chancellor was of the opinion that the "seasonal gate" between the Bates land and the Buddy Brock land had existed since 1906 and had defeated the appellants' right to use the Brock road over the appellee's lands. But the appellants argued that even if the Brock road was not a public road under § 37-109 Ark. Stats., still the appellants and their predecessors in title had used the Brock road and acquired prescriptive rights long before 1906 and that the prescriptive rights once acquired could not be lost except by a *continuous* gate maintained for seven years; that neither the "seasonal gate" nor the "wire-gap-gate" was so maintained; and that thus the prescriptive rights over the Brock road had not been lost by reason of either the "seasonal gate" or the "wire-gap-gate".

A decision by the Chancery Court required a weighing of the appellants' evidence to determine at least two questions: (a) had appellants' predecessors in title acquired a prescriptive right prior to 1906? and (b) had the "seasonal gate" or "wire-gap-gate" been maintained in such a manner as to cause appellants' prescriptive rights to be lost? In short, when we give full probative force to appellants' evidence — as we do under the rule of *Werbe* v. *Holt* — the said evidence was suffi-

[3] We cannot find "wire-gap-gate" in the dictionary; but to farmers and others engaged in agricultural pursuits the meaning is clear: when there is a wire fence, the wires on one of the fence posts may be severed from the post and attached to a stake so that the stake can either be tied to the post to make a fence, or the stake and attached wires pulled away so as to leave an opening or gate between the two fence posts. The evidence showed that the "wire-gap-gate" was far less an obstruction to the road than the "seasonal gate", and existed for a much shorter period of time.

cient to require the exercise of fact finding powers and the determination of whether the said evidence should be believed or disbelieved. In this situation the demurrer to the evidence should have been overruled so the evidence could be weighed and the facts decided on the merits. Therefore, the decree is reversed and the cause is remanded, with directions to overrule the demurrer; and for further proceedings not inconsistent with this opinion.

CARLETON HARRIS, C. J., not participating.

CONSOLIDATED CHEMICAL INDUSTRIES, INC. *v.* WHITE.

5-1122 297 S. W. 2d 101

Opinion delivered January 7, 1957.

Wright, Harrison, Lindsey & Upton, for appellant.

Fred A. Newth, Jr., and *Kenneth C. Coffelt,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant, Consolidated Chemical Industries, Inc., owns a 10-acre tract of land in Pulaski County which lies immediately south of 8.5 acres belonging to appellees, E. H. White and Jesse A. White. E. H. White purchased the 8.5 acres in 1945 and subsequently sold two acres to his

brother and each built homes on their respective tracts. In 1951 appellant commenced strip mining operations for bauxite on its land and the first dirt removed was spread over the 10-acre tract. Later appellant built a high ramp or dump out of the dirt, lignite and other waste material from its mining operations along the north edge of its tract adjacent to appellees' lands.

On July 29, 1955, appellees filed the instant action against appellant to recover damages to their lands which allegedly occurred within three years next before the filing of the complaint by reason of the maintenance of a nuisance in the construction of the ramp or stockpile of waste materials which caused the washing of appellees' lands and the deposit of said waste materials upon and across said lands. Appellant's answer was a general denial and a plea that the action was barred by the three-year statute of limitations (Ark. Stats., Sec. 37-206). This appeal is from a verdict and judgment for E. H. White in the sum of $650 and for Jesse A. White in the sum of $275.

Appellant first argues that the undisputed evidence established that the damage to appellees' lands was completed in the spring of 1952 and that their claims were consequently barred by the statute of limitations. The applicable rule which is based upon a distinction between structures which are and those which are not "necessarily injurious" is stated in the leading case of *St. Louis I. M. & S. R. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174, as follows: "Whenever the nuisance is of a permanent character and its construction and continuance are *necessarily* an injury, the damage is original, and may be, at once, fully compensated. In such case the statute of limitations begins to run upon the construction of the nuisance. *Ry.* v. *Morris,* 35 Ark. 622; *Ry.* v. *Chapman,* 39 Ark. 463. But when such structure is permanent in its character, and its construction and continuance are *not necessarily* injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recov-

eries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the injury complained of." See also, *Chicago, R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, and *Daniels* v. *Batesville,* 189 Ark. 1127, 76 S. W. 2d 309, and cases there cited.

It is clear that the instant case falls within the second class mentioned above and that the statute begins to run from the happening of the injury complained of. On this issue appellees testified that the ramp and stockpile of waste materials were still under construction in August 1952 and that rains subsequent thereto washed their lands and otherwise damaged them by leaving heavy deposits of the waste material as far as 75 feet upon their lands, killing their trees and destroying the fertility of the whole tract. While Jesse A. White noticed some washing by the "winter rains" in 1952, each of the appellees stated that most of the damage occurred in 1953 and subsequently. While the testimony of appellees was disputed to some extent by that offered by appellant, it was substantial and sufficient to support the jury's finding that the damages occurred within three years next before the filing of the complaint on July 29, 1955. On the whole case the evidence was sufficient to sustain the verdict and the trial court did not err in refusing to direct a verdict for the appellant.

We also find no merit in appellant's contention that the verdict was excessive. A real estate agent familiar with the lands in question testified on direct examination that appellees' lands would be worth $11,000 except for the damages occasioned by appellant's construction and maintenance of the ramp which had reduced the value of the lands 40 per cent. While this estimate was rendered somewhat indefinite on cross-examination, the witness still concluded that the lands sustained a 25 percent reduction in value on account of the construction and maintenance of the ramp and his testimony was not contradicted by that of any other witness.

Affirmed.

CARLETON HARRIS, C. J., not participating.

MOORMAN *v.* TAYLOR.

5-1208 297 S. W. 2d 103

Opinion delivered January 7, 1957.

Thomas E. Downie, for appellant.

Wayne W. Owen, for appellee.

GEORGE ROSE SMITH, J. The 1956 general election was held on November 6. Wylie Perry, in order to qualify as an independent candidate for alderman of the third ward in Little Rock, filed with the county board of election commissioners, on September 21, 1956, a petition signed by forty-seven electors. Perry based his action upon Act 30 of 1891, which requires that such a petition contain from ten to fifty signatures. Ark. Stats. 1947, § 3-261. The present suit to enjoin Perry's certification as an independent candidate was brought by the appellee, who contends that Act 352 of 1955 requires the petition to be signed by fifteen percent of the qualified electors in the city. Ark. Stats., § 3-837.

The chancellor upheld the appellee's contention and enjoined the county board from placing Perry's name on the ballot. The defendants immediately appealed to this court, and, at a preliminary hearing held before the case was ready for submission, we set aside the trial court's order and directed that Perry's name appear on the ballot. Although Perry was defeated by the Democratic nominee for the office, it is not our practice to

dismiss such cases as moot, for the public interest demands that substantial questions concerning the election laws be set at rest. *Cain* v. *Carl-Lee,* 171 Ark. 155, 283 S. W. 365.

The 1891 act applies by its express language to nominees for offices of the State, district, county, township, and ward of a city or town. The 1955 statute is not equally far-reaching in its terms, as it mentions only State, county, and district offices. Hence a comparison of the two statutes indicates pretty clearly that the legislature did not mean for the later act to be as comprehensive as the earlier one.

The appellee argues, however, that the word "district" is not an exact term and may include a city as well as a senatorial district, a chancery district, etc. Any uncertainty that exists is completely dispelled when the legislative history of the 1955 act is examined. As originally introduced in the legislature, the bill which became Act 352 applied to city offices as well as to those of the State, a county, or district. Before its final passage the bill was amended to delete the word "city" wherever it appeared. House Journal, 1955, p. 394. We certainly should not read into the act by implication a provision that the legislature itself expressly eliminated. *Mayo* v. *American Agricultural Chem. Co.,* 101 Fla. 279, 133 So. 885; *Grasso* v. *Cannon Ball Motor Freight Lines,* 125 Tex. 154, 81 S. W. 2d 482.

The decree is reversed and the appellants are awarded their costs, but the cause need not be remanded.

CARLETON HARRIS, C. J., not participating.

THE FARM BUREAU COOPERATIVE MILL & SUPPLY *v.* SWIFT & COMPANY.

5-1110 297 S. W. 2d 107

Opinion delivered January 7, 1957.

J. R. Crocker and *O. E. Williams,* for appellant.

James R. Hale, for appellee.

PAUL WARD, Associate Justice. The only question involved in this appeal is whether the actions of appellant amounted to a waiver of its mortgage on 6,860 broilers owned by Norman Spencer and sold by Spencer (through another party) to appellee.

Most of the facts forming a background to this litigation are not in dispute and may be briefly stated. Norman Spencer has for several years raised broilers in Washington County, Arkansas during which time he has frequently bought supplies and borrowed money from appellant, the Farm Bureau Cooperative Mill & Supply, located in Washington County with its principal place of business at Fayetteville. As indicated, appellant is in the business of loaning money and selling supplies to those engaged in raising broilers in that section of the State. Guy Eeds of Seminole, Oklahoma, d/b/a Oklahoma Poultry Brokerage Company, buys and sells broilers and has for years past dealt with broiler raisers in Washington County, Arkansas through its agent, Ray

Luginbuel, who lives at Lincoln in said Washington County. On November 16, 1954, Spencer gave a mortgage on 6,860 broilers to appellant to secure an indebtedness of $2,800 which was due and payable February 8, 1955.

On January 24, 1955 Ray Luginbuel (as agent aforesaid) purchased from Spencer said broilers for a total purchase price of $4,540.25, drawing a draft on Eeds through the First State Bank of Seminole, Oklahoma for said amount in favor of Spencer. Eeds took said broilers to Muskogee, Oklahoma and forthwith sold 4,500 of them to appellee, Swift & Company, for the sum of $2,833.75.

Spencer, upon receiving Eeds' draft for $4,540.25, took the same to appellant. Authorized employees of appellant accepted the draft, gave Spencer credit for the amount necessary to pay off the indebtedness to appellant, and gave Spencer its check for $1,620.47, being the balance due on the purchase price of said broilers. When appellant in due course presented the Eeds' draft for payment the same was dishonored and payment was refused.

On October 4, 1955 appellant filed this action in the Washington Chancery Court against appellee, asking judgment in the amount of $3,000, representing its secured loan to Spencer plus interest, on the ground that appellee had converted the broilers to its own use. Appellee defended on the ground that the mortgaged property in question had been sold by Spencer with the consent of appellant, and that appellant thereby waived its lien under the mortgage.

The case was tried on January 13, 1956, and at the close of plaintiff's testimony the defendant filed a demurrer to the evidence. The trial court sustained appellee's demurrer and dismissed plaintiff's complaint, resulting in this appeal.

In general, appellant relies on the principle of the law announced in the case of *May Way Mills, Inc.* v. *Jerpe Dairy Products Corporation,* 202 Ark. 397, 150

S. W. 2d 615, to the effect that the sale of mortgaged property by the mortgagor without the knowledge or consent of the mortgagee constitutes a conversion of the property, and that both the mortgagor and the purchaser are liable to the mortgagee for the conversion of the mortgaged property. It is admitted here, of course, that appellant had a mortgage on Spencer's broilers, that Spencer sold the broilers to Eeds who sold to appellee, and that appellant's indebtedness against Spencer has not been paid. Appellant says the chancellor committed error in dismissing his complaint because the evidence does not show the necessary knowledge or consent on its part. To sustain the order of the trial court appellee advances several arguments, one of which is that appellant waived its lien on the broilers because it consented to the sale. Since we have concluded that the trial court must be sustained on the above mentioned ground, we deem it unnecessary to consider its argument on the other grounds.

This court, in the *May Way* case, *supra,* after stating the general rule above announced, quoted with approval from *Mitchell* v. *Mason,* 184 Ark. 1000, 44 S. W. 2d 672, the following:

"On the other hand, if a mortgagee consents to a sale of the property by the mortgagor, the purchaser takes title free from the lien. In such cases, the waiver on the part of the mortgagee may be established by oral evidence, which may be direct and positive, or may be established by circumstances surrounding the transaction. *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392, and *Vaughan* v. *Hinkle,* 131 Ark. 197, 198 S. W. 705. In these cases, the court expressly held that where a mortgagee verbally authorizes a mortgagor to sell the property and the property is sold to a *bona fide* purchaser for value, the latter acquires a good title, whether he knew of the existence of the mortgage or not."

Weighed under the above announced rule, the oral testimony and surrounding circumstances convince us that appellant consented to the sale of the broilers by Norman

Spencer, and that appellee was a *bona fide* purchaser for value.

It appears that most of the people connected with this particular sale of broilers had known and done business with each other for several years. The nature of the broiler business makes it important that the producers of broilers have a ready market at the proper time.

Thus, it was natural that appellant should help Spencer obtain a purchaser, as evidence shows it did do in this instance. This background of circumstances lends support to the testimony which, in general, is to this effect: Appellant knew that Ray Luginbuel, agent for the Eeds' Company, was a prospective buyer for Spencer's broilers, and there is evidence that appellant initiated the move which led to the sale; Appellant knew, before it accepted the draft on the Eeds' Company, that Spencer was selling the broilers upon which it had a mortgage; It is certain appellant made no claim of illegal procedure before it learned Eeds' draft was no good; When appellee purchased 4,500 broilers from the Eeds' Company, it had no knowledge of the source of the broilers and did not know they had been mortgaged to appellant, and; There is no testimony which shows bad faith or unscrupulous dealings on the part of any one involved. Every fact and circumstance convinces us that appellant knew and highly approved of the sale of the broilers in question, and would have gladly accepted the proceeds of the draft had it been paid in regular course. Appellant having once consented to the sale, its mortgage was discharged, and he will not be heard to say later that his consent was conditionally given, especially where the rights of a *bona fide* purchaser are involved. In *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392, this court said:

". . . where the mortgagee authorizes or gives consent to the mortgagor to sell the mortgaged property, the mortgage lien thereon is discharged. Under such circumstances, a *bona fide* purchaser for value from the

mortgagor obtains a good title to the property, whether he knew of the existence of the mortgage or not."
So, after Swift & Company had purchased the broilers in question from the Eeds' Company in Oklahoma without knowledge of any existing mortgage or the original ownership, appellant will not be heard to say that his consent to the sale of the broilers by Spencer was conditioned on Eeds' draft being good.

In upholding the action of the trial court in sustaining a demurrer to appellant's testimony, we are aware of the rule announced by this court in the case of *Werbe et al.* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, which rule was also considered and applied by the trial court. Giving the evidence in this case its strongest probative force in favor of appellant, we still conclude that it does not make out a *prima facie* case of liability against appellee.

Affirmed.

CARLETON HARRIS, C. J., not participating.

BRAMBLE *v.* KEMPER.

5-1068 297 S. W. 2d 104

Opinion delivered January 7, 1957.

Williamson & Williamson, for appellant.

(No brief for appellee).

SAM ROBINSON, Associate Justice. This is a suit to annul a void marriage. The issue is whether the Chancery Court of Hot Spring County has jurisdiction. The appellant, Lia Bramble, at a time when she was married

to O. G. Bramble, undertook to marry appellee, C. H. Kemper. She had previously filed suit asking for a divorce from Bramble, but the divorce had not been granted. A marriage license was issued to Mrs. Bramble and Mr. Kemper by the County Clerk of Independence County, and the parties went through a marriage ceremony in Hot Spring County. Later, Mrs. Bramble, now a resident of Louisiana, learned that her purported marriage to Kemper was void because the marriage ceremony with him took place before the divorce from Bramble was granted. To keep the record straight, she filed this suit in Hot Spring County to have the marriage to Kemper annulled. The Hot Spring Chancery Court held there was want of jurisdiction and dismissed the petition for annulment; Mrs. Bramble has appealed.

In the case of *Feigenbaum* v. *Feigenbaum,* 210 Ark. 186, 194 S. W. 2d 1012, this court held that the Chancery Court of the county where a voidable marriage was performed had jurisdiction to annul the marriage. Subsequently, the Legislature passed Act 168 of 1947, which provides:

"Section 1. That Chapter One Hundred Seven (107) of Pope's Digest of the Statutes of Arkansas be amended by inserting after Section 9021 and before Section 9022, a new section to be known as Section 9021A and to read as follows:

Section 9021A. The action shall be by equitable proceedings in the county where the complaint or complainant or complainants reside, and the process may be directed in the first instance to any county in the state where the defendant may then reside or be found."

In the *Feigenbaum* case it was held that the courts of this State have jurisdiction to determine the validity of a marriage performed in this State, notwithstanding that neither party to the marriage is a resident of this State. Subsequently, Act 168 of 1947 fixed the venue in actions to annul voidable marriages as the domicile of the plaintiff, but Act 168 does not apply to void marriages. The statutes involved now appear as Ark. Stats. §§ 55-106, 55-107, 55-108, which is the order directed by

Act 168 of 1947. When the statutes are read in that order, it is obvious that the 1947 Act, Ark. Stats. § 55-107, does not apply to § 55-108, which is the section dealing with void marriages. In the *Feigenbaum* case, Judge Frank Smith discussed the various views of the courts with reference to jurisdiction in suits to annul marriages, and, after an exhaustive review of the authorities, it was held that the courts of this State have jurisdiction to determine the validity of marriages performed in this State, although the parties are non-residents of the State. The decision in the *Feigenbaum* case is not impaired by Act 168 of 1947 insofar as void marriages are concerned. It follows that the Hot Spring court has jurisdiction.

Reversed.

CARLETON HARRIS, C. J., not participating.

BARHAM *v.* MCCALMAN-HILL, INC.

5-1107 297 S. W. 2d 105

Opinion delivered January 7, 1957.

Lawrence L. Mitchell; Q. Byrum Hurst and *C. A. Stanfield,* for appellant.

McKay, Anderson & Crumpler, for appellee.

SAM ROBINSON, Associate Justice. This suit was filed by appellee, McCalman-Hill, Inc., hereinafter referred to as McCalman, to reform a deed given by appellants. McCalman contends there was a mutual mistake; that the description given in the deed fails to include all the land intended by grantors and grantee that the deed

should convey. The Chancellor held in favor of reformation, and some of the grantors have appealed.

Appellee, McCalman, is in the contracting business, engaged in dirt moving. During the period from August 14 to November 1, 1952, by the use of heavy earth moving equipment, McCalman dug a lake for appellants. When the job was completed, appellants owed to McCalman a balance of about $16,000. To secure the payment of this indebtedness, appellants, along with their wives, executed and delivered to McCalman a mortgage describing about 4½ acres. Appellants defaulted in payment of the indebtedness, and McCalman filed suit to foreclose. To effectuate a settlement, R. D. Barham and his wife, Christine Barham, and D. W. Barham and his wife, Bonnie Barham, executed and delivered to McCalman a deed carrying the same description as that set out in the mortgage, and the foreclosure suit was dismissed. McCalman contends that, according to the agreement of the parties made at the time the mortgage was executed, the description of the property conveyed by appellants should have included the land on which is situated the homes of appellants, which property joins the land described in the mortgage.

To sustain the contention that the deed should be reformed, the evidence must be clear, conclusive and decisive. The Chancellor held that the proof came up to the required standard for reformation, and we agree.

McCalman's version of the transaction is that it was agreed the Barhams would give a mortgage to secure the payment on the indebtedness incurred by the construction of the lake; that the property on which the mortgage was to be given included three houses, one where each of the appellants live, and the one where Dave Barham's son lives; that the value of this property was considered to be worth about $25,000. It developed, however, that previously, the property on which Dave Barham's son lives had been conveyed to the son; he is not a party to this litigation and his property is not involved. The circumstances corroborate McCalman. The Barhams introduced testimony to the effect that they

were to give a mortgage on 10 acres, but the land actually described in the mortgage is only about 4½ acres. The 4½ acres do not appear to have a valuation that would amount to substantial security for the balance owed on the indebtedness at the time the mortgage was given; it is 4½ acres of pasture land located near Cale, Arkansas, a town consisting of about three stores and a school. McCalman testified that it was agreed the property, including the houses, would be given as security before he ever started the job. It was known that the job would run into a good deal of money; there were about 95,000 cubic yards of dirt to be moved.

On the Barhams' part, there is an outright denial that there was ever any intention to give a mortgage on the homes. In addition to the circumstances which corroborate McCalman, there is the testimony of Mr. W. F. Denman, Sr., an attorney of Prescott who represented McCalman in the transaction, and his secretary, Mrs. Lelia McCargo, to the effect that after the deed was executed all parties were under the impression that it conveyed the houses. Mr. Denman testified that after the execution of the deed R. D. and D. W. Barham came to see him with reference to renting the houses from McCalman; that he did not know what McCalman wanted to do in that respect, and he wrote a letter to Mr. McCalman telling him of the Barhams' desire to rent the houses and asking for instructions in that regard. A copy of the letter written by Mr. Denman was introduced in evidence. Furthermore, Mrs. McCargo testified that the letter was dictated by Mr. Denman in the presence of Mr. Dave Barham, and that she read the letter back from her notes in the presence of Mr. Barham. Immediately after the deed from the Barhams to McCalman, Mr. Denman, acting for McCalman, took steps to secure insurance on the houses. He did not know the physical description of the houses as to the foundation, roof, etc., and Mrs. McCargo went to find the Barhams for the purpose of getting that information. She located R. D. Barham and D. W. Barham at the coffee shop of the Broadway Hotel, and had a cup of coffee with them.

She told them what she wanted, and the Barhams gave her the desired information.

The testimony of Mr. McCalman that the houses were supposed to be in the deed, the testimony of Mr. Denman that such was his understanding, the testimony of Mr. Denman and Mrs. McCargo about the Barhams seeking to rent the houses from McCalman after the deed had been executed, the letter from Mr. Denman written to Mr. McCalman at that time, coupled with the testimony of Mrs. McCargo to the effect that the letter was dictated in the presence of Dave Barham, and the fact that Mrs. McCargo inquired of both R. D. and D. W. Barham as to the construction of the houses for the information of the insurance companies, is overwhelming evidence of the fact that it was the understanding of the parties that the deed was to include the property where the houses were located. The Chancellor was justified by the evidence in reaching the conclusion that the plaintiff had met the burden of proving its case by clear, convincing and cogent testimony.

On behalf of Christine and Bonnie Barham, appellants argue, in their brief, the law as to reforming a deed where homestead and dower are involved, but the wives of appellants, although parties in the Chancery Court, have not taken an appeal.

Affirmed.

CARLETON HARRIS, C. J., and Mr. Justice ED. F. McFADDIN not participating.

WALLS *v.* WALLS.

5-1136 297 S. W. 2d 648

Opinion delivered January 14, 1957.

Shaver, Tackett, Jones & Lowe, for appellant.

Joe Rosenbloom and *Van Johnson,* for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Pearl Roberson Walls, a resident of Miller County, instituted suit in the Miller Chancery Court on February 4, 1956, against her husband, Dee Clark Walls, seeking divorce.

The complaint alleged that the parties were married in Miller County, November 1, 1942, and lived together as husband and wife until January 30, 1956; that defendant treated her with contempt, indifference, and studied neglect; that he struck her on many occasions, frequently absented himself from home, and that this course of conduct was pursued to such an extent that her condition in life became intolerable. The complaint stated that five children were born of the marriage, and that the defendant earned $100 per week. Plaintiff prayed for a divorce, for care and custody of the five minor children, and for a reasonable amount for the support and maintenance of said children. Appellant (defendant) denied that he had committed any acts which would entitle appellee to a divorce, denied that appellee had any cause to leave him, denied that appellee is the proper person to be given the care and custody of the minor

children and prayed that the court deny appellee's petition, and that he be awarded the care and custody of said children.

The Chancellor, after hearing the evidence, passed the case for nearly a month to give the parties an opportunity to adjust their differences and go back together; however, they were unable to do so, and on April 26, 1956, the court decided the issues. Formal decree was entered on May 21, 1956. The Chancellor found that appellee had failed to establish a cause for divorce, that she had no meritorious cause for leaving her husband and refusing to live with him, and that her complaint for divorce should be dismissed for want of equity. The court further found that "if plaintiff refuses to return to and live with her husband, defendant should vacate the farm home in order that plaintiff and said children may live there; that if plaintiff will no longer live and cohabit with her husband, plaintiff should have care and custody of said children, subject to reasonable visitation rights in the defendant; and defendant should pay the plaintiff the sum of $31.25 per week, beginning April 28th, 1956, for the care and support of plaintiff and maintenance of said children, that defendant should furnish plaintiff a milch cow, and afford plaintiff the use of an automobile." In accordance with said finding, and the further fact that the court was convinced appellee would not return and live with defendant, it was ordered and decreed that appellee be awarded the care and custody of all the children, together with the use and occupancy of the farm home (which they held as an estate by the entirety). Appellant was ordered to vacate the home, and directed to pay to appellee the sum heretofore set out for her support and that of said children. From the order requiring him to vacate the home place, and giving to appellee the custody of the children, appellant brings this appeal; appellee cross appeals the decision of the Chancellor in denying her petition for divorce.

Appellee's allegations of mistreatment dealt largely with the supposed infidelity of her husband. She testified that he would not come directly home from work,

but would frequently come in several hours late, often went on fishing trips, and in both instances, returned frequently with lipstick on his shirt. Various incidents were related that led her to believe that appellant was "carrying on an affair" with another woman. No point would be served in detailing the testimony, other than to say there is little, if any, corroboration of the charges made by appellee. Repeated "fusses" occurred between the parties, generally resulting from appellee's belief that appellant was unfaithful; and on January 30th, 1956, after a heated quarrel, appellee left, with the two youngest children, and went to her father's home in Texarkana, where she resided until the time of this hearing. The three older children were at school, which was her explanation for not taking them with her, though the record does not reflect that she made later efforts to remove them to the premises where she was living. The three older children, (the eldest being a girl 13 years of age) continued to reside with their father, and this 13 year old daughter stated that if her parents would no longer live together, she preferred to live with appellant, and that this feeling was concurred in by the other two. While it cannot be said that appellant was totally blameless for the marital difficulties,[1] still, it definitely appears that appellee was principally at fault. To say the least, she falls far short of establishing that appellant committed such acts as would entitle her to a divorce.

We accordingly feel that the learned Chancellor held correctly in denying her a divorce, and we further agree with the finding in the decree "that plaintiff has established no meritorious cause for leaving her husband and three older children and refusing to live with him." Yet, despite such finding, the Chancellor ordered appellant to vacate the premises, gave the custody of the five children to appellee, and directed an award of support, not only for the children, but also for the plaintiff. Hence, we have the unique situation of the court finding

[1] For instance, instead of telling or explaining to his wife where he had been, appellant would frequently and impatiently tell her it was none of her business; he also admitted slapping her several times on one occasion when she had spat in his face.

that Mrs. Walls had no right to leave her husband and three older children, (finding that she had failed to establish alleged wrongful acts on his part), and yet making an award commensurate with establishment of cause of action. In other words, she was treated as the successful party, and appellant, though by the court's own finding, innocent of any wrong doing that would justify appellee in leaving, was treated as the guilty party. This court has held in *Woodall* v. *Woodall,* 144 Ark. 159, 221 S. W. 463, and *Heinrich* v. *Heinrich,* 177 Ark. 250, 6 S. W. 2d 21, that where a divorce is granted to the wife, the court may award to her the use of a homestead, because she is the innocent party. There is no question but that if appellee had established a cause of divorce, (or even separate maintenance) the Chancellor, in awarding her the use of the home property, would have been entirely correct, and an award of maintenance for her personal support would have been proper. Under the court's findings, she is not entitled to maintenance. In addition to the homestead, this is also an estate by the entirety, with the parties holding equally. Each has the same right under the law to share the property. Both hold the same interest. Appellee has a perfect right to return to the home and live there with appellant. In fact, the record reflects that he has urged her to do so, but appellee emphatically refuses. We recognize that the Chancellor was using his best judgment in trying to solve a most difficult situation, and that he was earnestly endeavoring to promote the re-establishment of the marital relationship, but we think it was error to dispossess appellant under the facts in this case. The factual situation here is different from that which existed in *Cassell* v. *Cassell,* 211 Ark. 489, 200 S. W. 2d 965.

Determining the custody of the children presents a more difficult problem. It is well established that children, where possible, should remain together. It is likewise true that the law favors granting custody of small children to the mother. This, however, is not a "hard and fast" rule, and each case must be governed by its own particular circumstances. We feel that the two young

children, taken away from the home by the mother, should remain with her. We think, however, that the Chancellor should have left the custody of the three remaining at home, with the father. As far as the record shows, the children, in each location, have been well cared for, and both parents seem to be morally qualified to have the custody. Near the home place, appellant constructed a residence for his invalid mother and sister, and the sister seems capable of looking after these children, all of whom are of school age. It is with reluctance that we separate these youngsters, but it is felt that under the circumstances, their best interests will be served, as well as the best interests of their parents.

While this modification of the order of the Chancellor is not based upon such act, it must be remembered, (and is somewhat persuasive) that appellee, of her own free will, and according to the court's decree, without cause, left these three children, to be looked after by their father.

For the reasons set forth above, that portion of the decree awarding the use and occupancy of the farm home to appellee, and directing that appellant vacate same, is set aside. Appellant is given the custody of the three older children, Joyce Maxine, age 13 years, Clovis Wayne, age 11 years, and Janice Kay, age 9 years. The custody of the two smaller children, Kathey Ann, age 5 years, and Terrell James, age 1, will remain with the mother as ordered by the Chancellor. The Chancery Court is directed to make a proper adjustment as to the amount of maintenance to be paid for the support and care of the two minor children remaining with appellee.

Affirmed on cross appeal. Modified and remanded as herein indicated on Direct Appeal.

Justices George Rose Smith, Ward, and Robinson dissent.

GRANDBUSH *v.* GRIMMETT.

5-1126 297 S. W. 2d 647

Opinion delivered January 14, 1957.

Harry Crumpler, W. H. Kitchens, Jr., and *Lawrence Mitchell,* for appellant.

Denman & Denman, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, J. Byron Grimmett, while in the employ of appellants, a drilling company, and in the course of his employment was seriously injured. The present suit was filed against appellants and a jury awarded him $7,500 damages. From the judgment is this appeal. It appears that appellants had no workmen's compensation coverage.

For reversal the drilling company says: "The appellants do not now nor did they at the trial of this cause deny liability and this appeal is taken on the sole and only question of whether the verdict of the Nevada Circuit Court is excessive." Under our well established rule the amount of recovery in these personal injury cases is for the jury's fair determination and when supported by substantial testimony we do not disturb the verdict unless it is shown to have been influenced by prejudice or so grossly excessive as to shock the conscience of the court. See *Ward* v. *Blackwood,* 48 Ark. 396, 3 S. W. 624; and *Hill* v. *Whitney,* 213 Ark. 368, 210 S. W.

2d 800. While the verdict appears to be adequate, we hold that it is not excessive in the circumstances.

Appellee (27 years of age and now a medical student in Little Rock) testified that he was thrown from a catwalk while assisting in setting a 30 ft. casing (some 5½ in. to 6 in. in diameter). He was struck by the pipe, knocked unconscious and did not regain consciousness until after he reached the hospital. As a result of his injuries his upper jawbone and his lower jawbone were fractured and they were wired back in place. His pain and suffering were severe and he continued to suffer some pain at the time of trial. He testified: "The bottom jawbone, or mandible, comes back and makes a crook here (indicating) or right angles, you might say. It is broken high on each side and I believe the x-ray will show that; and across the top of my mouth, the palate—it was broken across— . . . The upper jaw. It was broken across—the front was floating all loose, and my throat—I don't know whether you could see from where you are sitting—there was a piece of cartilage which was bruised or broken; but it has grown back and enlarged, and it bothers in swallowing . . . Q. As a result of this injury, have you suffered pain? A. Well yes, sir. I have had headaches and I have a sore throat, and have had since I got hurt . . . I can't open my mouth as far as I used to . . . Q. The width of two fingers, and that is as far as you can open it? A. Yes, sir. I can't eat a sandwich, if it is a big sandwich. Q. Your neck there; how is that affected? A. Well, it makes my neck sore in swallowing food and stuff. It keeps it irritated. Here is the Adam's Apple (indicating) and right below you can see a piece of cartilage, and it is smaller when it is normal, and when it was burst, it grew back bigger. It partly occludes the food, and when I chew and swallow, it hurts . . . Q. What about your teeth? . . . A. I can go this way some (indicating); I can move my lower jaw to the left some, but to the right, I can move it, see, and it goes that way (illustrating), if you work it, it will go both ways. The break was high in here, and mashed up the joint. You can hear it pop . . . These teeth hang

over the front now, and they didn't before and they ground off my jaw teeth. Q. Has the dentist worked on your teeth to try to make them fit? A. Yes sir, and he is going to work on them some more. Q. Do they fit yet? A. No, sir . . . A. My teeth in front—upper front teeth are numb—I guess the nerves —they don't have the feeling they used to have . . ." There was medical testimony tending to corroborate appellee and also that his injuries are permanent. His hospital and medical bills amounted to approximately $793 and additional treatment by his dentist is necessary at an estimated cost of $500.

We do not attempt to detail all of the testimony, it suffices to say that the evidence was substantial and ample to support the verdict and we do not find it excessive. Affirmed.

CLEMENT *v.* WILLIAMS, CHANCELLOR.

5-1264 297 S. W. 2d 656

Opinion delivered January 14, 1957.

Dudley, DuVall & Dudley, Oklahoma City, Okla.; *Hardin, Barton, Hardin & Garner,* for appellant.

Williams & Gardner, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an original proceeding for a writ of prohibition against Paul X. Williams, Judge. The background facts are these: in November, 1956, William Hugh Clement filed suit for divorce against June W. Clement in the Danville District of the Yell Chancery Court; and Mrs. Clement was notified by warning order. In due time she entered her special appearance and motion to dismiss the di-

vorce case, claiming that Mr. Clement did not have a *bona fide* domicile in Arkansas; and that he was in fact domiciled in the State of Oklahoma.

There was an extended hearing on this motion to dismiss. Mrs. Clement showed that Mr. Clement filed his income tax return in 1956 listing Oklahoma City as his residence; that he claimed homestead exemptions in Oklahoma in 1956; and that they lived together in Oklahoma until October 22, 1956. She offered other evidence to show that Mr. Clement did not have a *bona fide* domicile in Arkansas, as required by our law.

In resisting the motion to dismiss, Mr. Clement offered a number of witnesses to show that he owned a large farm at Danville; that he had claimed this farm as his home for many years, although he had business addresses in Oklahoma City, Edmond, Oklahoma, and Corsicana, Texas, and other places. He admitted his business address was in Oklahoma City, but stoutly maintained that his domicile was on his farm near Danville in Yell County, Arkansas.

Thus there was presented to the Trial Court the sharply disputed question of whether Mr. Clement had a *bona fide* domicile in the State of Arkansas within the purview of the holding of our cases on domicile in suits for divorce. On sharply conflicting evidence, the Chancery Court held that Mr. Clement had a *bona fide* domicile in Arkansas and denied Mrs. Clement's motion to dismiss. Thereupon Mrs. Clement applied to this Court in the present case for a writ of prohibition to test the correctness of the Trial Court's ruling on the matter of domicile.

We hold that the writ of prohibition should be denied. Appeal, rather than prohibition, is the appropriate remedy to test the correctness of the Court's ruling where the facts are sharply disputed; and appeal is from the final judgment. In the case of *Pleasant View School Dist. No. 4 of Franklin County* v. *Kincannon,* 216 Ark. 843, 227 S. W. 2d 941, we said:

". . . we have repeatedly held that the Supreme Court does not 'undertake to determine facts upon petitions for writ of prohibition.' See *Simms Oil Co.* v. *Jones,* 192 Ark. 189, 91 S. W. 2d 258; *Twin City Lines* v. *Cummings,* 212 Ark. 569, 206 S. W. 2d 438, and *Capital Transportation Co.* v. *Strait,* 213 Ark. 571, 211 S. W. 2d 889."

In *Capital Transportation Co.* v. *Strait, Judge,* 213 Ark. 571, 211 S. W. 2d 889, Mr. Justice ROBINS, speaking for this Court, quoted from the earlier case of *Twin City Lines* v. *Cummings,* 212 Ark. 569, 206 S. W. 2d 438:

" '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.' "

In *Pleasant View School District* v. *Kincannon,* 216 Ark. 843, 227 S. W. 2d 941, in denying a petition for writ of prohibition, we said:

"The remedy by appeal is entirely adequate as to whatever judgment the Franklin Circuit Court may render in Cause No. 1100, and the writ of prohibition will not issue by this Court if the remedy by appeal be adequate. *Kastor* v. *Eliott,* 77 Ark. 148, 91 S. W. 8; *Macon* v. *LeCroy,* 174 Ark. 228, 295 S. W. 31; *Safeway Cab & Storage Co.* v. *Kincannon,* 192 Ark. 1019, 96 S. W. 2d 7."

Writ denied.

CAPPS *v.* CLINE.

5-1128 297 S. W. 2d 654

Opinion delivered January 14, 1957.

J. Loyd Shouse and *Merle Shouse,* for appellant.

A. J. Russell, for appellee.

MINOR W. MILLWEE, Associate Justice. Martha Cox Cline filed her claim against the estate of her deceased sister, Elizabeth Harris, for keeping house, nursing and otherwise caring for decedent during the last three years of her life. This appeal is by certain other heirs of decedent from a judgment of the Probate Court in appellee's favor for $500, the amount claimed by her. After the appeal was lodged here Martha Cox Cline died testate and the cause was revived in the name of her executor.

According to the proof adduced by appellee, Mrs. Harris was living alone in Eureka Springs, Arkansas, about 10 years ago when she became ill and sent for appellee to come and take care of her. Appellee left her former home and came to Eureka Springs, where she lived with, nursed and kept house for her sister until the latter's death in March, 1956. When Zoe Harp, a friend and neighbor, frequently visited decedent and repeatedly tried to purchase certain items from her for her shop, Mrs. Harris would say: "It all belongs to Martha. She is here taking care of me and it all belongs to Martha." Mrs. Harris repeatedly told other friends and neighbors

who visited her that "she intended for Martha to have everything"; that "she had willed everything to Martha"; and that none of her other relatives would do anything for her. Mrs. Harris was confined to her bed most of the time and her sister did all the housework and nursed and otherwise cared for her during the last three years of her life and was paid nothing for these services. The trial court sustained appellants' objection to testimony by Martha Cline Cox that she came to live with Mrs. Harris at the latter's request but this was shown by other witnesses. Appellants offered no testimony in contradiction of that introduced by appellee.

Appellants contend the foregoing evidence was insufficient to establish any contractual relation between appellee and her deceased sister for payment of the services performed. They rely on the rule first announced by this court in *Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898, as follows: "The presumption is that services rendered by members of the same family, and especially between father and son, are gratuitous. Such services are enjoined by the reciprocal duties of the family relation, and are always presumed to have been prompted by natural love, rather than by the promise or the hope of pecuniary reward. Courts are reluctant to infer a pecuniary recompense from performance of filial or parental duties such as humanity enjoins. Hence the burden is upon him who claims a money recompense for personal services performed, whether voluntarily, or upon the request of the other, to establish a contract expressed or implied for such consideration." Some later cases in which the rule has been reaffirmed are: *Lineback* v. *Smith,* 140 Ark. 500, 215 S. W. 662; *Clerget* v. *Williams,* 176 Ark. 533, 3 S. W. 2d 301; *Graves* v. *Bowles,* 190 Ark. 579, 79 S. W. 2d 995; *The Peoples National Bank, Adm.* v. *Cohn,* 194 Ark. 1098, 110 S. W. 2d 42; *Wilson* v. *Dodson, Adm.,* 203 Ark. 644, 158 S. W. 2d 46. While the presumption of the gratuitous nature of the services rendered between members of the same family is ordinarily less strong as the relationship between the parties becomes more remote, the rule is generally applied to the relationship between brothers or sisters.

58 Am. Jur., Work and Labor, Sec. 27; *Graves* v. *Bowles, supra.*

The case of *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540, involved a claim filed by a sister against her brother's estate in which the nature of the services performed and the testimony generally were somewhat similar to those in the instant case and the jury was instructed that the claimant could not recover without establishing a special or express promise to pay her. In holding the instruction erroneous the court said: "No hard and fast rule can be laid down, and every case must be governed by its peculiar circumstances. It is incumbent upon the claimant to show that, at the time the services were rendered, it was expected by both parties that she should receive compensation, but she may show this by circumstantial as well as by direct evidence. All the surrounding circumstances under which the services were performed may be proved."

In several cases we have also approved the following statement by Justice SHAW in the leading case of *Guild* v. *Guild,* 15 Pick. (Mass.) 129: "That it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that, although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all the circumstances of the case, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise and a *quantum meruit;* but, if otherwise, then they should find that there is no implied promise."

In *Graves* v. *Bowles, supra,* upon which appellants rely heavily, a brother filed certain claims against the estate of his deceased sister including one for nursing and caring for her during her last years. This court held substantial proof was lacking to indicate that decedent intended to repay her brother where the only competent evidence of a contractual relationship consisted of decedent's remarks to friends that she could

never repay her brother for his kindness and the existence of an alleged will which was refused probate and in which decedent left certain property to the brother after a specific bequest to her daughter.

Although there was no evidence of an express promise to pay in the instant case, we think the evidence was sufficient to warrant an inference of such a promise by the trial court. Appellee left her home to live with and perform valuable and burdensome services to her sister which were extraordinary and unusual in the sense that they were not incidental to the normal domestic relation subsisting between sisters. While the question presented is close, we hold the uncontradicted evidence sufficient to overcome the presumption of a gratuity and to sustain the finding of an implied agreement that appellee should be paid for her services. The judgment is, therefore, affirmed.

HARRIS v. HELENA RICE DRIER, INC.

5-1129 297 S. W. 2d 652

Opinion delivered January 14, 1957.

John C. Sheffield, for appellant.

D. S. Heslep, for appellee.

George Rose Smith, J. This suit was brought by the appellee to require R. E. Harris to satisfy of record a deed of trust executed by the appellee in 1951. Harris admits that nearly all of the indebtedness secured by the deed of trust has been paid; the only point now in controversy is whether the appellee is entitled to be credited with an item amounting to $750. The chancellor decided this issue in favor of the plaintiff and granted the relief sought.

Harris organized the appellee corporation in 1949 and was originally its principal stockholder. On April 16, 1951, Harris sold his interest in the company to the other stockholders, the unpaid purchase price being evidenced by notes totaling $102,000. The corporation executed its deed of trust to secure the debt which the new owners owed to Harris. In the contract of sale Harris agreed to pay all liabilities of the corporation that were then outstanding. The pivotal question in the case is whether the corporation was justified in honoring, over Harris's protest, a $750 claim which was asserted against it under a written agreement that the corporation had made with D. L. Abernathy and William Eifling in 1949.

In the first paragraph of the contract with Abernathy and Eifling the corporation agreed to dry and store rice of the 1949 crop at twelve and a half cents a bushel. In a subsequent paragraph the corporation acknowledged the receipt of $750 as an advance payment for the drying and storage of rice and bound itself to reserve for one year, for the exclusive use of Abernathy and Eifling, storage capacity for 6,000 bushels. Harris has contended all along that the corporation's original obligation related only to the 1949 crop, that as president of the company he gratuitously extended the agreement to

include the 1950 crop, and that the contract expired as a result of the failure of Abernathy and Eifling to utilize the company's drying and storage facilities in either of those years.

Abernathy and Eifling did not agree with Harris's view that the agreement expired in 1950. In 1952 or 1953 they consulted their attorney and were told that the contract was still in force and could be availed of in a later year. They quit farming in 1954 and undertook to recover their investment in the contract by transferring it to B. C. Culp, for value. The appellee, upon the advice of its own attorney, recognized its obligation under the contract and dried 5,000 bushels of rice for Culp at fifteen cents a bushel. It now asks credit for having discharged a corporate liability that was outstanding in 1951, when the appellant agreed to satisfy all existing obligations of the corporation.

We think the appellee was correct in its conclusion that the duty to perform the 1949 contract still existed in 1954. Although the agreement initially refers only to the 1949 crop, the document later acknowledges the receipt of $750 as an advance payment for the drying and storage of rice, and the final sentence reads: "It is agreed that this contract shall remain in effect, regardless of the above specification of the number of years, until the full amount of the advance payment has been repaid." This clause unmistakably qualifies the preceding provisions of the agreement and creates a continuing obligation on the part of the promisor.

A second contention made by the appellant involves an escrow agreement that was executed in connection with Harris's sale of his stock in the corporation. By this agreement the purchasers' notes were placed in escrow with a bank. Harris relies upon a paragraph in this agreement which provides that if any demand should be made against the corporation which cannot be satisfactorily adjusted by Harris and the claimant, "then the escrow agent shall continue to hold said notes subject to a final adjudication" by a court of competent jurisdiction. We do not agree with the appellant's sugges-

tion that this clause took from the appellee the privilege of voluntarily recognizing its duty under the 1949 contract, without first compelling the creditor to resort to litigation. This provision in the escrow agreement was undoubtedly inserted for the purpose of affording Harris an opportunity to contest the validity of claims asserted against the corporation. The present case has given Harris his day in court with reference to the various legal questions arising from the Abernathy-Eifling contract; so he has no basis for complaint.

Finally, Harris attempts to interpose certain technical objections to the transaction by which the appellee discharged its obligation under the 1949 agreement. It is said that the contract was not assignable (but see Ark. Stats. 1947, § 68-801), that the assignment to Culp should have been in writing, and that the contract called for the drying of 6,000 bushels of rice at twelve and a half cents a bushel instead of the drying of 5,000 bushels at fifteen cents. Harris is not in a position to raise these objections, for he has not been prejudiced by the appellee's handling of the matter. Harris, by reason of his assumption of the corporate liabilities, was responsible for the $750 claim that existed under the Abernathy-Eifling contract. The appellee discharged that obligation, to the creditor's satisfaction, by the rendition of services worth the face amount of the claim. In these circumstances Harris has received the benefit of the transaction and was correctly required by the trial court to satisfy the record of the mortgage indebtedness.

Affirmed.

5-1131 297 S. W. 2d 660

Opinion delivered January 14, 1957.

A. D. Chavis, for appellant.

Hendrix Rowell, for appellee.

PAUL WARD, Associate Justice. This appeal comes from an order of the Jefferson County Circuit Court dismissing a complaint filed by appellants, Alma and A. D. Chavis, against several defendants, appellees herein, including a Circuit Judge and two attorneys.

The complaint is long and involved (covering 40 pages in the record), contains no prayer for relief, and details no acts of misconduct or wrong doing on the part of any defendant. It does contain a general statement to the effect that the defendants had conspired in previous litigation to deprive appellants of their money and property. We gather from the complaint that this is the last (to date) of a series of efforts to avoid paying a judgment rendered against them in the Circuit Court of Cleveland County, Judge Golden (one of appellees) presiding. The complaint is a full recapitulation of all the legal procedure preceding and following the rendition of the judgment just mentioned.

Most of the essential facts relative to said litigation are set out in our opinion in the case of *Chavis* v. *Golden,*

Judge, 226 Ark. 381, 290 S. W. 2d 637, and need not be repeated here.

If any of the appellees have done anything in connection with all this litigation other than what was done in open court or in accordance with approved legal practices, the complaint fails to point it out.

Fortunately for all concerned, however, appellants have clearly and succinctly defined the issues to be resolved by us on this appeal. We quote from their brief.

"There are but two questions or issues involved in this case, except the damages caused thereby:

1. Were the plaintiffs herein sureties on said cross-bond?

2. Is the summary judgment against the plaintiff, A. D. Chavis, and his wife, Alma Chavis, valid and legal, as against them?

Upon these two questions rest the rights of the plaintiffs herein, and by and through these two issues, the plaintiffs herein, sustained the damages asked for in this suit."

The decision in the *Golden* case, *supra,* forces us to resolve both of said issues against appellants' contentions.

1. Appellants are in error in assuming or supposing that the original judgment rendered against them was based on a cross-bond. The *Golden* case shows conclusively that said judgment was based on a *supersedeas* bond which appellants had signed. This court there said: "It is because these petitioners were sureties on this *supersedeas* bond that judgment was rendered against them in the circuit court."

2. Again appellants are in error in assuming that the original judgment against them was a *summary* judgment. Once more the *Golden* case makes it clear that the judgment was not a summary judgment and, further, that it is a valid and legal judgment against appellants. In the cited case this court said: "The judgment (against appellants) was not a summary judgment

under Section 29-201 Ark. Stats. as petitioners suggest, but was a judgment on the *supersedeas* bond . . ." We also said: "So if the petitioners herein thought that the judgment against them . . . was erroneous, they should have perfected their appeal to this court."

In view of the above we see no occasion for further extending this opinion or this litigation.

Affirmed.

CARLETON HARRIS, C. J., not participating.

NOBLE GILL PONTIAC, INC. *v.* BASSETT.

5-1111 297 S. W. 2d 658

Opinion delivered January 14, 1957.

Roy & Roy, for appellant.

James M. Gardner, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the seller of an automobile who has repossessed the car under a title retaining contract can sell the vehicle for less than the amount owed thereon at the time of repossession, and then collect the deficiency from the first purchaser. Appellee, J. L. Bassett, purchased an automobile from appellant, Noble Gill Pontiac, Inc.; $1,255.76 was paid in cash, leaving a balance of $1,491.60 to be paid in monthly instalments. Among other things, the contract of purchase provides:

"If Purchaser defaults on any obligation under this contract or if Seller or assigns should deem itself or said Car insecure, Seller or his representative may take

possession of said Car, and all equipment . . . wherever it may be found, and may enter upon premises therefor without notice or demand to Purchaser and without legal process, and Purchaser waives all claims for damage caused thereby, and the entire unpaid balance of said indebtedness shall at the option of the holder, without notice, become forthwith due and payable. Said Car may be retained by Seller, together with any and all amounts paid thereon which shall be considered compensation for the use of said Car, and Purchaser shall pay to Seller any costs for necessary repairs because of damages to said Car; or said Car may be sold at private or public sale . . . and all laws governing such sale are hereby waived by the Purchaser. The proceeds of any sale . . . shall be applied to the amount due hereunder and the surplus, if any, shall be paid to Purchaser; and in case of a deficiency Purchaser covenants to pay forthwith the amount thereof to the Seller" . . .

It will be noticed that according to the above provision of the contract, if the seller repossesses the car he can keep it and do nothing further, or he can sell it and, if it fails to bring enough to offset the balance owed by the purchaser, the seller can collect the deficiency.

The question here is whether the seller can have both remedies — a repossession of the car and a deficiency judgment. At a time when appellee owed a balance on the car, it was repossessed by the seller, who then sold the automobile and later, filed this suit alleging that, after crediting appellee with the price received from such sale, there remained a deficiency of $583.13. The trial court held that appellant exhausted his remedies when he repossessed the car, and therefore could not collect the deficiency.

On appeal, appellant cites several Arkansas cases, contending that the reasoning in those cases, when followed to a logical conclusion, supports the theory that the seller may collect a deficiency after repossessing and reselling the automobile; that in effecting the remedy of repossession the seller is not barred from pur-

suing other remedies where the contract provides that such additional remedy may be had. Appellant cites as sustaining its view: *Brandon* v. *General Motors Acceptance Corporation,* 223 Ark. 850, 268 S. W. 2d 898; *Southland Tractors, Inc.* v. *Clayton,* 222 Ark. 539, 261 S. W. 2d 539; *Brigham* v. *Thrailkill,* 166 Ark. 548, 266 S. W. 958, 37 A. L. R. 97; *Oliver, Wheeler, Thomas Company, Inc.* v. *Boon, Admr.,* 224 Ark. 830, 276 S. W. 2d 417; *White* v. *Bragg,* 168 Ark. 670, 273 S. W. 7; *Wentworth Military Academy* v. *Marshall,* 225 Ark. 591, 283 S. W. 2d 868. All of these Arkansas cases are distinguishable from the case at bar. There are cases, however, from other jurisdictions that support appellant's theory. Several such cases are cited in an annotation on the subject in 25 A. L. R. 1490, but the annotation points out that *Nashville Lumber Company* v. *Robinson,* 91 Ark. 319, 121 S. W. 350, is to the contrary. That case is controlling here; it is directly in point, the contract having a similar provision with reference to the seller repossessing the property, reselling it, and applying the sale price on the debt owed by the first purchaser, and then collecting any deficiency. In the *Nashville Lumber Company* case, this court said: "When this debt became due and was unpaid, the vendor, having reserved the title until the purchase price was paid, had its election to take either of two courses. It could elect to retake the property, and thus, in effect cancel the debt, or it could bring its action to recover the debt, and thus affirm the sale and waive reservation of title." The *Nashville Lumber Company* case has been cited with approval many times. This court has consistently held that in a conditional sale contract where the seller reserves title to the property until the purchase price is paid, he has either one of two remedies. He can waive the right to follow and reclaim the property by bringing a separate suit for the price and recover a judgment thereon; or, he can repossess the property, but when he does so, he thereby cancels the contract of sale and has no other remedy except for repossession of the article in question. See *Gordon Hollow Blast Grate Company* v. *Zearing,* 130 Ark. 535, 198 S. W. 97. In *Loden* v.

Paris Auto Co., 174 Ark. 720, 296 S. W. 78, the court quoted with approval from *Nashville Lumber Company* v. *Robinson, supra,* as follows: " 'For, if the appellant elected to retake the property, and thus in effect to cancel the debt before this suit was brought, then it could not thereafter sue to recover the purchase money also.' Citing *Butler* v. *Dodson,* 78 Ark. 569, 94 S. W. 703; *Baker* v. *Brown Shoe Co.,* 78 Ark. 501, 95 S. W. 808; *White* v. *Beal & Fletcher Grocery Co.,* 65 Ark. 278, 45 S. W. 1060; *Bell* v. *Old,* 88 Ark. 99, 113 S. W. 1023. And in the case of *Hollenberg Music Co.* v. *Barron,* 100 Ark. 403, 407, 140 S. W. 582, 36 L. R. A. (N. S.) 594, Ann. Cas. 1913C, 659, this court quoted with approval from *Bell* v. *Old, supra,* as follows: 'The principle is well established that the seller of personal property who has reserved title until the purchase price is paid may, upon default of payment, retake the property, and thereby cancel the debt, or he may sue to recover the debt, and thereby affirm the sale, in which case he looks to the debtor and not to the property; in the other case he looks to the property and not to the debtor.' "

"So, in such a case, the vendor has the right to elect which remedy he will pursue, and, having elected to pursue the one, he is precluded from pursuing the other." *Beene Motor Co.* v. *Dison,* 180 Ark. 1064, 23 S. W. 2d 971, citing *Nashville Lumber Co.* v. *Robinson.* And, in *McCain* v. *Fender,* 188 Ark. 1139, 69 S. W. 2d 867, the court said: "He may not, however, have both remedies, and, where he elects to retake the property an action to recover on the debt is barred." Citing *Nashville Lumber Co.* v. *Robinson.* The *Nashville Lumber Co.* case is also cited in *Gale & Company* v. *Wallace,* 210 Ark. 161, 194 S. W. 2d 881, where the court said: "When the debt becomes due the vendor, in sales of this character, may bring an action to recover the debt, and by this he affirms the sale and waives the reservation of title; or he may elect to take the property, and by doing so, cancels the debt. He may not, however, have both remedies, and, where he elects to retake the property an action to recover on the debt is barred." See also *Provance* v. *Arnold Barber & Beauty Supply Company,* 218

Ark. 274, 235 S. W. 2d 970, where the *Nashville Lumber Company* case is cited with approval, and *Oliver, Wheeler, Thomas Company, Inc.* v. *Boon, Admr.*, 224 Ark. 830, 276 S. W. 2d 417. The law is firmly established in this State that the seller cannot repossess the property on a title retaining contract, and then pursue the second remedy of collecting on the debt.

Affirmed.

CARLETON HARRIS, C. J., not participating.

BAXTER *v.* STATE.

4860 298 S. W. 2d 47

Opinion delivered January 21, 1957.

[Rehearing denied February 25, 1957]

Joe P. Melton, Peyton D. Moncrief, Virgil Roach Moncrief and *John W. Moncrief,* for appellant.

Tom Gentry, Attorney General; *Ben J. Harrison,* Assistant Attorney General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Walter Baxter, was convicted of murder in the first degree, and the jury fixed his punishment at life imprisonment.[1] Evidence showed that appellant had trouble with his landlady, Sallie Bitner, and that she left the house and requested neighbors to call the officers. The call was answered by Bert O. Burbanks, town marshal and police chief of DeWitt. Burbanks was shot and killed in front of the door of the Bitner home (where appellant roomed) from a shotgun blast fired (admittedly by appellant) from inside the house and through the screen. The evidence is conflicting as to whether or not the officer was reaching to open the door or was just knocking for admittance. Appellant claims that he had been repeatedly persecuted by this officer; that on many occasions he had been stopped by Burbanks in Dewitt, and had his person searched, as well as his truck, ostensibly for illegal liquor. Baxter states that though Burbanks never found any liquor, and had no just cause for such search, he was told by the marshall in effect that he would be searched "everytime he saw him." He further contends that at the time of the killing Burbanks was attempting to arrest him illegally, was reaching for his gun, and that he (appellant) fired in self-defense. There

[1] This case here on its first appeal is found in 225 Ark. 239, 281 S. W. 2d 931.

is, however, more than ample evidence to sustain the verdict.

Appellant, in seeking a reversal, sets up numerous assignments of error. Among instructions requested was one to the effect that there was no evidence that Baxter had committed a felony or that the deceased had any reasonable cause to believe that Baxter had committed a felony. Requested instruction No. 6 was to the effect that appellant had not committed a misdemeanor in the presence of the deceased, and a further requested instruction was to the effect there was not sufficient evidence to show deceased had the right to arrest appellant. We think such requested instructions argumentative, and properly refused. *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963. The neighbor who called Burbanks testified that she did not report to him as to who was causing the trouble, and the state's theory is that the officer was only making an investigation of the reported disturbance. At any rate, the court properly instructed the jury as to lawful and unlawful arrests, and we think appellant's theory of the case was adequately presented by such instructions.

Various assignments of error deal with the refusal of the court to give defendant's instruction No. 14 which was as follows:

"Members of the jury may have read newspaper reports during the trial of this case and if any of you have read any such reports, you must disregard any such reports entirely. No jury has any right and it would be wrong for a jury to base its verdict upon newspaper reports, or to allow newspaper reports to influence or affect their verdict in the slightest extent.

"And in this connection the jury is further charged that it must not take into consideration, even to the slightest degree, the result of any former trial of this case. The action taken or result of any former trial must not be considered by this jury and this jury's verdict should be the verdict of this jury and this jury only."

a. In the first place, it would appear that the content of this instruction was a proper subject matter for *voir dire*. In fact, several of the veniremen were questioned as to whether or not they would be influenced by newspaper accounts which they had read. Counsel for appellant, had he so desired, might well have interrogated them as to any possible effect the reading of future newspaper accounts might have upon their deliberations. Likewise, he could have examined them as to any possible prejudice that might exist because of knowledge of appellant's previous conviction for the same offense. Appellant was not required to take any particular juror. He did not exhaust his challenges. Apparently he was satisfied that each juror selected would be able to give him an impartial trial.

b. The requested instruction is cautionary only, and it has been held that the giving or refusing of such instruction lies within the sound discretion of the court. *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356; *Strabel* v. *State,* 192 Wisc. 452, 211 N. W. 773. Actually, the Court did admonish the jury during the trial.[2]

Assignments of error 19 and 20 deal with the Court's action in refusing to allow appellant to ask certain questions of the witness, Sallie Bitner, on cross examination, relative to her past morals and conduct. It is sufficient to state that the court subsequently ruled that these questions might be asked; however, appellant declined to do so.

Another assignment dealt with a question asked by the prosecuting attorney of Baxter during cross examination, it being the contention of appellant that this question informed the jury that appellant had received the death sentence in a previous trial.

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[2] During the examination of one of the witnesses, there was a verbal exchange between the prosecuting attorney and appellant's counsel relative to an affidavit which had been filed after the first trial (in support of motion for a new trial). The court remarked, "Lady and Gentlemen of the jury, you are instructed to try this case on the testimony you hear on the witness stand today and the testimony you hear in the entire case." * * *

Q. "Do you think the death house down at the penitentiary is as dark as the grave?" Appellant objected, and the court instructed the prosecuting attorney not to ask that question, *e. g.,* the objection was sustained. Appellant then moved for a mistrial, and the court cautioned the jury that they must not consider the question. No further objections or exceptions were made, nor was request made for ruling on the motion, and the admonition was apparently treated as sufficient.[3]

A number of the assignments of error deal with the remarks of the court at various intervals during the trial of the cause. We have carefully examined each of these and are of the opinion that no prejudice resulted to the appellant thereby.

Assignment No. 25 relates to the refusal of the court to permit appellant to ask the following question of witness Bradberry, (deputy marshal), in attempting to show that deceased was of a violent and reckless nature. Q. "Now, while he (deceased) was marshal there, I believe you stated you know of some three or four cars he had shot into."[4] The ruling of the court in holding the question improper was correct, as it is well settled that it is not proper to go into specific instances of misconduct, and deceased's disposition could only have been shown by testimony relating to his general reputation. *Burton* v. *State,* 204 Ark. 548, 163 S. W. 2d 160, *Shuffield* v. *State,* 120 Ark. 458, 179 S. W. 650.

It is next contended that the court erred in ordering a special panel for the trial of this cause. The undisputed facts are as follows: The court discovered that the jury commissioners had not signed their certificate as to the regular list of jurors selected for the February

[3] Actually, the subject was presented by appellant himself in answer to the first question propounded by his own counsel after stating his name.

Q. "Walter, I want to ask you this question whether or not you are having any trouble with your eyes?"

A. "Yes, sir, since I have been in the death house over there so long my eyes are awful weak."

[4] This referred to alleged actions in another state.

term, 1956, (as required by Ark. Stats. 1947, § 39-208).[5] A special panel was then ordered, but within a few days it was discovered that the court had failed to swear in the clerk and deputy as required by § 39-209. The court accordingly required the jury commissioners to return and select a second list of special jurors. On this occasion the proper oath was administered to the commissioners and they then proceeded to select qualified jurors from the different localities of Lonoke county (where the case was being tried on a change of venue). The clerk and deputy were sworn as the law requires. The court did not quash either the first or second list, but refused to use them because the Statute was not complied with as set out above. It is sufficient to state that the record does not show an objection by appellant at any time in regard to these proceedings, which we hold renders this assignment meritless. *Johnson* v. *State,* 127 Ark. 516, 192 S. W. 895.

This court, of course, can only proceed on the record, unless it be shown in proper legal manner that said record is incorrect.

As stated at the outset, numerous other assignments of error are set out. No point would be served in listing these separately. We have examined the rulings of the court throughout the trial and find no error. The jury was properly instructed as to the law, and defendant had a fair trial.

Finding no reversible error, the cause is affirmed.

[5] An order was entered on March 28, 1956, finding that said jury commissioners were summonsed back before the court to correct the error, and after being administered the oath required by law, each commissioner, on being examined by the court, stated that it was an omission on their part in failing to certify said jury lists. Each commissioner stated he had examined the list of jurors selected by them, and that the names contained therein were the names and persons they selected to serve at the regular February term, 1956, and they, on the above date, did certify to said list in open court as being correct.

KIMBERLING *v.* ROGERS.

5-1118 297 S. W. 2d 772

Opinion delivered January 21, 1957.

Denver L. Dudley, for appellant.

Fred M. Pickens, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a child custody case involving a little boy nine years of age. The litigants are the paternal grandmother, appellant, and the mother, appellee. In the decree from which comes this appeal the Chancellor awarded the custody of the little boy to the mother for the school term and to the grandmother for the vacation period; and the grandmother brings this appeal.

The custody of this little boy, Larry Kimberling, has been the cause of frequent litigation. First: in September, 1949, Junior Kimberling obtained a divorce from Wanda Kimberling and the Court gave Wanda Kimberling, the mother, the custody of Larry, then thirteen months old. Second: Wanda, being unable to properly care for Larry, persuaded the paternal grandparents, Mr. and Mrs. Mark Kimberling, to take Larry; and later, when Wanda wanted her child, the grandparents resisted. There was a *habeas corpus* proceeding (see *Kimberling* v. *Rogers,* 223 Ark. 348, 265 S. W. 2d 952);

and we affirmed the judgment of the Circuit Court, which had awarded the custody to the mother.

Third: thereupon the grandparents — Mr. and Mrs. Mark Kimberling — intervened in the original 1949 divorce suit, which had awarded the exclusive custody to the mother. In their intervention the grandparents alleged and established by evidence that in October, 1949, Wanda had left Larry with the grandparents; that he had been with them in a good, Christian home; that Junior Kimberling (the boy's father) had been in the armed forces until his death recently; that the success of Wanda's recent marriage to Mr. Rogers was yet to be determined; and that the best interests of Larry — then seven years old — would be served by leaving him with the grandparents, Mr. and Mrs. Mark Kimberling. On May 17, 1954, the Chancery Court decree awarded Larry's custody to the grandparents for the school term and to the mother, Wanda, for the vacation term.

Fourth (the present litigation): after the decree of May 17, 1954, Mr. Mark Kimberling — the grandfather— died; and thereupon, Wanda — the mother — filed the present petition, praying that she have Larry's entire custody. After a patient hearing, the Chancellor entered a decree awarding Larry's custody to Wanda, the mother, during the school term, and to Mrs. Rosie Kimberling, the grandmother, for the vacation period. This appeal is from that decree.[1]

I. *Changed Conditions.* Appellant says that the May 1954 decree should not be disturbed because there has been no change of conditions. But the death of the grandfather, Mr. Mark Kimberling, and the success of Wanda's marriage to Mr. Rogers, constitute sufficient changes in conditions to justify the Court in re-examining its former decree.

[1] Appellee claims that the present appeal was not taken in due time. There is no merit to such contention. Sec. 27-2106.1 Ark. Stats. (from Sec. 2 of Act 555 of 1953) says "that the notice of appeal must be filed within 30 days from the *entry* of the judgment or decree appealed from. . . ." Here the judgment was not actually filed for entry until February 28, 1956; and the notice of appeal was duly filed and given on March 24, 1956. So the notice of appeal was within 30 days from the *entry* of the judgment.

II. *The Best Interests Of The Child.* This is the polestar in these child custody cases. Appellant cites *Brown* v. *Brown,* 218 Ark. 624, 238 S. W. 2d 482, and *Griffen* v. *Newcom,* 219 Ark. 146, 240 S. W. 2d 648, as justifying a reversal of the Chancellor's decree. Appellee cites *Perkins* v. *Perkins,* 226 Ark. 765, 293 S. W. 2d 889, as justifying an affirmance of the chancery decree. Because human nature is as it is, no two child custody cases can ever be exactly the same; so the policy is to examine our other similar child custody cases and then see which one more nearly resembles the case at bar. The same Chancellor who heard the witnesses and entered the decree of May, 1954, also heard the witnesses and made the decree now attacked. Here are pertinent excerpts from his opinion at the close of the hearing from whence comes this appeal:

"This court is concerned with one thing only, that is the welfare of this little fellow in the light of those closest to him. I have seen the little fellow and I would be tickled to take him home with me and end the whole argument. Mark Kimberling, Senior, and Mrs. Kimberling, I think, have proved the right to the eternal love and respect of this little man and I think they have given him a good home, a good clean Christian home. I think they are to be highly commended. I do think they merely did what their son should have done.

"It is not easy for the Court. The entire life of this little fellow can so easily be turned one way or the other if the Court makes a mistake; and as I said, unfortunately there is no completely happy answer to a problem of this kind . . .

"I honestly believe this mother and her present husband are trying honestly and sincerely to establish a good home. Banking on that theory, but not gambling too much on the boy's part, I want to give them an opportunity to prove their sincerity bit by bit. As the counsel on both sides fully understand, the court always retains jurisdiction of a matter of this kind, and custody can be changed. I hate to divide custody, but I have seen that feeling is so high that it will be impossible for

visits to continue in the future with any satisfaction to anybody. I want this boy, if possible, to come to where he will regard his mother as his mother and have love for his mother as he should have . . ."

As aforesaid, the Chancery Court awarded the custody to the mother during the school term and to the grandmother during the vacation. It would serve no useful purpose to abstract and recite the evidence. We have reached the conclusion that the decree should be affirmed because we cannot say that the Chancellor decided against the preponderance of the evidence. His familiarity with the situation is eloquently expressed by the quoted portions of his opinion. He has power to modify the decree should circumstances so require.

Affirmed.

McVay *v.* Stupenti.

5-1140 297 S. W. 2d 769

Opinion delivered January 21, 1957.

J. H. Spears, for appellant.

Hale & Fogleman, for appellee.

MINOR W. MILLWEE, J. This is a proceeding by appellant, Dr. L. C. McVay, to establish a private road across certain lands belonging to appellee, U. Stupenti, under Ark. Stats., Secs. 76-110 and 76-111. The lands are near the intersection of U. S. Highways 61, 63 and 64 west of Marion in Crittenden County, Arkansas.

Appellant owns lands along a drainage canal which failed to follow the property lines between his land and that owned by appellee along U. S. Highway 63 so that a small strip of appellant's land was left east of the canal and immediately west of appellee's land. The strip comprises about 2 1/2 acres along a ditch bank and is about 97 feet wide at the widest point and tapers to a point on the north end and to a width of 14 to 20 feet at the south end. Appellant's land is unimproved and for several years a portion of it has been cultivated by his son-in-law. Ingress and egress to and from the land to Highway 63 for purposes of cultivating and harvesting crops has been maintained by crossing the tract owned by appellee near a tenant house along a ditch bank and a turn row which appellee used in the cultivation of his land. Appellee has at all times consented and never objected to this use of his land by the appellant.

After some negotiations between the parties for an exchange of lands or the construction of a road, appellant filed the instant proceeding in county court alleging he was without any means of access to his lands which were so situated as to render it necessary that he have a private road across appellee's lands to Highway 63 and asked that viewers be appointed to establish such road in accordance with the statute. The county court first refused to appoint viewers but on appeal to circuit court was directed to do so and to determine whether a road should be established. On remand viewers were appointed who filed majority and minority reports. Hearings and personal inspections of the premises by the county

court and the circuit court, on appeal, resulted in a judgment and findings that no present necessity existed for the establishment of a private road as sought by appellant and that the petition should be denied.

Appellant argues the trial court erred in failing to follow the report of the two majority viewers by granting the petition of appellant. We think a proper determination of such contention depends upon whether or not the evidence is sufficient to sustain the court's finding that no present necessity existed for the establishment of the road as sought by appellant. In making this determination the evidence must be viewed in the light most favorable to appellee under our settled rule.

The statute in question provides that when the land of any person is so situated as to render it necessary for him to have a private road therefrom to a public road over the land of another who shall refuse to allow it then the county court shall on the petition of such owner appoint viewers to lay off said road. Upon their report to the county court an order shall be made establishing said road provided the court be of the opinion that it is necessary for petitioner to have it. The statute also provides that the report of the viewers shall describe the route of the road and the damages to the owners of lands through which it passes and that the road shall be laid out so as to produce the least inconvenience to the parties through whose land it passes.

We have held that a road established under the statute to become a public road in the sense that it is open to the use of all who see fit to use it. *Roberts* v. *Williams,* 15 Ark. 43; *Pippin* v. *May,* 78 Ark. 18, 93 S. W. 64. In construing the statute we have also held that, while it is not required that a petitioner establish an absolute necessity for such a road, mere inconvenience is not sufficient to entitle one to condemn a way over another's lands which may be taken only upon a showing of reasonable necessity. *Houston* v. *Hanby,* 149 Ark. 486, 232 S. W. 930; *Mohr* v. *Mayberry,* 192 Ark. 324, 90 S. W. 2d 963; *St. Louis-San Francisco Ry. Co.* v. *Logue,* 216 Ark. 64, 224 S. W. 2d 42. In *Pippin* v. *May, supra,* the

court said: "In determining whether such a road is necessary, the court must, of course, take into consideration, not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend it. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not."

The report of the majority viewers appointed by the county court stated: "We feel that Dr. McVay should be permitted to cross the Stupenti property in order to get to his farm land. We recommend that this crossing be provided along a ditch bank at the rear of a tenant house on the Stupenti property. There is ample space at this location for an access road, and it would not disrupt Mr. Stupenti's farming operations at this point. Since the Stupenti property will not be damaged at this location, we do not recommend that Dr. McVay pay any damages to Mr. Stupenti."

One of the majority viewers called as a witness by the appellant testified there was no intent on their part to recommend the construction of a permanent road across appellee's lands; that since their investigation disclosed that appellee had never refused appellant entrance to his land by the "crossing" already in use which could be used as long as appellant was "out there," it was their intention that he continue to go across appellee's land in the future as he had in the past. Apparently it was for this reason that they also declined to recommend that appellant pay any damages despite the fact that the land to be taken had an estimated market value of from $300.00 to $1,500 because it fronted on a U. S. Highway near a busy intersection. While appellant testified he was "sorta thinking" of improving or developing his land "some day," there was no indication that he intended to do so in the near future. Appellant's engineer stated that an access road to the land from U. S. Highway 64 near the south end of the property could be provided by the erection of two bridges

at a cost of $1,500 to $2,000 without the inconvenience to appellee of crossing his strip of land at its widest point.

In none of the cases relied on by appellant did the petitioner already have permissive access to the public highway over the very route that the viewers determined he should, or should not, have a private road. Under all the facts and circumstances we hold the evidence sufficient to sustain the finding that there was no reasonable necessity for the establishment of the road in question.

Affirmed.

WILLIAMS *v.* STATE.

4858 297 S. W. 2d 771

Opinion delivered January 21, 1957.

Pat Robinson and *Patsy Robinson,* for appellant.

Tom Gentry, Attorney General; *William M. Dabbs, Jr.,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted of having murdered Arnold Hutchison and was

sentenced to life imprisonment. The evidence is amply sufficient to support the jury's finding of guilt. The homicide arose from a dice game that was in progress after midnight on the morning of May 12, 1956, at the home of Fred Wesley in the city of Stamps. According to the state's testimony, Hutchison refused to lend Williams two dollars so that the latter might enter the game. After an exchange of heated words Williams went home and got his shotgun. The state's witnesses say that the accused did not re-enter the Wesley house when he returned with the shotgun; from the steps he called to one of the players to move out of the way and then fired through the screen door, killing Hutchison. This testimony fully sustains the charge of murder in the first degree.

For reversal it is argued that the court erred in arraigning Williams before he was arrested. This contention is based on the fact that the bench warrant in the record was served on May 15, although the accused had entered his plea of not guilty on the preceding day. The sheriff testified, however, that Williams voluntarily surrendered himself on May 12, a few hours after the shooting, and was put in jail on the same day. Even if Williams was not still under arrest when he was arraigned two days later he made no objection at the time. The record reflects that when the case came on to be heard the appellant's attorney announced his readiness for trial (though a motion for a continuance was filed and overruled). By such an announcement the accused waives his right to a formal arraignment. *Bettis* v. *State,* 164 Ark. 17, 261 S. W. 46. If the arraignment may be waived in its entirety it follows that a supposed defect in the arraignment can also be waived; for the whole includes its parts.

The sheriff testified that on the afternoon of May 12 Williams signed a confession, and while the sheriff was on the witness stand this document was handed to him by the prosecuting attorney, to refresh the witness's memory. The defense objected to this procedure, but, by failing to save an exception, apparently acquiesced

in the court's adverse ruling. In the absence of an exception the asserted error is not available on appeal. *Walker* v. *State,* 138 Ark. 517, 212 S. W. 319.

The appellant's attorney was correctly permitted to examine the written confession and, during the accused's examination in chief, exhibited it to the witness in eliciting a denial of a damaging statement in the confession. Later on, when the prosecuting attorney sought to cross-examine Williams about other statements in the confession, the defense objected on the ground that the paper had not been offered in evidence. Quite apart from the possibility that the prosecution's questions were a proper method of laying the foundation for impeachment by proof of prior inconsistent statements, voluntarily made, the defense had gone into the matter on direct examination and therefore could not object to its further development on cross examination. *Robinson* v. *State,* 174 Ark. 899, 298 S. W. 349.

We have studied the other assignments of error and find them to be without merit. Affirmed.

PEAIRS *v.* STATE.

4855 297 S. W. 2d 775

Opinion delivered January 21, 1957.

McMath, Leatherman & Woods, for appellant.

Tom Gentry, Attorney General; *Ben J. Harrison,* Assistant Attorney General, for appellee.

PAUL WARD, Associate Justice. This appeal challenges the constitutionality of the criminal provision of Ark. Stats. 51-601 as being in violation of Art. 2, Sec. 16, of the constitution of the State of Arkansas, presenting a question of first impression to this court.

The section above mentioned consists of two legislative acts, viz: Act 146 of 1895 and Act 563 of 1923. The first act provides generally that laborers and materialmen shall have a lien on the property constructed or repaired, and provides how said lien shall be perfected and enforced. The second act added to the first act a criminal provision for failure of the contractor to satisfy the lien, reading as follows:

"Any original or principal contractor or his assignee who shall be paid the contract price or any portion thereof, and who shall fail or refuse to discharge the liens created by this section, to the extent of the contract price received by him, shall be deemed guilty of an offense and punishable as follows:" (If the amount received by the contractor exceeds $10.00, he shall be deemed guilty of a felony, and if less than $10.00, he shall be deemed guilty of a misdemeanor.)

An information charged appellant with a violation of the above criminal statute based on the following factual situation: Appellant, Allen M. Peairs, entered into a contract with the Pan-Am Southern Corporation to build certain large oil tanks in El Dorado. Peairs subcontracted the work to the Baker Tank Company, which furnished the materials and built the oil tanks in question. The Pan-Am Company paid appellant the contract price, but appellant failed to pay the Baker Tank Company. The Baker Tank Company perfected its lien against the property of Pan-Am but appellant failed to discharge the lien.

Appellant was tried and convicted of violating the criminal portion of Section 51-601, and was sentenced to one year in the penitentiary. It is his contention on this appeal that the said criminal statute violates Article 2, Section 16, of the Arkansas Constitution, which

reads as follows: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." After careful consideration we have concluded that appellant's contention must be sustained.

At the very outset we are forcibly impressed with the absence of any language in Section 51-601 which makes fraud or fraudulent intent a part or prerequisite of the criminal offense. It is the absence of such language in the statutes which makes it violative of that portion of the constitution above quoted. As the statute now reads, a contractor would be guilty of a felony if he fails, for any reason, "to discharge the liens," of, in other words, if he fails to pay a debt. It is not difficult to imagine many situations in which a contractor might be prevented from paying the subcontractor or laborers even though he may have acted in all good faith and without any intent to defraud any one, yet, under the wording of the statute, he could be convicted of a felony.

Although this court has not had occasion to pass upon the question under consideration, other jurisdictions have, and those decisions support the conclusion we have reached. In the case of *Commercial National Bank of Sturgis* v. *Smith,* 60 S. D. 376; 244 N. W. 521, the Supreme Court of South Dakota, in dealing with a statute somewhat similar to ours, had this to say: "In our opinion the legislature is without authority to provide that a contractor shall be deemed guilty of a crime punishable by imprisonment for failure to pay the claims of creditors furnishing labor and materials from money paid to him under contract," holding said statute unconstitutional. In this opinion the court referred to *People* v. *Holder,* 53 Cal. App. 45, 199 P. 832, and quoted therefrom as follows: "In our opinion the legislature is without the power to do either of these things. That is, the legislature has not the power to provide that a contractor who breaches his agreement to pay a certain class of debts with money that is his own, shall, for that reason alone, be deemed guilty of a crime punishable with imprisonment."

In an early case, the Supreme Court of Minnesota, in the case of *Meyer* v. *Berlandi, et al.,* 39 Minn. 438, 40 N. W. 513, in speaking of the criminal provision of a lien statute, had this to say:

"Section 3, if not unconstitutional on other grounds, is clearly repugnant to Section 12, Art. 1, of the constitution of the state, prohibiting imprisonment for debt. It is not necessary that a contractor be guilty of any fraud or other tort in order to subject him to the penalties of this section. If he has received his pay from the owner of the property, and owes a debt due on contract to one of his laborers or materialmen which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the penitentiary. No matter how honestly he may have paid over the last dollar which he has received on his contract, yet if, through honest mistake, he took the job too cheap, or if by unforseen accident it cost more than he anticipated, and for that reason he cannot pay all that he owes for labor or material, he is a felon. This is returning with a vengeance to the old barbarous fiction upon which imprisonment for debt was originally based."

Later the legislature of Minnesota changed the statute referred to above, making the intent to defraud a necessary element of the crime. The amended statute was held constitutional in the case of *State* v. *Harris,* 134 Minn. 35, 158 N. W. 829, where the court, in referring to the original statute and to the decision in the *Meyer* case, *supra,* said: "When, however, that case is examined, it will be found to sustain the legislation here in question, rather than to overturn it. The 'intent to defraud,' which is the gist of the Act of 1915 (Amended Act), was not contained in the act there under consideration, and it is the 'intent to defraud' which makes unlawful and criminal the acts prohibited by the statute." The same line of reasoning, when applied to the statute under consideration, forces the conclusion that it violates the constitutional prohibition against imprisonment for debt in the absence of fraud.

The Supreme Court of the United States in the early case of *Bailey* v. *Alabama,* 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191, in a lengthy and well considered opinion, discussed an Alabama statute which, in general, provided that any person who, with *intent to defraud* his employer, entered into a written contract for service and thereby obtained money or property, and who failed to perform said services would be guilty of a criminal offense. As set forth in the opinion, however, this statute was later amended so as to provide that the *intent to defraud* would be *presumed* if the service was not in fact rendered. In holding the amended statute unconstitutional the court noted that the original statute had been upheld in the case of *Ex Parte Riley,* 94 Alabama 82, 10 So. 528, on the ground that it was necessary to prove "the intent to defraud," and that this was not necessary in the amended statute. In that case the court pointed out it was no longer necessary for the prosecution to establish the intent to defraud which, as the court said, constituted the gist of the offense.

The *Bailey* case has been cited with approval many tines by the United States Supreme Court and has in no instance been overruled. Some of these cases are: *Pollock* v. *Williams, Sheriff,* (Fla.), 322 U. S. 4, 23; 64 S. Ct. 792, 88 L. Ed. 1095; *Morrison, et al.* v. *California,* 291 U. S. 82, 31 S. Ct. 145, 55 L. Ed. 191; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 52 S. Ct. 103, 76 L. Ed. 136; and *Minski* v. *U. S.,* 131 F. 2d 614.

The state thinks the constitutionality of the questioned statute is sustained by the holdings in *State* v. *Hertzog,* 92 S. C. 14, 75 S. E. 374, and *State* v. *Williams, et al.,* 133 Wash. 121, 233 Pac. 285, but we do not agree. The *Hertzog* case dealt with a constitutional provision like ours, but the statute was different. The South Carolina statute created a lien (in favor of the laborer or materialman) on the money paid by the owner to the contractor, and the defendant was charged with, and convicted for, violating a general statute "which, in general terms, made a criminal offense the disposition of any personal property upon which a lien exists," etc.

The *Williams* case dealt with a statute which started out with this language:

"Every person who, with *intent to deprive* or *defraud,* the owner thereof," etc. (emphasis supplied).

The above quoted language was what convinced the Washington court the statute was constitutional. It is the lack of the same or similar language in Sec. 51-601 which forces us to conclude that said section violates Art. 2. Sec. 16 of our constitution.

Reversed and dismissed.

ASSOCIATED SEED GROWERS, INC. *v.* JOHNSON.

5-1114 297 S. W. 2d 934

Opinion delivered January 21, 1957.

[Rehearing denied February 18, 1957]

Warner, Warner & Ragon, for appellant.

Batchelor & Batchelor and *Ralph W. Robinson,* for appellee.

SAM ROBINSON, Associate Justice. The appellant, Associated Seed Growers, Inc., is engaged in producing and selling various kinds of seeds. The appellees purchased Logan Bean seed from appellant; the beans produced from such seed were defective, and, therefore, unsalable. Appellees filed this suit against the seed company, alleging the beans were unsalable because they were afflicted with a disease known as "common bean mosaic"; that the seed company had given express and implied warranties that the seeds were resistant to such a disease, which is seed borne. This suit is based on a breach of such alleged warranties. There was a verdict and judgment for appellees in the sum of $2,500.

The evidence was sufficient to take the case to the jury on the question of whether the beans were defective due to common bean mosaic. Appellant produced weighty evidence to the effect that the unsalable condition of the beans was not due to that disease, but there is substantial evidence to the contrary. It is not disputed that the beans were unsalable. Marshall Johnson, Harold Ballentine and Boyce Wofford qualified as experts, through many years of experience by producing and dealing in beans, testified that in their opinion the beans were unsalable because they were afflicted with common bean mosaic. Appellant questions the qualifications of the witnesses to testify as experts. True, they were not trained pathologists, but they had long years of experience with beans, and a witness may qualify as an expert by experience. The court said, in *Nixon et al., Receivers* v. *Fulkerson,* 128 Ark. 172, 193 S. W. 500: "The

rule with reference to experts is that the witness must be 'possessed of such experience, skill, or science in the particular subject or inquiry as entitles his opinion to pass for scientific truth. The knowledge contemplated by the rules is knowledge acquired, either from actual study or long experience, in the particular field toward which the inquiry is directed.' "

The principal issue on appeal is whether the seed company gave an express or implied warranty with regard to the fitness of the seed. Appellee, Johnson, acting for himself and the other appellees herein, bought the seed from appellant. Johnson had one of appellant's catalogues; he testified that he studied the catalogue and referred to it in ordering seed. Furthermore, it was stipulated that Johnson used the catalogue in buying seed from appellant. The catalogue described the seed as being resistant to common bean mosaic.

Ark. Stats. § 68-1415 provides: "*Implied warranty of quality or fitness.*—Subject to the provisions of this act (§§ 68-1401—68-1480) and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."

Ark. Stats. § 68-1412 provides: "*Express warranty defined.*—Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if

the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon . . ."

Appellant does not insist that the statement in the catalogue to the effect that the beans were resistant to common bean mosaic, coupled with the statutes set out above, would not be sufficient to constitute an express or implied warranty if that were the entire picture. But, appellant says that in making the sale of the beans, it limited the warranty or disclaimed the warranty. This brings us to a consideration of the facts surrounding the actual sale. The transaction came about in this manner: Johnson called Henry Hicks, the manager of appellant's Memphis branch, and ordered the Logan Bean seed. Hicks told him that they did not have the seed at Memphis, but thought he might supply them out of their branch at Omaha, Nebraska. After talking to Johnson, Hicks ascertained that the seed were available at Omaha and wired Johnson that they would be shipped. The telegram stated: "SHIPPING TODAY FROM OMAHA VIA TRUCK TWENTY BAGS LOGAN. THANKS." On the same day that the telegram was sent, Hicks wrote to Johnson as follows: "Following our long distance telephone conversation this morning we found that Logan beans were available at our Omaha warehouse and wired you that we were instructing immediate shipment via truck freight. Accordingly we have entered your order as follows: 2,400 lbs. Beans, Logan, f. o. b., Omaha, Nebraska, .29 1/2 per lb., volume discount 10% . . ." In the upper right hand corner of the letterhead, in small type, was printed the following: "We warrant that the seeds, bulbs and plants we sell are, at the time of delivery, as described on the container within recognized tolerances: But we limit our liability on this warranty to the amount of the purchase price of such seeds, bulbs, and plants, and we give no other or future warranty express or implied. Associated Seed Growers, Inc." The tags on the sacks of beans containing the name and address of the purchaser also had printed thereon the identical disclaimer, as above set out. This disclaimer also appeared on the invoice.

The problem is: Was it a question for the jury to decide as to whether the disclaimer was effective in the existing circumstances. In the first place, it could be said that the contract of purchase was completed when the seed company accepted the order from Johnson by wiring him to the effect that the beans were being shipped. Evidently both parties considered there had been an offer and acceptance. It is not reasonable to believe that Hicks would have taken the liberty of shipping the beans unless he had an order from appellees. Even if it could be said that the contract was not consummated until something further was done by the purchaser, the fact that he did not attempt to cancel the order upon receipt of the telegram left nothing else to be done by either party to complete the contract. Judge Hart said, in *Rock* v. *Deason & Keith,* 146 Ark. 124, 225 S. W. 317: "The order signed by appellees on August 7, 1917, constituted an offer to buy the car load of flour from appellants and the acceptance by appellants on August 9, 1917, constituted a completed contract." In the case at bar, the order was received and accepted by the seller without anything having been said regarding a disclaimer of the express or implied warranty that then existed. Of course, without both parties agreeing to it, a completed contract cannot be modified.

Appellant contends that since the order given by Johnson was not in writing he could not be held to it, and argues that therefore there was no contract, and cites the statute of frauds. But the purchaser would be the one in this instance that could take advantage of the statute, and not the seller, who accepted the order by telegram, and by shipping the seed. Judge Holmes said, in *Edgar* v. *Joseph Breck & Sons Corp.,* 172 Mass. 581, 52 N. E. 1083: "The contract was made when the parties made their oral agreement. It does not matter that at that time it was not evidenced by a memorandum in writing. The statute of frauds could be satisfied later as effectually as at the time. It was satisfied by delivery of the bulbs. The general printed warning on the bill head that the defendant did not warrant seeds could have no effect unless it led to the inference that the old contract

had been rescinded, and a new one substituted, by mutual agreement. Even if the bill had been receipted, it would not have excluded proof of warranty, and, whether there was evidence of a rescission or not, it did not establish one as matter of law."

The courts are not in accord as to the effect to be given to disclaimers such as the one involved here, and appellant has cited several cases sustaining its theory. But we think the better view is as expressed by Judge Holmes in *Edgar* v. *Joseph Breck & Sons Corp., supra,* which is supported by such cases as *Gray* v. *Gurney Seed & Nursery Company,* 62 S. D. 97, 252 N. W. 3, and *Davis* v. *Ferguson Seed Farms,* Tex. Co. App., 255 S. W. 655, where the court said: "We will dispose of this contention of the parties by saying that if a warranty was actually made during the negotiations for the purchase of the seed, and not withdrawn or modified, it should be given effect, irrespective of the printed disclaimers." See also *Moorhead* v. *Minneapolis Seed Company,* 139 Minn. 11, 165 N. W. 484.

Over appellant's objection, appellees introduced evidence to the effect that other beans of the same kind but of a different variety were planted at the same time, under the same conditions, on land adjacent to that on which the Logan beans were planted; that all of the beans were fertilized and cultivated in a like manner, and that all of the beans developed properly except the Logan beans from the seed obtained from appellant. Appellant contends this evidence was not admissible and cites *J. S. Elder Grocery Company* v. *Applegate,* 151 Ark. 565, 237 S. W. 92. In the case at bar, the evidence was admissible as tending to show that the reason the Logan beans failed to develop properly was due to something other than the condition of the soil and the cultivation of the crop. In the *Elder* case, California blackeyed peas failed to germinate, and the appellate court held it was error to allow the purchaser to show that soy beans planted about the same time did germinate, and that whippoorwill peas planted three weeks later germinated. The court pointed out that soy beans and blackeyed peas are

two different things, and that, although the whippoorwill peas might be the same kind of peas as the California blackeyed peas, they were planted three weeks later. There could have been sufficient moisture in the ground when the whippoorwill peas were planted, and not enough moisture to germinate the California blackeyed peas which were planted three weeks earlier. Thus, it can be seen there is quite a distinction between the *Elder* case and the case at bar. Here, the beans were of the same kind but of a different variety, planted on the same soil at the same time, and fertilized and cultivated in the same manner.

Appellant makes the further contention that there was no privity of contract between it and appellees herein, however, the record shows that the beans were purchased by Johnson for all of the appellees. Hence, there was a privity of contract. *Kefauver* v. *Price,* 136 Ark. 342, 206 S. W. 664.

Affirmed.

BRUN *v.* REMBERT.

5-1145 297 S. W. 2d 940

Opinion delivered January 28, 1957.

Hardin, Barton, Hardin & Garner, for appellant.

Holland & Holland, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, (plaintiff below) was awarded a decree of divorce from appellant on September 12, 1944, by the Sebastian Chancery Court. The custody of the minor child, Juanita Marie Brun, was given to appellee, but no support payments for the child were ordered by the court at that time. Subsequent thereto, (May 31, 1946) the court entered an order directing appellant to pay the sum of $32.50 per month for the support of the child, then 13 years of age, and two payments were made under the order. No further payments were made, and on November 2, 1950, Juanita Marie attained her majority. The proof shows that she is presently married, and has a child of her own. On December 31, 1955, more than five years after the last payment became due, appellee filed suit against appellant seeking to reduce to judgment the delinquent payments in the amount of $1,657.50. The amount sought was not questioned, but appellant filed answer setting up other defenses. At the conclusion of the hearing the Chancellor granted the relief sought and entered judgment against appellant in the sum of $1,657.50, together with costs, and providing that execution might issue if judgment was not paid within ten days. From such holding of the Chancellor, comes this appeal.

For reversal, appellant primarily urges that this action is barred by the Statute of Limitations. This is evidently a case of first impression under this defense. Appellee argues that the court in *Pence* v. *Pence,* 223 Ark. 782, 268 S. W. 2d 609, held against this contention. The opinion in the *Pence* case did not go into the matter of limitations, but rather was decided on the question of the mother removing the child without authority to a place unknown to the father, and thus depriving him of

the opportunity to see and visit with said child. While the three year statute of limitations was pleaded in that cause, it was not passed upon by the trial court, and definitely was not passed upon by this court. It might be also stated that the facts in that case were vastly different from those here on appeal. There the child was still a minor so there was a present and continuing duty upon the father to support said child. It is recognized that child support is a family duty, and one which would be incumbent upon a father, even though there were no order requiring such support. *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677. In the case before us, the order for support payments was not a current cause; *the child had attained her majority more than five years before the institution of this suit. Worthington* v. *Worthington,* 207 Ark. 185, 179 S. W. 2d 648. This is an action for the benefit of the ex-wife; the amount sought will not go to the child. It is no more than an effort by a former wife to collect a debt.

All agree that some statute of limitations must apply. The sole question is "Which statute?" Appellant argues both the three and five year periods. The three year statute is set forth at Sec. 37-206, Ark. Statutes, Annotated. The ten year statute (Sec. 37-212) reads as follows: "Judgments and decrees — Ten years. —Actions on all judgments and decrees shall be commenced within ten (10) years after cause of action shall accrue, and not afterward." Section 37-213 provides: "Actions not otherwise provided for — Five years. — All actions not included in the foregoing provisions shall be commenced within five (5) years after the cause of action shall have accrued." The three year statute obviously was not meant to apply in matters of this nature, but appellant earnestly argues that the five year limitation does apply.

Section 29-101, headed "Judgments and Decrees," reads as follows: "Judgment defined. — A judgment is the final determination of the rights of the parties in action." Bouvier's Law Dictionary defines a final decree as "One which finally disposes of a cause, so that noth-

ing further is left for the court to adjudicate." Thus we find that a final decree is conclusive — nothing remains to be done. Appellee insists that the effect of the holding in *Sage* v. *Sage,* 219 Ark. 853, 245 S. W. 2d 398, wherein it was held that past due payments vest in the payee as they accrue, is to declare such vested payments a judgment as contemplated under Section 37-212. Since this section provides a ten year limitation period, appellee contends that her suit was brought in time. We do not concur with this thinking. It is true that in the *Sage* case, *supra,* we held that the trial court had no authority to modify payments which had already become due. The right of modification only extended to future payments. But this was merely to say that once a child support payment falls due, it becomes vested, and is to the payee *"a debt due."* For example, one signs a note providing payments at regular intervals. As each installment falls due, the payee has a "debt due," but still, no one would contend that it would not be necessary to sue on the note and obtain judgment. In order to enforce such a debt due, (support payments) it is necessary to ascertain from time to time the amount of arrearages due and then render judgment for the specific amount. *Jones* v. *Jones,* 204 Ark. 654, 163 S. W. 2d 528. A decree for future payments of permanent alimony is not a final decree upon which an execution may be issued, or which might become a lien on real estate. *Jones* v. *Jones, supra; Frazier* v. *Hanes,* 220 Ark. 765, 249 S. W. 2d 842. While the above mentioned cases refer to alimony for the wife, it has been held that payment of allowances for child support falls in the same category. *Bucknam* v. *Bucknam,* 176 Mass. 229, 57 N. E. 343. This is clearly implied in our statute. Ark. Stats. Sec. 34-1211, "Decree — Alimony — Care of Children. —When a decree shall be entered, the court shall make such order touching the alimony of the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." It is noted that the two are listed together, from which we gather that the General Assembly intended the right of support for the wife, and children, to be construed

in the same manner. A thorough analysis of the aforementioned statute also serves to enlighten us as to what is meant by "Decree." Apparently "decree" and "order" are considered as being separate. The statute does not recite "when a decree shall be entered, the court *shall therein provide* for provisions of alimony for the wife and care of the children," but rather from the verbiage, as we construe it, the meaning is "when a decree shall be entered, the court shall *also* make such order touching the alimony of the wife and care of the children."

While appellee on the one hand insists that she already has a judgment, it is noticeable that her prayer for relief asks judgment against appellant. If appellee's theory were correct, it, of course, would not be necessary to ask for judgment at all. It would only be necessary to issue execution.

In conformity with the above reasoning, we hold that accumulated or past due child support payments, are not a judgment, (or final decree) but only the *right to a judgment.* The order in a decree awarding future child support payments is not the decree itself, but only an order. This is true because such an order deals with *things yet to be done.* A judgment (or final decree) deals with matters *already done,* and is thus final. Since the order for child support is not a final decree as contemplated by the statute, it must therefore follow that the ten year statute does not apply, and the five year statute of limitations, (known as the "catch-all" because it covers all actions not previously covered by other limitation statutes) is the statute applicable to this cause. Appellee, accordingly, was not timely in instituting the action. It should be pointed out that the question as to a father's liability for support payments more than five years delinquent *but while the child is still a minor* is not adjudicated herein. This cause deals only with a plea of limitations, where suit was instituted more than five years after the minor attained her majority.

The cause is reversed and dismissed.

HALBERT *v.* BLOCK-MEEKS REALTY CO.

5-1146 297 S. W. 2d 924

Opinion delivered January 28, 1957.

[redacted]

Joseph C. Kemp, for appellant.

Spitzberg, Mitchell & Hays and *Beresford L. Church, Jr.,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Block-Meeks Realty Co., brought this suit against appellants, Roy Halbert and his wife Alice Halbert, for a 5% sales commission on the sale of certain real property in Little Rock. The listing price was $16,500. Trial before the court, sitting as a jury, resulted in a verdict for appellee for $825 and from the judgment is this appeal.

For reversal appellants rely on the following points: "1. The listing contract executed between the parties had expired before the sale by the defendants. 2. The

plaintiff failed to prove that the sale was made 'on information given, received or obtained through' the plaintiff. 3. There is no proof that the plaintiff was the procuring cause of the sale. 4. The plaintiff failed to prove that it found a buyer ready, willing and able to buy according to the fixed price set out in the contract. 5. The evidence does not support a finding that the defendants received value in the amount of $16,500 for their property." The trial court found against appellants on all of these contentions, and we think correctly so. The evidence shows that on July 27, 1955, appellants entered into an *exclusive* listing contract with the appellee real estate firm for the sale of the property involved, No. 1 Myrtle Lane, from July 27, 1955 "till 8-15-55." During this listing period there was evidence that Mr. Block, one of the appellees, attempted to bring about a sale or trade of the property to Mr. and Mrs. Roy Bosson and that on August 16, 1955, the Bossons conveyed their home to the Halberts as part of the consideration for the transfer of the property here involved, No. 1 Myrtle Lane, which was later conveyed by the Halberts to the Bossons. It appears that Block made a diligent effort to bring about the sale of the Myrtle Lane property to the Bossons, such deal to include Bosson's equity in the Markham Street property. Roy Bosson testified, in effect, that he and his wife bought the Myrtle Lane property from Roy Halbert and his wife; they looked at the property shortly after July 25, 1955; that the first contact he had with Halbert was when he, his wife, and daughter were visiting the property and Mr. Halbert came in; that later Halbert brought Mr. Block to Bosson's Markham Street property to make an appraisal of it, and that Block examined the house thoroughly. Bosson did observe Block-Meeks signs on the Myrtle Lane property at the time. It was stipulated that the Bossons executed a deed to their Markham Street property to the Halberts August 16, 1955. Bosson further testified that it was a day or two before he and his wife executed this deed that he reached an agreement with the Halberts for the purchase of the Myrtle Lane property here involved. Roy Halbert testified to the same effect. The listing contract

contained this provision: "If said property be sold or disposed of during the period above stated, no matter by whom or in what manner, I agree to pay the Block-Meeks Realty Company a commission of Five (5%) as compensation for the services of Block-Meeks Realty Company to be rendered herein." As pointed out, it is undisputed that the deed from the Bossons to the Halberts, conveying the West Markham Street property, was executed August 16, 1955, and Bosson testified that his agreement with Halbert to sell the Halbert property to him was a day or two before the execution of this deed. We hold that there was substantial evidence to support the finding of the trial court that the sale was made during the listing period and for the listing price, amounting to $16,500. In the circumstances here we think it was clearly the intention of the parties that the day of August 15, 1955, should be given an inclusive meaning, that is, that the contract did not expire till the end of that day. Mark Block testified that such was his understanding. ". . . no general rule can be laid down to determine whether the word 'until' is a word of inclusion or exclusion. A strictly literal definition would doubtless make it one of exclusion, but popular use is quite as likely to give it an inclusive as an exclusive sense. The use of the word in particular instances may be such as to leave no room for doubt as to its meaning, and, in such cases, the court will give it the meaning intended. Where the word is used with reference to a future day on which something is required to be done, 'until' may have an inclusive or an exclusive meaning, according to the use to which it is applied, the nature of the transaction which it specifies, and the connection in which it is used; and it may be held to include the day to which it is prefixed." 52 Am. Jur., Time, § 25, p. 351. See also *Thorn* v. *Delany and Pennywit,* 6 Ark. 219, where we held that where an appellant had been given "until" July 5 to render a bill of exceptions, and the tender was made on that day, it was within the time allowed.

Under this contract we hold that appellee had an *exclusive* listing of the Myrtle Lane property, and when

it was shown that the sale of this property was made by the Halberts to the Bossons within the listing time, it made no difference to whom or in what manner the Halberts sold to the Bossons, they could not defeat appellee's commission, even though the Halberts sold to a stranger to appellee. It was not necessary under the plain wording of the contract for appellee to show that the sale was made on information given or received or obtained through appellee's efforts, or that appellee had found a buyer, ready, willing and able to buy, for the contract contained no such provisions. In other words, during the listing period, appellants could not sell their property to anyone, without becoming liable to appellee for the commission specified in the contract. There was another provision of the contract which provided: "If said property be sold or disposed of *after* the above period on information given, received or obtained through this agency, I agree to pay the Block-Meeks Realty Company the commission as herein provided." Obviously this provision would only come into play had the sale of the property here been consummated after, — and not before —, the expiration of the exclusive listing period, and under its terms appellee could recover its commission only on showing that the sale was made after the listing period "on information given, received or obtained through this (appellee's) agency." "While a contract employing a broker and providing for the payment of a commission to him may be valid, binding, and enforceable according to its terms, there is nothing special or peculiar about it which calls for its construction other than by the rules which govern the interpretation of contracts generally." 12 C. J. S. § 59, p. 133. In *Hardwick* v. *Marsh,* 96 Ark. 23, 130 S. W. 524, in construing a contract on a real estate commission, we said: ". . . the contract expressly stipulated for a definite period of time within which the agent might make a sale. In such case the contract implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency unless there is a reservation to the contrary . . . Now, if the principal cannot, under a contract of this kind, stipulating a definite time

which the sale may be made revoke the agency directly, it follows that he can not do so indirectly by making a sale of the property himself, thereby putting it beyond the power of the agent to perform the contract. The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby." The principles of law announced in the case of *Moore* v. *Holman Real Estate Co.,* 129 Ark. 465, 196 S. W. 479, also apply with equal force here.

Finding no error, the judgment is affirmed.

S. & M. Oil Company *v.* Mosley.

5-1123 297 S. W. 2d 926

Opinion delivered January 28, 1957.

Carneal Warfield, for appellant.

Grubbs & Grubbs, for appellee.

ED. F. MCFADDIN, Associate Justice. This suit was brought by appellee, Jack Mosley,[1] to have appellant, S. & M. Oil Company, declared a constructive trustee of a lot, and filling station thereon, in the City of Eudora, and to obtain performance of the constructive trust by the execution and delivery of a deed to appellee. The Chancery Court awarded the relief prayed, and this appeal resulted.

The background facts are largely undisputed. In the fall of 1951, Jack Mosley and W. R. Smith (acting for himself and other members of the Smith family) organized a corporation named "S. & M. Oil Company." The corporation was (a) to become a bulk distributor for the "Pan-Am" products in the Eudora territory; and (b) to own and lease to Pan-Am Southern Oil Company (herein referred to as "Pan-Am") a filling station in Eudora where "Pan-Am" products would be sold at retail. Mosley was to pay $10,000 for half of the corporate stock, and the Smiths were to pay a like amount for the other half. Mosley paid his $10,000, but the Smiths, instead of paying $10,000, only paid an amount between $800 and $1,800. As a result of the Smiths' failure, the S. & M. Oil Company was in financial difficulties from the beginning. In the spring of 1952, "Pan-Am" took over the bulk plant operation and Mosley assumed the other liabilities of S. & M. Oil Company; and, by deed dated March 13, 1952, the S. & M. Oil Company duly conveyed to Jack Mosley the filling station property in Eudora. The validity of this deed is unquestioned.

The S. & M. Oil Company had borrowed from a bank in Eudora approximately $12,800, which had been used in the construction of the filling station. A New Orleans bank had agreed to make the S. & M. Oil Company a loan of $15,000, secured by a first mortgage on the filling station property and assignment of rentals; and "Pan-Am" had agreed to rent the filling station from the S. & M. Oil Company at a monthly rental, which was to be paid direct to the New Orleans bank to amortize

[1] Mosley's wife was a party plaintiff and is an appellee, but her only interest is a claim of dower, so we refer to Jack Mosley as "appellee."

the $15,000 loan. The Eudora bank money was a short term loan and was to be retired from the proceeds of the New Orleans bank loan. All of this matter was pending in March, 1952, when the S. & M. Oil Company deeded the filling station property to Mosley and he assumed the outstanding obligations of the S. & M. Oil Company. In May, 1952, the New Orleans bank was ready to take the first mortgage from the S. & M. Oil Company and advance the $15,000. But, in the meantime, the title had been transferred by the S. & M. Oil Company to Mosley.

The foregoing are the background facts; and we get now to the points in dispute. In order to prevent a delay in closing the loan with the New Orleans bank, the representative of "Pan-Am," Mr. Mosley, and his attorney, Mr. Grubbs, went to W. R. Smith and explained the situation to him and asked if he would agree that the title be transferred back to the S. & M. Oil Company and the mortgage and papers made to the New Orleans bank, and then the S. & M. Oil Company would re-transfer the title to Mosley, just as had been done in the deed of March 19, 1952, previously mentioned. W. R. Smith, secretary of the S. & M. Oil Company, acting for himself and the other members of the Smith family and the corporation, agreed to such proposition. Accordingly, Mosley and wife deeded the filling station property back to the S. & M. Oil Company; the mortgage and other papers were made to the New Orleans bank; the $15,000 obtained from that bank was used to retire the Eudora bank loan; and then W. R. Smith, acting for himself and the S. & M. Oil Company, refused to reconvey the filling station property to Mosley. He (Mosley) then brought this suit to have the S. & M. Oil Company declared a constructive trustee of the legal title to the filling station property, and to require that it be reconveyed to him. The Chancery Court granted the prayed relief and the correctness of that decree is the issue here.

We have a multitude of cases involving constructive trusts. Some of them are: *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910; *Barron* v. *Stuart,* 136 Ark.

481, 207 S. W. 22; *Moore* v. *Oates,* 143 Ark. 328, 220 S. W. 657; *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338; *Eason* v. *Wheeler,* 167 Ark. 320, 268 S. W. 29; *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94; *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; *Patton* v. *Randolph,* 197 Ark. 653, 124 S. W. 2d 823; *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793; and *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840.

From our cases, and from authorities generally, the following rules — applicable to this case — are clearly recognized: (a) a constructive trust in lands — as distinguished from an express trust[2] — may be shown to have been established by parol, but such evidence must be clear, cogent and convincing; and (b) in the absence of family relationship or confidential relationship, the evidence required to establish a constructive trust must show that the original promise to reconvey was made with a fraudulent intention; and the mere failure to reconvey — standing alone — is not sufficient to establish the fraudulent intent.

With these two applicable rules before us, we conclude that the decree of the Chancery Court should be affirmed. Appellee presented the required quantum of evidence to show that Smith had agreed that the S. & M. Oil Company would reconvey the filling station property to Mosley as soon as the mortgage to the New Orleans bank had been consummated. In fact, Smith himself admitted as much on cross-examination:

"Q. Then, Mr. Smith, regarding the reconveyance of this property back to Jack Mosley, the only difference, as I understand, between your testimony and Mr. Mosley's testimony is that he was also to execute another deed back to S. & M. Oil Company.

"A. I think that is substantially correct, other than perhaps some difference in detail."

Furthermore, appellee established by the required quantum of evidence the fact that Smith did not un-

[2] As regards express trusts involving lands or tenements, the Statute requires that they can be proved only by some written instrument. See § 38-106 Ark. Stats.

equivocally intend for the S. & M. Oil Company to reconvey the filling station property to Mosley after the New Orleans bank mortgage had been executed. As his reason for the S. & M. Oil Company refusing to reconvey the property to Mosley after the New Orleans bank mortgage had been executed, Smith claimed: that when the deed from S. & M. Oil Company to Mosley had been executed in March, 1952 — as heretofore recited — Mosley had agreed that he would execute and place in escrow an ultimate reconveyance transferring the filling station property back to S. & M. Oil Company, so that the ultimate equity in the filling station property — after the New Orleans bank had been paid in full — would be owned equally by Mosley on the one part and the Smith interests on the other part. So Smith contended in the present suit that the S. & M. Oil Company would not convey the property to Mosley unless and until Mosley made the ultimate reconveyance to the S. & M. Oil Company so that the equities could be ultimately divided as claimed by Smith.

When we remember that Mosley had paid $10,000 for capital stock in the S. & M. Oil Company and that the Smiths had paid no more than $1,800 for stock in the Company, the inequality of such payments to a "fifty-fifty" division in the ultimate equity becomes glaringly apparent; and the inequality makes unlikely any such agreement for ultimate reconveyance, as is claimed by Smith. The Chancery Court found that Smith did not offer sufficient proof to establish his alleged ultimate reconveyance of title to S. & M. Oil Company; and we agree with the Chancery Court on this point.

So with the ultimate reconveyance not being proved, the record stands in this shape: Smith admitted that there was to be an immediate reconveyance to Mosley from the S. & M. Oil Company after the execution of the mortgage to the New Orleans bank; and Smith has failed to prove any ultimate reconveyance by Mosley to the S. & M. Oil Company. Therefore, Smith never intended for the S. & M. Oil Company to execute the deed to Mosley unless and until Mosley executed the ultimate re-

conveyance. Smith does not claim that when he had the conversation with Mosley, Clardy and Grubbs, he (Smith) ever mentioned the ultimate reconveyance. It remained undisclosed to those who heard him agree to the immediate reconveyance to Mosley.

In the light of the foregoing and other evidence in the record, we conclude that the decree should be affirmed.

WASHINGTON *v.* STATE.

4857 297 S. W. 2d 930

Opinion delivered January 28, 1957.

No brief for appellant.

Tom Gentry, Atty. General; *Roy Finch, Jr.,* Assistant Atty. General, for appellee.

MINOR W. MILLWEE, Associate Justice. E. W. Lee resides in North Little Rock, Arkansas, where he has been employed at the shops of the Missouri Pacific Lines for 40 years. On December 9, 1955, approximately $6,200 in currency was stolen from Lee's home on Locust Street. The money was kept in a small locked container in a closet which was also locked and represented savings by Lee and his former wife since 1929.

On or about December 30, 1955, the father of appellant reported to Little Rock detectives that he had information that appellant had been spending "some extra money" and had been seen with a "large roll" of money. A search was made for appellant and two other youths who had been staying at a hotel on Ninth Street and spending rather freely. Appellant was apprehended on the streets about 2 o'clock the next morning. He freely admitted to the officers that he broke in the Lee home, took the money and hid it under a vacant house on Vine Street. His description of the manner of breaking and entering corresponded with that previously given the officers by Lee. He was taken to the Vine Street address where he crawled under the house and brought out about $5,000 which included forty-five $100 bills and six $50.00 bills identified as belonging to Lee. Police also recovered two $100 bills from two companions to whom appellant had given the money to get them "to let him alone."

At the trial held upon his plea of not guilty to burglary and grand larceny charges, appellant offered no evidence in contradiction of the foregoing proof adduced by the State. He has appealed from a verdict and judgment finding him guilty on both counts and fixing his punishment at the minimum of 2 years in the penitentiary for burglary and one year for grand larceny, the sentences to run concurrently.

The proof by the State is ample to sustain the verdict and there is no merit in the five assignments of error by appellant which question its sufficiency for that purpose.

The next assignment of error relates to the following answer given by Officer Jack Morgan when counsel for appellant asked him whether he knew appellant was a minor about sixteen years of age: "Yes, we had him one other time." Appellant's objection to the answer was promptly sustained by the trial court and the jury admonished not to consider it. If it be assumed that the answer was unresponsive to the question and erroneously given, any possible prejudice arising therefrom was cured by the court's action. *Howell* v. *State,* 220 Ark. 278, 247 S. W. 2d 952.

Error is also assigned in the overruling of appellant's objections to certain admissions which the police officers testified he made on the ground that his parents were not contacted. It should be noted that appellant's father first contacted the officers. There is no proof that appellant was mistreated in any manner and no contradiction of the voluntary nature of the admissions. Under the law infants from the age of fourteen years are presumed capable of committing crime and of being responsible therefor in the same manner as in the case of adults. *Gilchrist* v. *State,* 100 Ark. 300, 140 S. W. 260. There is nothing to rebut this presumption in the instant case, or to require that appellant's parents be contacted prior to interrogation by the officers. Under Ark. Stats., Sec. 46-302 it is also within the trial court's discretion to impose either a penitentiary sentence or a sentence to the reform school upon minors under eighteen years of age convicted of a felony. *Freeman* v. *State,* 158 Ark. 262, 249 S. W. 582, 250 S. W. 522.

We have examined other assignments of error by appellant and find no merit in them. The judgment is accordingly affirmed.

SPICER *v.* SPICER.

5-1153 297 S. W. 2d 931

Opinion delivered January 28, 1957.

[redacted]

Henry B. Whitley, for appellant.

Keith, Clegg & Eckert, for appellee.

GEORGE ROSE SMITH, J. In 1947 the appellant, Frank W. Spicer, brought this suit to reform a deed which he and his mother, Daisy Spicer, had made to the appellees in 1946. A summons was issued and apparently served, but for reasons not explained by the record the case was allowed to lie dormant for several years without any pleading having been filed by the defendants. In 1956 the appellees demurred to the complaint, upon the ground that Daisy Spicer is a necessary party to the suit, that she has not been made a party, and that the suit is therefore barred by limitations. This appeal is from an order sustaining the demurrer and dismissing the case.

The complaint alleges that on February 1, 1946, the plaintiff owned an undivided one-fourth interest in certain land, subject to the dower of Daisy Spicer. On that date the plaintiff and Daisy Spicer signed a quitclaim deed conveying the land to the defendants. Because the person who was to prepare the deed was busy Spicer signed it in blank, with the understanding that it would be completed later and that his oil and gas interest would be reserved by him. It is asserted that by mutual mistake the reservation of the plaintiff's oil and gas interest was not inserted when the blank form was filled in. The prayer is that the deed be canceled for want of de-

livery, or, in the alternative, that it be reformed to include the reservation of the plaintiff's mineral interest.

An entire complaint is not demurrable if any good cause of action is stated. *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749. In our opinion this complaint does not show on its face that the alternative cause of action for reformation is barred. Needless to say, the appellees do not suggest that the appellant's right to reformation of the 1946 deed was already barred when this suit was filed in 1947. They merely insist that Daisy Spicer is a necessary party and that the plaintiff waited too long before bringing her into the case.

The trouble with this argument lies in its assumption that Daisy Spicer is a necessary party. As a general rule it is true that the grantors must be joined in a suit to reform a deed, but this is because each grantor is ordinarily a real party in interest. *Oliver* v. *Clifton,* 59 Ark. 187, 26 S. W. 817. With respect to the subject matter of this litigation the appellant was the sole grantor, for he alone had any interest in the mineral reservation that is said to have been overlooked. Daisy Spicer joined in the deed for the purpose of conveying a separate property right — her vested dower as the widow of H. F. Spicer. As far as the complaint shows, Daisy Spicer is a stranger to this controversy; she has no pecuniary interest that can possibly be affected by a decree for or against the plaintiff. In these circumstances the rule that the grantors must be joined does not require that she be made a party to the suit. See *Hargis* v. *Lawrence,* 135 Ark. 321, 204 S. W. 755.

Reversed, the demurrer to be overruled.

ELMORE, ADMR. *v.* DILLARD.

5-1135 298 S. W. 2d 338

Opinion delivered January 28, 1957.

[Rehearing denied March 4, 1957]

Collins, Edwards, Core & Collins, for appellant.

George E. Steel and *Gordon B. Carlton,* for appellee.

PAUL WARD, Associate Justice. Harold Elmore died as the result of injuries which he received on November 16, 1954 while riding in an automobile being driven by O. J. Zacharias. The administrator of the estate of Harold Elmore filed suit against Zacharias, Louis Little, and two Buick agencies. One of these agencies,

known as the Dillard Buick Agency, was located at Nashville, Arkansas and was owned by E. C. Dillard and B. G. Dillard. The other agency, known as the Stuart Buick Company, was located at DeQueen, Arkansas and was owned by Joe P. Stuart.

Appellant's cause of action was predicated on the following: Zacharias, with the deceased and one Van Miller (all in the front seat), started to drive from DeQueen to Oklahoma City. They were to get two new Buick automobiles and drive them back — one for each agency. When they were 2 or 3 miles out of DeQueen on Highway 71, and immediately after going over a rise in the highway, the automobile struck 5 or 6 horses which resulted in the fatal injuries to the deceased. The cause of action against Zacharias was based upon his negligence in driving at a fast, dangerous, reckless and unlawful rate of speed; in failing to keep a proper lookout for such animals; in failing to check the speed of his automobile when encountering the lights of an approaching automobile, and; in failing to avoid colliding with the said horses. Appellant sought damages against the two Buick agencies on the ground that Zacharias was their agent, and Little was charged with negligence in allowing the said horses to run at large.

Appellees answered: Zacharias denied that he was guilty of negligence and alleged that the deceased was guilty of contributory negligence; The two Buick agencies stated that Zacharias and the deceased were their employees, that they were fellow servants, and that therefore they (the Buick agencies) would not be liable for any injury to the deceased caused by the negligence (if any) of Zacharias. They both pleaded contributory negligence on the part of the deceased.

At the conclusion of all of the testimony the trial court directed a verdict in favor of the two Buick agencies on the ground that Zacharias and deceased were fellow servants. Thereafter the jury brought in a verdict in favor of Zacharias and Little. No appeal is taken from the verdict in favor of Little.

Appellant, on appeal, seeks a reversal on the following grounds: 1. It was error for the trial court to direct a verdict in favor of the two Buick agencies, and; 2. The verdict in favor of Zacharias is based on four separate erroneous rulings by the trial Judge.

We will examine these grounds in the order mentioned.

1. Although both sides devote a large portion of their briefs to the directed verdict, yet under the view we take, that question is immaterial and a determination thereof is unnecessary. Unless we find error in connection with the jury verdict in favor of Zacharias, this cause will not be reversed. Under the pleadings in this case, the jury would have to find Zacharias guilty of negligence before appellant could recover against Zacharias' employer — in this case the Buick agencies or one of them. Conversely, if Zacharias was not negligent, as the jury has found, then his employer could not be held liable in any event.

This view, we think, is supported by decisions in this and other states. In *Davis, Administratrix* v. *Perryman,* 225 Ark. 963, 286 S. W. 2d 844, the suit filed by the administratrix was based on Perryman's negligence in operating a truck for the East Texas Motor Freight Lines. During the trial it developed that the administratrix had unsuccessfully sued said E. T. M. F. Lines for the same accident based on the negligence of its driver, Perryman. The trial court sustained Perryman's motion to dismiss for the reasons above mentioned and we sustained the action of the trial court, stating, among other things, that ". . . other jurisdictions are overwhelming in holding that an action like the present one cannot be maintained when a previous action by the same plaintiff against *either the master or the servant* for the same alleged act of negligence has been finally decided against the plaintiff in the Courts . . ." (emphasis supplied). We also held in the case of *Porter-DeWitt Construction Company, Inc.* v. *Danley,* 221 Ark. 813, 256 S. W. 2d 540, that a jury's verdict could not stand because of inconsistency where it found that a

truck driver was not negligent and at the same time returned a verdict against the driver's employer or principal where, as here, no independent acts of negligence have been established. A case more nearly in point with the one under consideration is *Overstreet* v. *Thomas, et al.,* (Ky.), 239 S. W. 2d 939, where the court referred to and quoted with approval from the case of *Graefenhan* v. *Rakestraw,* 279 Ky. 228, 130 S. W. 2d 66, 69, stating: ". . . the trial court directed a verdict for the alleged principal, and the jury, under proper instructions, returned a verdict for the agent. On appeal to this court the judgment was affirmed, the court saying: 'The conclusions we have reached made it unnecessary to consider the contention of appellant that the trial court erred in directing a verdict in behalf of the Falls City Sales Company. As the jury found for appellee Hosley, the driver of the truck, who was claimed by appellant to be the agent of the company, the verdict is conclusive as to non-liability on the part of the company in the circumstances here presented.' " It is our conclusion therefore that the jury verdict in favor of Zacharias in this case, if allowed to stand, precludes appellant from recovering against the Buick agencies.

2. We now examine appellant's allegations of error attending the Zacharias verdict.

(a) Several weeks before the trial Zacharias gave a written statement to appellant's attorney, which, according to appellant, in some measure contradicted portions of his oral testimony at the trial. It is appellant's contention that the court erroneously refused to allow the statement to be introduced in evidence. The record fails to support appellant in this contention.

Appellant says the question "is whether or not the statement was admissible as against Zacharias as an admission and declaration against interest by party defendant." Appellant did not ask to have the introduction limited to Zacharias only, and it was not admissible, as an admission, against his employer. See *Casteel* v. *Yantis-Harper Tire Company,* 183 Ark. 912, 39 S. W. 2d 306.

The court allowed appellant to read to the jury portions of the statement which appeared to contradict his oral testimony, and offered to allow other portions read. Appellant neglected or refused to accept this offer at the time. After all the testimony on both sides had been introduced, appellant asked to read the entire statement into the record, without asking to recall the witness. The court refused this request, and correctly so. One sufficient reason for the court's ruling has already been given.

(b) By Instruction No. 16 the court told the jury that the permissible speed on the highways, outside of cities and in the absence of a special hazard, was 60 miles per hour. This instruction appears to be in accord with Ark. Stats. § 75-601.

Appellant raises no objection to the instruction except the one based on the testimony of Carlisle Crews. Crews, a maintenance man on the highway where the accident occurred, testified as follows:

Q. "What is the speed limit there?"

A. "At night it's *50;* in days, *60.*"

Q. "*Fifty-five* miles per hour, and *60* miles per hour?"

A. "Yes."

In the absence of a showing that a special hazard existed on the highway, or that there were signs specifying a particular speed, the statutory speed mentioned in the above section would control. Moreover there is no testimony that Zacharias was driving at any definite speed when the collision occurred. Whether or not Zacharias was driving at a reckless or careless speed was a question for the jury under proper instructions.

(c) The court gave an instruction on the contributory negligence of the deceased. Appellant does not object to the form, but contends there is no evidence to support it. In our opinion this contention is without merit. This question is most often presented to us when the trial court refuses to give such an instruction. We

think the accepted and safest rule is to leave the question of contributory negligence to the jury where there is substantial evidence of such and we think there is in this case. Appellant stoutly maintains of course that Zacharias was guilty of negligence, yet the same acts of negligence attributable to Zacharias apply to a large degree to the deceased, who had the same opportunities to judge the speed of the car and the condition of the road ahead, and there is no evidence that the deceased made any complaint to Zacharias. If the jury had thought Zacharias was driving too fast or recklessly, it might have also concluded that the deceased should have objected. The general rule is that the occupant of a car has the duty of exercising ordinary care for his own safety. This rule is well stated in 65 C. J. S. Sec. 152, page 795, in this way:

"While an occupant of a vehicle is not required to exercise the same watchfulness as the driver, it is his duty to exercise ordinary care, including a reasonable use of his faculties of sight, hearing, and intelligence, to observe and appreciate danger or threatened danger of injury, and, if he fails to do so, and such failure contributes to the injury complained of as a proximate cause, he is guilty of contributory negligence."

(d) The court gave the following instructions on unavoidable accident.

"7. The burden rests upon the one who seeks to recover to establish by a preponderance of the evidence that the accident complained of by him was not the result of an unavoidable accident."

"8. An unavoidable accident is one not avoidable by precaution which reasonable men would be expected to take. Such an accident furnishes no basis for recovery."

Appellant predicates error on the grounds that unavoidable accident was not pleaded, and because the instructions do not correctly declare the law.

It is not necessary that unavoidable accident be specifically pleaded if the question is raised by the evi-

dence. In 65 C. J. S., Sec. 264e, page 1192, we find this: "Ordinarily the issue of inevitable or unavoidable accident should be submitted to the jury where it is raised by the evidence; and such issue is raised when, and only when, there is evidence tending to prove that the injury resulted from some cause other than the negligence of the parties." We think that is the situation here. That there was a collision and an injury is conceded, but the only parties accused of negligence have been exonerated. In the last paragraph of the above citation we find this language: ". . . if the evidence is conflicting or different inferences can reasonably be drawn from the facts as to whether the injury was the result of negligence or inevitable accident, the question of defendant's liability is properly left to the jury."

Appellant thinks some language should have been added to the first sentence in Instruction No. 8 to the effect the precaution required was that of a reasonable man under the same or similar circumstances as those obtaining in the particular case. We think such language would have been proper, as was indicated in *Newark Gravel Co.* v. *Barber,* 179 Ark. 799, 18 S. W. 2d 331, but we do not think its absence from Instruction No. 8 is so prejudicial as to call for a reversal. Undoubtedly the jury knew the court's instruction related to the occasion of the accident in question. In the *Barber* case no instruction was set out or approved, the court merely making a general remark concerning an inevitable accident.

Finding no error calling for a reversal of the verdict and judgment in favor of Zacharias, the entire judgment of the trial court must be upheld.

Affirmed.

Justices McFaddin and Millwee dissent.

Ed. F. McFaddin, Associate Justice (dissenting).

I would reverse the judgment and remand the case for a new trial as to all the parties. My study of the case convinces me of three matters:

(1) The Trial Court committed error in directing a verdict in favor of the two Buick agencies. A question of fact was made for the jury as to whether Zacharias and Howard Elmore were fellow servants. The majority does not decide this point; but I think it is fundamental.

(2) The Trial Court committed error in giving the instruction on contributory negligence. There was no evidence whatsoever on contributory negligence and the majority fails to point out any such evidence.

(3) The Trial Court committed error in its instruction as to speed. While § 75-601 Ark. Stats. says that under some circumstances the speed is 60 miles an hour, yet the same statute also recognizes that the speed may be regulated by appropriate signs along the highway. Here is a portion of the Statute as to such speed:

". . . . Outside municipalities the stated speed as determined by the State Highway Commission (Commissioner of Revenue) upon the basis of an engineering and traffic investigation, which shall be effective when appropriate signs giving notice thereof are erected along the highway . . ."

The witness Cruse was a maintenance man of the Highway Department, and he said that the speed was 55 miles per hour at night at the place where this mishap occurred. In view of the fact that the speed may be regulated by posted signs and that Cruse was a maintenance man and was testifying as to the speed, I think it clear that the evidence showed that the speed at the place of this mishap was 55 miles an hour at night. Therefore, the Court committed reversible error in instructing the jury that the speed was 60 miles an hour.

In view of the foregoing, I respectfully dissent from the affirmance.

COOK *v.* AMERICAN CYANAMID CO.

5-1134 297 S. W. 2d 933

Opinion delivered January 28, 1957.

[redacted]

A. D. Chavis, for appellant.

Cockrill, Limerick & Laser, for appellee.

SAM ROBINSON, Associate Justice. From the Chancellor's order sustaining appellee American Cyanamid Company's plea of *res judicata* to a complaint filed by appellant, Hazel Cook, on January 30, 1956, comes this appeal.

The complaint in substance alleged that appellant is the owner in fee simple of certain described lands to which she deraigned title through her mother, Ida Erickson, to one T. E. Smith; that T. E. Smith acquired the lands from the Globe Bauxite Company under a deed executed and delivered in 1921, which was lost before it was placed of record; and that appellee claimed title to the bauxite deposits because of the fraud of Louis Lagger and wife in retaining title to the said deposits in the deed they made to T. E. Smith in 1925 as a substitute for the lost 1921 deed from the Globe Bauxite Company—(it appears that Louis Lagger held the lands as trustee for the Globe Bauxite Company).

Appellee has brought into the record the case of Ida Erickson v. Certain Lands and American Cyanamid Company, which was filed in the Saline Chancery Court on October 6, 1952, and which sets forth the same identical allegations involved in the suit at bar. The record

in the Erickson case shows that after the filing of ten different pleadings and motions, a stipulation of facts, the taking of Ida Erickson's testimony, and an announcement by the parties that they rested, the Chancellor entered an order, on October 23, 1954, dismissing Ida Erickson's complaint for want of equity. On March 1, 1955, a motion to set aside the decree was denied; and that on January 9, 1956 appellant's motion to revive the same in her name was denied. No appeal has been taken from any of the proceedings in that case.

Appellant contends that neither the parties nor the issues in the two suits are identical. Her contention is that her mother, Ida Erickson, was asking for a decree of confirmation, which was denied, and that in the case at bar appellant is asking that a premature and fraudulent decree, referring to the decree in the Erickson case on October 23, 1954, be cancelled and set aside on the grounds of fraud.

The contention that the parties are not identical under the doctrine of *res judicata* is without merit. See *Collum* v. *Hervey,* 176 Ark. 714, 3 S. W. 2d 993, to the effect that a grantee, under the doctrine of *res judicata,* stands in the relation of privy to the grantor.

The contention that the decree of October 23, 1954 in the Erickson case was premature and fraudulent, in that it was made without notice to appellant, was the ground upon which appellant's mother relied in her motion and amended motion to set aside the said decree.

Therefore, since no appeal was taken from the court's order overruling the motion to set aside the decree in the Erickson case, that issue, too, is *res judicata. Knights of Honor of the World* v. *Epps,* 123 Ark. 371, 185 S. W. 470.

Affirmed.

CLARK *v.* RUTHERFORD.

5-1056 298 S. W. 2d 327

Opinion delivered February 4, 1957.

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

James R. Hale, Price Dickson and *W. B. Putman,* for appellee.

CARLETON HARRIS, Chief Justice. In 1930, Claud Rutherford and wife, Maud Rutherford, left Nebraska and moved to the home of Maud Rutherford's parents, John and Ellen Clark, near West Fork, Arkansas. John Clark was the owner in fee simple of a 24 acre tract of land, and Ellen Clark, in her own right, was the owner of a 40 acre tract which joined it. A short time after the Rutherfords arrived, John Clark died intestate, leaving his widow, Ellen, the daughter, Maud, and two sons, Bert and D. N. Clark. According to appellees, these two sons entered into an agreement with appellee, Claud Rutherford, and his wife, whereby they agreed, that in consideration of Claud and Maud Rutherford remaining on the property and caring for their mother, (Ellen), they (the Clark brothers) would convey their interests in both

their father's and mother's estates. Bert Clark executed a written instrument, but appellees rely entirely upon an alleged oral agreement with D. N. Clark. Claud and Maud Rutherford remained in the home with Ellen Clark until February 15, 1952, when Maud died. In April, while Claud was away, visiting a sister in Oklahoma, Bert Clark obtained from his mother a warranty deed in favor of his brother, D. N. Clark, conveying the entire 40 acre tract, and also obtained a quitclaim deed in favor of D. N., conveying her interest in the 24 acre tract, which had belonged to her deceased husband. On May 10, 1952, Claud went to Oregon to visit his son, Ellis Rutherford (who later died). On the same date, D. N. Clark and wife executed a deed in favor of Bert, conveying to him an undivided one-half interest in the 40 acres, although this last deed was not placed of record until more than a year later. Ellen Clark died in February, 1953. On March 2, 1955, Bert executed a deed conveying his one-half interest in the 40 acres back to D. N., and on June 14, 1955, the two brothers filed a suit to partition the 24 acre tract alleging that they each owned an undivided one-third and that Burl Rutherford, (son of Claud and the deceased Maud Rutherford) and Lillith Rutherford, (wife and sole beneficiary of a deceased son of Claud and Maud, Ellis Rutherford) owned an undivided one-sixth each. Claud Rutherford then intervened, claiming title to both the 24 acre tract and the 40 acre tract by reason of the agreement with the two brothers to convey to him and his wife, contending that an estate by the entirety had been created, and that as the survivor, he held the property absolutely. His daughter-in-law, Lillith, answered and counterclaimed, alleging a one-half ownership in the property by reason of the same contract. At the conclusion of the trial, the Chancellor dismissed the petition of the Clark brothers, holding that the conveyances from Ellen to D. N. were invalid. The court did not find an estate by the entirety in Claud and Maud Rutherford, but vested title to the lands in defendants and intervener as follows: The 40 acre tract: Burl Rutherford, an undivided one-third interest; Lillith Rutherford, an undivided one-third interest; Claud Ruth-

erford, an undivided one-third interest. The balance of the property: Burl Rutherford, an undivided one-sixth interest; Lillith Rutherford, an undivided one-sixth interest; Claud Rutherford, an undivided two-thirds interest. There is no dispute between intervener and defendants as to the proportions they received under the decree. For reversal, appellants (Bert and D. N. Clark) argue three points, which we discuss in our own order.

I. An estate in expectancy cannot be the subject of an agreement to convey. The trial court erred in holding to the contrary.

II. Exhibit No. 1 to intervener's testimony should be construed as a will and not as a contract. The trial court erred in holding to the contrary.

III. The evidence is insufficient to support the finding of the trial court that D. N. Clark agreed to will or convey his expectancy in the estate of Ellen Clark to Claud and Maud Rutherford, or that he agreed to will or convey his interest in the estate of his deceased father, John Clark, to Claud and Maud Rutherford.

I.

We do not agree with appellant's argument here, inasmuch as this particular point has been passed upon in *Bradley Lumber Co. of Ark.* v. *Burbridge,* 213 Ark. 165, 210 S. W. 2d 284. In that case, a Mrs. Wells, through a quitclaim deed, purported for a substantial consideration to convey to Burbridge her interest in the lands "present and prospective." Quoting from the language of Justice ROBINS, "As a contingent remainderman she had a 'prospective' interest in the lands when she executed this deed, and she, by the plain language of her deed, conveyed this 'prospective' interest. Therefore, when this 'prospective' interest became, upon the death of Mrs. Isabella J. Burbridge, a vested one, it passed to appellee under this deed, which, though a quitclaim deed was fully effective to transfer title." Quoting further, "Even if the deed executed by Mrs. Wells to appellee should be held ineffective as a conveyance of

title, it could well be sustained as an assignment by her to appellee of any and all interest in the land, present or future, owned by her. It has frequently been held that an assignment of a future interest, or expectancy, though unenforceable at law, is valid in equity and may be enforced in the latter forum when such expectancy ripens into a present and enjoyable estate. 'In equity, by the great weight of authority, there can be a valid assignment of . . . property to be subsequently acquired, and of contingent and expectant interests, . . . A court of equity, for example, will uphold an assignment of an interest under a will, such as of a contingent bequest and legacy, to take effect on the happening of some future event, as the coming of age of the beneficiaries or the death of some person.' 6 C. J. S., 1056. 'Courts of equity have generally upheld assignments of expectancies by prospective heirs . . .' 4 Am. Jur. 269.'' Accordingly, one can agree to convey his expectancy in an estate, and appellants' contention is not well taken.

II.

The instrument in question is as follows:

WEST FORK, ARKANSAS

Dec. 18, 1930

''I, Bert Clark sound in mind on this Nineteenth (19th) day of December Nineteen Hundred and Thirty (1930) of my own free will and accord will and bequeast to my sister Maud Rutherford my One third interest in the estate of my mother Elen Clark and the Estate of my deccased father John Clark.

''It being understood by and between me and my Sister Maud Rutherford and her husband Claud Rutherford that they Maud Rutherford and her husband Claud Rutherford are to remain on the estate of my Mother Elen Clark and the estate of my deceased father John Clark care for my Mother Elen Clark the ballance of her life. It being understood and agreed that my Sister Maud Rutherford and her husband Claud Rutherford are at the death of my Mother Elen Clark to have and to hold

my one-third interest in the estate of my Mother Elen Clark and the estate of my deceased Father John Clark. But this part of my estate only. This will to in know way connected or effect or have bearing on will made to my wife Clara Josephine Clark of my property and estate owned and accumulated by me and located in the State of Oklahoma. I will only to my Sister Maud Rutherford my part of the estate of my Mother Elen Clark and my deceased Father John Clark said estate located in the County of Washington and State of Arkansas.

"It is agreed by me and between my Sister Maud Rutherford and her husband Claud Rutherford if My Mother is living at the end of four years after date of this will that my Sister Maud Rutherford and her Husband Claud Rutherford are to have and to hold my part of the estate of my Mother Elen Clark and the estate of my deceased Father John Clark.

/s/ Signed

Bert Clark.

Witness
/s/ W. E. Phillips
/s/ Clifton Karnes
/s/ Roy A. Karnes

"It is agreed and understood that I reserve my one-third interest in all mineral rights produced from the estate of my Mother Elen Clark and my deceased Father John Clark."

This instrument was not prepared by an attorney, but by Bert Clark himself, and the question posed is whether it constitutes a will or a contract. While it is couched in terms of a will, it obviously is not meant as such. In determining whether or not an instrument is a will, it is necessary to ascertain whether there is testamentary intent; that is, is the estate in the beneficiary to be created upon the death of the maker of the instrument? Clearly such is not the intention here. The disposition of the interest of Bert Clark depended, not upon

his death, but upon the death of his mother. In conflict with this provision is the third paragraph, which provides that Maud and Claud Rutherford are to have and hold the interest of the maker (Bert Clark) if the mother (Ellen Clark) is living at the end of four years. In either event, the instrument cannot be considered as a will because nothing is dependent upon the death of Bert Clark. There is a further notation which provides that the maker reserves his one-third interest in the minerals. A reservation in an instrument can only be effected by conveyance or contract, and not by will. We hold the instrument to be a valid assignment of the interest of Bert Clark in his father's estate, and an assignment of his expectancy in his mother's estate.

III.

Appellees rely entirely upon an alleged oral agreement with appellant D. N. Clark. Appellee, Claud Rutherford, testified that D. N. Clark made the same agreement orally that Bert Clark had made in writing, but this is vigorously denied by appellant. It is undisputed that to establish an oral contract to convey land, the evidence must be clear, cogent and convincing. *McCombs* v. *McCombs,* 227 Ark. 1, 295 S. W. 2d 774; *McKie* v. *McClanahan,* 190 Ark. 41, 76 S. W. 2d 971. One of the appellants' witnesses, a Mrs. Karnes, testified that D. N. Clark told her that he had made an agreement with the Rutherfords, but her testimony does not make clear as to what such agreement consisted of. A witness, Mrs. Hattie Watson, testified that she heard some conversation between Rutherford and D. N. Clark on the night before Rutherford left for Oregon and stated that "she understood" Clark to ask Rutherford the question "What do you want done with your place?" This about summarizes the evidence for appellees. In contrast, from the inception of such alleged agreement, D. N. Clark refused to sign any deed or contract. A few days after the alleged oral understanding had been reached, the parties met in a law office in Fayetteville, and D. N. Clark there refused to sign any kind of instrument conveying his interest. Rutherford testified that he or his wife asked

this appellant many times during the 21 years appellee and wife lived on the Clark place, to execute a deed or contract, but that Clark consistently refused. Nor did Rutherford apparently rely upon appellant making any conveyance. Numerous times during the trial, Rutherford stated that he never did think D. N. Clark would convey his interest. He stated he considered D. N. Clark a crook, that from the time they were in the lawyer's office he knew that Clark had no intention of making such a conveyance, that he would not believe anything D. N. Clark said, (in his words) "I couldn't believe him any further than you could throw a bull by the tail." Accordingly, it certainly does not appear that Claud Rutherford stayed on the place for 21 years in reliance upon a belief that D. N. Clark would convey his interest in the property. Clark's contention is that Rutherford and his wife (Clark's sister) were taken care of during the 21 year period in return for the services rendered to the mother, and that the intention of each of the appellants had only been to furnish their sister a home during her lifetime. The evidence does show that both the Clark boys gave some sums of money throughout the years for the support of their mother, paid the taxes on the properties for the entire period of time, and paid the insurance premiums for said period of time. Another circumstance deemed unfavorable to the cause of appellee, is that Rutherford left the home place on May 10, 1952, and went to Oregon. He returned about a year and a half or two years later for the purpose of disposing of some personal property, and then went back to Oregon. He does not appear to have exercised any acts of ownership during this period of time, having paid no taxes, nor borne any expenses relative to the maintenance of the properties. He furthermore testified that he learned on this return visit that D. N. Clark had received a deed from Ellen Clark, but that despite such knowledge, he made no effort to contact Clark, stating "There wasn't no use." Certainly it seems the normal reaction of one claiming property would be to contact the party alleged to have taken it from him, and then, failing to reach a satisfactory understanding, institute

suit to enforce his rights. Rutherford returned to Oregon without taking any action whatsoever. His explanation was that he relied on the written contract with Bert as herein set out. D. N. did not join in the execution of that instrument, and is not bound thereby. Under the rule, heretofore mentioned, and repeatedly reiterated, ". . . we have many times held that a court of equity may grant specific performance of a parol contract to convey land only where the evidence of the agreement is clear, satisfactory and convincing." *McCombs* v. *McCombs, supra.* We are of the opinion that appellees' proof falls short of establishing their cause.

While we cannot say that the Chancellor erred in setting aside the deeds executed by Ellen Clark to her son, D. N.,[1] said appellant would still be entitled to his rights of inheritance in both his father's and mother's estates.

The decree of the court will therefore be reversed insofar as said decree divests D. N. Clark of his one-third interest in the properties under discussion. The cause is remanded with directions to the Chancellor to enter a decree not inconsistent with this opinion.

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[1] While the Chancellor did not state his reason for setting aside such conveyances, allegations on part of the intervener, Claud Rutherford, were as follows: (1) They were not executed in the form or manner required by law; (2) at the time of their purported execution and delivery the said Ellen Clark was not mentally competent to execute them; (3) they were procured and obtained by and through fraud perpetrated by and on the part of the plaintiffs; (4) they were procured and obtained by and through undue influence brought to bear, exercised and perpetrated by the plaintiffs upon the said Ellen Clark; and (5) they were never delivered by the said Ellen Clark. * * *

5-1050 298 S. W. 2d 61

Opinion delivered February 4, 1957.

[redacted]

DuVal Purkins and *House, Moses & Holmes,* for appellant.

C. C. Hollensworth and *Martin & Haley,* for appellee.

J. SEABORN HOLT, Associate Justice. In the Spring or Summer of 1953, appellee Fullerton of Warren, Arkansas, bought on open account an air conditioner from appellant, General Air Conditioning Corporation located in Little Rock, Arkansas. The purchase price

was $3,574.43. Appellant had Dick Hedrick, who appellee testified was appellant's agent and representative, install the equipment. In November 1953 Fullerton had paid $1,000 on the account, leaving a balance due of $2,574.43 and on December 1, 1953, Fullerton executed his promissory note to appellant for this balance, which bore interest at 5% and to mature on February 14, 1954. Appellee made no payments on this note before or after its due date, and appellant filed the present suit to collect the balance due. A jury trial resulted in a verdict in favor of appellee, Fullerton. From the judgment comes this appeal.

For reversal appellant relies on these points: "1. The court erred in refusing to direct a verdict in favor of appellant. (a) There was no effective accord. (b) There was no performance (fulfillment, execution) of even a supposed accord. 2. The trial court's amendment to appellant's Instruction No. 2 was error. 3. The court erred in giving to the jury appellee's Instruction No. 2." Appellee, as a complete defense to the note, "specifically pleads accord and satisfaction by which the defendant paid interest on the indebtedness and plaintiff agreed to receive back the equipment in question, which was delivered by defendant in the manner suggested by plaintiff and later ratified by plaintiff." In effect, Fullerton testified that when he determined that he was unable to pay the balance due on the note he went to Little Rock in March or April 1954, and entered into an agreement with appellant whereby appellant agreed that it would accept and retain the original $1,000 payment made by appellee, together with the interest due on the note up to that time; that Fullerton was to hold the equipment, in effect, subject to appellant's orders, until appellant sent its truck to pick it up, and that this agreement, in full settlement of the note, was carried out. He further testified that appellant was to send his truck from Little Rock for the equipment. Appellee also testified that appellant's representative, Hedrick, in Warren sent one of his employees to appellee with instructions to take a sump pump, which was a

part of the stored air conditioner, and appellee, after calling Hedrick, who informed him that he was acting, in effect, on appellant's orders, turned the pump over to appellant's agent, who sold it for $98, which appellant later on, without appellee's consent, placed as a credit to appellee's note. Appellee also testified that after his agreement with appellant to settle the note he had never had any agreement or understanding with appellant as to the value of the sump pump.

Appellant's president, Mr. Wellons, testified in regard to the settlement: "Q. What I am asking you about now is any discussion you had on payment of the note after it became due. A. . . . As a result of the conversation that he (appellee) and I had I told him that if he would return the goods to me promptly, we had been trying for a year to get some sort of a settlement. We had had promises and promises and promises, with no action, and that if in any of his regular trips to Lonoke he would return the goods to our place of business with immediacy being a prime consideration of it, . . . Q. You (Wellons) did have an understanding with Mr. Fullerton in Little Rock concerning the return of the equipment? A. As I have stated. Q. That's right. It was your understanding he was going to return the equipment to you? A. That's right. Q. And when he did the note would be cancelled? A. We would settle the note. Q. You were willing to accept the return of the equipment and cancel the note? A. When he paid the interest up to date, that is correct." Appellant further testified, that he made an agreement with Fullerton to settle the note but in this agreement Fullerton was to deliver the equipment to appellant in Little Rock. Appellee stoutly denies this and testified that appellant agreed to send its truck to bring the equipment to Little Rock and that appellee told appellant, as an accommodation to appellant, that he, appellee, in the event one of his own trucks might be coming to Little Rock, would bring the air conditioner to appellant. Thus, we think that a question of fact was presented as to what the agreement was and whether

it was carried out. Boiled down, the decisive issue in this case was the place of delivery of the property under the terms of the agreement. The jury found that the agreement to settle the note had been made and had been carried out, and we think there was substantial evidence to support the jury's action.

We do not agree that the court erred in amending its Instruction No. 2 and in giving appellee's Instruction No. 2, as appellant argues. Appellant's Instruction No. 2 as modified and given by the court was as follows: "You are instructed that an accord and satisfaction is a new contract between two parties that constitutes a bar to an action on the original debt; that to constitute accord and satisfaction as a bar to this action you must find that the agreement was fully executed, unless you find that the mere promise was accepted in satisfaction. If you find then by a preponderance of the evidence that the mere promise to return the goods to General Air Conditioning Corporation was not accepted as full performance and the equipment was not *returned or accepted at Warren, Arkansas,* then you find for the plaintiff." The appellant asked the court to give the instruction, leaving out the italicized words, "returned or accepted at Warren, Arkansas," and substitute the following words "completely returned or taken back." Appellant argues that the court, in refusing its request, erred. We do not agree, for according to appellee's version of the agreement the equipment was to be, and was, returned to appellant at Warren, Arkansas, and accepted there, which completed the agreement.

Appellant next argues that the court erred in giving appellee's Instruction No. 2 as follows: "You are instructed that, should you find from a preponderance of the evidence that plaintiff and defendant entered into an agreement by which the defendant agreed to pay the interest on the indebtedness and did pay such interest and plaintiff agreed to take back the equipment in question at Fullerton's place of business in Warren, Arkansas and in fact did take back a part of the equipment, then

you will find for the defendant." When this instruction is read in connection with No. 2 above and considered with all the instructions as a whole, we do not think it was erroneous. As indicated, it was for the jury here to determine, on the evidence presented, whether an accord and satisfaction, or an agreed settlement, had been reached by the parties. "It is well settled that the parties to a contract may at any time rescind it in whole or in part by mutual consent, and the surrender of their mutual rights and the substitution of new obligations is a sufficient consideration," *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379. The evidence tended to show that an agreement had been reached by appellant and appellee to satisfy the note by delivering the property back to appellant at Warren, Arkansas, paying the interest due on the note up to the date of settlement, and as further consideration appellant accepted and retained the $1,000 already paid by appellee on the purchase price of the air conditioner. The agreement constituted the accord, and satisfaction was the doing of what the agreement called for.

We agree with appellant that the rule is that: "Nothing short of actual performance, meaning thereby, performance accepted, will suffice . . . Accord and part performance do not constitute satisfaction. It is merely executory so long as to its terms something remains, and the party to be charged is allowed what he has paid in diminution of the amount claimed," *Lyle* v. *Federal Union Ins. Co.,* 206 Ark. 1123, 178 S. W. 2d 651, but here, according to the testimony, there was a *full* performance accepted by appellant under its agreement with appellee. We think the admitted action of appellant, in sending its agent to the building in which the property was stored and taking a part of the equipment and selling it for $98, without previously having had an understanding with appellee as to the price to be paid for the sump pump, was strong evidence in justifying the jury in finding that appellant considered all the property as its own, and exercised its prerogative to take and sell all or any part of it. The above Instruction, No. 2,

instructed the jury, in effect, that in the event it should find from the preponderance of the evidence that appellant had agreed to take back the equipment in question (of course, meaning all of it) at Fullerton's place of business in Warren, Arkansas, *and* in fact did take back a part of the equipment, that they should then find for appellee. As indicated, the facts warranted the jury in finding that appellant had taken back all of the equipment at Fullerton's place of business in Warren, and thereafter, it appears undisputed, took and sold the sump pump, a part of its property. Had the instruction read "or in fact did take back a part of the equipment"—instead of—"and . . .", then appellant's objection might have merit. As pointed out, appellee's whole case was based on full performance by appellee of the agreement, not on part performance—and we think the court, in effect, so instructed the jury.

Affirmed.

Justice George Rose Smith dissents.

George Rose Smith, J., dissenting. This case does not involve a disputed or unliquidated claim that was settled by a compromise agreement. Fullerton did not question the amount of his original indebtedness, which was evidenced by a promissory note; he merely asked the creditor to accept in satisfaction of the debt something less than payment in full. Such an agreement by the creditor is initially without consideration, but if the agreement is fully performed by both parties it discharges the original obligation under the doctrine of accord and satisfaction. As I read the record, the agreement in this case was not fully performed by the creditor, and therefore the accord was not followed by a satisfaction.

Wellons testified that Fullerton was to deliver the equipment to the appellant, but of course we must assume that the jury accepted Fullerton's version of the transaction. In the course of his testimony Fullerton stated *seven* different times that by the agreement the appel-

lant was to pick up the equipment at Warren. He also testified that he understood that the note would not be returned to him until the equipment had either been delivered by him or picked up by the appellant. Fullerton explained that after the agreement was reached the equipment was *in fact* placed in a safe place in his building at Warren, but he did not even intimate that the parties ever agreed upon the storage of the property as constituting full performance of the accord. To the contrary, he said again and again that the agreement required the appellant to come and get the property. His sole defense in the trial court was that the appellant failed to carry out its part of the contract.

It is plain enough that this defense must fail. Williston puts the exact case: "Suppose the debtor within the time agreed or, if no time was specified, within a reasonable time tenders performance of his promise, but the creditor in violation of his agreement refuses to accept the performance in satisfaction of his claim and brings suit on the original cause of action. Even here, the unexecuted accord is no defense. The creditor's claim is not satisfied. Tender is not the same as performance. To assert the contrary is to say that the debtor after making his tender has satisfied the debt, though he is still the owner of the thing which was agreed upon as the satisfaction." Williston on Contracts (Rev. Ed.), § 1843. To the same effect is the Restatement of Contracts, § 417 (d): "If the creditor breaks such a contract, the debtor's original duty is not discharged."

Our own decisions support the rule that the defense of accord and satisfaction depends upon a full performance of the agreement by both parties. As we said in *North State Fire Ins. Co.* v. *Dillard,* 88 Ark. 473, 115 S. W. 154: "But where the agreement is not executed, and is not evidenced by any writing, then it is not a bar to an action on the original debt; and, not being a bar, it is immaterial why the agreement is not executed. *It may be through the fault of either party,* or it may be through the fault of neither, as was the case here, or through the

interposition of a third party. Still, the promise is to satisfy, and until that promise is fulfilled the agreement has not become binding." (My italics). In *Grimmett* v. *Ousley,* 78 Ark. 304, 94 S. W. 694, we likewise held that "the accord must be fully executed." Additional cases need not be cited.

It is evident from the above that the case should be reversed for the trial court's error in giving this instruction: "You are instructed that, should you find from a preponderance of the evidence that plaintiff and defendant entered into an agreement by which the defendant agreed to pay the interest on the indebtedness and did pay such interest and plaintiff agreed to take back the equipment in question at Fullerton's place of business in Warren, Arkansas, and in fact did take back a part of the equipment, then you will find for the defendant." This is a binding instruction, not susceptible of being cured by other instructions, and is patently erroneous in telling the jury that if the agreement was only partly performed "then you will find for the defendant."

The judgment should be reversed, but I do not agree with the appellant's earnest contention that it is entitled to have judgment entered here in its favor. It is true that when the creditor breaches the contract of accord the debtor's original duty is not discharged, but it is also true that the debtor may be entitled to damages for the creditor's breach of his agreement. Rest., Contracts, § 417 (d); Williston, § 1844. For this reason the case should be remanded for a new trial.

PORTER *v.* TIME STORES, INC.

5-1157 298 S. W. 2d 51

Opinion delivered February 4, 1957.

Lyman L. Mikel, for appellant.

Dobbs, Pryor & Dobbs, for appellee.

J. SEABORN HOLT, Associate Justice. Appellants, Nina Jean Porter, et al., sued Time Stores, Inc., and their employee, Bobby Hicks (appellees) to recover damages for personal injuries alleged to have resulted from a collision of an automobile in which appellants were riding and a car driven by Bobby Hicks. The complaint alleged that the injuries were caused by appellees' negligence.

A jury trial resulted in a verdict for appellees and also a finding by the jury, on proper interrogatories submitted under our comparative negligence statute, (Act 191-Acts of Ark. 1955) that neither the appellees nor the appellants were guilty of any negligence,—in effect, that the collision was an accident. From the judgment is this appeal.

Appellants seek a reversal here, in effect, on the grounds that the verdict was contrary to the law and the evidence.

At the outset we are confronted with appellees' contention that the judgment must be affirmed for failure of appellants to comply with Rule 9(d) of this court. We hold that appellees are correct in this contention. The record reflects almost a total failure to abstract the pleadings, or material parts thereof, or the evidence, all of which are referred to largely by reference. Reference is made to a motion for a new trial and the order overruling it but neither of these documents is abstracted or summarized. The judgment is not abstracted. In a record containing approximately 144 pages, some 60 pages of which cover the evidence presented, appellants devote approximately 6 pages to abstracting the testimony. Clearly this short abstract, which appears to be of isolated excerpts only from extensive testimony, cannot be considered as an abstract of material facts so that the judges of this court could determine whether there is any substantial evidence to support the verdict of the jury. In the very recent case of *Ellington* v. *Remmel,* 226 Ark. 569, 293 S. W. 2d 452, we said: "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 . . .' ¶. . . 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 cannot pass upon its merits without exploring the transcript, which, as has been often heretofore said, it cannot be expected to, and will not, do, and this without regard to whether such failure to furnish an ab-

stract 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 Str. Steel Co.,* 220 Ark. 114, 246 S. W. 2d 414;'' *Thornbrough, Commissioner of Labor* v. *Danco Constr. Co.,* 226 Ark. 797, 294 S. W. 2d 336; *Speed* v. *Mays,* 226 Ark. 213, 288 S. W. 2d 953.

Affirmed.

LITTLE ROCK FURNITURE MANUFACTURING COMPANY *v.* COMMR. OF LABOR.

5-1120 298 S. W. 2d 56

Opinion delivered February 4, 1957.

Moore, Burrow, Chowning & Mitchell, for appellant.

Luke Arnett and *McMath, Leatherman & Woods,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal from a judgment of the Circuit Court in two consolidated cases involving claims arising under the Employment Security Act (§ 81-1101 *et seq.* Ark. Stats.). The questions presented in the two cases are materially different, so we refer to the cases by the numbers in the Circuit Court.

Circuit Court Case No. 41167.

On October 14, 1953, certain employees of the appellant, Little Rock Furniture Manufacturing Company (hereinafter called "Company"), went on strike and established a picket line. Among such strikers were the fifty-five workers[1] — hereinafter called "claimants" — who are appellees in this Court. C. R. Thornbrough, as Commissioner of Labor, is also an appellee. The strike was called by the Labor Union, in an effort to obtain certain desired economic benefits. So far as the record here shows, the strike was not in violation of any contract. On October 23, 1953, the Company notified all the claimants by letter that work would be resumed on November 2nd and claimants' places would be filled by other workers on that date. The Company did resume work on November 2nd.

On November 27th the Union called off the strike; and on November 30th the strikers returned for work. Some of the strikers were used, but these fifty-five claimants were not put back to work because their jobs had been filled. Claimants then filed application for unemployment benefits accruing after November 30th, when they had sought to return to work. The claims are under the Employment Security Act, which is § 81-1101 *et seq.* Ark. Stats. and amendments to and including Act No. 162 of 1953 — but, of course, not including Act No. 395 of 1955, because the claims were filed in November, 1953. Therefore, our decision in this case is governed by the law that was in force in November, 1953.

[1] Originally there were fifty-eight claimants, but three claims were withdrawn: these being Creed Ashley, Alberta Chandler and Robert Coates, Jr.

The Company, in resisting the efforts of the claimants to obtain unemployment benefits, insisted that the claimants had *voluntarily left their work* when they went on strike and were disqualified from drawing benefits for ten weeks after the filing of the claims. The Company relied on § 81-1106(a), as amended by § 3 of Act No. 162 of 1953, which section, with amendment, reads:

"If so found by the Commissioner, an individual shall be disqualified for benefits: (a) if he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall be for ten weeks of unemployment as defined in sub-section 'I' of this section."

The Company contended that each of these fifty-five claimants, voluntarily and without good cause, went on strike and should therefore be disqualified for ten weeks from November 30, 1953, the date each sought to return to work. The supervisor of the local office of the Employment Security Division held the claimants to be so disqualified; and claimants appealed. The Appeal Tribunal (a hearing agency set up under § 81-1107 of the Employment Security Act) held that the ten weeks' disqualification provision did not apply to a worker who went out on strike; reasoning that when such worker offered to return to work and could not obtain employment, he was entitled to the unemployment benefits without the ten-weeks' disqualification provision applying to him. The Board of Review (§ 81-1107 Ark. Stats.) affirmed the holding of the Appeal, Tribunal; the Company sought judicial review under § 81-1107(d) (7); the Circuit Court agreed with the administrative holding; and the case is here on appeal. So the issue in Circuit Court Case No. 41167 is whether the ten weeks' disqualification under § 81-1106 Ark. Stats. applies to a person who engaged in a labor dispute and later ended the strike and sought to return to work.

We emphasize that this case does not involve any claim for benefits during the time the workers were on strike. It involves only claims for benefits *after* the

strike had been ended and the claimants tried to go back to work. As the law existed at the time this case arose, § 81-1106(d) related to disqualifications in labor disputes,[2] and § 81-1106(a) related to one who voluntarily left work. Our original Employment Security Act was Act No. 155 of 1937. It has frequently been amended. Many states have comparable acts. These are listed following § 81-1101 in the Annotated Volume of Arkansas Statutes. The purpose of all of such Employment Security Acts is an effort to afford compensation under some circumstances to a covered worker who is unemployed. Section 81-1101 Ark. Stats. gives the declaration of state public policy regarding our Act, and is worthy of study. In § 81-1102 of the Act the Legislature declared its intention to provide for the carrying out of the purposes of the Act in cooperation with the appropriate agencies of other states and of the Federal Government. The Act must be given an interpretation in keeping with the declaration of state policy.

Some states hold that when a worker goes out on a strike he has "voluntarily left his work" and so is subject to the disqualification period (varying in weeks from state to state). For cases so holding, see: *Walgreen Co.* v. *Murphy,* 386 Ill. 32, 53 N. E. 2d 390; *Baker* v. *Powhatan Mining Co.,* 146 Ohio St. 600, 67 N. E. 2d 714; and see also cases collected in Sec. 3 of the Annotation in 28 A. L. R. 2d 294.

Other states hold that the spirit of the Act is not to penalize a worker who follows the Union's orders and goes on a strike, but to afford such worker unemployment benefits when he offers to return to work and is unable to find it. In other words, when he offers to return to work and can find no work, he then becomes involuntarily unemployed. For cases looking in this direction, see: *T. R. Miller Mill* v. *Johns,* 261 Ala. 615, 75 So. 2d 675; *M. A. Ferst Ltd.* v. *Huiet,* 78 Ga. App. 855, 52

[2] By Act No. 395 of 1955, the provision found in § 81-1106(d) was deleted from that section and the matter of labor disputes was placed in § 81-1105 Ark. Stats. The effect of this change by the subsequent legislation is not before us in this case.

S. E. 2d 336; *Intertown Corp.* v. *Appeal Board,* 328 Mich. 363, 43 N. W. 2d 888; and *Great A. & P. Tea Co.* v. *New Jersey Dept.,* 29 N. J. Super. 26, 101 Atl. 2d 573.

A careful study of § 81-1106 Ark. Stats. convinces us that this case should be affirmed. This § 81-1106 is the section disqualifying an individual from benefits. The section consists of eight sub-divisions, lettered (a) to (h), inclusive, and we hold that each sub-division is mutually exclusive. In other words, if a person is disqualified from benefits under Sub-division (b) of § 81-1106, he cannot again be disqualified for the same conduct under Sub-division (a) of § 81-1106. In the case at bar, the claimants were disqualified under Sub-division (d) of § 81-1106, which is the section relating to labor disputes: they could not also be again disqualified under Sub-division (a) of § 81-1106 when they offered to return to work. The case of *T. R. Miller Mill Co.* v. *Johns,* 261 Ala. 615, 75 So. 2d 675, is in point. Section A of the Alabama Employment Security Act contained the provision on disqualification in labor disputes and Section B contained the provision as to disqualification of the worker "if he has left his employment voluntarily without good cause connected with such work." The Alabama Court held that one suffering disqualification under Section A was not to be further disqualified under Section B, saying:

"We note that subsection A provides that the disqualification contained therein is to continue so long as the labor dispute is in active progress in the establishment. The conclusion seems necessarily to follow that when the dispute is settled the disqualification ceases. It thus appears that it contains all of the disabilities that the legislature intended to impose because of a labor dispute. Subsection B then appears to be without the influence of the conditions of disqualification set out in subsection A and stipulates for disqualification under other and different conditions. Such seems to be the explicit holding of the Michigan case of *Intertown Corp.*

v. *Appeal Board of Michigan Unemployment Commission,* 328 Mich. 363, 43 N. W. 2d 888, 890."

When the claimants offered to return to work on November 30th, they removed themselves from the disqualification of Sub-division (d) of § 81-1106 and thereby became involuntarily unemployed and should not be subject to the ten weeks' disqualification under Subdivision (a) of § 81-1106. So the judgment in Circuit Court case No. 41167 is affirmed.

Circuit Court Case No. 42261.

The question in this case is one of procedure: that is, which party had the burden of going forward with the proof on the issue of availability of claimants under the state of the record existing, when the Board of Review sent that issue back to the Appeal Tribunal for further determination. In an effort to clarify the situation presented, we sketch in the numbered paragraphs, I to VIII below, the procedure[3] that was followed in this case in the handling of the unemployment claims:

I. Each worker filed a claim for unemployment benefits according to the procedure set out in § 81-1107 (b). An individual record was made for each claimant.

II. The examiner (in this case Mr. Ritchie, the supervisor of the local office of the Employment Security Division) made a determination of each claim pursuant to § 81-1107(c). The supervisor disqualified each claimant under § 81-1106(a) (for voluntarily quitting work), as previously stated.

III. Each claimant, being dissatisfied with the determination so made by Mr. Ritchie, appealed his claim to the Appeal Tribunal, set up under § 81-1107(d) (1) & (2). Testimony was taken[4] at the hearing before the Appeal Tribunal. A number of witnesses testified, and

[3] This procedure is regulated by § 81-1107 Ark. Stats. and the rules of procedure adopted by the Commissioner of Labor pursuant to the authority contained in said section.

[4] Section 81-1107(d) authorizes the taking of testimony by the Appeal Tribunal.

the hearing covered not only the disqualification under § 81-1106(a), but also the question of each claimant being available for work under § 81-1105. A written opinion was delivered by the Appeal Tribunal. We refer to this hearing in the Appeal Tribunal as the "Fitzsimmons hearing," because it was conducted before the Chief Appeals Referee, Mr. Fitzsimmons. We shall subsequently revert to this Fitzsimmons hearing, as our decision in this Circuit Court Case No. 42261 turns largely on the record made up at that hearing. The result of the Fitzsimmons hearing was (a) to reverse the supervisor's determination as to disqualification of claimants under § 81-1106(a), and also (b) to hold that each claimant was entitled to draw unemployment benefits from November 30th. In other words, eligibility of each claimant was established.

IV. The Company, being dissatisfied with the results so reached by the Appeal Tribunal, appealed all the claims to the Board of Review, as provided by § 81-1107(d) (3). The Board of Review affirmed the holding of the appeal Tribunal. Here is the decision of the Board of Review:

"The decision of the Appeal Tribunal is hereby modified to hold that the Appeal Tribunal had jurisdiction to go into the claimants' availability for work since filing their claims after November 30, 1953, and the question of claimants' availability is remanded back to the Appeal Tribunal for further hearings and decisions. The Board holds further that the Appeal Tribunal was correct in reversing the determinations of the Agency holding claimants disqualified for voluntarily quitting their work on October 14, 1953."

V. The Company then appealed from the Board of Review to the Pulaski Circuit Court (under § 81-1107 (d) (7)) from that part of the opinion of the Board of Review which held that the claimants were not disqualified under § 81-1106(a); and that case became Circuit Court Case No. 41167, as heretofore discussed.

VI. The Board of Review sent back to the Appeal Tribunal (as per the decision previously copied) the matter of making the awards to the individual claimants. When the case went back to the Appeal Tribunal, the Company took the position that the claimants, having had the burden of establishing their claims originally, would have to come in individually and show availability. The Appeal Tribunal insisted that the testimony taken at the previous hearing before it (i. e., the Fitzsimmons hearing) was sufficient to establish *prima facie* the claims of all fifty-five of the claimants as to eligibility, but allowed the Company to call any or all of the claimants for cross-examination. The Company insisted that the burden was on the claimants and not on the Company. Thus there arose the procedure problem, i. e., the burden of going forward. When the Company refused to accept the burden of going forward, the Appeal Tribunal sustained the claim of each of the fifty-five claimants.

VII. The Company appealed to the Board of Review, which affirmed the holding of the Appeal Tribunal.

VIII. The Company then appealed to the Pulaski Circuit Court from the opinion of the Board of Review on this procedural matter; the Circuit Court affirmed the Board of Review in its Case No. 42261; and the case is now before us in this consolidated appeal.

A careful study of the record and of the statutes convinces us that this case should be affirmed. Section 81-1107(d) (4), (5), (6) & (7) contain the law governing these administrative hearings. The Fitzsimmons hearing mentioned in paragraph numbered III heretofore, was based on the entire record in the case, including the Agency records. In the course of the Fitzsimmons hearing, there arose the question of whether each claimant had established his availability for work. Supervisor Ritchie testified that he handled these fifty-five claims; that determinations were made on all of the claims involved on an individual basis; and that there was no

disqualification of any claimant on the issue of availability to work. He testified that the only disqualification was because of voluntarily quitting the work under § 81-1106(a). The record shows that the card of each individual claimant, while not introduced in evidence, was tendered to the Company's attorney at the time of the hearing and that the Company actually called several claimants (Agnew, Handley, and Barnes) to cross-examine them on the question of availability. If the Company had wanted to call all the other claimants it could have done so at that time. The determination by Superintendent Ritchie[5] that each of these claimants was available for work beginning November 30th made a *prima facie* case and the burden of going forward to disprove that case was on the Company. When the Board of Review sent the case back to the Appeal Tribunal it was not necessary to retake the evidence. The entire record of the Fitzsimmons hearing was before the appeal tribunal on remand, and the burden was on the Company to go forward to overcome the *prima facie* case made by the determination of Supervisor Ritchie. We think the better reasoned cases support the following statement contained in the written opinion of the Board of Review in this case:

"It has been held that a claimant, an unemployed worker in a covered employment, is presumed to be available for work when he registers for work and files a claim for benefits, but such presumption is rebuttable. *Mattey* v. *Unemployment Comp. Bd. of Rev.,* 164 Pa. Super. 36, 63 A. 2d 171; *Kelleher* v. *Unemployment Compensation Board of Review,* 175 Pa. Super. 261, 104 A. 2d 423. According to the authorities in the field, 'It is indispensable to proper administration of unemployment insurance laws that the claimant be presumed to be available for work unless cause for doubting that availability appears.' Williams, 8 Vanderbilt Law Review, p. 294,[6] cit-

[5] He so testified before the Appeal Tribunal.

[6] This article by Lee G. Williams in 8 Vanderbilt Law Review, p. 286 *et seq.* is entitled, "Eligibility for Benefits," and is most enlightening. It is one of a symposium of articles on unemployment problems, all contained in 8 Vanderbilt Law Review.

ing Altman, Availability for Work, Harvard Univ. Press, 1950, p. 98.''

Accordingly, the judgment of the Circuit Court in Case No. 42261 is also affirmed.

BERRY *v.* NICHOLS.

5-1121 298 S. W. 2d 40

Opinion delivered February 4, 1957.

Charles L. Carpenter and *J. Harrod Berry,* for appellant.

Byron R. Bogard and *Gerland P. Patten,* for appellee.

MINOR W. MILLWEE, Associate Justice. This is a proceeding by an attorney for an alleged breach of his contract of employment upon a contingent fee basis when his clients summarily discharged him and employed other attorneys in the settlement of their claims for damages arising out of an automobile collision.

On October 7, 1954, the appellees, Mr. and Mrs. T. H. Nichols, and their daughter, Jackie, who was then 18 years of age, were involved in a collision in North Little Rock, Arkansas, in which their automobile was struck from behind by a truck belonging to Virgil Young, doing business as Young's Fish Market. Jackie was merely shaken up, Mr. Nichols received minor injuries but Mrs. Nichols was more seriously hurt and their car was badly damaged.

Appellees operate a grocery store in North Little Rock and for several years prior to the collision had employed the appellant, J. Harrod Berry, in all legal matters. Appellant had previously represented Mrs. Nichols on a similar collision claim against L. M. Alexander on a contingent fee basis. He had also handled income tax and other matters for appellees as their regular attorney.

There is little dispute of the proof offered by appellant which tends to establish the following facts. The next day following the collision Mr. Nichols telephoned appellant and they engaged in an extended conversation in which it was agreed that appellant should represent appellees in settlement of their claims against Young on a contingent basis of one-third of any sums received before suit and 45% of all amounts received after suit.

At the time of the conversation Mrs. Nichols was confined to her bed within a few feet of the telephone. While she denied appellant's testimony to the effect that she joined in the conversation and consented to the employment, she subsequently accepted and acquiesced in appellant's services and participated with him in extended negotiations over a long period without complaint.

Immediately upon his employment appellant went to work on the claims and contacted the adverse party and his liability insurer by registered mail. He attended a traffic court hearing and held numerous conversations and conferences with appellees, their physicians and the insurer's representative relative to the claims over a period of several months. During this period he had about 40 telephone conversations with appellees and Mr. Nichols visited his office about 20 times in regard to the case.

Appellees were first treated by Dr. J. W. Shuffield, a bone specialist, who discharged them on December 29, 1954, as completely recovered. Appellant and Mrs. Nichols conferred with the doctor in his office early in January, 1955, and she was dissatisfied with his findings as to her condition. Appellant advised that she consult her family physician, Dr. Myers Smith, and Dr. Richard M. Logue, another bone specialist, and this was done. On February 7, 1955, Dr. Logue examined Mrs. Nichols and two days later reported to Dr. Smith that she had suffered a severe whiplash injury to her neck at the time of the accident. While he did not think any permanent disability would result he recommended use of a traction halter apparatus and stated that the headaches and other pain occasioned by the injury might last for a considerable period. It was about this time that the insurer rejected appellant's offer to settle for $3,000 and made a counter offer of $1,250 which was declined upon appellant's advice that negotiations be suspended for a time.

About April 1, 1955, it was agreed that negotiations for settlement should be resumed. Shortly thereafter Mrs. Nichols became unhappy when her family physi-

cian intimated that she was not in as bad shape as she thought and told her that she would feel better when the case was settled. Although she seemed to feel that appellant shared the doctor's views, Mrs. Nichols made no complaint directly to him about the matter. During the April negotiations the adjuster made an offer to settle for $2,000 which appellant submitted to appellees and they rejected. Mrs. Nichols felt her condition had worsened and, at appellant's suggestion, it was agreed that she would consult further with her doctors after which appellees would notify appellant to either resume negotiations or file suit. Appellant prepared a complaint, complete except for the amount of damages sought, which he left with appellees on a visit to their home on April 19, 1955, after they failed to appear at his office the day before. On that visit Mr. Nichols told appellant that Mrs. Nichols was too ill to see him but promised they would come to his office the next day and suggest a final offer of settlement to be submitted to the insurer before suit, and the amount to seek in the event suit was filed.

On April 20, 1955, appellees came to appellant's office and stated they were discharging him and employing their present attorneys under a written contract executed earlier that day which they exhibited to appellant. This contract recognized the prior employment of appellant by appellees and provided for a contingent fee to the new attorneys on terms substantially similar to those previously made with the appellant. It further provided that appellant should receive the first $666.66 of any fees received by present counsel under their contract. Appellant advised appellees of his unwillingness to enter into such arrangement, that he stood ready, willing and able to perform his contract of employment and that any compensation paid should conform thereto. When appellant inquired whether they would make immediate payment of the fee stipulated in the new contract Mr. Nichols replied: "Why, of course not. I don't aim to pay you anything."

After appellant's discharge negotiations for settlement were continued by appellees' present attorneys.

Mrs. Nichols again consulted Dr. Logue who placed her in the hospital where she remained in traction for 14 days in May, 1955. The doctor issued an additional medical report on May 25, 1955, which was made available to the insurer. Further negotiations for settlement continued without success until June 24, 1955, when present counsel filed suit against Young for damages allegedly sustained by appellees in the amount of $32,500 as a result of the collision. After the issues were joined present counsel made preparation for trial which was set for October 3, 1955, at a pretrial conference. Further negotiations with the insurer resulted in an offer to pay appellees $6,000 ($1,000 to Mr. Nichols and $5,000 to Mrs. Nichols) which was accepted and the money paid into court and impounded to await action upon appellant's intervention in which he sought a fee of 45% of the settlement under his contract. After appellees answered with a general denial it was stipulated that the intervention, together with appellant's claim for a percentage of an out-of-court settlement with Jackie Nichols for $250, would be tried by the special judge without a jury.

At the trial the testimony of the insurance adjuster corroborated that of the appellant as to the negotiations for settlement. He denied that appellant indicated any disposition to hurry a settlement and stated that the major factors causing his company to evaluate the claims upward after April 20, 1955, were the additional medical report by Dr. Logue, the increased medical and hospital expenses and the additional claim for loss of past and future earnings to Mrs. Nichols alleged in the complaint. He raised the settlement offer to $2,500 on the date appellant was discharged.

The discovery depositions of appellees taken by appellant were introduced by the former. While appellees contradicted the testimony of appellant on a few points, their answers were so evasive and contradictory as to render their entire testimony questionable from the standpoint of reasonableness and credibility. Although they seemed to be intelligent business people, they evaded direct answers and disclaimed recollection of matters

which the circumstances clearly disclosed to be within their certain knowledge.

The able trial judge found that the $250 settlement of Jackie Nichols was exempt from appellant's fee claim. While he felt that appellant was only entitled to a fee of $666.66 from appellees, this sum was increased to $833.33 at the suggestion of appellees' present counsel with $333.33 of the recovery apportioned to Mr. Nichols and $500 apportioned to Mrs. Nichols. In reaching this conclusion the court rendered an opinion in which he held it unimportant to determine whether appellant's discharge was with or without cause; that it was impossible to assume that appellant would have secured more than $2,000 had he been permitted to complete the contract without interference; and that since the increased settlement was produced by appellees' present attorneys, it would require speculation to conclude that a like disposition would have resulted if appellant's employment had continued.

The evidence sufficiently sustains the court's finding that Jackie Nichols never authorized the employment of appellant to prosecute a claim on her behalf. However the evidence is overwhelming that appellees wrongfully and without just cause discharged appellant thereby breaching the contract of employment. Under such circumstances, we are of the opinion that in fixing the damages the court erred in using as the sole measure thereof a percentage of the unacceptable offer of settlement made by the insurer shortly before the wrongful discharge.

The authorities generally are not in agreement as to the measure or basis of recovery by an attorney employed under a contingent fee contract who is discharged without fault on his part. In some jurisdictions the discharge of an attorney employed on a contingent fee basis is regarded as putting an end to the contract, so that any recovery of compensation must be exclusively upon *quantum meruit*. However, in perhaps a majority of jurisdictions, including Arkansas, it has been held that an attorney employed under a contingent fee

contract and discharged without fault on his part may recover damages as for breach of contract. Under these cases the measure of recovery usually is the contract price abated by such sum as would in the natural course of things have been incurred if the services had been continued. See 5 Am. Jur., Attorneys at Law, Secs. 182 and 202; 7 C. J. S., Attorney and Client, Sec. 169 a(2); and cases collected in 136 A. L. R. 231.

One of the leading authorities in support of the breach of contract theory is our own case of *Brodie* v. *Watkins,* 33 Ark. 545, 34 Am. Rep. 49, where the situation was similar to that presented in the instant case. In that case Turner was employed by Watkins to prosecute a suit upon an unliquidated claim on a contingency fee basis of 10 per cent of the amount recovered. Turner filed suit and was engaged in its prosecution when he was wrongfully discharged and other attorneys employed who recovered $10,000. In an action by Turner for breach of the employment contract the court held he was entitled to recover $800. This amount represented 10 per cent of the total recovery less $200 which the court estimated as the "probable expenditures" Turner would have incurred if his services had been continued. In reaching this conclusion the court said: "A review of all the authorities, cited on both sides, leads the mind to the conclusion that in cases of special contracts for legal services, which are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, the latter may claim the whole compensation, subject to such abatement as would, in the natural course of things, have been incurred if the services had been continued. The value of the legal services proper, will not be apportioned; but whilst, upon one hand, the attorney will not be put upon the *quantum meruit,* he ought not to recover more than he would have made if he had gone on with the case. His *time,* however, does not belong wholly to his client, and no deduction can, in ordinary cases, be justly made on the presumption that it was wholly occupied in other professional business."

The rule announced in the *Brodie* case has been followed in several later decisions including *Bockman* v.

Rorex, 212 Ark. 948, 208 S. W. 2d 991, where we again approved the following statement by Judge Eakin in the *Brodie* case: "Legal services . . . cannot be apportioned either by time, or the amount of physical labor expended in drawing papers, attending courts, and oral arguments. It is the attorney's judgment, his learning, his responsibility and advice, which is relied upon, and which gives the peculiar value to legal services. Perhaps the most difficult and valuable services of the attorney may be rendered in considering his client's case, and giving him confidential information, before any visible act is done. These are general considerations, to show that the professional services of an attorney cannot justly be apportioned by the plain and obvious mode indicated above for cases of other classes." The court also observed that while it might be supposed that the first attorney would have done as well as those who actually made the recovery, it could not be presumed that he would have done better. By the same token it should not be presumed that he would not have done as well.

Insofar as this record discloses appellant faithfully, diligently and competently discharged his duties and responsibilities to appellees under the employment contract. Since it is clear that his discharge was wrongful, he is entitled to recover 45 per cent of the recovery of $6,000 less the probable expenditures he would have been required to make if his services had been continued. While we recognize the impossibility of rendering an accurate account of such expenses, we think a deduction of $300 would be proper under the circumstances. The judgment is accordingly modified by increasing appellant's fee to $2,400 and, so modified, the judgment is affirmed.

5-1149 298 S. W. 2d 52

Opinion delivered February 4, 1957.

R. L. Searcy, Jr., and *Graves & Graves,* for appellant.

Keith, Clegg & Eckert and *McKay, Anderson & Crumpler,* for appellee.

GEORGE ROSE SMITH, J. This is a bill in equity by which John W. Wall and J. R. Arnold, Jr., seek to quiet their title to an undivided fifteen-fortieths interest in the oil, gas, and other minerals underlying a forty-acre tract. The appellant levee district is the principal defendant and bases its claim of ownership upon its purchase of the forty acres in foreclosure suits brought for the collection of delinquent levee assessments. The chancellor held that the improvement district sales did not af-

fect the plaintiffs' interest in the minerals; the decree granted the relief sought.

On December 24, 1938, Wall and Arnold purchased an undivided fifteen-fortieths mineral interest from F. R. Redden, who then owned the forty acres in fee simple. The deed was recorded two days later and is the basis for the appellees' claim of title.

Later on the appellant brought suit to collect delinquent levee district assessments for the years 1937, 1938, 1939, and 1940. In that suit "F. R. Redding" was designated as the owner of the land, which was correctly described as the northeast quarter of the southwest quarter of Section 3, township 20 south, range 26 west. Wall and Arnold were not named in the suit; the district's officers testify that they had no actual knowledge of the mineral deed that was then on record. The district obtained a decree of foreclosure in 1944 and was the purchaser at the commissioner's sale. In like manner (except that Redden's name was correctly spelled) the district foreclosed its lien for the 1941 and 1942 assessments and again bought the land at the commissioner's sale, in 1946. After the expiration of the time for redemption the commissioner deeded the forty acres to the district, on September 13, 1948. When the district subsequently sold the land to third persons it reserved a half interest in the oil, gas, and other minerals. That reserved title constitutes the appellant's present claim of ownership.

We lay aside the district's contention that it should not have been required in the court below to elect to rely either upon the first foreclosure sale or upon the second, for in the view we take this issue is immaterial. Inasmuch as both sales appear to have been regularly conducted the question is whether the foreclosure proceedings affected the outstanding mineral interest that was owned by Wall and Arnold.

It cannot be doubted that the foreclosure sales ostensibly vested in the district the fee simple title to the forty acres, including the minerals. The land, as we have said, was accurately described, and such an un-

qualified description includes the minerals as well as the surface. *Osborn* v. *Ark. Ter. Oil & Gas Co.,* 103 Ark. 175, 146 S. W. 122; *Maloch* v. *Pryor,* 200 Ark. 380, 139 S. W. 2d 51.

Nor, apart from a statute to be mentioned in a moment, can it be doubted that the district obtained a good title despite its failure to name Wall and Arnold in the foreclosure proceedings. The district was created by Act 106 of 1905, which defines the foreclosure procedure and then provides: "Such proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of said land be incorrectly alleged in said proceedings . . ." In construing this identical language in other improvement district statutes we have repeatedly held that the district's failure to designate the true owner of the land does not affect the validity of the foreclosure sale. *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252, affirmed 204 U. S. 241; *Pinkert* v. *Lamb,* 215 Ark. 879, 224 S. W. 2d 15; *Stith* v. *Pinkert,* 217 Ark. 871, 234 S. W. 2d 45, appeal dismissed, 341 U. S. 901. Here the district was mistaken in naming Redden as the sole owner of the land; but, under the rule of property established by the many decisions on the point, the error did not invalidate the sale.

The appellees insist, however, that the district had constructive notice of their recorded mineral deed and was therefore required by statute to make on its own initiative a separate assessment of benefits against the mineral interest. The statute relied upon was originally enacted in 1897 and now reads: "When the mineral rights (and) or timber rights in any land shall, by conveyance or otherwise, be held by one or more persons, and the fee simple in the land by one or more other persons, it shall be the duty of the assessor when advised of the fact, either by personal notice, or by recording of the deeds in the office of the recorder of the county, to assess the mineral rights (and) or timber rights in said lands separate from the general property therein. And in such case a sale of the mineral rights (and) or timber rights for nonpayment of taxes shall not affect the title

to the land itself, nor shall a sale of the land for nonpayment of taxes affect the title to the mineral rights (and) or timber rights. When any mineral rights (and) or timber rights assessed as above set out, become forfeited on account of nonpayment of taxes, same shall in all things be certified to and redeemed in the same manner as is now provided for the certification and redemption of real estate upon which taxes duly assessed have not been paid.'' Ark. Stats. 1947, § 84-203.

It is plain that this statute was intended to apply to the assessment of property for general taxes rather than to an assessment of benefits by an improvement district. The statute refers to the nonpayment of ''taxes,'' to mineral rights ''forfeited'' for such nonpayment, and to the ''certification'' of those rights. This language is appropriate to the field of general taxation but not to that of improvement district assessments. The duty to make the separate assessment is imposed by the statute upon the county assessor, who ordinarily has nothing to do with improvement district assessments and does not even have custody of the books in which the assessed benefits are recorded. The legislature certainly did not mean to impose upon the county assessor a duty which that officer would be altogether unable to perform.

The appellees point out that as a matter of fairness the owner of constructively severed minerals should not be required to pay for benefits received by the land as a whole; it is said that the justice of this assertion was recognized in *Lewis* v. *Delinquent Lands,* 182 Ark. 838, 33 S. W. 2d 379. Doubtless this is true, but the legislature provided a complete remedy by Act 359 of 1925: ''The assessing officers of any improvement district may make a reassessment of the benefits annually, and in any such reassessment they may correct defective descriptions, and where tracts of land have been assessed as a whole such tract may be divided according to their ownership at the time of the reassessment.'' Ark. Stats., § 84-1209. Instead of applying for relief under this section of the statutes the appellees stood by for more than ten years and permitted the land to be sold to the district and

the period of redemption to expire. Their title to the mineral interest has now vested in the appellant.

The decree is reversed, and, since the title to land is involved, the cause will be remanded for the entry of a decree dismissing the complaint for want of equity.

McFaddin, J., dissents.

Hestand *v.* Erke.

5-1156 298 S. W. 2d 44

Opinion delivered February 4, 1957.

Lem C. Bryan and *Chas. A. Beasley,* for appellant.

Kincannon & Kincannon, for appellee.

Paul Ward, Associate Justice. This appeal deals with the proper retirement pay for a Lieutenant in the Police Department of the City of Fort Smith, Arkansas.

After 20 years of service in the police department appellee, Oscar Erke, at his own request, was permitted, by the Board of Trustees for the Policemen's Pension and Relief Fund, to retire, and his retirement pay was fixed at $135.75 per month. The Board arrived at the above amount as follows: appellee's regular monthly salary as a Lieutenant at the time of retirement was $271.50 as fixed by City Ordinance No. 2195, and Ark. Stats. § 19-1809 provides for a pension of "half pay" in event of retirement.

Appellee filed a Petition for a Writ of Mandamus in the circuit court, directed against the members of the

said Board, asking the court to compel the Board to fix appellee's retirement pay at $166.95 per month out of the funds held in trust for that purpose. It was appellee's contention before the trial court that his salary or pay at the time of retirement was $333.90 per month. The trial court held in favor of appellee, and ordered his retirement pay fixed at one-half of the above amount or $166.95 per month. The Board has appealed.

The matter was submitted to the trial court on An Agreed Statement of Facts, the material portions of which, in addition to those already mentioned, are as follows: Appellee served as a member of the police department in excess of 20 years and had risen to the rank of Police Lieutenant when he was retired; He was eligible for retirement under Ark. Stats. § 19-1809; In accordance with the provisions of Act No. 78 of 1955 appellee did sufficient extra work as a policeman to boost his monthly pay in 1955 as follows—July $277.37, September $321.42, and October $333.90; The last pay received by appellee as a Lieutenant in the police force was for the month of October 1955, and; Appellee contributed 2 per cent of all extra pay to the Pension and Relief Fund.

It is our conclusion that, under the above situation, the Board in this instance was correct in fixing appellee's retirement pay at $135.75 per month. Appellee's salary was fixed by Ordinance No. 2195 of the City of Fort Smith and not by Act No. 78 of 1955. The purpose of the latter Act was to limit the hours and days for police personnel to work and not to fix salaries or pay. It is true that said Section 19-1809 provides for retirement "at half pay." However a careful study of the provisions of the above section together with the related sections convinces us that the word "pay" as used above relates (under the facts of this case) to the word "salary" as used in the Ordinance mentioned above.

General Act No. 250 passed in 1937 provides for the Policemen's Pension and Relief Fund. This Act, as later amended, now comprises Ark. Stats. Sections 19-1801 to 19-1821 inclusive. Section 19-1801 authorizes a millage tax on all property in cities of the first class for the

benefit of a pension fund for policemen. Section 19-1802 provides for other funds, one of which is 2 per cent of the "monthly salary" of each member of the police department. Likewise Section 19-1809 makes mention of "monthly salary."

According to Webster's International Dictionary the word "salary" denotes payment at regular intervals or "fixed compensation regularly paid, as by the year, quarter, month or week." Black's Law Dictionary, Fourth Edition, defines the word as "a stated compensation, amounting to so much by the year, month, or other fixed period, . . ."

In this case the extra pay which appellee received for the three months specified above was for additional hours he worked when and as called upon to do so under the provisions of Section 19-1712. The very fact that different amounts were paid for each of the three months negatives the idea that they were "regular" payments or "fixed compensation regularly paid."

This entire matter must also be considered from another standpoint which confirms the view we have taken. Pensions have to be paid with money, and the money in this case has to come partly from an assessment on the salaries of the various policemen. It must have been contemplated that such an assessment over a period of many years would produce a substantial and stable fund. No such results however could have been expected from an assessment on remuneration received for brief and irregular extra work such as relied on here by appellee. If appellee's contention is correct the entire pension program could be endangered simply by giving a large amount of extra work to a policeman for only one month before he was subject to retirement. Manifestly this could be unfair to other policemen who have a right to expect to receive full retirement compensation in the future.

The learned judge in an able opinion relied largely upon the holding in the case of *State ex rel. King* v. *Abbott, et al.,* 43 Del. 472, 48 A. 2d 745, but the facts in that

case distinguish it from the case under consideration. There the policeman, at the time of retirement, was drawing base pay at the rate of $170 per month and in addition thereto he was drawing, under legislative enactment, $15 each month under a "State Police Compensation Plan" and $15 each month to compensate for the increased cost of living. The court properly held that all of the above payments constituted salary, holding that the policeman was entitled to a pension of $100 per month, or one-half of his salary. The $15 payments mentioned above met all of the requirements of the definition of a "salary" as stated above — said payments constituted fixed compensation paid at regular intervals over an extended period of time.

Because of the disposition which we have made of this case it is unnecessary to consider appellant's first contention that the action of the Board of Trustees of the Policemen's Pension and Relief Fund in this matter was not subject to review by the courts. The Board acted properly in offering to refund to appellee the 2 per cent assessments he has paid on the amounts received for additional work.

Reversed.

GRIFFIN *v.* MO. PAC. RD. CO.

5-1168 298 S. W. 2d 55

Opinion delivered February 4, 1957.

M. V. Moody, for appellant.

Pat Mehaffy and *W. A. Eldredge, Jr.,* for appellee.

SAM ROBINSON, Associate Justice. In this appeal, the appellant states his points as follows: "1. This

appeal is taken by appellant for the *sole purpose of determining whether or not the trial court had the right to arbitrarily take from the appellant's attorney the right to qualify the Jury on voir dire examination;* the right to examine the jury as to disqualification; challenge for cause and peremptory challenge and to examine them individually or in groups of three. 2. To determine whether the trial court erred *in not allowing appellant's attorney the privilege of reading before* the jury and into the record that part of his complaint touching upon *'The Federal Employers' Liability Act'* and the *'Safety Appliance Acts.'* 3. To determine if the *trial court had the right and power to permit the appellant's wife to testify in behalf of the appellee* to impeach or discredit her husband's testimony."

There is no abstract of the *voir dire* examination, and no abstract of the testimony or of the opening statement. Hence, from appellant's brief, we cannot determine whether there was error. It has been pointed out repeatedly that this court will not search the record; that it is wholly impractical for the seven members of this court to read the one record. *Commissioner of Labor C. R. Thornbrough* v. *Danco Construction Company,* 226 Ark. 797, 294 S. W. 2d 336.

Affirmed.

LESLIE MILLER, INC. *v.* STATE.

4807-8-9-10 298 S. W. 2d 44

Opinion delivered February 4, 1957.

Per Curiam opinion conforming to mandate of U. S. Supreme Court.

CONFORMING OPINION

These are the same cases as *Miller* v. *State* (4807-4810, inc.) reported in 225 Ark. 285, 281 S. W. 2d 946.

In our former opinion we affirmed the convictions of the appellants. They appealed to the United States

Supreme Court; and on December 17, 1956, that tribunal reversed our decision. See *Miller* v. *Arkansas,* 352 U. S. 187; 1 L. Ed. (2) 231; 77 S. Ct. 257. The United States Supreme Court made this directive:

"The judgment of the Supreme Court of Arkansas is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

The Mandate of the United States Supreme Court was filed in our Court on January 21, 1957; and in accordance with said Mandate, we now deliver this conforming opinion, towit:

The judgment of the Pulaski Circuit Court in each of these cases is hereby reversed, annulled and set aside and the appellants are awarded all costs therein expended.

WARD BODY WORKS, INC. *v.* SMALLWOOD.

5-1169 298 S. W. 2d 332

Opinion delivered February 11, 1957.

Huie and *Huie,* for appellant.

Lookadoo, Gooch & Lookadoo, for appellee.

CARLETON HARRIS, Chief Justice. This case arose out of a traffic mishap which occurred a short distance south of Arkadelphia, on highway 67. Appellant, W. E. Bolding, was driving south on said highway delivering a new school bus to a customer of Ward Body Works. He attempted to pass appellee, Cecil R. Smallwood, who was also proceeding south in a tractor belonging to him, and to which was attached a trailer, belonging to United Transport, loaded with new automobiles. While he (Bolding) was in the process of passing, a car came over the hill from the opposite direction, moving rapidly, and appellant, thinking he was clear of appellee, pulled back into the right lane. The right rear corner of the school bus collided with the left front of Smallwood's tractor, which overturned. Smallwood filed this action against Bolding and Ward Body Works to recover for property damage and physical injuries.

At the trial, appellee contended that Bolding cut in too quickly, while appellants contended that appellee should have decreased his speed when the approaching car was observed, in order to permit Bolding to completely pass the tractor. The jury found that Bolding was guilty of negligence, and that the total amount of damages sustained by appellee was $12,000 personal injury and $1,500 property damage. The jury also found appellee guilty of negligence, and further found that the total negligence causing the collision should be prorated 75% to Bolding and 25% to Smallwood.[1] This resulted in a judgment for Smallwood in the amount of $9,000 for personal injuries and $1,125 property damage, or a total of $10,125. From such judgment comes this appeal, the sole point raised by appellants being that the verdict of the jury was excessive. Appellee cross appeals, contending that there was no evidence that Small-

[1] See Act 191 of 1955.

wood was guilty of any negligence at all, and he should have the full amount of recovery.

First, we dispose of the cross appeal. Appellee insists there is no evidence of negligence on his part, and that the jury was in error in making this finding. It is true that the only direct evidence as to negligence of appellee was presented in the testimony of Bolding, who stated as they started down the hill (at which time he was endeavoring to pass appellee) the tractor picked up speed, and that if Smallwood had slowed the tractor down, appellant would have been able to clear the vehicle before cutting back in. Other evidence also indicated that Bolding may well have been trying to pass appellee for a distance of about four-tenths of a mile. We think the testimony of Bolding was sufficient to raise a jury question, and it was within the province of the jury to determine whether or not appellee was guilty of negligence. Accordingly, we hold there is no merit in the cross appeal.

We come then to the claim that the verdict is excessive. Appellee contends that the cervical part of his spine has been injured; that it causes pain when he turns his head; that he has extreme pain in the lower part of his back, and that at times when driving, he takes trembling spells which almost cause him to black out. He testified that he formerly worked a 70 hour week, but that he is presently not able to put in more than 60 to 65 hours, which extend over the entire week (instead of concluding in five days, six hours), and instead of taking an eight hour rest period, it has become necessary to rest from 10 to 14 hours before resuming his duties. He also complains of extreme nervousness; states that he has to frequently stop and rest on his trips, and that he has undergone much mental pain and worry through fear that he will not be able to continue in his work, and, accordingly, not be able to support his family. The record discloses that he spent one day in the hospital immediately following the collision, lost 35 days from work, and has visited several physicians for examination or for treatment.

Two physicians, Dr. Richard M. Logue, orthopedic surgeon of Little Rock, and Dr. R. E. Rowland of Pineville, Louisiana, testified for appellee. Dr. Logue stated that he saw the patient three times, first in October, and last on March 26th, 1956. He found tenderness over the mid-portion of the neck, particularly on the right, and x-rays revealed a narrowing of the interspace between the fifty and sixth vertebrae. This, according to Dr. Logue, indicated an injury at some prior time, said injury causing this narrowing because of damage to the intervertebral disc space. It was his opinion that this narrowing could have been caused by the injury received by appellee on July 28th.[2] He stated that pain is a natural accompaniment of such an injury. "With the complaints that Mr. Smallwood exhibits and in spite of the dearth of physical findings, it is my feeling in cases such as these, that pain arises from the strains associated with the accommodation of the body to the narrowing of the space and this in turn produces tensions in the neck which can result in his headaches. Because of my experience in seeing a number of these injuries, and in many without even x-ray evidence present, I feel that it is accepted among orthopedists that such injuries do cause some degree of permanent disability. In Mr. Smallwood's case I feel this does not exceed 10% to the body as a whole." Dr. R. E. Rowland examined appellee on October 15th, 1955, and this examination was entirely neurological and psychiatric. From his testimony; "Neurological examination: he had a decided facial tremor; in other words, he was shaking and nervous — tremors on both sides. The fold — the nasal laval fold — running from his cheek to the corner of his mouth on the right side is exaggerated; tremor of lips, tremor of tongue on extension; tremor of fingers on extension — his hands were shaking — both upper extremities showed slight increased motor activity on reflexes, more pronounced on the right; slight exaggerated reflex of patellae; left achilles exaggerated; tremor of the voice; missed finger to nose test; positive Rhom-

[2] The collision which is the subject of this litigation occurred on July 28, 1955.

berg." Dr. Rowland related the patient was suffering from traumatic neurosis, was very nervous, and in his opinion, the nervous condition resulted from the wreck on July 28th. He also examined appellee April 22, 1956 (one day before the trial). His testimony relative to such examination was that he considered the patient disabled at that time because of high tension, that Smallwood was extremely nervous, and he did not know how long this condition would exist, but "the nervous tissue is the highest tissue we have in the body, and the last to repair itself." He considered the patient disqualified vocationally, *e. g.,* that he would be unable to use good judgment and would become frustrated; that the dizzy spells and blackouts would certainly disqualify him from driving, and that Smallwood needed rehabilitation or revocationing because "those black-spells are certainly serious."

Dr. Kenneth Jones, orthopedic surgeon of Little Rock, Dr. Robert Watson, practicing neurological surgeon of Little Rock, and Dr. Andrew Crenshaw, orthopedic surgeon of Campbell's Clinic, Memphis, Tennessee, all testified on behalf of appellant. Dr. Watson saw the patient on January 6th, 1956, and testified he found no physical evidences to prohibit appellee from returning to work, and was of the opinion that there were no indications for further medical treatment. Dr. Jones found no evidence of physical injury, but in his report stated the patient "appeared to be emotionally unstable and might well be suffering from a traumatic neurosis." Dr. Crenshaw (whom Smallwood first visited for treatment by his own choice) first treated appellee in August, 1955. He testified that his examination revealed tenderness over the mid-portion of the neck, and restriction of neck motion 50 to 75% normal. Examination of the back proved negative except for the fact that pressure over the right 10th and 11th ribs posteriorly (behind) caused a clicking sensation in the right lower front part of the chest, which caused the patient to jump with pain. Appellee complained that this was the type of pain he had in his back while driving the truck, and that it usually came when he hit a bump in the road.

Dr. Crenshaw also found a narrowing of the disc space between the fifth and sixth cervical vertebrae (bones in the neck). He advised staying away from work for two weeks and the use of hot packs. Dr. Crenshaw again saw appellee during the latter part of September, at which time most of the neck discomfort had disappeared, and also most of the back discomfort. Examination of patient's back still revealed the clicking sensation in the ribs (previously described) in front, when pressure was applied from behind. It was the opinion of Dr. Crenshaw that appellee would eventually be completely free of the symptoms, though this might not occur for more than a year. He stated that the patient would be able to work, although he would have discomfort. The doctor did not know how long a truck trip appellee might be able to make in comparison to previous truck trips.

Appellants further contend that with the exception of the months of August, September, and November, appellee's earnings have been higher than before the wreck. This is true with the exception of January, 1956, but appellee states that his base pay had been raised about 3c a mile subsequent to the accident.

As stated in *East Texas Motor Freight Lines, Inc.* v. *Buck,* 213 Ark. 640, 212 S. W. 2d 13, "It is not the province of the appellate court—in considering whether a verdict is excessive — to determine as between the credibility of the various sets of medical experts. On appeal we are required to give the evidence supporting the verdict its highest probative value. * * * So, here, we must take the substantial evidence showing the greatest amount of injuries, and then, — based on such injuries — determine whether the verdict is excessive." The case of *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593, quotes with approval the earlier language of Mr. Justice Kirby in *St. L. S. W. Ry. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822. "There is no market where pain and suffering are bought and sold or any standard by which compensation for it can be definitely ascertained and the amount actually endured determined, and compensation therefor must be consid-

ered on a reasonable basis, and the jury cannot give any amount they please, although the amount of damages must be left largely to the reasonable discretion of the jury." * * * Applying the standard as herein set out, we are of the opinion that the verdict awarded appellee for personal injuries was excessive, and should be reduced to $9,000.

Appellants also contend that the judgment for damage to the tractor was excessive by about $400. William Earl Smith, a witness for appellant, testified that the tractor could be repaired for $795.76. He did not profess to know the market value of the tractor before the wreck occurred. Appellee testified the fair market value of the tractor to be $2,000 before the wreck, and the fair market value afterwards to be $300. W. O. Duce, automobile dealer in Arkadelphia, testified that he was familiar with appellee's tractor (in fact, he had seen it the day before the wreck) and a fair market price for the tractor would be from $1,850 to $2,100; that he would estimate the value of same after the wreck at $300 to $400. On cross-examination, he reduced this figure to some extent, but we are of the opinion that the evidence was sufficient to justify the judgment of the jury for $1,500 property damage.

Summarizing, the jury awarded Smallwood $12,000 personal injuries, and $1,500 for property damage. We feel that the judgment for $12,000 is excessive, and should be reduced to $9,000. The jury also found Smallwood guilty of negligence, and that such negligence should be prorated 75% to appellant and 25% to appellee. Accordingly, under the reduction herein ordered, and after prorating the negligence as found by the jury, appellee is entitled to personal damages in the amount of $6,750, property damage in the amount of $1,125, or a total judgment of $7,875.

CONCLUSION: If, within fifteen juridical days, a remittitur be entered in keeping with this opinion, then the judgments will be affirmed as so reduced. If such

remittitur be not entered, the judgments will be reversed and the cause remanded.

Justices WARD and ROBINSON think the case should be affirmed in all respects.

KINCADE *v.* C. & L. RURAL ELECTRIC COOP. CORP.

5-1097 299 S. W. 2d 67

Opinion delivered February 11, 1957.

[Rehearing denied March 18, 1957.]

V. J. Brocato, Clarksdale, Miss.; *Brockman & Brockman,* for appellant.

T. S. Lovett, Jr., and *J. W. Barron,* for appellee.

J. Seaborn Holt, Associate Justice. Some phases of the present case have been considered and determined in the two former cases of *C&L Rural Electric Co-operative Corporation* v. *McEntire,* 216 Ark. 276, 225 S. W. 2d 941 and *C&L Rural Elec. Coop. Corp.* v. *Kincaid,* 221 Ark. 450, 256 S. W. 2d 337.

On June 19, 1947, appellants (to whom we shall refer as Delta) were engaged under a contract with C&L Rural Electric Co-operative Corporation (to which we shall refer as C&L) in construction of additional electric distribution lines (or extension lines) for C&L to be tied in with some 1,200 miles of C&L's existing system which had been constructed in 1945 and energized in 1946. Dickinson and White were the project engineers employed by C&L and they let the contract for C&L with Delta and supervised the construction. Dickinson and White employed, with C&L's approval, W. A. Ramsey as construction supervising engineer over the project. On June 18, 1947 Ramsey prepared and issued clean-up order 314 for work on a number of poles on the new construction project including pole 249, which he gave to Paul Strode, Delta's superintendent, who worked in cooperation with Ramsey. The next day, June 19, 1947, Strode gave this clean-up order to McEntire, Delta's employee, and directed him to do certain work on pole 249. McEntire, with but two months' experience at the time, proceeded to the pole, and in attempting to perform the work required came in contact with a wire carrying 7,620 volts and was so severely

injured that it was necessary to amputate both of his hands. McEntire then sued C&L, Dickinson and White and Ramsey (engineers) and secured a judgment for $40,000. The judgment was affirmed in *C&L* v. *McEntire*, 216 Ark. 276, 225 S. W. 2d 941. Dickinson and White's insurance carrier paid $5,000 (the extent of its policy liability) on the judgment. C&L had liability coverage with Employers Mutual Liability Insurance Company (appellee) and his company paid $25,000 on the judgment (the limit of its policy liability), plus its *pro rata* share of the interest and cost. C&L paid the balance of $10,000 together with its share of interest and cost. Under the terms of its policy Employers Mutual was subrogated *pro tanto* to the rights of C&L, and has joined C&L in the present suit against Delta on Delta's indemnity agreement with C&L which was a part of the 1947 new construction contract. Delta demurred to appellees' complaint and the trial court sustained its demurrer. On appeal here from the order dismissing appellees' complaint, we reversed (221 Ark. 450, 256 S. W. 2d 337) and remanded with directions to overrule the demurrer and in that case we pointed out: "We must point out that the extent of Delta's liability to C&L on Delta's Indemnity Contract with C&L would be measured by, or depend upon, its degree of negligence, if any, in contributing to McEntire's injury and prorated accordingly." On a trial the court instructed the jury "If you find from a preponderance of the evidence that the defendant, Delta Construction Co., or its agents or employees were negligent and that such negligence, if any, either proximately caused the injury to McEntire or contributed to cause the injury, then you will answer the following question: Using 100% to represent the total or combined negligence of C&L and Delta, if you find Delta was negligent, in causing the injuries to McEntire, what percent of negligence do you find from the evidence is attributable to each of them? In this connection you are instructed to find that C&L was negligent in some percentage, — whatever the evidence may show." The jury returned a verdict finding that Delta was guilty of negligence and assessed its part of the whole at 60%.

From the judgment appellant has appealed and appellee has cross-appealed from that part of the judgment denying interest to them from the date they satisfied the McEntire judgment.

Appellant first argues that to establish Delta's liability under its indemnity contract with C&L that C&L must show "that Delta was in control of Pole 249 and the electric transmission lines attached thereto on June 19, 1947, at the time McEntire went upon said pole and was hurt . . . that Delta, its agents or employees, committed some act of negligence, while in control, that caused or contributed to McEntire's injury." In short, says appellant, "was the work called for to be done on Pole 249 part of the contract Delta was bound to perform?" We have concluded that the jury could so find. The construction contract defines Project as follows: "The term 'Project' shall mean the rural electric distribution system, or portion thereof, described in the Plans and Specifications, construction drawings and maps attached hereto. Article, 7, 1(e), Construction Contract." The indemnity contract, upon which the present suit is based, provides: "(g) The Project, from the commencement of work to completion, or to such earlier date or dates when the Owner may take possession and control in whole or in part as hereinafter provided shall be under the charge and control of the Contractor and during such period of control by the Contractor all risks in connection with the construction of the Project . . . shall be borne by the Contractor . . . The Contractor shall hold the Owner harmless from any and all claims for injuries to persons or for damage to property happening by reason of any negligence on the part of the Contractor or any of the Contractor's agents or employees during the control by the Contractor of the Project or any part thereof."

Article 8, 1 (f) defines completion as follows: "The term 'Completion' shall mean full performance by the Contractor of the Contractor's obligations under this contract *and all amendments and revisions thereof.* A certificate of Completion stating the date of completion,

signed by the Engineer and approved in writing by the Administrator, shall be *the sole and conclusive evidence* as to the fact of completion and the date thereof. Portions of the Project shall be deemed to be completed, within the meaning of this provision when they have been completely erected, and have been inspected and accepted in writing, by the Engineer on behalf of the Owner. Thereafter such completed sections may be energized in accordance with the provisions of Article IV, Section 3, at which time the Contractor's liability for maintaining them will cease." It appears undisputed that Pole 249, on which McEntire's injury occurred was constructed by Delta under its 1945 contract with C&L, and was a part of C&L's existing system of distribution lines on June 19, 1947, when McEntire received his injuries. It also appears to us equally clear that the control required under the 1947 contract, hereinafter considered, was on the project which included Pole 249, on which McEntire was injured, and on which clean-up work was required under the contract before the project was completed.

The record reflects that shortly before McEntire received his injuries Delta had dead-ended a new tie-in line from the South to Pole 249, and this particular line was deenergized (or cold) when McEntire was injured. It further appears that the line had not been accepted by C&L, nor was it in service when the injury occurred. The evidence further shows that on the day before the injury to McEntire, Ramsey handed to Strode (Delta's superintendent) certain clean-up notes which required certain clean-up work to be done on Pole 249 as a result of the construction of the new tie-in line before this line would be accepted and put in service, or before the project was completed. To do this work it was necessary for McEntire to climb to near the top of Pole 249, lower a down guy, which was on the south side of the pole and move it to the north side. The work also required the completion of an A-6 assembly, which meant to put proper insulators on either side of the pole so that the new tie-in line could be connected with the existing primaries, and finally to anchor the pole. While

on the pole McEntire contacted the live primary wire, which came from the north, carrying 7,620 volts resulting in his injury. It appears undisputed that C&L owned the hot primary wire which extended to the north from Pole 249. The work, however, that McEntire was doing under the clean-up sheet given to him by Strode (Delta's man) was work necessary to be done in order to complete the project under the 1947 contract, and we think the evidence shows that the tie-in line was still under the control of Delta at the time its superintendent, Strode, sent McEntire up on the pole, without first having inspected the pole. It appears that the work sheet which Ramsey handed to Strode, and which work sheet Strode in turn gave to McEntire, directed McEntire to do the clean-up work on Pole 249 but it did not show that the pole was energized, or hot. The evidence further shows that Delta made no inspection of the pole before directing its employee, McEntire, to ascend the pole and do the work required, but appears to have relied upon what the work sheet alone showed. It further appears that Strode had never seen Pole 249, but located it from a plate or a map of the project.

Lynn Thomasson, C&L's manager, testified that the new tie-in line from the south was constructed about two weeks before McEntire's injury and that it was dead-ended into Pole 249 and that this tie-in line had not been turned over to C&L at the time of the injury, that there still remained work to be done on it and it was Delta's line until the project was completed. W. S. Kincade, one of the appellants, testified: "Q. This tie-line we have been talking about running south from pole 249 hadn't been completed at the time McEntire was hurt, was it? A. No, sir. Q. There remained further work to be done on it by the Contractor, namely, Delta Construction Company, didn't there? A. On? Q. On the tie-line. A. On the tie-line, that is correct. Q. That is correct so that being the situation, Delta had positive control over that tie-line? A. Yes." In these circumstances we think there is ample evidence that additional work remained to be done in connection with the tie-in line before it could be accepted by the engi-

neers of C&L and that Delta had control over it within the meaning of the contract provision calling for indemnity, and that the jury was warranted in finding that Delta was negligent and in fixing its degree of fault at 60%.

Next appellant says that our decision in *C&L Rural Elec. Coop.* v. *McEntire, supra,* is the controlling doctrine of law in this case. We do not agree. The law of the case can only apply where the parties are the same. In the original McEntire case the parties were not the same as in the present case. *Stare decisis* has no application here for the reason that the subject matter in the McEntire case is not identical with that in the present case. The McEntire case was a suit in tort for personal injuries and this case being one on contract for indemnity. "The doctrine of the law of the case has no application in cases where the parties are not the same; but the doctrine of *stare decisis* requires the decision on a former appeal in a case between different parties, but involving the same subject matter, be followed, unless there be in the former case palpable error," *Western Union Telegraph Co.* v. *Byrd, Adm'x.,* 197 Ark. 152, 122 S. W. 2d 569.

Appellants also contend that: "The tie-line constructed in May, 1947, was a part of and was included in the construction contract entered into between C&L and Delta on July 14, 1945, and the cause of action thereunder, if any, arose February 13, 1950, . . . and is therefore barred by the five-year statute of limitations."

It appears from ample testimony that Delta received notice in a letter (dated May 17, 1948) from C&L by registered mail of the McEntire tort suit against C&L; that Delta was offered the opportunity to take over and defend that suit, but that it refused to do so. Another registered letter (dated December 21, 1948) was mailed to Delta informing it of the judgment against C&L in the McEntire case, and a return receipt postmarked December 23, 1948 was received by C&L; also a letter from Delta dated January 24, 1949, in response to the De-

cember 21st letter, stating "We would like to advise you that we are disclaiming any liability on this judgment." There was also in evidence the contract C&L entered into with Delta in 1947 authorizing, in effect, the construction and completion of a certain tie-in power line to connect with Pole 249. We think, after reviewing the testimony, that there was substantial evidence that the work was done under the 1947 contract, which was designated Arkansas 21M Lincoln, — Lynn Thomasson so testified. The work calling for the clean-up notes resulted from the stringing of the new tie-in line to Pole 249 from the South. Records of C&L tended to show that part of work order 314 was performed under an amendment to the 1947 contract and Thomasson identified that part as being the tie-in line in question. W. S. Kincade, one of the appellants, admitted he had signed many construction orders showing that work order 314 was at least in part performed under the 1947 contract. One of these orders which he signed was designated Arkansas 21M Lincoln, and when asked whether this designation meant the 1947 contract, he testified: "Q. This is the copy of the 1947 contract, Mr. Kincade, introduced in evidence, is that correct? A. Yes. Q. How is it entitled? A. REA Project Arkansas 21M Lincoln. Q. . . . How is line 314 entitled here (referring to the construction order signed by Kincade)? A. You mean this? Q. Yes, sir. A. Project. Q. Project What? A. Arkansas 21M Lincoln. Q. Who signed it? A. I signed all of them."

We hold, without detailing more of the testimony, that there was substantial evidence that the work was done under the 1947 contract and, therefore, the cause of action was not barred by the five-year statute of limitations.

Appellants further contend that: "An indemnity agreement is to be construed as written, and when ambiguity exists, it must be construed against the indemnitee in favor of the indemnitor." Most of appellants argument on this point has been answered, adversely to it above — that is, its contention that C&L was in con-

trol at the time of the injury and the work was being done under the 1945 contract. Nor can we agree that there is any ambiguity in the indemnity contract above, in question here. On this point appellant also argues, in effect, that if the work was done under Amendment No. 1 to the 1947 contract, then there was no liability because this amendment was never approved and, therefore, no contract, and that McEntire's injury occurred prior to the amendment and was not covered by it. We do not agree. The indemnity contract above provides in no uncertain terms that "The term 'Completion' shall mean full performance by the Contractor of the Contractor's obligations under this Contract and all amendments and revisions thereof . . ." So, clearly, the indemnity provision applied to all amendments or revisions of the contract. The record shows that this Amendment No. 1 to the 1947 contract was denominated: "Project—21M Lincoln Request for Construction Contract Amendment No. 1 Date—July 14, 1947. It is addressed to the Administrator of the REA in Washington. It commences: 'The following changes in material and labor cost in the Construction Contract dated February 20, 1947, are hereby submitted for your approval.' It then sets out the data on the original contract, together with the data on the proposed amendment, such as the mileage, signed consumers and costs. It is signed on behalf of C&L by its president. There is a written approval of Dickinson & White, engineers, and also contains the signature of Delta as follows: 'Accepted: Delta Construction Company (Contractor) by W. S. Kincade.' Attached to this Amendment No. 1 is a contract dated December 1, 1947, between C&L and Delta which recites: That Owner and C&L had entered into a contract dated February 20, 1947, for the construction of approximately 265 miles of distribution lines financed by the REA. That the Contractor has commenced the construction of an additional 125 miles of distribution lines without securing the approval of the Administrator." It thus clearly appears that Amendment No. 1 was made a part of the 1947 contract, so that the 1947 contract, affecting the obligations of the par-

ties, was made a part of this Amendment No. 1 and as pointed out the indemnity agreement applied not only to the 1947 contract but to all amendments and revisions.

Another contention of appellants is that: "The Court erred in admitting imcompetent testimony on behalf of the plaintiff; and rejecting competent testimony on behalf of the defendant." We think there is no merit to this contention. It suffices to say that we have reviewed the record and find no prejudiced error in the trial court's actions in permitting or refusing the introduction of evidence.

Errors were also alleged in the giving and refusing to give certain instructions. It would unduly extend this opinion to enter upon a discussion of them. We have, however, considered them all and find no error. Other alleged errors have not been overlooked, but on consideration we find all to be untenable. Accordingly, the judgment is affirmed on direct appeal.

On appellees' cross-complaint we have concluded that their contention that the trial court erred in denying them interest at 6% on the McEntire judgment from the date they paid it, February 13, 1950, must be sustained. It is unquestioned here that appellees paid the McEntire judgment, and on that date Delta became liable to them on the indemnity agreement. The jury determined that Delta was liable for 60% of the money that appellees paid from their own money for Delta, so Delta has had the use of appellees' money, and fairness and justice demand that Delta pay interest (6% the legal rate) on this money of which appellees have been deprived. The fact that we are dealing with an unliquidated demand is not controlling. "As a necessary part of his damages an indemnitee may recover against his indemnitor interest . . ." 27 Am. Jur. Indemnity, § 27, p. 473. *Miller* v. *Robertson,* 266 U. S. 243, 257, 69 L. Ed. 265, 45 S. Ct. 73: "Compensation is a fundamental principle of damages, whether the action is in contract or in tort . . . One who fails to perform his contract is justly bound to make good all damages

that may accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract." *Loomis* v. *Loomis,* 221 Ark. 743, 255 S. W. 2d 671, "Yet when the defendant is actually in default there are many instances in which interest is allowed even though the precise extent of his liability is not determined until the trial. For example, a defendant's liability for breach of a contract to pay a definite sum of money may be uncertain, for the default may have saved the plaintiff the expense of full performance on his own part, and that saving may be a matter for the jury to determine. In spite of this uncertainty interest is recoverable from the date of the breach." *Public Market Co. of Portland* v. *City of Portland, et al.,* 171 Or. 522, 138 P. 2d 916, 918, ". . . We are of the opinion, moreover, that the fact that the damages are unliquidated is not necessarily a bar to the allowance of interest, and that 'no right reason exists for drawing an arbitrary distinction, between liquidated and unliquidated damages.' . . . The tendency of modern authority is to disregard such a distinction." *American Law Reports, Annotated,* 27 A. L. R. 2d, Annotation, § 8, p. 1276, "Interest from the date of payment of a joint judgment has been held properly allowable to a tortfeasor on the outlay thus made on behalf of the other joint tortfeasors." 42 C. J. S. § 13 c. Interest, p. 585, "As a general rule an indemnitee who has been compelled to pay a debt or liability against which he is indemnified is entitled to recover interest on the amount paid, from the time of payment or, as it has been held, from the date of the judgment against him, from the time the loss was definitely settled, or from judicial demand . . ."

So, on appellees' cross appeal the judgment in so far as it denies interest will be modified so as to allow interest and as so modified it is affirmed.

Justice George Rose Smith not participating.

SMITH *v.* STATE.

4845 299 S. W. 2d 52

Opinion delivered February 11, 1957.

[Rehearing denied March 18, 1957.]

[redacted]

James E. Stein, Floyd E. Stein and *John F. Gibson,* for appellant.

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

ED. F. MCFADDIN, Associate Justice. Appellant, B. N. ("Bill") Smith, was convicted of murder in the

first degree for the homicide of Buck Layne; and the jury fixed the punishment at life imprisonment. The motion for new trial contains forty-one assignments, which we group and discuss in topic headings:

I. *Sufficiency Of The Evidence.* Viewing the evidence in the light most favorable to the verdict,[1] the facts appear as herein recited. On October 29, 1955, the badly decomposed body of Buck Layne was found in a secluded section of woodland near the "old Ben Thomas place" off of Highway No. 8 in Dallas County. There was evidence of an injury to the skull. Tracks indicated a vehicle had backed from the road to the place where the body was found. It was the opinion of the state medical examiner, after performing an autopsy, that death had been caused by the force of a blunt instrument striking the head and that the date of the death was about October 20, 1955, with a possible variance of 24 hours earlier or later.

The last day that Layne was seen alive was on October 19, 1955, and the last person seen with Layne was the appellant, Bill Smith, who was frequently interrogated before he was arrested. Blood was found on the leather boots that Smith admitted that he wore on October 19th. Buck Layne and Bill Smith were long time acquaintances, and each was engaged in some phase of the livestock business. Layne was working on a profit-dividing basis with L. H. Campbell, who was furnishing the money for their operations. On October 17, 1955 Layne and Smith went together to Eastern Arkansas to fix Layne's truck. They spent Tuesday night, October 18th, at Marvell, Arkansas, and then proceeded to Fordyce on October 19th in Smith's truck, with Layne's horses and mules and saddle in the truck.

While in Fordyce they purchased some Vodka and Layne became intoxicated. He unloaded his livestock at Barner's Stockyard, but was unable to make a sale. Layne and Smith then reloaded the livestock into Smith's

[1] This is the rule on appeal in cases such as this. See *Allgood* v. *State*, 206 Ark. 699, 177 S. W. 2d 928, and cases there cited.

truck in the late afternoon and Smith and Layne were last seen together in Smith's truck in Fordyce.

Burke Hodnett testified that shortly after five o'clock in the afternoon of that day, he saw a truck driving on old Highway No. 8. Hodnett, driving his own car, followed the truck until it turned off on a small road leading toward the "old Ben Thomas place." Hodnett testified that the truck looked like Smith's truck because of the unusual construction of its bed.

When Layne failed to return to Little Rock with the livestock on October 19th, his business associate, L. H. Campbell, went in search of him, and when Campbell reached El Dorado on October 20th he found that Bill Smith had sold Layne's horses and mules in El Dorado and still had Layne's saddle. Smith's explanation as to how he came into possession of the livestock was, that he cancelled a $125.00 debt which Layne owed him and, in addition, had given Layne "fifteen $20.00 bills" for the livestock. As to the saddle, he said that Layne failed to take it when Layne left him to go off with a white man named Henry and an unnamed Negro in the late afternoon of October 19th. Smith was entirely unsubstantiated as to the identity or the existence of Henry or the Negro. Smith also had deposited, to his own account in an El Dorado bank, a $50.00 check that Layne had endorsed.

An El Dorado policeman, Monroe Taylor, testified that on August 27, 1955, Smith came to the police station shortly after midnight and told Taylor that Smith was having trouble with his wife; that he had just seen his wife and Layne on the highway, but their car had eluded him. Taylor testified that Smith told him that he would "take care" of Layne later. The jury viewed the place where the body of Layne was found, and also viewed Smith's truck and certain tools that were said to have been in the truck.

We have sketched enough of the evidence to clearly demonstrate that it was sufficient to take the case to the jury and to support the jury verdict. For some of our

cases involving circumstantial evidence see: *Edmonds* v. *State,* 34 Ark. 720; *Butler* v. *State,* 63 S. W. 46;[2] *Hogue* v. *State,* 93 Ark. 316, 124 S. W. 783, 130 S. W. 167; and *Osborne* v. *State,* 181 Ark. 661, 27 S. W. 2d 783.

II. *Defendant's Requested Instruction On Circumstantial Evidence.* The appellant claims that the Trial Court committed reversible error in refusing defendant's requested Instruction No. 2 on circumstantial evidence. The Court refused the said Instruction No. 2 because the Court gave its own Instruction No. 21 on circumstantial evidence, which reads:

"You are instructed that evidence is of two kinds, namely, direct or positive, and circumstantial, and that any fact in the case or any element of the crime charged may be proved by either kind or by both kinds of evidence; and if any fact in this case or any element necessary to constitute the crime charged, has been established to your satisfaction beyond a reasonable doubt by either direct or circumstantial evidence, or by both kinds, then such fact or element has been sufficiently proved, and if upon a consideration of all the facts proved in the case you believe beyond a reasonable doubt that the defendant is guilty as charged, it is your duty to so find."

The Court also instructed the jury as to: (a) burden of proof; (b) reasonable doubt; and (c) presumption of innocence. In *Trammell* v. *State,* 193 Ark. 21, 97 S. W. 2d 902, we cited the earlier case of *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81, and then affirmed this language:

"It is not error to refuse an instruction that, before the defendant can be convicted of murder upon circumstantial testimony, the jury must find that the circumstances proved establish the guilt of the defendant to the exclusion of every other reasonable hypothesis, if the jury were properly instructed as to the burden of proof resting upon the State and as to reasonable doubt." The Trial Court committed no error in refusing the defendant's requested Instruction No. 2. See also *Cranford* v. *State,* 156 Ark. 39, 245 S. W. 189; *Osborne* v. *State,*

[2] This case is not officially reported. See 69 Ark. 659.

181 Ark. 661, 27 S. W. 2d 783; and *Cooper* v. *State,* 215 Ark. 732, 223 S. W. 2d 507.

III. *Separation Of The Jury.* The trial began on January 9th and the jury verdict was not returned until January 13th.[3] During the course of the trial, and before the case was finally submitted to the jury, the Court permitted the jurors to separate and in some instances the appellant's counsel objected, asking that the jury be kept together and the jurors not allowed to go to their homes at night.

We find no error in the rulings of the Trial Court allowing the jurors to separate. The Court duly and properly admonished the jury before each separation. Section 43-2121 Ark. Stats. says in part: "The jurors, before the case is submitted to them, may, in the discretion of the court, be permitted to separate . . ." See *Hamilton* v. *State,* 62 Ark. 543, 36 S. W. 1054; and *Borland* v. *State,* 158 Ark. 37, 249 S. W. 591.

IV. *Prejudice and Bias Of The Trial Court.* Appellant's counsel grouped incidents to support the argument on this matter. We quote the pertinent portions of the record in regard to each incident.

(a) When the State (Prosecuting Attorney, Mr. Linder) was examining the witness, Paul McDonald (State Policeman), on direct examination regarding what the defendant, Bill Smith, was reported to have said to the witness, the following occurred:

"Q. How many occasions beside that time did you ask him if he was on Highway 8 on that day?

A. My first contact with Bill Smith a few days before his arrest he was asked those questions and after his arrest he was again asked with the same answers.

Q. And you have told this jury that he said he was never on Highway 8 and that nobody else was in possession of his truck that day?

[3] The record is voluminous, containing more than 650 pages.

BY MR. STEIN: If we would stop the repetition of asking the witness a question and having the witness answer it and then go back over it it would save time.

BY THE COURT: If you will quit interfering.

BY MR. STEIN: I have a right to make my objections.

BY THE COURT: All right, you sit down.

BY MR. STEIN: I want to object to the remarks of the Court as prejudicial to the defendant and state further that I have a right to make objections at such times as I think necessary and that it is embarrassing to me and it is prejudicial to reprimand me before the jury for making an objection.

BY THE COURT: No reprimand has been made. Proceed.

BY MR. LINDER:

Q. Did you ask him any questions concerning whether or not he and Buck Layne were together on October 19, 1955?

A. Yes, sir.

Q. What was his answer to that?

A. He stated that they were together all during that day."

Appellant's counsel in their brief object most vigorously to the Court's words: "All right, you sit down." These words, standing alone and out of context, might either be a violent command or a polite agreement, depending on the tone of voice and manner of speaking. But in the record here before us, with the full surroundings shown — as we have by the excerpt — it is clear that there was no reflection on counsel and no reprimand. In fact, the language of the Court — "No reprimand has been made. Proceed." — removes any inference of a reflection toward appellant's counsel.

(b) Again, near the end of 27 pages of cross-examination by appellant's counsel of the State's witness, Hodnett, the following occurred:

"Q. And you are relying upon her memory in fixing this date as Wednesday and not your own, isn't that correct, Sir? You are telling this jury here this afternoon (interrupted)

BY THE COURT: Don't make a speech, Mr. Gibson. Ask the gentleman a question and let him answer.

A. (By Mr. Gibson:—) (continues) that you saw a truck on Wednesday, but isn't it a fact that the only way that you know this day, whether it was Wednesday or Thursday, is by what your wife told you?

A. I saw the truck on Wednesday.

Q. But you didn't know whether it was Wednesday or Thursday, you have told me that too, haven't you?

A. That's right."

The Court said: "Don't make a speech, Mr. Gibson. Ask the gentleman a question and let him answer." This was just another way of asking counsel to rephrase the question so as to make it less argumentative. That the remark of the Court was not considered at the time by counsel to be any kind of reflection is shown by the fact that no objection was saved.

(c) Again, in the testimony of the defendant, Bill Smith, regarding his efforts in repairing Layne's truck over in Eastern Arkansas on October 17th, the following occurred:

"Q. How long were you fixing the truck?

A. We got there about 12 and left about dark. After I drove this axle out, in driving this axle out it swelled the housing, it was stuck to the housing, and stuck to the housing where the bearing wouldn't — this bearing had to go jam up against it, and this bearing wouldn't slip up on the housing and I had to file that housing down enough that that bearing would go on and then that

housing run hot and the nuts didn't want to go back on the housing.

BY THE COURT: I want to know what the nuts up there have to do with this trial.

DEFENDANT OBJECTS TO THE STATEMENT OF THE COURT.

BY MR. STEIN:—

Q. Go ahead.

A. While I was filing this housing I asked them to run these nuts up on this housing. While I was sitting there filing this housing where those nuts would screw up easy enough I could screw them with my hand, and then had to use the big Stillson wrench, and I was working this Stillson wrench and Buck was holding the nut, and at that time Buck skinned his hand a little bit, let the wrench slip.

Q. Was his hand bleeding?

A. Yes, and I was sitting down on it and Buck said, 'I am not going to work any more.' And he said, 'If you can fix it, fix it, and if you can't, let it go.' I said, 'I am going to fix it. I have come to fix it for you.'

Q. How long did you work on it?

A. Started about 12 and got it going just about dark that night."

It is urged by the appellant's counsel that the prejudice and bias of the Court is shown by the Court's statement, as above copied, "I want to know what the nuts up there have to do with this trial." We think the question by the Court was beneficial to the appellant's case. Because of the question, the defendant went on to state that because the nuts were hard to adjust on the housing, Buck Layne skinned his hand; and this offered an explanation for the presence of blood. Furthermore, the fact that the nuts were difficult to adjust, also tended to explain the time consumed in repairing the truck on October 17th.

We cannot see any bias or prejudice on the part of the Trial Court by reason of any of the three remarks which we have copied into the opinion; and these are the only three instances of bias and prejudice that appellant's counsel have argued in their brief. We have dwelled in considerable detail on this point of bias and prejudice because we emphasize that Courts and Judges must always see that every person receives a fair and impartial trial before a fair and impartial jury. The Courts are the last bulwark of freedom and justice; and Judges must always act fairly and impartially. We conclude that the appellant received a fair and impartial trial.

V. *Other Assignments.* We have carefully considered all of the other assignments in the appellant's motion for new trial and find none which would justify reversal of the judgment.

Affirmed.

WILLIAMS *v.* GIFFORD-HILL & CO., INC.

5-1159 298 S. W. 2d 323

Opinion delivered February 11, 1957.

R. D. Rouse; and *Richardson & Cavanagh,* Lawton, Okla., for appellant.

Shaver, Tackett, Jones & Lowe, for appellee.

MINOR W. MILLWEE, Associate Justice. This is an appeal from a judgment of the Miller Circuit Court reversing and dismissing an award of the Workmen's Compensation Commission. The sole issue is the sufficiency of the evidence to sustain the Commission's finding that the accidental injury and death of Willie Williams arose out of and in the course of his employment with the appellee, Gifford-Hill & Company, Inc.

Appellee owns and operates a sand and gravel plant at Hoot, Arkansas, near Texarkana. Appellants are the widow and minor child, respectively, of Willie Williams, deceased, who was working at appellee's plant on July 24, 1955. The plant consists of several railroad tracks, a washing plant, a tunnel and a conveyor belt running from the washing plant to a filter plant where the cars of sand or gravel are made ready for shipment. On the date in question Williams and three other employees reported for work on the night shift which ran from 6:30 P. M. to 6:30 A. M. The duties of Williams required him to stay in the tunnel of the washing plant and feed the conveyor belt carrying gravel to the filter plant. After a car located beneath the filter plant was filled he was required to come up from the tunnel and help level the gravel therein. Mack Pierce, a fellow employee, operated a bulldozer in pushing the gravel

up to the tunnel where it passed through hoppers onto the conveyor belt.

About 8:15 P. M. it was discovered that gravel was not moving through the hoppers to the conveyor belt as it should. The formation of large mud balls made it necessary that a door in the tunnel be raised to permit the gravel to pass through. When Pierce went down to the tunnel to investigate he saw Williams standing either in a daze or asleep. After 30 to 45 seconds Williams aroused, opened the doors and restored proper operation of the conveyor belt. After the car being loaded at the filter plant was filled Williams went there to assist in the leveling process about 8:30 P. M. He complained of a headache and told Pierce he was going for some aspirin at a commissary or boarding house maintained on the premises by appellee several hundred feet northwest of the filter plant. After purchasing a box of aspirin and a Coca Cola at the commissary he returned to the filter plant a few minutes later but from a southerly direction where appellee's employees usually answered calls of nature in a wooded area on appellee's property. When he returned to the car at the filter plant he was not wearing his cap and E. W. Cain, his foreman, asked him where it was. Williams replied: "I guess I left it out in the bushes," and left in that direction.

Williams had not returned about 10:00 P. M. when it became necessary to move loaded cars off and empties onto the loading track leading to the tunnel. Cain was operating the "dinkey" and Pierce was acting as switchman. When they began moving a string of empty cars on a spur track they heard Williams yell. They went to a point near the south end of the string of cars where they found Williams had been struck and run over by one of the cars. He had been dragged about 31 feet from the point where he was struck and died within a few minutes. His cap and vomitus were found near the point where the wheels of the car first struck him.

The track upon which Williams was struck was located south of the track leading to the filter plant which

is about 105 feet from the point where the body was found. While he had no specific duties to perform on this track, it was necessary that deceased cross it in order to reach the bushes where he went to get his cap and where appellee's employees customarily went to answer calls of nature. An officer who made an investigation of the accident examined the body and the vomitus and found no evidence of intoxication. Cain stated deceased had been gone about an hour before he was killed.

In awarding compensation on the foregoing facts, the Commission found: "There are certain inferences that can be drawn from the evidence. One inference is that deceased had answered a call of nature and had gone to the woods for such purpose and was on his way back to his place of work. Another inference is that deceased became ill and lay down by the railroad track, while yet another inference is that deceased had possibly gone to sleep by the track. It appears that no one will ever know for a certainty why deceased was where he was at the time of his accidental injury and death.

"We have conscientiously considered all of the evidence of record herein, and we are of the opinion that when reasonable inferences are drawn from all of the facts and circumstances surrounding the entire scope of deceased's employment, and those facts and inferences are viewed in the light most favorable to claimants by resolving all doubts in their favor, it must be found that deceased's accidental injury and death on the night of July 24, 1955 arose out of and during the course of his employment with Gifford-Hill & Company, Inc."

In our opinion there is sufficient competent evidence to support the Commission's conclusion that deceased's accidental injury and death arose out of and in the course of his employment. Our compensation statute covers every injury to an employee arising out of and in the course of his employment except those injuries caused by his intoxication or by his willful intention to bring about the injury or death of himself or another. (Ark. Stats., Secs. 81-1302 (d) and 81-1305). The word "employment," as used in the statute, does not have

reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually doing the thing he was employed to do. *Hunter* v. *Summerville*, 205 Ark. 463, 169 S. W. 2d 579. We have also said that circumstantial evidence is sufficient to support an award of the Commission, and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; and that neither absolute certainty nor demonstration is required. *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252. Under our settled rule the findings of fact by the Commission are, on appeal, given the same verity that would attach to a jury's verdict and will be sustained if supported by any substantial evidence.

The facts here are somewhat similar to those in *Cox Bros. Lumber Co.* v. *Jones,* 220 Ark. 431, 248 S. W. 2d 91. In that case a night watchman at a sawmill was permitted by his employer to cross railway tracks adjacent to the mill property for the purpose of making purchases for his evening meal at a nearby store. The Commission's disallowance of an award was reversed and we held there was no such deviation from the work as to take the watchman out of his course of employment where he had journeyed across the tracks to the store owners's home to procure food and was returning to the mill when he was struck and killed by a train. Also in *Tinsman Mfg. Co.* v. *Sparks,* 211 Ark. 554, 201 S. W. 2d 573, we approved the rule that acts of personal ministration are recognized as *incidents of the employment* and injuries sustained in the performance thereof are as well protected as the injuries on the main job when such acts are done with the consent or acquiescence of the employer. See also, 58 Am. Jur., Workmen's Compensation, Secs. 236 and 240; Larson, Workmen's Compensation Law, Secs. 21:00 & 21:53.

In the case at bar there is no evidence of intoxication and there is a *prima facie* presumption against suicide. Ark. Stats., Sec. 81-1324. It is certain that the deceased was ill and that his first mission to the commis-

sary and bushes was reasonably necessary for the relief of his illness and in accordance with the usual custom. His return to the bushes for his cap was made with the tacit consent of his foreman. He was killed during working hours on company property and his body was found at a place where he might properly have been in the performance of acts which, though personal, were nevertheless incidental to the employment. When all reasonable inferences that may be drawn from the circumstances are considered the Commission was justified in concluding that, upon his return for his cap, the deceased became seized by the illness and either unconsciously fell upon the tracks or unintentionally went to sleep on or near the tracks.

Under the rules of liberal construction accorded to an award made by the Commission, we hold the evidence substantial and sufficient to establish the fact that deceased's fatal injury arose out of and in the course of his employment. The judgment is accordingly reversed and the cause remanded with directions to reinstate the order of the Commission.

EDWARDS *v.* JOHNSON.

5-1161 298 S. W. 2d 336

Opinion delivered February 11, 1957.

Don Steel and *Shaver, Tackett, Jones & Lowe,* for appellant.

C. E. Blackburn, for appellee.

George Rose Smith, J. In 1951 the three appellees sold to the appellants, W. B. Edwards and his wife, certain lots and blocks in the city of Nashville, a vendor's lien being retained to secure the unpaid balance of the purchase price. Upon the buyers' failure to make the last two payments, totaling $1,000, this suit was brought by the sellers for the foreclosure of their lien. By answer and cross-complaint the defendants sought damages on the ground that the sellers had misrepresented the quantity of land being sold. The chancellor found the proof insufficient to establish the charge of fraud and accordingly entered a decree for the plaintiffs.

One of the three appellees, James P. Johnson, and their real estate agent, Oscar J. Pate, acted for the sellers in making the sale. Pate had attempted to sell the tract for a former owner and was under the impression that it comprised thirteen acres. It is clear enough that he so described the land to Edwards, although the tract

actually contains only about four acres. We are not convinced that Johnson himself misrepresented the acreage, but of course the sellers are responsible for misstatements on the part of their agent.

After examining the land Edwards agreed to pay $3,400 for it. He made a down payment of $400 on August 4 and moved into the house on the tract three days later. The deed had to be sent away for a grantor's signature and was not delivered until six or eight weeks later. Edwards says that he then complained of the deficiency in acreage and was assured by Johnson that the matter would be corrected. He indicates that he relied upon similar assurances in paying the first installment of $2,000 upon the purchase money debt. Johnson insists that he merely promised to verify the fact that the deed described all the land that the sellers owned and meant to convey. Both Edwards and Johnson seem to have testified with candor; their controversy is really due to Pate's misunderstanding of the true acreage.

In trying the case *de novo* we find two obstacles in the way of the appellants' insistence that they are entitled to a reversal. First, we cannot say with confidence that Edwards' reliance upon Pate's misrepresentation has been established by the weight of the evidence. Edwards makes the statement that he did not discover the deficiency until the deed was delivered some weeks after the sale was concluded, but elsewhere in his testimony he concedes that before making the initial payment on August 4 he knew there weren't thirteen acres in the tract. The latter view is pretty well confirmed by the fact that Edwards looked at the land before buying it. As an experienced farmer he doubtless knew the difference between four acres and thirteen acres. Although Edwards denies having seen all the boundaries during his inspection, his witness Pate testified that the trip was made so that Johnson could point out the boundaries, which Johnson says he did. When the purchaser learns of the shortage before entering into the sale and knows how much land he is buying, he no longer has a legal right to rely upon the seller's misrepresentations. *Gilbertson* v. *Clark,* 175 Ark. 1118, 1 S. W. 2d 823.

Second, even if it could be said that a cause of action has been shown to exist, the requisite proof of the appellants' loss is lacking. More is involved than a simple computation of the proportionate damage resulting from a deficiency of nine acres. The dwelling house upon this small parcel of ground unquestionably enhanced its value. There is nothing to indicate that the parties dealt in terms of a fixed price per acre without reference to the improvements. In these circumstances the purchaser's loss is equitably determined by first deducting the value of the improvements from the purchase price and then calculating the damage attributable to the shortage of acreage. Sutherland on Damages (4th Ed.), § 590; *Lichtenthaler* v. *Clow,* 109 Ore. 381, 220 P. 567. Here the only testimony touching upon values is Edwards' bare statement that the property was hardly worth half what he paid for it. There is no basis for a determination of the extent to which the purchasers may have been hurt by the deficiency in quantity. It is suggested that the cause be remanded for additional proof, but the record discloses no circumstances justifying a piecemeal trial of the issues. *Upshaw* v. *Wilson,* 222 Ark. 78, 257 S. W. 2d 279.

Affirmed.

ADAMS, COMMR. *v.* COCKRILL, Judge.

5-1242 298 S. W. 2d 322

Opinion delivered February 11, 1957.

Ivan H. Smith and *Fred E. Henne,* for petitioner.

Virginia H. Ham, Robert C. Downie, and *Edwin E. Dunaway,* for appellee.

PAUL WARD, Associate Justice. Dr. Frances E. Brennecke, as Director of the Crippled Children's Division of the Arkansas State Department of Public Welfare, was relieved of her employment by the petitioner, Carl Adams, Commissioner of said Welfare Department. She appealed to the Merit System Council (sometimes referred to as Council) which upheld her dismissal by the Commissioner.

Dr. Brennecke applied to the respondent court (Pulaski Circuit Court, Third Division) for a Writ of Certiorari to bring up the record of the proceedings before the Council for review. The petitioner moved the trial court to dismiss the Certiorari proceedings on the ground of lack of jurisdiction. The respondent refused to grant the said motion but suspended further proceedings until the matter could be presented to this court for determination on the present petition for a Writ of Prohibition.

In petitioner's own words, there is "only one question for determination by this court, that question is whether or not the Circuit Court can take jurisdiction to review the administrative action of the Commissioner of Public Welfare in terminating the employment of a Welfare Department employee?" The question for decision is briefly and, we think, more properly stated this way: Does the Circuit Court have jurisdiction to review by Certiorari the proceedings before the Merit System Council in this instance?

A consideration of the language and the holding in the case of *McCain, Labor Commissioner,* v. *Collins,* 204 Ark. 521, 164 S. W. 2d 448, forces us to answer the above question in the affirmative and, consequently, against the contention of petitioner. The essential facts

in the cited case, insofar as they bear on the jurisdiction of the Circuit Court to review the proceedings before the Merit System Council, are the same as in the case we are here considering. The same Council was involved in both cases, and in each case the Commissioner (who did the firing) was the head of a State Department participating in the same merit system. In each case the action of the Commissioner was upheld by the Council. In the cited case the Circuit Court, on a Writ of Certiorari, reversed the Council, and on appeal, we reversed the Circuit Court and upheld the actions of the Council. In doing so, however, we distinctly asserted the jurisdiction of the Circuit Court to review, on Certiorari, the proceedings before the Council. In speaking of the Writ of Certiorari, the court said: "The office of the writ is merely to review the errors of law, *one of which may be the legal sufficiency of the evidence*" (emphasis supplied). In other words, we held in the *Collins* case, *supra,* that the courts have jurisdiction to determine "whether the council acted arbitrarily and without legally sufficient evidence" when (as here) it approved the dismissal of Dr. Brennecke.

We cannot agree with petitioner's view that the Council's actions are purely administrative (as opposed to *quasi* judicial) and therefore not subject to review by the courts. As stated by petitioner, the Merit System and the Council have been authorized by the State of Arkansas pursuant to a requirement of the Federal Social Security Act (42 U. S. C. A., § 1202 (a)(5)). From this it is obvious that it was the intent of the State and the Federal Government that employees (such as Dr. Brennecke) should have some measure of security in their employment, and not be subject to dismissal at the whim of an employer. From this it naturally follows that every employee (in a State Department participating in the Merit System) has certain rights which may be enforced in the courts. Since there is no provision in the statutes for an appeal from a decision of the Merit Council to the Circuit Court or any other court, Certiorari is the proper and only remedy for review. *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041.

Section 6 of Act 280 of 1939 (Ark. Stats. § 83-107) gives the Welfare Commissioner the authority to select and discharge employees "subject to the provisions of the rules and regulations established." The above section was amended by Section 1, Act 228 of 1951 (Ark. Stats. Supp. § 83-107) and the language strengthened by an addition to the effect that the Commissioner could only discharge for *cause*.

It is our conclusion, therefore, that the petition for a Writ of Prohibition must be, and it is hereby, denied.

MO. PAC. TRANS. CO. *v.* MILLER.

5-1142 299 S. W. 2d 41

Opinion delivered February 11, 1957.

[Rehearing denied March 11, 1957.]

Cracraft & Cracraft and *Barber, Henry & Thurman,* for appellant.

McMath, Leatherman & Woods and *John L. Anderson,* for appellee.

SAM ROBINSON, Associate Justice. The appellant, Missouri Pacific Transportation Company, appeals from a judgment in the sum of $100,000 awarded V. W. Miller for personal injuries sustained by Miller while a passenger on one of appellant's busses; appellant also appeals from a judgment in the sum of $25,000 in favor of appellee, Mrs. V. W. Miller, for the loss of consortium. Judgment in like amounts were also returned against Rube Oxner, the other party involved in the collision, but he has not appealed.

The first question to be considered is whether there is any substantial evidence of negligence on the part of the bus driver. On November 16, 1955, at about 8:00 P. M., appellant's bus, while being driven by its employee, Thomas M. Hopkins, was traveling in a southerly direction between Marianna and Helena, Arkansas. The bus collided with a truck operated by Oxner. Appellee, V. W. Miller, was a passenger on the bus. He alleges the collision was due to negligence on the part of both Hopkins and Oxner, and that he received injuries as a result of the collision which render him permanently and totally disabled. It is appellant's contention that there is no substantial evidence of negligence on the part of its driver that would carry the case to the jury; that the collision was due entirely to the negligence of Oxner; that Oxner was drunk and, while driving his truck in a northerly direction, meeting the bus, suddenly, without warning, cut across the highway in front of the bus, and that the collision was unavoidable on the part of appellant's driver. On the other hand, appellees contend that the truck driven by Oxner could be seen by the bus driver for a distance of 600 feet, and that it was obvious or should have been obvious to the bus driver that the truck was out of control; and, in the circumstances, the bus driver was negligent in not reducing the speed of the bus to such an extent that it could be stopped absolutely, if necessary, to avoid the collision.

We must view the evidence in the light most favorable to appellees, and when that is done, if there is any substantial evidence of negligence on the part of the bus driver, then the trial court did not err in letting the case go to the jury on the issue of liability on the part of appellant. When viewed in the light most favorable to the appellees it can be said that the evidence shows the bus driver saw that Oxner was on the wrong side of the road while they were a considerable distance apart; that the bus driver could see that the Oxner truck was traveling in an abnormal manner; that the bus driver realized this, and blew his horn and blinked his lights, and reduced his speed to 45 or 50 miles an hour, but applied his brakes no further; that Oxner was drunk and his

truck was out of control, and he cut across the highway in front of the bus; that the bus driver, although he had seen the truck weaving down the highway for a distance of some 200 yards, had not taken the necessary precautions to avoid a collision; that the bus, while traveling at about 55 miles an hour, hit the truck broadside; that the bus, after hitting the truck, traveled 123 feet, pushing the truck sideways; that the truck wheels, while being pushed sideways by the bus, dug a trench about 4 inches deep in the ground; that there were no skid marks indicating there was any attempt to stop the bus; that if a person were alert and anticipating that a stop might be necessary, the bus could have been stopped in 43 feet if it were making not more than 40 miles an hour. When all of the evidence is viewed in the most favorable light to the appellees, it cannot be said that there is no evidence to the effect that the bus driver was negligent in failing to observe that the truck was out of control, or in failing to act accordingly and reduce the speed of the bus to the point where it could be stopped absolutely to avoid the collision.

Appellant says the court erred in giving appellees' requested Instruction No. 2:

"You are instructed that in the exercise of the care required by the operator of the bus of the defendant Missouri Pacific Transportation Company, when such operator sees danger ahead or it is reasonably apparent if he is keeping a proper lookout, or if he is warned of approaching imminent danger, then the duty is imposed upon him and a reasonable control of the bus requires that he immediately bring his bus under such control as to be able to check the speed or stop it absolutely if necessary in the threatened emergency.

"Therefore, if you find from the evidence in this case that the driver of defendant Missouri Pacific Transportation Company's bus at the time of the alleged collision was aware of or had been advised of impending danger and negligently failed to bring his bus under such control as to be able to check its speed or stop it absolutely, if necessary, after such danger came within his

line of vision then in that event he would be guilty of negligence and if such negligence, if any, proximately caused the injuries to the plaintiff, V. W. Miller, then your verdict in this case will be for the plaintiffs, V. W. Miller and Mrs. V. W. Miller."

It is contended that the first part of the instruction is erroneous because it states that in the face of imminent peril the bus driver is required to bring the vehicle under such control that it can be stopped absolutely to avoid the threatened danger. This is a correct statement of the law. In *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, the court approved an instruction which contained the following language: "And it is the duty of such a driver to keep his automobile under such control as to be able to check the speed or stop it if necessary to avoid injury to others when danger is apparent." And, in *Craighead* v. *Missouri Pacific Transportation Company,* 195 F. 2d 652, the Circuit Court of Appeals for the Eighth Circuit said: "But it does not offend against the rule announced in *Fort Smith Gas Company* v. *Cloud* (8th Cir., 75 F. 2d 413, 416, 97 A. L. R. 833) and *Coca Cola Bottling Co. of Blytheville* v. *Doud,* 189 Ark. 986, 76 S. W. 2d 87, 90, to require that when the driver of the motor vehicle sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout, or if he is warned of approaching imminent danger, then the duty is imposed upon him and the reasonable control of the car requires that he immediately bring his automobile under such control as to be able to check the speed or stop it absolutely, if necessary, in the threatened emergency." Citing *Livingston* v. *Baker,* 202 Ark. 1097, 155 S. W. 2d 340. Appellant complains of the second part of the instruction, contending that it tells the jury that in certain circumstances the appellant would be negligent as a matter of law. However, it will be observed that the instruction states: "Therefore, if you find from the evidence in this case that the driver of defendant Missouri Pacific Transportation Company's bus at the time of the alleged collision was aware of or had been advised of impending danger and negligently failed to bring his bus under such control, . . . " The

instruction was approved, practically *verbatim,* in *Livingston* v. *Baker, supra.*

Appellant argues that the court erred in giving appellees' Instruction No. 5, which tells the jury that, in determining whether the bus driver was negligent, the question of whether he violated the law with reference to speed could be taken into consideration. This instruction was justified by the evidence.

It is also maintained by appellant that there is no competent medical testimony showing that Mr. Miller's disability is the result of the collision. Miller was riding on one of the front seats of the bus; there was a metal railing in front of him. The evidence shows that at the time of the collision the bus was traveling at a speed of somewhere between 45 and 60 miles an hour. It struck the Oxner truck broadside with such force that it pushed the truck in front of the bus sideways for a distance of 123 feet before the truck became disengaged from the bus. The wheels on the truck were in contact with the ground to such an extent that, although going sideways, they dug a trench about 4 inches deep. All of this goes to show that the impact of the bus striking the truck was terrific; Miller was thrown from his seat violently, and after the bus came to a stop he was on the floor, unable to move his lower extremities. His legs felt cool and numb and he could not get up; an ambulance took him to Marianna, then he was removed to the hospital in Memphis. He lost consciousness; he was paralyzed from his waist down and could not move his legs or body; he could not control his kidneys or his bowels and it was necessary to insert a catheter and colon tube.

Dr. Bland W. Cannon, of Memphis, qualified as an expert. He is a neuro-surgeon, having received training in neurology at Mayo's Clinic, and received his Master's Degree in neurological surgery at the University of Minnesota. He is a member of the Board of Neurology and a Fellow of the American Surgical College. Dr. Cannon testified that, in his opinion, Miller is unable to do physical work, and that this condition is permanent.

He further testified that Miller's condition is complicated by multiple sclerosis; that about 15% of the cases of multiple sclerosis are traced to trauma and in this instance the multiple sclerosis cannot be separated from the injury. He was asked:

"Q. In your opinion, is there a causal connection between this patient's accident and his present condition?

A. Yes, sir. I would like, for a second, to draw, to dovetail what I think about his present condition. I think he had an injury to the cord in his back and that he never completely recovered from that injury, because within the period we expected him to recover, as I told you, I expected him to get better and he didn't, he reached a plateau and then he went backwards. I would have to assume that the trauma he had was the initial cause of it and that the multiple sclerosis has now complicated the picture and is contributing to the trouble."

Dr. Louis P. Britt, of the Campbell Clinic, at Memphis, gave evidence to the effect that, in his opinion, Miller is permanently disabled and will never be able to carry on his former occupation. Dr. C. M. T. Kirkman, of Helena, also testified on behalf of appellee, V. W. Miller. The appellant produced no medical testimony.

The evidence is substantial to the effect that when Miller was thrown from his seat by the collision he received an injury to the spinal cord, from which his disability has developed, and that he is permanently and totally disabled.

The next point made by appellant is that the judgments are excessive. At the time of his injury, Miller had an expectancy of future life of 27 years; he was a lumber mill worker and earned $2,860 a year. According to the evidence, the total amount that Miller could be expected to earn in the future is $77,220. When that sum is reduced to its present value, it is materially decreased, and after adding to that reduced sum his expenses growing out of the injury, there remains a large portion of the verdict that must have been for pain and

suffering and mental anguish. Of course, it is hard to measure physical pain and mental anguish in dollars and cents; and there is no amount of money that would entirely relieve the pain and mental anguish which a person in Miller's condition must suffer. But, he should be relieved of such pain and mental anguish so far as money will do it. In the circumstances presented here, we believe that by allowing the present value of Miller's earning capacity for the 27 years of his future expectancy, plus his expenses growing out of the accident, and add to that sum a sufficient amount to make a total of $75,000, would be allowing an ample sum to compensate him for his physical pain and mental anguish insofar as money will serve that purpose.

As pointed out in *Southern National Insurance Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487, "Precedents are of scant value in a case like this." In that case, a $95,000 verdict for the pecuniary loss to the family of Knabe, who was killed, was reduced to $75,000. He had a life expectancy of 33.44 years; he earned $8,000 a year, of which he contributed more than one half to the family. Here, Miller has an expectancy of only 27 years and an earning capacity of not quite $2,900 a year.

Mrs. Miller was awarded a $25,000 judgment for loss of consortium. We now come to a consideration of her case. Consortium has been defined as: "the comfort and the decent and proper enjoyment of the affection of her husband"; "comfort and society"; "society and service"; "conjugal society"; "the society of her husband"; "society and affection"; "the mass of indefinable duties and rights are conveniently gathered under the word consortium." Appellant stoutly asserts an action of this kind cannot be maintained by the wife, that it is not authorized by statute or the common law. Admittedly, we have no statute specifically giving the wife a cause of action for loss of consortium. If she has such a right, it must be found in the principles of the common law. In defining the common law, it is stated, in 11 Am. Jur. 154:

"It is the system of rules and declarations of principles from which our judicial ideas and legal definitions are derived. The common law is not a codification of exact or inflexible rules for human conduct, for the redress of injuries, or for protection against wrongs; on the contrary, it is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men. Its development has been determined by the social needs of the community which it serves. In other words, the common law is the legal embodiment of practical sense. It is a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. The capacity of common law for growth and adaptation to new conditions is one of its most admirable features. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice."

As a result of his injuries, Miller was completely paralyzed for two weeks; however, he has recovered to some extent but has not regained the use of his legs, kidneys or stomach muscles, and he is not able to have sexual relations with his wife. Before he was injured, he attended church services and PTA meetings with his wife, also picnics and "singings," and he is not now able to do those things. He was the superintendent of a Sunday School, and his wife was a teacher in the School; he helped his wife with the children, of whom there are four — ages 21, 16, 11 and 8; he helped her cook, and made a garden. And now, about the only thing he is able to do is to look at TV. It appears that Mrs. Miller has

suffered the complete loss of consortium; Miller is not able to furnish any companionship; it does not appear that he has sufficient mental attainments that would enable him to be an enjoyable companion notwithstanding his present pain and mental anguish and his physical disabilities. Prior to Mr. Miller's injuries, Mrs. Miller led a happy life, enjoyed her husband, his companionship and marital relation. And now, instead of a mate with whom she can mutually enjoy life, she has a burden to bear by the loss of consortium. Undoubtedly, she has been damaged heavily. The question is: Does the law give her a remedy for the damage that she has suffered?

Prior to the case of *Hitaffer* v. *Argonne Company, Inc.,* 183 F. 2d 811 (1950), all the courts of this country and England, having occasion to pass on the question, held that the wife had no cause of action for the loss of consortium due to injuries to the husband. It does appear in *Hipp* v. *E. I. DuPont de Nemours & Co.,* 182 N. C. 9, 108 S. E. 318 (1921), in an action of this kind, the wife was allowed to recover, but, later, in *Hinnant* v. *Tide Water Power Co.,* 189 N. C. 120, 126 S. E. 307 (1925), the *Hipp* case was overruled. Another case that departed from the traditional rule, *Griffen* v. *Cincinnati Realty Company,* 27 Ohio Dec. 585, lost its force by the later case of *Smith* v. *Nicholas Building Company,* 93 Ohio St. 101, 112 N. E. 204. But the husband has the right of such a cause of action. *Bernhardt* v. *Perry,* 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320.

In *Hitaffer* v. *Argonne Company, Inc., supra,* the court held outright that the wife can recover for the loss of consortium because of negligent injuries of the husband. There, the court said: "The modern rule is thus well stated by the Court of Appeals of New York: 'The actual injury to the wife from loss of *consortium,* which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is en-

titled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of natural right, but also of a legal right arising out of the marriage relation. * * * As the wrongs of the wife are the same in principle, and are caused by acts of the same nature, as those of the husband, the remedy should be the same.' *Bennett* v. *Bennett,* 116 N. Y. 584, 590, 23 N. E. 17, 6 L. R. A. 553. * * *

"The underlying ground of the common-law rule of discrimination between husband and wife in respect of this right, namely, the incapacity of the wife to maintain a separate action for a tort, has been swept away by the modern legislation that has so generally relieved the wife of the ordinary disabilities of coverture."

Bennett v. *Bennett, supra,* was an enticement case. There is no doubt about the wife having a cause of action for loss of consortium, where a willful act gives rise to such action. Actually, there is no sound reason for allowing a recovery where the act complained of is willful and not allowing a recovery where the action is based on negligence.

Since the decision in the *Hitaffer* case, the rule therein announced has been rejected by several courts. *Jeune, et al.* v. *Del E. Webb Const. Co.,* 77 Ariz. 226, 269 P. 2d 723; *Franzen* v. *Zimmerman,* 127 Col. 381, 256 P. 2d 897; *Ripley, et al.* v. *Ewell,* (Fla.) 61 So. 2d 420; *La Eacse* v. *Cincinnati, Newport & Covington Ry.,* (Ky.) 249 S. W. 2d 534; *Coastal Tank Lines, Inc.* v. *Canoles,* 207 Md. 37, 113 A. 2d 82; *Danek* v. *Hommer,* 9 N. J. 56, 87 A. 2d 5; *Larocca* v. *American Chain & Cable Co.,* 23 N. J. Super. 195, 92 A. 2d 811; *Passalacqua* v. *Draper,* 279 App. Div. 660, 107 N. Y. S. 2d 812; *Lurie* v. *Mammone,* 107 N. Y. S. 2d 182; *Nelson* v. *A. M. Lockett & Co.,* 206 Okla. 334, 243 P. 2d 719; *Weng* v. *Schleiger,* 130 Col. 90, 273 P. 2d 356; *Garrett* v. *Reno Oil Co.,*

(Tex.) 271 S. W. 2d 764; *Nickel* v. *Hardware Mutual Casualty Co.,* 269 Wis. 647, 70 N. W. 2d 205; *Ash* v. *S. S. Mullen, Inc.,* 43 Wash. 2d 345, 261 P. 2d 118; *Werthan Bag Corp.* v. *Agnew,* 202 Fed. 2d 119; *Filice* v. *United States,* 217 Fed. 2d 515; *O'Neil* v. *United States,* 202 Fed. 2d 366; *Seymour* v. *Union News Co.,* 217 Fed. 2d 168; *Josewski* v. *Midland Constructors,* 117 Fed. Supp. 681.

But, on the other hand, the *Hitaffer* decision has been approved. In *Cooney* v. *Moomaw,* 109 Fed. Supp. 448 (1953), the right of the wife to recover for the loss of consortium as decided in the *Hitaffer* case was recognized and the language of that case was quoted extensively. In *Delta Chevrolet Company* v. *Waid,* 211 Miss. 256, 51 So. 2d 443 (1951), the court sustained a large judgment to the wife for the loss of her husband. The court used this language: "In fixing the amount of damages to be awarded, the jury was warranted in taking these matters into consideration, as well as the element of damages resulting from the loss of society and companionship, * * *" In *Gist* v. *French,* 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955), the court said: "The parties to a marriage are each entitled to the comfort, companionship and affection of the other. Any interference with the right of either spouse to the enjoyment of the other is a violation of a natural right as well as a legal right arising from the marriage relation." Citing *Hitaffer* v. *Argonne Company, Inc., supra.*

Acuff v. *Schmit,* (Iowa) 78 N. W. 2d 480 (1956), was a suit by the wife for damages for loss of consortium due to defendant's negligent injury of her husband through the operation of an automobile. It is directly in point with the case at bar. The court discusses all angles of the question, including the history of the old rule that the wife could not recover for loss of consortium, and holds that the wife may now recover in an action of this kind, and this is also the holding in *Brown* v. *Georgia-Tennessee Coaches,* 88 Ga. App. 519, 77 S. E. 2d 24. The *Hitaffer* decision is cited with approval in both cases.

Both appellant and Mrs. Miller rely on the case of *Best* v. *Samuel Fox & Company,* as reported in the All England Law Reports, 1951, Volume 2. There, the *Hitaffer* case is cited, and Mrs. Best was denied the right of recovery, not because she could not recover for a total loss of consortium but because she could not recover for a partial loss of consortium as existed in that case. As we construe it, the *Best* case holds that for a total loss of consortium, as in the case at bar, the wife may recover.

In this country, for many years, experts in the law have criticised the old rule that the wife could not recover for the loss of consortium. Prosser, in his work on Torts published in 1941, at page 948, says:

"In spite of almost universal condemnation on the part of legal writers, there is little indication of any change in the rule. Obviously it can have no other justification than that of history, or the fear of an undue extension of liability of the defendant or a double recovery by wife and husband for the same damages. The loss of 'services' is an outworn fiction, and the wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband. Nor is any valid reason apparent for allowing her recovery for a direct interference by alienation of affections, and denying it for more indirect harm through personal injury to the husband, where no such distinction is made in his action. There remains of course the important fact that the husband is under the duty to support his wife, so that any compensation for loss of earning power paid to him goes indirectly to benefit her, while the wife is under no corresponding duty. This must necessarily be taken into account in any determination of her damages. But such elements of damage as her loss of the husband's society and affection, and in some cases even the expenses to which she has been put in caring for him, remain uncompensated."

See also discussion of the subject in Harvard Law Review, Volume XXXV, Page 343.

This court has not heretofore passed on the question, and the course we think is dictated by reason and justice is that the wife should be allowed to recover for loss of consortium caused by injuries to the husband. Mrs. Miller was awarded a judgment of $25,000. Again, this is something hard to measure in dollars and cents; but, even in this day and time $25,000 is a considerable amount of money, and we believe that a judgment for $15,000 would be more in line with the damage that Mrs. Miller has sustained.

The judgments are affirmed upon condition that remittiturs are entered as indicated, within seventeen (17) calendar days; otherwise the judgments will be reversed and the cause remanded for new trial.

Justice WARD concurs.

Justices HOLT and MILLWEE dissent in part.

Justice McFADDIN concurs in part and dissents in part.

J. SEABORN HOLT, J., dissenting in part. I dissent from that part of the judgment which allowed the wife to recover for the loss of consortium, for the very simple reason that I can find no Arkansas law that would allow it. While it may be, as the majority points out, that "reason and justice" dictate that we allow it, however, courts have nothing to do with the wisdom and expediency of statutes and if a law appears to operate harshly, the remedy lies with the Legislature and not with us. "Until the Legislature has seen fit to designate the redress which, under Article 2, Sec. 13 of the Constitution, it has a right to do, the judiciary should not transgress the coordinate boundary established by Article 4, Section 1 of the Constitution," *Lucas* v. *Bishop,* 224 Ark. 353, 273 S. W. 2d 397. This court has never had occasion to pass on this issue, however, in the recent *Lucas* case above, we had occasion to pass on the question of the father, Lucas, as next friend of his minor son, suing Bishop for allegedly alienating the child's home life and parental affections. In denying right to recover in the circumstances we there said: "The creation of a

right of action for a child's benefit to compensate for loss of the intangible elements set out in the complaint here is a subject that addresses itself to the State's policy forming department. Until the legislature has seen fit to designate the redress which, under Art. 2, § 13 of the Constitution, it has a right to do, the judiciary should not transgress the coordinate boundary established by Art. 4, § 1 of the Constitution. 'The power of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy, to-wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another; (and, Sec. 2) no person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others.'

"But we do hold that in the case at bar Lucas as next friend has not shown that financial compensation for the things complained of has been authorized by any law, and we are not persuaded that judicial empiricism is the answer."

The principle announced in the above case [*Lucas* v. *Bishop*] applies with equal force here. Diligence of counsel has pointed to but one case, *Werthan Bag Corp.* v. *Agnew,* 202 Fed. 2d 119, involving an accident which occurred near Forrest City, Arkansas, which resulted in injuries to the husband, and wherein the husband sued for his injuries and the wife sued for loss of consortium. The Circuit Court of Appeals for the Sixth Circuit rejected the wife's claim for loss of consortium, refused to follow the Hitaffer case [*Hitaffer* v. *Argonne Co., Inc.,* 183 F. 2d 811 (1950] strongly relied upon by the majority here, and dismissed her cause of action, and the court said: "None of these (Arkansas) cases, in our judgment, even intimates that a wife possesses the right to sue for damages for the loss of her husband's consortium resulting from an injury negligently inflicted upon him. ¶ Being bound as we think we are to look to the common law as declared by the state courts of our country, where the Arkansas courts have not spoken upon the subject,

we find the decisions, as heretofore indicated, to be overwhelmingly against the contention of appellant." Leading text books generally appear to be against recovery for loss of consortium on the part of the wife unless statutory authority therefor exists. In 27 Am. Jur., § 514, p. 114, it is said: "Whatever right a wife may have, by virtue of statutes removing her common law disabilities, to recover for loss of consortium of her husband as a result of injuries inflicted by a third person, does not extend to loss of consortium caused by a mere negligent injury inflicted upon the husband. At least in the absence of any statute expressly conferring it, a wife, even though able to sue and be sued as a femme sole, has no right or cause of action, as a general rule, for loss of consortium due to injuries negligently inflicted on her husband. She has no such cause of action even under a statute preserving to her all rights of action growing out of violation of her personal rights. Her loss of consortium resulting from negligence is too remote and indirect to permit her to recover therefor, and hence, it is distinguishable from loss of consortium resulting directly from a wrongful act, as where her husband is wrongfully enticed, seduced or forced away from her. Furthermore, damages to which the husband is entitled, in a suit for his injuries sustained through another's negligence, are supposed to be full compensation for his injuries, in which compensation the wife has a benefit, with the consequence that if the wife is permitted a separate recovery for her loss of consortium resulting from such injuries, there is, in effect, a double recovery from the same matter." In 41 C. J. S., § 404, p. 900, we find this language: "In the absence of statute, a wife has no cause of action for any loss sustained by her, including loss of consortium, in consequence of personal injuries inflicted on the husband." The same rule is set forth in *Restatement of Torts,* Vol. 3, § 695, p. 496: "A married woman is not entitled to recover from one who, by his tortious conduct against her husband has become liable to him for illness or other bodily harm, for harm thereby caused to any of her marital interests or for any expense incurred in providing medical treatment for her husband.

"Comment: a. Although a husband is entitled to recover for the loss of his wife's services and society and any expense which he incurs as a result of illness or bodily harm caused to her by the tortious conduct of another, a wife is not entitled to a recovery under similar circumstances. The wife is not, nor has she ever been, entitled to the services of her husband. Moreover, she is not deprived of the support to which she is entitled by any tort committed against him. The husband is still legally bound to provide support for her, and the tortfeasor is liable to the husband for any loss of earning power which he may suffer. This the husband himself may recover, and were his wife permitted to recover for the loss of support, a double recovery would result. The wife has a similar interest in the society and sexual relations with her husband as he has in such relations with her. However, the law has not recognized her right to recover against one who has caused harm to such interests by conduct which is not intended to harm them. One who has negligently injured the husband, or has intentionally caused him harm, by conduct directed toward him personally rather than toward the wife's interest, is not liable to the wife. . . ."

It is conceded here that we have no statute in Arkansas allowing for such a recovery. It appears that the right of the wife to recover for the loss of consortium has been denied in at least 29 of our states and in England. It also appears that since the decision in the *Hitaffer case, supra,* in 1950 the common law courts in 13 of our states, 3 Federal courts and in England have been asked to review again the question in the light of that decision and with the exception of Georgia the doctrine in the Hitaffer case has been unanimously repudiated and the common law rule adhered to and reaffirmed. Accordingly, until our own legislature acts and provides for the wife to recover for the loss of consortium, I cannot go along with the majority opinion in this case.

Mr. Justice MILLWEE joins in this dissent.

ED. F. MCFADDIN, Associate Justice, (concurring and dissenting). I agree with all of the majority opinion except that part which relates to the damages; and on the matter of damages I entertain these views:

I. *Consortium.* I cannot agree to Mrs. Miller's recovering for loss of consortium. We have no statute in Arkansas allowing for such a recovery. The majority concedes that it is proceeding under the judge-made law in the case of *Hitaffer* v. *Argonne Co.,* 183 F. 2d 811. Until the Legislature of Arkansas passes a statute allowing for consortium, then I cannot agree to the consortium portion of the majority opinion. Judge HOLT has gone into the matter in detail in his dissent, and I concur in his conclusions.

II. *Excessiveness of Miller Verdict.* The majority has seen fit to reduce from $100,000.00 to $75,000.00 the jury verdict awarded Mr. Miller. I cannot say that the verdict is excessive. This Court should reduce a jury verdict only when the amount is so grossly excessive as to shock the conscience of the Court. When we take the testimony supporting Mr. Miller's recovery at its strongest probative force, I maintain that the award is not excessive. The majority says that Mr. Miller is totally and permanently disabled. He has 27 years of expectancy and could have earned in that period of time $77,200.00, even at his present earning capacity; and there is nothing to show that he could not have earned much more in the years to come. In addition to his earning capacity, he has had conscious pain and suffering of a tremendous amount. I quote this portion of the majority opinion:

"As a result of his injuries, Miller was completely paralyzed for two weeks; however he has recovered to some extent but has not regained the use of his legs, kidneys or stomach muscles, and he is not able to have sexual relations with his wife. Before he was injured, he attended church services and PTA meetings with his wife, also picnics and "singings," and he is not now able to do those things. He was the superintendent of a Sunday School, and his wife was a teacher in the School; he

helped his wife with the children, of whom there are four, ages 21, 16, 11 and 8; he helped her cook, and made a garden. And now, about the only thing he is able to do is to look at TV."

Medical experts testified that Mr. Miller's condition is permanent. In view of all of the foregoing, I certainly cannot say that the verdict to Mr. Miller for $100,000.00 was so grossly excessive as to shock the conscience. What young man with 27 years of expectancy would exchange for $100,000.00 a happy and useful life like Miller had in prospect for what Miller now has before him?

So to summarize: I would reverse and dismiss the judgment that Mrs. Miller recovered for consortium; and I would affirm the judgment in full for Mr. Miller.

KELKER v. PAYTON.

5-1164 298 S. W. 2d 704

Opinion delivered February 18, 1957.

Paul E. Gutensohn, for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Andy J. Kelker, and appellee, W. W. Payton, entered into a partnership in January, 1952, for the purpose of constructing homes in the city of Fort Smith, Arkansas. In February, 1953, the Kelker-Payton Construction

Company, Inc., was organized as a corporation doing the same type of construction work, and still in existence at the time of this litigation, though it had ceased actual construction operations, and had only potential assets. The corporate stock was owned by Kelker and Payton equally. On May 14, 1954, Kelker loaned to the corporation (Kelker-Payton Construction Company, Inc.) the sum of $10,000. This was deposited in the First National Bank of Fort Smith to the corporation account. It was entered in the books of the corporation at that time, and has been carried as a debt owed Kelker by said corporation.

During the period of time in which they were actively associated together a loan of $17,500 was obtained from the United Building and Loan Association on five houses which were constructed in Fort Smith ($3,500 each), which, after loan expenses, netted $17,041.45. A check was made payable to Kelker and wife and Payton and wife for said amount, and after being endorsed by all parties, was cashed at the Merchants National Bank of Fort Smith by Payton. Appellants contend that this money was divided equally between the two men in cash, while appellee Payton contends that Kelker was first repaid the $10,000 which he had loaned the corporation, and that the balance of $7,041.45 was then divided equally.

On June 9, 1955, appellee filed suit seeking an accounting of the affairs of Kelker-Payton Construction Co., and an accounting by appellant and wife, Loretta, for credit of Kelker-Payton Construction Co., Inc., covering funds used for labor and materials in the construction and repair of homes (three in number) owned individually by the wife, Loretta Kelker[1], and further asking that a constructive trust be declared by the Court upon these properties in favor of the corporation; that after an accounting by the said Kelker, he should be required to pay into the corporation all sums

[1] The complaint alleges that the wife paid no consideration, but "fraudulently, unlawfully, and wrongfully conspired with the defendant, Andy J. Kelker, her husband, to acquire title to said property. * * *"

"which he had wrongfully, unlawfully, and fraudulently appropriated."

Thereafter, Kelker-Payton Construction Company, Inc., filed its separate answer asking that the Court direct an accounting of the affairs of the corporation to determine whether either appellant (Andy Kelker) or appellee Payton profited to the detriment of said corporation, and that after an accounting, judgment be given the construction company against either or both stockholders for any diversion or misapplication of funds. Later, appellants filed their answer denying the allegations and joined with the construction company in asking for an accounting. Still later, appellant, Andy Kelker, filed a cross complaint, together with amendments alleging that he was due the sum of $6,080.91, representing advances that he had made to the partnership. Subsequently, amendments were filed to the pleadings by the parties alleging additional items, and on March 28th and 29th, the cause proceeded to trial.

On April 4th, the Court filed its findings of fact, and (after the filing of various motions and stipulations by the several parties pertaining to debits and credits between the individuals and the corporation) entered its decree on May 3, 1956. Kelker received judgment against Payton in the sum of $1,000; Payton received judgment against Kelker-Payton Construction Co., Inc., in the amount of $3,385.10; and the corporation received judgment against Kelker in the sum of $5,717.77. The Court further impressed a constructive trust against part of the properties held by Loretta Kelker to secure the judgment given to the corporation. From such decree appellants bring this appeal. Appellants rely upon several points to reverse the decision of the Chancellor, though the principal one argued is that the Court was in error in finding that appellant Kelker was repaid the $10,000 which he loaned to the corporation.

About May 14, 1954, the corporation was in need of funds to meet corporation payrolls, and Kelker agreed to deposit ten thousand dollars in the corporation account with the understanding that he was to be repaid

from the loan which would be received from the United Building and Loan Association. He directed that this repayment be made in cash and did accordingly make such deposit to the corporation account; three days later the loan from the United Building and Loan Association was processed, and check in the amount of $17,041.45, payable to Kelker and wife, and Payton and wife, was delivered to the parties. The two men then drove by their respective homes and the wife of each endorsed the check. They then proceeded to the bank, at which time Kelker let Payton out of the car to cash the check, advising that he would meet him at the Wide-Awake cafe. Appellee cashed the check, receiving the full amount in cash, and then went to the Wide-Awake cafe to meet Kelker.

So much is in agreement, but from this point on, the evidence was in conflict. Payton stated that as he went in the front door of the cafe, Kelker was standing talking with an acquaintance, and on observing Payton, walked over. They left together, got in the car, and drove to Kelker's house. It was time for lunch, and Kelker was let out at his home; however, before he left the car, the money was divided between the two of them in the following manner. First, Kelker counted out to himself the $10,000 which he had loaned the corporation, leaving a balance of $7,041.45, which was then divided equally between the parties ($3,520.73 to each)[2]. Payton took his money home, leaving it with his wife for safe keeping. According to Payton, Kelker advised he would see that an entry was made on the corporation's books to show the item had been paid back to him. Mrs. Payton, wife of appellee, testified that her husband brought home the $3,520.73, and thereafter she had occasion to talk to Andy Kelker in her home relative to the matter; that she had not been satisfied with the manner in which it had been handled, as she felt the check should have been deposited. Kelker told her there was nothing to worry about, and that he would make an entry on the books to take care of it.

[2] The record does not reflect who received the odd cent.

Kelker's version is as follows: He was sitting in a booth with L. D. Moran (associated with Kelker in the construction of a furniture building) when Payton came to the booth with the $17,041.45; that this money was divided equally between the parties in the booth, and in the presence of Moran ($8,520.73 to each). Moran corroborated Kelker's testimony to the effect that several bundles of money were counted out, but stated that in his opinion, the amount divided amounted to seven or eight thousand dollars. This last, of course, would be a circumstances corroborating Payton's version. Additional circumstances tend to corroborate either version. In appellee's favor, it is noted that Kelker, from the time of making the loan, made no demand for repayment of the $10,000; on the other hand, there was no release of the debt, nor receipt obtained by Payton, nor was any demand made on the bookkeeper to show that the loan had been paid. Payton's answer is that he trusted Kelker implicitly.

The Court found as follows: "The Court further finds that in regard to the $10,000 loan by Kelker to the corporation being repaid, the following: That plaintiff's testimony was undisputed by defendant Kelker that Kelker made said loan to the corporation in cash on May 14, 1954, upon condition that said loan would be repaid on or about May 17, 1954, in cash. That Kelker did not want said sum deposited in his account, and did not want any check from said corporation. That on May 17, 1954, $17,041.45 was received in one check from a local loan company payable to defendant corporation, and said check was cashed, and all of the money was received by plaintiff and Kelker. The Court further finds that the only dispute was that Kelker claims he did not receive his $10,000 loan before the balance of the proceeds was divided equally between these two men.

"The Court further finds that since that date until the audit made on and by said corporation, Kelker made no demand for repayment of said loan. The Court further finds that plaintiff's testimony that Kelker did receive his $10,000 loan back is supported by the testi-

mony of plaintiff's wife. The Court further finds that Kelker's witness to the meeting between plaintiff and Kelker, at which time said witness stated a large sum of money was divided equally between these two men, specifically stated that the sum divided equally was "between seven and eight thousand dollars," and that fact corroborates plaintiff's statement that Kelker got his $10,000 first and the balance, to-wit: $7,041.45 was divided equally between the two men."

Appellants contend that the check for $10,000 was payable to the partnership rather than to the corporation; that the corporation did not pay the indebtedness, and even if Payton's version is taken as correct, Kelker was repaid the loan from partnership funds. Since the men had been equal partners, this would leave Kelker paying to himself, in repayment of the loan, $5,000 of his own money, which a man of Kelker's business experience would not be likely to do. While confusing statements were made by counsel as to their position on the question of whether the partnership assets and liabilities were merged and assumed by the corporation at the time of its creation, the record reveals that appellants' counsel (R. 25) made the remark during the trial, "Your Honor, to simplify things, we will agree that the corporation started by taking over the partnership assets, and there is no question between the parties as to that."

The Court found, after hearing the evidence, "That upon the formation of the corporation the partnership assets and liabilities were merged and assumed by the corporation. That said corporation was formed with the assets of said partnership."

Following the Court's entering of its finding of fact, further motions clarifying the various items of indebtedness owed to the corporation and to the individuals were filed by the respective parties and certain stipulations were entered into pertaining to credits and debits between the individuals and the corporation. This had the effect of amending the court's findings. It is noticeable that appellants, though they filed several motions adjusting the rights of the parties, never raised the ques-

tion at all that the Court had erred in refusing to recognize the separate identities of the partnership and the corporation.

It is contended that the Court erred in holding that a constructive trust should be impressed upon the property held under the name of Loretta Kelker; however, this contention is based upon the fact that the $10,000 item had not been repaid to her husband; further, it does not appear that she invested any of her own money in the construction of the homes upon which the trust was impressed.

It is further contended that the Court erred in granting appellee judgment against Kelker-Payton Construction Company, in granting the company judgment against Kelker, and in failing to render judgment for the corporation against Payton for corporate funds which he was alleged to have used personally[3].

This brings us to our conclusions in the entire matter. This case is almost entirely a question of fact, and if the lower court construed the facts correctly, there could be no contention that the law was erroneously applied. The Chancellor heard the case, had the opportunity to observe the demeanor of the witnesses, and evidently paid close attention to the evidence. On April 4, 1956, he rendered his findings of fact composed of seven and one-half pages. The rule, so many times reiterated, is to the effect that while this court tries Chancery cases *de novo,* still it will not reverse a Chancellor's decree unless his findings are against the weight of the evidence. *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686 (1946); *Little* v. *Farm Bureau Co-Operative Mill and Supply Co.,* 224 Ark. 289, 272 S. W. 2d 818. We cannot say, in this case, that the findings of the court are against the weight of the evidence. The decree, accordingly, is in all things affirmed.

[3] The corporation did not appeal from the findings of the Chancellor.

DUDLEY *v.* ADAMS.

5-1165 298 S. W. 2d 701

Opinion delivered February 18, 1957.

Denver L. Dudley, pro se, and *Claude B. Brinton,* for appellant.

Arthur L. Adams, pro se, and *W. B. Howard,* for appellee.

J. SEABORN HOLT, Associate Justice. This suit involves a dispute between two attorneys over the division of an attorney's fee. February 13, 1956, appellee, Adams, filed suit against appellant, Dudley, in which he (Adams) alleged that appellant, who had previously been employed by E. L. Garris to prosecute a tort action for him (Garris) against the Greyhound Bus Lines on a contract of 50% of any recovery, employed appellee to assist him in the prosecution of the claim and that appellant agreed to pay appellee one-half of Dudley's fee under Dudley's contract with Garris. He further alleged that he assisted Dudley in making the settlement for $5,000, and that he, Adams, was entitled to

one-half of Dudley's fee of $2,500 or $1,250. He further alleged that Dudley offered to pay him only $750 which he refused to accept. Appellant answered with a general denial and specifically pleaded accord and satisfaction. Trial before the court sitting as a jury resulted in a judgment in favor of appellee, Adams. This appeal followed.

For reversal appellant relies on the following points: "1. The evidence was insufficient to sustain the judgment; 2. There was accord and satisfaction, compromise and settlement or novation; 3. The deposition of Roy Garris should not have been considered."

Considering the third point above first, it appears from the record that the deposition complained of was read and admitted at the trial without objection, therefore, any objection now comes too late.

Primarily, points 1 and 2 are questions of fact. Under our long standing rule of procedure the duty rests upon the jury, or the trial court sitting as a jury, to determine from all the evidence presented whether the preponderance thereof supports the plaintiff (appellee here) or the defendant (appellant). When the cause reaches us on appeal we do not concern ourselves with determining where the preponderance of the evidence lay but only whether there was any substantial evidence to support the verdict and judgment rendered. In other words, if we find any substantial evidence to support the verdict we must affirm, even though it might appear to us that the preponderance was against the verdict. The testimony was in sharp conflict, however, after a careful review of it all, we cannot say the evidence on behalf of appellee when given its strongest probative force, as we must, was not substantial, and, therefore, the judgment must be affirmed. *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492.

Appellee's testimony was to the following effect. About December 1, 1954, appellant called him, Adams, to his office and told him that he, Dudley, was employed by E. L. Garris, in a tort action, on a contract for a fee

of 50% of the recovery; that he wanted me to assist him in the matter and he would divide any fee that might subsequently be paid in the case, and that he, Adams, accepted the employment. He further testified that after considerable work and effort on the part of Mr. Dudley and himself, offers and counter-offers by the parties, a settlement for $5,000 was finally agreed upon before a trial of the case. That a draft for $5,000 in settlement was sent to him (Adams) and he so informed Dudley. Shortly thereafter Dudley telephoned Adams to bring the draft over that Garris was in his office. Appellee further testified: "Denver (Dudley) came back, Roy was not with him, never did come back. When Denver walked in the door he motioned me in his inner office, I had been in the outer office. He went in, sat in a chair, I sat in a chair in front of the desk. He got his check-book out, put it on the desk, leaned back, said finally, 'Hard Case.' Said finally, 'Hard Case, if we had tried it we might have gotten a lot more money out of this thing. Now, since you and I did not have any fee arrangement, I think $750 would be about right.' I was amazed, looked at Mr. Dudley, I said, 'Denver, that was not the way it was. We agreed when I came in the case, any fee received would be divided 50-50.' Sat and looked at each other for five seconds. Not another word was spoken. Denver wrote a check, handed it to me. I looked at it, amount of the check was $750.00. Also noted there was no notation on the check 'payment in full' nor had any oral import. I was mad, concluded there was only one of two things to do; one, get in a fight with Mr. Dudley; or, get up and walk out . . . I got up, walked out, not a word was spoken. Since there was no oral or verbal condition imposed, it was my idea I could deposit the check and it would have no legal significance other than payment on account. I would legally collect the other $500 by bringing suit, as was done, or talk with Mr. Dudley. That is just about the history of the thing." E. L. Garris testified: (appellant's abstract) "I went to the defendant's (Dudley's) office. Mr. Adams came later. Conversation was about the lawsuit. Mr. Dudley would get half the other lawyer would get half. That was

my understanding (Tr. p. 43). He said he would have to split one-half with the other lawyer. We were discussing Arthur Adams. This was before he came to the office . . . It was Mr. Dudley who told me of the 50-50 split between the lawyer . . . Afterwards Mr. Dudley was offered $5,000 and he was told to hold out for $6,000. At that time, Mr. Dudley said he would split it three ways, $2,500 to me, $1,250 to each of them. The case was settled for $5,000." Mrs. E. L. Garris' testimony tended to corroborate that of appellee.

On the issue of accord and satisfaction, which appellant pleads as a defense, his testimony was to the effect that when appellee accepted and later cashed the check for $750, which he Dudley tendered to him, that this amounted to a settlement or accord and satisfaction. Appellee testified that he accepted the check not in full payment but, in effect, to be applied upon the $1,250, which he claimed appellant agreed to pay him as his division of the fee. In the circumstances here whether appellee accepted the check in full settlement of his claim against appellant was a question of fact for the trial court to determine. The evidence shows there was nothing on the check to indicate that it was payment in full. In one of our cases, *Rose* v. *Lilly et al.,* 170 S. W. 483 (not reported in the Arkansas Reports) there was conflicting testimony as to whether a check in question had been accepted by a creditor in full payment of a note sued on. We there said: "A check given in payment of a debt does not amount to an extinguishment of the debt unless accepted in absolute payment thereof. *Sharp* v. *Fleming,* 75 Ark. 556, 88 S. W. 305; 7 Cyc. 1007 . . . The appellant denied having accepted the check in payment of the note, but the question whether he accepted it in absolute payment was fairly presented to the jury . . ." The textwriter in 1 C. J. p. 561, § 84, on Accord and Satisfaction, says: "The mere fact that the creditor receives less than the amount of his claim, with knowledge that the debtor claims to be indebted to him only to the extent of the payment made, does not necessarily establish an accord and satisfaction." In *Collier Comm. Co.* v. *Wright,* 165 Ark. 338, 264 S. W. 942, we

said: "Accord and Satisfaction—Jury Question.—Where statements were furnished showing the net balance due on the purchase of carloads of peaches with check accompanying the statements, but neither the statements nor the check showed on their faces that the check was tendered in full, it was a question for the jury to determine whether, under the circumstances, the tender was conditioned on its acceptance in full." And, in *Alling* v. *John V. Lee & Sons,* 148 Ark. 655, 230, S. W. 1, we said: "The next and last insistence of appellant for reversal is that the acceptance and collection of the $82.83 check constituted an accord and satisfaction . . . An acceptance by a creditor of a tender or remittance made by his debtor on a disputed claim does not constitute an accord and satisfaction of the claim, unless clearly indicated by the facts and circumstances to be in full payment thereof. There must be a meeting of the minds of the debtor and creditor before there can be an accord and satisfaction. The debtor must impose the condition of full payment on the disputed claim on the tender or remittance, and the creditor must accept the tender or remittance with such condition attached . . . No condition was imposed in the face of the check, or in any instrument or letter accompanying it, or in any subsequent communication between the parties, to the effect that it was tendered in full settlement of the controversy between them . . . Nowhere does it appear that the check was offered by appellant or received by appellees in full settlement of the disputed claim."

Finding no error, the judgment is affirmed.

Opinion delivered February 18, 1957.

[Rehearing denied March 18, 1957.]

McCourtney, Brinton, Gibbons & Segars, for appellant.

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

ED. F. MCFADDIN, Associate Justice. Appellant, Clyde Mangrum, was convicted of the crime of sodomy (§ 41-813 Ark. Stats.); and prosecutes this appeal. The motion for new trial contains twenty-three assignments which we group and discuss in topic headings.

I. *Sufficiency Of The Evidence.* The act of sodomy charged by the information in this case was, "unnatural sexual relations with Edward Brasshire, another male, being aged 9 years old, by forceably placing his sex organ in the mouth of said child." Such information charged an offense denounced by § 41-813 Ark. Stats. See *Woolford* v. *State,* 202 Ark. 1010, 155 S. W. 2d 339;

Havens v. *State,* 217 Ark. 153, 228 S. W. 2d 1003; and *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594.

The testimony of Edward Brasshire (hereinafter referred to as "the boy") was: that he was at the home of Mr. Harbin, along with Mangrum, Byrd Ashburn (the boy's uncle), and several other people; that Mangrum lured the boy to a place in the back yard behind the chicken-house, and there committed the filthy act, as charged in the information. Byrd Ashburn, the boy's uncle, testified that when he went in search of the boy he saw the entire performance. The testimony of either the boy *or* his uncle was sufficient to take the case to the jury. Giving the testimony of the State its full force and effect, as we do on appeal in cases like this one[1], the evidence is sufficient to support the verdict.

II. *Competency Of The Boy To Testify.* The boy was blind and only nine years old; and appellant urges that the Trial Court failed and refused to make sufficient interrogation of the boy before allowing him to testify on original examination. Appellant relies most strongly on some of our language in *Crosby* v. *State,* 93 Ark. 156, 124 S. W. 781, 137 Am. St. Rep. 80, reading as follows:

"In the present case we do not think the examination of the witness by the circuit judge was sufficiently comprehensive. The child must not only have intelligence enough to understand what he is called upon to testify about, and the capacity to tell what he knows, but he must also have a due sense of the obligation of an oath, by which is meant, as we deduce from the authorities, *supra,* that the promise to tell the truth must be made under 'an immediate sense of the witness' responsibility to God, and with a conscientious sense of the wickedness of falsehood.' "

Our cases recognize that the determination of the competency of a child, of such years as the one here involved, to testify at all is a question for decision by the Trial Judge. In *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80, we said:

[1] See *Allgood* v. *State,* 206 Ark. 699, 177 S. W. 2d 928, and cases there cited.

"It is the province of the judge to pass upon any question involving the competency of the witness and the admissibility of the evidence offered; . . ."

We have many times reaffirmed what we said in the early case of *Flanagin* v. *State,* 25 Ark. 92:

"As to children, there is no precise age within which they are absolutely excluded, or the presumption that they have not sufficient understanding. At the age of 14 all persons are presumed to have common discretion and understanding, until the contrary appears; but under that age it is not presumed; hence inquiry should be made as to the degree of understanding which the child, offered as a witness, possesses; and, if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he should be permitted to testify, no matter what his age may be."

The questions asked the boy by the Court — to determine his competency as a witness — consumed two pages in the transcript. At the conclusion of such examination, the Court held that the boy was competent to testify — adding, of course, that the *credibility* of the boy's testimony was entirely a matter for the jury to decide. We hold that the Court ruled correctly in the matter of the competency of the boy as a witness. Here is the Court's summary:

"This witness has stated he believes in God and he has stated that it is wrong to tell a lie and he has further stated, when asked what would happen to him if he told a lie, that he would be in serious trouble. He stated the Bible has been read to him and his answers have been clear and concise other than he has had a little difficulty in hearing. He has demonstrated to the court that he has an intelligent appreciation of the English language for a child of his age."

III. *Refusal Of The Court To Allow The Witness, Russell Baxter, To Testify As To The Competency Of The Boy As A Witness.* When the State first offered the boy as a witness, the appellant not only (a) objected

as to his competency, as shown in Topic II, *supra,* but also (b) sought permission to call Russell Baxter to testify against the competency of the boy. This request was refused; and then later, after the State had rested its case in chief, the appellant again sought to call Russell Baxter to testify to the boy's competency as a witness. This request was also refused. Appellant saved his exceptions to each adverse ruling and in the proper manner has brought into the record the offered and refused testimony of Russell Baxter on the boy's competency. Here is a summary of the proffered testimony: Mr. Baxter is a Counsellor of Vocational Rehabilitation for the Blind, where the boy has been a pupil. In the early part of 1956, Mr. Baxter had occasion, in his official duties, to give intelligence tests to the boy. Such counselling continued for some time and in the course of it, Mr. Baxter tested the boy by the Wexler Intelligence Scale for Children, which Mr. Baxter says is an accepted test for handicapped children. Under this test a grade of 69 and below shows a mental defective; from 70 to 79 is a borderline case; from 80 to 89 is dull normal; and from 90 to 100 is normal. Mr. Baxter says that in this test the boy made 70, which is above the mental defective range, but is a "borderline case." From the Wexler test and from Mr. Baxter's personal observation of the boy, Mr. Baxter gave as his professional opinion regarding the mental status of the boy:

"He is easily dominated, highly over-protected by those close to him. If this person is close enough to him, he could be made to believe (anything told him by such person) . . . He doesn't think fast, because of this emotional immaturity. He doesn't think fast because of a low intelligence quotient sometimes mistaken for hard of hearing . . . I feel that Eddie cannot give a comprehensive detailed description of any eight hour period regardless of lapse of time involved without a certain amount of instruction . . ."

Appellant most earnestly insists that the Court committed error in refusing to allow the jury to hear the foregoing testimony of Russell Baxter; and appellant

cites *Thrash* v. *State,* 146 Ark. 547, 226 S. W. 130; and *Mell* v. *State,* 133 Ark. 197, 202 S. W. 33. In the last cited case, we said of a witness who had testified for the State and against whom offered testimony as to mental competency was rejected:

"It is not contended by the defendant that the prosecuting witness was mentally incompetent to testify in the case. His contention was that she was subject to insane delusions at times and it was admissible, in order to affect her credibility as a witness and to explain her conduct, to prove this fact by witnesses who had personal knowledge of her condition of mind or mental delusions as well as by her acts and conduct on the occasion in question."

We understand that the *insanity* or the *mental delusions* of a witness may be shown by the testimony of another witness. But that is not the situation in the case at bar: here it is not claimed that the boy was insane or suffered mental delusions — it is only claimed that he was dull of comprehension and could be easily imposed on. The Court asked the witness, Baxter, as to the insanity of the boy:

"Court: Do you say Edward is insane? A. No, sir, not at all."

And the Trial Court in its ruling summed up the entire situation as follows:

". . . it appears to me that the nine year old blind boy made a very bright witness. You have asked highly technical questions here with regard to whether these things could have been suggested or not. The undisputed evidence shows here that the nine year old boy was taken immediately to an officer and shortly thereafter repeated this story to the Constable and deputy Sheriff shortly after the occurrence of it. If there is no contention here that this witness is insane, then the court does not believe this testimony is competent. If you could introduce testimony of this type, you could introduce it with reference to any person . . . I believe the credibility of the witness is entirely a matter for the

jury, and I think the nine year old boy has demonstrated that he is aware, he believes in God, he is taught the Bible regularly, and that he is aware he must tell the truth."

The cases and the textbook writers are sharply divided on this matter of offering testimony to impeach a witness on the basis of low mentality. To review all of the authorities would constitute a treatise. In *Isler* v. *Dewey* (1876), 75 N. C. 466, the Supreme Court of North Carolina held that it was proper to allow one witness — a layman — to testify that an opposing witness has a memory "below medium." Again, in the later case of *State* v. *Armstrong* (1950), 232 N. C. 727, 62 S. E. 2d 50, a doctor was not allowed to testify to the jury concerning a witness: "I would classify her as a low class moron, equivalent of a nine-year-old child." The North Carolina Court held such evidence should have gone to the jury, saying:

"What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of the witness? If his interest, bias, indelicate way of life, insobriety and general bad reputation in the community may be shown as bearing upon his unworthiness of belief, why not his imbecility, want of understanding, or moronic comprehension, which go more directly to the point?"

Many courts hold directly opposite from the holdings above mentioned. In *Bell* v. *Rinner* (1864), 16 Ohio State 45, the Ohio Supreme Court held that it was reversible error to permit witnesses to testify of an opposing witness, that she was not of ordinary intelligence. The Ohio Supreme Court said:

"The question presented by the record is, whether the credibility of a competent witness may be impeached by general evidence that the witness is not possessed of ordinary intelligence or powers of mind. It would not only be novel in practice, but would be entirely impracticable, to permit the parties, on the trial of a case, to go into general proof as to the strength of the mental capacity of the several witnesses. It might

lead to as many collateral issues as there are witnesses, and thus divert the minds of the triers from the substantial issues of the case. Litigation would become more uncertain and interminable than ever. Moreover, if it be conceded that the credibility of a witness is to be graded in proportion to his strength of intellect, the tribunal before which he testifies can better estimate his capacity, and the weight to which his testimony is entitled, by his manner, and by his statements on cross-examination, than can, ordinarily, be done by the testimony and conflicting opinions of other witnesses, as to the extent of his mental powers, or the degree of his intelligence."

The Supreme Court of Colorado, in *Blanchard* v. *People* (1922), 70 Colo. 555, 203 Pac. 662, followed the holding of the Ohio Court. Witnesses were allowed to say of opposing witness that he was of a "low order of intelligence." In holding the admission of such testimony to be reversible error, the Colorado Court said:

"Men differ in grades of intelligence as blades of grass in appearance. The utter unreliability of such testimony is at once apparent, when we remember that every man's opinion of the intelligence of others is largely controlled by the quality of his own. To his neighbors John Smith may have seemed a man of average intelligence, though Herbert Spencer may have deemed him a fool."

In Wigmore on "Evidence," 3rd Ed. Vol. 3, § 935, the arguments are listed on this question of admissibility of evidence to dispute competency; and cases are cited to sustain each side[2]. Also in McCormick on "Evidence," page 97, *et seq.*, this matter is discussed:

"Manifestly, however, the fact of insanity or mental 'abnormality' either at the time of observing the facts or at the time of testifying will be provable, on cross or by extrinsic evidence, as bearing on credibility. What of defects of mind within the range of normality, such as

[2] See also Annotation in 15 A. L. R. 932: "Impeachment of witness by expert evidence tending to show mental or moral defects."

a slower than average mind or a poorer than ususal memory? These qualities reveal themselves in a testing cross-examination by a skilled questioner. May they be proved by other witnesses? The decisions are divided. It seems eminently a case for discretion. The trial judge would determine whether the crucial character of the testimony attacked and the evaluative light shed by the impeaching evidence over-balance the time and distraction involved in opening this side-dispute."

Without further laboring the point, we think our own case of *Criglow* v. *State,* 183 Ark. 407, 36 S. W. 2d 400, indicates the course that our holding should take in the case at bar. In the Criglow case, Judge Frank G. Smith stated the issue and the holding in this language:

"E. E. Brooks was called as an expert by appellant, and a hypothetical question was submitted upon which his opinion was asked. This question would have called for the opinion of the witness as to the powers of observation and recollection of Allen and Jones in the matter of their identification of appellant as one of the robbers, they never having seen him prior to the robbery. The court properly excluded this testimony. There was no contention that these witnesses were of unsound mind. It was, of course, proper to inquire how badly the witnesses themselves were frightened by the robbery, and this information might have been elicited by the examination of the witnesses themselves on that subject. It would not have been improper to have asked other witnesses present what opportunity Allen and Jones had to observe the robbers, also what their conduct was during the robbery. But the question whether these witnesses were mistaken in their identification, whether from fright or other cause, was one which the jury, and not an expert witness, should answer. This was a question upon which one man as well as another might form an opinion, and the function of passing upon the credibility and weight of testimony could not be taken from the jury. *Dickerson* v. *State,* 121 Ark. 564, 181 S. W. 920; *Mitchell* v. *Lindley,* 148 Ark. 37, 228 S. W. 728."

We agree that evidence may be offered to the jury regarding the *insanity* of a witness or *mental delusions* that a witness may suffer. This is because a witness may testify ever so brilliantly to the jury, and yet his insanity or mental delusions may not appear. But, when we come to the question of whether a witness has low mental comprehension — absent, as here, any claim of insanity or mental delusions — it seems that the trial judge should have discretion to decide whether the trial should be prolonged by calling witnesses to give their opinions to the jury, or whether the matter is sufficiently clear for the jury to intelligently determine credibility without the trial being prolonged by such testimony as to the mental comprehension of another witness. We hold that the trial judge has discretion in this matter; and we cannot say that he abused his discretion in the case at bar.

IV. *Other Assignments.* We have examined all the other assignments urged by the appellant and find none to constitute reversible error.

Affirmed.

CUNNINGHAM *v.* CHAMBLIN.

5-1167 299 S. W. 2d 89

Opinion delivered February 18, 1957.

Omar F. Greene and *Douglas Bradley,* for appellant.

Elbert S. Johnson, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant is an illiterate Negro farm laborer who lives at Dell, Arkansas. He filed this suit against appellee, W. D. Chamblin, doing business as Chamblin Sales Company, to cancel a note and conditional sales contract as usurious and for damages allegedly resulting from the unlawful conversion of the automobile involved in the transaction.

At the trial it was agreed that the question of usury would first be determined. Appellant presented proof to the effect that he and his wife went to appellee's place of business in Blytheville, Arkansas, on October 29, 1955, when appellant purchased a 1949 model Packard automobile from appellee. Appellant and his wife both testified that a purchase price of $395.00 with a down payment of $100.00 was then and there agreed upon and that a written memorandum introduced by appellant to that effect was furnished by appellee. Either on the same date or a week later, when appellant made a payment of $25.00 on the balance, he executed a conditional sales contract showing a "Time differential Price (credit purchase price)" of $493.00. After credit of the $100.00 down payment the contract provided for payment of the $393.00 balance in 19 weekly installments of $20.00 and one payment of $13.00, beginning November 5, 1955.

In addition to the down payment appellant had paid $190.00 of the balance on December 14, 1955, when he and his family stopped near appellee's place of business and

appellant's 14 year old son was sent to make a payment of $14.00 on the contract. After accepting the payment appellee sent an employee to the car where appellant and other members of his family were waiting. The employee directed that the car be driven on appellee's lot and left there and this was done.

At the conclusion of the foregoing proof by appellant the appellee moved for a "directed verdict" on the ground that appellant had not shown sufficient proof of usury. Appellant also moved for a "directed verdict," whereupon, the court entered a decree finding there was no proof of usury and dismissing the complaint.

We have held that a motion by the defendant for a "directed verdict" at the close of plaintiff's proof in a chancery case may be treated as one challenging the sufficiency of the evidence under Ark. Stats., Sec. 27-1729; and that the requirement that such motion be in writing may be waived by plaintiff's failure to object on that ground. *Thompson* v. *Murdock Acceptance Corp.*, 223 Ark. 483, 267 S. W. 2d 11; *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322. It is also settled that, in passing on a demurrer to the evidence filed by a defendant under the statute, the chancellor must view the testimony in the light most favorable to the plaintiff, and if so viewed a *prima facie* case has been made then the demurrer should be overruled. *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225.

According to appellant's proof the parties agreed on a purchase price of $395.00 for the automobile without regard to whether the sale was for cash or on credit, and a down payment of $100.00 was made leaving a balance of $295.00. But under the conditional sales contract appellant was required to pay $393.00 over a period of 21 weeks without any indication that any part of the $98.00 differential was for anything other than interest. In *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, we reaffirmed the following statement of the court in *Ford* v. *Hancock,* 36 Ark. 248: "It is not usury for one who sells a piece of property on credit, to contract for a higher price than he would have

sold it at for cash. If the intention be, in fact, to sell on credit, he has the right to fix a price greater than the cash price, with legal interest added; but if the sale be really made on a cash estimate, and time be given to pay the same, and an amount is assumed to be paid greater than the cash price, with legal interest, would amount to, this is an agreement for forbearance that is usurious. Therefore, where the intention is not apparent, it is a question for the jury to determine, whether it was a *bona fide* credit sale, or a device to cover usury. Tyler on Usury, 92." In the *Hare* case we also condemned the practice of using the credit price rule as a means of obtaining more than a 10% return upon what is in form a sale but is in substance a loan, saying: "Buying at a credit price, as distinguished from a cash price, has largely disappeared in fact, but is being used as a cloak for usury in many cases by such words as "time price differential," or some other such language." See also, *Crisco* v. *Murdock Acceptance Corp.*, 222 Ark. 127, 258 S. W. 2d 551.

When viewed in the manner required under the statute, the appellant's proof was sufficient to make a *prima facie* case of usury and the cause should be reversed for further development unless appellant forfeited his right to insist on such procedure by himself moving for a "directed verdict." Sec. 27-1729, *supra,* provides only for a demurrer to the plaintiff's evidence by the defendant in a chancery case and did not contemplate the filing of a counter demurrer or motion by the plaintiff, as is sometimes done in law cases at the conclusion of all the evidence. As we view the situation, appellant's counter motion for a "directed verdict" was simply out of order and should be ignored. The decree is accordingly reversed and the cause remanded for further proceedings.

Opinion delivered February 18, 1957.

[Rehearing denied March 18, 1957.]

John W. Bailey, for appellant.

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

George Rose Smith, J. The appellant was convicted of murder in the first degree and was sentenced to death. Among many objections made during the trial the main ones relate to the selection of the jury, the denial of a request for a change of venue, and the court's instructions to the jury.

It is apparent from the record that news about the crime and its investigation had been extensively reported in the press and by radio and television. Many veniremen who had formed opinions on the basis of such reports were excused by the court, but the appellant insists that four jurors whom he challenged for cause should also have been rejected. Each of these four men stated in substance that he had formed an opinion about the case and that evidence would be required to remove his opinion, but upon further questioning each man also declared that he could lay aside his preconceived view and try the case impartially upon the law and the evidence.

It is settled by many decisions that a tentative opinion of this kind, based upon newspaper reports and the like, does not disqualify a prospective juror. The appellant relies chiefly upon the early case of *Polk* v. *State,* 45 Ark. 165, but that decision was disapproved in *Hardin* v. *State,* 66 Ark. 53, 48 S. W. 904, and has not been followed in any later case. *Sneed* v. *State,* 143 Ark. 178, 219 S. W. 1019; *Howell* v. *State,* 220 Ark. 278, 247 S. W. 2d 952. Nor was one of these four men shown to be disqualified by his statement on *voir dire* that on the issue of the accused's asserted insanity he would be guided by the medical testimony. Upon its being explained that the opinions of lay witnesses might also be offered in evidence this juror expressed his willingness to give such testimony whatever credit he thought it entitled to receive.

The first four days of the trial were devoted to the selection of the jury. On the third day the appellant filed a written motion for a change of venue, supported by two affidavits, and the testimony of these affiants was offered on the fourth day. One of these witnesses said in effect that the homicide had been widely publicized and that there was a general belief throughout the county that Leggett was guilty. The other expressed the same thought, although it developed on cross-examination that his knowledge was largely limited to the attitude prevailing in two wards in Little Rock. At this point in the trial eleven jurors had been chosen. In denying the motion the judge expressed his confidence in the impartiality of these eleven and his belief that the panel would soon be completed, which proved to be the case.

It cannot be said that the court abused its discretion in refusing to order a change of venue. What the statute requires is a showing that the minds of the inhabitants of the county are so prejudiced against the accused that a fair trial cannot be had. Ark. Stats. 1947, § 43-1501. Formerly the court was restricted to determining the credibility of the affiants supporting the motion, but the 1936 revision of the statute permits the court to ascertain whether the allegations of prejudice are well founded. *Robertson* v. *State,* 212 Ark. 301, 206 S. W. 2d 748. Here the trial judge had listened for more than three days while hundreds of veniremen were searchingly examined under oath. In deciding whether the appellant's two witnesses had correctly estimated the local sentiment the court was entitled to consider the views of scores of citizens already heard. Although many veniremen had reached positive conclusions from what they had read or heard, there is no indication that the news reports were biased or represented a studied effort to inflame the public. *Meyer* v. *State,* 218 Ark. 440, 236 S. W. 2d 996. Despite the defendant's theory that it was impossible to obtain a fair-minded jury within the county, the court was convinced by testimony heard at firsthand that this goal had almost been reached. In these circumstances the conclusion that the

asserted prejudice did not exist lay well within the limits of the court's discretionary authority.

On the merits it is contended that the court erred in refusing to charge the jury on the lesser offense of murder in the second degree. Whether that instruction should be given depends in every case upon the evidence. Here the deceased, Joe King, was a fourteen-year-old boy who lived with his mother and stepfather about a mile from Jacksonville. On the night of December 23, 1955, young King went to a picture show in Jacksonville and was last seen by his friends as he started home alone. His body was found four days later in woods near the highway about three and a half miles from the city. An autopsy showed that bruises on his face had been inflicted before he died and that death was caused by strangulation.

Leggett was questioned in January and confessed his guilt. His narrative is the only direct evidence of the exact manner in which the crime was committed. Leggett said that he picked up King, who was hitchhiking, and offered to drive him to his home. Leggett at first stated that the boy called him a son of a bitch when he drove past the place which the boy pointed out as his home. Leggett hit King in the face twice with his fist, dazing him, and then drove to the spot where King's body was found. There he choked the boy until he thought he was dead and dragged the body to a thicket. On his way back home Leggett threw King's pocketbook into some weeds by the road. In his confession Leggett described the place where the wallet was thrown; he later went with the officers to the scene, and the pocketbook was just where he said it would be. In a second account of the crime Leggett said that King refused to engage in an act of sexual perversion and that he killed the boy for fear that he would report the matter.

Upon this proof the court was not required to charge the jury on the lesser degrees of homicide. A similar situation was presented in *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477, where, as here, the defense was a plea of insanity, the accused did not testify, and the defendant's

proof was directed to the issue of his mental capacity. In upholding the trial court's decision to submit a form of verdict for first degree murder only we said: "However, in the present case it would not have been error for the court to refuse to charge the jury as to the degrees of homicide lower than murder in the first degree; for, according to the undisputed evidence, appellant was guilty of that crime, if he was of sufficient mental capacity to commit it . . . Without any provocation except an epithet, he went off and armed himself with a pistol, returned in twenty or thirty minutes to the place where he had left his intended victim, and deliberately slew him." Other cases applying the principle include *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704, and *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849.

Another point urged for reversal centers upon the court's action in giving an oral instruction to the jury after counsel for the accused had asked that the instructions be in writing. Ark. Const., Art. 7, § 23. At the defendant's request the court had given a written instruction submitting four possible verdicts, the first one being: "We, the jury, find the defendant guilty of murder in the first degree, as charged in the information, and fix his punishment at death by electrocution." (The other three related to a finding of guilty with the punishment of life imprisonment, a finding of not guilty, and a finding of not guilty by reason of insanity.) After deliberating for two hours the jury returned to the courtroom and asked, among other things, that this instruction be read again, which was done. When the jury again retired the court recalled them, apparently at once, and added this oral charge: "I am going to instruct you further, gentlemen, that if you find the defendant guilty of murder in the first degree, as charged in the information, and you desire that he suffer the death penalty, you may also bring in a verdict, 'We, the jury, find the defendant guilty of murder in the first degree, as charged in the information,' and stop—that automatically imposes the death penalty and it is the duty of the Court to sentence him. You have that other alternative."

After the jury had again left the courtroom the defense objected to the charge's having been oral. There was no request that the supplemental instruction be reduced to writing, which, if accomplished before the end of the trial, would have complied literally with the constitutional requirement. *Reed* v. *Rogers,* 134 Ark. 528, 204 S. W. 973. Within fifteen or twenty minutes the jury returned a verdict in the form described in the oral instruction. The members of the jury were polled, and all answered that this was their verdict.

Even though the court's procedure may not have satisfied a strict interpretation of the language in the constitution, it is readily apparent that no prejudice could possibly have resulted. The constitution contemplates that the court will have some freedom in the matter of giving instructions on its motion after the jury has retired. *National Lbr. Co.* v. *Snell,* 47 Ark. 407, 1 S. W. 708. Here the oral instruction was short, clearly worded, and an accurate statement of law. The complaint is merely that it was not read from a piece of paper or reduced to writing at once. This situation falls within our ruling in *Merrill* v. *City of Van Buren,* 125 Ark. 248, 188 S. W. 537, where it was said: "We would be compelled to reverse the judgment of the court below because of the failure to reduce the charge to writing if we did not think it affirmatively appears that no prejudice resulted from the failure of the court to reduce the instructions given to writing. Appellant's instructions . . . were in writing, while the ones given by the court were few in number and simple in their nature and there was no opportunity for disagreement about what the court had declared the law to be. This is not a case where a copy of the instructions would have been required in a discussion before the jury of the law of the case as applied to the evidence, nor one in which there was opportunity for disagreement in settling the bill of exceptions. It is, of course, proper always for the trial court to reduce the instructions to writing and thereby obey the letter of the Constitution and of the statute, and reversals must follow the failure so to do when the request is made, except in cases similar to this where it

can be affirmatively said that no prejudice resulted from that failure."

We have painstakingly examined the record and have considered all the points raised. It is our conviction that the appellant received a fair trial and that the court below committed no reversible error in the proceeding.

Affirmed.

COX *v.* DARRAGH COMPANY.

5-1150 299 S. W. 2d 193

Opinion delivered February 18, 1957.

[Rehearing denied March 25, 1957.]

W. R. McHaney and *Melvin E. Mayfield,* for appellant.

J. Bruce Streett, James M. McHaney, and *Owens, McHaney, Lofton & McHaney,* for appellee.

PAUL WARD, Associate Justice. Appellee sued appellant on a promissory note. The only defense inter-

posed was usury. The case was tried before the Circuit Judge, sitting as a jury, and judgment was rendered in favor of appellee.

The sole question presented to us is whether there is substantial evidence to support the decision and judgment of the trial court.

The facts involved in this case, which in most part are undisputed, are substantially as hereinafter set out. Appellee, with its head office in Little Rock, Arkansas, is a corporation which owns and operates a feed store in Camden. The Camden store does business under the name of Darco Feed Mills. Ted Darragh is the Vice-President and General Manager of appellee corporation. Appellant, C. S. Cox, being indebted to the Camden store in the amount of $3,019.43 executed a note in that amount on August 4, 1954 to the Darco Feed Mills, with interest at the rate of 6 per cent per annum. It was agreed that appellant would pay the above amount in 6 monthly installments — the first 5 installments were to be $500 each and the last one to be $519.43, in addition to the interest which had accumulated when each successive installment became due. It was contemplated that appellee would calculate the amount of each monthly payment (including interest) and place the same on the back of the note. In fact the note itself refers to a "schedule on the back."

It was the contention of appellee in the trial below that a mathematical error was made in calculating the interest and in placing the erroneous figures on the back of the note. It is admitted that two or more of the interest calculations amounted to more than 10 per cent. Appellant paid the first and second installments as called for in the schedule, and he testified that on each occasion he protested to a Mr. Johnson (the manager of the Camden store) that he was being charged more than 10 per cent interest, and that on each occasion Mr. Johnson told him, in effect, that he would have to pay what the schedule called for.

Mr. Darragh's explanation of what happened is substantially as follows: When Mr. Darragh was told of

the transaction he called Mr. Lovett who was cashier of the Commercial National Bank in Little Rock and asked him to figure the interest; Mr. Lovett, who was busy at the time, said he would have his secretary make the calculations and call him in a short while; When the secretary called she gave Darragh the figures which were placed on the back of the note, and; That he assumed the figures were correct and did not check them personally. At the same time, according to Darragh's testimony, he had his secretary insert the above figures in a letter which he had already dictated to appellant. Darragh further testified that the matter of excess interest was not brought to his attention until about the first of December when he promptly wrote a letter to appellant and apologized for the error in the interest calculations, explaining a mistake had been made, and gave him the correct interest calculations.

The judgment of the trial court must be sustained if there is substantial evidence from which it could find that the first interest calculations were the result of a mistake and that there was not present at any time the intent on the part of appellee to charge more than 10 per cent interest. In the early case of *Garvin* v. *Linton,* 62 Ark. 370, 35 S. W. 430, 37 S. W. 569 (on rehearing), this court announced this rule:

"There can be no usury when the amount taken in the contract for interest in excess of ten per cent per annum was reserved through a mistake or ignorance of the fact that it was in such excess. If the lender, by mistake of fact, by error in calculation, or by inadvertance in the insertion of a date, contracts to receive an illegal rate of interest, 'such mistake, error or inadvertance will not stamp the taint of usury on such engagement, nor cause to be visited upon him, who did not knowingly and intentionally disregard the law in this behalf, the highly penal consequences of an usurious offense.' "

In the same case the court also said: "To constitute usury in this state, there must be an intention to take or receive more than 10 per cent per annum interest." Further on in the opinion the court, aftering comment-

ing on numerous other decisions, stated that it was sufficient to constitute usury if the lender alone had such intent. The plain rules above announced have never been revoked by this court but they have been approved. In the case of *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198, at page 1027 of the Arkansas Reports, the court quoted with approval from the decision in the *Garvin* case, *supra,* to the effect that a mistake in charging an illegal rate of interest will not stamp the transaction with the taint of usury. In addition to the above this court in the case of *Temple* v. *Hamilton,* 178 Ark. 355, 11 S. W. 2d 465, announces the universally approved rule that "the burden of proof is upon the party who pleads usury to show that the transaction was usurious."

Under the factual situation in this case and in accordance with the legal principles above announced we must hold that the judgment of the trial court is sustained by substantial evidence, and the same is hereby affirmed.

Affirmed.

Justice GEORGE ROSE SMITH not participating.

NORTH *v.* GRIFFIN.

5-1152 298 S. W. 2d 700

Opinion delivered February 18, 1957.

Thomas L. Cashion and *W. K. Grubbs,* for appellant.

J. W. McCall, Memphis, Tenn., and *Ed Trice,* for appellee.

SAM ROBINSON, Associate Justice. On the 5th day of December, 1952, the appellant, L. C. North, sold to appellee, Mrs. J. W. Griffin, a 640 acre farm located in Chicot County. As part of the consideration, the purchaser executed a promissory note in the sum of $24,000 secured by mortgage; the note and mortgage do not bear interest. North filed this suit, asking that the note and mortgage be reformed to provide for the legal rate of interest. The chancellor's decree was against reformation, and North has appealed. To justify the courts in reforming a written instrument, the evidence must be clear, cogent and decisive.

Here, we cannot say the testimony produced in favor of reformation meets that test. The note and mortgage were prepared by Mr. J. W. McCall, an attorney, of Memphis. He is the regular attorney for Griffin, and it was at Griffin's suggestion that Mr. McCall was selected to do the legal work in connection with the sale. At the time of the sale, the parties entered into a contract for the operation of the property that was being sold. It was agreed that North would remain on the farm, and manage the operation of it for a percentage of the profits. North remained on the land pursuant to that agreement, but, later, the contract was terminated by mutual consent. It is North's contention that at the time of the sale of the land and execution of the note and mortgage it was agreed that the balance of the purchase price of $24,000 would not bear interest as long as the contract to operate the farm remained in effect; but, at the termination of that contract, the note and mortgage would begin to bear interest. North is corroborated to some extent by the testimony of his wife; however, Griffin and McCall positively deny that there was any such agreement. They contend that it was part of the condition of the sale that the note representing the unpaid part of the purchase price should bear no interest. It is clear from the record that the interest was not left out inadvertently. The mortgage was prepared on a form, and that part of the printed matter with the blank space for the interest to be inserted is deleted by being marked through with a pen. The alteration of the

printed form is very obvious, and is such that it would attract one's attention immediately. In view of the testimony of McCall and Griffin, along with the altered form used in preparing the mortgage, we cannot say that appellant has proven his case by clear, cogent and decisive testimony.

Affirmed.

AHRENS *v.* HASKIN.

5-1130 299 S. W. 2d 87

Opinion delivered February 25, 1957.

Thomas B. Tinnon, for appellant.

Emery D. Curlee, Chicago, Ill., for appellee.

CARLETON HARRIS, Chief Justice. Appellee, A. C. Haskin, is a real estate broker at Mountain Home, Arkansas, and appellant,[1] Richard Ahrens, owned and operated an ice manufacturing plant and cold storage lock-

[1] Peoples Bank of Mountain Home is only a nominal party as it is holding a sufficient amount of money belonging to Ahrens to satisfy any judgment obtained by appellee.

er plant in said location. Appellant entered into an oral non-exclusive listing agreement with appellee, whereby appellee was to sell the property and receive a commission of five per cent. Appellant directed appellee to ask the price of $27,500.00. Appellee made contact with one Joe Watson, and showed Watson the property on May 20th, 1954. Watson was interested, but did not wish to negotiate further until his uncle (a Mr. Esker Watts, who lived out of the state, and who had been engaged in the cold storage locker business for some years) had a chance to look at the property. Some six weeks later, appellee showed the ice and locker plant to the uncle, who recommended against his nephew's purchasing same at the $27,500.00 price. Watson returned to his home in West Virginia, but in January, 1955, came back to Mountain Home, where further conversations were held with appellee. The evidence shows that Watson advised appellee that he would pay "in the neighborhood" of $20,000 for the property. Appellee inquired of appellant as to whether he would be willing to take a reduced price, and appellant replied that his wife would not sign for any lesser amount. In the meantime, appellant had learned that Watson was back in the county, and had made a visit to Watson's home, but had been unable to locate him. Early in February, appellant went directly to Watson and began negotiations. On the same day, and prior to contacting Watson, appellant had a conversation with appellee in which he suggested that the two of them go to see Watson and determine if he would pay the $27,500. Appellee replied that there was no use to see him "at that figure." Appellant declined to reduce the price, and went on to personally contact Watson himself. The sale was consummated in early April at a price of $21,000. Appellee instituted suit for the five per cent of the sale price, and the Court awarded him such amount, ($1,050). From said decree of the Court comes this appeal.

There is not a great deal of conflict in the evidence, but one main difference relates to the terms of the agreement. Appellant stated that the five per cent commission was only to be paid if appellee succeeded in sell-

ing the property for $27,500, while appellee testified that he was to receive the five per cent irrespective of the purchase price. The only direct evidence on this point was the testimony of the two principals, which, as stated, was in direct conflict; however, Joe Watson, the purchaser of the property, testified that he inquired of appellant as to whether he intended paying appellee any commission, and was told by appellant that he "would take care of him." The matter was purely a question of fact for the Court to determine, and we have heretofore held that a Chancellor's findings will not be disturbed unless clearly against the weight of the evidence. *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686 (1946).

Appellant argues that the original negotiations were unproductive of a sale, and such were abandoned in June, 1954. He then contends that the resumption of the negotiations seven months later was directly between appellant and Watson; that these latter negotiations were the sole cause of the sale, and appellee had nothing to do with it. We cannot agree with this contention. It is true that negotiations between appellee and Watson were temporarily broken off when Watson returned to West Virginia in June, 1954. It is, however, undisputed that upon his return to Mountain Home, he talked with appellee on several occasions relative to the property, and it is undisputed that appellee endeavored to obtain the permission of appellant to offer the property at a lower price. It is also undisputed that appellant, on the same day that he went to see Watson and began to negotiate on his own, first tried to get appellee to go with him to see if the prospective purchaser could not be talked into giving the full amount that had been asked. We conclude from the evidence that appellee still had his authority to promote a sale, and that the negotiations carried on by him with Watson, after the latter's return in January, were under full authority from appellant.

In order for Haskin to recover his commission, it must first be found that his efforts were the procuring

cause of the sale. *Hartzog* v. *Dean,* 216 Ark. 17, 223 S. W. 2d 820. It is undisputed that Watson was first contacted by appellee in regard to the sale of the property. Appellee took him to the plant where the premises might be viewed. Later, appellee took Watson's uncle through the plant. He had several conversations with Watson after the latter's return, and tried to prevail upon appellant to reduce the price in order to further the sale. Certainly, he endeavored to maintain the prospective purchaser's interest in the property. There is no indication that Watson would have even known that the property was being offered for sale had not appellee, under his agreement with appellant, contacted him with reference thereto. Likewise, there is no indication that appellant would have known of Watson's interest except upon advice of appellee. Under the evidence, it is apparent that appellee would have pursued the sale to its conclusion had appellant authorized him to offer the property for the price that was finally received. The fact that the property was sold on modified terms is immaterial. *Hartzog* v. *Dean, supra.* We consider that Haskin was the procuring cause of the sale, and so find. On the whole case, we are of the opinion that the Chancellor's findings are supported by the evidence. The cause is accordingly affirmed.

HUGHES *v.* HARRIS.

5-1172 299 S. W. 2d 85

Opinion delivered February 25, 1957.

B. W. Thomas, for appellant.

Roy Mitchell, for appellee.

J. Seaborn Holt, Associate Justice. September 27, 1955, appellant, Mae Hughes, sued appellee, A. L. Harris, for $1,650 alleged to be due her for the use, and as rental, of a building which she owned. Appellant answered with a general denial. By agreement trial was had before the court sitting as a jury and resulted in a verdict and judgment for appellee. This appeal followed.

For reversal appellant contends that the court erred in permitting evidence that tended to question appellant's title to the building and also that the judgment was contrary to the law and the evidence. The record reflects that on December 30, 1952, appellant, and her then husband (W. H. Hughes) entered into a written contract with appellee, Harris, which was denominated "Contract and Working Agreement," and which contained the following provisions:

"This agreement made and entered into on this 30th day of December, 1952, by and between W. H. Hughes and Mae Hughes, his wife, hereinafter called parties of the first part, and Albert Harris, Sr., hereinafter called party of the second part, WITNESSETH: For and in consideration of the sum of $1.00 paid to each other and the covenants and conditions herein contained, both parties agree as follows: That first parties will furnish to second party, the building located at 310 Whittington, Hot Springs, Garland County, Arkansas, for the purpose of operating a cleaning plant. Second party agreed to place machinery now owned by second party, necessary to equip said location for the operation of a cleaning and pressing plant and to place said plant in operation as soon as he can reasonably do so. Each party is to receive one-half (1/2) the net income from said business, after the payment of all operating expenses . . . Second party reserves the right to sell the equip-

ment and business at any time. HOWEVER, in case of sale by second party, the purchaser shall enter into a Lease Agreement to lease said building from first parties for a period of one year at the monthly rental of $50.00 and said rent is to be paid the first day of each month during the leasehold agreement . . . It is agreed between the parties hereto that said agreement shall not constitute a partnership and shall be considered a 'working agreement' in the nature of a rental agreement . . . It is mutually agreed between the parties hereto that second party shall exercise complete managerial authority over said place and business and that first parties are not to interfere and have any voice in said management.''

The evidence was to the effect that the cleaning and pressing equipment was moved into appellant's building between October 1, 1952 and December 30, 1952, but was never in fact set up and operated. Appellee so testified. Appellee further testified that he moved out that part of the equipment on which the Home Finance Company had a mortgage, stored it elsewhere, and then gave W. H. Hughes, husband of appellant, a Bill of Sale for the rest of the equipment in order that Hughes might dispose of it in his auction business, and get Harris his money out of it, that Mae Hughes called appellee (Harris) about moving the equipment and that he told her he had given her husband a Bill of Sale for it and had also given her husband a cash register for which he (appellee) had paid $75. Appellee never claimed any interest in appellant's real property adverse to appellant.

As we interpret the above contract between Mae Hughes and appellee Harris, it was, in effect, an agreement under the terms of which Mrs. Hughes was to furnish the building and Harris would furnish the equipment, manage and operate the business, and all profits, after expenses, were to be divided equally between them. There were never any profits. There was no provision that Mrs. Hughes should have $50 per month rental for her building while the cleaning and pressing business

was being operated by Harris. The only reference to a $50 per month rental appears in the above provision of the contract which provides that Harris reserves the right "to sell the equipment and business at any time. HOWEVER, in case of sale by second party, the purchaser shall enter into a Lease Agreement to lease said building from first parties for a period of one year at the monthly rental of $50 . . ." Since, as we pointed out, the business was never in fact operated there were no profits, and Harris gave a bill of sale for the equipment to Mrs. Hughes' husband, W. H. Hughes, one of the parties to the contract, clearly, Mrs. Hughes was not entitled to claim any rental in the circumstances.

Under our well established rule, we must affirm this judgment if we find any competent, substantial evidence to support it. The weight of the evidence and credibility of the witnesses were for the sole determination of the court, which, as we have often said, has all the finality as the verdict of a jury. *Holman* v. *Armstrong,* 187 Ark. 958, 63 S. W. 2d 339. Appellee's testimony was substantial and sufficient to warrant the findings and judgment of the trial court.

Affirmed.

NORTHWEST LAND CO., INC. *v.* SUGG.

5-1132 299 S. W. 2d 63

Opinion delivered February 25, 1957.

Cockrill, Limerick & Laser, for appellant.

Kay Matthews, Richard L. Pratt and *Cooper Jacoway,* for appellee.

J. Seaborn Holt, Associate Justice. This litigation involves land outside the corporate limits of the City of Little Rock and described as Lots 1, 2, 3, 4 and 5, Block 10, Hamilton and Brack's Addition to the City of Little Rock, Arkansas. Northwest Land Company, Inc. (appellant) on March 10, 1955, filed suit against J. W. Sugg, Frank and Mary Pinkerton, Ira Loyd, Clara Hamilton and H. J. Burney, her guardian, to remove certain alleged clouds on the title to this property, the alleged clouds consisting of certain tax deeds to appellees. Appellant also asked that a confirmation decree confirming title to said lands in the State of Arkansas be cancelled. In the alternative appellant prayed that it be permitted to redeem on the ground that Clara Hamilton was an incompetent at the time of the tax sale and at all times thereafter. Appellant, Clara Hamilton, answered with a general denial and in a cross complaint against appellant, Northwest Land Company, and appellees, Frank and Mary Pinkerton and Ira Loyd, prayed that title to the lands be quieted in her. She also alleged in her answer irregularities in her commitment

to the State Hospital and the appointment of her guardian. The Pinkertons answered alleging that they had acquired title to Lots 1, 2, 3, and 4 above by valid tax deed from the State of Arkansas and also by adverse possession, and prayed that title to these lands be quieted in them. Ira Loyd, though duly served, filed no pleadings, and has not appealed. January 24, 1956, following a trial, the court entered a decree quieting title to Lot 5, Block 10, in appellant land company, against any and all claims of Clara Hamilton, J. W. Sugg or Ira Loyd and further decreed that title to Lots 1, 2, 3, and 4, Block 10, be quieted in Frank Pinkerton and Mary Pinkerton, free of any claim of interest by Northwest Land Company, Inc., Clara Hamilton or H. J. Burney, her guardian.

Northwest Land Company, Inc., has appealed from that part of the decree quieting title to Lots 1, 2, 3, and 4, Block 10, in the Pinkertons. Clara Hamilton has appealed from that part of the decree quieting title to Lot 5, Block 10, in Northwest Land Company, Inc., and quieting title in Lots 1, 2, 3, and 4, Block 10, in Frank and Mary Pinkerton. Appellant says: "This appeal by appellant, Northwest Land Company, Inc., resolves itself into two questions. First: Appellant's right to attack the tax sale for 1937 taxes and the confirmation thereof, and Second: In the alternative, if the sale for nonpayment of 1937 taxes is upheld, appellant's right to redeem from the tax sale."

For reversal Northwest Land Company contends that the tax sale to the State of Arkansas was absolutely void because of excessive costs, erroneous descriptions and insufficient notice of sale; that it has the right to attack the confirmation decree within one year after Clara Hamilton's disabilities are removed, or, in any event within two years or within three years after Clara Hamilton's disabilities are removed, and finally, in the alternative, that appellant has the right to redeem from the tax sale.

It appears that Clara Hamilton acquired title to the five lots in question, through her mother's will, in 1936.

This property, while owned by Clara Hamilton, was sold to the State at a tax sale in November 1938 for the 1937 taxes. The State of Arkansas sold by tax deed these five lots to appellee, J. W. Sugg, on April 3, 1941, and by mesne conveyances the Pinkertons acquired a deed to Lots 1, 2, 3 and 4 on April 16, 1947, have paid the taxes, occupied and improved the property since they acquired it, and Ira Loyd acquired a deed to Lot 5, based on the tax deed to Lot 5. On November 10, 1942, the State's title to these lots was confirmed by the Pulaski Chancery Court.

Clara Hamilton was committed to the State Hospital October 30, 1939, after having been properly and legally adjudged insane on that date. On December 4, 1939, C. M. Walser, on his petition, was appointed guardian of the person and estate of Clara Hamilton, and on March 2, 1943, H. J. Burney was appointed her guardian in succession. H. J. Burney sold the five lots involved here to Gladys Knighton on May 25, 1953, and this sale was confirmed by the Probate Court, and on appeal to this court was affirmed, *Hamilton* v. *The Northwest Land Co., Inc.,* 223 Ark. 831, 268 S. W. 2d 877. On June 29, 1953, Gladys Knighton deeded these five lots to appellant, Northwest Land Company, Inc., Clara Hamilton was released from the State Hospital, December 30, 1953, and her guardian, Burney, had not been discharged.

The Northwest Land Company's contention that the tax sale was void because the lands were improperly described in the tax sale, and advertised separately resulting in excessive costs, we hold to be untenable. In this connection, the land company says: "Each of the parcels was advertised under separate calls which thereby rendered the costs excessive by the inclusion of an additional 25 cents publication fee," and relies on § 84-1104 Ark. Stats. 1947 (Sec. 2, Act 170 of 1935) which provides: "Such list of delinquent lands shall be published in some newspaper of the county . . . All contiguous city lots in any city block owned by one person shall be listed and published under one item and as

one tract. The legal fees for the publication of delinquent real property tax lists shall be twenty-five cents (25c) per tract for the first insertion, and ten cents (10c) per tract for each subsequent insertion . . ." Clearly we think this section applies only to city lots within a city block and does not apply here for the reason that it's conceded that the five lots here involved are located *outside of the City of Little Rock.* There is yet another reason why this section does not apply here and that is, it also appears that the five lots here involved were not contiguous to Lots 8 through 12, Block 10, Hamilton & Brack's Addition to the City of Little Rock, which were sold at the same tax sale, together with these five lots, but were, in fact, separated from them by an eleven foot alleyway.

We hold that the description above used in the tax sale was sufficient. The property was conveyed as Lots 1 through 5, Block 10, Hamilton & Brack's Addition to the City of Little Rock, when as pointed out, the lots were not within the City of Little Rock. This description, however, was sufficient. It appears there was only one Hamilton & Brack's Addition in Pulaski County and it is difficult to see how there could be any confusion in the location of these lots. In the recent case of *Cook* v. *Langhorne,* 219 Ark. 443, 242 S. W. 2d 838, wherein lots were sold for taxes describing them as being in the City of Texarkana, when, in fact, they were not, we said: "In our opinion the description of these lots, as they were forfeited and also deeded by the State, was definite to and understandable by any person of ordinary knowledge. There is only one Forest Park Addition to Texarkana and it is difficult to see how one could possibly be misled as to where the lots were located. Certainly appellant, who bought from the man who platted the lots and named the addition, gives no indication that he was ever confused or misled by the description . . ."

Appellant's next contention, that the tax sale was void because sufficient notice of the sale was not given, is also without merit. Here it is undisputed that the tax

sale was duly confirmed by appropriate proceedings. This confirmation cured any irregularities in the notice of the tax sale. In *Billingsley* v. *Lipscomb,* 211 Ark. 45, 200 S. W. 2d 510, we said: "When the power to sell land for the non-payment of the taxes due thereon did not exist, the sale is void, and the confirmation thereof may be collaterally attacked. If, however, the power to sell existed, but was defectively exercised, the defects may be and are cured by appropriate confirmation proceedings which are not attacked within the time, and in the manner provided by law."

Appellant next argues that it "may attack the confirmation decree within one year after Clara Hamilton's disabilities are removed," and relies on Sec. 9 of Act 119 of 1935. At the time of the confirmation decree involving the five lots here, on November 10, 1942, the provisions of Act 423 of 1941 (now § 84-1325 Ark. Stats. 1947) which fully covered the subject, were in effect and we hold that this act controlled. It is significant that this act contained no saving clause in favor of insane persons or infants. We must presume that the legislature intended just what the act says and deliberately omitted any saving clause to infants and insane persons. ". . . it is a general rule that where the legislature has not seen fit to except a particular person or class of persons from the operation of such statutes (of limitation), the courts will not assume the right to do so. Except, therefore, as the statute of limitations makes express exceptions in favor of such persons, the statute will be applied against the rights of persons laboring under legal disability. Similarly, as a general rule where an exception to the operation of the statute of limitations is not expressly mentioned in the statute, no such exception will be made on the ground of inability to bring suit, absence or non-residence of a party, or evasion of process. It has been held that the courts in construing a special statute of limitation will not read another statute into it and thus incorporate exceptions not contained therein, or give it any new or unusual interpretation." 34 Am. Jur. § 186 p. 150-151. "The rule that the court will not read exceptions into the stat-

ute of limitations applies in the case of persons *non compos mentis.* Generally if there is no saving clause or exception in favor of incompetents, the statute will run against claims in their favor the same as against claims of others not expressly mentioned in the exceptions of the statute . . ." 34 Am. Jur. § 201, p. 162. Therefore, since the enactment of Act 423 of 1941, insane persons stand in the same position as persons who are sane, and are given the right to redeem within one year *from the date of the confirmation decree.*

As indicated, Clara Hamilton's guardian, Burney, conveyed those five lots to Gladys Knighton on proper order from the Probate Court on May 25, 1953, and by this conveyance he conveyed all the interest Clara Hamilton had in the lots at the time. Since we are holding that Clara Hamilton was sane at the time of the tax sale to the state, and that the state acquired good title to these five lots under the tax sale, and that the Pinkertons by mesne conveyances acquired good title to Lots 1, 2, 3, and 4 (on April 16, 1947) it follows that Clara Hamilton had no interest in these four lots that her guardian could later convey to Gladys Knighton, and, therefore, the Pinkertons' title to Lots 1, 2, 3, and 4 is good as against Clara Hamilton, H. J. Burney, guardian, and appellant land company.

The contention of Clara Hamilton on her cross appeal that she had never been legally declared insane and had been fraudulently confined in the State Hospital is without merit and contrary to the record presented, which shows: "Order of Commitment — State of Arkansas — County of Pulaski In the Probate Court of Said County

"Be it Remembered, that at the October term, 1939, of the Probate Court of Pulaski County, Arkansas, Hon. Frank H. Dodge, Judge, presiding, among others, the following proceedings were had in said court on the 30 day of October 1939, a day of said term, to wit: In the matter of the charge of insanity against Miss Clara Hamilton.

"On this day is presented to the court the affidavit of John C. Curtis a reputable citizen of Pulaski County,

Arkansas, wherein he states that Clara Hamilton, a citizen and resident of said County, is insane, and that she should be confined in an asylum for care and treatment.

"And it appearing to the court from the testimony of C. C. Reed, M. D. and Jno R. May, M. D. two competent and disinterested physicians of said County, that the said Clara Hamilton is insane as alleged, the Court doth so find.

"It is therefore ordered and adjudged by the court that the said Clara Hamilton be committed to the Arkansas State Hospital for Nervous Diseases, and there confined for care and treatment. And it is further ordered that a duly certified copy of this order and of all papers pertaining thereto be delivered to the Superintendent of said hospital as his authority for receiving and confining the said Clara Hamilton.

State of Arkansas County of Pulaski I, L. A. Mashburn, Clerk of the Probate Court within and for the County aforesaid, do hereby certify that the foregoing is a true and complete copy of the original order and judgment of said Court therein set forth, and of all papers pertaining thereto, as the same appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 30 day of October 1939.

"By L. A. Mashburn, Clerk,

"By Alma Allnut, D. C."

As to Lot 5, the Chancellor correctly found and decreed "That the title of Northwest Land Company, Inc., to Lot 5, Block 10, Hamilton & Brack's Addition to Little Rock, is hereby quieted against any and all claims that may be asserted by Clara Hamilton, J. W. Sugg or Ira Loyd." We hold that title to this Lot 5 was acquired by appellant land company, through the guardian's deed to Knighton and any interest that Ira Loyd or J. W. Sugg might have claimed is foreclosed since

they were made parties to this suit, duly summonsed, did not plead or appear, but wholly made default.

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

Mr. Justice MILLWEE not participating.

SHULTS *v.* SHULTS.

5-1177 299 S. W. 2d 57

Opinion delivered February 25, 1957.

J. Loyd Shouse and *Arthur N. Wood,* for appellant.

Arnold M. Adams and *Garvin Fitton,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants, as plaintiffs, sought to set aside a conveyance of real and personal property made to appellee. From a decree refusing all the relief they desired, the appellants bring this appeal.

Mr. and Mrs. James W. Shults died intestate some time about 1920, survived by several sons and daughters. Two of the sons were Virgil Shults and Delmer Shults and they were single and unmarried: "they were old bachelors." For a valuable consideration, all the other heirs of Mr. and Mrs. James W. Shults conveyed to Virgil Shults and Delmer Shults the home place of 139 acres here involved. Some of the heirs conveyed

to Virgil and some to Delmer, so that the two brothers did not own equally, but together they owned the entire fee and lived on the land.

In 1950 Virgil Shults died intestate and his interest in the home place descended to his four surviving brothers and the heirs of his two deceased sisters — some thirteen persons in all. After the death of Virgil Shults his heirs, in 1950, conveyed the Virgil Shults interest in the home place and personal property to Delmer Shults, the surviving bachelor brother, who continued to live on the farm. The nature of this conveyance — whether absolute or in trust — is discussed in Topic II, *infra*. Delmer lived on the home place until a few months before his death. On October 22, 1952, Delmer executed a warranty deed conveying to his brother, A. J. Shults, of Phillipsburg, Missouri (appellee here), the entire 139 acres and also all personal property owned by Delmer Shults.

On January 4, 1953, Delmer Shults died intestate; and this suit was subsequently filed by the plaintiffs as the administrator and all the heirs at law of Delmer Shults (except defendant, A. J. Shults) against A. J. Shults, to cancel the said deed and bill of sale of October 22, 1952. Two claims were made by plaintiffs: first, that A. J. Shults exercised undue influence on Delmer Shults to obtain the said conveyances; and, second, that Delmer Shults held the title in trust for all of the heirs of Mr. and Mrs. James W. Shults, the original owners. Trial in the Chancery Court resulted in a decree (a) denying the claim of undue influence; and (b) denying most of the trust claim. Appellants bring this appeal.

I. *The Matter Of Undue Influence.* In August, 1952 it was determined that Delmer Shults was suffering from cancer. At that time, he was living alone on the 139 acre farm. His condition gradually grew worse; and in October, 1952 he got one of his friends to take him to Harrison, Arkansas. There Delmer called by long distance his brother, A. J. Shults, who lived at Phillipsburg, Missouri, and informed him of the malignancy. A. J. Shults came immediately to Delmer's home. Next

day the two went to Harrison where Delmer executed the deed and bill of sale here attacked. Then A. J. Shults took Delmer to Little Rock for examination regarding the malignancy. The doctors' report was that Delmer had only a few months to live. Delmer and A. J. returned to the home place; an auction sale was conducted of the farm equipment and livestock; and Delmer went to Missouri to live with A. J. Shults. Later, Delmer was transferred to a nursing home in Missouri and was visited every day by A. J. Shults until January 4, 1953, the date of death, as aforesaid.

It is admitted by all sides that Delmer Shults was sane at the time he executed the deed in October, 1952; but witnesses for the plaintiffs said that after A. J. Shults arrived on the scene he made all the decisions and Delmer merely acquiesced. Such was the main basis for the claim of undue influence. But there is strong evidence to disprove any undue influence: (1) Delmer sent for his brother, A. J.; (2) the notary public who prepared the deed and took Delmer's acknowledgment testified in favor of the validity of the deed and the conveyance of the personal property; and (3) it was in keeping with previous transactions in the family for title to pass from brother to brother. In short, a careful study of all the evidence fails to convince us that the Chancellor was in error in holding the plaintiffs' evidence insufficient to establish undue influence.

II. *The Matter Of Delmer Shults As A Trustee.* The plaintiffs claimed that when they, or their ancestors, executed the deeds to Delmer Shults in 1950 (conveying the Virgil Shults interest in the land and personal property) it was then agreed by Delmer Shults that he would hold the entire farm and all the personal property thereon as trustee, and that on his death the entire 139 acres and all personal property would go to Delmer Shults' heirs at law. There was an attempt to make proof of such a promise of trust by Delmer Shults as regards the real estate. There was practically no evidence of a trust of any kind as regards the personal property; and the evidence as to the real property, even if admissible,

was entirely too sketchy to substantiate such a broad claim that Delmer Shults agreed to hold his own interest in his own property in trust for his own heirs.

The Trial Court held, however, that certain of the conveyances made to Delmer Shults in 1950 (of the Virgil Shults interest) were based on a trust; that is, Delmer Shults agreed that at his death the interest of such grantors in the real estate would revert to them. The Court held that such evidence was clear, cogent, and convincing; and so decreed a trust regarding the interests that Delmer Shults received from such grantors. The effect of such holding was to give the said grantors (some of the appellants herein) an undivided interest in the 139 acres of land. A. J. Shults has not challenged that part of the decree by cross-appeal, so we leave it undisturbed.

Affirmed.

TIMMONS *v.* CITY OF MORRILTON.

5-1158 299 S. W. 2d 647

Opinion delivered February 25, 1957.

[Rehearing denied April 1, 1957.]

E. H. Timmons, pro se, for appellant.

George F. Hartje and *Phillip H. Loh,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal by E. H. Timmons against three parties, being (1) Clyde Wallace; (2) George Brannan; and (3) the City of Morrilton. For each identification we will refer to the parties by name; and we will discuss separately the appeal of Timmons against each such party.

I. *The Appeal Of Timmons Against Wallace.* On October 19, 1955, Timmons filed a complaint in the Chancery Court against Clyde Wallace. Subsequently there were a number of amendments to the complaint, so that finally the allegations were: that on February 28, 1948, Clyde Wallace, for the consideration of $450.00 cash, conveyed to Timmons Lots 13, 14, 15, and 16 in Block 6 of Hamilton and Wilson's Addition to the Town of Lewisburg, Arkansas (a part of Morrilton); and that Clyde Wallace and his predecessors in title, some time between 1926 and 1948, erected obstacles and obstructions that prevented Timmons from full possession of the property described in the deed.

Wallace's answer was a general denial, plea of limitations, *laches,* and *res judicata.* At the trial a voluminous record was made, but the entire claim of Timmons against Wallace may be disposed of by noticing one defense — that is, limitations. Timmons introduced the original deed that Wallace executed to him. It was dated February 28, 1948, and was filed for record by Timmons on April 16, 1948, and duly recorded. Any obstruction or encroachments involving the property Wallace conveyed to Timmons existed prior to and at the time of the delivery of the deed and were visible and obvious, so there was a constructive eviction the day of the deed. Yet Timmons delayed from February 28, 1948 until October 19, 1955 before filing any action or suit of any kind against Wallace. The statute of limitations for breach of covenant is five years. See *Bird* v. *Smith,* 8 Ark.

368; and *Lampkin* v. *Long,* 226 Ark. 476, 290 S. W. 2d 623. The statute begins to run on the day of the breach of the quiet enjoyment. *Gibbons* v. *Moore,* 98 Ark. 501, 136 S. W. 937. When the land conveyed is at that time in possession of a stranger, the covenant is broken the date the deed is made, and limitations commences immediately. *Abbott* v. *Rowan,* 33 Ark. 593; *Van Bibber* v. *Hardy,* 215 Ark. 111, 219 S. W. 2d 435.

In the case at bar, any obstruction existed the day the deed was delivered, so limitations commenced that day and the action was barred at the expiration of five years. The deed was executed in 1948 and Timmons filed no suit against Wallace until this one in 1955, so Timmons was barred by limitations in the suit against Wallace. Therefore, the Chancery Court decree in favor of Wallace is affirmed.

II. *The Appeal Of Timmons Against Brannan.* Timmons filed suit in the Chancery Court against the City of Morrilton and Clyde Wallace on October 19, 1955, making numerous allegations about obstructions in the streets. On March 29, 1956, George Brannan filed his intervention, which stated, *inter alia*:

"Comes George Brannan and for his Intervention and Motion to Dismiss states:

"That plaintiff's pleadings filed herein contain certain allegations that involve intervenor's land, fences, and improvements, alleging, among other things, certain obstructions to streets in an area formerly known as Lewisburg, which is now purported to be a part of the City of Morrilton.

"That said obstructions complained of by plaintiff are fences which belong to intervenor individually, and some of which he owns jointly with plaintiff.

"That plaintiff has heretofore complained of said alleged obstructions. That said complaints have heretofore been thoroughly litigated by this court and the Supreme Court.

"That the case of *Timmons* v. *Brannan,* 219 Ark. 636, 244 S. W. 2d 136, was decided by the Supreme Court on the 3rd day of December, 1951. That a subsequent suit on the same issues between the same parties was decided by the Supreme Court on the 20th day of June, 1955. Said case is found in 225 Ark. 220, 280 S. W. 2d 393. That the intervenor and plaintiff are same parties that were involved in said suits. That the issues therein in reference to streets and obstructions are the same raised by plaintiff herein, and which have heretofore been adjudicated and decided by this Court and affirmed by the Supreme Court.

"That intervenor pleads *Res Judicata* to plaintiff's suit for the reason that it appears on the face of his pleadings that same has been heretofore adjudicated."

Timmons' full answer to the intervention reads as follows:

"Plaintiff denies that intervenor has any property rights that will be affected by reason of any allegations contained in plaintiff's complaint. Plaintiff admits that intervenor is the individual owner of the fences located in the public streets of Morrilton and which constitute a public and private nuisance. Plaintiff disclaims any right of ownership in fences situated in and across the public highways of the City of Morrilton, and cheerfully consents to the removal of any fences which prevent the use of the highways of the City of Morrilton."

At the trial on April 13, 1956, from which comes this appeal, the entire transcripts were introduced containing the complete records before the Arkansas Supreme Court in each of the cases of *Timmons* v. *Brannan*— that is, 219 Ark. 636, 244 S. W. 2d 136; and 225 Ark. 220, 280 S. W. 2d 393. It is beyond peradventure of a doubt that three of the streets claimed in the present suit to be obstructed were the same streets involved in the two previous cases. The Trial Court made this finding in the decree in this case:

"(a) . . . the testimony, including the admitted testimony of the plaintiff, E. H. Timmons, shows

that three of the street obstructions herein sought by this action to be caused to be removed were the identical obstructions and fences heretofore litigated in this Court in the case of *E. H. Timmons* v. *George Brannan* and thereafter decided by the Supreme Court of Arkansas on the 20th day of June, 1955, and reported in Law Reporter Vol. 99 No. 18, at page 637. That by reason thereof, the plea of the intervener, George Brannan, of *res adjudicata* should be sustained and

"(b) that the testimony of the plaintiff is otherwise insufficient to entitle the plaintiff to the relief sought against the intervener, George Brannan."

There is no need for us to state again, in this third case of *Timmons* v. *Brannan,* the applicable rules of *res judicata* that were stated in the second case of *Timmons* v. *Brannan, supra.* We affirm the present decree of the Chancery Court involving the issues between Timmons and Brannan.

III. *The Appeal Of Timmons Against The City Of Morrilton.* On October 19, 1955, Timmons filed suit against the City of Morrilton, alleging that he (Timmons) owned certain described property that abutted on named streets in the City, and that the City was permitting the said streets to be obstructed, with the result that Timmons was deprived of ingress to, or egress from, his property. The prayer was that the City be enjoined from permitting the said obstructions to remain.

These were the same streets involved in the case of Timmons against Wallace which we have already discussed in Topic I; and also these were the same streets involved in the Brannan cases, which we have already discussed in Topic II. It is obvious that Timmons' claims against the city must fail when his claims fail — as they have — against Wallace and against Brannan. So, without discussing other reasons, we affirm the appeal of Timmons against the City of Morrilton because he has had his day in Court against the other interested litigants involving the same issues.

EHRLICH *v.* CASTLEBERRY.

5-1178 299 S. W. 2d 38

Opinion delivered February 25, 1957.

Bailey, Warren & Bullion, for appellant.

Langston & Walker, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit by appellee, Precious Castleberry, to have a deed and two allied instruments declared a mortgage, and for an accounting and recovery of an alleged overpayment of the mortgage indebtedness to the appellants, Nates Ehrlich and L. A. Gardner, doing business as Arkansas Paint & Roofing Company. Appellants defended on the ground that the transactions in question constituted an absolute conveyance of the property to them and asked that their title thereto be quieted.

At the conclusion of the trial on April 18, 1955, the late Chancellor Rodney Parham found for appellee and directed that the parties proceed to work out an accounting along specific lines designated by the court in accordance with the evidence. Judge Parham had been forced by illness to leave the bench by the time an agreement was reached on the accounting feature. Original counsel on both sides withdrew from the case and pres-

ent attorneys were employed. This appeal is from a formal decree entered by Chancellor Rorex on May 28, 1956, in which a deed, rental agreement and option to purchase were construed, and reformed to read, as a mortgage upon which appellee still owed a balance of $1,801.69 as of April 10, 1956. Since there is no dispute as to the amount of the indebtedness, if any, the sole issue is the correctness of the holding that the transactions in question should be construed as a mortgage.

The evidence reflects that appellee is a Negress with a limited education and slight familiarity with legal transactions. In 1945 she purchased two adjoining lots situated at 1500 and 1502 East Second Street in Little Rock, Arkansas, for $2,700. Each lot had a small house on it. Appellee lived in one of the houses and conducted a small business of some sort in the other. Appellants are partners engaged in the sale of building materials and as general contractors specializing in home construction and repairs. They also make loans to owners who desire to improve or repair their property. Appellant Ehrlich is in charge of the business and office work while Mr. Gardner looks after construction.

In March, 1951, appellee had become delinquent on the monthly purchase money payments on the two lots upon which she still owed a balance of $768.00. In an effort to meet three delinquent monthly payments and satisfy the demands of a tax title purchaser for $250.00, appellee approached appellants about a loan. While there is a sharp dispute in the testimony concerning the negotiations at that time, it is clear that appellee had no intention of selling her property and sought some arrangement whereby appellants would pay off the indebtedness on the lots, repair the houses, which were in a bad state of repair, and allow appellee to make repayment and redeem her property.

After appellants inspected the property, but before any determination was made as to the amount of the repairs, appellee executed a general warranty deed of the lots to appellants on March 17, 1951. A few days later appellants paid off the balance of the mortgage

indebtedness due by appellee on the purchase price of the lots and $250.00 to the tax title purchaser. On March 26, 1951, the parties executed two instruments designated "Rental Agreement" and "Option to Buy." Under the first instrument appellee was to pay appellants a monthly rental of $116.67 for the two lots. The second instrument provided that appellee should notify appellants not later than April 1, 1952, of her desire to exercise the option to buy the lots one month later for $9,000 plus 8% interest per annum payable in 120 monthly installments of $109.20 each. In addition appellee was required to pay $15.80 monthly for taxes and insurance. Although appellee sought specific information on, and a contract for, the repairs none was ever furnished or negotiated.

Appellee paid appellants $1,313.24 from March 21, 1951, to April 30, 1952. Appellants also collected an additional $280.00 from a tenant in one of the houses during this period and in May, 1952, appellee paid appellants $125.00 and the tenant paid $35.00. The cost of labor and materials used in repairing the houses amounted to $3,215.

Although no contract to that effect was ever executed, Ehrlich testified that appellants agreed to sell one of the lots to appellee for $13,000 in June, 1952, when they delivered to appellee a small "Customer's Receipt Book" captioned: "8% Purchase Contract, $13,000.00." When asked to explain the sharp increase in price over that stipulated in the option to purchase, Ehrlich stated the sale was subject to appellants' payment of the insurance, taxes and repairs for an unspecified "term of the contract" despite the fact that the insurance and tax payments were already included in the payments appellee was making.

Appellee continued to pay appellants $25.00 weekly from June, 1952, to December, 1954, and appellants credited her with such payments monthly on the booklet they had furnished her. Including monthly rentals of $35.00 collected from a tenant in one of the houses, appellants had been paid a total of $6,003.24 when the in-

stant suit was filed December 8, 1954. After all payments had been credited by appellants, appellee still owed a principal balance of $12,375.14 on only one lot at that time according to the booklet furnished her. The transactions listed on appellants books with reference to the two lots were under the heading, "Castleberry Property," and recited the execution of the deed, rental agreement and option to purchase but made no reference to any contract for $13,000. There is also a ledger notation that in April, 1952, appellee refused to sign a note and mortgage drawn by appellants in connection with the option to purchase.

The legal principles applicable in cases like this were clearly stated by Chief Justice HART in *Clark-McWilliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18, as follows: "The general doctrine prevails in this State that the grantor may show that a deed absolute on its face was only intended to be a security for the payment of a debt and thus is a mortgage. Since the equity upon which the court acts arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. If there is a debt existing with a loan of money in advance, and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. However, the presumption arises that the instrument is what it purports to be; and, to establish its character as a mortgage, the evidence must be clear, unequivocal, and convincing. By this is meant that the evidence tending to show that the transaction was intended as a security for debt, and thus to be a mortgage, must be sufficient to satisfy every reasonable mind without hesitation." In that case the court again approved this statement from the early case of *Scott* v. *Henry,* 13 Ark. 112: "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." See also, *Buffalo Stave & Lumber Co.* v. *Rice,* 187 Ark. 731, 62 S. W. 2d 2; *Carpenter* v. *Walker,* 199 Ark. 829, 138 S. W. 2d 68; *Watson* v. *Clayton,* 203 Ark. 1097, 160 S. W. 2d 849; *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240, 15 A. L. R. 1096; *Gray* v. *Butrum,* 217 Ark. 967, 234 S. W. 2d 774.

The question whether a deed to realty, absolute on its face, when construed together with a separate agreement or option to repurchase by the grantor amounts to a mortgage, or is a conditional sale, depends on the intention of the parties in the light of all the attendant circumstances. 59 C. J. S., Mortgages, Sec. 28. It is settled by our decisions that whenever a vendor, at the time of a sale, is indebted to a purchaser, and continues to be indebted after the sale, with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be considered by a court of equity as a mortgage. *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736. As Judge Knox stated in *Newport* v. *Chandler, supra*: "It is unquestionably within the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of land, with a reservation to the vendor of a right to repurchase the property at a fixed price and at a specific time. If such transaction is security for a debt, then it is a mortgage, otherwise it is a conditional sale. In practice the line of demarkation between a mortgage and a sale with a right of repurchase is shadowy, and it is frequently a matter of great difficulty to determine to which category a given transaction belongs."

We are convinced that the evidence here is of that clear, cogent and convincing character necessary to support the trial court's conclusion that the deed and allied instruments were actually intended as a mortgage. Appellants cite several cases holding that before reformation of a written instrument is authorized there must be either a mutual mistake of the parties, or a mistake on one side and fraud or inequitable conduct on the other.

It is clear from the evidence that appellee never intended a sale of her lots to the appellants and their awkward effort to extract $13,000 plus 8% interest from her for only one of the lots, under the circumstances, amounts to something less than equitable conduct.

In reaching the conclusion that the instant transactions were intended as a mortgage, we share the views expressed by Judge Butler in *Buffalo Stave & Lumber Co.* v. *Rice, supra*: "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 learned chancellor had an intimate knowledge of the instant case from its inception and of the character and situation of the parties and the course of the lawsuit. He interpreted the instruments, viewed in the light of the attendant circumstances and the evidence adduced, as a security for a debt, that security having been changed from the lien given by the court by instruments which were in effect nothing more than a mortgage. He concluded that this was the intention of the parties, and we are unable to say, after a careful consideration of the record before us, that he has wrongly decided."

The decree is affirmed.

LYTLE *v.* ZEBOLD.

5-1137 299 S. W. 2d 74

Opinion delivered February 25, 1957.

Brockman & Brockman, for appellant.

Robert A. Zebold and *Coleman, Gantt & Ramsay,* for appellee.

George Rose Smith, J. W. W. West, a resident of Jefferson county, died testate in 1953, leaving an estate consisting of real and personal property. By his will the testator, who left no descendants, first provided for his widow, next made specific devises to three churches at Wabbaseka, Arkansas, and then left the residue of his estate in trust for purposes to be described in a moment. During the administration of the estate the present petition for a construction of the will was filed by the appellants, who are five of the eight named beneficiaries of the trust. It is the appellants' contention that the trust is invalid for several reasons. The attack is defended by the four appellees, being the executor and the other three named beneficiaries. This appeal is from an order of the probate court sustaining the validity of the trust.

The trust provisions of the will are extremely long and need only be summarized. The testator first directed his trustees to divide the corpus of the trust into as many equal parts as there should be survivors among

eight named persons, whom we will refer to as the life beneficiaries. These eight, who in fact all survived the testator, are his brother, his sister-in-law, his two sisters, two nieces, a great-niece, and a long-time employee. All except the sister-in-law and the employee were related to the decedent by blood.

After the division of the trust property into eight parts the trust is to be administered pursuant to seven paragraphs of the will, which are to this effect:

(1) The income from the share of each life beneficiary may, in the discretion of the trustees, either be paid to that beneficiary or be accumulated.

(2) In case of illness or other misfortune on the part of a life beneficiary the trustees may expend income accumulated for him and may also invade his part of the principal.

(3) Upon the death of each life beneficiary any accumulated income being held for him becomes a part of his estate.

(4) Upon the death of the employee beneficiary his share of the corpus is to be divided equally and added to the other shares originally created.

(5) Upon the death of each of the other life beneficiaries his share of the principal is to remain in trust, the income to be paid to or accumulated for his heirs, as determined by the Arkansas law of descent and distribution.

(6) Upon the death of the last surviving life beneficiary the trust property is to be distributed per capita among the lineal descendants of those life beneficiaries who were kin to the testator by blood. Should any of these distributees be a minor his share is to remain in trust and be delivered to him when he reaches the age of twenty-one.

(7) If, at the death of the last surviving life beneficiary, there should be no such living lineal descendants, the trust property is to be conveyed "to the Board

of Directors of the Wabbaseka Public Schools, now designated as School District Number 12 of Jefferson County, Arkansas."

The appellants' first attack upon the trust is based on proof that in the interval between the execution of the will and the testator's death School District No. 12 was consolidated with another district to form Wabbaseka School District No. 7 of Jefferson County. It is argued that the original district has ceased to exist, that the gift to that district was an essential part of the testamentary plan, and that the invalidity of this element in the scheme results in the failure of the trust as a whole.

This argument is unsound, for either of two reasons. To begin with, West did not limit his benevolent intent to the particular school district then existing. Instead, he referred broadly to the Wabbaseka public schools, "now designated" as District No. 12. This language is amply sufficient to show that West's bounty was meant to extend to a successor of the district specifically named. See *McDonald* v. *Shaw,* 81 Ark. 235, 98 S. W. 952. Second, the gift over to the schools and the rest of the trust are not so interdependent that both must stand or fall together. That conclusion would follow only if the remainder to the school system is such an essential factor in the plan that it cannot be separated without defeating the testator's purpose in creating the trust. Cf. Rest., Trusts, § 65. It is plain, however, that West's primary concern lay with the life beneficiaries and those of their descendants who were of his blood. We find nothing in the will to indicate that the testator's solicitude for his relatives was dependent upon the continued existence of a particular school district.

The appellants' insistence that the trust violates the rule against perpetuities must also be rejected. That rule requires an interest to vest not later than twenty-one years after some life in being at the creation of the interest. Gray, The Rule Against Perpetuities (4th Ed.), § 201. In this case the eight life beneficiaries represent the measuring lives in being at West's death. It appears

that the estate will vest at the death of the last surviving member of this group, with merely a postponement of enjoyment in the case of remaindermen who are then minors. But even if it might be said that such a minor's interest will not vest until he attains twenty-one, the period allowed by the rule has still not been exceeded. This is true because membership in the class is limited to lineal descendants who are living at the expiration of the last measuring life.

In a third contention the appellants stress the fact that the executor has converted the entire trust estate into personal property. It is said that the language of this will would have created a fee tail at common law. It is then argued, on the authority of *Denson* v. *Thompson,* 19 Ark. 66, that the same words which would create an estate tail as to land give to the first taker an absolute interest in personal property.

Among several answers that might be made to this contention the simplest one is that this language would not have created a fee tail at common law. For such an estate to be created the succession must be confined to the issue of the first taker; the estate is not a fee tail if the limitation permits the interest to pass to persons other than the bodily heirs of the first taker. Rest., Property, § 59. Here West directed that the trust property be divided and that a specific portion of the corpus be allotted to each life beneficiary. There is no requirement that the interest of a particular life beneficiary must pass to his bodily heirs alone. To the contrary, it is contemplated that the interest of a life beneficiary who dies without direct descendants will eventually pass to collateral kindred. Thus the limitation fails to satisfy a fundamental condition to the creation of an estate tail.

Finally, it is shown that two of the life beneficiaries already have one child each. We are asked to declare that the interest of these two children is a vested remainder rather than one contingent upon their being alive at the death of the last surviving life beneficiary. This question was not decided by the trial court, if in-

deed it was even raised below, and we too must decline to explore this problem. For one thing, the two children are not parties to this litigation and therefore would not be bound by any determination we might make. *Hogan* v. *Bright,* 214 Ark. 691, 218 S. W. 2d 80. For another, it is not suggested that the requested declaration of law would have any practical effect whatever. It is not our practice to speculate upon issues having only a theoretical value.

Affirmed.

HARRIS, C. J., disqualified and not participating.

ACME BRICK COMPANY *v.* ARK. PUBLIC SERVICE COMM.

5-1144 299 S. W. 2d 208

Opinion delivered February 25, 1957.

UNITED STATES OF AMERICA *v.* ARK. PUBLIC SERVICE COMM.

5-1201

Opinion delivered February 25, 1957.

Gordon E. Young, J. E. Gaughan, Jeff Davis and *Reuben Goldberg,* Washington, D. C., for appellant.

John R. Thompson, W. S. Mitchell, Edward L. Wright, and *Robert Roberts, Jr.,* Shreveport, La., for appellee.

Osro Cobb, U. S. Atty., *James W. Gallman,* Ass't. U. S. Atty., and *Major J. C. Kinney,* Washington, D. C., for appellant.

John R. Thompson, W. S. Mitchell, Edward L. Wright and *Robert Roberts, Jr.,* Shreveport, La., for appellee.

PAUL WARD, Associate Justice. This appeal challenges a decision of the Arkansas Public Service Commission approving a Rate Schedule submitted to it by the Arkansas Louisiana Gas Company, one of the appellees herein. This litigation however differs from most utility rate cases, in which usually the ultimate goal is to ascertain the proper return to the utility company in dollars and cents, in that here we are concerned not only with the amount of return in money but principally with the method of determining that return.

THE PRINCIPAL ISSUE.

Heretofore, under the utility rate decisions in this state, and, other states, the amount of money a public utility has been allowed to earn has been related in some way to the amount of money it had invested, or, to state it generally another way, a public utility has heretofore been allowed to earn a certain percent of its "rate base." The "rate base" has not always been arrived at in the same way, but it is always related either to the amount of money invested, the present value of asset, the production costs, the prudent investment value or some other similar factor. Whatever method used in determining the "rate base" the principle heretofore used to determine a fair rate of return for a public utility has been the same.

On this appeal we are called on to approve or disapprove an entirely different, and unrelated, method (requested by appellee, Arkansas Louisiana Gas Company, and approved by appellee, Arkansas Public Service Commission) of determining the rate of return allowable to the Gas Company. The question posed above is, as we see it, the most important one presented by this appeal, although, as it will later appear, there are other issues to be resolved.

DESIGNATION OF PARTIES. The Arkansas Louisiana Gas Company will be referred to as the Company, and the Arkansas Public Service Commission will be referred to as the Commission. The appellants here

were the protestants before the Commission, either directly or by intervention, and for clarity we will refer to them as appellants. Some appellants have chosen to dismiss as to their interest, but these still remain; Acme Brick Company, Columbian Carbon Company, International Paper Company, and Monsanto Chemical Company.

How litigation began. On March 12, 1955 the Company, feeling that it was not recovering sufficient revenues under the existing Schedule which had been in force since November 17, 1953, wrote a letter to the Commission asking it to approve a new Schedule proposed, (to be effective April 15, 1955), which was inclosed along with certain substantiating data. The new Schedule, which is shown filed March 14, 1955, provided for an increase in the price of gas to be consumed by the Company's large industrial users — some 34 in number — but for no increase to domestic and small commercial users. The highest rate fixed by the new Schedule was 30 cents per one thousand cubic feet (m. c. f.) for the first 1,000 m. c. f. used in a period of one month, and the lowest rate fixed was 17 and one-quarter cents per m. c. f. for 500,000 m. c. f. or more used in a period of a month. The intervening rates were graduated according to the monthly consumption of gas.

Before the new Schedule was to become effective (or could under Ark. Stats. § 73-117) on April 15, 1955, appellants, as respondents before the Commission contended, among other things, that the old Schedule provided the Company with a fair return, that the proposed Schedule was unnecessary, and that it discriminated against them in favor of the other gas customers. On March 30, 1955, the Commission issued its order suspending the proposed Schedule, but after the Company filed a bond for $1,250,000 (as by statute provided) the Commission allowed the Schedule to become effective as of April 15, 1955. On August 22, 1955, the Commission found that under the new rate Schedule the Company had taken in (through July 1955) $1,260,000 more than

the old rate would have produced, and so ordered the Company to execute an additional bond in the amount of $1,000,000, to insure a refund if it should finally be so ordered.

Extended hearings were held before the Commission at which appellants and the Company introduced numerous witnesses and documents, amassing a record of approximately 3,000 pages, and after which the Commission approved the Schedule as it was submitted by the Company, except that two rate adjustment clauses (not material to this opinion) were deleted. This order of the Commission was approved by the Circuit Court, from whence comes this appeal.

Effect of Commission's Findings.

Very generally speaking, the overall effect and implications of the Commission's approval of the Company's proposed gas rate schedule were the following: (a) The Company will receive approximately $4,300,000 more revenue annually than it would have received under the old rate schedule, which had been in effect since November 17, 1953; (b) All this additional revenue will be derived from the Company's large industrial users, known as 3-B customers — none to be paid by domestic or commercial users; (c) All of the Company's property devoted to the production of gas — such as gas wells, gas leases, etc. (hereafter called "production property"), valued at approximately $10,000,000, was removed from the rate base; (d) For the purpose of figuring the Company's net income (on gas sold to 3-B customers) it was permitted to carry as a fixed operation charge the field price (i. e. the price the Company pays other producers for its purchased gas in the various fields where it has gas production) for the gas it produces rather than the net cost of production as it has always done in the past under the rate base method; (e) Because the Commission found that certain risks were involved in servicing 3-B customers, the Company was permitted to earn 8% (instead of the traditional 6%— approximately) on the portion of its properties allo-

cated to servicing them, and; (f) The Commission made certain other findings relative to allocation of transmission costs, recoupment for previously acquired property, and working capital, all of which we will consider later.

Rate Base v. *Fair Field Price.* As before indicated, one of the important questions presented by this appeal is what method shall be used by the Commission to determine the monetary return a utility shall be allowed to make? Must we adhere to the traditional *rate base* method or can we (if it is found to be in the best public interest) approve the fair field price method which the Commission has adopted?

The rate base. As recognized by the Commission in its findings, it has been traditional heretofore to limit the net earnings of a utility company to a percent of its invested capital or some other indication of the extent of its capital assets. In Arkansas the rate base is the prudent investment value of the property of the utility, as defined by the Commission and this Court, and about which definition there is no dispute. It is upon this method of rate fixing that the relationship between the utility, on the one hand, and the public, on the other, has been established. Upon this basis the public grants the utility a monopoly (or a virtual monopoly) to do business and guarantees the right to charge a price that will produce a fair and reasonable return to the stockholders on all the capital invested by them. In return for the public's concessions, the utility is obligated (under the statutes of this state, and under the rate base method) to render services at the lowest possible prices commensurate with a fair and reasonable return on its prudently invested capital. To the above end, the utility holds and must manage its property in the nature of a trusteeship. In the case of *City of Ft. Smith* v. *Southwestern Bell Tel. Co.,* 220 Ark. 70, 247 S. W. 2d 474, at page 85 of Arkansas Reports, we said: "The utility must use all its receipts as though they were a public trust."

The Fair Field Price as applied to this case. The production property belonging to the Company is val-

ued at around $10,000,000 as compared to its total assets of approximately $93,000,000. With this production property the Company produces about 20% of all the gas it sells to all of its customers. The rest of the gas sold by the Company it buys on the open market from other gas producing companies. The 3-B customers consume approximately 80% of all the gas passing through the Company's lines.

The Commission, by its Order of November 3, 1955, approved the Company's proposal, one effect of which is (as stated previously) to remove the $10,000,000 worth of production property from the rate base and from further jurisdiction of the Commission. Under such order there will be no occasion for the Commission to be concerned with what it costs the Company to produce the gas it sells its customers. This is true because hereafter (under the Commission's order) the cost of production will be the fair field price (as heretofore defined), which in this instance was found by the Commission to be 9.22 cents per thousand cubic feet.

It should be pointed out here that, under the rate base method, the cost (to the Company and the consumers) of producing gas has been lessened by reason of the fact that the Government allows a depletion cost of 27-1/2 per cent on gas producing wells for income tax purposes. Under the Commission's order this tax windfall will no longer inure to the benefit of the Company's gas customers, but it appears that it will inure to the benefit of the Company's stockholders. Commenting on this phase of the case the Commission said: "While the Company has introduced no other method of arriving at the price of gas to be used in the cost of service computations, it takes the position that whatever method is used, the *stockholders are entitled to any benefits from these allowances.*" (emphasis supplied)

It is our understanding, also, that any profit derived from the difference between the fair field price (here determined by the Commission to be 9.22 cents per m. c. f.) and the amount required to produce the Com-

pany's own gas (as it would be figured by the Commission under the rate base method) would likewise inure to the benefit of the stockholders and not the gas consumers.

In view of the above there are other implications that must be anticipated if this court sustained the Commission's adoption of the fair field price method. Some of them are: From now on any disposition the stockholders of the Company make of its valuable production property (valued around $10,000,000) would be of no concern to the Commission or the Company's customers. This is true because the Company's stockholders could sell a part or all of its production properties and put the purchase price in their own pockets, and it would in no way affect the price the consumers would have to pay for gas.

It might be argued that there is no guarantee that the Company can produce gas cheaper than it can buy it on the open market (under the fair field price method), but such an argument is not convincing. Evidently the stockholders feel they will be able to make a profit on the gas they expect to produce and sell to the Company, otherwise they would be unwilling to try it, especially when it is remembered that they are foregoing a virtual guarantee against all losses in gas explorations under the rate base method.

Adoption of the fair field price method suggests a violation of the idea of the trustee relationship which we have said exists between the customers and the stockholders of a utility company. It would place the Company in the position of serving two masters. In order to make money for the stockholders management would be under a duty to sell its own produced gas at as high a price as possible while, out of loyalty to its customers, it would be under a duty to buy its own produced gas as cheap as possible.

If a public utility has the right (or if the Public Service Commission has the power to give it the right)

to dispose of one segment of its assets without any kind of an accounting, then there is reason to fear it might some day be urged that it would have the same right to dispose of another segment or all of its assets in a like manner. This could, of course, lead not only to breach of trust but could defeat the very purpose for which utilities are organized to serve the public.

Fair Field Price Method Unlawful. What we have set forth above forces us to the conclusion that the Public Service Commission has no authority, in the absence of further legislation, to discard the rate base method in favor of the field price method in determining the net profits a public utility can earn in this state. In fact it is difficult to pose the question of a proper net return for a public utility company without stating the answer. This is true because the very concept of "net return" means a return on some kind of a basis, and that basis has traditionally been (in some way) the capital prudently invested.

We cannot read our statutes creating and defining the powers and duties of the Public Service Commission without concluding that they limit it to the rate base method for regulating the return allowable to a public utility company. In fact it appears that such a method was so obvious that the legislature did not deem it necessary to spell it out. Running through all the pertinent statutes is the idea that earnings or returns are based on the amount of property owned by the utility and on nothing else. To begin with all rates received by a public utility must be "just and reasonable," and if not they are unlawful (Ark. Stats. § 73-204). The Commission has the power to fix just and reasonable rates for public utilities (Ark. Stats. § 73-218) and in order to do so, it is given the power to "fix the value of the whole or any part of the property of any public utility," (Ark. Stats. same Section No. (4)). Also the Commission has the power and authority by order to require any public utility to furnish a verified, itemized, and detailed inventory of its property (Ark. Stats. § 73-220).

The Commission has power to require a public utility to keep a uniform system of accounts subject to its jurisdiction and inspection (Ark. Stats. § 73-221) at all times. A public utility is required to "prepare and transmit to the Commission a certified statement of the gross earnings from its properties" annually, Ark. Stats., 73-248.

The legislature undoubtedly gave the Commission this power to ascertain and keep informed of the assets of a public utility "in order to enable it to perform its duties" as set out in § 73-220 above. That duty, of course, is primarily to establish just and reasonable rates (for a public utility to charge) and a just and reasonable return for the stockholders on the money they have invested.

We have somewhat laboriously set out above the reasons that compel us to this inevitable conclusion: The Commission was not empowered under our present statutes to remove approximately $10,000,000 worth of property out of the Company's rate base (thereby departing from the traditional rate base method), and in lieu thereof to measure the justness and reasonableness of the Company's earnings on an entirely new basis or theory, viz; the fair field price method. If the Commission and this court should embark on the new and untried fair field price method of regulating public utilities, it would amount to abandoning our entire previous experiences and legal concepts in rate regulation which have thus far proved fair and satisfactory. Our thought on this point is well expressed by the language used in the case of *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810. In that case the Circuit Court of Appeals District of Columbia, in speaking of the rate base method (as compared to the fair field price method) said: "It has been repeatedly used by the Commission (Federal Power Commission), and repeatedly approved by the courts as a means of arriving at lawful—'just and reasonable'—rates under the act. Unless it is continued to be used at least as a point of departure, the whole experience under the act is discarded and no anchor, as it

were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning."

The Public Service Commission of the State of Wisconsin attempted at one time to depart from the long established rate base method in fixing the return allowable to the Commonwealth Telephone Company. The Commission's order was appealed to the Circuit Court of Dane County, Wisconsin, 71 P. U. R. 65. The Circuit Court posed the question by saying the Commission "failed to make any finding of fact at all and particularly failed and, indeed, emphatically *refused* to find a *rate base.*" Some of the language used by the Circuit Court in reversing the Commission is we think interesting, and also applicable to the question under consideration by us. Some pertinent quotes are: ". . . for the regulatory Commission to repudiate the necessity of finding the 'fair value' of the utility's property, *or some other base,* is to us unprecedented in forty years of administrative regulation . . ." "The Commission throws out a half century of rate making as recognized in the forty-eight states and by the Federal Government — and announces that the rates are not based on any rate base," and; "The Commission finds *nothing except* that a certain amount of dollars represents a reasonable profit." Then the Circuit Court, in commenting on the last quoted statement said: "Reasonable profit ON WHAT? That is the trouble with the Commission's decision. It has no bottom. It has a numerator but no denominator." "The point is that there is, and always has been, a BASE in the fixing of public utility rates. That is where the decision of the Public Service Commission of Wisconsin, now under review, is unique in the decades of rate making. There is no base found or even faintly suggested in the Commission's decision."

We realize of course that only limited weight can be given to a decision of the Wisconsin Circuit Court, but that fact does not detract from the force of the reasoning if it is sound, and we think it is. In addition, this

Circuit Court's holding was reviewed and affirmed by the Supreme Court of Wisconsin in *Commonwealth Telephone Co.* v. *Public Service Commission,* 252 Wis. 481, 32 N. W. 2d 247. There the Supreme Court, after reviewing the findings of the Commission, said: "It was not the intention of the legislature to bestow such arbitrary powers upon the Commission, and nothing in the statute can be so construed." Also the Court after stating that the Commission must make specific findings of the "relevant facts and circumstances" to determine whether a return is proper or not, said: "The Commission must determine what those are and set them forth as required by law. Those essential facts which control each case will then determine the *rate base*" (emphasis supplied). The decision in the *Commonwealth* case, *supra,* was cited with approval in *New England Telephone & Telegraph Co.* v. *State, et al.,* 95 N. H. 353, 64 A. 2d 9, at page 14; *New England Tel. & Tel. Co.* v. *Kennelly,* 80 R. I. 436, 98 A. 2d 835 at page 838, and; In Re *Petition of New England Tel. & Tel. Co.,* 115 Vt. 494, 66 A. 2d 135, at page 140. In the last cited case the court (on page 138), after stating that the usual method of fixing rates was to determine a proper rate base and the allowable expenses, made this statement:

"Whether the method adopted in fixing rates follows the one just suggested in the order of the steps taken is immaterial. It is apparent, and it is shown by all the cases which we have read touching on this point, that in order to reach a fair judgment of rates to be fixed, it is *necessary* that a *proper rate base* and allowable expenses be determined." (emphasis supplied)

Even though the Company and the Commission acknowledge that the fair field price method is relatively new and untried, they point to the fact that the Federal Power Commission (Re *Panhandle Eastern Pipe Line Company,* 3 P. U. R. 3d 396) and the U. S. Circuit Court of Appeals, District Court of Columbia, 230 F. 2d 810, held that it was not an unlawful method of rate fixing under the provisions of the National Gas Act,

52 Stats. 822 (1938) 15 U. S. C. A. § 717 *et seq.* There are however good reasons, we think, why the above decisions are not applicable to, and certainly not binding, in the matter here considered. *First,* in the *Panhandle* case the party seeking an additional return is an independent pipeline company, while here the Company is a public utility, operating under an exclusive franchise. *Second,* the relationship of the parties is not the same. As we have heretofore pointed out, the Company in this case bears a trust like relationship to its customers and the general public, but this is not the situation in the case of an independent pipe line company. *Third,* the two situations are not governed by the same statutory provisions. In the *Panhandle* case the Federal Power Commission operating under the provisions of the Natural Gas Act, above, was under no obligation "to fix rates at the lowest level of reasonableness" . . . but only "to protect consumers against exploitation at the hands of natural gas companies" (*City of Detroit, supra*). In the case of a public utility however, the situation is not the same. Not only does the spirit of the regulatory statutes require the lowest possible rate commensurate with fair and reasonable return to the stockholders, but Ark. Stats. § 73-1901 makes it plain that: "All gas lines or companies operating within the State who render a domestic or general service to the public in furnishing and sale of gas are hereby required to buy or furnish from the lowest or most advantageous market."

The Company has introduced into the record a mass of expert testimony to show (and appellants have done the same to refute) that the very nature of the gas production business makes the base rate an outmoded and impractical method. The Company presents able arguments and pertinent testimony and citations to sustain their contention, but because we have concluded the Commission has no authority, without additional legislation, to abandon the rate base method, it would serve no useful purpose and would unduly extend this opinion to consider the case from that standpoint.

Other Issues. Since our determination of the principal question above calls for a remand it is necessary, for the Commission's guidance, to consider four other questions raised by appellants.

1. *Rate of Return.* After applying the fair field price method and after separating the Company's gas production properties from the rate base, the Commission fixed 8% (or more) as a fair rate of return on gas sold to 3-B customers. The acceptance of this figure was perhaps influenced by the testimony of Eugene S. Merrill. However, as fully recognized by the Commission, Mr. Merrill did not purport to say what a fair per cent of return would be on an overall basis. On the other hand Dr. Lionel W. Thatcher, whom the Commission described as "eminently qualified," and he alone, made a study of a proper overall return, and he recommended 6.34 per cent. We have given careful consideration to this matter and it is our best judgment that the Commission should adopt 6.34 per cent as being the proper return for the company, since we find no substantial evidence to support a higher rate. Incidentally it is a higher rate of return than this court has heretofore approved for a public utility company.

2. *Allocation of Transmission Costs.* In a rate proceeding such as this it is necessary for the Commission to allocate or apportion the joint costs of transmitting gas from the well to the customers according to each class of customer's responsibility therefor. Generally speaking there seem to be two methods of making this allocation or at least two elements which deserve consideration. One is based on the peak capacity required by each class of customer, and the other is based on the actual consumption of each class over a stated period of time. Appellants say the former method is preferable, and would result in a saving to them. The Commission, however, chose to allocate 50% of the constant cost of transmission to coincidental peak use and 50% to the annual volume used. It appears to us that this is a matter that cannot be determined to a mathe-

matical certainty but must be left to the determination of the Commission, based on substantial evidence in the record. We find such evidence in this record. Where the same question was under consideration, in *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 65 S. Ct. 829, 89 L. Ed. 1206, it was said: "Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science."

3. *Account* 100.5. Several years ago the Company (or its predecessor) in acquiring certain distribution, transmission and production properties, paid approximately $5,000,000 in excess of the original costs. The Company now carries in account 100.5, called Gas Plant Acquisition Adjustment — $3,013,468.58, representing the unamortized portion of the $5,000,000 existing on December 31, 1954 (1954 being the test year on which this hearing was based). Appellants introduced testimony to show that the Company had recouped the questioned amount through earnings in excess of 6% per annum (allowed by the Commission) over a period of years. It appears from the record however that there is substantial evidence to support the Commission in finding (as it did find) (a) that the purchase of the aforementioned properties by the Company was made at arms length dealing, (b) that substantial amounts of the Company's earnings had come from non-utility property, and (c) that the amount of $3,013,468.58 should be included in the Company's rate base in this case.

4. *Working Capital.* We do not agree with appellants in their contention that the Commission acted arbitrarily in determining the Company Working Capital allowance, which of course is included in the rate base. It is conceded by appellants that the Company is entitled to set aside some considerable amount, called working capital (estimated at $4,000,000) to buy material and supplies, and to pay day-to-day operating expenses. It is conceded by both sides that the Company collects from its customers (through established

rates) large amounts with which to pay income taxes. Much of this, of course, is collected in advance of disbursement. Appellants show that approximately 70% of these tax accruals would be available in cash at all times to the Company, and therefore, say appellants, this amount should be deducted from the Company's working capital requirements. The Commission however, ordered the Company's working capital decreased by only 50% of the total tax accruals instead of 70% as urged by appellants. This, again, is a matter which we think, addresses itself to the sound judgment of the Commission based on substantial evidence. It seems reasonable that the Commission had a right to consider factors other than the percentage of advance tax collections in arriving at a proper allowance. The Commission states that in a former case its staff developed information from which it determined that a 50% allowance was fair. We are in no position to question the same finding here because, in the absence of proof to the contrary, we must assume that the percentage of advance tax allocation was the same in both instances.

This court has not, of course, made any attempt to determine whether the disposition we have made of this case calls for any refund to be made by appellants on their bonds. This will be done by the Commission after a redetermination of the whole matter in accordance with the views herein expressed.

This cause is therefore reversed and remanded to the trial court with instructions to remand to the Commission for further action consistent with the holdings in this opinion.

The *United States of America,* as a large consumer of gas furnished by the Company, was also a remonstrant before the Commission and an appellant to the Circuit Court. It has attempted to lodge an appeal in this court from the decision of the Circuit Court, under appeal docket number 1201, and has been granted the right to use the record in appeal number 1144.

However appellees point out that the United States has not perfected its appeal to this court within the 60 days provided for by Ark. Stats. § 73-236(a). The United States, conceding the above, relies on the fact that it has perfected its appeal within the time provided by Act 555 of 1953. This poses the question of whether said Act 555 supersedes § 73-236(a), and we think it must be answered in the negative.

In the first place a casual reading of Act 555 shows that it was not meant to apply to this kind of a case where the Circuit Court reviews the record made before the Commission. In taking an appeal under Act 555, Section 8 provides for the designation of all or part of the evidence, and Section 19 outlines the procedure where there is no stenographic report of the testimony. None of these provisions would be applicable to the taking of an appeal of this nature.

In addition, we point out that Act 555 does not specifically repeal Ark. Stats. § 73-236(a), which is a special law providing for special appeals. Nor does Act 555, which is a general law, repeal by implication the special law. This court, in *Faver* v. *Golden, Judge,* 216 Ark. 792, 227 S. W. 2d 453, in deciding whether a general election law repealed specific provisions for the contest of the election of a school director, said: "We have held that a general law does not apply where there is another statute governing the particular subject, irrespective of the dates of their passage." See also *Johnson* v. *Darnell,* 220 Ark. 625, 249 S. W. 2d 5, at page 628 of the Arkansas Reports.

It follows therefore that the appeal of case number 1201 must be dismissed.

BREIER *v.* MARTIN.

5-1133 299 S. W. 2d 77

Opinion delivered February 25, 1957.

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

Talley & Owen, Max Howell and *Wayne Owen,* for appellee.

SAM ROBINSON, Associate Justice. This litigation involves the title to a strip of ground about 4 1/2 inches wide, running North and South, on the North side of Markham Street, between Main and Louisiana Streets, in the City of Little Rock. A brick wall 4½ inches wide is located on this narrow strip of property. The appellant, Mrs. Bertha Breier, owns the West Half of Lot 8, Block 79, Original City of Little Rock; Lot 7, adjacent thereto on the West, is owned by appellee, Mrs. Bernice W. Martin. Both parties claim that the 4 1/2 inch strip of ground in question is a part of their respective lots, and, also, each claims title thereto by adverse possession.

In 1955, Mrs. Martin demolished and removed from her lot a two story brick building, hereinafter called the Martin building; part of the East wall of that building extended upward only as high as the first floor, and the ceiling joists of the South 35 feet of the Martin building rested on that wall. The joists of the South 35 feet of the Martin building above the 4 1/2 inch wall were set in the upper portion of the wall supporting the Breier building located on the West Half of Lot 8. But, Mrs. Martin claims no interest in the wall on the West Half of Lot 8 supporting the Breier building. When the Martin building was demolished, the South 35 feet of the East wall of the building, consisting of one layer of brick about 4 1/2 inches in width, was left standing. This 4 1/2 inch layer of brick runs from the front to the rear of the Breier building; it does not support the Breier building, but is laid flat against the wall that does support that building. Ownership of the 4 1/2 inch layer of brick and ground on which it stands is the principal subject of this litigation. In addition, there are two sewer pipes from the Breier building that extend over the property line of the Martin lot; Mrs. Breier claims prescriptive rights in the Martin property in respect to such sewer pipes. The chancellor held that the 4 1/2 inch strip of ground and the wall thereon belong to Mrs. Martin, the owner of Lot 7, and that Mrs. Breier has gained no prescriptive rights in the Martin property by reason of the location and use of the sewer pipes. Mrs. Breier has appealed.

The issue here is whether the decision of the chancellor is contrary to the preponderance of the evidence. When all of the direct and circumstantial evidence is considered, we cannot say that it does not preponderate in favor of Mrs. Martin, the owner of Lot 7.

In the first place, two registered civil engineers, John P. Powers and W. Terry Feild, surveyed the property, and testified that the wall in question is on Lot 7, and not on the West Half of Lot 8; and there is other direct and circumstantial evidence which is convincing that the wall is on Lot 7. The wall does not support the

Breier building, but about 35 feet of it was supporting the building on Lot 7. There are many pictures in the record of the property in controversy; it can be seen from these pictures that the front of the Breier building is faced with some kind of white stone. Apparently, this stone covers the entire front of the Breier building, with the exception of the doors and windows, but it does not extend over the front of the 4 1/2 inch wall on the West, which is in controversy; it does, however, extend to the very edge of what appears to be the East wall of the Breier building. A cast iron post, or column, which supported the Southeast corner of the Martin building, was at the South end of the 4 1/2 inch wall; it was located on the same property on which that wall is situated. Exclusive of the 4 1/2 inch wall, both the East and West walls of the Breier building are of the same thickness; but if the 4 1/2 inch single brick wall should be considered part of the West wall of the Breier building, that wall would be thicker than the East wall by 4 1/2 inches, and there does not appear to be any sound reason for making the West wall of the Breier building 4 1/2 inches thicker than the East wall, especially when this additional 4 1/2 inch wall on the West does not support any part of the Breier building.

Appellant attempts to show by ancient documents, consisting of newspapers published about the time the Martin building was constructed or reconstructed, and by other records, that the wall in question is a part of the Breier building. However, this evidence is not convincing in that respect. From the records and ancient documents, it appears that on the first day of December, 1874, John G. Price and Mary B. Price, his wife, who at that time owned both Lot 7 and the West Half of Lot 8, gave Henry Buerger a lease on Lot 7 with the privilege of constructing a building thereon; and, further, he was to have the use of 35 feet of the West wall of the building then located on the West Half of Lot 8, commencing at the Southwest corner and running North 35 feet. Buerger did use the upper portion of the wall of the building on the West Half of Lot 8, now the Breier building, about which there is no dispute, to place some of the

joists of his building. But the ceiling joists of the first floor of the Martin building were placed on the wall now in dispute, and the evidence is not at all convincing that the 4 1/2 inch brick wall was ever a part of the building located on the West Half of Lot 8.

It appears that there had been a building or buildings on Lot 7 at a time before Buerger constructed his building, and it is not improbable that the wall in question was in place on Lot 7 at the time Buerger put up his building. On February 28, 1868, John P. Jones and John G. Price entered into a partnership for the purpose of publishing a newspaper, and at that time Jones conveyed to Price property as follows: "Now I the said John P. Jones, party of the first part hereto, do hereby grant, bargain, sell and convey unto the said John G. Price, party of the second part hereto and his heirs, executors, administrators and assigns forever, one undivided half of the West Half of Lot numbered Eight in Block numbered Seventy Nine . . . also an undivided half of the buildings and improvements on the lot of ground on the corner of Markham and Louisiana Streets . . ." Lot 7, now the Martin lot, is located on the corner. Hence, it appears that there was a building or buildings on Lot 7 in 1868, about seven or eight years before Buerger built anything on that lot. The conveyance just mentioned, from Jones to Price, executed in 1868, says "the buildings and improvements on the lot of ground on the corner of Markham and Louisiana Streets." In 1875, when Buerger constructed his building, Lot 7 was still referred to as the corner. In the "Little Rock Republican," of April 3, 1875, the following appears: "Buerger will open his Palace Saloon, on the corner of Markham and Louisiana, between the 12th and 15th of this month, . . ."

There is some circumstantial evidence to the effect that the 4 1/2 inch wall is a part of the Breier building, such as evidence that at one time there were openings into that building through both the 4 1/2 inch wall in controversy and the admitted wall of the Breier building, but there is no showing as to when the open-

ings, now closed, were made in the wall, or the circumstances thereof. Also, there are some windows that appear to have been constructed at a time when the 4 1/2 inch wall was in place in the Breier building, but the Breier building is very old, and Lot 7 and the West Half of Lot 8 were at one time controlled by one ownership. There is no evidence as to when the windows were placed in the Breier building.

Another difficult problem is the fact that the 4 1/2 inch wall also appears to be in the rear of the Breier building. But this difficulty is no greater than it would be to assign any reason whatever for constructing the 4 1/2 inch wall as a part of the Breier building.

Mrs. Breier has no title to the wall on the theory of adverse possession. She testified that she claims only what is on the West Half of Lot 8; it is established that the 4 1/2 inch wall is not on the West Half of Lot 8, and is not supporting the building on that lot; her restaurant sign on the front of her building, on the West Half of Lot 8, appears to go to the very edge of her building, but it does not cover the 4 1/2 inch wall, and she has never had possession of the 4 1/2 inch wall.

Appellant also contends that in the year 1874 the Prices, owners of Lot 7 and the West Half of Lot 8, and Buerger, lessee of Lot 7, fixed the boundary between the two lots as West of the 4 1/2 inch wall; but the evidence does not support that contention.

Appellant's testimony with reference to the sewer pipes extending from her building out over very small parts of the Martin property is vague and uncertain; but, it is certain that appellant is not claiming prescriptive rights in the sewer line which crosses the Martin property from the point where appellant's pipes join it to the main sewer line. Without the right to use the sewer line crossing the Martin property, the sewer pipes in controversy here would be worthless. The sewer line on the Martin property is not the only one leading from appellant's building. Appellant has access to the main sewer line by another sewer pipe located on her

own property; hence, it is not necessary that she have use of the sewer line across the Martin property. Furthermore, in the event Mrs. Martin should construct on her own lot a building consisting of two or more stories, in all probability the sewer pipes involved here would be completely enclosed, and it would be impossible to make any necessary repairs on the pipes without entering the new building on the Martin property. Since Mrs. Breier does not claim an easement across the Martin property for a sewer line, an easement over a very small fraction of the lot would be worthless to her. Furthermore, the evidence is not convincing that Mrs. Breier has ever made any claims of prescription or ownership on any part of Lot 7.

Affirmed.

Mr. Justice SMITH not participating.

HOUSE *v.* HODGES.

5-1183 299 S. W. 2d 201

Opinion delivered March 4, 1957.

Hubert J. Meachum and *Charles F. Cole,* for appellant.

Kaneaster Hodges, pro se, for appellee.

CARLETON HARRIS, Chief Justice. In September, 1954, Frank Hopwood, a non-resident of this state, employed Charles Howell of Evansville, Indiana, and Kaneaster Hodges of Newport, to represent him in an action which had been brought against him personally by C. T. Roberson in Independence County. An attachment had been levied on a 1953 Ford Pick-up truck belonging to Hopwood. At the time of retaining Howell and Hodges, Hopwood agreed to transfer the truck to them in payment of attorney fees. Other actions were also pending against Hopwood Manganese Company, Inc., in which the two attorneys also represented Hopwood. Under the agreement relative to attorney fees, Hopwood, on June 9, 1955, gave an absolute bill of sale to the truck (which was still under attachment) to Kaneaster Hodges, trustee, which bill of sale was acknowledged before a notary public in Vanderburough County, Indiana, and was forwarded to Hodges on said date. On October 17, 1955, the Roberson attachment on the truck was released and Hodges gave to Roberson's attorney a check in the amount of $433.50, with the understanding that the truck would be delivered to Hodges within a week. On October 20, 1955, the attorney for Roberson wrote Hodges, "I will be unable to deliver the truck to you as per our agreement because I filed suit yesterday for one Mary C. House against Frank Hopwood personally for debt (personal loan) for $500 and attached the truck again." Hodges intervened, claiming title in himself under the bill of sale. The trial court sustained the contention, and from such holding comes this appeal.

Appellant, Mary C. House, argues that the alleged sale to appellee was not complete, and therefore void; that there was no delivery, either actual or constructive, of the truck to appellee and the purported sale was void as to creditors, and that the attempted transfer of the title should have been given by assignment of certificate of title instead of bill of sale.

We do not agree that the sale was incomplete. Hopwood testified that the sale was complete when he sent the bill of sale to appellee; that the truck was turned

over to Hodges in order that it might be sold, and the proceeds applied on the fees of appellee and his co-attorney, Howell, and that appellee could have sold it for $100 had he so desired[1]. It is true that both Hopwood and appellee stated that Hopwood was to be notified and his approval obtained when the truck was sold, but they were both even more emphatic that appellee had full control of the vehicle, and the right and authority to make disposition as he saw fit. We do not concur that the statement Hopwood should be notified, imposed a condition precluding an absolute sale. We see nothing unusual in this arrangement. In June, 1955, Hopwood had several lawsuits to defend, with the possibility of others. He retained both an Indiana attorney and an Arkansas attorney, and had no funds with which to pay either. His testimony was to the effect that the truck was his sole means of paying the lawyers. Since the truck could not actually be divided, it was necessary that it be sold in order that both attorneys might be paid. It is understandable that Hopwood might well want to know the price to be obtained, and that it would substantially take care of the attorney fees due. We conclude that there was evidence of a substantial nature to sustain the holding of the Circuit Court that there was an absolute sale rather than a mere mortgage.

We further find that there was a constructive delivery of the truck to Hodges. Section 68-1418, found in Chapter 14, Ark. Stats. (1947) Anno., entitled "Uniform Sales Act," reads: "*Property in specific goods passes when parties so intended.* — (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." It was not possible for

[1] From the record:

"Q. In other words, if Mr. Hodges wanted to sell it for $100, he could.

A. Yes, sir, he could. He could license it in Kentucky with the bill of sale if he had wanted to."

Hopwood to actually deliver this vehicle, for it was under attachment. From Am. Jur. Volume 46, page 603, Section 434: "* * * there may be a constructive delivery under which title may pass if such is the intention of the parties. Thus, * * * where goods * * * cannot conveniently be delivered manually, title may pass upon a delivery of a writing representing such property, or evidencing ownership thereof, in other words, a document of title such as a bill of sale * * * ." This truck had been attached by Roberson, so Hopwood could not make manual delivery. Roberson released the attachment when his claim was satisfied. Roberson's attorney in the matter agreed when receiving the check from Hodges, that he would deliver the property to appellee within a week. Roberson was the man who had actual control of the property, though it was held by the sheriff. We consider that the bill of sale properly endorsed from Hopwood, together with the promise of delivery from Roberson's attorney, was constructive delivery.

Appellant contends that the attempted transfer of the title was ineffective because appellee did not receive a certificate of title from Hopwood. Actually, the principal question in this litigation is whether the failure to obtain such assignment of certificate of title prevented the passing of title to appellee, or made the transfer void as to creditors. Appellant argues that the provisions of Act 142 of 1949, (Uniform Motor-Vehicle Administration, Certificate of Title, Anti-Theft Act) are mandatory, and cites the case of *West, Sheriff,* v. *General Contract Purchasing Corporation,* 221 Ark. 33, 252 S. W. 2d 405. This case in turn cites *Terrell* v. *Loomis,* 218 Ark. 296, 235 S. W. 2d 961. It should be pointed out that both of these cases deal with the question of priority of liens, and both quote from Section 60, Article V. That Section reads as follows: "No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attach-

ment or subsequent purchasers or encumbrances with or without notice until the requirements of this article have been complied with." We agree that these provisions are mandatory, but in the instant case, we hold that the bill of sale was an absolute conveyance of the interest of Hopwood, and not a conditional sale or mortgage. We find nothing in the Motor Vehicle Act which states that a *bona fide* sale of a vehicle cannot be made except by an immediate assignment of certificate of title. It is true that the purchaser cannot obtain a license, nor legally operate the vehicle without obtaining such certificate, and one so doing would be guilty of a misdemeanor, but the matter of obtaining the proper transfer lies between appellee and Hopwood. The failure of appellee to obtain the certificate of title at the time he received the bill of sale does not deprive him of title, for the certificate of title *is not title itself* but only *evidence of title*. Section 79 of the Motor Vehicle Act provides several grounds under which the department is authorized to suspend or revoke a certificate of title, registration certificate, or registration plate. Such a provision in the statute, of course, negatives any argument that the certificate of title is the only evidence of ownership.

It is pointed out that though appellee had a bill of sale dated June 9, 1955, he made no application for a new certificate of title, which the Motor Vehicle Act requires be made within five days after the transfer of the vehicle. In the instant cause, there was no reason for appellee to make this application since he did not have physical possession of the truck. It was being held by the sheriff under attachment. He does not yet have actual possession of the truck, since it was not delivered to him as per the agreement, but was, instead, attached two days after the attachment of Roberson was released. Section 31 of the Motor Vehicle Act provides, "It shall be a misdemeanor for any person to drive or move * * * any vehicle of a type required to be registered hereunder which is not registered, or for which a certificate of title has not been issued or applied for * * * ." Section 32 provides: "Every motor vehi-

cle, trailer, semi-trailer, pole trailer, *when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this Act.* * * * " Let it simply be added that our statute does not purport to make void, sales which are accomplished without compliance with each provision, where such sale is *bona fide.*

In summary, we find that there was consideration for the bill of sale from Hopwood to appellee. There was no fraud, nor is any alleged. The sale was not consummated as a matter of prejudicing the rights of appellant. Appellant has not been injured by the transaction, since, except for the services of appellee, the attachment on the truck would not have been released by Roberson.

We are hence of the opinion that appellant's argument must fail, and the judgment of the trial court is affirmed.

MILLS *v.* DENISTON.

5-1187 299 S. W. 2d 195

Opinion delivered March 4, 1957.

Wiley A. Branton, for appellant.

Jay W. Dickey, for appellee.

J. Seaborn Holt, Associate Justice. Appellees, Robert Deniston and wife, brought suit against appellant, Annie B. Mills, in which they alleged they owned, by virtue of a deed from M. L. Poss and wife dated May 29, 1952, the West 1/2 of Lot 1 in Block 11 of Dorris' Addition of Brump's Bayou to the City of Pine Bluff, Arkansas. They further alleged that appellant had caused to be placed on a 30 foot wide strip in the rear of this property (W 1/2 of Lot 1, Block 11) a building which she refused to move, and prayed for an order directing defendant to move said building from the property.

Appellant answered with a general denial and alleged ownership by adverse possession of that part of the above property in dispute and upon which the building was located, and further alleged that appellees "held title by virtue of a deed from the purchaser at a tax sale and could claim no greater interest than the owner of the assessed property at the time it went delinquent for taxes." Trial resulted in a decree granting appellees the relief prayed and this appeal followed.

For reversal appellant says first, that the court erred in holding that appellant had not acquired title by adverse possession. We do not agree. As indicated, this litigation involves primarily title to the 30 foot strip of land to the rear of the appellees' lot. The record shows that the above property has been assessed and the taxes paid thereon from about 1928 to 1954 as the W 1/2, Lot 1, Block 11, of Dorris' Addition of Brump's Bayou to the City of Pine Bluff, Arkansas, together with the E 1/2 of Lot 2, Block 11 of said addition, two con-

tiguous lots. Following a mortgage foreclosure sale, E. D. Peebles, Jr., was issued a commissioner's deed, May 10, 1941 to the E 1/2 of Lot 2, Block 11 and no mention was made of this 30 foot strip in the rear of the W 1/2 of Lot 1, Block 11. Thereafter the E 1/2, Lot 2, Block 11 was conveyed to appellant (Mrs. Mills) and again no mention was made of the 30 foot strip in question. The W 1/2 of Lot 1, Block 11, was also conveyed to E. D. Peebles, Jr., on November 23, 1946, and thereafter Peebles conveyed to Annie B. Mills, E 1/2 of Lot 2, Block 11, and this deed was recorded in 1952. In the early part of 1953 Mrs. Mills, appellant, constructed a small frame building on the line between the W 1/2 of Lot 1, Block 11, and the E 1/2 of Lot 2, Block 11, about half of the building being on the E 1/2, Lot 2 and the other half on the W 1/2 of Lot 1, on the 30 foot strip here in question. It further appears that Peebles had sold to Mrs. Mills, appellant, under contract, the E 1/2 of Lot 2, Block 11. Peebles transferred his interest in this contract and deeded the property to Pinchback Taylor, Jr., in 1948, and the latter made a deed to Mrs. Mills, appellant, in 1952 and took a mortgage back as a security for a loan. In all these transactions the property was always described as the E 1/2 of Lot 2, and no mention was made of the 30 foot strip of land in the rear of Lot 1.

Appellees, Deniston and wife, acquired title to the W 1/2 of Lot 1, Block 11, by virtue of a deed from Mr. and Mrs. Poss, May 29, 1952. It appears that this property became delinquent for the 1948 taxes while assessed under the description W 1/2 of Lot 1, Block 11 of Dorris' Addition of Brump's Bayou to the City of Pine Bluff, Arkansas, and a tax deed was issued the Posses under that description December 13, 1951. The tax deed from the State conveyed to the purchaser (M. L. Poss and wife) at such sale whatever right, title and interest the State had in the property, and the Posses in their deed to appellees transferred all the interest they had.

In *Osceola Land Co.* v. *Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S. W. 609, we held: "Under Kirby's Di-

gest, § 7104 (now § 84-1302 Ark. Stats. 1947), providing that a tax deed 'shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed and also the right, title and claim of the State and county thereto, and shall be *prima facie* evidence that all the prerequisites of the law were complied with, . . . and that all things whatsoever required by law to make it a good and valid sale and to vest the title in the purchaser were done,' a valid tax sale transfers, not only the title of the person in whose name the land was assessed for taxes, but the interests of all others therein."

As we said in *U. S. Bond & Mortgage Co.* v. *Reddick,* 199 Ark. 82, 133 S. W. 2d 23, "To be adverse, possession of land must be actual, open, continuous, hostile, exclusive, and be accompanied with an intent to hold adversely to the true owner" for seven years. Appellant attempted to establish adverse possession by an effort to show that she and her predecessors in title had held the property adversely for a period of more than seven years. To do this it was necessary for appellant to prove that her predecessors held this property adversely and that appellees had notice thereof, before she could "tack on" their possession to hers. We so held in *Fulcher* v. *Dierks Lumber & Coal Co.,* 164 Ark. 261, 261 S. W. 645, "One claiming land by adverse possession has the burden of proving that his predecessors in title held adversely, and that the legal owner had notice thereof, before he could tack his possession on to theirs." In order for Mrs. Mills to establish her claim of seven years adverse possession of the property in question, it would be necessary to take the period of time the property was held by Peebles, May 9, 1941-November 15, 1945, and tack on the first 2 1/2 years of the period after she went into possession. We hold that the preponderance of the evidence in this case is not against the chancellor's findings, that she failed to do this. It appears undisputed that throughout, including tax assessments, the foreclosure, conveyance by E. D. Peebles, Jr., and the mortgage to Taylor and Company, at no time was any reference ever made to the 30 foot

strip here involved and, in fact, the property was always described as the E 1/2 of Lot 2 and W 1/2 of Lot 1, Block 11. They were two separate adjoining pieces of property separated by a fence which extended on the dividing line to the 30 foot strip for a distance of 125 feet, and the evidence showed that there were signs of an old fence along the remaining 30 feet, the chancellor so found on viewing the property. By stipulation there was put in evidence a plat which shows the W 1/2, Lot 1, Block 11 to be 155 feet deep and 60 feet wide, and the E 1/2, Lot 2, Block 11, which on the east side joins the W 1/2 of Lot 1, is likewise 155 feet deep and 60 feet wide.

It is significant that E. D. Peebles, Jr., was not offered as a witness in this case to show what his intent was in conveying the property (E 1/2, Lot 2) to appellant, or whether he was claiming any of the property by adverse possession. When Peebles conveyed the E 1/2 of Lot 2 to appellant, there is a presumption that he only intended to convey the property described and no other. Had he intended to include also the 30 foot strip off the side of the W 1/2, Lot 1, Block 11, it would have been a simple matter to have embraced this in the description. This he did not do. "The general rule that parol evidence is inadmissible to vary or contradict the terms of a written contract applies in all its strictness to actions involving deeds. In the construction of a deed, all prior negotiations must be taken as merged in that instrument, the conclusive presumption being that the whole engagement of the parties and the extent and manner of it were reduced to writing . . ." 16 Am. Jur. § 445, p. 686. The evidence also shows that appellant never assessed or paid any taxes on this 30 foot strip.

Finally, appellant says that "the subsequent actions of the owners of the two adjacent lots amounted to an acquiescence of the boundary line that was binding on all parties." We do not agree. As indicated, the evidence does not show that there was any agreement as to the boundary lines separating the South 30 foot wide

strip of the W 1/2, Lot 1, Block 11 of Dorris' Addition of Brump's Bayou to the City of Pine Bluff, from this lot.

Accordingly, the decree is affirmed.

Chief Justice HARRIS disqualified and not participating.

ROGERS *v.* KAYLOR.

5-1188 299 S. W. 2d 204

Opinion delivered March 4, 1957.

Yingling & Yingling, for appellant.

T. E. Abington, for appellee.

ED. F. MCFADDIN, Associate Justice. The question presented is whether the deed, here, comes within the Rule in Shelley's Case.

In 1908, John and Callie Tenniswood conveyed the three lots here involved to their daughter, Johnie Tenniswood. The granting clause of the deed recited: ". . . do hereby give, bargain, sell and convey unto the said Johnie Tenniswood during her natural life, and unto heirs and assigns forever . . ." The *habendum* clause recited: "To have and to hold the same unto the said Johnie Tenniswood during her natural life, and unto her heirs and assigns forever . . ." The grantee, Johnie Tenniswood, became Mrs. Johnie Rogers, and in due time executed warranty deeds which purported to convey to the grantees — through whom

the appellees claim — the entire fee to the three lots conveyed to her by her father and mother, as aforesaid.

Upon the death intestate of Mrs. Johnie Tenniswood Rogers, the appellants, as her children and heirs at law, brought this suit against appellees to recover the three lots. The appellants claimed that under the said deed to their mother, Mrs. Johnie Tenniswood Rogers, she took only a life estate and that the appellants, as her heirs, took the remainder in fee. The appellees claimed that, under the Rule in Shelley's Case, Mrs. Johnie Tenniswood Rogers owned the fee in the lots which she had duly conveyed. The Trial Court ruled in favor of the appellees; and this appeal resulted.

The ruling of the Trial Court was correct. This case presents the perfect application of the classic "Rule in Shelley's Case," which rule, most succinctly stated, is, that when the first taker takes an estate of freehold and in the same instrument there is a remainder to his heirs by way of limitation, then the first taker takes the fee estate. Here, the conveyance was to Johnie Tenniswood, ". . . during her natural life and unto heirs and assigns forever"; and, under the rule in Shelley's Case, Johnie Tenniswood took the fee title.

In *Hardage* v. *Stroope,* 58 Ark. 303, 24 S. W. 490, Mr. Justice BATTLE, in 1893 rendered a most scholarly opinion on the Rule in Shelley's Case; and that opinion has been our landmark case on the question. He gave (a) the statement of the rule; (b) its history; (c) the reasons for the rule; (d) the application of it; and (e) why it was the law in Arkansas. Mr. Justice BATTLE stated that, under the Rule in Shelley's Case, the first taker in *Hardage* v. *Stroope* took the fee because the word "heirs" was there used by way of limitation and not by way of purchase. We have many cases discussing the Rule in Shelley's Case[1], and the textbooks and annotations on the Rule in Shelley's Case are legion.[2] Our own

[1] In addition to *Hardage* v. *Stroope, supra,* the following are a few: *First National Bank* v. *Graham,* 195 Ark. 586, 113 S. W. 2d 497; *Shields* v. *Shields,* 179 Ark. 167, 14 S. W. 2d 545; and *Ryan* v. *Ryan,* 138 Ark. 362, 211 S. W. 183.

[2] In 47 Am. Jur. 791 there is an article on the Rule in Shelley's Case. See also Annotation in 29 L. R. A., N. S. 963; and American Law Institute's Restatement of the Law, "Property," § 312.

case of *Hardage* v. *Stroope* conclusively settles the question here presented. Mrs. Johnie Tenniswood Rogers took the fee under the deed to her, and the appellants cannot prevail.

Affirmed.

CARMICHAEL *v.* LITTLE ROCK HOUSING AUTHORITY.

5-1154 299 S. W. 2d 198

Opinion delivered March 4, 1957.

Fred A. Newth, Jr. and *Kenneth Coffelt,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

MINOR W. MILLWEE, Associate Justice. Plaintiff, Jewell Carmichael, brought this action against Little Rock Housing Authority to recover damages for the death of Lonnie Carmichael, her minor son (seven years and eleven months old), who was drowned in a pond on land owned by the defendant corporation on August

13, 1955. At the conclusion of plaintiff's proof, and upon additional facts stipulated by the parties, the trial court sustained defendant's motion for a directed verdict. We must decide whether the pond in question constituted an attractive nuisance under the undisputed facts.

In August, 1955, plaintiff and her three minor children lived on that part of U. S. Highway 65 known as Confederate Boulevard which runs along the Eastern side of the City of Little Rock. Plaintiff's home was about 30 feet from the street and about 150 yards from the pond located on lands acquired by defendant four months before the accident. There was a vacant house and a railroad spur track between plaintiff's home and the pond. There were two grocery stores nearby and families with children lived along the highway and on the 38th Street which ran East from the highway.

While the origin of the pond was not shown, it had been in existence for at least 50 years and plaintiff testified, without objection, that a 66-year-old neighbor told her it was there before he was born and that he swam in it in 1906. It is in a sunken area and is lined with large sweet gum trees and smaller willow trees. There is a large rock at the East edge and small fish live in the pond. While plaintiff would not say positively that it was fed by springs, she felt "there was bound to be everlasting water there" since it did not go dry in periods of drouth. The pond is unenclosed and children from the heavily populated area congregate there in the shade of the trees and on the large rock to watch and throw rocks at the fish. Parents in the vicinity caution their children against playing around the pond but have difficulty keeping them away.

Plaintiff and a married daughter living with her at the time were away from home on August 13, 1955, but had left Mr. Shirly, a boarder, to look after the three children. About 1:30 p. m. one of Lonnie's young companions ran from the pond and told a neighbor, "Lonnie is drowning." The child's body was found at the

bottom of the middle of the pond which is about 35 feet wide and about 60 feet long.

Although it is rejected by some courts, we adhere to the attractive nuisance doctrine or, as it is sometimes called, the "turntable doctrine" in this state. Broadly stated, the doctrine embraces the proposition that one who maintains upon his premises a condition, instrumentality, machine, or other agency which is dangerous to children of tender years by reason of their inability to appreciate the peril therein, and which may reasonably be expected to attract children of tender years to the premises, is under a duty to exercise reasonable care to protect them against the dangers of the attraction. 38 Am. Jur., Negligence, Sec. 142.

We have frequently approved the following statement by Judge Hughes, speaking for the court, in *Brinkley Car Co.* v. *Cooper,* 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216: "The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature, and exposed and open condition, of something thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs." See also, *Foster* v. *Lusk,* 129 Ark. 1, 194 S. W. 855, and cases there cited. The mere fact that a thing is attractive to children is not of itself a ground for invoking the attractive nuisance doctrine. *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A. (N. S.) 1020.

Although similar cases have frequently engaged the attention of other courts, we have never determined whether the attractive nuisance doctrine is applicable to a pond under a situation similar to that presented here. "The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its lo-

cation." 65 C. J. S., Negligence, Sec. 29 (12) j. The weight of authority in this country is to the effect that ponds, lakes, streams, reservoirs, and other bodies of water do not constitute an attractive nuisance in the absence of any unusual element of danger. See 56 Am. Jur., Waters, Sec. 436, where the textwriter further says: "In some cases, the view has been taken that the proprietor may be held liable where some additional or unusual element of danger is involved in the situation as where the pond or pool is in close proximity to a highway or a playground, or where it is located in an urban or densely populated community, but the weight of authority appears to hold to the contrary, except where the facts bring the case within the rule respecting pitfalls or hazards adjacent to highways." See also, Restatement of Torts, Sec. 339. Numerous cases on the question are collected in annotations in 36 A. L. R. 34, 39 A. L. R. 486, 45 A. L. R. 990, 53 A. L. R. 1355 and 60 A. L. R. 1453.

Since water hazards exist everywhere, the tendency of a majority of the courts which recognize the attractive nuisance doctrine under other circumstances, is to refuse to apply it to permit recovery for the drowning of a child in a pond or other body of water unless it constitutes a trap or there is some other hidden inherent danger. Many cases to that effect are collected in an exhaustive annotation on the subject in 8 A. L. R. 2d 1259. A few such cases are: *Athey* v. *Tennessee Coal, Iron & R. Co.*, 191 Ala. 646, 68 So. 154; *McCall* v. *McCallie*, 48 Ga. App. 99, 171 S. E. 843; *Dennis* v. *Spillers*, 199 Okla. 311, 185 P. 2d 465; *Morris* v. *Britton*, 66 S. D. 121, 279 N. W. 531; *Fiel* v. *City of Racine*, 203 Wis. 149, 233 N. W. 611, 30 N. C. C. A. 297; *Peters* v. *Bowman*, 115 Cal. 345, 47 P. 113; *Phipps* v. *Mitze*, 116 Colo. 288, 180 P. 2d 233; *Stendal* v. *Boyd*, 67 Minn. 279, 69 N. W. 899; *Riggle* v. *Lens*, 71 Or. 125, 142 P. 346.

A variety of reasons have been assigned for the majority rule. First is the difficulty of placing any practical limitation upon such liability, which is also denied for the reason that the danger inherent in water in a pond is or should be obvious to a child. There is

also a disinclination on the part of courts to shift the duty of caring for their children from the parents to the owners of such hazards. There is also the impracticability of guarding or fencing against a hazard of this kind. As the court said in *Emond* v. *Kimberly-Clark Co.,* 159 Wis. 83, 149 N. W. 760: "The world cannot be made danger proof — especially to children. To require all natural or artificial streams or ponds so located as to endanger the safety of children to be fenced or guarded would in the ordinary settled community practically include all streams and ponds—be they in private parks or upon private soil,—for children are self-constituted licensees if not trespassers everywhere. And to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison."

Notwithstanding the weight of authority to the contrary, a few jurisdictions hold that an ordinary pond, artificially created, can constitute such an attractive nuisance as to impose liability on the landowner for the drowning of a child therein. *Franks* v. *Southern Cotton Oil Co.,* 78 S. C. 10, 58 S. E. 960; *Allen* v. *McDonald Corp.,* (Fla.) 42 S. E. 2d 706. Since the only evidence on the point indicates we are dealing with a natural condition in the case at bar, it is unnecessary to determine whether we would subscribe to this minority view under the same state of facts. Plaintiff also relies on our own decision in *Brinkley Car Co.* v. *Cooper, supra,* where a six-year-old boy was burned by stepping into an unguarded pool of hot water covered with debris, and which the defendant created by draining its boilers in the operation of its manufacturing plant. That case involved unusual elements of danger and artificial features which point up the natural characteristics of the pond involved in the instant case. This pond is not unusually dangerous and contained no trap or hidden hazard which the immature mind would be unlikely to appreciate.

The drowning of a child of tender years is a most regrettable tragedy. In determining a claim of legal responsibility for such a deplorable misfortune it is diffi-

cult to resist the temptation to substitute sentiment for law and reason. But under applicable legal principles there can be no recovery for the unfortunate death of plaintiff's intestate on the facts presented. The judgment is accordingly affirmed.

HUDGENS *v.* OLMSTEAD MFG. CO., INC.

5-1179 300 S. W. 2d 26

Opinion delivered March 4, 1957.

H. B. Stubblefield, for appellant.

Frank J. Wills, for appellee.

George Rose Smith, J. This is a suit by the appellees to enjoin the appellants from violating a contract by which the principal appellant, C. C. Hudgens, agreed that for a period of three years he would not engage directly or indirectly in any business competitive with that of the appellees in that part of Pulaski county lying west of Hayes Street as extended southward to the county line. This appeal is from a decree in favor of the plaintiffs.

On March 29, 1954, Hudgens was the principal stockholder in two corporations. One of these corporations, Rosedale Building & Supply Company, Inc., was actively conducting a building materials business at 8108 Asher Avenue, which is west of Hayes Street. The other corporation, Asher Avenue Building Supplies, Inc., had an office east of Hayes Street but was not doing an active business.

On the date mentioned the Rosedale corporation and Hudgens individually executed a contract by which the assets of the "building supply business" at 8108 Asher Avenue were sold to the appellee, Olmstead Manufacturing Company, Inc. This contract defines the Rosedale area as that part of Pulaski County described above and further provides: "A part of the consideration for said sale is that neither the Seller nor C. C. Hudgens, individually, shall engage directly or indirectly in the Rosedale Area for a period of three years from April 1, 1954, in any business competitive with that to be conducted by the Buyer . . . , it being contemplated that the business to be conducted by the Buyer . . . shall be similar to that heretofore conducted by the Seller." The plaintiffs were permitted in the court below to show that during the negotiations for the sale Hudgens represented that the Rosedale corporation was engaged in the sale of building materials and in the con-

struction of houses. Whether the latter activity is forbidden by the contract is the basic dispute in the case.

At the time of the sale Hudgens owned more than a hundred vacant lots in the Rosedale area. Within a few months after the sale Hudgens reactivated his other corporation and began constructing and selling homes on these lots, the materials being furnished by the corporation. At the trial Hudgens readily admitted that he was still building houses in the prohibited area and intended to continue to do so.

The chancellor correctly enjoined this course of business on Hudgens's part. We do not agree with the appellants' contention that the parol evidence rule was violated by the proof that the selling corporation had, before the sale, been building houses and in that way selling building materials. The contract refers to a building supply business, which is not an exact term, and provides that it is contemplated that the buyer's business will be similar to that previously conducted by the seller. This general language is open to more than one interpretation and therefore may be clarified by oral evidence. "The testimony merely makes certain that which the face of the contract leaves uncertain as to what the intention of the contracting parties was." *Montgomery* v. *Ark. Cold Storage & Ice Co.*, 93 Ark. 191, 124 S. W. 768. It is immaterial that Hudgens carried on his operations in the prohibited area from a headquarters outside that area, as there is still a violation of the contract. Corbin on Contracts, § 1386; *Johnson* v. *Stumbo,* 277 Ky. 301, 126 S. W. 2d 165; *Foxworth-Galbraith Lbr. Co.* v. *Turner,* 121 Tex. 177, 46 S. W. 2d 663, 87 A. L. R. 323; *Valley Mortuary* v. *Fairbanks,* 119 Utah 204, 225 P. 2d 739. The appellants also contend that the injunctive decree is too broad in scope, but we think it conforms to the contract and affords no greater relief than the appellees are entitled to.

When the suit was brought the plaintiffs filed a notice of *lis pendens* describing 147 lots assertedly owned by Hudgens in the Rosedale area. By cross-complaint Hudgens charged that this notice was unneces-

sary and had damaged him in the sum that would be required to show these proceedings in each abstract of title to the lots in question. In his proof to support the cross-complaint Hudgens established the cost of showing the proceedings in an abstract, but he did not show that a separate abstract would be required when he sold each lot or, in fact, that any abstract at all would be necessary. In the absence of agreement there is no duty on the part of the seller to furnish an abstract of title. Thompson, Abstracts and Titles (2d Ed.), § 12; Jones, Arkansas Titles, § 1235; and see *Bolton* v. *Branch,* 22 Ark. 435. Upon the record it cannot be said that Hudgens proved the amount of his damages, if any, with a fair degree of certainty.

In one respect the decree must be modified. Before the suit was filed Hudgens sold the business of the reactivated corporation, Asher Avenue Building Supplies, Inc., to third persons. In connection with that sale the purchasers organized a new corporation, which took the identical name of the old Asher Avenue company, and Hudgens changed the latter's name to Lake Hamilton Corporation. By their complaint the plaintiffs sued Asher Avenue Building Supplies, Inc., which is the new concern, but did not join Lake Hamilton Corporation as a defendant. Upon proof that Hudgens has no interest in the new corporation the chancellor dismissed the complaint as to it but granted injunctive relief against Lake Hamilton Corporation.

In this particular the decree is erroneous. This is not a case in which the plaintiffs merely made an error in the corporate name of the real defendant, as was true in *Foster-Holcomb Inv. Co.* v. *Little Rock Pub. Co.,* 151 Ark. 449, 236 S. W. 597, and *Evans* v. *List,* 193 Ark. 13, 97 S. W. 2d 73. Here there were two distinct corporations, as the plaintiffs presumably could have learned from the records of the Secretary of State, and the plaintiffs sued the wrong one. Lake Hamilton Corporation is not a party to the suit and did not enter its appearance in the court below. In these circumstances the complaint against the Asher Avenue company cannot be treated as one against Lake Hamilton Corporation.

Fencing Dist. No. 6 of Woodruff County v. *Mo. Pac. R. Co.*, 180 Ark. 488, 21 S. W. 2d 959.

The decree is set aside insofar as it purports to enjoin Lake Hamilton Corporation; in other respects it is affirmed.

ELLIS *v.* ASHBY.

5-1181 299 S. W. 2d 206

Opinion delivered March 4, 1957.

E. M. Arnold, for appellant.

Rolland A. Bradley, for appellee.

PAUL WARD, Associate Justice. In April 1954 W. F. Ashby and his wife, Flora, purchased a lot on Lake Conway, taking title by the entirety. They promptly began the erection of a dwelling on said lot, and on November 16, 1954, when the dwelling was practically completed, they conveyed the property, by regular warranty deed, to Miss Mona I. Ashby, a sister of W. F. Ashby. Mr. Ashby died on May 7, 1955.

In June 1955, appellants filed a suit against Mona and Flora Ashby, and Flora Ashby as executrix of the estate of her deceased husband. The material allegations in the complaint are: T. E. and G. A. Ellis are engaged in the lumber business under the name of Capitol City Lumber Company; When W. F. Ashby acquired the property in April, 1954 he was insolvent and was indebted to appellants; W. F. Ashby purchased

building material from appellants to construct the said dwelling and he agreed to convey the property to appellants "for debts then existing and to be thereafter incurred, but failed and neglected to do so"; The conveyance to Mona was "without consideration and was made for the purpose of defrauding and hindering plaintiffs' creditors" at a time when Ashby was insolvent, and; After W. F. Ashby conveyed to his sister he induced appellants to endorse his notes to the First National Bank in Little Rock in the amount of $3,500 through the representation that he was still the owner of said property. The prayer was that Mona be held as trustee for appellants; that all rights of Flora, the widow, be declared inferior to the rights of appellants, and; that a lien be declared on the property in favor of appellants, and the property sold if necessary.

The chancellor dismissed appellants' complaint for want of equity, based upon the findings that appellants were secured creditors; that there was no presumption of fraud in the making of the conveyance to Mona; that the questioned conveyance was not voluntary but based on valuable consideration, and; the evidence fails to show that W. F. Ashby was insolvent at the time the questioned conveyance was made or that it was made to defraud his creditors.

It is not necessary to examine the record to determine whether the chancellor's findings are in accord with the testimony, because we find that he must be sustained for another reason.

The record discloses these uncontroverted facts: The deed to Ashby and his wife conveyed an estate by the entirety; It is not contended that this deed (by the entirety) was a part of any scheme to defraud creditors; The lumber and material furnished by appellants had all been paid for when this suit was filed; The debt upon which appellants are here suing was assumed by W. F. Ashby (and by him alone) long after the deceased and his wife purchased the lot and after the deed was made to appellee, Mona I. Ashby, and; W. F. Ashby died before this suit was filed.

Under the above factual situation appellants could not maintain a suit to set aside the deed to Mona as being in defraud of creditors. If there had been no conveyance to Mona, appellants would have been in no better position than they are now because upon the death of W. F. Ashby title to the property vested, absolutely, in his widow. Since in this case the widow has executed a deed to Mona, if she should regain title it would revert to Mona under Ark. Stats. § 50-404.

Although this court has not had occasion to pass directly on the question here considered, we have in *Moore* v. *Denson,* 167 Ark. 134, 268 S. W. 609, pretty clearly indicated what our decision should be here. The holding there was that property owned by husband and wife by entirety is subject to sale under execution to satisfy a judgment against the husband, *subject however to the wife's right of survivorship.* In reaching that conclusion the court quoted with apparent approval that "a conveyance by the husband and wife jointly passes title to the property clear of any claim of creditors of the husband." It is clear from the context that the court had reference to property held by the entirety.

Since we have held that, where property is held by the entirety, the interest of one spouse cannot be sold on execution for the debt of the other spouse, it seems to follow logically that property so held is similar to a homestead in that respect. It was stated in *Davis* v. *Cullums,* 205 Ark. 390, 168 S. W. 2d 1103, that: "It has been many times held that a creditor may not complain that a homestead has been conveyed in defraud of creditors."

We make clear that we are not here holding that fraud cannot be shown in the procurement of the title by the entirety in the first instance if the evidence warrants such a holding.

Other jurisdictions have dealt more specifically with the question under consideration, and the weight of such authority accords with the view we have heretofore expressed. It was held in *Wortendyke* v. *Rayot,*

88 N. J. Equity 331, 102 A. 2, that a voluntary conveyance by a husband and wife of an estate by the entirety could be set aside as in fraud of the husband's creditors, and the husband's interest sold under execution, *but, that upon the husband's death, the entire title would vest in the surviving widow.* The above case was cited and the holding approved in the case of *J. & A. Steinberg Co.* v. *Pastive,* 97 N. J. Equity 52, 129 A. 201, and in other cases cited in 121 A. L. R. at page 1028, *et seq.*

From the above it follows that the decree of the trial court must be, and it is hereby, affirmed.

Affirmed.

TRINITY UNIVERSAL INS. CO. *v.* ROBINSON.

5-1185 299 S. W. 2d 833

Opinion delivered March 4, 1957.

[Rehearing denied April 8, 1957.]

Wm. Andress, Jr., Dallas, Tex.; *Jay W. Dickey,* for appellant.

John Harris Jones, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Lancaster & Love, Inc., contractors, entered into a contract with the City of Pine Bluff for the construction of a sewer system. Appellant, Trinity Universal Insurance Company, made the Contractor's Surety Bond.

Lancaster & Love subcontracted the construction of six tunnels through railroad embankments to appellee, George J. Robinson and others, doing business as Robinson Construction Company. According to the terms of the subcontract, Robinson was to receive as consideration $52,792 plus $791.00.

Robinson filed the present suit in the Jefferson Chancery Court against Trinity Universal Insurance Company and the City of Pine Bluff *et al.,* alleging performance of the subcontract; that the sum of $30,208.02 was due and unpaid, and that the subcontractors were entitled to a judgment for said sum plus a 12% penalty and attorney fees. The City of Pine Bluff *et al.* were brought in on a *quantum meruit* and assignment theory. See *Robinson* v. *City of Pine Bluff,* 224 Ark. 791, 276 S. W. 2d 419, for previous litigation in this court on that angle of this case.

This case was removed to the Federal Court and remanded to the State Court several times. By consent of the parties, the answer filed in the Federal Court by Trinity Universal Insurance Company was considered as filed in its behalf in Jefferson Chancery Court and also considered as being filed on behalf of Lancaster & Love.

In addition to certain denials and admissions, the answer asserts two affirmative defenses: First, that under the terms of the subcontract Lancaster & Love was entitled to liquidated damages at the rate of $25.00 per day because the work under the subcontract was not completed within the time required; and second, that Lancaster & Love was not obligated to pay Robinson prior to the time that the City paid Lancaster & Love. The answer makes these admissions:

"Defendant admits the allegations of paragraph 9, except the allegation that the balance of $30,208.02 is owing and due."

Paragraph 9 is as follows:

"In addition to the work provided for under the original contract price of $52,792, plaintiffs upon authorization and direction of City of Pine Bluff and Lancaster & Love, Inc. constructed Tunnel No. 6 under said Contract as 42 inches in diameter rather than 36 inches as called for in the original specifications for an agreed additional consideration of $791.00, making a total contract price of $53,583 to be paid to plaintiffs under said Contract and Supplemental Agreement. Of said sum the amount of $13,930.93 has been paid to plaintiffs, and materials, labor and equipment rental of the agreed value of $9,444.05 has been furnished to plaintiffs, leaving a balance of $30,208.02 owing to plaintiffs from the defendants, which sum is now due."

The answer also admits Paragraph 11 of the complaint, which is as follows:

"Defendant City of Pine Bluff had knowledge of, and agreed to, said Contract by and between Lancaster & Love, Inc. and plaintiffs for the construction to be

performed under said Supplemental Agreement and of the *performance thereof by plaintiffs.* Said City of Pine Bluff has received the benefits of the work performed by plaintiffs under said Contract. That the reasonable value of said benefits of the City of Pine Bluff resulting from the aforementioned construction done by plaintiff was not less than $53,583 of which said City of Pine Bluff would be entitled to the above stated credits totaling $23,374.98, leaving a balance due plaintiffs of $30,208.02 with interest thereon at the legal rate from April 6, 1953, on which date said City of Pine Bluff placed in use said construction work performed by plaintiffs."

Appellants, in answer to requests for admissions, admitted that the tunnels had been approved by the Engineer acting for the City of Pine Bluff on or before July 17, 1952 and that Lancaster & Love, Inc. did not complete or turn over to the City the entire works or project until October 31, 1952.

Appellees filed their motion to strike the two affirmative defenses set up by appellants as dilatory and frivolous. After the motion to strike was sustained, appellees moved for judgment on the pleadings. Appellants, Trinity Universal Insurance Company and Lancaster & Love, Inc., have appealed from the order giving appellees a judgment as prayed.

Appellants rely upon nine points for reversal, but they are grouped into four categories for purposes of this opinion:

Appellants say that appellees cannot recover because the contract was for a sum in excess of $20,000 and that appellees did not sustain their burden of proof by showing that they were licensed by the contractor's Licensing Board for Arkansas, Ark. Stats. § 71-701, *et seq.* Since this was not an issue in the lower court, it cannot be raised for the first time on appeal. See *Stroud* v. *Crow,* 209 Ark. 820, 192 S. W. 2d 548.

It is contended that the trial court erred in refusing to allow all answers filed in the Federal District Court

to be treated, after remand, as answers in the Jefferson Chancery Court per agreement of counsel. The general rule is that when a case is removed to the Federal Court and remanded, it stands in the State Court in the same position in which it would have been had it never been removed. See *Meyers Store Co.* v. *Colorado Milling & Elevator Co.,* 187 Ark. 636, 61 S. W. 2d 440; *Reese Bros.* v. *Allen,* 67 Ga. App. 514, 21 S. E. 2d 244; and 76 C. J. S. "Removal of Causes," Section 312.

The record as abstracted by appellants shows an agreement by counsel relating only to the first answer and the trial court did not err in so ruling.

It is contended that the trial court erred in striking the affirmative defenses set out above because in so doing it accepted a disputed construction of replies to requests for admissions. The general rule with respect to payment of a subcontractor is that "* * * unless the subcontract clearly and expressly so provides the right of the subcontractor to payment is not dependent on the receipt of payment by the contractor, but only on the performance of his subcontract * * * ." 17 C. J. S. "Contracts" § 502 (2) (d). See also *Trinity Universal Insurance Company* v. *Smithwick,* 8th Circuit Court of Appeals, 222 F. 2d 16. Appellants have pointed to no provision in their contract that would justify a delay in payment.

The contract on the issue of liquidated damages provides:

"* * * no liquidated damages shall be chargeable against the party of the second part for the failure to complete said work within the time allotted unless such failure to complete the tunneling works delays the final acceptance of the project covered by the principal contract * * * ."

Appellants have admitted that appellees completed the tunnels on or before July 17, 1952; that appellants placed the tunnels in use on or before October 31, 1952; and that the "principal contract," as distinguished from the supplemental contract, was not completed by appel-

lants prior to October 31, 1952. Therefore, the completion of the prime contract was not delayed by the failure of the subcontractor, and by the express terms of the contract there can be no recovery for liquidated damages.

Appellants argue in their brief that appellees did not complete their contract in accordance with plans and specifications, and that appellants are entitled to certain setoffs because of the work that they did in bringing the tunnels up to contract specifications, but their admission to paragraph eleven of appellee's complaint precludes this argument.

With the affirmative defenses struck from the record, and the contract price, the credits allowable thereon, and the performance of the contract having been admitted, the trial court properly entered judgment on the pleadings since no justiciable issue was left pending. *Crary* v. *Ashley & Beebe,* 4 Ark. 203.

The trial court allowed the 12% penalty provided by statute, but held in abeyance the issue of a reasonable attorney's fee; and at the time of the appeal to this court, the attorney's fee question had not been disposed of. Later, the trial court granted a $10,000 attorney's fee. Appellee has filed a motion in this court for an additional fee for handling the case on appeal. Appellants' response to that motion states that the decree awarding the $10,000 fee has been appealed to this court. Therefore, a decision on the attorney's fee question is reserved and will be determined later.

Affirmed.

CARLETON HARRIS, C. J., disqualified and not participating.

THURMAN *v.* FARMERS COOPERATIVE, INC.
ARK. FARMERS ASSOCIATION *v.* THURMAN.

5-1213 299 S. W. 2d 650

Opinion delivered March 11, 1957.

W. B. Putman and *James R. Hale,* for Thurman.

Rex W. Perkins and *David J. Burleson,* for Farmers Cooperative, Inc.

John R. Thompson, for Ark. Farmers Ass'n.

J. SEABORN HOLT, Associate Justice. August 1, 1955, Farmers Cooperative, Inc. (appellee), sued Ellis Thurman to recover $2,061.75 alleged due for "goods, wares and merchandise" as set out in a "verified, itemized account," made a part of its complaint as "Exhibit A", that said itemized account set out the dates and amounts of the purchases and, all credits, and the balance due. Thurman answered denying the accuracy of the account, and denied owing appellee (plaintiff) in any amount. He also filed a cross complaint against appellee, (Farmers Cooperative, Inc.) and against Arkansas Farmers Association, in which he alleged that: ". . . On or about January 19, 1954, the cross-defendants, Farmers Cooperative, Inc., and Arkansas Farmers Association sold and delivered to

the cross-complainant 1,000 pullets for a laying flock, and that said cross-defendants . . . represented and guaranteed to the cross-complainant that the said 1,000 pullets were good, healthy chickens, properly inspected, disease free, and otherwise fit for the purpose for which they were intended, . . . In truth and in fact, said 1,000 pullets sold by the cross-defendants to the cross complainant were of an inferior quality, sick and diseased and totally unfit and unsatisfactory for the purpose for which they were intended, . . ." that as a result of such diseased condition of said chickens he had been damaged in the amount of $3,750.00 and asked for judgment against Farmers Cooperative, Inc., and Arkansas Farmers Association for this amount. On the issues raised in the complaint and cross-complaint, trial was had July 10, 1956, and at the close of all the testimony the court instructed the jury to return a verdict in favor of cross-defendant, Farmers Cooperative, Inc., on the cross-complaint of Ellis Thurman. The jury returned a verdict in favor of Thurman against Arkansas Farmers Association for $2,061.75 and for appellee (Farmers Cooperative, Inc.) against Thurman in the amount of $2,061.75, and from this $2,061.75 judgment Thurman has appealed, and Arkansas Farmers Association appeals from the judgment of Thurman against it, for $2,061.75.

We first consider the judgment of Farmers Cooperative, Inc., against Thurman on the account for $2,061.75. For reversal Thurman relies on two points: "I. The plaintiff, Farmers Cooperative, Inc., did not prove an open account against Ellis Thurman. II. The plaintiff, Farmers Cooperative, Inc., did not prove that it was the real party in interest in the suit against Ellis Thurman on open account, or that it had any right to bring suit against him for the collection of said alleged account."

As to point I, Thurman contends that the account, Exhibit A, was not proved and that it was not sufficiently itemized to furnish him information as to the various items that he purchased, and that were charged to him. We hold that the evidence was ample to show that he pur-

chased the goods from Farmers Cooperative, Inc., as shown in the account, and that said account was properly verified. The record shows that Thurman did not ask at the trial that the account be itemized. He was content to file the following motion: "Comes Ellis Thurman, defendant in the above entitled cause, and moves the Court to require the plaintiff, Farmers Cooperative, Inc., to furnish to the defendant a copy of Exhibit "A" to plaintiff's complaint." This motion was granted by the court and appellee furnished Thurman a copy of Exhibit "A". Obviously the opportunity was open to him on cross-examination of witnesses of Farmers Cooperative, Inc., to inquire as to what purchases made up the items in the account, and this he failed to do. We hold that it is now too late to complain.

As to the second point, that there was a defect of parties, it appears that witness Doyle Moad, testified that he was manager of Farmers Cooperative, Inc., from the time it first began doing business, February 15, 1954, until February 15, 1955, and that the verified account, Exhibit "A", represented purchases by Thurman from the Farmers Cooperative, Inc., covering the period from March 3, 1954, through February 11, 1955, and that there was due $2,061.75. We find no defect of parties in the circumstances. It also appears that Thurman made no objection as to any defect in parties, as to plaintiff, before the trial, the cause went to trial without objections, and in so doing, we hold that he has waived any right to object.

The Arkansas Farmers Association, for reversal of the judgment in favor of Thurman against it, contends that the trial court erred in refusing to grant it a severance, and in refusing to permit it to "stand trial" separate from Farmers Cooperative, Inc., and that there was a misjoinder of parties. Arkansas Farmers Association had been properly served with summons in Washington County. We hold that this contention is untenable. Thurman (who was sued by Farmers Cooperative, Inc.) in his cross-complaint sued both Farmers Cooperative, Inc., and Arkansas Farmers Association and alleged but one cause

of action against them jointly, which was for breach of contract—warranty on account of the diseased condition of the chickens which he alleged they sold to him. Here Thurman, as indicated, was sued on a contract for certain feed sold to him by the Farmers Cooperative, Inc., and it was incumbent on him to set up in his cross-complaint any defenses (set offs or counter claims) that he might have, § 27-1121 Ark. Stats. 1947. As indicated, his cross-complaint did not allege a cause of action in tort but one on contract for breach of warranty. In the circumstances, we hold that the trial court did not abuse its discretion when, in an effort (as appears here) to avoid a multiplicity of suits, save unnecessary costs, and delay, it denied Arkansas Farmers Association a severance, § 27-1301—4 and 5, Ark. Stats. 1947.

The judgment is affirmed.

COMPTON *v.* TALLEY.

5-1174 299 S. W. 2d 653

Opinion delivered March 11, 1957.

Paul B. Pendleton, Gordon H. Sullivan and *Harry C. Robinson,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

ED F. MCFADDIN, Associate Justice. This case stems from a traffic mishap. The jury returned a verdict for appellees; and appellants claim (1) that there is no evidence to sustain the verdict, and (2) that the Trial Court committed error in giving an instruction.

I. *The Evidence.* Mr. J. T. Compton borrowed the car of his wife, Mrs. Aileen Compton, and took his mother, Mrs. Gussie Compton, for a pleasure ride. Mr. Compton was driving west on Markham Street in Little Rock and attempted to make a left turn into Thayer Street. Appellee, Talley, was driving east on Markham Street and drove into the right side of the Compton car, damaging the vehicle and causing personal injuries to Mrs. Gussie Compton. Mrs. Aileen Compton and Mrs. Gussie Compton brought this action against Talley and his employer. The defendants claimed that the mishap occurred because of the negligence of J. T. Compton in attempting the left turn in the face of oncoming traffic. The jury verdict was for the defendant.

Was there any substantial evidence to sustain the verdict? We conclude that there was. The defendant, Talley, testified that he was driving in the regular flow of traffic; that he was proceeding normally; that he was not passing any car; that there was a car a short distance in front of him; that he was keeping a lookout; that as soon as he saw the Compton car attempting to turn left, he (Talley) immediately applied his brakes and did everything possible to avoid the mishap. The testimony of Talley was sufficient to take the case to the jury on the issue of who was at fault.

It is true—as appellants claim—that there was a considerable amount of evidence tending to indicate that Talley was driving faster than the speed limit and that Compton gave the left turn signal in ample time for Talley to have avoided the mishap. But it is not for us as appellate judges to decide where was the preponderance of the evidence; our duty, and our only right, in a case like this one is to decide whether there was substantial evidence to take the case to the jury. We do so find.

II. *The Challenged Instruction.* The Trial Court gave the jury a number of instructions, all germane to the issues; and appellant challenges only the defendants' instruction No. 3, which was given over the plaintiffs' general objection. The instruction reads:

> "You are instructed that the statutes of the State of Arkansas provide that: 'The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right-of-way to the vehicle making the left turn.'[1] If you find and believe from the evidence that the collision involved here was caused solely by negligence on the part of J. T. Compton in failing to yield the right-of-way to John B. Talley, then the plaintiffs would not be entitled to recover, and your verdict should be in favor of John B. Talley."

Appellant offered only a general objection to this instruction; but insists that the instruction (1) is a binding instruction, and (2) is inherently erroneous; so that a general objection is sufficient.

That this instruction is a binding instruction is admitted, because it told the jury that the verdict "should be in favor of John B. Talley." See *Reynolds* v. *Ashabranner,* 212 Ark. 718, 207 S. W. 2d 304; and *Clark* v. *Duncan,* 214 Ark. 83, 214 S. W. 2d 493. It is true that a general objection is sufficient against a binding instruction that is inherently erroneous. In *Mo. Valley Bridge & Iron Co.* v. *Malone,* 153 Ark. 454, 240 S. W. 719, we said: "These instructions were inherently erroneous, and a general objection to them was sufficient." See also *Clark* v. *Duncan,* 214 Ark. 83, 214 S. W. 2d 493.

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[1] The statute quoted is § 75-622 Ark. Stats.

The mere fact that the instruction was a binding instruction does not make it fatal. To be fatal, the binding instruction must be inherently erroneous. So the question to be decided is, whether the defendants' Instruction No. 3 was "inherently erroneous." An instruction is "erroneous" if it misstates the applicable rule of law. "Inherently" is the adverb of the adjective "inherent", and here has the meaning of "firmly or permanently contained, in-dwelling, or intrinsic". Wherein was this instruction in error, and wherein was such error intertwined in the rule of law so that it could not be separated?

We find no error in the instruction. It is certainly the law that, if the collision was caused entirely by the negligence of an unsued third party, the defendant would not be liable; and that is what the instruction said. J. T. Compton was not a party to this litigation, and yet he was the driver of the Compton vehicle. The instruction says that, if the collision was caused entirely through the negligence of J. T. Compton, the defendant, Talley, would not be liable. That is the law.

Appellant claims that the vice in the challanged instruction is in the word "solely". Appellant says that the word "solely" is ambiguous and misleading; and cites our recent case of *Whaley* v. *Crutchfield,* 226 Ark. 921, 294 S. W. 2d 775. In that case an instruction used the words "sole proximate cause". We held the instruction to be erroneous: not because it used those words but because the instruction ignored the issue of the contributory negligence of one of the drivers. *Whaley* v. *Crutchfield* does not hold that the words "sole proximate cause" make an instruction "inherently erroneous". In the case at bar: if appellants had considered the word "solely"—as used in defendants' Instruction No. 3—to be ambiguous, then a *specific* objection should have been offered: in the absence of such a specific objection, appellants cannot now—under a general objection—claim a mere matter of ambiguity. The challenged instruction was not inherently erroneous.

Affirmed.

Mr. Justice Robinson not participating.

WEEKS *v.* MCCLANAHAN.

5-1193 300 S. W. 2d 6

Opinion delivered March 11, 1957.

[Rehearing denied April 15, 1957.]

Rieves & Smith and *Giles Dearing,* for appellant.

Hale & Fogleman, for appellee.

MINOR W. MILLWEE, Associate Justice. This is an action by a tenant against his subtenant and landlord to recover damages in the form of double rent for the alleged willful and wrongful holding over of the rented lands after the term. For clarity the parties will be referred to as they were designated in the trial court.

The action was filed by plaintiff, P. McClanahan, against the defendants, Alton Weeks and J. O. Anderson. The issues presented by the pleadings were summarized by the trial judge in a preliminary instruction to the jury, as follows: "Gentlemen of the jury, in this case P. McClanahan sues the defendants Alton Weeks and J. O. Anderson, alleging that (they) conspired and colluded together in wrongfully holding over 412 acres of land which this plaintiff says that he had rented from the defendant, J. O. Anderson, for the year 1952, and to which the plaintiff says he was entitled to the possession of for the year 1952. The plaintiff further alleges that the defendant, J. O. Anderson, wrongfully prevented him from taking charge of the proceeds of the crop produced by the defendant Weeks and wrongfully converted said crops to his own use and to that of the defendant, Weeks, thereby depriving him of his right to enforce his landlord's lien and of the fair rental value of said property.

"The plaintiff McClanahan admits that he was indebted to the defendant Alton Weeks in the sum of $1,164.-75, and he admits that he was indebted to the defendant J. O. Anderson in the sum of $751.00.

"The defendant Alton Weeks denies that he wrongfully held over the 412 acres for the year 1952, and further denies that he conspired or colluded with the defendant J. O. Anderson to hold over said 412 acres for the year 1952, and further denies that he conspired with J. O. Anderson to defeat the plaintiff, McClanahan, in the enforcement of any of his rights and claims. He says that he had an agreement with the plaintiff McClanahan whereby he rented said lands for the year 1952 for the sum of $12.00 per acre. By way of cross-complaint against the plaintiff, McClanahan, he alleged that the plaintiff McClanahan is indebted to him in the sum of $1,376.75.

"Alton Weeks by way of cross-complaint against J. O. Anderson alleges that Anderson wrongfully refused to permit him to sell said cotton upon his request and that by reason of a later decline in the market value of the cotton, he was damaged thereby.

"The defendant and cross-defendant Anderson on the other hand denies that he colluded with the defendant Weeks or that the plaintiff McClanahan was damaged by reason of any conspiracy or collusion on his part and that of Weeks, and says that he should recover on his cross-complaint against the plaintiff McClanahan the balance due on his rent which he alleges is $751.00, together with interest at the rate of 6% per annum, which after the allowance of credits against the principal, amounts as of May 10, 1953, to a total of $936.60, for which he asks judgment against the plaintiff McClanahan. He also denies that he is indebted to the cross-complainant Weeks in any amount and alleges that they have had a settlement of their account."

By agreement of counsel the issues were presented to the jury at the conclusion of a lengthy trial upon ten special interrogatories in answer to which that body found that for the year 1952 Weeks wrongfully and willfully held over the lands in question which had a fair rental value of $18.00 per acre and that Anderson conspired and colluded with Weeks in such holding over; that Anderson converted the proceeds of the crop of Weeks to the latter's damage in the sum of $1,148.97; that plaintiff owed Weeks $1,248.75 and Anderson $751.00; and that there was an agreement by Anderson with Weeks to return a portion of the rent paid by Weeks. In conformity with these findings the Court entered judgment finding that plaintiff should recover from both defendants the sum of $11,051.00 which represented double the fair rental value of the land for 1952 less a credit already paid by Weeks; that Anderson recover from plaintiff the sum of $751.00 with interest to the date of a tender of the payment of the rent note by plaintiff to Anderson; that Weeks recover from plaintiff $1,248.75; and that Weeks

recover from Anderson $1,148.97 for conversion of part of the cotton grown on the lands.

According to the proof presented by plaintiff, the 412 acres in question is part of a larger tract of 1236 acres which plaintiff leased from Anderson for the years 1950, 1951 and 1952 at $11.00 per acre. Weeks had rented the 412 acres from Anderson in 1949 and was in possession when plaintiff took over under his lease in 1950. At Anderson's insistence plaintiff sublet the land to Weeks at $12.00 per acre during 1950 and 1951 with Weeks executing notes to plaintiff for said rents. On or about November 1, 1951, plaintiff advised Weeks that he could sublet the land to others for $20.00 per acre and that he would not renew the rent contract for 1952 on the basis of $12.00 per acre. Upon Weeks' refusal to agree to pay the increased rental plaintiff served a written notice upon him to quit the premises on or before December 31, 1951. About this time Weeks rented another large tract from another party for the year 1952.

Anderson was anxious for Weeks to stay on his land for several reasons and acted as his advisor and secretary in negotiations with plaintiff. Anderson was furnishing Weeks in his operations on these and other lands and held a mortgage on all his equipment. Under his lease with plaintiff Anderson had no control over ginning of the cotton but Weeks was required to gin all cotton at a cooperative gin in which Anderson was the principal stockholder and received a "kick-back" or rebate of $6.00 per bale. In November, 1951, Anderson tried to purchase plaintiff's contract on the land held by Weeks for $1,200.00 but the offer was refused. Weeks stayed on and farmed the land without a contract with plaintiff until October, 1952, when Anderson wrote plaintiff that Weeks would not gather the crop unless some agreement could be made about the rentals.

On November 5, 1952, Anderson prepared and had Weeks sign a check payable to plaintiff and Anderson "in full settlement of rent and account" on a rental basis of $12.00 per acre for 1952. Anderson was to furnish funds

to pay the check which plaintiff returned and Anderson testified that plaintiff would have been a "gump" to have accepted it. Plaintiff also tendered to Anderson the full amount of rents due him on the Weeks land under their lease agreement provided Anderson would turn over the unharvested crop and warehouse receipts for cotton already harvested, but the tender was refused. Proof of the foregoing, and other circumstances tending to show the defendants conspired and colluded in the holding over of the lands by Weeks, were disputed in part by the defendants. Weeks testified, and plaintiff denied, they orally agreed in September, 1951, that Weeks could rent the land for 1952 at $12.00 per acre.

On the cross-complaint of Weeks against Anderson for damages growing out of the alleged conversion of some of the cotton, Weeks offered evidence to the effect that in the late Fall of 1952 he made urgent requests of Anderson to permit him to sell about 60 bales of the harvested cotton as Weeks had done in previous years. Anderson refused and insisted on holding the cotton until the latter part of February, 1953, when he forced Weeks to sell at a price of approximately 33 cents per pound as compared to the price of 39 cents per pound which the same kind and staple of cotton was bringing at the time the requests were made. The testimony of Weeks as to the price differential was corroborated by experienced farmers and cotton buyers, one of whom purchased the cotton in question. Anderson retained proceeds of the sale in the net amount of $13,-521.27 with the exception of about $330.00 which he turned over to Weeks.

For reversal of plaintiff's judgment against him the defendant J. O. Anderson, argues there is no substantial evidence to support the jury's finding that he conspired or colluded with Weeks in wrongfully holding over the land for the year 1952. When considered in the light most favorable to plaintiff, we hold the evidence substantial and sufficient to sustain the conclusion that Weeks wrongfully and willfully held over the land and that Anderson conspired and colluded with him in doing so. Nor do we agree with Anderson's further contention that the evi-

dence is insufficient to sustain the jury's finding that he converted Weeks' cotton. While the evidence is in dispute on this issue the jury was justified in concluding that Anderson refused to permit a sale of the cotton at the usual time of settlement as requested by Weeks and forced a sale several months later at a loss and to the damage of Weeks.

The statute (Ark. Stats., Sec. 50-509) under which plaintiff sought double damages against both defendants reads: "If any tenant for life or years, or if any other person who may have come into possession of any lands and tenements under or by collusion with such tenant, shall willfully hold over the same, after the termination of such term and thirty (30) days' previous notice in writing given, requiring the possession thereof, by the person entitled thereto, such person so holding over, shall pay to the person so kept out of possession double the yearly rent of the lands or tenements so detained, for all the time he shall keep the person entitled thereto out of possession."

The serious question is whether, under the proof, Anderson may be held liable for damages in the amount of double the yearly rental under the statute. Since the suit was brought on the theory that Anderson colluded in aiding Weeks to retain possession, and not to obtain possession for himself, there may be some merit in the contention that Anderson is not a "person who may have come into possession of any lands or tenements under or by collusion with such tenant," as that term is used in the statute. Aside from this argument, however, we agree with Anderson's further contention that the statute has no application to anyone unless he has been given the 30 days' written notice required therein. Although such notice was given to Weeks none was served on Anderson. It is true that the jury could have found that Anderson knew of the notice served on Weeks and colluded with him in ignoring it, but we do not agree that this constituted notice to Anderson as required in the statute. We have held that the statute, being highly penal, must be strictly construed and cannot be extended by intendment beyond

its express terms. See *Lesser-Goldman Cotton Co.* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742, where the court held the statute applicable only where the holding over after the term is willful and the 30 days' written notice requiring possession is given.

Anderson also contends the court erred in refusing to give, without modification, his Requested Instruction No. 4, the first paragraph of which reads: "The jury are instructed that a landlord has a lien upon all crops grown on the demised premises in any year for the rent, without regard to whether the crop is raised by the tenant or not and without regard to any agreement between the tenant and sub-tenant. This lien accrues as soon as there is any crop. You are further instructed that Anderson, the landlord, could lawfully collect from each sub-tenant the sub-tenant's portion of the total rent owed by McClanahan and that McClanahan was without right to collect from any sub-tenant the rent or any portion thereof owing by such sub-tenant to McClanahan unless McClanahan had paid his rent in full to Anderson, *which he has not done in this case.*" The court gave the instruction as modified by deleting the words in italics and substituting therefor, "or had tendered payment in full of such rent to Anderson." In view of the evidence to the effect that plaintiff made a tender of payment in full of the rents due Anderson, which the latter refused, the instruction as requested was misleading and would have amounted to a comment on the evidence by the court. The modification simply cured this defect.

Anderson also argues the court erred in allowing him interest on plaintiff's rent note only *from* the date of the alleged tender of the rents by plaintiff. We think counsel means to contend that the court erroneously allowed interest only *to* the date of tender because that is what the court did. The evidence is practically undisputed that plaintiff made a full tender of all the rents due Anderson. While Anderson contends plaintiff's request that the warehouse receipts be turned over to him at the time of the tender amounted to an "unreasonable condition" which rendered it ineffective to stop the running of inter-

est, there is a paucity of proof to support this conclusion. It is well settled that a creditor cannot refuse to accept payment in full and demand interest in the future. *Miller* v. *Miller,* 193 Ark. 362, 100 S. W. 2d 74.

Defendant Weeks argues the court erred in failing to allow him interest on the account due him by plaintiff, but no objection was made below on this ground and it cannot be urged for the first time on appeal.

It follows that the court erred in assessing double damages in favor of plaintiff against the defendant, J. O. Anderson. But this error may be cured by modification. The cause will therefore be remanded to circuit court with directions to reduce said judgment in this respect to single damages only. In all other respects the judgment is affirmed.

SMITH *v.* WITTMAN.

5-1166 300 S. W. 2d 600

Opinion delivered March 11, 1957.

[Rehearing denied April 29, 1957.]

John W. Moncrief and *Virgil R. Moncrief,* for appellant.

Milton G. Robinson, for appellee.

George Rose Smith, Associate Justice. This action was brought by Walter Nolan Smith, an infant, and his father, Francis W. Smith, to recover damages for personal injuries sustained when the child was struck by a truck being driven by the appellee. The jury returned a verdict for the defendant. The only questions on appeal relate to the court's instructions to the jury.

Whether the appellee was guilty of negligence was an issue of fact. At the time of his injury Walter Nolan was a few months less than four years old. He had gone across the gravel street in front of his parents' home in Stuttgart, and, before attempting to return, stood at the south end of a line of mailboxes on the west side of the street. The child waited as a trailer-truck coming from the south went by, but he then entered the roadway and was hit by the appellee's truck, which was traveling south. The plaintiffs contended primarily that Wittman was negligent in driving into a cloud of dust raised by the trailer-truck, while Wittman asserted that his visibility was good and that he could not see the little boy until he ran out from behind the mailboxes.

At the plaintiffs' request the court instructed the jury that a child under four is incapable of negligence or contributory negligence. The appellants complain of an instruction, given for the defendant, by which the jury were told that a motorist has the right to assume that a pedestrian will obey traffic laws and may proceed upon that assumption until he knows or should know that the pedestrian will not do so. It is argued that the effect of this instruction was to require the child to obey the traffic laws. We do not think so at all. The court had already excluded the possibility of negligence on the part of the child; the instruction now in question dealt with the situation from Wittman's point of view and merely stated an assumption that a motorist may rely upon in the operation of his car. *Kendrick* v. *Rankin,* 219 Ark. 736, 244 S. W. 2d

495. Although the instruction may have been abstract, it was not objected to on that ground and in any event was not misleading or confusing to the jury. *Equity Mut. Ins. Co.* v. *Merrill,* 215 Ark. 483, 221 S. W. 2d 2.

The appellants' main point is directed to the defendant's Instruction No. 14: "You are instructed that in this case, the fact that the pedestrian was a child did not require the defendant to exercise any due care or proper precaution for the safety of children until he actually observed the child." This instruction is not a complete and accurate statement of the law, for the duty of special care would arise not only when the child was actually observed but also when he should have been observed. *Russ* v. *Strickland,* 130 Ark. 406, 197 S. W. 709. The plaintiffs' specific objections did not touch upon this defect, however; so the question is whether a general objection was sufficient to call the court's attention to the matter.

Although the point is not free from difficulty we are of the opinion that a specific objection was required. The instruction is not a binding one and therefore may be clarified by the rest of the court's charge. Elsewhere the court told the jury that if Wittman was operating his vehicle with due regard for the safety of others and the accident was caused by the child's suddenly darting into the path of the vehicle "at such time and under such circumstances that, in the exercise of ordinary care, the defendant was unable to stop his automobile in time to avoid an accident after he became aware, or ought to have become aware, of plaintiff's danger," then the verdict should be for the defendant. Hence the jury were in fact informed that the duty of care arose when Wittman should have been aware of the child's danger.

A somewhat similar issue was considered in *Bain* v. *Fort Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021, where this instruction was objected to generally: "The court instructs you that if you believe from the evidence that defendant's motorman in charge of its car used ordinary care in the management of said car at and near the place where the plaintiff was

injured, and that as soon as he saw plaintiff in a position of danger, said motorman used such care and caution in stopping said car to avoid injury to plaintiff as a person of ordinary care and prudence would have used under such circumstances, then your verdict should be for the defendant." It was contended there, as it is here, that the instruction was erroneous because it only required the motorman "to use ordinary care after he saw plaintiff in a place of danger." We held that the earlier reference to ordinary care in the management of the car was, in the absence of a specific objection, a sufficient reference to the motorman's duty of care before he actually saw the plaintiff. In the case at bar that prior duty of care was brought to the jury's attention in another instruction, which may be read together with the one complained of. Had a specific request been made, it cannot be doubted that the trial court would have modified the instruction in the manner now thought necessary by the appellants. We are not willing to hold that the court's charge, when read as a whole, was inherently erroneous. *Mo. Pac. R. Co.* v. *Havens,* 164 Ark. 108, 261 S. W. 31.

Affirmed.

HARRIS, C. J., and MCFADDIN and WARD, JJ., dissent.

PAUL WARD, Associate Justice (dissent). It is not clear from the majority opinion, as I think it should be, whether Instruction No. 14 is treated as inherently erroneous or as merely conflicting with other instructions given by the court. Personally I consider the Instruction inherently erroneous, but in either event the cause should be reversed, in my opinion.

If inherently erroneous, then the majority opinion appears to be in direct conflict with *Walther* v. *Cooley,* 224 Ark. 1027, 279 S. W. 2d 288, where, at page 1038 of the Arkansas Reports, this court quoted with approval from former decisions of this court:

" 'The rule that all the instructions must be read together, and that an omission in one instruction may be cured by another, does not extend to instructions inherently erroneous and misleading.' "

If only conflicting with other instructions, then, in my opinion, the cause should also be reversed, under our former decision in *J. Foster & Co.* v. *Woolridge,* 199 Ark. 551, 134 S. W. 2d 526, in reversing the trial court for giving conflicting [and misleading] instructions, we said, at page 555 of the Arkansas Reports: "To say the least of it these two instructions are so conflicting that the jury was probably misled by giving both of them."

Likewise we said, in *Arkansas Baking Company* v. *Aaron,* 204 Ark. 990, 166 S. W. 2d 14:

"It is impossible to know in a given case, what consideration jurors gave to one instruction as distinguished from another. We only consider whether (in the light of experience and the psychology and conduct of mankind in the average) separate instructions, one being erroneous and the other correct, probably resulted in a verdict against the party who complains of the mistake."

EASTBURN *v.* GALYEN.

5-1155 300 S. W. 2d 10

Opinion delivered March 11, 1957.

[Rehearing denied April 15, 1957.]

George E. Steel, Wootton, Land & Matthews, Rose, Meek, House, Barron & Nash and *John H. Haley,* for appellant.

Nabors Shaw, for appellee.

PAUL WARD, Associate Justice. For some years prior to March 9, 1955, appellees, L. A. Galyen and his wife, owned a cheese plant at Mena, Arkansas, known as Seven Valley Cheese Plant. A brother of L. A. Galyen, Lindsey Galyen, actively managed the plant for appellees.

On March 9, 1955, appellant, John M. Eastburn, entered into an agreement to purchase said plant for the price of $45,000, of which $10,000 was to be paid upon completion of the agreement and the balance of $35,000 was to be paid in monthly installments of $500 plus accumulated interest—the first payment to be due May 1, 1955. The sale was consummated on or about March 26, 1955, through an escrow agent, a deed and bill of sale executed by appellees and a note and mortgage executed by appellants being delivered to the escrow agent. It appears from the record that the $10,000 was paid to appellees and that the deed and bill of sale were delivered to appellants, and the note and mortgage delivered to appellees within 30 days after March 26, 1955. At the time the sales agreement was entered into John M. Eastburn took possession of the cheese plant and began operating it, and continued to operate it until the decree appealed from was rendered on May 25, 1956.

Appellants having failed to make any of the $500 monthly payments (with interest) heretofore mentioned, appellees filed, on October 5, 1955, a foreclosure suit in the chancery court, asking for judgment for the full amount of the note and, if necessary, for a sale of the mortgaged property.

After filing a demurrer and several motions appellants filed an answer on April 17, 1956, in which they sought a rescission of the purchase agreement on the ground that they had been induced to purchase the plant by the fraudulent misrepresentations of L. A. Galyen and

his agents. The specific allegations on fraud are substantially the following: (a) Lindsey Galyen employed one Earl Goodner to serve as the agent of appellees to assist him (Lindsey) in practicing a fraud upon appellants, and said Earl Goodner represented himself to be a friend of appellants and to be personally interested in their welfare, and that he (Eastburn) relied upon Goodner's superior knowledge of the cheese business; (b) Appellees' agents represented that the value of the cheese plant was in excess of $50,000 when it was known to them to be of the value of not more than $15,000, and; (c) the plaintiffs and their agents "fraudulently misrepresented the true quantity and quality and value of the stock of merchandise on hand at the time these defendants assumed control of said plant." Appellants, in a cross complaint, asked judgment against appellees for the value of some cheese which appellees had sold for them. The trial court gave appellants judgment for $1,252.50 from which there has been no appeal.

A great deal of testimony was presented by both sides tending to show and refute fraudulent misrepresentations alleged to have been made by appellees and their agents, after which the chancellor, without making any specific findings of fact, rendered judgment in favor of appellees in the amount prayed for, after giving credit to appellants in the amount of $1,252.50, and ordered a sale of the mortgaged property if said judgment was not paid within the time specified by the court.

After a study of the entire record, and after weighing the able arguments presented by both sides, we have reached the conclusion that appellants, by their actions hereinafter set forth, waived any right they may have had at one time to rescind the purchase agreement because of fraudulent misrepresentations. In accordance with this disposition of the case it will not be necessary for us to discuss the testimony in detail, or to determine whether or not said misrepresentations of facts were made by appellees or their agents, or to evaluate several propositions of law which are discussed at some length.

The substance of Mr. Eastburn's testimony relative to misrepresentations of facts, fraudulent or otherwise, which induced him to purchase the cheese plant, is the following:

(a) He stated that if he had known a hoop of cheese was worth only $24.50 instead of $35 as was represented to him, and if he had known that cream was bringing only 60 cents a pound instead of 78 cents as was represented to him he would not have bought the plant.

(b) If he had known that Mr. Goodner was acting as an agent for appellees he would not have considered buying the plant.

(c) He stated that appellees told him they could manufacture 94 hoops of cheese in 10 days but that he could manufacture only 64 hoops in 10 days; and that when he bought the plant he was told there was 108 hoops of cheese when in fact there were only 94.

The evidence shows very clearly, and certainly the trial judge was justified in finding, that appellants knew about the above alleged falsifications within a few days or a few weeks at most after they went into possession of the cheese plant. According to Eastburn's own testimony he found out within 10 or 12 days after taking charge of the plant that cheese was selling for only $24.50 per hoop and that cream was selling for only 60 cents a pound. Within the same period of time he learned that there were only 94 hoops of cheese conveyed to him instead of 108, and he also learned how much a hoop of cheese weighed. By Eastburn's own testimony it appears that he was not dissatisfied at all with the amount of cheese the plant would produce. He was asked this question: "You were well pleased with what the plant would produce?" Eastburn's answer to this question was: "Oh, yes." As to the weight of a hoop of cheese Eastburn gave this testimony: Q. "But you had the hoops of cheese?" A. "Yes, I weighed some of the hoops they were not weighing 100 pounds." Eastburn further testified:

Q. "When did you first discover that a can of cream wouldn't bring $35?"

A. "When we shipped the first time."

Q. "When was that?"

A. "I haven't these dates."

Q. "How many days after March 9?"

A. "Well, let's see. I believe they picked up every week so it would be within ten days."

Q. "What did you discover then?"

A. "Well, we were very much disappointed in our weights and in our prices, and we thought there must have been some mistake."

Q. "All right. Did you go right then and act promptly and offer to turn this business back to the sellers?"

A. "No."

Q. "You didn't say a thing to them about it?"

A. "It is kind of hard for me to accuse anybody."

As to Eastburn's knowledge of the actual number of hoops of cheese, he testified:

Q. "When did you first discover that there were some hoops of cheese short?"

A. "I think it was twelve."

Q. "When did you discover that?"

A. "That was the first load, including the inventory and the few hoops we had made."

Q. "Was that a few days after you bought the place?"

A. "Yes."

If Mr. Eastburn was deceived by Earl Goodner acting as appellees' agent without his knowledge, he found out the true situation by about May 1, 1955. This fact is shown in this way: Goodner sued appellees for a $1,000 commis-

sion fee, and garnisheed the escrow agent for that amount. This matter was settled about May 1, 1955, and Eastburn testified that he learned of Goodner's agency relationship to appellees at that time.

Therefore it appears that on or before the first of May, 1955, Mr. Eastburn had learned the true situation regarding all matters about which he claims to have been deceived, yet he had made no complaint whatever about any of these before the foreclosure suit was filed on October 5, 1955. Not only did appellants make no complaint to appellees, but they continued to operate the cheese plant all along, even up to the day of the foreclosure decree on May 25, 1956. While so operating the cheese plant Mr. Eastburn had many contacts with L. A. Galyen (one of the appellees) who also assisted him on numerous occasions in the operation of the plant, and in buying new equipment for the plant.

As before stated, it is not necessary for us to decide whether any material misrepresentations were made to Mr. Eastburn or whether, if made, he relied on them. We do hold however that, if Mr. Eastburn was deceived by any such false misrepresentations, he waived any right he might have had to rely on them for a cancellation of the sales contract by failing to make a complaint promptly or within a reasonable time after learning of the alleged deception. This court has frequently and clearly announced the rule applicable to a situation such as presented in this case. See: *Fleming* v. *Harris,* 142 Ark. 553, 219 S. W. 33; *McCormick* v. *Daggett,* 162 Ark. 16, 257 S. W. 358; *Pylant* v. *Braden,* 166 Ark. 377, 266 S. W. 272; *St. Louis-San Francisco Railway Company* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440, and; *Minton* v. *Hall,* 218 Ark. 92, 234 S. W. 2d 515.

The original note and mortgage sued on by appellees were lost, and appellants make the contention that Eastburn's wife did not sign and that the mortgage did not contain a waiver of the right of redemption. We have carefully examined the record in this connection and are convinced that the Chancellor's findings contrary to ap-

pellants' contentions are not against the weight of the evidence. The undisputed evidence is that the mortgage was of standard Arkansas form. As we interpret Mr. Eastburn's testimony he admits that his wife did sign.

> Q. "Yes, sir, you may answer my question. You and your wife don't deny executing that mortgage and note?"
>
> A. "Yes, but I don't remember all that was in that mortgage and note."

As it appears to us, if by using the word "yes" Mr. Eastburn meant to deny that he and his wife signed the note and mortgage there would have been no reason for the rest of his answer. At any rate a reputable attorney prepared all the papers and it does not appear likely that he would have overlooked a matter so obvious and so important as the wife's signature.

Affirmed.

Justice GEORGE ROSE SMITH not participating.

SMITH *v.* NELSON.

5-1162 299 S. W. 2d 645

Opinion delivered March 11, 1957.

W. H. McClellan, for appellant.

Sigun Rasmussen and *John L. Hughes,* for appellee.

SAM ROBINSON, Associate Justice. The issue here is the validity of a purported will. On February 15, 1953, Harvey J. Nelson executed a typewritten instrument which he doubtless intended to be his will. The document, however, does not meet the requirements of the law so as to constitute it a valid will. Only one witness signed the instrument. Ark. Stats. § 60-104. Subsequent to Nelson's death, the purported typewritten will was offered for probate, but probate was denied because of the invalidity of the document as a will. Later, the same purported will, along with two letters written by deceased to his wife, was again offered for probate, the proponents of the will contending that the purported typewritten will became a part of a valid will when coupled with the letters written by deceased in his own handwriting to his wife. A demurrer to the petition to probate was overruled. Those protesting probation of the alleged will have appealed.

The purported typewritten will is as follows:

"The last will and test*im*ent of Harvey J. Nelson February 15, 1953.

I, Harvey J. Nelson of the City of Benton Saline County Arkansas. Do make and declare this to be my last will and Test*im*ent, hereby revoking all former wills made by me.

First: I request that my Executor herein named shall pay all of my funeral expenses, expenses of my last illness, expenses of administration, and all claims against my estate, as soon as practicable.

Second: I give, devise and bequeath all my personal property go to my beloved wife Mary G. Nelson to have and use as she sees fit, and that she also have charge of my real estate to hold until her death receiving the rentals therefrom, and that she shall not be required to furnish sureties on bond as such.

In event my wife and I should pass away at the same time or at the death of my wife, I desire that the Probate Court of Saline County appoint an Administrator.

He being required to make bond satisfactory to the said court.

That my property of every kind and description be equally divided between Edward Pounders Nelson, Mary Jo Armstrong Sivils, and James Nelson Power.

I have hereunto set my hand and seal this 14th day of February 1953.

Harvey J. Nelson
Seal
D. Y. Young Witness
County Clerk''

Subsequently, a letter was written by Nelson to his wife, which we will refer to as Letter No. 1:

''Mrs. Harvey Nelson
Benton, Arkansas

Dearest Wife,

When you read this my body will be sleeping in Rose Mont and my Soul will be gone to God Who gave it.

According to my Will in the Courthouse *valt,* in the County Cler*ks* office, you are to do as you please with our personal things.

I hope you will help Mary Jo and Robert and Edward and his wife get started in life. Mary Jo, Robert and Eddie could live with you and you would be happy.

Use your money from the rentals to have the things that you need, and to keep the property in good repair and pay taxes of all kind. My life has been happy with you, but today I am with the Lord.

May God ever bless and keep you 'til he calls you home, then we will meet again.

Your loving husband,
Harvey''

He also wrote a letter to his wife, which we will refer to as Letter No. 2. It is as follows:

"Honey you may wonder why I had my will fixed so you couldn't sell the houses.

You are so big h*ar*ted and good you would be talked into selling them and it wouldn't be long until you would be without an income after my death.

This way I know you will have an income as long as you live.

I love you,
Harvey"

There are two questions: First, the testamentary character of the letters, and second, the proposition of whether typewritten matter can be incorporated into a holographic will. The view we take of the first question makes unnecessary a discussion of the second question.

Are the letters testamentary? That is, do they show the *animus testandi*—the intent to make a will—which is necessary to constitute any writing a valid will? It is a fundamental principle that an instrument, to be a valid will, must be executed with testamentary intent. *Stark* v. *Stark,* 201 Ark. 133, 143 S. W. 2d 875. See also *Johnson* v. *White,* 172 Ark. 922, 290 S. W. 932; Page on Wills, § 46; Thompson on Wills (3d Ed.), § 12.

In the case at bar, the evidence is clear that Nelson did not intend that the letters, or either of them, should be his will. True, he referred to what he thought was his will, which he had executed and deposited in the vault at the County Clerk's office. The very fact that he had executed and deposited what he thought was his duly executed typewritten will is rather conclusive evidence that he did not think he was making a new will or adding a codicil to an old one when he wrote the letters to his wife. The letters made no change in the terms of the document he had filed.

Appellant cites *Cartwright* v. *Cartwright,* 158 Ark. 278, 250 S. W. 11, as sustaining the contention that the letters coupled with the typewritten instrument constitute a will, but the facts were quite different in the *Cartwright* case. There, Cartwright, prior to writing the let-

ters, had executed nothing which he thought was a will. In *Stark* v. *Stark, supra,* Judge Frank Smith, in speaking of the *Cartwright* case, said: "But this and all other cases are to the effect that there is no will unless there exists the '*animus testandi,*' which phrase is defined as the intention to make a will, and the existence of this intention is not a matter of inference, but must be expressed so that no mistake be made as to the existence of that intention."

Prior to 1949, a duly executed and attested typewritten will could not be superseded by a holographic will. But the General Assembly of 1949 changed the law in that respect, and now a holographic will takes precedence over a prior typewritten will. In these circumstances, it is imperative that the holographic document asserted as a will should clearly show *animus testandi* before such instrument is declared by the courts to be a will. Here, the letters written by Nelson to his wife cannot be said to be any more than family correspondence. There is no evidence whatever to the effect that he intended that either letter should constitute a will or that it be used in connection with any other document or instrument so as to constitute a will.

Reversed.

Justices HOLT and MILLWEE dissent.

BREWER *v.* HOWELL.

5-1171 299 S. W. 2d 851

Opinion delivered March 18, 1957.

Amis Guthridge and *L. Gene Worsham,* for appellant.

James F. Sloan, Edwin E. Dunaway, and *Penix & Penix,* for appellee.

CARLETON HARRIS, Chief Justice. This action was instituted by appellants as taxpayers and residents of Hoxie School District No. 46, seeking the following relief: an injunction against alleged illegal activities by the school board, the recovery of public funds allegedly paid out in violation of the law[1], an order requiring the school board members to meet with appellants, and an order prohibiting the school directors further serving. The last prayer mentioned was contained in paragraphs ten and eleven of the complaint, and was demurred to by appellees. The demurrer was sustained by the court, and the matter was not raised on appeal. Shortly prior to the trial, appellants amended their complaint, alleging a conspiracy between the school board directors and K. E. Vance, superintendent of schools in the district, to defraud said district, and alleging school funds had been wrongfully expended by Vance, and that the directors had otherwise illegally dissipated the funds. The amendment prayed that the directors and Vance be required to give a complete accounting of all cash funds coming into their possession during the school years 1951 through 1954. On motion of appellees, this amendment was stricken from the pleadings. At the conclusion of the hearing, the Chancellor issued a rather lengthy opinion, discussing fully all of the questions in issue. In accordance with his findings, a decree was entered denying appellants all relief sought, except for an order requiring the board to meet with appellants. From such decree, comes this appeal. Appellants rely upon four points for reversal, listed as follows:

I.

The lower court erred in denying plaintiffs recovery of public funds illegally paid the wives of the school directors.

[1] Salaries paid to wives of certain school directors who were employees of the school district and payment for school supplies made to B. B. Vance, a Hoxie merchant, whose son was a member of the school board.

II.

The lower court erred in denying plaintiffs recovery of public funds paid to B. B. Vance & Sons Lumber Company.

III.

The lower court erred in denying the plaintiffs injunctive relief against future hiring of relatives in violation of the statute, and against future illegal purchases.

IV.

The lower court erred in striking plaintiffs second amendment to the complaint.

These will be discussed in the order set out.

I.

In discussing this contention, it is noted that there are numerous decisions dealing with payments of money made contrary to statute or contrary to public policy. Both appellants and appellees have cited several cases upon which they rely to sustain their position. We shall discuss the leading cases from both viewpoints and apply the principles, therein established, which seem to best fit the facts of this litigation. Appellants rely heavily on *Tallman* v. *Lewis,* 124 Ark. 6, 186 S. W. 296; *Vick Consolidated School District* v. *New,* 208 Ark. 874, 187 S. W. 2d 948; *Ridge* v. *Miller,* 185 Ark. 461, 47 S. W. 2d 587; and *Quattlebaum* v. *Busbea,* 204 Ark. 96, 162 S. W. 2d 44. In *Tallman* v. *Lewis, supra,* Tallman was president of the board of commissioners of a certain drainage district. The act creating the drainage district provided that the board should prepare plans for the improvement of same, procuring estimates from competent engineers as to the cost, and further provided the board could employ such engineers and agents as they might need. The board did not employ an engineer, but deemed it advisable that someone should be employed to supervise the construction of the drainage ditch, and accordingly employed Tallman for that pur-

pose. He drew warrants in the amount of $2,014 which were signed by himself (as president), and the secretary of the board. Tallman admittedly was not an engineer, but testified that he understood how to measure the yardage of dirt taken from the ditch. Suit was brought to compel Tallman to refund the money which he had received because the statute creating the drainage district contained language making it unlawful for a member of the board to become interested, directly or indirectly, in any contract authorized by the board. This Court sustained the contention that Tallman did not have the right to contract with the board, and denied him compensation on a *quantum meruit* basis. In *Vick Consolidated School District* v. *New, supra,* Arthur G. New was employed by the school district as a teacher. It developed that for about a three month period, New had no license of any kind to teach, contrary to Arkansas law, which required "any person who shall teach in a public school in this state without a legal certificate of qualifications to teach shall not be entitled to receive compensation for services from the school fund." The district sought recovery of funds paid to New, and this Court held that his receipt of money during the period when he was without license, was a diversion of public funds, and should be recovered into the public treasury. In *Ridge* v. *Miller, supra,* R. H. Curtis was a member, and president, of the school board. The board entered into a contract to employ Curtis and to lease his truck for the purpose of transporting pupils to and from school. Warrants were issued to him for his services and for use of the truck. After the legislature of 1931 passed an act prohibiting contracts with any member of the school board for the transportation of children, suit was instituted against Curtis, and this Court held that an injunction permanently restraining the treasurer from paying warrants for services rendered (after the passage of the act) should be granted. The case of *Quattlebaum* v. *Busbea, supra,* could not possibly be of any help in the instant case as it involved a matter of falsification of records, deceit, concealment, and, in fact, a conspiracy which was consummated when warrants, showing upon their face that they were for a desig-

nated purpose, were in fact, issued for a wholly different purpose.

Appellees' leading cases are *Spearman* v. *Texarkana,* 58 Ark. 348, 24 S. W. 883; *Frick* v. *Brinkley,* 61 Ark. 397, 33 S. W. 527; *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800; and *Dowell* v. *School District No.* 1, *Boone County,* 220 Ark. 828, 250 S. W. 2d 127.

In *Spearman* v. *Texarkana, supra,* Spearman was a medical member of the Board of Health for the city of Texarkana, and while so serving, was directed by the Board to make a personal examination of a case of diphtheria in the city, the alleged existence of which had caused the closing of the schools. He examined the case and made a report to the Board. There was no agreement to pay him for this service, nor did he inform the Board that he expected payment before rendering such service. Several months later, he instituted suit to recover the sum of $50.00. The lower court instructed the jury to the effect that if they found the plaintiff was a member of the Board of Health when he was requested by the Board to perform the services, and that he was a member of the Board when he performed said services, they should find against him. This Court held such instruction to be erroneous, and stated that Spearman was entitled to recover for what he reasonably deserved to have. In *Frick* v. *Brinkley, supra,* Frick was an alderman at Brinkley, and chairman of the Council's Improvement Committee. He was also a dealer in tiling, and entered into an agreement to sell tiling to the city, after which he laid such tiling. Subsequently, after a change in the composition of the Council, the town instituted suit against Frick to recover the amount thus paid him. Among other grounds for recovery, the issue was raised that Frick, as a member of the Council, and chairman of its Improvement Committee, could not contract with the town. From a judgment against him, Frick appealed. This Court held that Frick had acted in good faith, that the relief sought should not be granted, and accordingly reversed the judgment of the lower court and entered judgment for Frick. In *Smith* v. *Dan-*

dridge, supra, G. G. Dandridge was one of the directors of the school district, and accepted employment by the district as superintendent of a school construction job. This Court held that the services were necessary, were for the benefit of the school district, were duly performed by Dandridge, the amount of his claim was fair and reasonable, and Dandridge was entitled to payment for such services. In *Dowell* v. *School District No.* 1, *Boone County, supra,* Dowell alleged that two of the school directors had been interested in the private sale of supplies to the school district, sought an injunction to prevent further sales, and prayed the return to the district of all monies received by each director. The Chancellor enjoined the directors from having any future private financial dealings with the school district, but refused to adjudge the return of the money to the district for past transactions. The oath of the school directors is, in part, "* * * I will not be interested, directly or indirectly, in any contract made by the district of which I am a director, except that said contract be for materials bought on open competitive bid, and let to the lowest bidder * * *"[2] This Court held that such language meant a school director should not make private sales to the district, and upheld the injunction which had been granted; however, it also sustained the lower court's decision in refusing to require the repayment of the money received by the directors, holding that the district received full and fair value on items purchased.

Admittedly, these decisions, which from a cursory examination might seem to be conflicting in some respects, draw a fine line, and it is accordingly necessary that we examine the facts of this particular case in order to determine which line of decisions applies.

In the instant matter, Mrs. Guy Floyd, Mrs. L. L. Cochran, and Mrs. Leslie Howell, (whose husbands were school directors), were employed by the Board, the first two as teachers, and the latter as cafeteria supervisor. Ark. Statute § 80-509, in defining the duties of the school board, provides, among other things, as follows:

[2] 80-505, Ark. Stats. (1947) Anno.

"(d) Employ such teachers and other employees as may be necessary for the proper conduct of the public schools of the district, and to make written contracts with teachers and all other employees in the form prescribed by the State Board of Education. There shall be four (4) copies of each contract made; one (1) to be retained by the Board; one (1) to be given to the employee; one (1) to be filed with the County Supervisor of Schools. Neither the husband nor wife of a school director, nor any person related within the fourth degree of consanguinity or affinity to any member of the school board shall be employed by the school board in any capacity except as follows:

"(1) Teachers may be elected upon written petition of fifty (50) percent of the qualified electors from the group constituting the parents of the grade group or groups to be taught by the teacher in question for the school year for which the election is made.

"(2) Other employees may be elected upon written petition of fifty (50) percent of the qualified white electors of the district for white applicants, * * *."

This is the statute upon which appellants rely in seeking a recovery of funds paid to these employees. Admittedly, none of the defendant employees originally had obtained such petitions. Shortly before the filing of the lawsuit, Mrs. Cochran ceased teaching, and shortly after the filing of the lawsuit, Mrs. Howell voluntarily terminated her employment. Mrs. Floyd submitted her petition as required by law, and it is not contended that she is presently teaching illegally. Let us compare this factual situation with the cases just mentioned, first looking at appellant's cases. In *Tallman* v. *Lewis, supra,* Tallman was president of the Board of Commissioners, and was accordingly contracting with himself. He even had to sign his own warrants. Nor was he qualified for the services that he rendered inasmuch as the statute contemplated the hiring of an engineer. Tallman was not an engineer. In *Vick Consolidated School District* v. *New, supra,* New had no teacher's license, accordingly was not qualified to teach under our law, and the statute

expressly prohibited such a person from receiving any compensation from the school fund. In *Ridge* v. *Miller, supra,* the statute specifically declared that a contract with any member of the school board for the transportation of children "*shall be null and void.*" These factual situations are therefore quite different from the one presently before the Court. No one has questioned the qualifications of these employees in the positions for which they were employed. Mrs. Cochran and Mrs. Floyd were, according to the record, apparently fully capable and experienced in their tasks. The Statute *does not prohibit wives of school directors from teaching,* nor does it provide that one so teaching shall not receive compensation. It is true that provision is made for obtaining the petition (heretofore referred to), but the legislature did not see fit to declare such a contract void because this required petition had not been obtained. Nor can it be said that these ladies contracted with themselves, and certainly it is not established that their husbands received the benefit of their salaries. No fraud was involved in employing these persons; in fact, the applications showed that they were related to members of the board, and one might well surmise that it was common knowledge among the parents in the school district that these people were so employed. Yet, no action was taken for several years, and not until other matters arose which occasioned strong feelings. No contention is made that these employees were overpaid. The salaries were most moderate, and, in fact, were not as high as those paid in the adjoining school at Walnut Ridge. All in all, it would appear that the parties acted in good faith.

Appellants state that the courts will not entertain any contract or rights growing out of same where such contract is expressly prohibited by law. In the case of *Frick* v. *Brinkley, supra,* (relied upon by the Chancellor in this litigation), the law provided as follows: "Nor shall any alderman or any member (of council) be interested, directly or indirectly, in the profits of any job, work, or services, to be performed for the corporation." The court there held that Frick's contract was irregular

and not in accordance with a mandatory statute; yet, as previously mentioned, this Court entered judgment for Frick. In both *Smith* v. *Dandridge, supra,* and *Dowell* v. *School District No.* 1, *Boone County, supra,* this Court upheld payments which had been made to members of the Board who rendered services or sold supplies to the district, and not on open and competitive bid, as required by law. The acts of these directors, were, of course, in direct conflict with the oath of office which they had taken.

While we are unable to lay down a "hard and fast" rule that can be followed in every case, this line of decisions seems more apt and fitting to the present situation. Quoting from *Smith* v. *Dandridge, supra,* relative to services Dandridge performed, and for which he received the warrant as payment: "* * * there is no claim made that there was any fraudulent dealing, either in selecting him to perform the services or in the amount of the claim therefor which he made; it is not claimed that the amount allowed him for the services is more than the services were fairly and reasonably worth. Under these circumstances, we think that he is justly and equitably entitled to payment for such services."

The above expresses our thought in the instant matter, and we hold that the Chancellor was correct in denying appellants relief on this point.

II.

Howard Vance, a member of the school board, is a son of B. B. Vance, a Hoxie merchant. The proof shows that B. B. Vance has sold supplies which would average about $1,000 per year (for the last several years) to the school district. Appellants contend that this was a violation of Ark. Statute § 80-505 (heretofore set out). Let it first be said that we agree with the trial court that purchases made from a business concern employing a school board member are not in violation of the law, for such director is not interested "either directly or indirectly" as is contemplated by the statute. While it is admitted that the name of the concern is

advertised as B. B. Vance and Sons, the proof is uncontradicted that B. B. Vance is the sole owner of the business.[3] The concern is not a partnership, nor a corporation. Howard Vance and two other brothers are only employees. In his opinion, the Chancellor mentioned an example, which is perhaps extreme, but could well happen. "* * * if a member of a school board happened to be the employee of a railroad company and the school sent its athletic team somewhere and bought tickets, this school board member, being an employee of the railroad company, would be interested either directly or indirectly; * * *." While our views, as so expressed, dispose of this contention, let it also be said that we find the Chancellor was correct in holding that the preponderance of the evidence establishes that fair prices were charged by B. B. Vance, and value received by the district. Mr. Cecil Grissom, a competitor of Vance, and who had sold lesser amounts to the district, was asked about numerous items purchased by the district from Vance. His testimony was to the effect that the prices were fair and reasonable. The cases that we have cited under heading I, as controlling on that point, apply with equal force here. The Chancellor was correct in denying relief.

III.

It has already been stated that the action of the Board, in employing wives of the directors who had not obtained petitions as provided by the statute, was a violation of the law. The proof showed that this practice had been engaged in for several years, and though the contracts were entered into in good faith, still the directors were guilty of violating the law. While the Board has announced a policy discontinuing this practice for the future, the School Directors are presumed to have been familiar with the fact that they had already violated the law; the best evidence for obtaining

[3] The regular Chancellor, who disqualified in this case, and who represented B. B. Vance, filing returns, etc., before assuming his judicial duties, testified to this fact, and it is stipulated that his present attorney would also so testify. This corroborated the testimony of Howard Vance.

an injunction is the evidence of prior violations. For this Court to say that no injunction should be granted, might well be construed to the effect that we had placed our stamp of approval upon the actions of the Board in employing the wives. Nothing could be more erroneous. The law should be complied with, and in such respect, this case is similar to that of *Dowell* v. *School District No. 1, Boone County, supra.* In that case, the Chancellor, though refusing to order the directors to return the money which had been paid to them, did enjoin them from having any further private financial dealings with the school district. We think such action appropriate in the instant case, and are of the opinion that the Chancellor should have enjoined the defendant school board members from employing their wives.

IV.

The matter of permitting amendments to pleadings is one that lies largely within the discretion of the trial court. *Austin* v. *Dermott Canning Co.,* 182 Ark. 1128, 34 S. W. 2d 773. This particular case was tried on an exchange between the regular Chancellor and the Chancellor from the Thirteenth Chancery Circuit. The lawsuit was originally filed October 3, 1955, and the amendment in question was filed January 24, 1956, two weeks before the date previously fixed for the trial of the case. Undoubtedly, to have permitted the amendment, (which did raise new issues) would have necessitated a resetting of the cause, and this would have been particularly inconvenient to a Chancellor on exchange who had already set his own docket. The matters raised in the amendment were important, but we cannot say that the Chancellor abused his discretion in striking same from the pleadings. Nothing herein shall be construed as such a determination of the matters set forth in said amendment as to make same *res judicata*; in fact, we make no finding at all, except to simply hold that the Chancellor was within his rights in refusing to consider the amendment in the instant lawsuit.

In passing, we might mention appellee's contention that appellant's suit is barred by the "clean hands" doc-

trine. Appellees have pleaded that this litigation was filed by appellants solely for the purpose of intimidating the said appellees and coercing them into re-establishing segregation in the Hoxie schools. While it may be true that the integration issue stirred the feelings of the inhabitants of the district, and caused them to look into school matters with more scrutiny than theretofore, we find no merit in the contention. Violations of law, as herein mentioned, had occurred. Efforts to meet with the board members, according to testimony of appellants, had failed, and there were *bona fide* reasons for instituting the suit. The Chancellor was correct in ruling against appellees on this point.

In accordance with this opinion, the case is remanded to the Chancellor with directions to restrain the defendant school directors from employing their wives in any capacity for the district, until said wives have complied with provisions of Sub-sections (d-a) (d-b) of § 80-509, and the provisions of § 80-511 of Ark. Statutes (1947) Annotated. With such modification, the decree of the Chancellor, in all respects, is affirmed.

TURNAGE *v.* MATKIN.

5-1184 299 S. W. 2d 831

Opinion delivered March 18, 1957.

Charles S. Harley, Robert C. Downie, and *Edward L. Wright; Wright, Harrison, Lindsey & Upton,* for appellants.

Forrest E. Long, for appellee.

J. Seaborn Holt, Associate Justice. This is a suit on a note, — secured by a chattel mortgage, — for an alleged balance due in the amount of $5,080.12 plus 6% interest. Trial resulted in a decree for appellants in the amount of $700.50, and they have appealed. Appellants are engaged in the wholesale lumber business with offices in Little Rock, Arkansas and appellee owns and operates a sawmill in Augusta, Arkansas. Beginning in September 1952 appellants made advances to, and began purchasing lumber from, appellee from time to time. This method continued up to January 9, 1953, when appellee's account with appellants had grown to a substantial amount, he gave appellants his note for $10,000, secured by a chattel mortgage on 250,000 feet of lumber and certain sawmill equipment. On this date appellants advanced appellee $4,000. The mortgage covered all future advances to appellee (Matkin) as well as his indebtedness to appellants. The mortgage was in the usual form, except that it contained this added provision, — "This mortgage contains the entire agreement between the parties named herein and no verbal agreement shall be binding."

Following the above loan to appellee, appellants handled 79 carloads of lumber from appellee's mill, and an accounting for these 79 cars of lumber is here involved. A typical shipment transaction between the parties here shows that an instrument styled "purchase order" was sent from appellants to appellee, which called for shipment of a car of lumber to another designated company or customer, and recited that the lumber was "sold to" appellant company. The mill owner, appellee, then secured a bill of lading which showed that this car was being shipped to the designated customer or consignee named in the purchase order and not to appellant. The bill of lading also showed appellant (Turnage Lumber Company) as shipper. Immediately appel-

lee would issue an invoice to appellant, showing quantities of lumber shipped and prices. The prices tallied with those quoted on the previously received "purchase order." After appellant received the invoice and bill of lading, he (appellant) issued another invoice to the customer, consignee, shown on the bill of lading, which invoice in practically every instance, showed an increase in price over that sent to him (appellant) by appellee. Following notice of receipt of the lumber by the consignee (customer), appellant credited appellee's note with the original invoice price of the lumber (from appellee to appellant) less 2% discount plus an 8% commission, as of the date the customer reported receipt of the lumber.

The primary, — and it appears the decisive, — question presented is one of fact, whether appellant was in the circumstances (as appellee contends) appellee's broker or commissioned agent selling appellee's lumber on an 8% commission basis and bound to credit appellee's note (or account) with the proceeds of the sales of the lumber to customers, after deducting his commission; or whether, — as appellant contends, — that he, appellant, was the purchaser of the cars of lumber from appellee and became the owner absolutely of same on the date the lumber was delivered to the railroad company by appellee and invoices issued to appellant, and that it was no concern of appellee what profit appellant made on the several cars over and above the price at which appellee invoiced same to appellant. The trial court sustained appellee's contention that appellant was appellee's agent. There appears to be no dispute that appellant did receive profits (or "overage") above the invoices from appellee which if applied on appellee's note would leave the balance due of $700.50, as the trial court found.

Appellant argues that the chattel mortgage above contains the entire agreement of the parties and that they are bound by its provisions. Appellee admits the debt. Clearly, we think, he had a right to agree with appellant how sales of the mortgaged lumber would be handled by appellant and the proceeds from such sales

applied on appellee's note or debt to appellant. This in no way violated the provisions of the mortgage.

On the fact question: we try the case *de novo* here; unless the preponderance of the evidence appears to be against the chancellor's findings we must affirm. See *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686. Our rule also is "that the judgment of the chancellor on the question of the preponderance of the evidence will be considered as persuasive when the evidence is conflicting, and evenly poised, or nearly so." *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750. Also see *Brown* v. *Ozark Black Marble Co. et al., Ozark Black Marble Co.* v. *Stephenson, et ux,* 222 Ark. 280, 258 S. W. 2d 882.

Appellee testified positively that his agreement with appellant was that appellant was to act as his agent or broker to sell the 79 cars of lumber on a commission of 8%, in addition to 2% discount, and the 6% interest on the note, and that the first knowledge that he had that appellant was claiming otherwise, was when the present suit was filed May 5, 1954. Appellant denied any such agreement. He testified that he purchased outright the 79 cars from appellee and was to have a 2% and an 8% discount on each. Appellant also testified that "title to the property (lumber) changes hands the minute the producer (appellee) turns over to the carrier the lumber and issues an invoice to the wholesaler (appellant)." In this connection it appears undisputed that appellant was charging appellee 6% interest on appellee's note up to the date the customer, or consignee, actually received the lumber and acknowledged same to appellant, and not from the date that appellant claims he purchased and became the owner of each car of lumber from appellee. On practically every shipment more than two weeks elapsed before the consignee acknowledged receipt to appellant.

A special master (an attorney) took voluminous testimony, observed the witnesses and obviously was in a better position than this court to evaluate all the evidence adduced. His findings, which we think are sup-

ported by the testimony, contains this recital: ". . . that term '8 per cent commission,' entered as a charge against defendant (appellee) at various places in the account against defendant and in the settlement sheets on the 79 cars of lumber and in the monthly statements furnished the defendant, was a commission to plaintiff for handling the lumber for defendant, as the defendant, W. E. Matkin, testified. On the basis of the foregoing record, together with the entire record, the master finds that plaintiff handled the sale of defendant's lumber as a commission agent and that it was proper for the plaintiff (appellant) to couple this agency with the mortgage interest he had in the lumber sold, and to carry on the transactions in the name of the plaintiff so that the proceeds from the sale of the mortgaged lumber might be properly and certainly credited to the mortgage debt which the defendant owed to the plaintiff. . . . that the profit made by plaintiff on the cars of lumber handled for defendant was a secret profit and that same was kept undisclosed by plaintiff . . ."

We do not attempt to detail the testimony. It appears to be in irreconcilable conflicts. It suffices to say that after considering it all, we hold that the preponderance thereof was not against the chancellor's findings. We have not overlooked other alleged errors by appellants, we find each to be without merit.

The decree is affirmed.

BAKER *v.* KANSAS CITY FIRE & MARINE INSURANCE COMPANY.

5-1089 300 S. W. 2d 264

Opinion delivered March 18, 1957.

[Rehearing denied April 22, 1957]

Rhine & Rhine and *John C. Watkins,* for appellant.

Kirsch, Cathey & Brown, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an action on an insurance policy. The appellants, Emile Baker, H. L. Houston, and First National Bank of Paragould, were the plaintiffs in the court below and filed this action against the appellee to recover $2,214.35 and penalty, interest and attorney fees. From a judgment in favor of the appellants for only $885.74 they prosecute this appeal.

The facts are somewhat complicated. On May 29, 1952 Emile Baker and Jim Miller (hereinafter referred to merely as "Baker" and "Miller") purchased a rice combine machine from H. L. Houston, a dealer in Paragould. As a part of the consideration, Baker and Miller executed to Houston a title retaining note for $3,600, one-half of such amount being due December 1, 1952, and the balance due December 1, 1953. As a part of the purchase agreement, Baker and Miller agreed that, until the entire obligation should be paid, the rice combine machine would be insured against fire, with loss payable clauses to Houston and his transferee; and Houston promptly endorsed the note, apparently with recourse, to the First National Bank of Paragould (hereinafter called "Bank"). The appellee, Kansas City Fire & Marine Insurance Company (hereinafter called "Kansas City Company") issued its policy for $4,000, dated May 29, 1952, insuring the said rice combine machine against fire, naming Baker and Miller as the assureds, with loss payable clauses to Houston and the Bank, as their respective interests might appear. This policy

was for one year and was held by the Bank, along with the note.

Baker and Miller used the rice combine machine in their farming operations in 1952. In January, 1953, Baker delivered the machine to Miller and attempted to orally transfer his interest or equity to Miller; but Houston and the Bank refused to release Baker from liability to them. Miller moved the rice combine machine to Mississippi County, and on April 13, 1953 he paid the Bank $1,000 on the $3,600 note. On May 29, 1953 the Bank and Houston obtained a renewal of the fire insurance policy from the Kansas City Company, with exactly the same provisions as the first policy. The new policy was also held by the Bank.

Without the knowledge of Houston or the Bank or Baker, Miller, on June 15, 1953, applied for and received a fire insurance policy for $6,000 on the same rice combine machine, which policy was issued by the Consolidated underwriters of the South Carolina Insurance Company (hereinafter called "Consolidated Underwriters"). This policy named only James Miller as the assured, and had no loss payable clause to anyone. None of the appellants knew of the Consolidated Underwriters' policy until after the fire of November 25, 1953.

In the fall of 1953 Miller went to Michigan; and on November 25, 1953 the said rice combine machine, while stored on a farm in Osceola, Arkansas, was damaged by fire of an undetermined origin. Houston and the Bank promptly notified the Kansas City Company of the fire; and later had an estimate made of the damage, which was shown at $2,214.53, for which amount Baker joined them in filing this suit.

For defense, the Kansas City Company claimed, *inter alia,* that it was only liable for 40% of the total damage, since the Consolidated Underwriters had issued a policy for $6,000 on the rice combine machine. The answer says: "By reason of said double insurance, therefore, this defendant's maximum liability to the insureds and any loss payee under said policy would not exceed

40% of the whole loss and damage sustained in the fire of November 25, 1953.[1]''

The Kansas City Company named Miller as a cross-defendant and he was served with non-resident process and defaulted. The Kansas City Company did not bring in the Consolidated Underwriters as a party to this case, but attempted to defend on the basis that there was a valid outstanding policy issued by the Consolidated Underwriters and that the effect of the two policies was to make the double insurance.

The cause was tried by the Circuit Court without a jury; and the Court found that at the time of the fire the rice combine machine was insured by both the Kansas City Company and the Consolidated Underwriters; that both policies were in full force and effect for the total sum of $10,000; and that both policies were ''valid and collectible insurance.'' The Court also found that the total damage to the rice combine machine was $2,214.35; and that the appellants were entitled to recover from the Kansas City Company only 40% of said damage, or $885.74.

Baker, Houston, and the Bank have appealed, making two points, the first of which is: ''That the Court's finding, that the policy . . . issued by the Consolidated Underwriters of South Carolina Insurance Company was valid and collectible insurance with regard to these plaintiffs, was error.'' There are other issues in

[1] The answer of the Kansas City Company pleaded this provision in its policy: "This Company shall be liable in event of loss for no greater proportion thereof than the amount hereby insured bears to 100% of the actual cash value of the property insured hereunder at the time such loss shall happen." It was shown that each policy (that is, the Kansas City policy and the Consolidated Underwriters policy) had identical clauses reading: "This Company shall not be liable for loss if, at the time of loss or damage, there is any other valid and collectible insurance which would attach if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance, and then only after all such other insurance has been exhausted." Since the clauses were identical, the Kansas City Company has conceded that the effect of these clauses in both policies was the same as *double insurance*. The effect of this concession will be discussed in this opinion. This clause differentiates the case at bar from such cases as *Planters Mutual Ins. Co.* v. *Green*, 72 Ark. 305. 80 S. W. 151; and *Roach* v. *Arkansas Farmers Mutual Fire Ins. Co.*, 216 Ark. 61, 224 S. W. 2d 48.

the case that we need not discuss, because we reach the conclusion that the judgment should be reversed and the cause remanded.

The Kansas City Company defended on the basis that there was ". . . other valid and collectible insurance." The burden was on the Kansas City Company to prove that, *as regards the plaintiffs,* there was outstanding a valid and collectible policy issued by the Consolidated Underwriters. The Kansas City Company also proved that the Consolidated Underwriters had issued a policy to Jim Miller. The evidence did not show that Houston and the Bank and Miller could have brought action and collected on that policy. In the case of *Langford* v. *Searcy College,* 73 Ark. 211, 83 S. W. 994, a policy of insurance had been issued to an original owner, who had sold the property. The purchaser of the property brought suit to recover on the policy of insurance. This Court, speaking through Judge Battle, held that a policy issued to the vendor could not be sued on by the purchaser, saying: "The contract of insurance was a personal contract . . . It did not run with the title to the property . . ." So the contract of insurance between the Consolidated Underwriters and Jim Miller did not automatically inure to the benefit of Houston and the Bank and Baker, who are the plaintiffs. The Kansas City Company never showed that the plaintiffs could have recovered on the $6,000 policy issued by the Kansas City Company. The fact that the Consolidated Underwriters had issued its draft for $603.08 merely shows an effort to compromise for a small amount.[2] It did not show a clear admission of liability. The Kansas City Company alleged the affirmative defense that there was other valid and collectible insurance; and the burden was on the Kansas City Company to sustain that allegation.[3] If the Con-

[2] This draft was payable to Jim Miller, First National Bank and Lee Wilson & Company. The Vice President of the Bank testified that he never saw the draft until it was exhibited to him while he was on the witness stand.

[3] Some cases holding that the burden of proving "other insurance" is on the defendant are: *St. Paul Fire & Marine Ins. Co.* v. *Westmoreland,* 130 Tex. 65, 105 S. W. 2d 203; *De Shields* v. *Ins. Co. of N. America,* 125 S. C. 457, 118 S. E. 817; and *Tourtlott* v. *West Bangor, etc.,* 126 Me. 118, 136 A. 481.

solidated Underwriters had been brought into the litigation, any number of defenses might have been pleaded and proved to avoid full liability.

Therefore, we conclude that the Trial Court was in error in holding that the Kansas City Company was liable for only a *pro rata* part of the loss. The judgment is reversed and the cause is remanded for a new trial; and upon remand the Consolidated Underwriters may be brought in and the issues litigated with all possible parties before the Court.

DAILEY *v.* CITY OF LITTLE ROCK.

5-1214 299 S. W. 2d 825

Opinion delivered March 18, 1957.

Harold Hall, for appellant.

O. D. Longstreth, Jr., City Atty.; *Joe Brooks,* Asst. City Attorney, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a taxpayer's suit by the appellant, Dalton Dailey, to enjoin appellees, City of Little Rock, and its officers, from

carrying out the provisions of a city ordinance and performing the terms of a contract executed between the City and International Harvester Company for the "lease purchase" of 14 garbage trucks for use by the Sanitation Department of the City.

Appellant alleged the contract was void on three grounds: (1) That it was not let to the lowest responsible bidder; (2) that it provided for payment of moneys by the City beyond the current fiscal year in contravention of Amendment 10 to the Arkansas Constitution; (3) and that the trucks were not suitable for the use for which they were intended. The City filed a motion to dismiss and answer in which it admitted enactment of the ordinance and alleged that the funds appropriated therein were for use as rental of the trucks pursuant to a "Lease Agreement" executed by it with the International Harvester Company. All other material allegations were denied.

At the trial appellant offered no evidence in support of his allegation that the contract in question was void on the first and third grounds above set out. Under the "Lease Agreement" in question International Harvester Company purported to lease the 14 garbage trucks to the City for a term commencing with the date of delivery in 1956 and ending December 31, 1956, with the right of renewal at the option of the City on January 1, 1957, for a year, on January 1, 1958, for another year, and on January 1, 1959 for a period of 8 months. "Rentals" under the agreement were payable as follows: For rent to December 31, 1956, $27,000 cash and $7,200 credit on 11 used trucks traded in; and thereafter rentals of $3,681.85 per month for such term as the City should see fit to exercise its option to renew during the life of the agreement. The City was also granted an option to purchase the trucks at the end of the lease period in 1956, or during any renewal thereof, for $152,018.24, and all moneys paid as rentals were to be credited on the purchase price.

The only other proof adduced by appellant was the testimony of a deputy city clerk to the effect that the

City had $29,617.07 in the general fund on January 1, 1956, and $181,802.79 in said fund on July 30, 1956; that an ordinance earmarked $50,000 to be in the fund at the end of 1956; and that, based on anticipated revenues and expenditures for the balance of the year, there would probably be $50,000 in said fund at the end of 1956. The Chancellor found the evidence insufficient to support the relief prayed in the complaint which was dismissed for want of equity.

For reversal appellant argues the agreement between the City and International Harvester Company is not a lease with option to purchase but is actually a contract of purchase, or sale, which is void because it constitutes a contract made by the City in excess of its revenue for the year in which the contract was made in violation of Amendment 10 to the Constitution. Appellees just as earnestly insist that the instrument is a true lease agreement with option to purchase which did not commit any revenues beyond the calendar year 1956. While it must be conceded that the agreement has characteristics common to both a lease and a sale, we find it unnecessary to determine the issue. Regardless of the true nature of the transaction, the burden was on the appellant to show that performance of the agreement would require an expenditure of revenues by the City in excess of those for the year in which the contract was made. The Chancellor was justified in concluding that appellant did not discharge this burden. The deputy clerk who gave the only testimony in this connection was not asked, and did not state, the amount of revenues of the City for the year nor did he indicate that the agreement would commit the City for an amount in excess of unexpended revenues for the year. The implication of his opinion that the earmarked sum of $50,000 would be left in the general fund at the end of the year, after all anticipated expenditures, is to the contrary. Under this state of the proof, we cannot say the Chancellor erred in denying the relief prayed.

Affirmed.

JACK TAR OF ARKANSAS, INC. *v.* JOHNSON.

5-1215 299 S. W. 2d 822

Opinion delivered March 18, 1957.

[redacted]

A. J. Thompson and *Wootton, Land & Matthews,* for appellant.

Bailey, Warren & Bullion, for appellee.

MINOR W. MILLWEE, Associate Justice. Vance Bryan was preparing to construct the Jack Tar Hotel and Baths at Hot Springs, Arkansas in 1948 when he entered into a contract with appellee, A. W. Johnson, doing business as A. W. Johnson Company, to do the plumbing, heating and air conditioning work upon a cost plus basis. Bryan, a licensed general contractor, supervised the entire project. Although he started the project as an individual, it was later incorporated as Jack Tar of Arkansas, Inc., the appellant here. Under the agreement Bryan was to settle with appellee for all moneys due monthly.

During the course of construction which ran from December, 1948, until February, 1953, appellee performed work amounting to approximately $130,000 and the parties had frequent accountings. Bryan and the appellant corporation secured advances from the Recon-

struction Finance Corporation based upon expenditures which included payments to appellee. Monthly statements were submitted by appellee which were carefully checked by Bryan and adjustments were frequently made at his request. Bryan made the monthly payments promptly for awhile but gradually got behind.

In March or April, 1953, appellee submitted a complete account of the entire transaction consisting of about 75 pages and showing a balance still due him of approximately $12,000 under the contract. The instant suit was brought May 1, 1953, to establish and foreclose a lien for the balance alleged to be due on the account. This appeal is from certain parts of a decree awarding judgment in appellee's favor in the amount of $12,633.45 plus interest on the account.

Appellant first contends the court improperly charged it with the cost of repairs and replacement of certain parts as set out in the account which were alleged to be defective. These charges for repairs and replacements were made in July, August and November, 1952, and amounted to approximately $230.00 after credits were given in the amount of $212.06 for replacement parts furnished by a manufacturer under its warranty of replacement for defective parts. In contending it should not be charged for this work, appellant relies on the general principle that a contractor under a cost plus agreement is not entitled to charge for the cost of doing work over which was improperly done initially, as set out in 9 Am. Jur., Building and Construction Contracts, Sec. 20. But the chancellor evidently concluded that a major portion of the repairs in question were necessitated either by Bryan's own negligence or that of the electrical contractor in failing to hook up an electrical oil safety switch and not because the work was improperly done by appellee initially. It is undisputed that appellee was in no manner responsible for the electrical work which was done by an electrical contractor. Appellee testified that he explained the importance of hooking up the switch to said contractor and furnished him a guide on how it should be done; and that the lat-

ter's failure to hook up the switch resulted in the burning up of the installation. It does appear, however, that appellee failed to properly credit appellant with $60.34 of the replacement amount allowed by the manufacturer for another installation.

Appellant also contends it was never given credit for a payment of $7,191.39 which it made on the account by its check dated January 17, 1949. In this connection the account showed items charged by appellee on December 31, 1948, in the total amount of $3,821.71 and a credit to appellant in the same amount on January 18, 1949. According to appellee the check for $7,191.39 covered the charge of $3,821.71 and $3,374.98 worth of soil pipe paid for at that time. On cross-examination appellee explained the fact that the soil pipe purchase was not entered on the books in this manner: "Q. Then the first payment that was due was $3,821.71, is that right? A. That was on this particular account. He (Bryan) paid cash, I believe, at that same time for a truck-load of soil pipe that had been delivered during the month and he was anxious to get the receipted bills to submit to the government, and he paid for the soil pipe at the same time and my bookkeeper handled it as a cash item because it had never been posted to the books. Q. Was this part of the contract? A. Yes, sir. Q. Do you remember the amount of that particular order? A. No, sir, but I have a copy of the invoice. Q. You say that was paid for in cash? A. No, I said we handled it as a cash item. Q. In other words, you never entered it on the books as part of this contract? A. No, it was counted as a cash sale. Q. What was the reason for that? A. The deal was that he would pay at the end of the month for material during the month, he paid for this practically on the day it was delivered and it was not necessary to carry it as a balance forward because he had paid for it. Q. Wouldn't you show it as a credit on the account? A. Some people might, but I wouldn't. That's the way usually; when we sell anything ordinarily, if it's handled as a cash sale to cut down on bookkeeping expense. Q. Then that particular truck load of material does not appear on this account anywhere?

A. No, sir. Q. Would that item run several thousand dollars? A. Oh, about three thousand dollars, I don't remember exactly."

On redirect examination appellee further testified: "Q. Mr. Bryan has referred to a cancelled check that he made payable to your company in the amount of $7,-191.39, that he states is not indicated on your exhibit No. 1 or your account of the job, how do you explain that? A. He was given credit for $3,821.71 for a part of that check, the rest of it was for a truck load of soil pipe that was delivered January 10, paid for on January the 18th, and we handled it as a cash item as though somebody had come in and bought a truck load of pipe, gave us a check; in other words, we didn't charge it through accounts receivable. Q. Did you deliver $3,-374.98 soil pipe to this job? Is it reflected anywhere in here? A. No, it was not charged, and therefore there's no credit. Q. Was $3,816.41 charged to this job for December '48? A. They made a $5.30 error, they charged it $3,821.71. Q. What do these two items total? A. $7,191.39. Q. Is that the exact amount of the check given you? A. Yes."

Although Bryan appeared to have in his possession at the trial all the appellant's checks and the various vouchers issued in connection with the project, he offered no tangible evidence in contradiction of appellee's explanation of the transaction involving the check for $7,191.39. He would not deny delivery of the soil pipe as indicated by appellee. If the credit of $3,821.71 had been paid by a separate check for that amount, or in some manner other than as indicated by appellee, it should have been a simple matter for Bryan to have made such proof. The chancellor also probably considered it significant that Bryan continually accepted monthly statements for over four years and without any indication that proper credit had not been given for the $7,191.39 payment until June 18, 1954, the day of trial.

The factual issues presented were determined by the chancellor on testimony that is to some extent con-

flicting. Except for the item of $60.34 previously mentioned, we are unable to say his findings are against a preponderance of the evidence. The decree is accordingly modified by reducing the judgment in appellee's favor to $12,573.11 plus interest. With this slight modification, the decree is affirmed.

MOORE ET AL. *v.* STATE.

4862 299 S. W. 2d 838

Opinion delivered March 18, 1957.

W. Harold Flowers, for appellant.

Tom Gentry, Atty. General; *Paul C. Rawlings,* Asst. Atty. General, for appellee.

George Rose Smith, J. The four appellants, Moore, Boyd, Boone, and Byrd, were convicted of murder in the first degree, committed in the perpetration of robbery, and were sentenced to death. A number of grounds are urged for a reversal of the judgment.

It is first contended that the court should have granted a change of venue. The petition for a transfer of the case did not comply with the statute, in that it was not supported by the affidavits of two credible persons not related to the defendants. Ark. Stats. 1947, § 43-1502. Nor was there any sworn testimony (except the affidavits of the defendants themselves) to show that the minds of the inhabitants of the county were so prejudiced that a fair trial could not be had. *Ibid.,* § 43-1501. The defense offered only the unsworn statements of the four attorneys who were appointed to defend the case. These gentlemen said in substance that they had unsuccessfully attempted to find and employ some one to make a survey of the public feeling in the county. It was their opinion — and this was at least in part a conclusion — that their failure to find some one qualified and willing to make the survey was due to the existence of local prejudice. Newspaper reports of the crime were also introduced in support of the petition, but we do not share counsel's opinion that these reports were biased.

In the absence of competent evidence to establish the existence of prejudice the court did not abuse its discretion in denying a change of venue. Appellants rely solely upon the decision in *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622, but that case is quite unlike this one. There the attorneys submitted a sworn statement, and offered to testify, that they had questioned numerous residents of the county and all thought the accused

could not obtain a fair trial, that members of the jury panel had stated they could not try the accused fairly, and that public feeling was so antagonistic that the statutory affidavits could not be had. In the *Hildreth* case the judge refused to hear the proffered testimony and denied the petition on the basis of his personal belief that a fair trial could be had. In reversing that action we did not say that a change of venue should have been granted; we merely held that the court erred in refusing to hear the testimony. That decision does not require a trial court to order a change of venue in the absence of any testimony that the statutory ground therefor exists.

A second contention is that the defendants' confessions were admitted in evidence without other proof that the offense charged had been committed. Ark. Stats., § 43-2115. According to the confessions, the four appellants were riding together in a truck on the morning of May 9, 1956. They picked up the decedent, M. R. Hamm, who was on the highway soliciting a ride to his home a short distance away. Instead of driving Hamm to his home the defendants took him to a lonely spot farther down the lane on which Hamm lived. There the four men beat the decedent with their fists and with a club, knocking him down several times. They took from him a coin purse and a larger purse, together containing $10.11. After dividing the money the defendants drove away rapidly, leaving Hamm lying by the roadside.

Apart from the confessions there is ample evidence to show that the offense was committed. Testimony independent of the confessions indicates that Hamm left his home on the morning of May 9 to go into Texarkana for the purpose of paying a bill and buying medicine. He was last seen several hours later on his way home. Hamm was missing until May 14, when two of the appellants, Boyd and Boone, were questioned in connection with another robbery and admitted the attack upon Hamm. These two showed the officers where the assault had taken place, and Hamm's purse was found by the road there. His body, badly decomposed, was discovered under some brush about two tenths of a mile away.

Later on the other two appellants were arrested and also led the officers to the scene of the attack. In view of the fact that Hamm was missing for five days, that his body was found far from the route he would normally have followed in returning home, and that his purse had been taken, the jury would have been warranted in concluding from this evidence alone that Hamm had been robbed and had not died from natural causes. *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32, and cases there cited.

The most serious question in the case is whether the court erred in permitting the State to prove that two of the defendants, Boone and Boyd, assaulted and robbed another man, T. B. Fenwick, five days after the attack upon Hamm. Although the two crimes were somewhat similar, in that both victims were picked up while hitchhiking, the record establishes no connection between the two offenses. In charging the jury with reference to the proof of the Fenwick robbery the court gave an instruction similar to that set out in *Scrape* v. *State,* 189 Ark. 221, 71 S. W. 2d 460, by which the jury were told that the Fenwick incident "might be considered by you as showing, if it does show, a scheme and a design on the part of these two defendants in the commission of crime, and for no other purpose."

That a defendant cannot be convicted of one crime by proof that he committed another is a fundamental principle of fairness conceded by every one. Judge Hemingway ably summarized the rule in *Billings* v. *State,* 52 Ark. 303, 12 S. W. 574: "The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issue. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist exclusively of the transaction that forms the subject of the indictment, and matters relating thereto. To enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule it is generally improper

to introduce evidence of other offenses; but if facts bear upon the offense charged, they may be proven, although they disclose some other offense. The test of admissibility is the connection of the facts offered, with the subject charged."

There are, of course, innumerable situations in which proof of other conduct on the part of the accused is relevant to the offense charged and is therefore perfectly competent, even though it also shows the commission of another crime. Many such situations were discussed in *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804, and need not again be reviewed. The question here is whether evidence of the Fenwick robbery was admissible to show a scheme and design on the part of Boone and Boyd in the commission of crime.

Our many cases admitting evidence to prove design fall naturally into two classes, corresponding to the two senses in which the word design is commonly used. First, design may simply indicate intent or conscious knowledge, as when one says that a thing was done by design rather than by accident or mistake. This usage is common in cases involving conduct which may be either innocent or criminal, depending upon the accused's guilty knowledge or intent. A typical instance is *Johnson* v. *State,* 75 Ark. 427, 88 S. W. 905, which involved a charge of larceny growing out of an elaborate confidence game. In holding that proof of similar conduct was admissible to show design (in the sense of intent), we said: "The general rule, of course, is that one crime cannot be proved as tending to prove another; but when the question of intention in the performance of acts becomes material, then similar acts which tend to show whether an innocent or criminal intent is present become admissible. This is frequent in cases of uttering forged instruments, passing counterfeit coins, receiving stolen property, and is applied in larceny as well as other crimes. 1 Wigmore, Evidence, § 346. The question was recently considered in this court, and this rule announced: 'When there is a question as to whether or not the crime charged was by accident or mistake, or

intentional and with bad motive, the fact that such act was one of a series of similar acts committed by the defendant is admissible, because it tends to prove system and show design.' *Howard* v. *State,* 72 Ark. 586 (82 S. W. 203)." Among other cases using the word design to mean intent or guilty knowledge are *Ross* v. *State,* 92 Ark. 481, 123 S. W. 756, and *Norris* v. *State,* 170 Ark. 484, 280 S. W. 398.

It is quite apparent that cases such as these do not support the State's position in the case at bar. The only evidence that connects these appellants with Hamm's death arises from their admissions and confessions. That proof, which must have been accepted by the jury, shows that these men beat their victim for the avowed purpose of robbing him. The question is not that of the intent with which Hamm was attacked. Rather, it is whether the attack took place at all; if it did, it was unquestionably done with criminal intent and constituted robbery. True, the appellants insisted in their confessions that they did not intend to kill Hamm, but that issue was eliminated by an instruction to the effect that a specific intent to take life is not necessary if the life is unlawfully taken in the perpetration of robbery.

In its other sense the word design means a plan of action formed in the mind and to be carried out in the future. Proof of design in this sense is undoubtedly competent, for the fact that a crime was planned in advance tends to show that it was actually committed. "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out." Wigmore on Evidence, (3d Ed.), § 102; see also § 300. We have approved this principle on many occasions. For example, in a prosecution for murder in the perpetration of robbery it was proper for the State to prove that three robberies were planned in advance, although only one was attempted. *Ford* v. *State,* 34 Ark. 649. Again, in a prosecution for receiving stolen cattle the State could prove that the accused was engaged in that

business and had offered to pay a witness $8 a head for any cattle that he might steal and deliver to the accused. *Long* v. *State,* 192 Ark. 1089, 97 S. W. 2d 67. Other cases in point include *Nichols* v. *State,* 153 Ark. 467, 240 S. W. 716; *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; cf. *Jenkins* v. *State,* 191 Ark. 625, 87 S. W. 2d 78.

It is likewise apparent that the proof of the Fenwick robbery does not come within the scope of this second aspect of design. The Fenwick incident occurred five days after Hamm was killed; it has no tendency to show that the robbery of Hamm was planned in advance. There is actually no evidence of an independent plan, formed ahead, for the attack upon either victim.

It is plain enough that the robbery of Fenwick was not competent to show design either in the sense of criminal intent or in the sense of a premeditated scheme. If the jury could not draw either of those permissible inferences from proof of the subsequent crime, of what value was the testimony to them? The only possible answer is that this proof established the fact that Boone and Boyd were criminals and were therefore likely to be guilty of the offense for which they were being tried. In short, the jury were afforded the opportunity of finding Boone and Boyd guilty of murder upon the basis of proof that they had committed robbery on another occasion.

We have in our reports more than a hundred decisions on this general subject. It may be conceded, as we indicated in the *Alford* case, *supra,* that these cases cannot all be harmonized with the principles stated there and here, or, indeed, with one another. The subject is one in which confusion is especially apt to arise. As we have seen, when the offense involves conduct that may be innocent or guilty, depending upon intent, it is proper for the State to offer evidence of similar conduct on the part of the accused in order to establish the necessary intent. But once the statement has been made that evidence of other offenses is admissible to

show intent, the rule may be inadvertently applied in situations to which it is really not applicable.

Perhaps the most conspicuous departure from the general rule occurred in *Scrape* v. *State, supra.* There, in a prosecution for the robbery of a filling station, the State was allowed to prove an attempted robbery of another filling station on the following night. We held the evidence admissible, citing *Wilson* v. *State,* 184 Ark. 119, 41 S. W. 2d 764, and *Sibeck* v. *State,* 186 Ark. 194, 53 S. W. 2d 5. It is at once apparent that neither decision supports the principal case, for both the *Wilson* case and the *Sibeck* case involved conduct that might have been innocent or criminal, according to intent. Thus a sound rule of law was lifted from its context and by oversight applied to a different fact situation.

It is easy to demonstrate that isolated cases such as the *Scrape* decision are out of harmony with the great majority of our opinions on the subject. A few examples will suffice. In *Wood* v. *State,* 157 Ark. 503, 248 S. W. 568, we held that evidence of a prior charge of robbery was inadmissible in a later prosecution for robbery. This language was quoted with approval by Judge Frank Smith: "On the trial of one indicted for robbery, as in the case of other criminal prosecutions, the general rule is that evidence is not admissible which shows, or tends to show, that the accused has committed a crime wholly independent of the offense for which he is on trial. Under this rule, therefore, evidence of another separate and distinct robbery, committed the preceding night, by the defendant upon another person, in the same neighborhood, in much the same way, is not admissible in evidence against one who is being tried for robbing a pedestrian on the street in a city by pointing a pistol at him." It will be observed how precisely this language fits the case at bar.

That two unconnected offenses do not themselves establish a scheme or design was unequivocally decided in *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701. There the accused was charged with the theft of mules. We reversed the judgment because the State had been

allowed to prove that when the stolen animals were found in the accused's possession he also had in his possession some stolen sets of harness. Chief Justice McCulloch analyzed the issue in detail: "We are of the opinion that it was error to admit the testimony of other thefts and appellant's possession of the other property which had been stolen. This court has adopted a very liberal rule in declaring exceptions to the general rule against proof of other crimes. We have said that proof of other crimes of a similar nature, shown to have been committed about the same time, may be admitted as disclosing the good faith or criminal intent of the accused, or to prove a scheme or plan or system of committing crime, or to show a connection between that particular crime and the one under investigation. (Citing seven cases.) The proof in the present case does not, however, fall within the exception. The proof of the theft of the harness had no connection with the alleged theft of the mules. It occurred at a different time and place, and under those circumstances it had no tendency to establish a plan or scheme which included the theft of the stock, and formed no connection with that incident. The court admitted the testimony on the theory that it tended to establish the good or bad faith of the accused, but we do not think that it was proper for that purpose. The assignment falls squarely within the decision of this court in the recent case of *Mays* v. *State,* 163 Ark. 232 [259 S. W. 398]. In that case the defendant was convicted of the offense of receiving stolen property, and the State proved the theft of a valise containing woman's apparel, that two of the dresses were found in the possession of appellant, and that other stolen property had also been found in his possession. We held that the testimony was incompetent, and the same reasoning calls for the exclusion in the present case of testimony relating to other thefts. The fact that the stolen harness was found in appellant's possession at the same time that the mules were found there does not relieve the testimony of the objection that it relates to another crime."

The charge in *Williams* v. *State,* 183 Ark. 870, 39 S. W. 2d 295, as in the case before us, was murder com-

mitted in the perpetration of robbery. In holding that the admission of testimony concerning other offenses, including robbery, was prejudicial we said: "There is no connection between these various crimes and the killing of McDermott, and the only, and the necessary, effect of this testimony was to show the desperate character of appellant as a confirmed criminal. There was no question as to the purpose for which appellant held up Chance, and that he robbed him, and that while still at the scene of the crime he killed the officer who attempted to arrest him."

There are many other holdings to the same effect. Recent thefts of saddles or bridles cannot be shown in a prosecution for the theft of horses. *Dove* v. *State,* 37 Ark. 261; *Endaily* v. *State,* 39 Ark. 278. Where the accused was charged with assault with intent to kill, after he had broken into a woman's room with a pistol, the State could not show two other occasions on which he had broken into women's rooms with a pistol. *Morris* v. *State,* 165 Ark. 452, 264 S. W. 970. A separate attempt to rape cannot be proved in a prosecution for rape. *Alford* v. *State, supra.* Evidence of the theft of other cars is inadmissible upon a charge of larceny of an automobile. *Rhea* v. *State,* 226 Ark. 664, 291 S. W. 2d 521. See also *Davis* v. *State,* 170 Ark. 602, 280 S. W. 636.

Thus we are firmly committed to the universally accepted rule that evidence of other offenses is inadmissible when it has no permissible relevancy to the crime at issue and can only serve the purpose of persuading the jury that since the accused has been guilty of similar offenses he is therefore likely to be guilty of the crime charged. It follows that the introduction of proof concerning the Fenwick robbery constituted prejudicial error as to Boone and Boyd.

Whether the error was also prejudicial as to Moore and Byrd, who had no part in the later crime, is apparently a question of first impression in this state. In admitting proof of the Fenwick robbery the court instructed the jury that the testimony could not be considered as to Moore and Byrd. It is of course possible

that the jury were able to obey the court's admonition and were not adversely influenced as to Moore and Byrd. On the other hand, the admission of the Fenwick proof was prejudicial as to Boone and Boyd, and the fact that the jury found all four defendants guilty and imposed the same penalty in every case indicates that the prejudicial effect of the testimony may have carried over to the other two defendants.

In the particular circumstances of this case we think the error was prejudicial to all four defendants. It is quite possible that if the attack on Fenwick had been mentioned only casually in the course of this prolonged trial, its effect as to Moore and Byrd would have been overcome by the court's admonition to the jury. That, however, is not the situation at all. The record discloses beyond question that the State undertook to, and did, prove the Fenwick robbery in every detail and beyond a reasonable doubt. Before it had even been shown how Hamm met his death Fenwick was called as a witness and described at length how Boone and Boyd beat him with a claw hammer and forcibly took his wrist watch and a wallet containing an 1891 silver dollar. Seven law enforcement officers testified about the investigation of Hamm's death; all of them except a police photographer also testified about the Fenwick crime. The wrist watch had been found in Boone's cap and was introduced in evidence. The silver dollar was traced, recovered, identified, and received in evidence. The officers described their search for the hammer and accounted for their failure to produce it as well. A substantial portion of the trial was devoted to the State's meticulous proof of the later crime, and it was mentioned several times in the prosecution's arguments to the jury. It is fair to say that the proof of the attack upon Fenwick was even more conclusive than the proof of that upon Hamm, for the latter involved circumstantial evidence while the former was proved by direct testimony.

"Where the effect of an erroneous instruction or ruling of the trial court might result in prejudice, the rule is that the judgment must be reversed on account of such ruling, unless it affirmatively appears that there

was no prejudice." *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380. We cannot conscientiously and sincerely say that the court's admonition eliminated the possibility that prejudice to Moore and Byrd resulted from the voluminous testimony relating to the brutal attack upon Fenwick. All four of the defendants had acted in concert in beating and robbing Hamm. When it was shown that two of these men also beat and robbed Fenwick, it would be natural for the jury to conclude that the other two would have joined in the attack had they been present. When the matter is thus open to doubt we are not warranted in holding that the record affirmatively shows the absence of prejudice.

Reversed.

Mr. Justice HOLT joins in the opinion except with respect to the trial court's denial of a change of venue; on this point he agrees with the concurring opinion of Mr. Justice MCFADDIN. The Chief Justice and Mr. Justice MILLWEE would affirm the judgment.

ED. F. MCFADDIN, Associate Justice (concurring). I concur in the reversal of this case, but for reasons entirely different from those stated in the majority opinion: hence this separate concurrence.

I. *Proof Of Acts Of A Similar Nature.* The majority is reversing the judgment because of the admission of the testimony regarding the attack on Mr. Fenwick; and the majority says that any admission of testimony regarding the Fenwick incident violates the holding of this Court in *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804. I dissented in the Alford case; and I maintain that the majority opinion in the present case does not answer the cases cited in my dissent in the Alford case. I think the Trial Court was correct in the case at bar in allowing the testimony regarding the Fenwick incident; and I would not reverse the judgment for that reason.

II. *Change Of Venue.* My vote to reverse the judgment in the case at bar is because of the failure of the Trial Court to grant a change of venue. I think

the matter of change of venue falls within the purview of our holding in *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622.

The situation in the case at bar needs to be stated in some detail regarding the motion for change of venue. When the defendants were unable to employ counsel, the Court appointed four splendid lawyers of the Texarkana, Arkansas bar to represent the defendants, jointly and severally. These attorneys were Dennis K. Williams, Joe Rosenblum, Van Johnson and William H. Arnold III. Each of these attorneys served, as court-appointed counsel, without compensation of any kind, and exemplified the fine ethics of the legal profession in acting as officers of the court in such capacity.[1] The Trial Court advised the four attorneys that they would work together, but each would take the responsibility for the individual interest of one particular defendant. The feeling against these four defendants was so high in Miller County that the defendants were kept in another county and the place of confinement was kept secret. The defendants were at one time confined in the jail in Hempstead County and at one time they were placed in the State Penitentiary for safekeeping. When the attorneys desired to consult with their clients, they were taken to the place where the defendants were confined, rather than having the defendants brought back to Miller County. All of this is reflected in the record.

The attorneys filed a petition for change of venue, which reads:

"Come the defendants, James E. Moore, James Boyd, Rogers Boone and Willie Henry Byrd, jointly and severally, and respectfully petition the Court for a change of venue and state:

"This petition for change of venue is made jointly and severally by each and all of us.

[1] When the defendants—or someone for them—employed present counsel to perfect this appeal, the Court released the court-appointed counsel.

"We are Negroes and are charged with robbing and murdering M. R. Hamm, an aged white man. Almost immediately upon being arrested in Miller County, Arkansas on the 15th day of May, 1956, we were all taken to the Clark County Jail in Arkadelphia, Arkansas, where we remained several days, and thereafter we were transferred to the Arkansas State Penitentiary, where we remained several days, and thereafter we were transferred to the Hempstead County Jail at Hope, Arkansas, where we remained several days. We were advised by the officers we were taken to these places for safe keeping.

"When we were arraigned the first time, we were brought secretly by the Officers from the Hempstead County Jail at Hope, Arkansas, to the Miller County Jail at Texarkana, Arkansas. Attorneys were appointed for us and after brief consultation with one of the attorneys, we entered a plea of not guilty and were immediately taken back to the Hempstead County Jail at Hope, Arkansas; during the meantime, an amended information was filed against us and we were again secretly brought to Texarkana, Arkansas, and arraigned and quietly placed in the Miller County, Arkansas Jail, at Texarkana, Arkansas.

"Upon inquiry from the officers as to why we were taken away from Miller County, Arkansas, we were advised the feelings in the minds of the inhabitants of Miller County, Arkansas were so prejudiced against us that there was great danger of mob violence.

"The newspapers of Texarkana, Arkansas-Texas published that we had confessed to killing M. R. Hamm, when in truth and in fact, no such confession or statement was made by either or all of us; this erroneous publication caused the minds of the inhabitants of Miller County, Arkansas to become so prejudiced against each and all of us that we cannot receive a fair and impartial trial in said county.

"We and each of us believe that the minds of the inhabitants of Miller County, Arkansas are so prejudiced against us that each and all of us believe that a

fair and impartial trial cannot be had in Miller County, Arkansas.

"Wherefore, James E. Moore, James Boyd, Rogers Boone and Willie Henry Byrd, jointly and severally, pray the Court order removal of this criminal cause to some other county for trial."

The petition for change of venue was not supported by the affidavits of witnesses, as required by law, for the admitted reason that the attorneys appointed by the Court stated that they were unable to obtain any persons to make a survey of Miller County so as to be prepared to testify in the trial. The attorneys published a notice in the Texarkana Gazette for three days, asking that anybody who wanted to obtain employment in making a survey would contact one of the attorneys. Any person answering the notice promptly refused when he found out what kind of work it was. The attorneys then contacted the Texarkana Employment Office, and again, were unable to obtain anyone who would do the work. Here is the statement that Mr. Dennis K. Williams, court-appointed counsel, made to the Court in regard to the petition for change of venue:

"My name is Dennis K. Williams, and I am one of the attorneys appointed to represent these defendants; and in the very early stages there, I suggested to the Court and also to the Prosecuting Attorney's office that we were going to try to get a change of venue, and during that time, why, I tried to contact people, too, that would make a survey of the county to find out the feeling of the people, and I was able to get one party that said he would do it. And as late as last Thursday, why, that party said he had made a survey of the county and that all that he contacted said the "niggers" ought to be burned or hung; and that party was also to come to my office this past Saturday morning, and in no event later than Monday morning, and I have not even seen the gentleman. I saw him Friday up here at the Courthouse, but I have not seen him since.

"Another man that I contacted said he would give me his answer Thursday morning — this past Thurs-

day morning — and he met us up here at the Courthouse, and we four attorneys talked with him in the library, and told him what we would need and all, and that afternoon, why, he called me and said that he had talked with his wife, and his wife said he couldn't have any part to do with it.

"As Mr. Johnson stated, some of these people, and my good friends, said they would not mind helping me, but this was a horse of a different color, and they refused to partake in it. And as a last resort, we thought we would advertise in the paper and I believe I can state kind of the sum and substance of the ad; I wanted credible persons to make a survey of Miller County on a controversial issue, and we didn't even sign that; we gave Mr. Van Johnson's room number in the State National Bank, and as he has told you about the number of people that have called; and it was impossible for us to get people whom I think to be credible persons to make a survey of the county at this time, and I believe if public opinion subsides some in a few months, we might be able to get this. I know there has been diligence on the part of us attorneys. We have conferences on the average of sometimes one and two times a day. I mean conferences where we were all together, and telephone calls that have been made. Hardly a day goes by that I don't call one of them or they don't call me about this matter. We have just had difficulty; in fact, we have not been able so far to get anybody to make a survey of the county for us."

This is not the ordinary case of paid counsel for a defendant making a statement as to inability to comply with the Statute. We have here the case of court-appointed counsel informing the Court that the sentiment in the County was of such a fever that people were unwilling to make a survey, even when offered employment. These four fine lawyers, officers of the Court, did everything they could to comply with the formalities of the Statute; and the change of venue should have been granted because the feeling in the County was so strong that the defendants had to be kept out of the County for safekeeping; and no person in

the County was willing to come into the Court and testify as to the feelings of the populace of Miller County. It is putting form before substance to say that the petition for change of venue should have been refused because the legal formalities were not complied with.

I submit that the case of *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622, points the way to the necessity of a change of venue in the case at bar. In the Hildreth case, in speaking of the compliance with the Statute (§ 43-1502 regarding two electors), we said:

"The statute is evidently based on the premise that the accused is entitled to a change of venue when hostile public sentiment makes an impartial hearing impossible. It would be patently illogical to grant the petition when affidavits are obtainable, but to refuse relief when public feeling is so antagonistic that the affidavits cannot be had."

In the case at bar the public sentiment, as shown by the court-appointed counsel, was so antagonistic that people refused to make the affidavits or make the survey. Therefore, I submit that the change of venue should have been granted. It is for this reason alone that I vote to reverse the conviction.

Carleton Harris, Chief Justice (dissent). While it forms no part of the reasons for this dissent, I should like to first express my disapproval of the law as established in the case of *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804. I consider that no better evidence can be presented to indicate one's intentions in a particular instance, than to establish the same or similar acts upon other occasions evidencing the same intention. I think this particularly true in crimes involving sex, as the lust of the perpetrator of a sex crime is only temporarily satiated after the crime is consummated. The urge that prompted the dastardly act will come again and again, and will be acted upon under what is deemed to be proper conditions and circumstances.

However, I recognize that the rule announced in the *Alford* case is the established law in this state until over-

ruled, and my dissent in the case at Bar is based upon the fact that I consider the evidence of the Fenwick robbery to be admissible *despite* the rule in *Alford* v. *State, supra.* Quoting from the *Alford* case, which in turn quotes from an earlier case, *State* v. *Dulaney,* 87 Ark. 17, 112 S. W. 158; "Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial."

The information in this case charged defendants with the crime of murder in the first degree, committed while perpetrating the crime of robbery. Under said information, it was necessary that the State prove that defendants robbed or attempted to rob the deceased. The most forceful evidence presented by the State was the confession of each of the defendants that they robbed Hamm. This, of course, standing alone and uncorroborated, was insufficient to establish that fact. It was therefore necessary that the State offer additional proof of the robbery. The evidence corroborating the robbery is thin indeed. Hamm's empty pocketbook was found near the scene of the crime, and his wife testified that he left home for the purpose of going to town to pay the light bill and get some medicine, but she did not testify that he had any money in his pocketbook. *There is practically no evidence in the record, with the exception of the confessions, that Hamm was robbed,* or that the assault on him was made by the defendants in an attempt to rob him.

The testimony of Fenwick established that within a few days (five) of the death of Hamm, two of the defendants (Rogers Boone and James Boyd) pulled up

[1] It was while the officers were questioning these two defendants about the Fenwick robbery that they learned of the robbery of Hamm, and were taken by Boone and Boyd to the location where Hamm had been beaten and left.

where he was waiting for a bus, and said, "Let's go to Hope." He accordingly got in with them. "The biggest boy suggested that we stop for a nature case, and we all got out, and when we started to get back in, he reached and came out with a claw hammer and said 'We ain't going to Hope, but you're going to Hell right quick'." Fenwick stated that he was struck and hit with the claw hammer, and fell down. The two men then took his wrist watch and pocketbook. About that time, one of the defendants saw someone coming and started off, but the other said "Wait, I've got to kill this old son-of-a-bitch yet," and kept hitting at him until his companion started driving away. Then he ran and caught the truck.

This evidence, in my opinion, was certainly admissible against these two defendants as being directly related to the issue of intent; in other words, it is "independently relevant" to the main issue — relevant in that it is evidence to prove a *material* point in the case at Bar, *e. g.*, that defendants killed Hamm while committing or attempting to commit the crime of robbery. Of course, the evidence would not be admissible simply to show that they were evil men. In the *Alford* case, upon which the majority rely, the ravished witness was still alive, and present in Court testifying that she had been raped. Therefore, as set out in that opinion, there was no need of further evidence to show Alford's intent, for no one would contend that he intended something other than rape. I would likewise agree that if Hamm were alive and testifying he had been robbed by the defendants, evidence of the Fenwick robbery would be inadmissible under the rule herein discussed. But, to the contrary, the victim is dead, and so cannot appear and testify as to what happened, and I repeat, there is no substantial evidence[2] (other than confessions) to

[2] I emphatically disagree with the majority that the fact a man is missing for five days, his body found on a route not normally taken in going home, and his empty purse found on the side of the road two-tenths of a mile from the body, is such evidence, standing alone, as would warrant a jury in concluding that that individual had been robbed.

establish that the deceased was killed while the defendants were perpetrating the crime of robbery.

The information does not allege, nor is there any evidence in the record to establish that defendants had a grudge against deceased, or had previously planned to kill him, and the State's first degree murder allegation must accordingly be sustained by proof of the robbery. The Court cautioned the jury that this evidence could only be used against the two defendants involved, and further, that it was only relevant as showing a general scheme or design. Such evidence has frequently been admitted for such a purpose. In *Casteel* v. *State,* 205 Ark. 82, 167 S. W. 2d 634, the defendant was tried for the crime of arson, it being alleged that he did "feloniously aid, abet, assist, and advise and encourage the burning of a * * * Pontiac automobile * * * property of Morris Henson, Bert Casteel and Porter Wilson Finance Company * * *". Among grounds for reversal, appellant urged that the trial court erred in permitting testimony relating to previous transactions of insurance on other automobiles in which appellant was interested, and which had been burned. Quoting from the Opinion: "Finally appellant urges that the trial court erred in permitting witnesses, J. O. Langley and Rellis Garrett, to testify as to transactions of insurance on other automobiles, and as to the alleged burning of these cars. The testimony is to the effect that this testimony concerned other automobiles, in which appellant was interested, which were insured and burned within a period of time shortly before the one in question here, and closely connected with its burning. This testimony, under proper instructions from the Court, was permitted to go to the jury solely for the purpose of determining appellant's motive, scheme, design or intent, and we think it was properly admitted."

Again, in the case of *Davis* v. *State,* 182 Ark. 123, 30 S. W. 2d 830, Davis was convicted of the crime of murder, and sentenced to death. The evidence showed that he and two others went to the place of business of J. J. Weed, a merchant in North Little Rock, and

while engaged in an attempt to rob Weed, killed him. A certain Joe Lee testified that on the same night, and within a few blocks of Weed's place of business, he was held up by three men and robbed. He identified Davis as participating. This testimony was admitted over the objections of the defendant. The Court admonished the jury that the testimony could be considered only for the purpose of identification and upon the question of "* * * intent of entering Weed's place of business * * *". Quoting from the late Justice Smith: "The indictment alleged that Weed was killed in an attempt to rob him, and it was this unlawful intent which made it unnecessary for the State to prove the deliberation and premeditation which would be required to establish murder in the first degree. * * * *It was essential for the State to show that appellants were in Weed's place of business for the purpose of committing the crime of robbery.* * * *" (Emphasis supplied.) "The testimony was, therefore, competent to show the business in which appellants were engaged that night, and the probable purpose for which they went to Weed's place of business thereafter."

The fact that the offense admitted in evidence occurred subsequent to the crime for which appellants are being tried is of no effect. *Scrape* v. *State,* 189 Ark. 221, 71 S. W. 2d 460. This case, incidentally, seems to be on "all fours" with the case at Bar, and I find absolutely no distinction in the evidence that was admitted there of a similar offense, and the evidence which was herein admitted, and which the majority say constituted reversible error. Scrape was convicted of the crime of robbery of a filling station in Little Rock, which occurred on November 9, 1933. During the trial, and over objections, L. R. Biggs, operator of another filling station in Little Rock, was permitted to testify that appellant and two others had attempted to rob him on November 10, the day following the date of the robbery for which he was on trial. In this connection the Court gave to the jury, over appellant's objections and exceptions, the following instruction: "The defendant is being tried alone for the crime of robbery. The

State has attempted to show by testimony that this defendant engaged in an attempted crime of robbery on the night following the date of the crime for which he is now being tried is alleged to have been committed. If you should believe from the evidence that the defendant did attempt to commit robbery on the night following the alleged crime for which he is being tried, it might be considered by you as showing, if it does so show, a scheme and a design on the part of the defendant in the commission of crime, and for no other purpose; and, even though you should believe him guilty of attempted robbery committed on the day following the day of the robbery for which he is now being tried, yet that would not be sufficient to warrant his conviction on the charge for which he is now being tried unless you believe he was guilty on this particular charge beyond every reasonable doubt." This instruction was approved by this Court, and in the language of Justice McHaney: "* * * we have many times held that evidence of similar crimes closely connected with the crime charged, is admissible, not only to show knowledge or intent, but to show a system, plan, or scheme of conduct on the part of the accused. * * *"

The majority do not attempt to reconcile the present holding with the *Scrape* case other than to say that it was a "conspicuous departure from the general rule", an isolated case, and actually occurred because of "oversight". Yet the majority do not overrule the *Scrape* decision.

It appears to me that the law relating to the admission of similar offenses in the trial of a particular cause, is now so highly technical and apparently conflicting, that lawyers and judges, in trying to distinguish between the various cases, can only reach a complete state of bewilderment. The net result will be that trial courts will never permit the introduction of evidence of similar crimes committed by a defendant which might well tend to prove intent, scheme, or design in the case under submission. I strongly feel such evidence to be invaluable in the trial of a criminal case.

For the reasons herein set out, I am of the opinion that the testimony relating to the Fenwick robbery was competent and relevant evidence, and the Court did not err in admitting same. I accordingly respectfully dissent to the views of the majority.

Justice MILLWEE joins in the dissent.

MO. PAC. TRANSPORTATION COMPANY *v.* GUTHRIE.

5-1197 299 S. W. 2d 829

Opinion delivered March 18, 1957.

Wiley Bean and *Barber, Henry & Thurman,* for appellant.

Thomas E. Downie; Lee & Booth, Tulsa, Okla., for appellee.

GEORGE ROSE SMITH, J. This is a personal injury suit brought by Vesta Jewell Guthrie and her husband to recover for injuries sustained by Mrs. Guthrie as she was alighting from the appellant's bus at Clarksville. It is asserted that the appellant's driver was negligent in failing to assist Mrs. Guthrie, whose vision is seriously defective. The case was submitted to the jury under

the comparative negligence statute. Ark. Stats. 1947, §§ 27-1742.1 and 27-1742.2. The jury found that half the total negligence was attributable to Mrs. Guthrie and half to the bus company and its driver. The verdicts were accordingly for the plaintiffs in half the amount of their respective total damages. For reversal it is contended that there is no substantial evidence to support the finding of negligence on the part of the bus company and its driver.

We think the conflicting evidence presented a question for the jury. Mrs. Guthrie testified that when she boarded the bus at Fort Smith she told the driver that she was practically blind and would need help in getting off at Clarksville. It is conceded that in these circumstances the bus driver owed his passenger a duty of assistance. *Payne* v. *Thurston,* 148 Ark. 456, 230 S. W. 561. Mrs. Guthrie says that she sat in the first seat behind the driver. According to her, when the bus stopped at Clarksville the driver announced the station and immediately left the bus without offering to help her. She waited "a few minutes," decided that the driver had forgotten her, and fell as she was attempting to alight by herself. The driver testified that upon stopping the bus at Clarksville he set the brakes, turned on the interior lights, and had just started down the steps of the bus when Mrs. Guthrie fell against him from behind. Which version of the accident is the true one was plainly an issue for the jury.

It is also contended that even if Mrs. Guthrie's testimony is accepted the sole proximate cause of her injuries was her negligence in attempting to leave the bus without assistance. To sustain this contention would in effect revive the doctrine that contributory negligence in any degree is a complete bar to recovery. Here the evidence warranted the jury in finding that, although Mrs. Guthrie was herself guilty of negligence, the bus driver's failure to render assistance was also a proximate cause of his passenger's fall.

Affirmed.

BOWEN *v.* HEWITT.

5-1200 299 S. W. 2d 827

Opinion delivered March 18, 1957.

[redacted]

Tom Kidd, for appellant.

Shaver, Tackett, Jones & Lowe, for appellee.

PAUL WARD, Associate Justice. Appellants, W. Ray Bowen and Elsie Bowen, and appellees, Jewell Hewitt and Roy Hewitt, own adjoining lands lying along the north side of the Little Missouri River, in Pike County, with appellants' lands lying to the east of appellees' lands. Prior to 1946 one Clyde Belt owned a portion of the lands now owned by appellants. Although it is not entirely clear from the record, it seems that the Belt tract of land adjoined appellants' lands on the east prior to 1946 and that there was a public road running north and south along or across the east portion of the Belt land.

This litigation relates to the use of a road which runs from the Hewitt lands east across the Bowen and Belt lands to the aforementioned public road.

It is undisputed that the road in question was used by appellees and the public until 1952 when the road became somewhat in disrepair and its use was discontinued for a time. Later when appellees attempted to

repair and use the road appellants brought this suit to restrain appellees.

The complaint, after setting forth the ownership of the lands, contains the following material allegations: (a) It refers to a County Court Order in 1946 establishing the road in question as set forth in an exhibit which will be referred to later; (b) Appellees have failed to maintain the road and repair the fences along the same as required to do by the said County Court Order, and; (c) They are trespassers upon appellants' lands. The prayer was that defendants be restrained from traveling through and across plaintiffs' property. In their answer appellees, Jewell Hewitt and Roy Hewitt, admit that they have entered upon the lands of appellants for the purpose of improving the said road and also admit that the road was established in 1946 by an Order of the County Court of Pike County.

According to the exhibits attached to appellants' complaint a petition was filed in the Pike County Court by John W. Hewitt (father of Jewell Hewitt and Roy Hewitt) and other petitioners (not named) to have a road established "to their bottom fields in Hempstead County." (Note: It appears from the testimony that the road in question was used to reach the public road referred to above which ran south across the Little Missouri River and into Hempstead County.) Viewers, appointed by the court, made a report on which the County Court made the following order:

"It is therefore by the Court ordered, considered and adjudged that a road be and the same is hereby established for the use and convenience of petitioners John W. Hewitt and the general public to run Easterly from the SW-1/4 NE-1/4 Sec. 19, Twp. 9 S. R. 23 West, which lands are now owned by John W. Hewitt, down Little Missouri River not more than 60 feet from the River bank and not nearer than 30 feet to said River Bank; and said road shall be constructed at the cost and expense of petitioners and that petitioners be and they are required to fence said right of way by placing a substantial wire fence between said road and the land owned by

W. R. Bowen and his wife, Elsie B. Bowen, and said fence shall be kept and maintained without cost to said landowners, W. R. Bowen and his wife, Elsie B. Bowen and their successors in title; and upon failure to so keep and maintain said fence, said road may be again fenced and taken into the inclosure of W. R. Bowen and wife, or their successors in title; he having agreed to give the right of way across his land free of cost on condition that same be kept fenced without cost to him."

At the close of appellants' testimony appellees demurred to the sufficiency of the evidence. The trial court sustained appellees' demurrer with the exception hereinafter mentioned. Appellants rely on two principal grounds for a reversal. One ground is that there was substantial evidence to show the road had been abandoned by appellees and that appellees had breached the conditions of the County Court Order establishing the road. The other ground is "the court erred in not holding the Belt land was crossed by permission." After carefully reviewing the testimony as set forth in the record we are of the opinion the trial court committed no reversible error.

First. We recognize the rule announced in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, that this case must be reversed if there is substantial evidence to support appellants' contention that the road had been abandoned by appellees. We find no such substantial evidence in the record. On the other hand the testimony affirmatively shows that appellees used the road until at least 1952. Appellants themselves do not question that appellees were given the right to use the road by the 1946 County Court Order. Before appellees could lose the right to use this road by abandonment it would have to first be shown that they had abandoned its use for a period of 7 years. See *Clinton Chamber of Commerce* v. *Jacobs,* 212 Ark. 776, 207 S. W. 2d 616. As noted above there is no testimony to establish that fact.

Appellants also contend that appellees lost the right to use the road because of a noncompliance with the County Court Order which required appellees to con-

struct and maintain a fence along the road. Said order also provided that "upon failure to so keep and maintain said fence, said road may be again fenced and taken into the inclosure of W. R. Bowen . . ." Again the evidence shows conclusively that the fence has been maintained at all times and that the road had not been "taken into the inclosure" of W. R. Bowen's land. It is true that appellants have maintained the fence in recent years, but they have done so of their own volition. At no time have appellees refused to keep the fence in repair. If appellants had wanted to reclaim the road under the terms of the Court Order they might have done so at the time of the breach but instead they elected to keep the fence in repair themselves and waive the breach.

Second. We cannot agree with appellants' contention that "the court erred in not holding the Belt land was crossed by permission." We find nothing in the complaint filed by appellants which raises this issue. On the other hand the complaint assumes that appellees acquired the right to use the road in question by virtue of the 1946 County Court Order. Not only is this true but there is no substantial testimony to show that the road crossed Belt's land with his permission. On the contrary all the testimony we find in the record is just the opposite. Appellant, W. Ray Bowen, was asked: Q. "Did Mr. Belt give them permission to do that?" (referring to the road going across the Belt land). His answer was "I don't know what Belt did."

The testimony shows that the road as it is now located is not in full compliance with the 1946 County Court Order relative to its distance from the river. In sustaining appellees' demurrer to the evidence the trial court provided that "if it be the desire of the plaintiffs (appellants) such roadway may be located where it now is or at a point along the river bank not more than 60 feet from said bank and not closer than 30 feet to said bank over the lands which were owned by Clyde Belt on the 4th day of June 1946, . . ." This part of the court's order is not objected to by appellees.

Affirmed.

HIGGS *v.* HIGGS.

5-1186 299 S. W. 2d 837

Opinion delivered March 18, 1957.

[redacted]

House, Moses & Holmes, for appellant.

Gladys Neal Brandon and *Ivan H. Smith,* for appellee.

SAM ROBINSON, Associate Justice. This action was filed in the chancery court by appellee to compel appellant, the alleged father of an illegitimate child, to support such child. This appeal is from the chancellor's order requiring the father to support the child. Appellant, the alleged father, contends that this is a matter relating to bastardy, and that Article 7, Section 28, of the Constitution of Arkansas gives the county court exclusive, original jurisdiction in such matters. Appellee contends that since appellant has acknowledged that he is the father the chancery court has jurisdiction to compel him to support the child. To sustain this contention, appellee relies on Acts 231, 242 and 294 of 1953.

Act 231 of 1953 makes it the duty of the prosecuting attorney, deputy prosecuting attorney, justice of the peace, or city attorney, to take action in a court of competent jurisdiction against the father of a legitimate or illegitimate child who fails to provide maintenance for such child. This statute does not provide that a bastardy proceeding may be instituted in any court other than one

of competent jurisdiction. Act 242 of 1953 is basically a criminal law, but parts of the act apply to proceedings which appear to be civil in nature. But the act does not give the chancery court jurisdiction of any matter dealt with by the act, therefore we need not at this time pass on the validity of the act with regard to whether it is in conflict with the Constitution. Act 294 is clearly a criminal statute and does not apply to the kind of proceeding involved in the case at bar.

Article 7, Section 28, of the Constitution provides: "The county courts shall have exclusive original jurisdiction in all matters relating to . . . bastardy . . ." The subject of bastardy is dealt with in detail in Title 34, Chapter 7 of Arkansas Statutes, found in Volume 3. The statutes provide that the county court has jurisdiction in bastardy proceedings. The statutes also provide for an appeal to the circuit court and a trial *de novo* in that court. Apparently, everything that may arise in connection with a case of that kind is mentioned in detail.

The action in the case at bar is to compel an alleged father of an illegitimate child to support such child. If this is a bastardy proceeding, then original jurisdiction is in the county court and not in the chancery court, according to Article 7, Section 28, of the Constitution. This brings us to a consideration of the meaning of the word *bastardy* used in the Constitution. *Ballentine's Law Dictionary,* page 142, defines a bastardy proceeding as "a proceeding of a civil nature to compel a bastard's father to support him." And, that is exactly the kind of proceeding involved in the case at bar. "The common law affords no remedy to compel a putative father to contribute to the support of his illegitimate offspring. Statutes now exist in most jurisdictions, however, providing for judicial proceedings, usually called filiation or bastardy proceedings, to establish the paternity of a bastard child and to compel the father to contribute to its support." 7 American Jurisprudence 679.

In *Epperson* v. *Sharp,* 222 Ark. 456, 261 S. W. 2d 267, the mother instituted proceedings in the county court to compel the alleged father of her bastard child to contribute to the support of the child. In that case, this court said: "This is a bastardy proceeding." Perhaps the reason for placing jurisdiction in bastardy matters in the county court no longer exists, but, nevertheless, the Constitution has not been changed, and the county court still has exclusive, original jurisdiction in such matters. The case at bar is clearly a bastardy proceeding, hence the chancery court does not have jurisdiction.

Reversed.

BRADLEY *v.* JONES.

5-1234 300 S. W. 2d 1

Opinion delivered March 25, 1957.

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

N. J. Henley; Fitton & Adams and *Arnold M. Adams,* for appellee.

CARLETON HARRIS, Chief Justice. Garvin Jones, appellee, and Roy Bradley, appellant, were candidates for the office of County Board Member of Zone 3, Searcy County, Arkansas, in the school election held in said zone on March 17, 1956. Appellant, Bradley, was certified by the election officers, the county judge, and County Election Board of Commissioners, as the winner, the certified returns giving appellant 77 votes and appellee 56. Shortly thereafter, appellee filed his complaint in the Searcy Circuit Court contesting the election and alleging that he received the majority of the votes cast, and had been duly elected to said office. After an extended hearing, the Circuit Court, in a well written memorandum opinion, issued its findings of fact, and subsequent thereto entered its judgment finding that Garvin Jones, appellee herein, was duly elected to the office of County Board of Education, and ousting appellant, Roy Bradley, from office. Appellant filed his *supersedeas* bond, and appeals from the judgment of the trial court.

Eleven points are listed for reversal, but many of these refer to the same alleged error, and can accordingly be passed upon without a full discussion of each point. For instance, the first four deal with whether the Circuit Court had jurisdiction of the parties and the subject matter of said suit.

Appellee filed his suit in the Circuit Court, but instead of having summons issued and served on appellant, served a notice on appellant (as provided in § 3-1205, Ark. Stats. (1947) Anno.) advising that the election was being contested and setting out the grounds upon which appellee relied. Act 366 of 1951 provides that the provisions of § 3-1204 shall be followed in election contests involving county and district school officers. The referred to Section states: "All actions or proceedings for contests as herein mentioned shall be by complaint filed in the Circuit Court as other actions at law * * * ." In *Kirk* v. *Roach,* 226 Ark. 799, 294 S. W. 2d 335, this Court held that the notice previously required to be given under § 3-1205 was no longer the proper method to obtain service on a defendant in an election contest for the county board of education or school director. Proper service could only have been obtained by service of summons, and appellant vigorously argues that since he was not served, he was never in court, and the Circuit Court had no jurisdiction, either of the person of appellant or of the subject matter. We do not agree that the court had no jurisdiction of the subject matter. The Searcy Circuit Court did, and does, have jurisdiction over the school election contests in that county. Act 366 changed the procedure for bringing contestees before the court. The question therefore is whether or not a court which has jurisdiction of the subject matter, can acquire jurisdiction of the parties involved, by their consent.

Appellant filed his answer to the complaint of appellee, admitting some allegations, and specifically denying others. Several motions were filed or made during the hearing by appellant. Throughout all these proceedings, before the trial, during the trial, and at the conclusion thereof, appellant never questioned sufficiency of service. On August 30th, notice of appeal was filed, in which appellant listed his points for reversal; the jurisdiction of the court still was not questioned. Our Court has repeatedly held that the entering of appearance without questioning the sufficiency of the service, amounts to a waiver of this requirement. *Wilson* v.

Luck, 201 Ark. 594, 146 S. W. 2d 696; *Mercer* v. *Motor Wheel Corp.,* 178 Ark. 383, 10 S. W. 2d 852; *Auto Sales Co., Inc.* v. *Mays,* 191 Ark. 884, 88 S. W. 2d 330. We therefore conclude that appellant's argument that the court had no jurisdiction is without merit.

It is next urged that no competent testimony was adduced to destroy the verity of the returns. We disagree with this contention, and consider that the testimony was ample to show that the election was improperly conducted, entirely sufficient to justify the court in ordering the ballot boxes opened, and to consider the testimony as to how various voters cast their ballot. The facts, as developed by the testimony, upon which the Circuit Court relied for this action, are set out in its findings and will not be commented upon as we are adopting same in its entirety and incorporating it as a part of this Opinion.

Again, it is urged by appellant that the lower court committed reversible error in ordering the "stub" box to be opened and admitting the stubs as competent evidence, for the reason that the "stub" box was never delivered to the County Treasurer as required by law, but was delivered instead to the County Clerk. We cannot see how appellant was prejudiced. There is no allegation, nor proof, that the ballots were tampered with after being delivered to the Clerk, or that they were in any different condition than when delivered by the election officials. Actually, this "stub" box was placed in the vault of the Leslie State Bank under the orders of the Circuit Court, and no evidence was introduced that would tend to show it had been unlawfully removed from the vault or its contents disturbed. Appellee was not responsible and had nothing to do with delivering the said box to the Clerk rather than the Treasurer, and it would be grossly unfair to withhold his right to an office to which he has been elected because of an error on someone else's part — an error, as previously stated, which resulted in no prejudice whatsoever to appellant.

Appellant argues that the trial court abused its discretion in ordering the original and "stub" ballot

boxes brought into court and opened after appellee had rested his case. Appellant states that appellee never did ask the court to open the ballot boxes; however, the prayer of the Complaint asks that the ballots be impounded and that "the false, fraudulent, and spurious ballots be purged from the election returns." We do not see how such a prayer could be granted unless and until the boxes were opened. At any rate, the court was well within its rights. The sole purpose of the hearing was to determine who had received the majority of legal votes cast, and the court was justified in prolonging the cause, or reopening same, if it felt that there was evidence available which would shed light upon the actual result of the election. *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706.

Other errors are alleged, and we have examined each one, but find them to be without merit.

The Findings of the trial court, in which we completely concur, and which we adopt in full as part of this Opinion, are as follows:

"The election contest grows out of the school election held on March 17, 1956, for the election of a member of the County Board of Education of Searcy County from Zone No. 3. The parties hereto were competitive candidates for said office. According to the official poll book 138 votes were cast at said election, while the tally sheets show a total of 133 votes cast for these two candidates. According to the official returns the contestee, Roy Bradley received 77 votes and the contestant, Garvin Jones received 56.

"The poll books and tally sheets properly made out and certified by the election officials and the ballots themselves are the *prima-facie* evidence of the result of the election, but not conclusive. They will stand until they are discredited by satisfactory evidence showing that they have not been preserved in the manner prescribed by law, or have been tampered with or falsified. So, in this case the Court is bound by the official election returns, unless there is substantial evidence sufficient to discredit the returns, in which case the Court may

then admit oral proof to show the results of the election.

"At the close of contestant's testimony the contestee filed a motion to dismiss the complaint on the ground that contestant had failed to introduce affirmative proof sufficient to destroy the verity of the returns.

"The evidence indicates that during the noon hour on the day of the election the polling booth was closed, and only one of the election officials remained in the polling booth, namely, Manuel Griffin. That during this time one of the candidates, Roy Bradley, appeared at the polling booth and delivered a large brown manila envelope to the said Manuel Griffin, rapping on the door and obtaining admission. There was considerable confusion it seems, in the delivery of the election supplies at this polling place. There is evidence that two of the election officials had some election supplies in their possession the day before the election, while the Sheriff testified that they were delivered on the morning of the election. The evidence indicates that the election officials were strongly partisan in favor of the contestee. This fact is not evidence of fraud within itself, but should be considered along with all other evidence. Also, as mentioned above, there was a discrepancy of 5 votes between the tally sheets and the poll book. The Court thinks that this evidence is sufficient to justify the Court in overruling contestee's motion to dismiss the complaint, and to grant contestant's motion to open the ballot box, and to consider the oral testimony as to how various voters cast their ballot. After hearing the testimony as to the preservation of the ballot box the Court was of the opinion that the integrity of the ballots had been preserved. While the law provides that the stub box should be delivered to and kept by the County Treasurer, while in fact it was delivered to the County Clerk and kept in his custody, yet the testimony shows that the ballot boxes were properly safe-guarded by being placed in the vault of the Bank at Leslie and kept there except on two occasions when they were removed for the Election Commissioners to canvass the returns

and on another occasion, by consent of the attorneys when depositions were being taken. On each occasion they were promptly returned to the bank vault.

"The facts revealed when said ballot box and stub box were opened amply justified the Court's action in opening same. It was found that there were 133 ballots in the box and each ballot was cast for one or the other of these candidates. The ballots gave no appearance of having been changed. The ballots themselves reflected that 76 were cast for Bradley and 57 for Jones. Of the 138 names appearing on the poll book there were 16 for whom there was no corresponding ballot stub bearing their poll number.

"The following ballot stub numbers were found in the ballot stub box, while there was no corresponding ballot in the ballot box: 411, 414, 427, 426, 435, 328, 437, 439, 440, 444, 455, 459, 458, 457, 463, 461, 462, 465, 464, 471, 472, 473, 476, 495, 503, 333, 332, a total of 27.

"Also the following ballots were found in the ballot box with no corresponding ballot stub: 370, 309, 295, 267, 266, 263, 297, 316, 319, 296, 257, 255, 300, 321, 443, 302, 264, 269, 268, 320, 262, 317, 318, 259, 299, 258, 298, a total of 27. Of this number, two — 370 and 309 were cast for Jones, and the other 25 were cast for Bradley. Incidentally, this is the same as the number of stubs found with no corresponding ballots.

"The law provides that the ballot is a writing and cannot be contradicted by parol evidence. But like other writings, it may be shown that it has been changed since it was cast, or that another ballot has been substituted in its place.

"A ballot is a writing or quasi-record and is the best evidence of how a voter cast his ballot. But when the evidence shows the ballot has been tampered with or changed since it was cast, it looses its verity as a writing and oral testimony may be received as to how the vote was cast. The Court is of the opinion that the ballots in this case have lost their verity and the

Court must resort to oral testimony as to how the votes were cast.

"The Court finds that the testimony of Gertha Griffin and Woodrow Loftin, who kept a record outside the polling place as to how various voters cast their ballot, based upon reports from the voters themselves as they came out of the polling booth, is not admissible, as being hearsay testimony. The Court is only considering the testimony of the individual voters themselves as to how they cast their ballot. The testimony indicates that 69 voters cast their ballot for Jones and kept their poll number and ballot number, while 11 voters testified that they voted for Jones but didn't keep either their ballot or poll number, making a total of 80 persons who testified affirmatively that they voted for Jones. Of those voters who testified they voted for Jones and kept their ballot numbers, all of them correspond with the ballot numbers reflected by the ballot stubs, as well as the poll numbers shown on the poll book. The names of all those who testified they voted for Jones appear on the poll book.

"From all of these facts and the law governing the same, the Court must conclude that the contestant, Garvin Jones received 80 of the votes cast at said election, which is a majority thereof, and that he was the duly elected member of the County Board of Education at said election."

Summarizing, we consider it unquestionably established that Jones received the majority of votes cast, and that he was accordingly elected as a member of the County Board of Education, Zone 3, Searcy County, Arkansas. Affirmed.

Since, because of the filing of the *supersedeas* bond by appellant, Jones has been denied the privilege of serving in the office to which he was elected, the Clerk of this Court is herewith directed to issue immediate mandate.

MARSHALL *v.* MARSHALL.

5-1224 300 S. W. 2d 933

Opinion delivered March 25, 1957.

[Rehearing denied May 6, 1957]

[redacted]

Cole & Epperson; James C. Cole, on reply brief, for appellant.

Henry B. Means, for appellee.

J. SEABORN HOLT, Associate Justice. The parties to this suit were the children of Mr. and Mrs. H. H. Marshall, Sr., now deceased. Mr. Marshall died in 1934 and Mrs. Marshall in 1951. Following Mr. Marshall's death, Mrs. Marshall was administratrix of his estate until her death. Appellants, Lambert Marshall and Anna Boyd Marshall (Lindvall) and appellee, Hubert Marshall, are the surviving children. Over a period of time up to August 26, 1940, Hubert Marshall became indebted to the Marshall Estate in the amount of $11,742.98, and to Mrs. Marshall, his mother, personally in the amount of $1,530. On August 26, 1940, he and his then wife, Helen Marshall, executed their note in favor of Mrs. Marshall as administratrix for $11,742.98, and on August 27, 1940, their note for $1,530 to Mrs. H. H. Marshall, personally, and at the same time they executed mortgages to secure these notes. These mortgages conveyed all the interest of Hubert Marshall (appellee) in his father's estate, both real and personal, particularly describing same therein. Mrs. Marshall had both mortgages recorded, the former on August 27, 1940 and the latter September 6, 1940.

Thereafter, on December 13, 1940, discord having arisen between her and her husband, Helen Marshall

filed two suits in the Hot Spring Chancery Court, one being a divorce suit against Hubert, and the other an action naming as defendants Hubert, Mrs. H. H. Marshall personally and also as administratrix of the estate, in which latter action she sought to set aside the two mortgages above on the grounds that their execution by her was procured through fraud, and she further sought to have Hubert's one-third interest in his father's estate subjected to her claim of dower, for child support, and alimony. Hubert did not appear or plead in either of these actions. It appears that a compromise settlement of these two suits was had which resulted in Mrs. H. H. Marshall paying to Helen a certain sum in cash (amount not shown in the record) and Hubert and Helen executing a warranty deed dated January 21, 1941 which recited:

"Warranty Deed-Know all Men by these presents: That we, H. H. Marshall, Jr., and Helen Marshall, his wife, for and in consideration of the sum of One Dollar and the further consideration of the cancellation of two promissory notes and mortgages in the separate sums of $11,742.98 and $1,530, which mortgages are of record in Book 27, pages 278, and Book 27, page 283, of the Mortgage Records of Hot Spring County, Arkansas, respectively, and the further cancellation of any other indebtedness we or either of us may owe to the grantee herein, to us cash in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto Mrs. H. H. Marshall, Sr., as administratrix of the estate of H. H. Marshall, Sr., deceased, and unto Lambert Marshall and Anna Boyd Marshall, as heirs of the said H. H. Marshall, Sr., deceased, and unto their heirs and assigns forever, the following real estate and personal property in the County of Hot Spring and State of Arkansas, to-wit: . . . 1 (describing it); also all stocks and bonds and other assets belonging to the said estate including stock fixtures, accounts receivable and equipment belonging to the Marshall Motor Service; and also one 1940 model Ford V-8 truck 1-1/2 ton; the real estate herein mentioned being more

minutely described as follows, to-wit: . . . (describing it)

"To have and to hold the same unto the said Mrs. H. H. Marshall, Sr., as administratrix, and Lambert Marshall and Anna Boyd Marshall, and unto their heirs and assigns forever, with all appurtenances thereunto belonging. And we hereby covenant with the said Mrs. H. H. Marshall, Sr., as administratrix, and Lambert Marshall and Anna Boyd Marshall, that we will forever warrant and defend the title to said lands, against all claims whatever. And I, Helen Marshall, wife of the said H. H. Marshall, Jr., for and in consideration of the said sum of money, do hereby release and relinquish unto the said Mrs. H. H. Marshall, Sr., as administratrix and Lambert Marshall and Anna Boyd Marshall, all my right of dower and homestead in and to the said lands and personal property. Witness our hands and seals on this 20th day of January, 1941.

"H. H. Marshall, Jr.
"Helen Marshall

"Acknowledgment State of Arkansas—County of Hot Spring—Be it Remembered, That on this day came before me, the undersigned, a Notary Public within and for the county aforesaid, duly commissioned and acting H. H. Marshall, Jr., to me well known as the grantor in the foregoing deed, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth." . . . and appeared "Helen Marshall, wife of the said H. H. Marshall, Jr., grantor in the foregoing deed, to me well known, and in the absence of her said husband declared that she had of her own free will, executed said deed and signed and sealed the relinquishment of dower and homestead in the said deed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband." This deed was duly recorded February 27, 1941 by Mrs. Marshall in Deed Record Book 65, p. 461, Hot Spring County.

Helen was granted a divorce March 13, 1941. Lambert Marshall and Anna Lambert, appellants, brought

the present suit in 1956 seeking a declaratory judgment construing the above deed and for a partition of all real estate in which the parties were tenants in common. Hubert (appellee) answered and filed a cross complaint in which he sought to have the deed reformed and declared to be a mortgage, or a resulting trust declared in his favor. The trial court decreed that no trust relationship was established but that the deed was, in fact, as appellee claimed, a mortgage, declared the interest of the parties to be one-third each in all the real estate and ordered partition, subject to Hubert's original indebtedness to the estate. This appeal followed.

The primary and decisive question presented is, as appellee says, "what construction is to be placed on the deed above, whether it was intended to be a deed or mortgage." The trial court upheld appellee's contention that the deed was, in fact, intended to be a mortgage and so declared it. After reviewing the evidence presented, we have concluded that the court erred in so holding.

The appellee (Hubert) under our well established rules assumed a very heavy burden of proof in seeking to have the deed here, regular on its face, declared a mortgage. "For a deed to be treated as a mortgage, evidence that the instrument was intended to secure a debt must be clear, unequivocal and convincing." *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. 2d 308. "The law presumes that a deed absolute on its face is what it appears to be, and the burden is on the one claiming it to be a mortgage to overcome this presumption by clear, unequivocal and convincing evidence." *DeLoney* v. *Dillard,* 183 Ark. 1053, 40 S. W. 2d 772. Also see *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240. "If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a mortgage; but if the conveyance extinguishes the debt, and the parties intend that result . . ." (*Hays* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027) the character of the deed is an absolute conveyance. "In determining whether a deed absolute on its face is such, or is to be considered as a mortgage only, the question for the court's determination is what was the intention of the parties at the time."

Hudgens v. *Taylor,* 206 Ark. 507, 176 S. W. 2d 244. "The cancellation of a mortgage and satisfaction of a debt which it secured is sufficient consideration for a deed by the mortgagor to the mortgagee." *Clark* v. *Friend,* 174 Ark. 26, 295 S. W. 392. "Another rule of construction is that the deed should be most strongly construed against the grantor." *Lawless* v. *Caddo River Lumber Co.,* 145 Ark. 132, 223 S. W. 395. "Evidence to prove that an instrument absolute on its face was intended by the parties as a mortgage is generally received by the courts with caution . . ." 36 Am. Jur. p. 755, § 134.

Much evidence was presented by the parties tending to establish their respective contentions. We deem it unnecessary to attempt to detail it more than to show that appellee by his own acts is precluded from claiming that the deed was intended to be and, in fact, was a mortgage, and that such acts were sufficient to turn the scales against him. No principle of equity is better established than that: "He who comes into equity must come with clean hands. The clean hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the court." 30 C. J. S. 475 § 93. At the time Hubert and his wife Helen executed the deed here in question, Hubert owed many other creditors who were pressing him. By executing the deed he settled his indebtedness to the Marshall Estate and received full value for his interest therein, and his wife, who joined him in the deed, released all her dower rights to Hubert's (her husband's) interest in the estate. In fact, the only way Helen could release her dower interest in her husband's property was by a valid deed, § 50-416, Ark. Stats. 1947.

Hubert testified that the instrument was in so far as his creditors were concerned a valid deed. He testified: "Q. If this was a mortgage and your interest was in excess of that then your creditors could come in for the excess? A. No, because there was a deed. Q. That was your understanding? A. So far as they were concerned it was a true and valid deed. Q. You took the execution of the deed as being a valid and true

deed as against your creditors. A. For the time being I was needing enough to pay my creditors. I did hold at the time that this was the correct thing to do. Q. As between you and your creditors you called it a deed? A. I did at the time to my creditors."

In effect, he says that the instrument was a valid deed in so far as it affected his wife and creditors but as to him it was only a mortgage. Obviously, he was agreeable to perpetrating a fraud on both his wife and outside creditors. The instrument could not be part deed and part mortgage, it was either one or the other.

Having concluded, as indicated, that the instrument in question was, in fact, in the circumstances a valid deed and not a mortgage, and that the "clean hands doctrine" precludes appellee from claiming otherwise, the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

VICKERS *v.* PEAKER.

5-1231 300 S. W. 2d 29

Opinion delivered March 25, 1957.

Homer T. Rogers and *Davis & Allen,* for appellant.

Keith, Clegg & Eckert, L. B. Smead, and *Harry Crumpler,* for appellee.

ED. F. MCFADDIN, Associate Justice. From a decree of the Chancery Court refusing the plaintiffs' prayer for cancellation of a certain instrument as a cloud on the title, there is this appeal. The equities preponderate in favor of the appellees.

The appellants are R. H. Vickers and his two sisters, Mrs. Humphreys and Mrs. Gray. They were plaintiffs below. As lessees, they own and operate an oil and gas lease (known as the "Murphy lease") on 40 acres; described as the SW¼ NW¼ Sec. 28, Twp. 15 S, R 15 W, Ouachita County, Arkansas. On this lease there are four oil wells producing from the Blossom Sand, which is at the approximate depth of 2,400 feet. In order to have determined the possibility of production from the sands at a greater depth, appellants on July 21, 1955 executed an assignment[1] to Edward McNeil, granting the

[1] The said assignment (on which appellants' suit is based) was prepared by attorneys for appellants, and the part here involved, reads: "Unless the Assignee, his heirs or assigns, commence the drilling of a well in search of oil and/or gas in Section 27 or Section 28, Township 15 S, Range 15 W, on or before September 15, 1955, and drills and completes the same with reasonable diligence to a depth sufficient to test the Smackover lime formation, this Assignment shall *ipso facto* become null and void and of no effect and all the rights of Assignee herein, his heirs, or assigns, shall terminate and cease. And there is a further condition under which this Assignment is given that all the rights of the Assignee herein, his heirs or assigns, shall cease, terminate, become null and void, unless said Assignee, his heirs, or assigns, shall drill and complete a well or wells for actual production of oil and/or gas in commercial quantity therefrom on the lease herein assigned within 12 months from date of this assignment.

"There is excepted from this conveyance and reserved unto the Assignors herein, their heirs and assigns, all of the oil, gas and other minerals in, on and under said lands belonging to their leasehold interest from the surface to a depth of 3,000 feet, and the Assignee herein shall not interfere in his operation with the operation and any development that may be carried on by Assignors, their heirs or assigns to said depth of 3,000 feet.

"Assignors herein except from this conveyance and serve unto themselves, their heirs and assigns 1/16 of 7/8ths of all the oil and gas (including distillate) which may be produced and saved from the land described in the lease herein assigned, to be paid to them as a free perpetual overriding royalty out of production from said lands and shall be paid to said Assignors, their heirs, successors or assigns, without cost of discovery, marketing or removal of same and taxes, save severance taxes."

right to explore the formations below 3,000 feet on the said 40-acre tract.

Appellee, Peaker, holds under the aforesaid McNeil assignment.[2] Somewhat similar assignments were executed by others holding interests in the said Sections 27 and 28; and appellee, Peaker, became the holder of enough of these assignments to justify him in testing the formations below 3,000 feet in said Sections 27 and 28. Peaker first drilled a well in the SE¼ NE¼ of Section 28, known and referred to herein as the "Berg well."[3] He made a contract with Al Grandebush, a recognized driller, to drill the Berg well to a depth of 5,000 feet and to complete it in the Smackover lime. The contract price was $20,000. The time of commencement of this well will be discussed in Topic I, *infra.*

Grandebush drilled this Berg well to a depth of 3,416 feet, but was unable to carry the well to a greater depth; so he started a new well in the SW¼ NW¼ of Section 27, one-quarter mile to the East, and known as the "Reynolds Brothers well."[4] He actually drilled the Reynolds Brothers well to the Smackover lime. The failure to drill the Berg well to the Smackover lime and the drilling of the Reynolds Brothers well to that formation will be discussed in Topic II, *infra.*

When Grandebush found that he was unable to drill the Berg well to a depth greater than 3,416 feet, he tested the sand at that depth and brought in a producing oil well. That sand at 3,416 feet is now known as the "Cotton Valley Sand"; and the Berg well was the discovery well of the Cotton Valley Sand in Sections 27 and 28. When Grandebush drilled the Reynolds Brothers well to the Smackover lime (approximate depth 4,800 feet), he found said formation to be non-productive; so he made the Reynolds Brothers well into a com-

[2] There are other appellees who claim by, through, or along with Peaker; but for convenience we refer to Peaker as the principal appellee, since he was the one who undertook to fulfill the requirements of the said assignment executed by Vickers, et al.

[3] This was only one-half mile from the Murphy lease held by appellant.

[4] This Reynolds Brothers well was only one mile from the Murphy lease operated by appellant.

mercial producer from the Cotton Valley Sand. This was on January 18, 1956.

Peaker then prepared to drill on the Murphy lease here involved (SW¼ NW¼ Section 28).[5] On May 5, 1956, appellant, Vickers, and his sisters, filed the present suit to cancel the McNeil assignment under which Peaker claimed. The complaint alleged that the terms of the assignment had been breached by (1) failure to commence the Berg well on September 15, 1955, and also by (2) failure to drill the Berg well to the Smackover lime. Peaker and the other appellees denied both of the said claims; and also made the affirmative defense of laches and estoppel (which will be discussed in Topic III, *infra*). The Trial Court dismissed the Vickers suit for want of equity, and this appeal ensued: presenting the three points now to be discussed.

I. *When Did Drilling Commence On The Berg Well?* Appellants say: (1) that the McNeil assignment (under which Peaker claims) required that the drilling of the Berg well be commenced on or before September 15, 1955; (2) that the actual spudding in of the well was not until October 15, 1955; and (3) that, therefore, the assignment executed by appellants expired for failure of the assignee to perform its conditions. Appellants cite and strongly rely on our case of *Vaughan* v. *Doss,* 219 Ark. 963, 245 S. W. 2d 826, wherein we discussed the "unless" type of lease; and appellants point out that this is an "unless" type of assignment.

The record herein establishes the following: (1) some time prior to September 12, 1955, Peaker entered into a contract with Al Grandebush, whereby Peaker agreed to pay Grandebush $20,000 to drill the Berg well, and Grandebush agreed to drill the well to the Smackover lime, estimated to be between 4,800 and 4,900 feet below the surface; (2) on September 12, 1955, the location was surveyed and cleared; (3) on September 13th a road was constructed to the location; (4) on September 14th a permit was obtained from the Arkansas

[5] He was required under the terms of the assignment from Vickers to McNeil to drill a well on the Murphy lease within twelve months from July 21, 1955.

Oil & Gas Commission to drill the Berg well; (5) by September 15th certain material had been moved to the drill site for the well, including drill pipe, butane tanks, pipe racks, and other material; (6) the entire equipment had been moved to the drill site by October 13, 1955, and on that day actual drilling commenced by the drill bit piercing the earth; (7) in the early part of November, 1955, the well had reached a depth of 3,416 feet, when sand was encountered in such quantities as to cause the mud pump to go out of commission; (8) on November 22, 1955, the Berg well was completed as a producer from the Cotton Valley Sand at 3,416 feet.

Appellees argue that all of these matters taken together mean that drilling commenced on or before September 15th. Appellants say that drilling commenced only on October 13th, the day the drill bit actually pierced the earth. Which argument is correct? Does "drilling" commence with the operations for a well, or does it commence only with the piercing of the ground with the drill bit? Does "baking a cake" begin with the preparation of the dough, or only with the actual placing of the dough in the oven? In *Haddock* v. *McClendon,* 223 Ark. 396, 266 S. W. 2d 74, we had a somewhat similar question presented and, in refusing to declare the lease forfeited, we reviewed a number of cases and quoted from one of them in this language:

" 'We are cited to no case by plaintiffs, and we know of none, holding that actual drilling of an oil and gas well is not in fact commenced until, as contended by plaintiffs, all the equipment, machinery and materials necessary to drill and complete the well have been placed upon the leased property. In fact from the testimony of witnesses produced by both parties, it appears that it is not customary, prior to commencing drilling operations, to have upon the land everything necessary to complete the well.' "

In considering all of the facts as recited herein, and considering also the estoppel issue hereinafter discussed in Topic III, *infra,* we reach the conclusion that the appellants cannot successfully claim that their as-

signment was forfeited in this case for failure to have the drill bit pierce the earth by September 15, 1955.[6]

II. *What Of The Failure To Drill The Berg Well To The Smackover Lime?* Appellants insist that the McNeil assignment they executed was forfeited because of the failure of Peaker to drill the Berg well to the Smackover lime. The portion of the assignment germane to this point reads:

"Unless the assignee . . . commence the drilling of a well . . . on or before September 15, . . . and completes the same . . . to a depth sufficient to test the Smackover Lime Formation . . ." Appellants point out that the Berg well was the only well that Peaker could claim to have been commenced on or before September 15th; and that said well admittedly did not go to the Smackover lime. Therefore, appellants claim that their assignment is null and void.

Appellees insist that Peaker did begin the Berg well on or before September 15th, that Peaker was prevented by an unavoidable casualty from drilling the Berg well to the Smackover lime; and that immediately upon said casualty, Peaker began the drilling of the Reynolds Brothers well which went to the Smackover lime. Appellees claim "substantial compliance" with the assignment. Regarding unavoidable casualty: appellees showed that when Grandebush reached the depth of

[6] In Summers on "Oil and Gas," permanent Edition, § 349, the rationale of the holdings is summarized in this language: "*Beginning or Commencement of a Well or Drilling Operations.* Where the lessee covenants to begin or commence a well or drilling operations within a certain definite time, and his failure to do so places him under a liability to have the lease forfeited, or a duty to pay delay rental, it becomes necessary to determine what act or acts of the lessor will satisfy this requirement. *The general rule seems to be that actual drilling is unnecessary,* but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, *when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well,* constitute a commencement or beginning of a well or drilling operations within the meaning of this clause of the lease. If the lessee has performed such preliminary acts within the time limited, and has thereafter actually proceeded with the drilling to completion of a well, *the intent with which he did the preliminary acts are unquestionable, and the court may rule as a matter of law that the well was commenced within the time specified by the lease.*" (Italics supplied.)

3,416 feet in the Berg well he ran into so much sand that his mud pump was put out of commission[7]; that it was necessary to have the mud pump sent to Magnolia for repairs; that when the mud pump was put back into operation, Grandebush was unable to get circulation[8] of mud in the drilling of the Berg well. Grandebush testified that he could not afford to continue the drilling of the Berg well until he could get circulation; that his drill stem might become stuck in the sand; that if he tried to pull the drill stem, the derrick might collapse and some of his workmen might be killed or injured. Grandebush testified that he made all of these representations to Peaker; that Peaker still insisted that the Berg well be completed to the Smackover lime; but that finally Peaker reluctantly agreed that a new well (that is, the Reynolds Brothers well) could be drilled to the Smackover lime in lieu of the Berg well being drilled to that depth. The actual drilling of the Reynolds Brothers well commenced on November 15, 1955; the Berg well was not completed as a producer until November 22nd; the Reynolds Brothers well was drilled to the Smackover lime and found unproductive; and then later brought in as a producing well at the Cotton Valley Sand on January 18, 1956. With these facts thus detailed, we leave the second point to go to the matter of estoppel which, coupled with the facts heretofore recited, shows the equities to proponderate in favor of the appellees.

III. *Estoppel.* We have heretofore stated that the equities preponderated in favor of the appellees; and we now come to that point. The appellant, Vickers, testified that prior to July, 1955 no well had ever been drilled to the Smackover lime in Sections 27 or 28; that he executed the assignment to McNeil (under which ap-

[7] Grandebush testified that a mud pump cost about $28,000.00.

[8] "Circulation of the mud" in a rotary drilling well is a matter of extreme necessity. As the hole is being drilled the mud pumped in the well operates to seal the hole against cave-ins. Unless some portion of the mud be returned to the surface, it becomes evident that the mud is going into some porous formation and is not sealing the hole. The returning of a portion of the mud to the surface is called "circulation." Because the mud pump had to be repaired, the Berg well stood without operation for some time and when the mud pump was reinstalled, Grandebush was never able to get circulation again.

pellee, Peaker, holds) in order that a block of sufficient size could be assembled to justify someone to test the Smackover lime; and that he was willing to make his assignment to McNeil to enable such a test to be made. From this, and other evidence in the record, it is clear that Vickers knew that Peaker, in drilling the Berg well and the Reynolds Brothers well, was relying on the validity of the Vickers Assignment to McNeil. Vickers also testified that he visited the location of the Berg well several times; that he knew at all times of the drilling by Peaker of the Berg well and the Reynolds Brothers well; and that, based on information obtained from these wells, Vickers was enabled to successfully drill two wells to the Cotton Valley Formation on another tract in Sections 27 and 28 near the Murphy lease that Vickers was operating. From this evidence it is clear that Vickers used the information from the Berg well and the Reynolds Brothers well to successfully drill wells for himself. Vickers also admitted that he was not damaged in any way, nor his rights prejudiced in any way, by the delay of Peaker in drilling the Berg well or the Reynolds Brothers well to the Smackover lime; that it was not until April 24, 1956 that Vickers first notified Peaker that Vickers considered as forfeited the assignment from Vickers to McNeil; and that this was after Peaker had made a location and started a right-of-way on the Murphy lease.

From the foregoing it is clear that Vickers sat by and remained silent and allowed Peaker to expend at least $40,000 in testing the Smackover lime and proving the Cotton Valley formation to be productive (all of which information was valuable to Vickers), before Vickers ever indicated in any way that he was going to make any claim of any forfeiture of his assignment under which he knew Peaker was holding and claiming.

In *Bray* v. *Woodley,* 162 Ark. 186, 258 S. W. 119, we held that a landowner could waive the forfeiture of a lease by accepting the delay rentals. In *Hodges* v. *Harrell,* 173 Ark. 210, 293 S. W. 25, we held that the provision in an oil and gas lease for forfeiture for failure to drill within the stated time was waived when the

landowner permitted the well to be drilled after the stated time. In *Keylon* v. *Arnold,* 213 Ark. 130, 209 S. W. 2d 459, we discussed equitable estoppel by silence and quoted from 19 Am. Jur. 661:

"An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by,' and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent.' "
In *Johnson* v. *Spencer,* 222 Ark. 710, 262 S. W. 2d 290, we also discussed equitable estoppel by silence. The cited cases conclusively show that all the equities in the case at bar are against the appellants.

We have given these facts in detail because this is not an ordinary oil and gas lease case where the landowner signs a lease form prepared by the lessee; but this is a case in which two experienced operators in the same field are in litigation with each other, and Vickers' attorney prepared the instrument here involved. Vickers is trying to use the language of that instrument to affect a forfeiture against Peaker, and yet Vickers knew all the time that Peaker, in reliance on the validity and continued existence of the assignment, made large expenditures. Vickers profited by the information he received from such expenditures; and after gaining all this information he now seeks to cancel the instrument he executed, when he admits that he has not been damaged by any delay that he claims Peaker made.

In view of all of these equities, we conclude that the Trial Court was correct in dismissing the complaint for want of equity. Affirmed.

5-1226 300 S. W. 2d 603

Opinion delivered March 25, 1957.

[Rehearing denied and opinion amended, April 29, 1957]

[redacted]

Ben B. Williamson, for appellant.

John B. Driver and *N. J. Henley,* for appellee.

MINOR W. MILLWEE, Associate Justice. Appellees, Incorporated Town of Mountain View, Arkansas, and two of its taxpaying citizens filed this suit to enjoin the appellants, C. K. Lancaster, C. L. Lancaster Jr. and Richard Lancaster from the further erection of an obstruction upon the southern terminus of Lancaster Street in said town and to require removal of that portion of a building already erected. This appeal is from a decree granting the relief prayed.

According to appellees' proof G. D. Lancaster, father of C. K. Lancaster and grandfather of the other two appellants, owned lands in 1905 which he desired to lay out as an addition to the town of Mountain View.

In that year G. D. Lancaster filed for record a plat of land called Lancaster's Addition to the Town of Mountain View which designated streets, blocks and lots therein. In 1916 he filed and recorded a supplemental or additional plat of dedication more particularly describing the area involved in this litigation. Also in 1916 the town council of Mountain View caused a map of the town to be made and filed of record which included Lancaster Addition and is still the official map of the town. After the filing and recording of said plats and map G. D. Lancaster and subsequent owners sold and transferred lots in the addition by reference to the recorded plats and map. Among many such transactions is a warranty deed executed by the appellant, C. K. Lancaster, and the other heirs of G. D. Lancaster, deceased, on March 6, 1947, to the area in controversy here.

Lancaster Street runs north and south through the western part of Mountain View for about four blocks. As shown by the official map and supplemental plat filed by G. D. Lancaster, the area in controversy is that part of Lancaster Street bounded on the north by Main Street, which runs east and west, and on the south by State Highway 66, which is the southern terminus of Lancaster Street and marks the corporate limits of the town at that point. Appellants own a small triangular strip designated as Lot 12 which is adjacent to the area in question on the east side of Lancaster Street and across the street from the American Legion Hut built about 1932. In 1946 appellants constructed a filling station on their lot with a concrete apron or slab that extended upon the street several feet which has been used for washing and parking cars.

Shortly before the filing of this suit on December 10, 1955, appellants started construction of a concrete block addition to their filling station building. This addition encroached upon Lancaster Street a distance estimated at 12 feet 11 inches to 14 feet. Although Lancaster Street is 33 feet wide at this point according to the official map, the mainly traveled portion is about 22 feet wide. According to appellees' witnesses the

area in controversy has been used by the public generally as a street for more than 25 years and during most of this time the town has graded and maintained it in the same manner as other streets of the town.

Appellants first say the town of Mountain View never legally authorized the bringing of the instant suit, but it is unnecessary to determine this question. Regardless of the town's authority to prosecute the suit, the two taxpaying citizens who joined as party plaintiffs had a right to maintain it as a class action under Ark. Stats., Sec. 27-809. *Goodman* v. *Powell,* 210 Ark. 963, 198 S. W. 2d 199.

Appellants' contention that the area in controversy was never properly dedicated to public usage is also without merit. Many of our decisions recognize the rule that where owners of land lay out a town or an addition to a city or town, platting it into blocks and lots, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and such dedication is irrevocable. *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541; *Mebane* v. *City of Wynne,* 127 Ark. 364, 192 S. W. 221; *Butler* v. *Emerson,* 211 Ark. 707, 202 S. W. 2d 599. A preponderance of the evidence supports the conclusion that such dedication was made of the area in controversy; and that the individual plaintiffs and other residents of the town acquired prescriptive rights by reason of the fact that the general public adversely used the area as a public way for more than seven years. The decree permanently enjoining appellants from further construction of said concrete block building in Lancaster Street and directing removal of that portion already built is accordingly affirmed.

LEACH *v.* LEACH.

5-1235 300 S. W. 2d 15

Opinion delivered March 25, 1957.

Eugene Coffelt, for appellant.

Eli Leflar, for appellee.

GEORGE ROSE SMITH, J. This case presents a question that is novel in this state and very nearly so in the United States: Can a husband maintain a suit against his wife for damages due to her negligence? The appellant's complaint, as supplemented by a stipulation, alleges that on August 9, 1956, he was the owner of a pick-up truck and a Ford sedan. As Leach was driving the truck on a county road he collided with his wife, who was driving the sedan in the opposite direction. It is asserted that Mrs. Leach was driving on the wrong side of the road and at an excessive speed. The trial court sustained a demurrer to the complaint and dismissed the action.

At common law neither spouse could maintain a tort action against the other. In the various states there is a decided difference of opinion about the extent to which the common law rule has been affected by statutes removing the disabilities of married women. The question has usually been considered in the converse situation, where the wife seeks to sue her husband. By a dwindling majority which now stands at about two to one the American courts hold that she cannot maintain the action. Prosser on Torts (2d Ed.), § 101; Sanford, Personal Torts Within the Family, 9 Vanderbilt L. Rev. 823. The courts following the majority view construe the emancipation acts strictly, as being in derogation of the common law, and usually suggest that recognition of suits between spouses would adversely affect har-

mony within the home. Prosser's criticism of the majority rule typifies the position generally taken by legal writers: "The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy — and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it." Prosser, *loc. cit.*

This reasoning has never appealed to us. With respect to a wife's suit against her husband we adopted the minority view more than forty years ago and have adhered to it. *Fitzpatrick* v. *Owens,* 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772; *Katzenberg* v. *Katzenberg,* 183 Ark. 626, 37 S. W. 2d 696. In the *Fitzpatrick* case we considered and rejected both the usual arguments, that the statute is to be interpreted narrowly and that the majority view tends to preserve marital harmony. If these arguments are without merit when the wife sues the husband, they are obviously equally ineffective when the situation is reversed.

As Sanford correctly points out in the article cited above, the problem is primarily one of statutory construction. Our emancipation act is far more sweeping in its language than are most statutes on the subject: "Every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all the rights and be subjected to all the laws of this State, as though she were a femme sole; provided, it is expressly declared to be

the intention of this act to remove all statutory disabilities of married women as well as common law disabilities, such as the disability to act as executrix or administratrix as provided by § 6 of Kirby's Digest, and all other statutory disabilities." Ark. Stats. 1947, § 55-401.

We do not perceive that the explicit language of the statute leaves any doubt about the legislative intention. The appellee's suggestion that the act was meant only to broaden the rights of married women, and not to curtail the protection afforded them at common law, is rebutted by the unequivocal and unrestricted declaration that married women may "sue and be sued." This clause was the basis for our holding that a wife may sue her husband in tort. There can be no sound basis for a different conclusion when the shoe is on the other foot, for in the same breath the legislature abolished her disability to sue and her immunity from being sued.

On the question now presented the decisions elsewhere do not support the appellee's contention that we can with consistency adopt one rule for the wife and another for the husband. As might be expected, those courts which hold that a wife cannot sue her husband for a personal tort also hold that he cannot assert a similar cause of action against her. In jurisdictions adhering, as we do, to the minority view, the converse situation has arisen only twice, and it happens that both cases denied the husband's right to sue his wife. *Scholtens* v. *Scholtens,* 230 N. C. 149, 52 S. E. 2d 350; *Fehr* v. *General Accident, etc., Corp.,* 246 Wis. 228, 16 N. W. 2d 787, 160 A. L. R. 1402. But in each case the court was construing a statute which expressly conferred upon a married woman the right to sue but did not mention the correlative matter of her liability to being sued. The problem, as we have said, is one of statutory construction; so we cannot be guided by decisions based upon statutes that differ from ours upon the very point that is controlling.

Reversed, the demurrer to be overruled.

HARRIS, C. J., and HOLT, J., dissent.

CARLETON HARRIS, Chief Justice (dissenting). In dissenting to the ruling of the majority, I desire to make it clear that my dissent is not based upon the fact that the common law did not grant either spouse the right to maintain tort action against the other; nor am I concerned because we are the first state to allow the husband the right to sue his wife for tort. I fully agree that if the wife has the right to sue the husband in tort, the converse should likewise be true, but I am persuaded that to allow either spouse to sue the other for *unintentional* tort is against public policy,[1] and should be so declared by this Court. I would accordingly overrule the case of *Katzenberg* v. *Katzenberg,* 183 Ark. 626, 37 S. W. 2d 696.

I would not overrule *Fitzpatrick* v. *Owens,* 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772, as that case dealt with the right of the wife to sue her husband for *intentional* injury. Actually, in that case, the husband made an assault upon the wife, and killed her, and the suit was brought by her administrator. To me, there is a vast difference between rights of a spouse that might accrue from an *intentional* injury, in contradistinction to an *unintentional* injury.

The theory of the law in those jurisdictions which frown upon suits between husband and wife is that permitting suits between spouses would adversely affect harmony in the home. The majority, in this current Opinion, quote Prosser. "The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald the-

[1] Bouvier's Law Dictionary defines Public Policy As: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good." It has been designated by Burroughs, J., as "an unruly horse pursuing us, and when once you get astride of it you never know where it will carry you."

ory that after a husband has beaten his wife there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy — and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.'' Prosser, *loc. cit.* I have no quarrel with this language; in fact, I quite agree that the harmony of the home is already disrupted when either spouse commits an *intentional* tort against the other. The same language does not apply to an *unintentional* tort.

Let us take a hypothetical case. The wife, after finishing her housecleaning, neglects to return the vacuum cleaner to the closet where it usually is placed, and negligently leaves same in the middle of the hall. The husband, returning home that night from a business trip, after the wife has retired, stumbles over same, and receives injuries. Under the view of the majority, he is entitled to sue the wife. Of course, if she is without means, he would not bring a suit; if, on the other hand, she is gainfully employed, or financially independent in her own right, and he goes to court to recover from her for the injury, no imagination is needed for one to know that harmony in that home would be completely disrupted, and connubial bliss abruptly terminated. The marriage relationship, which might have been happy enough, would totally disintegrate. But, on the other hand, let us say that this particular family has comprehensive personal liability coverage, and suit is brought. In such event, I concede that domestic harmony would not be destroyed, but it could not be logically argued that such a suit between spouses would be justified simply because the insurance company, after all, would be the one to pay. This brings me to one of the worst features involved in permitting this type of suit. Using my same example, let us say that the hus-

band fell and injured himself in the home, not because of his wife's negligence, but because of his own carelessness. There will be medical expenses and loss of time from work, with perhaps a resulting loss of income. Under this set of facts, the husband would have to stand this loss himself, which would also directly affect the welfare of the wife. Now, if this man and wife are without morals and conscience, what is to prevent the husband from instituting suit against his wife, alleging that his injury occurred in the manner first stated. (Wherein she left the cleaner in the hall.) She does not deny it, and how can it be proved that it did not happen in that manner? There are no other witnesses to establish that the injury was sustained by the husband because of his own negligence rather than that of his wife. Unfortunately, I fear that there might be a few husbands and wives who would welcome the opportunity to make a joint raid upon an insurance company. This certainly should not be permissible. Either set of facts presents an intolerable situation, not in the interest of the public, and one which the law should not countenance. While I hope that it will not so result, the holding of the majority, in my opinion, opens the door to fraudulent claims against insurance carriers.

Be that as it may, litigation between man and wife for an unintentional tort committed by one against the other, is not salutary, and actually is repugnant, to the marriage vows. The bulwark of our community and national strength is the home, and we should not adopt a policy that might well, in individual cases, rupture marital happiness.

Solely because I consider such holding to be *against public policy,* I respectfully dissent.

Justice HOLT joins in this dissent.

GIFFORD-HILL & CO., INC. *v.* BRASWELL SAND & GRAVEL CO., INC.

5-1192 300 S. W. 2d 24

Opinion delivered March 25, 1957.

Shaver, Tackett, Jones & Lowe, for appellant.

Cecil E. Johnson and *Chas. C. Wine,* for appellee.

PAUL WARD, Associate Justice. Appellant, Gifford-Hill Company, Inc., and appellee Braswell Sand and Gravel Company, both claim the right to produce and sell sand and gravel from lands lying in Little River and Sevier Counties, and also claim, in connection therewith, the right to the use of personal property and equipment situated on said lands. Appellee's claim is based on a lease and assignments emanating from the owner of said lands and personal property. Appellant's claim is based on a subsequently executed quitclaim deed by said owner which, it contends, conveys title free and clear of any right or claim on the part of appellee.

On January 16, 1942 Nina V. Jones, as the owner in fee of said lands and personal property, executed a lease contract with the Little River Sand and Gravel Development (a partnership) whereby lessee was to have the exclusive right to produce sand and gravel from said lands, and to use the personal property and equipment

in doing so. The term of the lease contract was 4-1/2 years from the date of execution and "as long thereafter as the production of gravel and sand from said lands shall be carried on by the lessee with due diligence . . ." Lessee was obligated to expend an amount not exceeding $25,000 in repairing and replacing the said equipment which was recognized in the lease to be "largely obsolete and in a state of bad repair, . . ." Both the lessor and the lessee were to be liable *pro rata* for the payment of severance taxes levied by the State of Arkansas. This lease deed was recorded February 24, 1942.

On October 7, 1943 the same parties mentioned above executed a written "Amended Lease Agreement" which amended the lease agreement set forth above in several particulars. One of these amendments provided that the lessee should pay $500 each year to maintain said lease in force and effect after the expiration of the aforementioned 4-1/2 years, said payments to be made to the lessor, Mrs. Nina V. Jones, or to her credit in the Merchants National Bank and Trust Company of Vicksburg, Mississippi.

On October 4, 1945 the Little River Sand and Gravel Development, designated as assignor, entered into a written contract with appellee, designated as assignee, whereby the assignor sold, assigned and conveyed unto the assignee all of its right, title and interest acquired under the aforementioned lease and amended lease. Among other things this instrument recognized that assignor was charging assignee $40,000 for the equipment located on said lands to be paid as sand and gravel were produced and sold. It also provided that the assignee, appellee, should maintain the aforementioned

$500 yearly payments to Nina V. Jones. The above assignment was signed by the assignor in this manner:

> "LITTLE RIVER SAND AND GRAVEL DEVELOPMENT
> BY Sidney G. Myers
> Sidney G. Myers, individually and as agent and attorney in fact for Richard M. Sellwood, Jr., and Joseph G. Sellwood."

On October 6, 1945 Joseph G. Sellwood (mentioned above) individually and as agent and attorney in fact for Richard M. Sellwood, Jr., ratified the acts of Sidney G. Myers in executing the contract mentioned above on October 4, 1945.

On October 11, 1945 by a written contract filed for record on November 30, 1945, appellee entered into a lease agreement with the Kansas City Southern Railway Company relative to certain rail and track material on the lands in question.

On October 25, 1945 there were executed three other written contracts or agreements ratifying the assignment to appellee on October 4, 1945 and providing for royalty payments to Nina V. Jones.

With the exception of the original lease executed on January 16, 1942, as heretofore mentioned which was filed February 24, 1942, and with the exception of the rail lease agreement executed on October 11, 1945, as heretofore mentioned, which was filed on November 30, 1945, all of the written contracts, agreements and assignments, mentioned above were filed of record on September 8, 1953.

The record discloses that all royalty payments mentioned in the above instruments accrued up to the time this litigation began were paid to and received by Nina V. Jones or the bank designated by her. There is testimony in the record to show that appellee had not been actively engaged at all times in the production of sand and gravel on the lands involved, but that it had main-

tained a watchman at the site of the property and had paid severance taxes to the state up until this suit was filed.

On October 13, 1953, Nina V. Jones for "$100 and other good and valuable considerations" executed to appellant a quitclaim deed to all of the real and personal property involved in this litigation. This quitclaim deed was filed for record on October 16, 1953.

On April 15, 1954 appellant filed a complaint in the chancery court seeking to restrain appellee from removing sand and gravel from the lands involved herein and asking that all of the lease agreements, assignments, etc. under which appellee claims be cancelled as clouds upon its title. It was appellant's contention that it was a *bona fide* purchaser without notice of appellee's claim, and also that appellee's rights had been forfeited by abandonment of operations. The testimony presented a fact question as to whether appellee had in fact abandoned operations to the extent of forfeiting its rights, but it is unnecessary for us to consider the case from that standpoint, because we agree with the chancellor that appellant was not a *bona fide* purchaser without notice.

Appellant ably contends that the assignment (to appellee), which was placed of record September 8, 1953, did not constitute constructive notice to it, for the reason that it was executed by an attorney in fact without the power of attorney having been placed of record. To support this contention appellant relies upon Ark. Stats. § 50-422 and the following decisions of this court: *Carnall* v. *Duval,* 22 Ark. 136; *DuVal* v. *Johnson,* 39 Ark. 182; *Jones* v. *Green,* 41 Ark. 363, and; *Hershy* v. *Berman,* 45 Ark. 309.

There are, however, convincing reasons why we cannot agree with appellant's contentions. In the first place, the authorities relied on by appellant are not applicable to the facts of this case. The rule of law announced by them is fairly stated in the second headnote in the *Jones* case, *supra*: "Powers by which deeds are made must be

recorded, or the record of the deed will not be notice to a *subsequent purchaser from the party executing the power.*" (emphasis supplied). In the case under consideration appellant did not *purchase from the party executing the power of attorney.*

If any one in this case executed a power of attorney, it was of course a partner in the Little River Sand and Gravel Development, and appellant's quitclaim deed was executed by Nina V. Jones.

There are also other reasons why appellant cannot prevail. The lease from Nina V. Jones to the Little River Sand and Gravel Development, dated January 16, 1942 and recorded February 24, 1942, (as amended on October 7, 1943) contained a provision for standby rentals to keep the lease alive. This lease was not executed by a power of attorney and appellant was of course charged with constructive notice. If appellant had made inquiry of Nina V. Jones it would have learned that appellee's lease had been kept alive by the regular payment of rentals.

Not only so but, contrary to appellant's assumption, the validity and force of appellee's lease did not depend entirely on an unrecorded power of attorney. At least two of the partners of the Little River Sand and Gravel Development (Sidney G. Myers and Joseph G. Sellwood) signed in their own rights.

Affirmed.

STEPHENS *v.* CITY OF FORT SMITH.

4869 300 S. W. 2d 14

Opinion delivered March 25, 1957.

Martin L. Green and *J. Sam Wood,* for appellant.

Lem C. Bryan and *Chas. A. Beasley,* for appellee.

SAM ROBINSON, Associate Justice. Appellant appeals from a conviction of violating Ark. Stats. § 41-4501, which provides: "Any person who shall wear or carry in any manner whatever, as a weapon, any dirk or bowie knife, or sword or spear in a cane, brass or metal knucks, razor, blackjack, billie or sap, ice pick, or any pistol of any kind whatever, shall be guilty of a misdemeanor." A jury was waived, and the cause was submitted to the court on the following agreed statement of facts:

"In March, 1956, the defendant LeRoy Stephens was employed as a United States Mail Carrier in Fort Smith, Arkansas. On or about March 6, 1956, at about 5:25 P. M. detectives Ralph Middleton and Edward Walker contacted said LeRoy Stephens at the B Street Post Office in Fort Smith, Arkansas, and asked him to come to the police station for a talk. Detective Ed Walker drove said LeRoy Stephens' car from said post office to the police station and en route found an automatic pistol, which was loaded, in the glove compartment of said LeRoy Stephens' car. LeRoy Stephens made the statement that the pistol belonged to his Mother.

"Stephens had been working at the said post office on said date and just finished work for the day at the time he was contacted by the officers.

"Neither the car nor the glove compartment in it was locked when Detective Walker got in it, but the glove compartment was closed.

"At the time when said pistol was found, LeRoy Stephens was not in the car for the reason that he rode to the police station in a separate car with Detective Ralph Middleton. However, said LeRoy Stephens stated that he had driven the car to work."

The sole issue on appeal is the sufficiency of the evidence to sustain the judgment of guilty. The pertinent part of the statute reads: "Any person who shall wear or carry in any manner whatever, as a weapon, . . . any pistol of any kind whatever, shall be guilty of a misdemeanor." The statute making it unlawful to carry a pistol as a weapon has several exceptions, but none of the exceptions apply here. There is only one question: Is the evidence sufficient to base a finding that the pistol was carried in any manner as a weapon? It was loaded, and the presumption is that it was placed in the glove compartment of the car as a weapon. *Carr* v. *State,* 34 Ark. 448. Of course, the defendant might remove the presumption by proof. But it would be one of fact and not of law. Here, the defendant offered no evidence to rebut the presumption.

The exceptions not being applicable, can it be said that the defendant carried a pistol in any manner? If so, he is guilty. The direct and circumstantial evidence that he carried the pistol in the glove compartment of his car is substantial. Placing a pistol in the glove compartment of the automobile within easy reach of the driver is certainly one way of carrying it and, in many instances, the operator of the car could get it out of such place easier than he could draw a pistol from his pocket. The pistol was found in appellant's car; he had driven the car to work that morning. He claims the pistol belongs to his mother but it is not stipulated that his mother had placed the pistol in the automobile. He makes no claim that he did not know the gun was in the car.

Appellant cites some cases, such as *Williams* v. *Commonwealth of Kentucky,* 261 S. W. 2d 807, to the effect that carrying a pistol in an automobile is not a violation of the statutes of the particular state involved, but in most cases cited by appellant the statute is not as broad as the Arkansas statute. For instance, the Kentucky statute provides: "(carrying) concealed a deadly weapon, other than an ordinary pocket knife, on or about his person." Our statute prohibits carrying a pistol in any manner whatever, with certain exceptions. In *Henderson* v. *State,* 91 Ark. 224, 120 S. W. 966, the

court refers to our statute as "broad language," and the opinion goes on to state that the purpose is to prevent the wearing or carrying about the person any pistols mentioned under the circumstances detailed in the statute. Our statute does not provide that the pistol has to be actually carried on the person. The statute prohibits the carrying of a pistol in any manner, and certainly having a pistol on the seat or the floor or in the glove compartment of an automobile, as it was here, is carrying a pistol in "any manner."

The weight of authority sustains the view expressed herein. 43 A. L. R. 2d, page 537.

Affirmed.

DuVal *v.* City of Little Rock.

5-1274 300 S. W. 2d 19

Opinion delivered March 25, 1957.

Wright, Harrison, Lindsey & Upton, for appellant.

O. D. Longstreth, Jr.; Spitzberg, Bonner, Mitchell & Hays, and *Mehaffy, Smith & Williams,* for appellee.

SAM ROBINSON, Associate Justice. The City of Little Rock owns its water supply system. The City is growing rapidly and there is an urgent need for expanding and improving the water supply. In order to raise money for this purpose, the City seeks to issue Revenue Bonds under an Indenture. The appellants, George E. DuVal, property owner, taxpayer and water customer, and Curtis Barham, owner of Water Works Bonds issued in 1936, filed this suit to enjoin the issuance of new bonds to finance the contemplated improvements, extensions and betterments.

The City demurred to the complaint. The trial court sustained the demurrer, and DuVal and Barham have appealed.

To facilitate the new bond issue, hereinafter referred to as the 1956 issue, the City Council passed Ordinance No. 10,364. The ordinance declares the value of the then existing water supply system to be $11,715,000, excluding improvements made in 1952, and the value of the proposed betterments and improvements to be made under the 1956 bond issue and those made under a 1952 bond issue to be $9,585,000, the face amount of the 1956 bonds; the 1952 bonds are to be refunded. The ordinance further provides that the value of any improvements made in the future under the 1956 Indenture shall be the face amount of the bonds so issued to provide for such improvements. The revenues to be used in

retiring the various bond issues are to be apportioned in accordance with such valuation. Appellants say that the fixing of such values and apportioning the revenues accordingly is not authorized by law and impairs the security for the 1936 bonds.

In Section 11 of Article V of the 1936 Indenture it was recognized that it might be necessary in the future for the City to issue additional bonds for further betterments, etc. The 1936 Indenture therefore provides for an increase in rates, if necessary, to meet the requirements of all bond issues. Hence, additional bond issues were anticipated and provision made for an increase in rates, if necessary, to meet all payments on the various issues.

Section 10 of Act 131 of 1933 (as now amended, is Ark. Stats. § 19-4210) was in effect at the time of the making of the 1936 Indenture, and applies insofar as that indenture is concerned; it provides: "Whenever any municipality . . . shall own and operate a waterworks system . . . and shall desire to construct improvements and betterments thereto, it may issue revenue bonds under the provisions of this act to pay for same, and the procedure therefor, including the fixing of rates and the computation of the amount thereof, shall be the same as in this act provided for the issuance of bonds for acquisition or construction of a waterworks system in a municipality which has not theretofore owned and operated a waterworks system; provided, however, that in the ordinance declaring the intention to issue the bonds and providing details in connection therewith, the council shall (a) provide, find and declare in addition to the other requirements set out in this statute the value of the then existing system and the value of the property proposed to be constructed, . . ." This act specifically authorizes the City Council to do the very thing the Council did in the case at bar: "The Council shall provide, find and declare . . . the value of the then existing system, and the value of the property proposed to be constructed."

Paragraph IX of the complaint alleges: "The Board of Commissioners of the Little Rock Municipal Water

Works has filed with the City Council a report on the values of the properties constituting the existing waterworks system, and the City Council has fully considered said report and other pertinent information and, as a result thereof, has found and declared that the value of the existing waterworks system, excluding the betterments and improvements financed by the Waterworks Improvement Revenue Bonds of 1952, is $11,715,000 . . .'' In finding the value of the then existing system, the Council did exactly what is required by the statute. It is not shown just how the valuation of $11,715,000 was reached, but the complaint alleges that the Council had fully considered the report of the Commissioners of the Water Works system and other pertinent information. There is nothing indicating that the Council used an unlawful method in finding the valuation. Furthermore, at the time the 1936 bonds were issued there was a valuation of only $6,590,000, which was also the total amount of the bonds issued in 1936. But now, there is a valuation of $11,715,000 assigned to the existing system and only $4,572,000 balance outstanding of 1936 bonds. Hence, as a matter of fact, the 1936 bondholders now have a great deal more security than they had to start with.

Probably to simplify and make less expensive the issue of bonds in the future, the 1956 Indenture is calculated to serve for all subsequent bond issues; in other words, for financing purposes the 1956 bonds will be combined with future bond issues. Appellants contend: ''The action of appellees in combining for financing purposes, the proposed $9,585,000 Water Revenue Bonds, Series 1956, with subsequent series of bonds, to be issued from time to time in the future, without making separate determinations of values and divisions of revenues at the time of each such subsequent issue, is contrary to law and in violation of the rights of the holders of the 1936 Indenture Bonds.'' It is true that the present valuation of the existing system, $11,715,000, will be in effect in the future notwithstanding additional bonds may be issued under the 1956 Indenture. But it makes no difference whether such bonds would be issued now un-

der the 1956 Indenture or issued at some time in the future. The 1936 bondholders will be in no way prejudiced as they will always have the $11,715,000 valuation and the revenues based on that valuation for the payment of the 1936 bonds.

The 1936 bonds are being retired regularly but if there should ever become a time that the revenues are not sufficient under the prevailing rates, this situation would be met by increasing such rates, as provided by Section 11 of Article V of the 1936 Indenture, which provides: "The City further covenants and agrees that if, at any time while any of the bonds issued under and secured by this Indenture shall be outstanding, it shall issue additional revenue bonds under the provisions of Section 10 of said Act 131 of 1933, as amended, to construct improvements or betterments to the waterworks system, the rates for water shall be increased, if necessary, to such extent that the revenues of the waterworks system remaining after setting aside the proportion thereof applicable to the payment of the additional revenue bonds issued for such improvements or betterments and to the costs of the operation and depreciation thereof, shall be sufficient to make the payments required to be made under Sections 6, 8 and 9 of Article III of this Indenture into the Water Revenue Bonds Fund, into the Water System Depreciation Fund and into the Water System Operation and Maintenance Fund, respectively." We fail to see how the finding at this time of the present valuation of the existing system does not comply with Act 131 of 1933. It is true that the act provides that "the Council shall provide, find and declare in addition to the other requirements set out in this statute, the value of the then existing system and the value of the property proposed to be constructed," but the Council has declared the valuation of the present system existing at the time of making the new 1956 Indenture, and the fact that all of the bonds that may be issued under that Indenture in the future are not issued at this time is of no consequence. The holders of the 1936 bonds are amply protected with the valuation fixed, and the purchasers of the bonds under the 1956 Indenture take with

full knowledge of all of the provisions of that instrument. Certainly, the statute does not mean that the 1936 bondholders are entitled to more valuation than that existing at the time of the first bond issue subsequent to the 1936 issue. True, subsequent issues give additional value, but this additional value must be handled so as to produce revenues to retire the subsequent issues.

There was a comparatively small bond issue in 1952; these bonds were sold at a very low rate of interest, part bearing interest at 1 3/4% per annum and part bearing 2%. The 1952 bonds are callable, and under the 1956 Indenture they will be refunded. The 1956 issue is in an amount sufficient to take care of such refunding, and although the 1956 bonds may bear interest at not more than 5% per annum, the 1956 Indenture provides that an amount of the 1956 bonds sufficient to refund the 1952 bonds may bear interest at no more than the present interest rate on the 1952 bonds. In other words, the bonded indebtedness on the 1952 bonds is not being increased by the refunding of those bonds. The power to issue bonds includes the power to refund such bonds provided the debt on the old bonds is not increased. *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. 2d 71; *Arkansas Bond Company* v. *Harton,* 191 Ark. 665, 87 S. W. 2d 52; *Ferris* v. *Stewart, County Judge,* 200 Ark. 714, 140 S. W. 2d 431. This court has approved the combining of refunding bonds and construction bonds in a single issue. *Bay Special Consolidated School District No. 21* v. *Hall,* 194 Ark. 423, 107 S. W. 2d 347. And the law does not prohibit the refunding of any series of bonds that may be issued under the 1956 Indenture.

The 1956 Indenture permits a redemption of the bonds issued thereunder at specific periods upon the payment of a premium for such redemption. Those bonds are being sold without the privilege of conversion, therefore the bond dealer who purchases the bonds from the City must in turn sell the bonds at a premium in order to realize a profit. Of course, no one would buy a bond and pay a premium therefor if the City could redeem the bond at par. Hence, the Indenture provides for a

premium in the event the City desires to redeem before maturity. But, the redemption premium allowed, coupled with the interest rate which the bonds will bear, does not exceed the rate of interest allowed by law.

The 1956 Indenture is what is known as an "Open End" Indenture, and authorizes the issuance of additional bonds on a parity with the 1956 series. The 1956 Indenture provides that before such additional bonds may be issued there must be revenues amounting to a gross of 200% and a net of 130% of the revenues needed to make the payments on the outstanding indebtedness. Appellants contend that this limitation is not authorized by law. This provision is for the protection of both the City and the purchasers of the bonds. It is realized that there will be a necessity for the issuance of additional bonds on one or more occasions before the 1956 bonds are retired. The City stands to save a great deal if such bonds can be issued under the 1956 Indenture on a parity with the 1956 bonds. But, of course, before a purchaser of the 1956 bonds would agree to such an arrangement he would want to know that additional bonds would not be issued recklessly, even if this could be done, which is not probable. The statutes in no way prohibit the City from agreeing to such a provision in the Indenture; in fact, Ark. Stats. § 19-4216 provides: ". . . The priorities as between successive issues of revenue bonds may also be controlled by the provisions of said ordinance. Said ordinance may also, if deemed desirable, provide for the execution . . . by the municipality of an indenture defining the rights of the bondholders *inter sese* . . . providing for the priority of lien as between successive bond issues, . . . or the application or safeguarding of the proceeds of the bonds, or other covenants intended for the protection of the bondholders; and containing any other provisions (whether similar or dissimilar to the foregoing) which are consistent with the terms of this act and which may be deemed desirable." Here, the City has determined that it is desirable for the Indenture to contain a provision in regard to the receipt of revenues before the issuance of addi-

tional bonds under the 1956 Indenture. We cannot say as a matter of law that such provision is not desirable.

Appellants complain that under the 1956 Indenture the City is not required to maintain separate depreciation, operation and maintenance funds. Of course, the purchasers of the 1956 bonds will take with full knowledge of the provisions of the indenture. There will be allocated to the 1936 bonds the proper percentage of the gross revenues; it is hard to see how the 1936 bondholders will be prejudiced, but if at any time a proper percentage of the revenues is not allocated to the retirement of the 1936 bonds, such condition could be corrected.

Affirmed.

Justices McFaddin, Millwee and Smith dissent in part.

Forster *v.* Bates.

5-1218 300 S. W. 2d 267

Opinion delivered April 1, 1957.

Digby & Tanner, for appellant.

Terral & Rawlings, for appellee.

Carleton Harris, Chief Justice. Pauline Bates, a resident of Pulaski County, Arkansas, died intestate on or about April 19, 1955, leaving surviving her, Fred Bates, her husband, and her brothers, M. P. Forster II, Henry Forster, her sisters, Katherine Elizabeth McCumpsey, Clara Forster Pape, and her nephews and nieces, who were children of Gertrude Pinkerton, a de-

ceased sister[1]. At the time of her death, Pauline Bates was the owner of a certain eight acres, described in the complaint, located in Pulaski County, Arkansas. Title to this property had originally been held by her father, and subsequent to his death, the appellants herein quitclaimed their interest in said property to Mrs. Bates. Appellee constructed a house thereon, lived there with Pauline Bates until the time of her death, and continues to reside in said location. Following the death of his wife, appellee learned (according to his testimony) that title to the property had been held entirely in his wife's name, and that he presently held only a curtesy interest. Later he contacted an attorney, Mr. J. S. Abercrombie of Pulaski County, and subsequently proceeded to contact appellants. Mrs. McCumpsey, Henry Forster, and M. P. Forster II, accompanied appellee to Mr. Abercrombie's office at different times, and conveyed, by quitclaim deed, their interest in said property to appellee. The wives of the Forsters relinquished their rights of dower and homestead at the same time. This deed is dated June 3, 1955. Mrs. Clara Forster Pape, who was living in Chicago, refused to sign a similar deed, and on November 2, 1955, appellants filed suit in the Pulaski Chancery Court, asking that their deed be cancelled and that they, together with the other heirs of Pauline Bates, deceased, be declared the owners of the property. For grounds of cancellation, appellants alleged: "That the said defendant, Fred Bates, made certain misrepresentations and perpetrated a fraud upon the plaintiffs, and informed them that all heirs at law of his deceased wife, Pauline Bates, would convey subject property to him, individually." * * * "That there was no consideration for the deed of conveyance aforesaid by the plaintiffs to the defendant; that he obtained said deed of conveyance from them by misrepresentation and fraud; that he has not obtained the interest of the other heirs of Pauline Bates, deceased; and that the condition upon which said deed of conveyance from the plaintiffs to the defendant has failed." Appellee filed a general denial, and the cause proceeded to trial. At the conclu-

[1] Mrs. Pape and the nephews and nieces are not parties to this litigation. Appellee later obtained deed from all except Mrs. Pape.

sion of the hearing, the Court entered its decree, finding for the appellee, and dismissing the cause of action. From such decree comes this appeal.

The fraud, alleged by appellants, consists of the alleged statements of appellee and his attorney, purportedly made to appellants before they signed, that all other heirs of Pauline Bates would likewise convey their interest. The statements of appellants, however, are somewhat vague; for instance, Mrs. McCumpsey testified that while Judge Abercrombie made such a statement to her, she did not ask him as to where he obtained the information, asked no questions at all, just "read the deed and it seemed like it was right." It is difficult to understand a person deeding away her interest in property simply because she is advised by an attorney that the other heirs are deeding their interests, and not even asking a single question about it. Mr. Henry Forster was asked: "Q. What was it Judge Abercrombie asked you, if you recall? A. Well, the whole thing was misrepresented. Q. Will you tell the Court what was said? I believe that is a function of the Court to determine whether that is correct, but tell the Court what was said? A. I don't know very much. THE COURT: Answer his question, Mr. Forster. If you know tell him and if you don't know, say so. THE WITNESS: A. I don't know. MR. TERRAL: Q. Just a minute. Did Judge Abercrombie say anything? THE COURT: Do you recall anything Judge Abercrombie said? THE WITNESS: No." Appellee testified that, under the impression he held equal interest in the property with his wife, his entire life savings ($9,000) had been invested in building a home, that such expenditure would not have been made had he known the true situation, and when he learned that the deed was entirely in his deceased wife's name, he went to Mrs. McCumpsey, and she advised that he obtain a lawyer. She, at that time, indicated her willingness to sign and stated that she would contact Mrs. Pape in Chicago. Appellee testified that he talked with the other appellants and each agreed to sign the deed. Both appellee and Judge Abercrombie testified that the latter explained to Mrs. McCumpsey

that Mr. Bates felt that since he had placed a $9,000 home upon unimproved property, under a mistaken belief, for appellee and his deceased wife to live in, he (appellee) was entitled to the property, and Judge Abercrombie asked Mrs. McCumpsey if she thought "it would be the will of your deceased sister that he should have the property." To this question, Judge Abercrombie stated that she answered "Yes," and proceeded to sign the deed. Judge Abercrombie further testified that before each appellant signed, he made the same explanation and asked the same question, and that the only representation he made as to whether Mrs. Pape would sign the deed was that Mrs. McCumpsey had said that she would do so. Mrs. McCumpsey denied such a conversation, and stated that she had never communicated with her sister about the deed. When asked as to whether or not she had talked over the phone with her about signing, she replied, "I don't remember,"; however, a letter placed in the record from Mrs. Pape to Mr. Bates, dated July 10, 1955, contained the following: "* * * Writing you about the papers that you sent me to sign when I called Katy I did say that I would sign if the clause was put in about the bauxite. * * *"

One of the strongest arguments supporting appellee's position relates to the fact that though the deed in question was signed in June, 1955, not a single one of the appellants endeavored to contact appellee or saw fit to complain that they had signed the deed because of misrepresentation; in fact, they filed their complaint without discussing the alleged fraud[2] with him. The record reflects the following testimony from appellant, Mr. M. P. Forster, II. "THE WITNESS: I have not seen him. I have not seen him, I reckon, over one time since this happened. MR. TERRAL: Q. Where

[2] Mrs. McCumpsey, after testifying that she had not discussed the signing of the deed with appellee, in later testimony stated that she talked about the deed when appellee came to her house in September. She did not testify as to what was said. Appellee testified that she said, "Fred, after studying it over and considering it, we have decided that I want my deed back. We are willing that you live there on the place the rest of your life, and we will treat you nice, and you can marry anybody you like, but when you are dead, we want the property to go back to us."

was that? A. I passed him on the road. Q. Just passing on the road? A. That is right, sir. Q. Did you try to find him? A. No, sir. Q. Why didn't you? A. It wasn't none of my business. What did I want to look him up for? THE COURT: Just answer his questions. MR. TERRAL: Q. I think your statement is well made. You had deeded your interest in some property to him under a misrepresentation from him and Mr. Abercrombie, is that correct? A. That is right. Q. And you had no interest in getting him to correct that? A. No, sir. Q. You had no interest in getting him to deed it back to you? A. I don't know."

Certainly it cannot be said that these appellants reacted in the normal manner of one who has been deprived of his property because of fraudulent representation. One would expect that appellants would have "beaten a path to the door" of appellee, demanding an explanation for the false and fraudulent statement, and clamoring for a return of the deed. Their failure to complain, of course, lends weight to appellee's argument that no such representation was made. Had appellants intended to sign only if Mrs. Pape signed, it would have been simple enough for them to have merely postponed their execution of the deed until the deed from Mrs. Pape (the only non-resident involved) had been returned[3]. We accordingly do not agree that the deed was invalid because a condition precedent was not fulfilled, nor can we conclude that it was signed because of a mistaken belief that all heirs would convey. It simply appears that appellants, because of the fact that appellee was the husband of their deceased sister and was accordingly looked upon "as one of the family," and had invested his life savings in constructing the home in which their sister had lived, felt that he was morally entitled to the property, and accordingly signed the deed. Subsequent thereto, they had a "change of heart" and regretted having conveyed their interest.

[3] There was testimony to the effect that Henry Forster's wife remarked: "Do you reckon we should sign these deeds before Clara signs them?"

The result of the lawsuit, of course, hinges upon whether or not fraudulent statements were made by appellee and his attorney, which induced appellants to execute the deed. The quantum of proof required to justify a court in setting aside a deed because of fraud, in this state, is so well known as to hardly require the citing of authority. Such proof must be clear, cogent, and convincing. *Penney* v. *Long,* 210 Ark. 702, 197 S. W. 2d 470; *Morris* v. *Cobb,* 147 Ark. 184, 227 S. W. 23. The testimony in this case falls far short of that required.

The decree is accordingly affirmed.

TROILLET *v.* TROILLET.

5-1222 300 S. W. 2d 273

Opinion delivered April 1, 1957.

Francis T. Donovan, for appellant.

Wood & Smith, for appellee.

J. SEABORN HOLT, Associate Justice. The parties to this suit were each born in Arkansas. Appellee, Elsie Mae Troillet, has lived mostly in Little Rock, Arkansas, until she secured work in Dallas, Texas, in 1952 and took up her residence in that city. She met appellant, Leo Joseph Troillet, in Dallas and they were married February 14, 1953. Appellant had lived in Conway, Arkansas, until he moved to Dallas, Texas in 1952. Following their marriage they made their home in Dallas for upwards of four years, when they separated. A girl baby was born to them. On May 15, 1956, appellee filed suit for a divorce, for child custody and support,

in Pulaski County, Arkansas, approximately 5 days after she had come to the home of her parents in Little Rock, Arkansas, and after having resided with her husband for some four years in Dallas, as indicated. Appellant answered with a general denial and in a cross complaint sought a divorce and custody of the child.

Trial resulted in a decree in favor of appellee for divorce, and custody of the child, on July 24, 1956. This appeal followed. For reversal appellant contends that the trial court was without jurisdiction of the parties, for the reason that appellee was not a resident of Arkansas at the time she filed suit, as provided and required in § 34-1208 Ark. Stats. 1947. Appellee on the other hand maintained in the trial below and argues here on appeal that "both parties were domiciliaries of Arkansas and their domicile never changed because residence in other states was never coupled with an intention to remain."

We have concluded that the contention of appellant was correct and must be sustained. § 34-1208 above provides: "The plaintiff, to obtain a divorce, must prove but need not allege, in addition to a legal cause of divorce: First, a residence in the State for three (3) months next before the final judgment granting a divorce in the action and a residence for two (2) months next before the commencement of the action." In *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49, in construing the above statute, we held that residence for two months in this state before filing suit for divorce is jurisdictional, and cited a number of cases in support. In that case we held that a divorce suit must be dismissed as premature where the plaintiff's own testimony disclosed that he had been in the state two days less than two months before commencing his suit. See also *Porter* v. *Porter,* 209 Ark. 371, 195 S. W. 2d 53. We have consistently reaffirmed our holding in these cases.

Appellee's own testimony conclusively shows that she had not complied with this statute, which requires residence in Arkansas for at least two months next be-

fore filing her suit for divorce. In fact, she, in effect, admitted she had only been in Arkansas some 5 or 6 days when she filed her action for divorce. Her testimony reflects: "Q. You are telling the Court you have been in Arkansas since May 10? A. Yes, sir. Q. That is approximately correct? A. Yes, sir . . . Q. Then you were not a resident of Arkansas for 60 days prior to the filing of this lawsuit, were you? A. No, sir . . . Q. So, you did consider yourself a resident of Dallas, Texas, as of the 13th day of March, 1956, and during the 4 years that you lived in Dallas? A. Yes." Her testimony was also corroborated by other witnesses. In fact, we find no contradictory testimony. Appellant testified: "Q. But your home residence and domicile was in Dallas, Texas? A. It has been in Dallas. Q. Since 1952? A. Since 1952."

It appears that appellee did not testify that it was her intention to remain in Arkansas and maintain a home here. In the circumstances we hold that appellee's domicile since she moved to Dallas in 1952 has been in that city, and if she has since then acquired a domicile in Arkansas, she had not resided here for the required sixty days before filing suit. In *Oakes* v. *Oakes,* 219 Ark. 363, 242 S. W. 2d 128, we said: ". . . to effect a change of domicile from one locality, state or country to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home . . . The change of residence must be voluntary; the residence at the place chosen for the domicile must be actual; and to the fact of residence there must be added the *animus manendi.*"

Having concluded that the present suit was prematurely brought, the decree is reversed and the cause dismissed.

5-1225 300 S. W. 2d 261

Opinion delivered April 1, 1957.

Wood & Smith, for appellant.

Longstreth, Kemp & Brooks, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves the liability of the registered owner of a vehicle for the traffic violation committed by one to whom the car had been rented. Appellant filed suit for a declaratory judgment. The complaint alleged, and the evidence established, these facts:

(1) Appellant owns automobiles which it rents (or leases) to persons who have acceptable credit rating. The lessee has full and complete control of the vehicle during the time of the lease agreement. The *bona fides* of the lease by appellant is not questioned by appellee.

(2) In each of the several instances here involved the lessee parked the car in a metered zone in the City of Little Rock and left the car parked so long that an overtime parking ticket was attached to the car. The lessee failed to pay the fine for the overtime parking.

(3) The lessee returned the car to appellant, paid the rental charge, and left the City without ever informing appellant of the overtime parking ticket or without leaving the money to pay for the traffic violation.

(4) Some time later the City of Little Rock ascertained that the automobile that had been overparked was registered in the name of the appellant. Thereupon, the City notified appellant of the traffic violation and the amount required to pay for it, which amount had become greater by reason of the failure to make prompt payment.

(5) The appellant offered to furnish the City the name and address of the persons who had each particular car rented the day of the specific traffic violation, but the City claimed that the appellant was personally liable for the fines for the traffic violations because the City ordinance reads: "It shall be unlawful and a violation of the provisions of this ordinance for any person to cause, allow, permit, or suffer any vehicle registered in the name of . . . such person to be parked overtime . . ." The City claimed that the ordinance made the appellant absolutely liable for the fines and that the City need not pursue the persons who had leased the cars from the appellant, even though appellant offered to give the City the name and address of each such person (most of whom were non-residents).

(6) When approximately twelve of these cases had accumulated, appellant brought this suit for a declaratory judgment[1] so that appellant and the City might know their respective rights. The Chancery Court held that the ordinance was valid and that under the stated facts the appellant was personally liable for the fine required to be paid for the traffic violation in each case.

While the question here presented is one of first impression in this Court, we are not without cases from other jurisdictions on whether merely being the registered owner of the vehicle is *conclusive* proof of the traffic violation by such registered owner. We list some of the cases discovered by our search: *Commonwealth* v. *Ober,* 286 Mass. 25, 189 N. E. 601; *People* v. *Hoogy* (Mich. 1936) 277 Mich. 578, 269 N. W. 605; *Commonwealth* v. *Kroger* (Ky. 1938) 276 Ky. 20, 122 S. W. 2d

[1] The appropriateness and timeliness of this declaratory judgment procedure was not made an issue, so we do not raise it.

1006; *People* v. *Bigman,* 37 Cal. App. 2d 708, 100 Pac. 2d 370; *State* v. *Morgan* (R. I. 1946), 72 R. I. 101, 48 A. 2d 248; *City of St. Louis* v. *Cook* (Mo. 1949) 359 Mo. 270, 221 S. W. 2d 468; *State* v. *Scoggin* (N. C. 1952) 236 N. C. 19, 72 S. E. 2d 54; *State* v. *Scoggin* (N. C. 1952) 236 N. C. 1, 72 S. E. 2d 97; and *Masfell* v. *Ogden City* (Utah 1952), 249 Pac. 2d 507. In 49 A. L. R. 2d 456 there is an annotation entitled: "Inference or presumption that owner of motor vehicle was its driver at time of traffic, driving, or parking offense"; and in the annotation other cases are cited, discussed, and classified.[2]

The Massachusetts case of *Commonwealth* v. *Ober, supra,* holds the registered owner to be conclusively liable for the traffic violation. The North Carolina case of *State* v. *Scoggin, supra,* holds that the registered owner is not liable until the prosecution proves that he was the actual driver of the car at the time. The Michigan case of *People* v. *Hoogy, supra,* refuses to allow any presumption to arise from the fact that the parked vehicle was registered in the name of the owner. The Missouri case of *City of St. Louis* v. *Cook, supra,* holds that the registered owner is *prima facie* liable for the traffic violation, but that such registered owner may overcome the *prima facie* case by showing that he was not the person who violated the traffic regulation. We think the Missouri rule is the fairest to all concerned and is the one to be applied in this case.

It would unduly prolong this opinion to discuss each of the cases cited. This is a declaratory judgment proceeding, and it is sufficient that we make a declaration extending only to the issues presented by the stated facts. We, therefore, declare:

(1) That to make the registered owner *conclusively* liable for the traffic violation under the ordinance and facts here involved would be to infringe on constitutional rights; and the ordinance should not be so construed as to be unconstitutional[3].

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[2] In 36 A. L. R. 1153, and in 7 A. L. R. 2d 456, there are annotations not directly in point but still shedding some light on the question here.

[3] On the matter of conclusive presumptions being unconstitutional in certain instances, see annotations in 51 A. L. R. 1149, 86 A. L. R. 182, and 162 A. L. R. 516.

(2) That the ordinance of the City of Little Rock, here involved, is constitutional when it is construed — as we do so construe it — as casting on the registered owner the burden of going forward with the evidence to show that such registered owner was not the person who committed the traffic violation in issue.

Applying the foregoing declarations, it is clear that when the appellant in the case at bar offers to furnish the Traffic Court of Little Rock the name and address of each person who had the car rented at the time of the traffic violation in issue, then the Traffic Court of Little Rock, if it believes the evidence offered by the appellant, should absolve the appellant from any fine for the said traffic violation in issue. In the light of the foregoing, the decree of the Chancery Court is reversed.

MILLWEE, J., concurs.

KIRKSEY *v.* CITY OF FT. SMITH.

5-1199 300 S. W. 2d 257

Opinion delivered April 1, 1957.

Warner, Warner & Ragon, for appellant.

Lem C. Bryan, City Atty. and *Hardin, Barton, Hardin & Garner,* Special Counsel, for appellee.

Mehaffy, Smith & Williams and *Glenn G. Zimmerman, amici curiae.*

MINOR W. MILLWEE, Associate Justice. The issue here is whether a municipal corporation is liable for a tort committed in connection with the operation and maintenance of its airport. Essential to such determination is the further question whether the operation and maintenance of a municipal airport is a governmental or proprietary function.

Plaintiff is the widow of Jason Kirksey, deceased, and administratrix of his estate. She brought this action against the defendant, City of Fort Smith, Arkansas, seeking damages for the injury and death of her husband arising out of his employment at the Fort Smith Municipal Airport. The complaint alleges that the airport was acquired under the right of eminent domain with all revenues derived therefrom being used for operation expenses, maintenance, retirement of bonds and improvements of such airport. There are repeated allegations in the form of conclusions of law or fact to the effect that the City operated its airport as "a proprietary function" or a "private corporation" and not for a governmental purpose; and that it sold petroleum products to the general public and operated at a net profit with income derived from such sources as office and other space rentals, cafe operation and other activities of an alleged proprietary nature. However the salient factual allegations are that the deceased sustained injuries from an explosion causing his death on account of the negligence of the defendant, and its agents, in ordering him to use certain solvents and in failing to use reasonable care to furnish him with safe tools and place to work.

The City demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. After the matter was taken under advisement and fully briefed the able trial judge rendered a comprehensive and well considered opinion in which he concluded that the operation and maintenance of the municipal airport by the City constituted a governmental and not a proprietary function for which it was not liable to respond in damages to the plaintiff; and that the demurrer should, therefore, be sustained. This

appeal is from a judgment dismissing the cause of action after plaintiff declined to plead further.

In reaching the conclusion that the operation and maintenance of the Fort Smith Municipal Airport is a governmental function the trial court reviewed our various statutes dealing with the construction and operation of such installations and the cases from other jurisdictions bearing on the question relied on by each party. After noting the sharp division of authority on the question in other jurisdictions the court concluded that our own cases pointed to non-liability on the part of the City. We quote from the opinion:

"Act 128 of 1953 was passed and referred to by short title as 'Municipal Airports Act,' which appears in Supplement, Ark. Stats. as sections 74-601 to 74-620, inclusive. Section 74-602 provided for the general powers of municipalities in the operation and maintenance of airports and as a part thereof, provided: '. . . including the construction, installation, equipment, maintenance and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of supplies, goods and commodities as an incident to the operation of its airport properties . . .'

"Defendant, City of Fort Smith, contends that under Section 74-615, Supplement, (Act 128 of 1953) the operation and maintenance of a municipal airport was determined and declared by the Legislature to be a governmental function. The section provides in part: 'the . . . construction, improvement, maintenance . . . operation . . . and the exercise of any other powers herein granted to such municipalities . . . are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; *and in the case of any municipality are declared to be municipal functions and purposes as well as public and governmental* . . .'

"Section 74-616 exempts the income from operation of airports by a municipality from taxation. Sec-

tion 74-619 as to interpretation and construction of the Act, provides that: 'This Act (74-601—74-620) shall be so interpreted and construed as to make uniform so far as possible the laws and regulations of this State and other States and of the government of the United States having to do with the subject of municipal airports.' Under the provisions of Act 128 of 1953, Federal aid was made available by grant or loan for construction of airports by municipalities.

"Section 74-615 very clearly provides that the exercise of the powers granted, which include maintenance and operation of airports, constitute public and governmental functions for a public purpose and to be matters of public necessity and that in cases of municipalities are declared to be municipal functions and purposes as well as public and governmental.

"Act 128 of 1953 makes no reference to tort liability, nor does it in direct terms, exempt municipalities from tort liability, other than declaring that in the exercise of the powers granted under the Act, same constitute governmental functions . . .

"The case of *Little Rock* v. *Holland,* 184 Ark. 381, 42 S. W. 2d 383, declared the law to be that: A municipality acting in its proprietary or corporate capacity is liable for injury caused by the negligence or nonfeasance of its officers or agents; but, when acting in its governmental capacity, it is not liable for such negligence or nonfeasance. Factually, the appellee was an electric lineman, employed by the city, was sent out alone to remove a pole from the city's line. He climbed the pole, which broke and he fell sustaining injuries. He alleged negligence upon the part of his superior by reason of failure to inspect pole or to warn him of its dangerous condition, and in failing to furnish him with a safe place to work. A demurrer was filed to the complaint, which was overruled. The appellate court on appeal, reversed the case and ordered its dismissal, holding that the operation of a municipal power plant was a governmental function. It cited with approval the case of *Granger* v. *Pulaski County,* 26 Ark. 37, in which the

court held that counties are *quasi*-corporations and that they possessed no power and incur no obligations except conferred or imposed by statute, by the party injured, for the negligence of their officers, unless authorized by statute. The court also stating that any distinction between liability of counties and cities had been lost sight of by the court in later decisions. The court stated that the maintenance and operation of waterworks, sewers, buildings and repair of streets were necessary governmental functions, and 'it is difficult to perceive why the same rule should not apply to the facts in this case. We hold that it does . . .'

"In the case of *Patterson* v. *City of Little Rock,* 202 Ark. 189, 149 S. W. 2d 562, plaintiff, a minor child, sustained injuries through the alleged negligence of the employees of the Municipal Waterworks in leaving open and uncovered a water meter box. She sued the City of Little Rock, the Little Rock Municipal Water Works and its Commissioners for damages. A demurrer to the complaint was sustained.

"The demurrer was sustained and affirmed on appeal to the Supreme Court. The court discussed Section 1 of Act 131 of 1933 which authorized any city to purchase or construct a waterworks system, holding that the Act conferred on municipalities the power to purchase or construct a waterworks system but did not require them to do so. If the power was exercised as conferred, then the operation of the same was to be performed as set out therein. They held that the city was therefore, engaged in a governmental function in the operation of the water works by its board of commissioners and could not be sued. The court, reiterated its former holdings, that the city in the operation of waterworks, electric light plants, sewer systems, etc., was engaged in a governmental function and that an action for damages based upon the negligence of its officers and agents could be maintained, citing cases.

"It should be observed that the declarations of law and the holding as announced in the case of *Holland* v. *City of Little Rock,* and *Patterson* v. *City of Little Rock,*

were made prior to the enactment of Act 128 of 1953. There is nothing in the context of Act 128 of 1953, as the court interprets the Act, which in any respect warrants or justifies a change, modification or reversal of the law as declared in the cases of *Patterson and Holland* v. *City of Little Rock, supra.* In the annotations p. 128, cited in 138 A. L. R., the California Court in the case of *Coleman* v. *Oakland,* 110 Cal. App. 715, 295 P. 59, held that a municipally operated airport 'falls naturally into the same classification as such public utilities as electric light, gas, water and transportation systems, which are universally classed as proprietary.' But the Supreme Court of Arkansas in its decisions holds directly to the contrary; that a city in the operation of waterworks, electric light plants, sewer systems, etc. was engaged in governmental functions, and not liable in damages for negligence of its officers.

"Our own Supreme Court has repeatedly held that a right of action against municipal corporations does not exist at common law and that their liability to a private action for torts, must be determined by the statute which creates them."

In urging a reversal plaintiff relies particularly on the case of *Rhodes* v. *City of Ashville,* 230 N. C. 134, 52 S. E. 2d 371, and several cases from other jurisdictions which have followed it, including *Granite Oil Securities, Inc.* v. *Douglas Co.,* 67 Nev. 388, 219 P. 2d 191; *Ex Parte Houston,* 93 Okla. Cr. 26, 224 P 2d 281; *Harrison Co.* v. *West Virginia Air Service,* 132 W. Va. 1, 54 S. E. 2d 1; *Miami Beach Airline Service, Inc.* v. *Crandon,* (Fla.) 32 So. 2d 153, 172 A. L. R. 1425. The North Carolina court held that the operation and maintenance of a municipal airport under a statute with a provision identical to Ark. Stats., Sec. 74-615, *supra,* to be a proprietary function and that the statutory declaration to the contrary demonstrated a legislative intent to declare such activities to be a governmental function only in the sense that "it was a public purpose." On rehearing in 53 S. E. 2d 313, the court concluded that the Legislature "unquestionably" intended to declare

the operation of the airport to be in furtherance of a governmental function, but that its "declaration to that effect did not make it so, for that is a judicial and not a legislative question."

In support of the judgment the City relies on *Stocker* v. *City of Nashville,* 174 Tenn. 483, 126 S. W. 2d 339, 124 A. L. R. 345; *Abbott* v. *City of Des Moines,* 230 Iowa 494, 298 N. W. 649, 138 A. L. R. 120; and *Imperial Production Corp.* v. *City of Sweetwater,* 210 Fed. 2d 917, which hold the operation and maintenance of municipal airports to be a governmental function under statutes containing provisions similar but not identical to Sec. 74-615. In addition the defendant relies on many of our own cases which hold a municipality or *quasi* public corporation to be engaged in a governmental function in the operation of such facilities as water works, electric light plants and sewer systems. The City also cites *Handley* v. *City of Hope,* 137 Fed. Supp. 442, where the court held the municipality immune from a tort action arising out of the operation of a swimming pool and rested its decision on *Yoes* v. *City of Ft. Smith,* 207 Ark. 694, 182 S. W. 2d 683. In the *Yoes* case we held the city's operation of a water works which sold water to other cities and an army camp, and its operation of a swimming pool, cottages and concessions were all exclusively for a public and not a proprietary purpose, so as to be exempt from taxation. See also *Hope* v. *Dodson,* 166 Ark. 236, 266 S. W. 68.

There is a notable lack of harmony among the various jurisdictions in the application of the governmental-proprietary distinction to specific municipal activities and functions. One legal scholar has observed that the divergent rules adopted by American courts "make a curious patchwork of immunity and responsibility."[1] Plaintiff correctly states that the weight of authority supports the proposition that the operation of a municipal airport is a proprietary function. However, as the trial court indicated, the same jurisdictions which so hold have also found the operation of water works,

[1] Professor Fleming Jones James Jr. in 22 U. of Chicago Law Rev. 610.

light plants and swimming pools by a municipality to be a proprietary function, while our cases are to the contrary.

The maintenance and operation of a municipal airport is in the interest of the public generally and we think it was within the province of the Legislature to determine that it constituted a governmental function. The North Carolina Court's holding that this involves a judicial and not a legislative question appears somewhat at variance with our own cases and the rule generally held applicable. The question whether a municipal function is governmental or proprietary is ordinarily determined in accordance with the public policy in the jurisdiction in which it arises. 63 C. J. S., Municipal Corporations, Sec. 747. It is also generally recognized that the public policy of a state is to be found in its Constitution and statutes. See 11 Am. Jur., Constitutional Law, Sec. 139, where the author states: "In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned." Our own cases are in harmony with this statement. *Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S. W. 679, 58 L. R. A. 921; *Ward* v. *Bailey, Governor,* 198 Ark. 27, 127 S. W. 2d 272. Statutes exempting municipalities from tort liability are generally held to be within the power of the legislature and are not unconstitutional. See cases cited in 124 A. L. R. 350, including *Mack* v. *Charlotte City Waterworks,* 181 N. C. 383, 107 S. E. 244.

If we were privileged to set the state's public policy on this issue we might readily agree that the present pattern of partial tort liability of municipalities should be replaced with a stricter or more complete rule of responsibility. Considerations of fair play and justice suggest that those injured by the negligence of a municipality or its agents should be compensated on equal terms with those injured by individuals or private corporations. Able law writers have so recommended, but through legislative and not judicial action. See the

splendid article on "Municipal Tort Liability in Operation," 54 Harvard Law Review 437. A step in this direction was taken by the Arkansas Legislature in 1947 by the enactment of Ark. Stats., Sec. 66-517, *et seq.*, which authorizes municipalities and other agencies immune from tort action to purchase liability insurance with the right of direct action by the injured plaintiff against the insurer. Perhaps the Legislature will make the purchase of such insurance mandatory at some future time. This decision rests with the people acting directly or through their legislature, and not with the courts.

The judgment is affirmed.

McFaddin, J., concurs.

Farmer *v.* Smith.

5-1202 300 S. W. 2d 937

Opinion delivered April 1, 1957.

[Rehearing denied May 6, 1957]

McCourtney, Brinton, Gibbons & Segars, for appellant.

Gus Causbie, for appellee.

George Rose Smith, J. The appellee brought suit to recover $83 from Verlin Farmer and attached a

truck assertedly owned by the debtor. The appellant, Verlin's sixteen-year-old son, intervened in the case and alleged that he had bought the truck from his father before the suit was filed. A jury verdict finding the appellant to be the owner was set aside by the trial court, upon the ground that the finding was contrary to the preponderance of the evidence. In appealing from this order the appellant has filed the required stipulation that judgment absolute may be rendered against him if the order is affirmed. Ark. Stats. 1947, §§ 27-2101 and 27-2150; *Bush* v. *Barksdale,* 122 Ark. 262, 183 S. W. 171, L. R. A. 1917A, 111.

In reviewing an order of this kind we do not reverse the trial judge's ruling unless it appears that he has abused his discretion by setting aside a verdict that is supported by a clear preponderance of the evidence. *Stanley* v. *Calico Rock Ice & Elec. Co.,* 212 Ark. 385, 205 S. W. 2d 841. We find no abuse of discretion in this case. The appellant testified that he paid his father $150 for the truck and produced an assignment of the certificate of title, ostensibly executed and sworn to by the elder Farmer some two and a half months before the vehicle was attached. This testimony is contradicted by that of the sheriff, who says that when he served the writ both the father and the son admitted that the boy had no documentary evidence of ownership. There is also proof that the father attempted to sell the truck to a third person after he had supposedly sold it to his minor son. The trial judge, in setting aside the verdict, doubtless took into consideration the fact that Verlin Farmer did not testify in his son's behalf, that the notary who signed the assignment of title was not called as a witness, and that a debtor's transfer of property to his sixteen-year-old son is a transaction which the law views with suspicion. In these circumstances we defer without hesitation to the trial court's firsthand opinion concerning the weight of the evidence.

Affirmed.

JOHNSON *v.* DUNNINGS, EXCR.

5-1230 301 S. W. 2d 457

Opinion delivered April 1, 1957.

[Rehearing denied May 20, 1957]

[redacted]

Caesar C. Latimer, Tulsa, Okla., and *Thad D. Williams,* for appellant.

O. E. Westfall and *Gaughan, McClellan & Laney,* for appellee.

PAUL WARD, Associate Justice. This appeal has to do with the interpretation of a will. The pertinent facts involved are not in dispute.

E. W. Dunnings, who died on October 1, 1955, executed his last will and testament on March 25, 1955 which, in all essential parts, reads as follows:

"SECOND. I give, devise and bequeath to Gwendolyn Johnson, the daughter of my son, Odis M. Dunnings, the United States Bond which was made payable to E. W. Dunnings and Odis M. Dunnings."

"THIRD. I give, devise and bequeath to my granddaughter, Vera Richardson, a daughter of Mary Dunnings who married Charlie Richardson, the sum of Ten Dollars."

"FOURTH. I give, devise and bequeath all the rest and residue of my estate, whether real, personal or mixed property and wheresoever located, share and share alike, to my children and to the surviving heirs of deceased children. My said children now living being named as follows: Hattie D. Sanders, a daughter; Edward Lee Dunnings, a son; Eula D. Britton, a daughter; Robert M. Dunnings, a son; Myles G. Dunnings, a son; Derrick W. Dunnings, a son; Retha D. Beck, a daughter; It is my desire that the interest which would have gone to my son, Walter Dunnings, if living, should go to his daughter, Mildred Dunnings; The interest which would have gone to my daughter, Mary D. Richardson, is to be divided among three of her children, as follows: Thelma Carmier; Woodrow D. Richardson; Mary Bresker; the interest which I have given above in this will is the amount which I desire paid to Vera Richardson, a daughter of Mary D. Richardson."

Altogether testator had 10 children. At the time of his death 7 of these children were living, and their names are set out above in paragraph FOURTH of the will. Of the three children who were deceased at the time of the testator's death, 2 of them, Walter Dunnings and Mary D. Richardson, are also named in the same paragraph. The tenth child, Odis M. Dunnings, a son, died approximately four months before the testator executed his will. As stated in the SECOND paragraph of the will, Odis M. Dunnings was the father of appellant, Gwendolyn Johnson, and she was his only child.

It is noted here, for emphasis, that the testator's daughter, Mary D. Richardson, deceased, left surviving four children and that three of them took, under paragraph FOURTH, her entire share, and that the fourth child, Vera Richardson, received only $10 as is provided in paragraph THIRD.

Appellant, Gwendolyn D. Johnson, filed her petition in the Probate Court asking to have the last will and testament of the said E. W. Dunnings construed and interpreted, asking the court to declare that she was entitled to inherit a one-tenth interest in the estate

of E. W. Dunnings as particularly provided in the FOURTH Paragraph. The above petition was resisted by the executor and by all of the children and grandchildren of the testator [excepting appellant]. After the introduction of certain testimony, none of which is abstracted, the trial court held that the appellant, Gwendolyn Johnson, should not be entitled to any part of the estate of the testator, E. W. Dunnings, under the provisions of paragraph FOURTH of his will. From this ruling appellant has appealed.

In urging a reversal of the trial court's decree, appellant presents an array of arguments which indicate studious and energetic research. Much significance is attached to the first sentence in the FOURTH paragraph of the will. It is pointed out that this sentence alone contains testamentary words, and that it clearly includes appellant as being one of a designated class, that is, the heir of a deceased child. It is further argued, in this connection, that once appellant is designated as a beneficiary, it would take positive language to remove her from the class, and that there is no such language in the will. In other words, appellant says that if the testator had wanted her eliminated, he would have specifically said so as he did in the case of Vera Richardson.

The argument is also presented that the law favors a just and equitable distribution of estates, citing, *Yeates* v. *Yeates,* 179 Ark. 543, 16 S. W. 2d 996, 65 A. L. R. 466, and *Cross* v. *Manning,* 211 Ark. 803, 202 S. W. 2d 584. Also appellant contends that the intent of the testator must be gathered from the first sentence in paragraph FOURTH, and that the rest of the paragraph merely illustrates how the property is to be divided, viz; grandchildren are to receive only the share which would have gone to their parent if living.

We recognize the force of the arguments presented above, and we also recognize the rule relative to a devise to a class, but we do not think any of these are controlling in the case here under consideration. It is our conclusion that the chancellor must be affirmed in

this case under the well established rule, hereafter pointed out from our many decisions, that the intent of the testator must govern and that such intent (with a few exceptions not applicable here) must be derived from all the language in the will as opposed to isolated parts of the will. The courts generally recognize that rules of construction, as applied to wills, are merely aids to a determination of the testator's intent. As stated in *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546, the courts cannot make a will — they can only endeavor to determine the intent of the testator.

In interpreting wills the courts will look at the entire will. See *Campbell et al.* v. *Campbell, et al.,* 13 Ark. 513, and *Morris* v. *Lynn,* 201 Ark. 310, 144 S. W. 2d 472.

The rule that the intent of the testator governs in the construction of wills is so well established and has been so often repeated from the earliest cases down to the present, that only a few citations will suffice. In the *Campbell* case, *supra,* the rule was stated this way: "The leading rule in the construction of wills, is to give effect to what appears to be the intention of the testator, in view of all the provisions of the will; and if this intention can be ascertained, it should be carried out, unless contrary to law or against public policy." In the *Park* case, *supra,* this language was used: "The polestar of the court, in construing a will, should always be the intention of the testator; . . ." In *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417, this clear language was employed: "All of our cases are to the effect that the object in construing wills to ascertain the intention of the testator. This must be done from and language used as it appears from a consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself as near as may be in the position of the testator when making the will."

Where there is language in a will indicating a devise to a class and where the devisees are named individually, generally the latter will control. This was

specifically recognized in *Rand* v. *Thweatt, Administrator,* 222 Ark. 556, 261 S. W. 2d 778. There in reply to appellant's insistence on a devise to a class, the court said: "There is another settled general rule that is equally applicable to the case at bar, to the effect that where a bequest or devise is made to beneficiaries designated by name, they take as individuals rather than as a class, in the absence of a contrary intention appearing elsewhere from the will, or the surrounding circumstances." In line with the above we find in 57 Am. Jur. page 835, § 1263, Wills; "Where legatees are named as individuals and also described as a class, and there is nothing more to show the testator's intention, the construction usually is that the gift by name constitutes a gift to individuals, to which the class description is added by way of identification." And in 97 C. J. S., page 26, Wills: "Designation by name of the beneficiaries, and terms appropriate to describe groups or classes, not only may be used separately, but may be, and frequently are, employed together; when that is done, the designation by name being preceded or followed by words expressive of some common relation or status, and there is nothing to indicate an intention to the contrary, the gift ordinarily is to the individuals and not to a class, and the class description is merely added by way of, and serves the purpose of, identification of the individual beneficiaries, or of an indication of the reason for making the provision."

Construing the testator's will in this case by the rules above mentioned, we cannot say the chancellor erred in holding that appellant could not take under the FOURTH paragraph. With rare exceptions not applicable here, a testator can do as he pleases with his property, and the most effective way for a testator to cut a person off from his bounty is to omit that person's name from his will. Here the testator, in the FOURTH paragraph of his will mentioned all of his children and grandchildren except appellant. This could not possibly have been an oversight on the part of the testator because he mentioned appellant in the SECOND paragraph of his will. The only conclusion we are able

to reach is that the testator intended for appellant to take the bequest mentioned in the SECOND paragraph of his will and nothing more.

Affirmed.

Justices HOLT and ROBINSON dissent.

SAM ROBINSON, Associate Justice (dissenting). It is agreed that in construing a will the courts should seek to ascertain the intention of the testator as shown by the entire will. In my opinion, the will in the case at bar shows that it was the intention of the testator that Gwendolyn Johnson, his granddaughter, should receive that part of the estate which her father, Odis M. Dunnings, would have received had he been living. The will was executed about four months after the death of Odis M. Dunnings. The second paragraph of the will provides: "I give, devise and bequeath to Gwendolyn Johnson, the daughter of my son, Odis M. Dunnings, the United States Bond which was made payable to E. W. Dunnings and Odis M. Dunnings." Value of the bond mentioned was about $1,800. All of the surviving sons and daughters of the testator received like bonds by virtue of survivorship.

The value of the estate of E. W. Dunnings involved here is about $51,000. No evidence has been called to our attention which would indicate that the deceased would have any reason for treating his granddaughter, Gwendolyn Johnson, any different than his other children and grandchildren.

The third paragraph of the will is highly significant when read in connection with the fourth paragraph in determining the testator's intent. The third paragraph reads: "I give, devise and bequeath to my granddaughter, Vera Richardson, a daughter of Mary Dunnings who married Charlie Richardson, the sum of Ten Dollars." Vera Richardson is insane and confined in a mental institution.

We come now to the all-important fourth paragraph of the will, which provides: "I give, devise and be-

queath all the rest and residue of my estate, whether real, personal or mixed property and wheresoever located, share and share alike to my children and to the surviving heirs of deceased children." The foregoing quotation is the first sentence of the fourth paragraph. Certainly, down to this point, Gwendolyn Johnson would participate as a beneficiary in the residue of the estate. If she is to be denied a share of the residue, it must be found in the rest of paragraph four, which reads: "My said children now living being named as follows: Hattie D. Sanders, a daughter; Edward Lee Dunnings, a son; Eula D. Britton, a daughter; Robert M. Dunnings, a son; Myles G. Dunnings, a son; Derrick W. Dunnings, a son; Retha D. Beck, a daughter; It is my desire that the interest which would have gone to my son, Walter Dunnings, if living, should go to his daughter, Mildred Dunnings; The interest which would have gone to my daughter, Mary D. Richardson is to be divided among three of her children, as follows: Thelma Carmier; Woodrow D. Richardson; Mary Bresker; *the interest which I have given above in this will is the amount which I desire paid to Vera Richardson, a daughter of Mary D. Richardson.*" (Emphasis supplied). It will be noticed that the fourth paragraph names the living children of the testator but does not state that all of the grandchildren are being named. The first sentence of the fourth paragraph specifically provides that the residue is to be divided share and share alike between the surviving children and the surviving heirs of deceased children. Gwendolyn Johnson is the surviving heir of a deceased child. Likewise, Vera Richardson is the surviving daughter of a deceased child. Vera is insane and the testator desired to leave her only the nominal sum of $10.00, as set out in Paragraph Three of the will; and to show that Vera was to be excluded from participating in the residue, Paragraph Four provides: "The interest which I have given above in this will is the amount which I desire paid to Vera Richardson, a daughter of Mary D. Richardson." It is clear to me that had the testator intended that Gwendolyn Johnson should take only the bond given to her

by the second paragraph of the will, and that she should not share in the residue of the estate, he would have specifically limited her part of the estate as he did in regard to Vera Richardson, another granddaughter.

On the other hand, it could be said that if the testator had intended that Gwendolyn should share in the residue he would have specifically named her as participating, as he did Mildred Dunnings, the daughter of Walter Dunnings, a deceased son.

The will is subject to the two constructions, as indicated. In a situation of this kind, the overwhelming weight of authority is to the effect that the will should be construed so as not to exclude the issue of a deceased child. In 95 *Corpus Juris Secundum* 846, it is said: "It will not be presumed that the testator intended to discriminate between the natural objects of his bounty. On the contrary, in the absence of any evidence of an intention to prefer some, the presumption is against such result, and in favor of equality as between beneficiaries of the same category or standing in the same relation to the testator, and a construction will be favored effecting equality between the natural objects of the testator's bounty, especially between those who are equally natural objects of the testator's bounty."

Law favors equality of benefits to descendants of testator's children. *In re Milhau's Estate,* 271 N. Y. S. 214.

A discrimination against descendants of one child in favor of other of testator's children should not be permitted unless testator's intention to do so is manifest. *In re Jerge's Will,* 40 N. Y. S. 2d 743.

Those who have equal claim in law, or in affection upon testator, should be placed in equal positions, where such can be done without doing violence to the written words of the will. *Curtis* v. *Safe Deposit & Trust Company of Baltimore,* 178 Md. 360, 13 A. 2d 546.

In re Jerge's Will, supra, the court quoted from *Soper* v. *Brown,* 136 N. Y. 244, 32 N. E. 768, as follows: "Even

if the construction given may be doubtful, it is a settled rule that, where a will, capable of two constructions, one of which would exclude the issue of a deceased child, and the other permit such issue to participate in a remainder . . . , the latter should be adopted.''

Of course, it is possible to construe the will as has been done by the majority, but the least that can be said is that the construction which should be given is doubtful, and, in these circumstances, the weight of authority is that the doubt should be resolved in favor of the issue of the deceased child. For the reason indicated, I respectfully dissent, and I am authorized to say that Mr. Justice HOLT joins in this dissent.

THOMPSON *v.* DILDY.

5-1204 300 S. W. 2d 270

Opinion delivered April 1, 1957.

W. J. Dungan, for appellant.

A. L. Burford and *Yingling & Yingling,* for appellee.

SAM ROBINSON, Associate Justice. On February 15, 1951, for the consideration of $1,600 plus delay rentals of $320.00 per year, appellant, Vance Thompson, executed to appellee, S. G. Dildy, a lease on one half section of land in Miller County, giving Dildy the right to drill and mine thereon for gas, oil, sulphur and other minerals for a period of ten years. The lease contains a warranty of title.

On May 12, 1956, Dildy filed this suit against Thompson in Woodruff County, seeking to recover the rent paid under the lease, totaling $2,880. As a basis for the cause of action Dildy alleges that the title has failed; that Thompson has permitted the land to be sold for delinquent assessments in the McKinney Bayou Drainage District; that Thompson had filed a suit in Miller County to set aside the Improvement District sale but that the suit had been dismissed March 28, 1955, for want of prosecution. The complaint does not allege that another suit had not been filed or that the time had expired in which such a suit could be filed to set aside the sale; nor does the complaint allege that Dildy or Thompson is not in possession of the land, and does not allege that either of them had been evicted; and the complaint makes no allegation that the land is wild and unimproved.

Thompson failed to answer within twenty days, and the trial court held that under Act 49 of 1955 no answer could be filed subsequent to the 20-day period, and entered a default judgment for Dildy. We do not reach the question of whether the court erred in ruling that an answer could not be filed, because we have arrived at the conclusion that the complaint does not state a cause of action; hence the court was in error in entering a judgment on the complaint. The rendition of a judgment by default upon a complaint which fails to state facts sufficient to constitute a cause of action is

reversible error. *Chaffin et al.* v. *McFadden,* 41 Ark. 42, and *Thompson* v. *Hickman,* 164 Ark. 469, 262 S. W. 20.

Appellant contends that the complaint does not state a cause of action because it is not alleged that there has been an eviction. When this cause came on for a hearing, and the court ruled that the 1955 Act prohibited the filing of an answer at that time, the plaintiff, appellee, proceeded to introduce evidence on which to base a default judgment. The lease agreement was introduced in evidence. Paragraph 14 thereof provides: "Lessor hereby warrants and agrees to defend the title to said land and to the minerals in and under the same. In the event Lessor's title or Lessee's rights under this lease should be disputed by suit or otherwise Lessee shall, during the pendency of such suit or dispute, be relieved from all obligations hereunder whether express or implied and may withhold the payment of royalties. If such suit or dispute be pending at the end of the primary term hereinabove mentioned, Lessee may extend such primary term for one or more successive years by payment of rental as above provided; in no event, however, shall the primary term be extended beyond the end of the year during which such suit or dispute shall have been settled. For the purposes hereof, it shall be considered that such suit or dispute is pending until thirty days after Lessor shall have furnished Lessee satisfactory evidence that such suit or dispute has been settled favorably to Lessee. Lessee shall have the right to acquire or lease the interest of any party in said land and minerals which any such party claims is not covered by this instrument." Paragraph 1 of the lease provides: "The 'primary term' of this lease shall extend from the date of its execution to the close of the last period for which rental, as hereinafter provided, can be paid."

As aforesaid, Paragraph 14 of the lease contains this provision: "In the event Lessor's title or Lessee's rights under this lease should be disputed by suit or otherwise Lessee shall, during the pendency of such suit or dispute, be relieved from all obligations hereunder

whether express or implied and may withhold the payment of royalties." It appears that perhaps the parties anticipated that the very thing might happen which did happen — that is, there might arise a dispute as to Thompson's title, and the lease set out the rights of the parties in the event such a dispute should occur. But, bypassing that point, we come to the issue of whether the complaint states a cause of action.

With some exceptions, the rule is that an action for damages on a covenant of warranty cannot be maintained where there has been no eviction. *Thompson* v. *Brazile,* 65 Ark. 495, 47 S. W. 299; *Dennis* v. *Long,* 128 Ark. 420, 194 S. W. 237; *Belleville Land & Lumber Company* v. *Griffith,* 177 Ark. 170, 6 S. W. 2d 36; *Hamilton* v. *Farmer,* 173 Ark. 341, 292 S. W. 683; *Smiley* v. *Thomas,* 220 Ark. 116, 246 S. W. 2d 419.

One of the exceptions to the rule requiring an eviction is where paramount title is in the Government or State. *Belleville Land & Lumber Company* v. *Griffith,* 177 Ark. 170, 6 S. W. 2d 36; *Abbott* v. *Rowan,* 33 Ark. 593; *Seldon* v. *Dudley E. Jones Company,* 74 Ark. 348; 85 S. W. 778; *Smiley* v. *Thomas,* 220 Ark. 116, 246 S. W. 2d 419. In the case at bar, the complaint does not allege that the State or Government owned the title. True, the complaint alleges that the taxes were delinquent to McKinney Bayou Drainage District for the years 1947 and 1948, and that Thompson permitted the property to be sold to O. P. Leonard for such taxes. But the complaint does not allege the lands are not redeemable, in fact it appears that it was recognized that the property is subject to redemption. Paragraph 4 of the complaint alleges: "That relying on defendant's promise to redeem said premises from said sale and to prosecute suit filed by him against said Leonard on July 6, 1953 in the Miller County, Arkansas, Chancery Court to invalidate said sale, . . ." Apparently it was recognized that the sale to Leonard was perhaps void and lessee accepted lessor's promise to take proper procedure to set the sale aside. There is no allegation in the complaint in the case at bar that the sale to Leonard could not be set aside at the time Dildy filed this suit.

Another exception to the rule is that eviction is not necessary where the land is wild and unimproved, but in the case at bar there is no allegation in the complaint that the land is wild and unimproved. In wild lands, possession follows the legal title. *Seldon* v. *Dudley E. Jones Company,* 74 Ark. 348, 85 S. W. 778; *Jerome Hardwood Lumber Company* v. *Munsell,* 169 Ark. 201, 275 S. W. 709.

It appears that the case of *Thompson* v. *Brazile,* 65 Ark. 495, 47 S. W. 299, is directly in point. There, one Walker sued Mrs. Brazile, claiming the property by virtue of a tax deed. Walker won the case in Circuit Court; but the litigation between Thompson and Mrs. Brazile on a warranty of title was transferred to equity, and there it was held that Mrs. Brazile's complaint against Thompson was not good because eviction was not alleged. In *Van Bibber* v. *Hardy,* 215 Ark. 111, 219 S. W. 2d 435, the situation is entirely different than in the case at bar. In that case, there was an outstanding lease with the lessee in possession. This amounted to an eviction, enabling the purchaser to file suit immediately. And in some cases it has been held that a judgment amounts to an eviction. *Brawley* v. *Copelin,* 106 Ark. 256, 153 S. W. 101, *Beach* v. *Nordman,* 90 Ark. 59, 117 S. W. 785; *Cox* v. *Bradford,* 101 Ark. 302, 142 S. W. 170; *Collier* v. *Cowger,* 52 Ark. 322, 12 S. W. 702, 6 L. R. A. 107.

The complaint in this case does not allege an eviction. It does not allege the title is in the State or the Government. It does not allege the lands are wild and unimproved. It does not allege that Thompson's suit against Leonard was dismissed with prejudice, and does not allege a final judgment that would bar Thompson or Dildy from successfully prosecuting a suit to redeem the property. The complaint therefore does not allege a cause of action for damages on a covenant of warranty.

Reversed.

GENERAL MISSIONARY BAPTIST STATE CONVENTION OF ARK. *v.* SMITH.

5-1220 300 S. W. 2d 939

Opinion delivered April 8, 1957.

Spitzberg, Bonner, Mitchell & Hays, for appellant.

John R. Thompson and *Gerald T. Ridgeway,* for appellee.

CARLETON HARRIS, Chief Justice. This action was instituted as a suit in foreclosure by appellee, Frank C. Smith, M. D., seeking to foreclose a mortgage on various tracts of real property in Pulaski County, Arkansas, owned by appellant. General Missionary Baptist State Convention of Arkansas, appellant herein, filed an answer and cross complaint, alleging that the indebtedness, evidenced by the note and secured by the mortgage, was actually an advance from appellee to appellant representing a part payment of the purchase price under a prior agreement, wherein Dr. Smith was to purchase the lands from the Convention. Appellant stated that it was willing and able to fulfill its part of the agreement by conveying the property in question to appellee in accordance with their agreement, and asked that appellee be required to specifically perform his part of the contract calling for his purchase of the property. Appellee, in answering the cross complaint, admitted that an advance was made under the terms of the agreement between the parties, but alleged that General

Missionary Baptist State Convention of Arkansas was unable to convey clear title to said property as required by their agreement, and that the indebtedness, heretofore referred to, was accordingly due and payable. Appellant admitted that Bolton T. Harris and Floy R. Harris owned jointly an undivided one-fourth mineral interest in the land in question,* but contended that it was only required under the terms of the agreement to convey the property now under litigation, subject to, and not free of, the outstanding one-fourth interest in the minerals. Upon a trial of the issues, the Chancery Court ruled that appellant was required to convey title to the property free of any mineral rights retained by others, foreclosed the mortgage, ordered the property in question sold to satisfy the indebtedness, and dismissed the cross complaint of appellant. From such decree appellant brings this appeal.

The sole question before the Court is whether the Chancellor was correct in determining that the contract called for merchantable title to a portion of the land, and that the sellers were unable to convey such merchantable title. The first instrument executed by both parties in point of time was the Offer and Acceptance Agreement (executed by appellee on July 26, 1954, and on August 21, 1954, by appellant). This instrument is relied upon entirely by appellee to sustain the decree of the Chancery Court, and is relied on only to a slightly lesser degree by appellant. The pertinent portions argued by the parties[1] are as follows:

"* * * It is understood that seller is in arrears of maturities of principal and interest due Bolton T. Harris and Floy Harris on the above note. Purchaser will advance to seller any required amount not in excess of Ten Thousand Dollars ($10,000)[2] for payment of arrearages on said note, upon demand after purchaser shall have examined and approved abstracts of title certified

*Retained by the Harrises in their Deed to Appellant.

[1] Provisions pointed out by appellee and appellant as sustaining their contentions are italicized.

[2] Amount actually advanced was $12,000.00.

to date *showing merchantable title to the lands to be conveyed by seller under its warranty* (but not as to those portions conveyed by quitclaim deed to seller by Bolton T. Harris and Floy R. Harris, for which lands so conveyed by quitclaim deed seller shall not be obligated to furnish abstract or abstracts of title); provided any advances for said purpose by purchaser shall be a loan to seller, bearing no interest *to date of warranty and quitclaim deed by seller to purchaser,* and to bear interest from date of advance at the rate of five per cent if the seller fails to convey said lands to purchaser. * * *"

"* * * Seller shall also deliver to purchaser abstracts of title *to lands to be warranted by it,* certified to date at seller's expense. * * *"

"* * * Purchaser will promptly examine said abstracts, or cause same to be examined, and should he unduly cause or suffer delay in the examination of same, or should he decline to make the advance for payment to Bolton T. Harris or Floy R. Harris, then seller shall be relieved of all its obligations hereunder, and purchaser shall be entitled to receive and retain the earnest money hereinafter mentioned, unless the refusal of purchaser is justified by *one or more real defects in title to the lands to be warranted by seller and which defects seller cannot cure within a reasonable time.* Seller shall have reasonable time and opportunity to cure any defects in title *to lands which it shall be required to warrant hereunder,* but it shall not be obliged to cure any defects in title to lands which it shall quitclaim to purchaser.[3] * * *"

The agreement further provides:

"* * * Contemporaneously, with the making of said advance by purchaser, seller shall execute its note payable to the purchaser on or before 90 days from date and shall execute to purchaser *mortgage upon said lands,*

[3] Emphasis in the sentences heretofore italicized supplied by appellee.

subject to lien of Bolton T. Harris and Floy R. Harris to secure payment of said note. * * *"

Further,

"* * * Seller shall warrant the title to all of said lands (subject to existing easements and rights of way) *only to the extent*[4] that the same were included in the warranty deed of Bolton T. Harris and Floy R. Harris executed to seller, and it shall convey the remainder of said lands by quitclaim deed. * * *"

In compliance with the agreement, appellant executed its mortgage on August 24, 1954, said mortgage containing the following language:

"* * * And for the consideration aforesaid, the grantors herein do hereby further grant, sell and quitclaim unto the said Dr. Frank C. Smith, and unto his heirs and assigns forever, subject, however, to the vendors lien retained in that certain deed dated July 30, 1947, executed by Bolton T. Harris and Floy R. Harris, his wife, to C. D. Pettaway, S. P. Long, W. R. Vaughan, J. B. Barnes, W. S. Thomas, J. B. Thomas, C. E. Canady, W. Marcus Taylor, Mrs. Annie Brown, Mrs. Emma Pratcher, and B. J. Whitfield, as Trustees for General Missionary Baptist Convention of Arkansas, as the same appears of record in Deed Record Book 351, pages 303, *et seq,* in the office of the Recorder of Pulaski County, Arkansas, *and subject, also, to the reservation to the said Bolton T. Harris and Floy R. Harris, his wife, one-fourth* (1/4) *of all the minerals upon or beneath the surface of the lands hereinafter described, as reserved in the above-mentioned deed.* * * *." (emphasis supplied)

Let it first be said that we agree with appellant's contention that the language in the Offer and Acceptance Agreement, quoted above, *viz,* "* * * Seller shall warrant the title to all of said lands (subject to existing easements and rights of way) *only to the extent* that the same were included in the warranty deed of Bol-

[4] Emphasis in the sentences italicized following footnote 3 supplied by appellant.

ton T. Harris and Floy R. Harris executed to seller, * * *" is cogent evidence sustaining appellant's position that the warranty of absolute mineral rights was not included in the agreement. This position is further strengthened by the provision (above italicized) in the mortgage, which instrument we hold may properly be considered in construing the agreement. The requirement of a mortgage was mentioned, and the execution of same was a part of the Offer and Acceptance Agreement. This mortgage contains two references to the reservation by the Harrises of one-fourth of all minerals upon or beneath the surface of the lands, as reserved in their deed. The mortgage also incorporates the applicable provisions of the Offer and Acceptance Agreement as a part of the instrument.

In *The W. T. Raleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S. W. 2d 886, Mr. Justice MEHAFFY, speaking for the Court, quoted from R. C. L. as follows: "The principal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." In *Gowen* v. *Sullins,* 212 Ark. 824, 208 S. W. 2d 450, (1948) this Court, in determining the intent of the parties, read and construed together a sales contract and an escrow agreement. The mortgage presently under discussion was accepted by appellee, and this litigation was instituted by the filing of a complaint to foreclose same. We deem it established that the Offer and Acceptance Agreement, and mortgage and note, were all a part of the same contract, and together, they clearly express the intention of the parties.

The litigation is thus disposed of, and it therefore becomes unnecessary for us to consider the admissibility of the testimony of one Morris High (whose evidence was excluded by the trial court) who testified to the effect that appellee was aware at the time of the agreement he would only receive three-fourths of the mineral rights.

For the reasons herein set out, the decree of the trial court is reversed and remanded, with directions to enter decree for appellant, requiring appellee to specifically perform his part of the agreement.

SMITH *v.* STATE.

4865 300 S. W. 2d 596

Opinion delivered April 8, 1957.

John F. Gibson, for appellant.

Bruce Bennett, Atty. General; *Thorp Thomas,* Asst. Atty. General, for appellee.

J. SEABORN HOLT, Associate Justice. A jury on August 28, 1956, found appellant guilty of the crime of carnal abuse, and fixed his punishment at a term of one year in the state penitentiary. From the judgment is this appeal.

For reversal appellant first questions the sufficiency of the evidence. The charge against appellant, by information, was filed March 8, 1956—and based on § 41-3406 Ark. Stats. 1947, which provides: "Carnal abuse—Penalty.—Every person convicted of carnally knowing, or abusing unlawfully, any female person un-

der the age of sixteen (16) years, shall be imprisoned in the penitentiary for a period of not less than one (1) year nor more than twenty-one (21) years." We hold that the evidence was ample to support the verdict.

The girl involved testified that she became 16 years of age June 3, 1956, and that she had intercourse with appellant October 5, 1955, at Watson, Arkansas, when she was 15, and became pregnant as a result of this intercourse. The father of the girl testified that she was born June 3, 1940, and was 16 on June 3, 1956. Appellant admitted that he had had intercourse with this girl seven or eight times over a period of some two or three months. Although the testimony of the girl, as to intercourse with appellant, is corroborated by him, corroboration is not necessary if her testimony was believed, since she was not an accomplice. See *Clack* v. *State,* 213 Ark. 652, 212 S. W. 2d 20.

Appellant's contention that the court, at the close of the State's case, erred in refusing his request to direct a verdict of not guilty, is wholly without merit. Where the evidence, as here, was sufficient to sustain a conviction, refusal to direct a verdict of not guilty was not error. See *Graham and Seaman* v. *State,* 197 Ark. 50, 121 S. W. 2d 892.

Finally appellant stoutly argues that: "The court erred in overruling defendant's objections in permitting the prosecuting witness and her father to testify as to her age, when the father admitted that he had her birth certificate at his home, and the court did not require the father to produce the birth certificate." We do not agree. As indicated, the girl testified that she had had intercourse with appellant on October 5, 1955, and that she was not 16 until June 3, 1956. Appellant objected to this testimony on the ground that her birth certificate, which her father had testified he had at home, was the best evidence. In *Tugg* v. *State,* 206 Ark. 161, 174 S. W. 2d 374, a similar situation was presented, and the same contention made there as here, and we there said: "It is insisted that there was not sufficient proof

as to the girl's age, which should have been shown by her birth certificate, or by the records of the Bureau of Vital Statistics. These records would have been competent to prove the girl's age; but the testimony offered on that subject was also competent. The girl's mother testified as to the age of her daughter; and this was competent testimony. It was objected that it was error to permit the girl herself to testify as to her age; but not so. In Wharton's Criminal Evidence, 11th Ed., Vol. 1, § 470, it is said that the general rule, from which there seems to be but little dissent, recognizes the competency of a witness to give testimony as to his or her own age . . ."

Other assignments of alleged errors have been considered by us, and are without merit. Affirmed.

ARK. STATE HIGHWAY COMM. *v.* CITY OF LITTLE ROCK.

5-1227; 5-1228 300 S. W. 2d 929

Opinion delivered April 8, 1957.

W. R. Thrasher and *Dowell Anders,* for appellant.

Martin, Dodds & Kidd and *Longstreth, Brooks & Kemp,* for appellee.

ED. F. MCFADDIN, Associate Justice. The appellee, City of Little Rock, in its brief, states the question here

presented in this language: "The only question before this Court is whether or not the (State Highway) Commission has authority to prohibit parking on State Highway truck routes within the City of Little Rock." We answer the question in the affirmative; and such answer requires a reversal of the decrees in these two cases.

In September, 1953 the Arkansas State Highway Commission (acting under authority of Act 323 of 1953) designated certain streets in Little Rock as a truck route and undertook to erect on said truck route signs reading, "No Parking At Any Time." Thereupon, the City of Little Rock filed its suit in the Chancery Court to enjoin the members of the Arkansas Highway Commission from erecting the said signs. Likewise, certain property owners, on the route involved, filed their suit to enjoin the Director and Chief Engineer of the Highway Department from proceeding to erect said signs. In each case the defendants demurred to the complaint. When the demurrers were overruled the defendants stood on the demurrers, and from a final decree in each case granting the injunction the defendants filed their appeals to this Court. The cases were consolidated here because the question is the same in each case.

Act 323 of 1953[1] authorizes the State Highway Commission to designate truck routes through cities and towns. Section 1 of the Act reads:

"The State Highway Commission is hereby authorized to designate and establish truck routes through cities and towns, which routes shall be properly marked by said Commission. Any truck route so established shall become a part of the State Highway System and the State Highway Department shall construct, repair and maintain the Truck Route."

The Legislature had the power to enact such a Statute. *Merchants Transfer & Warehouse Co.* v. *Gates,* 180 Ark. 96, 21 S. W. 2d 406; *Adkins* v. *Harring-*

[1] This Act is in § 76-549 of the 1955 Cumulative Pocket Supplement of Ark. Stats.

ton, 164 Ark. 280, 261 S. W. 626. In the last cited case in an opinion by Honorable E. B. KINSWORTHY, Special Justice, this Court said:

"The State, in its sovereignty over all public highways, has full power over streets as well as over public roads, and, unless prohibited by the Constitution, the Legislature may confer on such agency as it may deem best the power of supervision and control over streets."

In the light of the foregoing there can be no doubt that the Legislature has authorized the Highway Commission to designate a truck route through Little Rock, and that the truck route so designated is a part of the State Highway System. So the question is whether the State Highway Commission has power to erect "no parking" signs on a part of the *State Highway System* that is in the City limits.

Act No. 300 of 1937 is a general highway traffic act.[2] It is not limited to the State Highway System, but applies to all highways, roads, and streets in the State of Arkansas, and, therefore, applies to streets in municipalities. Section 30 of the Act 300 of 1937 (§ 75-503 Ark. Stats.) allows local authorities in their respective jurisdictions to place and maintain traffic control devices on highways *"under their jurisdiction";* but the same Section 30 concludes with this language: "Local authorities in exercising those functions referred to in the preceding paragraph shall be subject to the direction and control of the State Highway Commission." Likewise, Section 26 of the Act No. 300 (§ 75-426 Ark. Stats.) allows local authorities certain regulatory power over traffic; but that section also limits the local authorities to "streets and highways under their jurisdiction."

Section 29 of the Act 300 of 1937 (§ 75-502 Ark. Stats.) reads:

[2] See § 75-402 Ark. Stats.

"(a) The State Highway Commission shall place and maintain such traffic-control devices,[3] conforming to its manual and specifications, upon all State highways as it shall deem necessary to indicate and to carry out the provisions of this act or to regulate, warn, or guide traffic.

"(b) No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the State Highway Commission except by the latter's permission."

Therefore, we conclude: (1) that the truck route designated through Little Rock is a part of the State Highway System by Act No. 323 of 1953; (2) that the State Highway Commission was vested with exclusive control of the State Highway System; and (3) that the decree of the Chancery Court in each of these cases, enjoining the officers and employees of the State Highway Commission from erecting no parking signs, should be and is hereby reversed.

[3] "Traffic-control devices" are defined in Section 17 of the Act No. 300 (§ 75-417 Ark. Stats.) as being: "All signs, signals, markings, and devices not inconsistent with this act placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."

FINDLEY *v.* TYLER.

5-1229 300 S. W. 2d 598

Opinion delivered April 8, 1957.

[redacted]

Fietz and *McAdams,* for appellant.

Douglas Bradley, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a suit to partition 20 acres of land originally brought by appellee, Anna Tyler. The widow and four children of Lee Findley, deceased, other than Anna Tyler either intervened or were joined as party defendants along with the appellant, Vernon Findley. The chancellor found that appellees, Anna Tyler, Lucille Storey and William L. Findley each owned an undivided one-fifth interest in fee in the tract and partition was ordered. Vernon Findley, who procured a deed from the other two heirs of his deceased brother, Lee Findley, and a tax deed from the State, has appealed.

According to the proof adduced by appellees the 20 acres in controversy was a part of an 80-acre tract owned by T. L. Findley at the time of his death intestate in 1934. His four surviving adult sons exchanged deeds in 1935 under which each took title to 20 acres with the tract in controversy going to Lee Findley, the eldest son, and the appellant, Vernon Findley, receiving an adjoining 20 acres and with each making his home on his tract. The 80 acres remained undivided for general tax assessment purposes but Lee Findley paid drainage taxes on his 20 acres in January, 1936. Lee Findley died April 2, 1936, survived by his widow Naomi (now Naomi Lamberth), Anna Tyler, a daughter by a former marriage, and four children born to the marriage to Naomi whose names are Louise Daugherty, Lucille Storey, William L. Findley and James Lee Findley and who lived with the widow on the property when their father died. The youngest of the five children was 5 years old and the eldest 18 years old at that time. Shortly thereafter the widow and her four minor children moved off the land to the home of Naomi Findley's mother. Naomi married Quilly Lamberth in February 1937.

When Lee Findley died in 1936 appellant was the nearest neighbor and offered advice and assistance to the widow. Acting on his advice she paid an unsecured debt of $350.00 owed by her deceased husband for repairs to the homestead out of the proceeds of a small insurance policy on his life. When the widow and children moved off the land appellant agreed to take care of the place and look after it for them. The testimony relative to the possession and renting of the place for the years 1937, 1938 and 1939 is in dispute and understandably vague. Naomi Lamberth stoutly denied receiving any rents and stated she assumed that appellant was looking after renting of the place under his agreement to do so. While two witnesses stated they were tenants on the place about that time and paid a small rental to Quilly Lamberth one of them admitted that Naomi Lamberth then told him she had turned the place over to appellant. While appellant admitted telling Mrs. Lamberth he would look after the place and first stated that he had no recollection as to just when he started collecting rents, he later testified that he first collected the rents in the summer or fall of 1940 and had continued to do so since that time.

The taxes on the entire 80-acre tract were unpaid for the years 1935 to 1939. The land sold to the state for the 1935 taxes which became delinquent in October, 1936, and was certified to the State in 1939. On February 23, 1940, appellant paid $41.00 for a state deed to his 20-acre tract and the 20 acres in controversy. Naomi Lamberth later learned of the purchase by appellant who told her she had lost the place and she stated she would not have discharged the $350.00 debt owed by her deceased husband if she had known she was going to lose the property in that manner. Appellant then agreed to and did pay Mrs. Lamberth $350.00 at the rate of $10.00 per month, which payments she assumed came from the rents. In 1944 appellant secured a quitclaim deed to the 40 acres from the drainage district. In 1951 Anna Lee Tyler, the oldest child of Lee Findley, deceased, approached appellant about her interest in the land and he promised to pay her something. These promises

were subsequently repeated up to the time the instant suit was filed in 1955. Appellant then tried to secure from all the children of Lee Findley a deed which two of them signed but the three appellees declined to execute. There is no proof that appellant ever brought any adverse claim of ownership on his part directly to the attention of these appellees prior to institution of this suit.

In holding that each of the three appellees owned an undivided one-fifth interest in the 20 acres and ordering partition, the chancellor found: "It is the considered opinion of this court that Vernon Findley was in permissive possession of this property and had been since his brother's death in 1936 and was supposedly protecting the interest of the widow and minor children when he purchased the State Deed in 1940. That Vernon Findley's purchase had the effect of an equitable redemption of the property for the benefit of the widow, Naomi Lamberth, and the heirs at law of Lee Findley — the four minor children of Naomi Lamberth and Anna Tyler.

"That Naomi Lamberth being an adult person in 1940 and having actual notice from Vernon Findley of his State Deed soon thereafter, and having delayed 16 years to assert a claim, is now barred by laches from dower and homestead. That none of the five children of Lee Findley had notice prior to the filing of this suit which would put the statute of limitations in motion, and did not abandon their homestead rights during minority. That Louise Daugherty and James L. Findley deeded their interest in these lands to Vernon Findley and have prayed for no relief in this action."

Naomi Lamberth has not appealed. In urging a reversal appellant earnestly contends the evidence is not of that clear, cogent and convincing character required to establish a constructive or resulting trust in favor of the appellees. The pleadings did not present the issue of a resulting trust and the chancellor did not decide the case on that point. The gist of the decree is that the purchase of the land from the State by appellant

in 1940 while he was enjoying the rents and profits amounted to a redemption for the benefit of the widow and heirs of his deceased brother. It is well settled that one in possession of land enjoying the rents and profits cannot acquire title thereto by permitting it to sell for the taxes and buying it at the tax sale, or by purchasing from one who has purchased at such sale; and that such purchase will be regarded in equity as a mere redemption. *Guynn* v. *McCauley,* 32 Ark. 97; *Wade* v. *Goza,* 99 Ark. 543, 139 S. W. 639; *Galloway* v. *Battaglia,* 133 Ark. 441, 202 S. W. 836; *Roberts* v. *Miller,* 173 Ark. 38, 291 S. W. 814; *Zimmerman* v. *Franklin County Savings Bank & Trust Co.,* 194 Ark. 554, 108 S. W. 2d 1074; *Smith* v. *Smith,* 210 Ark. 251, 195 S. W. 2d 45. See also Jones, *Arkansas Titles,* Sec. 1299. Where a person bound to pay taxes on land permits a forfeiture, his subsequent purchase from the State will be treated as a redemption. If Naomi Lamberth had remained in possession of the homestead following her husband's death the duty would have rested upon her to keep down the taxes and she could not have acquired title to appellees' interest in the land by permitting a forfeiture and purchase from the State. If the testimony adduced by appellees is credible, the appellant stood in the same relation toward appellees as did the widow insofar as the 20 acres in controversy is concerned. The chancellor's findings to this effect, and that the possession of appellant was permissive and not adverse to appellees, are not against the preponderance of the evidence.

Affirmed.

SECURITY BANK *v.* MCENTIRE.

5-1237 300 S. W. 2d 588

Opinion delivered April 8, 1957.

Garvin Fitton and *Arnold M. Adams,* for appellant.

No brief for appellee.

George Rose Smith, J. This is an action by the appellant bank to enforce a promissory note for $385.88, executed by the appellee in connection with the purchase of a car. By his answer the appellee sought a rescission of the contract on the ground that he was only twenty years and four months old when the contract was made. At the first hearing in the case the trial court upheld the defendant's right to rescind, found that the car was worth $200 at the time of the sale, and allowed the defendant thirty days in which to make restitution in accordance with Act 337 of 1953. Ark. Stats. 1947, § 68-1601. At a second hearing the minor surrendered the car, which the court found to be then worth $175, and paid into court the $25 difference between the value of the car at the time of the sale and its value when surrendered. The trial judge held that since restitution had been made the bank was entitled to no other relief. In appealing from the judgment the bank assigns several asserted errors.

Basically, the bank contends that it did not sell the car to young McEntire but merely lent him the money to buy the vehicle from its previous owner, Harvey

Myers. Upon this premise the bank argues that, as far as it is concerned, McEntire is entitled to rescind the loan agreement only and that to do so he must make restitution by repaying the money.

The trial court rightly rejected this argument. McEntire did not borrow $385.88 for general purposes and later spend the money in a separate transaction with Myers. To the contrary, it does not appear that the bank actually advanced any money to McEntire or to any one else. Legal title to the car may have been in Myers, but he had mortgaged the vehicle to the bank and had apparently abandoned the car by leaving it with a garageman named Risley. Risley testified that the car belonged to the bank, as far as he knew, and that he acted as the bank's agent in selling the automobile to young McEntire. As far as the record discloses, McEntire merely signed a note for the purchase price and in return received title to and possession of the car, which was equitably owned by the bank. Thus there was but a single transaction, which the minor is entitled to avoid by giving back the only thing he received, the car in question.

It is next contended that the trial court acted prematurely in ascertaining the value of the car at the time of the sale without first requiring its surrender to the bank. We see no practical objection to this procedure, for the car's market value at a given prior date can certainly be proved without regard to who happens to have possession of the vehicle at the time of the hearing. Nor does the statute, cited above, support the appellant's argument. Among other things the statute provides in substance that if the infant no longer has the property he must repay its fair market value at the time of the sale. Hence the act itself contemplates that the market value may be determined without restitution having been made in kind. Nor is there merit in the suggestion that the court below erred in allowing McEntire thirty days in which to return the automobile, which was being held in Texas for nonpayment of a repair bill. This is not a question of substantive law but is

merely a procedural matter that rests within the sound discretion of the trial court.

Finally, the bank contends that the proof does not support the court's finding that the car was worth $200 at the time of its sale and $175 when surrendered. Young McEntire's testimony as to the $200 value of his own property was competent, *Phillips* v. *Graves,* 219 Ark. 806, 245 S. W. 2d 394, as was that of his father, who had owned more than a dozen automobiles. *Chunn* v. *London, etc., Co.,* 124 Ark. 327, 187 S. W. 307. The other valuation is supported by the testimony of two dealers called by the bank, both of whom said that they would expect to resell the car for $175.

Affirmed.

ARK. FARMERS ASSN., INC. *v.* YOHE.

5-1236 300 S. W. 2d 589

Opinion delivered April 8, 1957.

John R. Thompson, for appellant.

John M. Lofton, Jr., and *Owens, McHaney, Lofton & McHaney,* for appellee.

PAUL WARD, Associate Justice. The only issue presented by this appeal is a legal question. It is: Do the undisputed facts, concerning an attempted settlement between appellant and appellee, constitute an accord and satisfaction?

Appellee, Carl Yohe, a substantial farmer, raised a special type of seed oats in 1953 and 1954. In 1953 he secured and used a type of oats, designated as "Arkwin," which had been developed by the University of Arkansas. Appellee also planted a crop of the same type of oats in 1954, which he sold to appellant, Arkansas Farmers Association, Inc. A dispute over the terms of this sale germinated this litigation.

It is admitted by both sides that seed oats are graded as to quality, and that the sales price depends on the grade. In this case, it is also admitted, that if the oats were *certified* by the State Plant Board they would bring a higher price. Apparently there are, at least, two different grades of certified oats. One grade is known as "Blue Tag" and brings a higher price, and the other is known as "Red Tag."

In the Spring of 1954 Mr. Ben Isgrig, head of the seed department of appellant, entered into an agreement with appellee to buy his oat crop for that year. Mr. Isgrig and Mr. Yohe differ as to the terms of that agreement, and that turns out to be the cause of this litigation. For the purpose of this opinion it is only necessary to set out the main point of disagreement. Mr. Isgrig says he agreed to pay appellee 85 cents per bushel for the oats if they graded "Blue Tag," otherwise the price was to be 75 cents per bushel. Mr. Yohe says he was to receive 85 cents per bushel for his oats if they were certified by the Plant Board. It turned out that the oats were *certified* but not as "Blue Tag."

After appellee harvested his 1954 oat crop, amounting to 16,332 bushels, he made delivery to appellant.

When appellee called at appellant's office in the absence of Isgrig, for his pay, one of the clerks gave him a check, computed at 85 cents per bushel, after appellee assured him the oats were *certified* as per agreement with Isgrig.

A short time later, when he learned of the settlement, Isgrig wrote appellee to the effect that a mistake had been made, and demanded a refund of 10 cents per bushel, or $1,633.20.

Some months later Yohe went to appellant's office and discussed the matter with Mr. Isgrig. For some time Mr. Isgrig and Mr. Yohe both stood firm on their own understanding of the sales agreement. Finally, after Mr. Isgrig threatened suit, Yohe agreed to pay $1,600 and gave his check to appellant for that amount. However, upon returning home, Yohe stopped payment on the check.

The original complaint filed by appellant was on the $1,600 check given by Mr. Yohe, but after appellee asked to have the complaint made more definite and certain, an amendment was filed setting out the facts much as we have detailed them heretofore. The last sentence in the complaint reads as follows: "A full and complete understanding having been reached and the check having been issued by Defendant in settlement of said account, this suit is brought by the Plaintiff and based upon the settlement compromise and agreement, and the check given in payment of the balance due by Defendant thereon."

In his answer appellee denied that any agreement was reached whereby he would make a refund to appellant but stated; that he was induced to issue his refund check by misrepresentations on the part of appellant and that when he discovered such misrepresentations he stopped payment on the check, and; further answering, appellee stated "that he delivered to the plaintiff oats that had been graded by the State Plant Board and met the grade that he had contracted to deliver to the plaintiff. That he was paid by the plaintiff for said

oats at the rate of 85 cents per bushel in accordance with their understanding and agreement."

After the introduction of testimony regarding the original purchase agreement between appellant and appellee and regarding the subsequent settlement agreement, the matter was submitted to a jury under two instructions given by the court, one of which was requested by appellant and the other was requested by appellee. Appellant's requested instruction submitted the theory of accord and satisfaction. Appellee's requested instruction was based on the original agreement. The jury returned a verdict in favor of appellee.

After careful consideration of the able briefs presented by both sides we have reached the conclusion that appellant had no right to maintain his suit on the check for $1,600 upon which payment had been stopped. This being true appellant cannot take advantage of any error on the part of the trial court in giving the first instruction. It was given at the request of appellant and it presented appellant's side of the case more favorably than it was entitled to under the law.

At the close of all of the testimony appellant requested a directed verdict which was refused by the trial court. It was and is the contention of appellant that the undisputed facts in this case show that the settlement reached between appellant and appellee and the giving of the check for $1,600 by appellee constituted an accord and satisfaction.

We agree with appellant that there is no dispute concerning the essential facts of the alleged agreement, but we have reached the conclusion that appellant cannot prevail for the reason that there was no satisfaction. If the check for $1,600 had been cashed by appellant we would agree that an accord and satisfaction had been reached, but such is not the situation. This court has many times held that the giving of a check upon which payment has been stopped does not constitute payment. In the case of *Sharp* v. *Fleming,* 75 Ark. 556, 88 S. W. 305, this court said: "Giving the check, which was never

paid, was not an extinguishment of the original debt, unless shown to have been accepted absolutely in payment." In this case there is no testimony to show that appellee's check was so accepted. The *Sharp* case, *supra,* was cited with approval in *Churchill* v. *Yeatman-Gray Grocer Co.,* 111 Ark. 529, 164 S. W. 283, where the court, at page 536 of the Arkansas Reports, said: "The taking by a creditor of a note, bill or check of a debtor for an antecedent indebtedness is not a payment or satisfaction of the debt unless it is agreed by the parties that it should have that effect."

Williston On Contracts, Revised Edition, Vol. 6, § 1847, has this pertinent statement relative to accord and satisfaction:

"It is often extremely difficult to determine as a matter of fact whether the parties agreed that the new promise should be itself the satisfaction of the original cause of action, or whether they contemplated the performance of the accord as the satisfaction. Unless there is clear evidence that the former was intended, the latter kind of agreement must be presumed, . . ."

Courts and textwriters generally recognize that there are two essential components in every accord and satisfaction, and that both, considered separately, are essential. In 1 C. J. S., page 462, under the title "Accord and Satisfaction," we find:

"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."

The same citation emphasizes "satisfaction" this way:

"An 'accord and satisfaction,' therefore, consists of the two elements expressed in the phrase, and designates the completed transaction; it is the agreement and its performance, . . ."

The same rule is expressed in 1 Am. Jur., page 252, this way:

"Ordinarily, in the absence of an express or implied agreement to take a check or note in satisfaction of a debt, there is no extinguishment of the claim on the theory of accord and satisfaction until the instrument is paid, since, by the taking of the note, there is merely an accord executory, and not a satisfaction."

Restatement of Contracts, § 417, under topic "Discharge by Accord and Satisfaction," *Comment a,* says: "Satisfaction takes place when the accord is performed."

Applying the rules announced above to the undisputed facts in the case under consideration, the conclusion is inescapable that appellant cannot maintain this suit on the ground of an accord and satisfaction, because there was no satisfaction.

Since the cause was properly tried on both sides' version of the terms of the original sales agreement, the judgment of the trial court must be sustained.

Affirmed.

Justice GEORGE ROSE SMITH concurs.

GEORGE ROSE SMITH, J. (concurring). In the usual case an accord and satisfaction is pleaded by the debtor as a defense to the creditor's suit upon the original obligation. In that situation it is familiar law that the debtor's original obligation is not discharged unless the subsequent agreement of accord has been fully executed, or, in other words, has been satisfied. Here, however, it is the creditor who is suing upon the agreement of accord, and I think the majority are in error in holding that in this situation a satisfaction of the accord must be proved.

The fallacy is readily apparent from the majority opinion itself. It is said that "we have reached the conclusion that appellant cannot prevail for the reason that there was no satisfaction. If the check for $1,600 had been cashed by appellant we would agree that an

accord and satisfaction had been reached, but such is not the situation." Thus the appellant is being told that the reason it cannot sue upon the check is that it failed to cash the check and collect its money. Needless to say, had the appellant succeeded in collecting its claim it would not have brought the present action.

Despite my disagreement with the majority's reasoning I think the judgment should be affirmed. An agreement of accord is a contract and, like any other contract, must be supported by a consideration. *Levy* v. *Very,* 12 Ark. 148; *DeSoto Life Ins. Co.* v. *Jeffett,* 210 Ark. 371, 196 S. W. 2d 243; Rest., Contracts, § 417. If the accord is a valid contract the creditor may, as the Restatement points out, sue upon the accord rather than upon the debtor's original obligation. That is what the appellant did in the case at bar, basing its complaint upon the check rather than upon the original transaction by which the appellee was assertedly overpaid for his crop of oats.

The jury's verdict for the defendant necessarily means that the jury accepted Yohe's version of the original agreement, for under the court's instructions there is no other basis on which the jury could have found for Yohe. Hence the jury found that Yohe was entitled to receive eighty-five cents a bushel for certified oats, regardless of the exact grade of certification. This being true, Yohe owed the appellant absolutely nothing when he delivered the check now sued upon, for he was justly entitled to every cent that he had received. There was therefore no consideration whatever for the agreement of accord, and since the check has not passed into the hands of a holder in due course the absence of consideration is a complete defense to the plaintiff's claim.

LUCAS *v.* MEEK.

5-1176 300 S. W. 2d 593

Opinion delivered April 8, 1957.

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

Dickson & Putman and *Suzanne C. Lighton,* for appellee.

SAM ROBINSON, Associate Justice. This case grows out of a contract whereby appellants, Robert O. Lucas, Della M. Lucas and Murray C. Lucas, agreed to purchase, and Mrs. L. Ruth Meek agreed to sell, certain lands in Madison County, Arkansas. The Chancellor rendered a decree in favor of Mrs. Meek, the seller, and the purchasers, the Lucases, have appealed.

The Lucases lived in Kansas and through an advertisement of the United Farm Agency they became interested in purchasing the property involved in this litigation. It appears that the United Farm Agency had described the property as consisting of 447 acres. Mr. George W. Reeves, a local real estate agent in Madison County, was handling the sale of the property, and in talking to the Lucases he explained to them that instead of there being 447 acres there were only 346 acres offered for sale; that this acreage was all he could find that was owned by Mrs. Meek. The Lucases looked at the property and one of them stated that the 346 acres were

sufficient to meet their requirements. The parties entered into a contract whereby Mrs. Meek agreed to sell 346 acres for a consideration of $9,500. The Lucases paid $3,000 in cash and agreed to pay $500 a year for two years, and the balance to be paid in four equal annual payments, with 6% interest. The deed and abstract were to be held in escrow at the First National Bank of Huntsville until the purchase price was paid in full. The contract further provides that, should the purchasers fail to make the payments as required when due, they were to forfeit all claims to said property and the monies paid would be considered as rent. As agreed, the $3,000 was paid by the Lucases, a deed was executed by Mrs. Meek warranting good title, and the deed and abstract were deposited with the escrow agent. Later, the Lucases took up with Mr. Reeves, the real estate agent, the proposition that they were to get 447 acres instead of 346, which their contract called for. Mr. Reeves again stated that he could not find where Mrs. Meek had title to more than 346 acres, and if the Lucases were not satisfied with the deal it would be called off and the $3,000 refunded. But Mr. Reeves' offer to refund was not accepted. Later, on February 18, 1954, when the first $500 payment became due, the Lucases paid that amount, plus $390 interest, to the escrow agent; but it was paid on condition that it was not to be turned over to Mrs. Meek until a good abstract of title was furnished to the 101 acres of land not included in the original deed and contract.

The contract of sale was entered into on February 20, 1953, but the Lucases did not obtain the abstract from the escrow agent for examination by an attorney until February 15, 1954. The Lucases contend that they made several efforts to obtain the abstract, but the bank would not turn it over to them to have it examined. On the other hand, Mrs. Edith Nichols, an employee of the bank in charge of the escrow files for 13 or 14 years, testified that she does not recall anybody asking for the abstract until about eleven months after it was placed in escrow. She testified that she would have permitted any lawyer to take it for the purpose of examination or

would have let any one of the Lucases take it to a lawyer. The Lucases finally submitted the abstract to an attorney for his examination. The description is very long, requiring almost three pages of the abstract to set it out. Mr. Fowler, the examining attorney, would not approve the title for the principal reason that he stated there were defects in the description.

Subsequently, Mrs. Meek filed this suit to quiet her title and alleged that the Lucases had breached their contract. Mrs. Meek also asked that the purchasers' rights under the contract be forfeited; but, in the alternative, asked for a judgment for the balance of the purchase price under the contract. The Lucases filed a cross complaint in which they alleged breach of warranty of title, and also alleged false representations in connection with the number of acres of land they purchased, and asked that for these reasons the contract be rescinded and they have judgment for the money they had paid on the contract. The Chancellor rendered a decree quieting the title in Mrs. Meek, subject to the deed to the Lucases; made a finding that only 346 acres were involved in the contract of purchase and rendered a judgment against the Lucases for $6,500, the balance owed on the contract, plus interest and taxes paid by Mrs. Meek, and ordered the property sold to satisfy the judgment if not paid within sixty days. On appeal, the Lucases contend that the title was defective, and that such defect constituted a breach of contract entitling them to the return of the money paid, plus the value of improvements they placed on the land.

Assuming that, by reason of the defective descriptions, Mrs. Meek's record title was not perfect, but that a decree has now been rendered quieting title in her on the theory of adverse possession, does she have a title that she can convey which will be in accordance with her contract, and such a title as the Lucases are entitled to receive under the contract? The contract provides: "And the said first party on receiving such payment at the time and in the manner above mentioned shall at their own proper cost and expense, execute, acknowledge, and deliver, to said second party or to their heirs

or assigns a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to them good title to said premises, free from all encumbrances except those mentioned herein, etc.'' Appellant contends that under the foregoing provision of the contract nothing will suffice except a perfect record title; saying, in effect, that regardless of how good Mrs. Meek's title may be by adverse possession the law will not compel the acceptance by appellants of anything less than a perfect record title. And such is the holding of this court in the cases of *Mays* v. *Blair,* 120 Ark. 69, 179 S. W. 331, and *Shelton* v. *Ratterree,* 121 Ark. 482, 181 S. W. 288.

But both of those cases were overruled in *Hinton* v. *Martin,* 151 Ark. 343, 236 S. W. 267. See also *Dalton* v. *Lybarger,* 152 Ark. 192, 237 S. W. 694; *Meek* v. *Green,* 166 Ark. 436, 266 S. W. 451; *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S. W. 588; *Landers* v. *Peoples Building & Loan Association,* 190 Ark. 1072, 81 S. W. 2d 917; *McWilliams* v. *Toups,* 202 Ark. 159, 150 S. W. 2d 34; *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475; *Bride* v. *Walker,* 206 Ark. 498, 176 S. W. 2d 148.

In the case at bar, Mrs. Meek contracted to deliver a warranty deed assuring the grantees a good title. She did not contract to furnish an abstract showing a good title of record. In *Hinton* v. *Martin, supra,* the court said: ''In the case of *Freeman* v. *Funk,* 117 Pac. 1024, 85 Kan. 473, annotated in 46 L. R. A. (N. S.) 487, there is a very extended annotation of a note on the 'use of possessory title as a weapon of offense.' A sub-note deals with suits for specific performance, and the law is stated by the annotator (p. 515) as follows: 'Title by adverse possession is generally held sufficient to enable the vendor to maintain an action for specific performance against a purchaser, in the absence of a contract for a perfect record title.' '' And the court further said: ''A title by adverse possession may be so clear and free from doubt as to be a 'marketable' title, and may therefore be the basis of a suit for specific performance of a contract to convey land.'' Here, it is not argued that there is anything wrong with Mrs. Meek's

title except there may be a defective description. The Chancellor quieted title in Mrs. Meek. In these circumstances, a delivery of her warranty deed to the escrow agent constituted performance of the contract on her part, and the Chancellor was correct in so holding.

The decree should be modified in one respect. In the circumstances shown here, the Lucases were justified in withholding payments on the contract until such time that Mrs. Meek perfected her title. This was not done until the decree herein was rendered. Therefore, there was no forfeiture, and the Lucases should be permitted to make the payments now in arrears on the contract and make future payments in accordance with the terms of the contract.

Modified and remanded, with directions to enter a decree not inconsistent herewith.

CRAIG *v.* O'BRYAN.

5-1189 301 S. W. 2d 18

Opinion delivered April 15, 1957.

[Rehearing denied May 13, 1957]

Sherrill, Gentry & Bonner, for appellant.

Talley & Owen, Dale Price and *William L. Blair,* for appellee.

CARLETON HARRIS, Chief Justice. Appellees filed their complaint stating that they were owners of property on the north side of Old River Lake adjoining the property of the appellants, and alleging that a road leading through appellants' property to that owned by appellees was a way of necessity to appellees; that said road was a public road, and that the roadway had been adversely used by appellees and the general public for a period of forty years. They further alleged that appellants were damaging the road and drainage ditches by using said road to turn their tractors, cultivators and plows, and by refusing to permit appellees to maintain the road. It was further alleged that appellants were estopped to deny appellees access to use of the road because they had stood by, knowing that appellees were investing thousands of dollars in improving their property, and knowing that their only access to same was over the road in controversy. Appellants filed answer and cross complaint admitting that the roadway in question crossed a portion of their lands and had been used by

appellees from time to time. They denied the adverse use by appellees and the general public, and stated that any use of the roadway upon their lands was permissive only. The pleading further set out that appellants and their predecessors in title had habitually used said roadway for the hauling, dragging, and transportation of all kinds of heavy farm equipment; that they habitually used the road as a turnrow for cultivating and harvesting equipment, and that in order to use said road in this manner, it was necessary that the area between appellants' cultivated fields and the roadway be free of ditches in order to permit the equipment to pass over and onto the road; that such acts had been under a claim of right and adverse to any rights or easements claimed by appellees. Appellants further alleged that appellees had caused to be constructed, ditches along the roadway which had trapped and accumulated water from appellants' integrated draining system, had caused the water to flood portions of appellants' fields at planting time, and that such flooding would continue unless appellees were enjoined from maintaining such ditches along the roadway. Appellees denied the allegations of the cross complaint and subsequent thereto, the cause proceeded to trial. On May 16, 1956, the court entered its decree, in which it found that the road in question was a public road by reason of the adverse use of the general public and appellees for a period greater than seven years. The court further found that appellants were estopped to deny appellees the use of said road, or to deny them the right to maintain the road. In conformity with said findings, the court entered its order dismissing the cross complaint of appellants, and making permanent a temporary injunction (which had been granted on July 15, 1955) restraining appellants from damaging the road, from interfering with the use and maintenance of same, and declaring it to be a public road. From such decree comes this appeal.

In reviewing the testimony of appellees' witnesses, we do not feel that the evidence establishes the roadway in question to be a public road. The people testifying (Linda Biggs, Ione Black, Sherman Abraham, Lillie

Garrett) as to this being a public road, had lived in the area at one time and traveled the road to reach their homes. Tenants on the farms, and people visiting both the owners and tenants, used the road. None of these witnesses (except Sherman Abraham) testified as to personal knowledge of seven years consecutive use by the general public. Abraham's testimony was to the effect that he saw people traveling the road who did not live in the area—"going in there to fish and different things." He testified that he had been familiar with the road for 25 or 30 years and formerly lived down on Old River, but it is not made known as to the particular years his testimony covers, or that he had occasion to observe daily the use of the road for a consecutive number of years. Certainly we cannot find that his testimony establishes same to be a public road. Joe Price, a county employee, testified that the road had been worked occasionally by the county since 1935, but he did not know whether this was done because of the requests of property owners. The evidence does not reflect any order of the county court establishing this as a public road, and the mere fact that the roadway was occasionally worked by the county would not, of course, make it a county road. The rest of the testimony on behalf of appellees as to use of the road came from appellees themselves.

To establish their easement by prescription, it is necessary that appellees establish their use of the roadway for more than seven consecutive years, under a claim of right, adverse, and hostile to appellants. Quoting from Vol. 14, page 98, of Words and Phrases: "Easement by prescription may be created only by adverse use of privilege with knowledge of person against whom easement is claimed, or by use so open, notorious, and uninterrupted, that knowledge will be presumed, and exercised under claim of right adverse to owner and acquiesced in by him." Several of the appellees testified that they talked with Craig about whether they had a right to use the road, and the majority have not owned their respective properties for a sufficient period of time to establish adverse rights.

Under the evidence, it would seem that this road "started out" as a turnrow, and has been used in connection with general farming operations on the Craig farm by appellants and their predecessors in title for a long number of years. Alfred Craig, Jr., testified that he had so used the road for 21 years. This is not disputed; there is no claim by appellees that appellants have been deprived of the use of the road, nor can we find any testimony in the record which would tend to show the commission of acts by appellees that would serve as notice to appellants they were claiming adversely. The fact that they finally did commit such acts which were hostile to the purpose for which appellants used the road, and to which they strenuously objected, occasioned this litigation.[1] These seem to have been the first instances in which appellees asserted rights contrary and hostile to those of appellants and such acts occurred a comparatively short time before the filing of the lawsuit. In short, the prior use of the road by appellees had not been inconsistent with the use of same by appellants. One might well make the observation that if appellees felt they had an absolute right to the use of the road, there was no reason for any of them to talk with Craig about the matter at all. In *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461, American Jurisprudence is quoted as follows: "The prevailing principle seems to be that while a way may be acquired by user or prescription by one person over the uninclosed land of another, mere use of the way for the required time is not, as a general rule, sufficient to give rise to the presumption of a grant. Hence, generally some circumstance or act, in addition to, or in connection with, the use of the way, tending to indicate that the use of the way was not merely permissive, is required to establish a right by prescription." Viewing the evidence and the circumstances in their entirety, we conclude that appellees have failed to establish their right to use of the road by prescription, and that such use has been permissive only.

[1] Appellees had constructed drainage ditches and placed gravel upon the road, and appellants filled up the ditches.

The court further found that appellants were estopped to prevent appellees from using and maintaining the road, because of statements of appellant Alfred Craig, Sr., made prior to appellees' purchase of properties on Old River, to the effect that they could use same. The evidence shows that Craig made such statements to several of the appellees and knowingly suffered the others to purchase and expend money on their properties.[2] We think the Chancellor was correct in holding that appellants are estopped to deny appellees use of the road. We are also of the opinion that they have the right to maintain said road so long as the manner of maintenance does not place an additional burden upon the servient estate. Actually, it may well be immaterial whether the right of appellees was acquired by prescription or permission. Quoting from Thompson on Real Property, Vol. 2, Sec. 681, page 352: "Where a right is acquired by use or prescription, the nature of the use cannot be changed so as to render it more burdensome upon the servient tenement." From A. L. R., Vol. 112, page 1303: "It is a general rule that the owner of an easement of way may prepare, maintain, improve or repair the way in a manner and to an extent reasonably calculated to promote the purposes for which it was created or acquired, *causing neither an undue burden upon the servient estate nor an unwarranted interference with the rights of common owners or the independent rights of others.*" (emphasis supplied). In *Doan* v. *Allgood,* (1923) 310 Ill. 381, 141 N. E. 779, the court said: "Whoever has an easement in or over the land of another has the right to do everything necessary to preserve the easement, and the right to repair a way is fully established . . . The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement. The owner of the easement may make such grades or fills and lay such tiles or construct such ditches as may be necessary to enable him to make use of the way

[2] Actually, the right of appellees to merely travel the road does not seem to be in dispute. Their right to maintain same is the pertinent issue.

in accordance with the grant, provided in doing so he does not injure the servient estate. He may not construct a grade or fill a ditch in such a manner as to affect injuriously the adjoining land of the servient estate." From Am. Jur., Vol. 17, Sec. 112, page 1006: "As a general rule, when the character of an easement is once fixed, no material alterations can be made in physical conditions which are essential to the proper enjoyment of the easement except by agreement."

At the time appellees acquired this easement by permission of Craig, the road in question was not graveled, nor were ditches existing to provide drainage of the road. There were "bad spots", almost impassable in winter, at that time. Appellees complain that the road has become much worse and more difficult to travel in the last two years; this would seem logical, since there is apparently much more motor traffic over the road than in the past. Appellees do have a right to maintain such road, but only to the extent that acts of maintenance do not render same useless for purposes of appellants. They may grade the road or gravel any bad spots. They may even dig ditches, if such are constructed in a manner as will not interfere with appellants' use of the road as a turnrow, or cause the fields to be flooded.

While appellees do not argue the point, the record is replete with references to the fact that appellees have no other way to reach their properties except by use of this road. It is well settled that a "Way of necessity" only arises where the lands of all parties were at one time owned by a common grantor. *Boullioun* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986; *Mettetal* v. *Stane,* 216 Ark. 836, 227 S. W. 2d 636. There is no evidence that such is true in the instant litigation.

It would appear that there is no reason why appellants and appellees should not both enjoy the use of this road. Appellants should operate their machinery, while using the road, in a manner that will limit any damage to that which must necessarily come from the mere use of the road, and consistent with the rights of appellees to their use of the roadway. The parties may

well agree on the stretches to be graveled, and take proper steps for drainage that would not prove injurious to either. An amiable and cooperative attitude on the part of all concerned should result in a satisfactory and harmonious solution.

The decree is therefore modified to the following extent. The finding that the road is a public road is held erroneous. The injunction restraining appellants from damaging the road and interfering with the use and maintenance of same by appellees is upheld, though modified to the extent as to apply only to unnecessary damage, and the term "maintenance" is modified as herein indicated.

The case is remanded to the trial court for any further orders which may be necessary to insure the rights of the parties as have been set out.

Justice WARD dissents.

PAUL WARD, Associate Justice (dissenting). I do not agree with the majority opinion in the following particulars:

One. The chancellor held that appellees had acquired a road by prescription. I would affirm that holding. Where the public uses a road across unoccupied and unenclosed land, there is a presumption the usage was permissive. See *Nelms* v. *Steelhammer,* 225 Ark. 429, 283 S. W. 2d 118. There is a good reason for such a presumption, because the owner of the land might not know of the usage. Such presumption does not arise where the land is occupied or cultivated, as here. The majority, in reversing the chancellor on this point, feel that no continuous usage for seven consecutive years was shown by the testimony. But as I view the testimony, the chancellor was justified in finding that the public, and appellees in particular, had used the road continuously for more than 50 years. Since the undisputed proof shows that appellees had no other road to and from their farms, and since appellants themselves admit the road has been in use for some 30 years, it would be preposterous to pre-

sume that the road was not used for a period of seven consecutive years. Joe Price, employed by the Pulaski County Road and Bridge Department, testified that he had been familiar with the road since 1935 and that the County had been working the road occasionally since that time. Sherman Abraham had been familiar with the road for 25 years, and knew the general public used it. Lillie Garrett knew the road was old in 1930 and that the general public used it. Witness Dortch stated that the road had been in existence within a few feet of where it is now for a period of at least 50 years. One of the appellants testified that the road had been there for 100 years. It seems to me that the above testimony (and there is much more) is ample to sustain the chancellor's finding on the period of usage. This is especially true since there is no testimony that there was any 7 year gap in the usage. If appellants thought there was any such gap they should have brought it out on cross examination or by direct testimony.

Under the above factual situation, it is my considered opinion that the trial judge in this case correctly followed the rule laid down by this court in the case of *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S. W. 2d 281, 46 A. L. R. 2d 1135, where, in dealing with a similar state of facts, we said: ". . . the road has been used by appellee and the public openly and adversely for more than 7 years and (that) the constant usage of said road for some 40 years under the circumstances of this case overcomes the presumption that said usage was permissive." In the cited case the road was over unenclosed land and therefore the presumption of permissive use attached, but in the case under consideration of course no such presumption attached. See also *Stoker* v. *Gross,* 216 Ark. 939, 228 S. W. 2d 638.

Two. In my opinion the majority have announced the wrong rule by which appellants and appellees must hereafter settle their differences. As I understand the majority opinion it lays down this rule: Appellees can maintain the road as long as they do not

increase the burden on appellants. It is not necessary to enter into a discussion of what constitutes a "burden", because I am concerned here only with a rule or principle.

The rule which I think this court should apply, and which I think is approved by the decisions cited by the majority, can be stated, in effect, as follows: Appellees have a right to make such repairs, and only such repairs, on the road as are reasonably necessary to insure its use. In other words I would make the *use* of the road, and not the *burden on appellants,* the criterion. The difference in the two rules may seem slight, but I think it is fundamental, and that it could lead to quite different results. For example: If digging a one foot side ditch along a portion of the road was found to be necessary in order to make the road usable, it would not be allowed, under the majority rule, if it was found to be an extra burden on appellants. This could, in effect, deny appellees the use of the road entirely.

KINGREY *v.* WILSON.

5-1250 301 S. W. 2d 23

Opinion delivered April 15, 1957.

[Rehearing denied May 13, 1957]

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

C. M. Carden, for appellee.

J. Seaborn Holt, Associate Justice. Appellee, Bernice Wilson, brought this suit against Homer Kingrey and his wife, appellants, to cancel a warranty deed dated December 13, 1955, which she gave to appellants. This deed for a consideration of $1,000 conveyed 4.4 acres of land, with the exception of a parcel 100 ft. x 110 ft. on which appellee's home (or dwelling) was located. She alleged in her complaint that this deed was procured from her through misrepresentation and fraud and that she received no consideration whatever. She asked that this deed be cancelled and set aside. Appellants answered with a general denial and also filed a cross complaint alleging that the suit was brought by appellee "maliciously and without probable cause" and sought damages.

Trial was had and following an extended and patient hearing the court found: "That the aforementioned deed conveying the above described property should be set aside for two reasons; fraudulent misrepresentations and total lack of consideration. The court finds that there was a relationship of trust and confidence between the plaintiff and the defendants and that this confidential relationship was taken advantage of by the defendants through their misrepresentations and procured the execution of said deed by virtue of the misrepresentations; that in addition there was a complete lack of consideration for the execution of said deed. That said deed should be set aside for both reasons."

For reversal appellants rely on the following points: "1. The evidence is not clear, unequivocal and decisive to warrant setting aside the solemn recitals of a deed, nor to warrant the court's findings of fraudulent misrepresentation, lack of consideration and existence of confidential relationship between plaintiff and defendants. 2. The court erroneously varied the terms of a deed upon the finding of no consideration for a voluntary conveyance and in effect found a resulting trust to exist which findings were erroneously based upon parol testimony. 3. The court erred in failing to grant defendants' motion to dismiss plaintiff's complaint as a matter of law after plaintiff failed to answer the request for admissions under oath and in permitting plaintiff to answer such questions at the trial. 4. The court erred in failing to grant defendants a continuance at the close of plaintiff's testimony and in failing to strike the testimony not in conformity with the plaintiff's pleadings. 5. The court erred in not permitting appellee to be cross-examined on whether or not she and her ex-husband were living together in adultery."

1 and 2

After a review of all the testimony we have concluded that it is sufficient to support the findings and decree of the trial court, however, on trial *de novo* here we have elected to affirm the decree on a different ground, that is, that the testimony shows that appellee was the beneficiary of a constructive trust which was shown to exist in the property described in the above deed, which she gave to appellants. We hold that appellee has met the burden of showing this by proof that is clear and convincing. See *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840.

The record reflects that appellee and her husband were divorced November 10, 1955. Prior to the divorce her husband had on September 1, 1955, deeded the land here involved to her. The appellants lived across the road from appellee and they became her very close personal friends and she relied strongly on Kingrey for advice. Appellee and her two children moved into appel-

lants' home at their request, where they lived with them for about four months.

Appellee testified (appellants' brief): "There was talk my husband would resue and take the property. Mr. Kingrey said he could fix it where he couldn't get the property. We talked over conveying the property to Mr. Kingrey to keep Mr. Wilson from getting the property . . . Ernest Briner made out the deed. Mr. Briner said just in case something went wrong he would make out the deed for $3,500 where I could have something for the land. I went to Mr. Briner's office with Mr. Kingrey on Friday or Saturday and went back on Tuesday evening and signed it. I did not notice what kind of deed I signed. I did not receive anything for the deed. I held the deed for awhile before delivering it to Mr. Kingrey. I didn't know until this year when my former husband came back and we were talking about it that the deed had been recorded. I gave Mr. Kingrey the money to pay the delinquent taxes. He redeemed the taxes in his name . . . There was talk all around that my husband was going to take the property from me and the children. We talked it over and they were going to hold the property until this was settled and then it would be given back to me . . . We were offered $7,500 for the whole place not long ago. That was about two or three years ago . . . Mr. Kingrey's exact statement concerning M. J. Wilson taking the land away from me was to fix it in his name to keep for me and then he could not get it and when this was over I would have the land. This statement was made a week or so before December 13, 1955, the date the deed was signed. When this statement was made Aaron Johnson and wife, Mildred Johnson, Charlie Allen and Mrs. Allen and Bill LaGue were present . . . My sole purpose in executing the deed was to hold the property where my husband couldn't take it . . . I never received one dime of the consideration stated in that deed."

Mr. Wilson, appellee's ex-husband, tended to corroborate appellee. "Q. He (Kingrey) did state that he was going to give the land back? A. He said "I am

going to give it all back to Bernice (appellee)." Aaron Johnson, on behalf of appellee, testified (appellants' abstract): "I know the defendants (appellants) and plaintiff (appellee). I was present when they were discussing making out a deed to Mr. Kingrey to keep M. J. from resuing and getting the land, and I understood when the trouble was over he was going to turn it back over to her." Charles Allen testified: "I visited in the Kingrey home while Mrs. Wilson lived with them. The conversation was she would convey to Mr. Kingrey until such time as they could settle their trouble, then Mr. Kingrey would give it back to her." Bill LaGue testified: "Mr. Kingrey told me he did not want to see Wilson get the land back from Bernice and thought they were going to have it fixed so he could not until their trouble was settled. This was after they were divorced. He said she was to get it back after the settlement and they were not going to charge Bernice for staying there; that she had worked hard and filled the deep freeze." Mrs. Aaron Johnson corroborated the testimony of the above witnesses for appellee.

Mr. Kingrey testified: "Q. As I understand you don't contend that you paid her anything for this deed. A. No, I never paid her anything." From appellants' abstract: "When she told me she was going to give me the land I told Mr. Briner to enter $1,000 in it. She said I could have the property for what I had done for her. I kept her in my house for four months." Kingrey denied ever having made the statements which appellee's witnesses testified that he made. There was other evidence on the part of appellants tending to contradict that offered by appellee.

As indicated, we think that when all the evidence is considered and measured by the clear and convincing rule, it was sufficient to support the findings and decree of the trial court. We said in the *Walker* case above that: "When the grantee's oral promise to hold for the grantor is fraudulently made, or when such a promise is given by a grantee who stands in a confidential relation to the grantor, equity will impose a constructive trust upon the grantee's refusal to perform his prom-

ise. *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; *Rest., Restitution,* § 182; *Rest., Trusts,* § 44." A constructive trust may be shown by parol testimony. See *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437 and *Harbour* v. *Harbour,* 207 Ark. 551, 181 S. W. 2d 805.

3.

On appellants' third point it appears that appellants,—proceeding under § 28-358 Ark. Stats. 1947, —submitted certain questions to appellee to be answered under oath. Question 28 was: "Didn't you execute a deed to Homer and Wilma Kingrey on December 13, 1955, conveying certain land to them because they had taken care of you and your children after your husband left you and your children for another woman?" The question was answered "No." None of these questions answered by appellee was verified. On this point appellants say: "Appellants submitted a request for admissions on appellee, which admissions were answered within the time designated but not under oath. In failing to answer such request under oath they would also be answered in the affirmative as a matter of law. Ark. Stats. 1947 § 28-358." The trial court, however, allowed appellee to verify her answers to the questions at the beginning of the trial and we think properly so. In so doing the court was clearly acting within its discretion. It is of strong significance that the above statute provides that the court may on motion or notice shorten or extend the time for answering. Obviously, the purpose and intent of the above section was to expedite the trial of litigation on its merits.

4 and 5.

Appellants' fourth point, questioning the action of the court in refusing them a continuance, is wholly without merit. Upon examination of the record we find no error in this regard.

We also find untenable appellants' fifth contention, that he was not permitted on cross-examination of appellee to inquire of her whether she and her ex-hus-

band were living in adultery. Appellants frankly admit that the trial court "is properly allowed wide discretion in permitting or denying such cross-examination." While we think that such cross-examination would have been proper as bearing upon her credibility, we hold, however, that had she admitted adultery, still on the basis of the testimony of the many other witnesses above, we would on trial *de novo* here affirm the case.

For yet another reason there was no error, for appellants did not offer to show what appellee's answer would have been had she been allowed to answer. See *St. Louis Southwestern Railway Co.* v. *Myzell,* 87 Ark. 123, 112 S. W. 203 and *Boland* v. *Stanley,* 88 Ark. 562, 115 Ark. 163.

Affirmed.

GRISSOM *v.* BUNCH.

5-1148 301 S. W. 2d 462

Opinion delivered April 15, 1957.

[Rehearing denied May 20, 1957]

C. M. Buck and *Claude F. Cooper,* for appellant.

Frank C. Douglas and *Oscar Fendler,* for appellee.

Ed. F. McFaddin, Associate Justice. Appellee, Mrs. Mattie Moody Bunch, brought this suit seeking to be declared the sole owner of certain lands in Mississippi County. She claimed that her mother, Mrs. Florence Moody Crawford, held the title as a constructive trustee for Mattie Moody Bunch. The defendants—appellants here—were the beneficiaries under the will of Mrs. Florence Moody Crawford. From a decree, declaring and enforcing the trust as prayed by the plaintiff, there is this appeal.

Matt Moody, father of Mattie Moody Bunch, died in 1906, the owner of an undivided one-third interest in the entire NW¼ of Section 1. He was survived by his wife, Florence. His child, Mattie (the appellee), was born a few months after his death. Mrs. Florence Moody married another man named Moody and had children by him. Later, when her second husband died, she married Mr. Crawford, and as Florence Moody Crawford made her will in February, 1952. She died on May 1, 1954, devising the lands here involved to certain grandchildren, who were the defendants below and are the appellants here.

The aforesaid Matt Moody owned an undivided one-third interest in the entire NW¼ of Section 1. Mattie Moody Bunch[1] was born in 1907 and was the sole heir of Matt Moody. The owners of the other two-thirds interest in the NW¼ of Section 1 (they being relatives of Mattie Moody Bunch) brought suit for partition in 1915; and the North third of the NW¼ of Section 1 was set apart to Mattie Moody Bunch as her property. This was approximately 53-1/3 acres. She was then about eight years of age and continued to live on her land with her mother and stepfather. They failed to pay the taxes and assessments, and were about to lose the land, when in 1925 they persuaded Mattie Moody Bunch to execute a mortgage to the Oklahoma Farm Mortgage Association to obtain money with which to pay the past due taxes and assessments. This mortgage was dated May 18, 1925, and Mattie Moody Bunch was then 18 years of age.

On June 17, 1925 Mattie Moody Bunch executed the first deed here involved, purporting to convey to her mother, the East half of the 53-1/3 acres owned by Mattie Moody Bunch. This deed will be discussed in Topic II, *infra*. On May 20, 1937, Mattie Moody Bunch executed to her mother a second deed, which purported to be a quitclaim deed to the entire North third of the NW ¼ of Section 1, and this deed will also be discussed in Topic II, *infra*. Mrs. Florence Moody Crawford continued to live on the land until her death on May 1, 1954. Shortly thereafter, Mattie Moody Bunch filed this suit against the persons to whom Mrs. Florence Moody Crawford had devised the lands.

I. *Appellee's Theory For Recovery.* Appellee claimed below and insists here that, even though she executed the two deeds to her mother, nevertheless the mother, Mrs. Florence Moody Crawford, became a constructive trustee for the benefit of the appellee, and that the court of equity should enforce the trust in this case just as was done in such cases as *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; *Ladd* v. *Bones,* 213

[1] She was born Mattie Moody. She first married Mr. Reece, and later married Mr. Bunch; but for definite identification we will at all times refer to her as "Mattie Moody Bunch".

Ark. 1030, 214 S. W. 2d 353; and *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840. Appellants claim that this case does not come within the holding of the foregoing cases but comes within the holdings in such cases as *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910; *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848; and *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822.

The clearest statement of the rule contended for by the appellee is stated in the case of *Bragg* v. *Hartney,* 92 Ark. 55, 121 S. W. 1059, and is there quoted from Pomeroy on "Equity Jurisprudence":[2]

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrong-doer."

The foregoing rule is the basis of constructive trusts; and, with the rule thus recognized, we proceed to consider the evidence.

[2] The opinion cites Vol. 3, page 2033 of Pomeroy. That was the then current edition in 1909. The present edition of Pomeroy is the Fifth Edition by Symons; and this quotation is found therein in § 1053.

II. *The Two Instruments Appellee Executed.* Appellee admits executing the deed in 1925 and also the deed in 1937. As regards the 1925 deed, she points out that in that year she was only eighteen years of age and living with her mother and stepfather and was about to marry; that her mother (Mrs. Florence Moody Crawford) insisted that the mother's dower had never been settled; that the mother claimed that she was entitled to one-half of the land for life as dower; and that the 1925 deed was represented to the appellee as conveying to the mother one-half of the land *for life* as dower. When we consider the age of Mattie Moody Bunch in 1925 and the influence of her mother and stepfather over her, the case at bar is strikingly similar in facts to that of *Gillespie* v. *Holland,* 40 Ark. 28.

As regards the 1937 deed, Mattie Moody Bunch testified that her mother and stepfather had failed to pay the taxes and assessments and were again about to lose the land just as had been the situation prior to 1925; and that the mother and stepfather told her that if she would sign the 1937 deed, Florence Moody Crawford would redeem the land and pay up all back taxes for the benefit of Mattie Moody Bunch, who would receive rents from time to time and would have the full title after the death of Florence Moody Crawford. The foregoing testimony bears a striking similarity to that contained in the cases of *Armstrong* v. *Armstrong, supra; Ladd* v. *Bones, supra;* and *Walker* v. *Biddle, supra.* So Mattie Moody Bunch's testimony makes a case for the application of the doctrine of constructive trusts, if her testimony is supported by the quantum of evidence required in such cases.

III. *The Quantum Of Evidence.* Our cases hold that the evidence to establish a constructive trust must be clear, cogent, and convincing. See *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338; and *Ladd* v. *Bones,* 213 Ark. 1030, 214 S. W. 2d 353. Appellants most seriously insist that appellee failed to offer such quantum of evidence; but a careful review of the record convinces us that the appellants are in error.

Mr. Crawford, husband of Mrs. Florence Moody Crawford and stepfather of Mattie Moody Bunch, testified that Mrs. Crawford always said that the land belonged to Mattie Moody Bunch and would go to her absolutely on the death of Mrs. Florence Moody Crawford. Mrs. Janie Moody, sister of Mrs. Florence Moody Crawford, testified that Mrs. Crawford repeatedly told her that the property belonged to Mattie Moody Bunch and would so revert on the death of Florence Moody Crawford. One disinterested witness was Mr. Sacrider. He said that Mrs. Florence Moody Crawford always referred to the land as being "Mattie's place", and that shortly before 1954 such statements were reiterated by Mrs. Florence Moody Crawford.

A number of other witnesses testified as to similar and stronger statements made all along by Mrs. Florence Moody Crawford. It was shown that in 1938 and in other years up to 1945 Mrs. Florence Moody Crawford paid Mattie Moody Bunch rent money from the place; and that after 1945 Mattie Moody Bunch was in sufficient financial condition where she let her mother keep the rent money. Furthermore, it was shown that when people would go to Mrs. Florence Moody Crawford to try to buy a building site on the land, she would tell them that she could not sell them anything more than a life interest because the land belonged to Mattie Moody Bunch. At one time Mrs. Crawford wanted to sell a man a 5-acre tract and Mattie Moody Bunch told her that she couldn't do it, so the sale was never made. It was only in two instances—both agreed to by Mattie Moody Bunch—that Mrs. Crawford actually sold one-acre parcels of the land.[3] All of this evidence is overwhelming to the effect that Florence Moody Crawford always recognized that she was holding the title to this property only for her lifetime and that on her death it would go back to Mattie Moody Bunch.

The appellants' witnesses attempted to contradict the appellee's testimony as to facts surrounding the execution of the 1925 deed and the 1937 deed; but the tes-

[3] The titles of these persons are not questioned in this case.

timony of appellants' witnesses was largely contradicted and overcome by the testimony of other witnesses and by certain physical facts.

IV. *Other Points Urged By Appellants.* Appellants make three other contentions, all of which we find to be without merit.

In the first place, appellants insist that the various witnesses should not have been allowed to testify as to the statements made to them by Mrs. Florence Moody Crawford concerning the land and title. Appellants say that such statements were inadmissible under the case of *Waldroop* v. *Ruddell,* 96 Ark. 171, 131 S. W. 670. The holding in that case was that declarations of a decedent —to the effect that she owned the land—were not admissible because they were *self serving.* But, in the case at bar, the statements made by Mrs. Florence Moody Crawford and admitted in evidence were to the effect that she was *not* the fee simple owner. Therefore, the declarations were *against interest* and were admissible under our holdings in *Smith* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776; *Sanders* v. *Baker,* 217 Ark. 521, 231 S. W. 2d 106; and *Norden* v. *Martin,* 202 Ark. 180, 149 S. W. 2d 550. In the last cited case we quoted from *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456:

"It is well settled that declarations and admissions of one in possession of land, relating to the title thereof and adverse to his interest, are admissible against him; and declarations and admissions of a person made while in possession, adverse to his title are admissible against his successors in interest and all who claim under him."

Secondly, appellants insist that the Statute of Frauds prevents the maintaining of this action and prevents the admission of any oral testimony as to the trust. Appellants claim that § 38-106 Ark. Stats. is applicable. We find appellants' contention in this regard to be without merit. We have repeatedly held that the statute does not apply to a constructive trust. See *Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88; and *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840.

Finally, appellants plead the five-year Statute of Limitations (§ 37-213 Ark. Stats.) and say that the deeds were executed by Mattie Moody Bunch in 1925 and 1937 respectively, and this suit was not filed until 1954. This contention is without merit. The trust was not repudiated by Mrs. Florence Moody Crawford until her will was probated after her death in 1954; and limitations commenced at that time. See *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840.

We conclude that the trust was proved by the *quantum* of evidence required and, accordingly, the decree is in all things affirmed.

HOLLIFIELD *v.* BIRD & SON, INC.

5-1239 301 S. W. 2d 27

Opinion delivered April 15, 1957.

[Rehearing denied May 13, 1957]

J. Fred Jones, for appellant.

Riddick Riffel, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee, Bird & Son, Inc., operates a slate crushing mill and

roofing granules processing plant near Glenwood, Arkansas. Appellant, Luther Hollifield, was 40 years old and a strong, vigorous and apparently healthy individual when he started working for appellee. He worked at the plant at four different periods: February 1, 1944, to September 25, 1944; January 22, 1948 to December 21, 1948; May 27, 1949 to September 1, 1949; and February 14, 1951 to May 4, 1952.

During his entire employment at appellee's plant the appellant was exposed to varying amounts of slate dust in the air containing from 24.10% to 44.27% free silica according to one analysis and from 32.35% to 41.27% according to another analysis. During most of the employment appellant worked either as a millright or a carpenter. On or about January 1, 1952, it became a part of appellant's duties as an "extra man" to spend about two hours each day in an unventilated steel tank where very fine slate dust poured from a conveyor through a hole in the top of the tank. He was required to shovel and distribute the dust to the four corners of the tank until it was filled. The air would become so hot and heavy with the fine dust that he could not endure the conditions more than three to five minutes at a time and would have to leave the tank to gather his breath. It was also a part of appellant's duties to sweep out boxcars containing various grain and chemical dusts. Appellant continued to do this type work during the last four months of his employment when he developed a severe cough, was unable to breathe without sitting up at night, and became exhausted on slight exertion. He was forced to quit work on May 4, 1952, and, so far as the record discloses, has been unable to do any kind of work requiring strenuous physical activity since that date.

Appellant filed a claim with the Arkansas Workmen's Compensation Commission contending he was totally disabled because of pulmonary emphysema which was either caused or aggravated to its disabling status by inhalation of the dust to which he was exposed in his employment by appellee, Bird & Son, Inc. After numer-

ous tests and examinations by various doctors and three extensive hearings before three single commissioners an order and opinion were entered on March 3, 1955 by Commission Chairman Bayard Taylor, who conducted the last hearing, in which it was found: "That the concentrations of dust in which claimant was required to work constituted an unusual working condition and one of a hazardous nature from which claimant sustained an accidental injury resulting in disability." Appellee and its insurance carrier were directed to pay reasonable medical expenses incurred by appellant and compensation at the rate of $25.00 per week beginning May 5, 1952, and continuing under the terms and provisions of the Arkansas Workmen's Compensation Law.

Appellee requested and was granted a review of Commissioner Taylor's order by the full Commission. In the meantime the appellant was hospitalized and a new series of medical examinations was begun and conducted by six specialists, three being selected by each party. Examinations or reports were made by these and other doctors in and out of Arkansas. After two hearings before the full Commission on September 6, 1955, and September 22, 1955, an opinion was entered on February 24, 1956, finding: "That between January 1952 and April 1952, claimant sustained an accidental injury that arose out of and during the course of his employment with Bird & Son, Inc., said accident being an over-exposure to heavy concentrations of dust that resulted in a temporary aggravation of claimant's pulmonary symptoms.

"That as a result of claimant's accidental injury he was temporarily totally disabled from May 5, 1952 to September 25, 1952, inclusive, and on the latter date claimant's disabilities resulting from said exposure to dust terminated without residual disability." The Commission found there was no serious conflict in the medical evidence to the effect that the heavy concentrations of dust to which appellant was exposed constituted an accidental injury that arose out of and in the course of his employment and "aggravated his pulmonary symptoms" to the point of disability. However, it concluded

that the additional evidence required it to modify and amend the opinion by Commissioner Taylor rendered March 3, 1955, to the extent that September 25, 1952, represented the termination period of such temporary total disability.

While the numerous doctors variously described the condition suffered by appellant, the medical evidence is overwhelming to the effect that he had pulmonary emphysema, the symptoms of which became apparent during the last four months of his employment. There is no appeal from the Commission's finding that appellant suffered a compensable accidental injury by reason of employment conditions which aggravated the emphysema, or its symptoms, to the point of disability. However the appellant prosecuted an appeal to the Montgomery Circuit Court from that part of the order which found that his disability resulting from the exposure to dust terminated without residual disability on September 25, 1952. The circuit court affirmed the order of the Commission.

The sole issue is the sufficiency of the evidence to support the Commission's finding that appellant's work connected disabilities terminated on September 25, 1952, without residual disability. This question must be determined under the established rule that the findings of fact made by the Commission are entitled to the same force and effect as a jury verdict and will not be disturbed on appeal if supported by substantial evidence. *J. L. Williams & Son* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82. But the sufficiency of the testimony to support the Commission's finding is a question of law which this court will review on appeal. *Bales, Administratrix* v. *Service Club No. 1, Camp Chaffee,* 208 Ark. 692, 187 S. W. 2d 321.

The "additional evidence" upon which the Commission based its finding that appellant's disabilities from dust exposure terminated on September 25, 1952, consisted of the reports or testimony of the several doctors selected by the parties. This testimony followed much the same pattern as that adduced in the recent case of

Boyd Excelsior Fuel Co. v. *McKown,* 226 Ark. 174, 288 S. W. 2d 614. In addition to the reports and testimony of the Arkansas doctors certain portions of the hearing transcripts together with X-ray films and other exhibits were sent by the insurance carrier to Dr. O. A. Sander at Milwaukee, Wisconsin. In his letter report to the carrier in reply, Dr. Sander, as in the *McKown* case, *supra,* found there was little, if anything, wrong with the claimant and based his definite opinion to that effect upon his examination of reports and transcripts of evidence which reflected facts directly to the contrary. However he did suggest that any bronchial irritation suffered by appellant might very well be attributed to his smoking habits. His further recommendation that such habits be considered was purportedly based on "the transcripts" which clearly revealed that appellant had never used tobacco in any form. As we pointed out in the *McKown* case, such reports hardly amount to substantial evidence.

Appellee candidly concedes that no witness testified that appellant's disability caused by the dust aggravation terminated on September 25, 1952; and that the record reveals no circumstances, such as a return to gainful employment, which would indicate this date as being the date of termination of his disability. But appellee points to the testimony of Dr. Fred Gray to the effect that appellant did not have any signs of bronchial irritation when he examined him on February 24, 1954, and that a dust irritation should clear up in a matter of days or weeks. Aside from the fact that appellant's condition on February 24, 1954, would scarcely prove a termination of his disability on September 25, 1952, it is difficult to reconcile the doctor's opinion with his further testimony that appellant was quite obviously short of breath and fell far below normal in his ability to expire air at the time of the examination. It was upon the basis of these and other symptoms that Dr. Gray at that time made a diagnosis of "pulmonary emphysema, far advanced".

In order to sustain the finding of the commission, reference is also made to a letter from Dr. Harvey Shipp

to Dr. W. J. Jones dated November 11, 1952, regarding an examination of appellant by Dr. Shipp on September 24, 1952, in which he found "no obstructive lesion in any of the bronchial orifices", and that, "the mucosa itself was relatively normal in appearance and shows complete recovery from inhalation of dust." This letter was introduced at the hearing before Commissioner Taylor and was not a part of the "additional evidence" upon which the full Commission based its determination that appellant's disability terminated in September, 1952. It should also be noted that in the same letter Dr. Shipp stated he was unable to explain appellant's "dyspnea on exertion" and recommended that "he continue on an expectorant cough syrup".

Under the undisputed medical testimony the appellant developed well known and definite symptoms of pulmonary emphysema such as irritation of the bronchial tubes, a severe cough, shortness of breath and easy fatigue on slight exertion as a result of his exposure to the silica dust in the course of his employment. Even if it could be said there was substantial evidence to support a finding that the bronchial irritation had cleared up on September 25, 1952, there is no evidence that appellant's shortness of breath or easy fatigue on the slightest exertion has improved since his removal from the dust. Dr. John E. Greutter, one of the doctors selected by appellee, testified before the full Commission that appellant was still disabled from performing any work demanding exertion or strenuous activity and there was no substantial evidence to the contrary.

We conclude that the Commission's finding that appellant's temporary total disability terminated on September 25, 1952, is without substantial evidence to support it. The judgment of the circuit court is accordingly reversed and the cause remanded with directions to remand the case to the Commission with directions that appellee and its insurance carrier pay appellant compensation from May 4, 1952, to February 24, 1956, and continue such payments thereafter within the limits of

the compensation act as long as appellant is disabled together with reasonable medical treatment for appellant within said limits.

Justice GEORGE ROSE SMITH dissents.

HOUSTON *v.* GRIFFIN.

5-1241 300 S. W. 2d 931

Opinion delivered April 15, 1957.

Spitzberg, Bonner, Mitchell and *Hays* and *Kaneaster Hodges,* for appellant.

Neill Reed, for appellee.

GEORGE ROSE SMITH, J. Dr. Troy Raney and his wife formerly owned eighty acres of land as tenants by the entirety. The appellant, G. P. Houston, claiming title under separate deeds from Dr. and Mrs. Raney, brought this suit to enjoin the sheriff from selling the land under a writ of execution issued upon a judgment which

the appellee W. R. Griffin had obtained against the Raneys. The sale was held, however, and Griffin was the purchaser. Houston then amended his complaint to ask that the execution proceedings be canceled as a cloud upon his title. Griffin countered with a request that the deeds from the Raneys to Houston be set aside as fraudulent conveyances.

Upon trial of the case the chancellor sustained the deed from Mrs. Raney to Houston, but the court held that Houston's claim of title under two deeds from Dr. Raney was subordinate to the lien of Griffin's judgment. The court concluded that Houston owns an undivided half interest in the land under his deed from Mrs. Raney and that Griffin owns the other undivided half interest by reason of his purchase at the sheriff's sale. (This holding evidently means that Houston and Griffin became tenants in common. Since neither party contends that they should instead be treated as what might be called tenants by the entirety *pur autres vies,* we do not examine that issue.) In addition, the court granted to Houston a right of contribution with respect to a mortgage debt and certain taxes that he had paid. Both parties have appealed.

Most of the issues hinge on the basic question of whether the Raneys' deeds to Houston were fraudulent. Griffin obtained his judgment against the Raneys on August 17, 1954; so his asserted lien against the land became effective on that date. Houston relies upon a quitclaim deed from Mrs. Raney, dated June 7, 1954, and upon two quitclaim deeds from Dr. Raney, the first dated July 15, 1954, and the second dated September 15, 1954. All three deeds to Houston were filed for record more than a year after the entry of Griffin's judgment.

The evidence supports the chancellor's finding that Mrs. Raney's deed was not a fraudulent conveyance. Houston had acted as one of Mrs. Raney's attorneys in a divorce suit against Dr. Raney and had obtained a divorce decree for her on April 20, 1954. Both Houston and Mrs. Raney testified that during the pendency of the divorce proceedings Houston lent some $380 or more to Mrs.

Raney, to pay living expenses for herself and her children. Mrs. Raney's conveyance of her interest in the land was given to satisfy this debt. It is not shown whether the value of Mrs. Raney's interest in the land was greater or less than the amount of her obligation to Houston. The deed is dated June 7, 1954, which was before the entry of Griffin's judgment against the Raneys. Except for the delay in the recording of the instrument there is nothing to indicate that the deed was executed after the date on which it was ostensibly signed and acknowledged. We conclude that Griffin failed to meet the burden of proving Mrs. Raney's deed to be fraudulent.

Houston contends that the chancellor should also have upheld his claim to Dr. Raney's former interest in the land. The divorce decree in favor of Mrs. Raney, entered in April of 1954, had directed that Dr. Raney pay a fee of $400 to Mrs. Raney's attorneys. Houston attempted to collect this fee in June by writing to Dr. Raney, who had moved to Nevada. In reply Dr. Raney expressed his willingness to pay the fee as soon as he could. Houston then prepared a quitclaim deed for Dr. Raney's signature and mailed it on July 5. According to Houston's recollection, he received the executed deed about August 1. He says that later on Raney's father-in-law insisted that the deed expressly recite that it was in satisfaction of the $400 attorney's fee. A second deed was therefore prepared and sent to Dr. Raney, who executed and acknowledged it on September 15, which was after the effective date of Griffin's lien against the land. It is contended that the second deed was merely a correction or amplification of the first, although it does not so recite. The chancellor held that the title was still in Dr. Raney when Griffin obtained his judgment.

Neither Dr. Raney nor the notary who purportedly took the acknowledgment on both deeds was called as a witness. The deed of September 15 is admittedly genuine, but the testimony about the authenticity of the July 15 conveyance is in conflict. A comparison of the original instruments indicates rather clearly that the handwriting on the July deed was copied from that on the

genuine deed of September 15. It follows that the questioned instrument could not have been executed prior to Griffin's judgment of August 17. The following matters are readily apparent from a comparison of the genuine deed and the one subject to question:

(a) The signatures of Dr. Raney and of the notary on the September deed are written smoothly with even strokes of the pen. Those on the July deed are jerky and, as Griffin testified, have the appearance of having been traced.

(b) On the genuine deed the notary made in the lower lefthand corner an unusual notation, which reads: "State of Nevada, County of Washoe. Leona A. Mosbaugh notary. My Commission Expires June 15, 1958." The notary also completed the printed acknowledgment on the back of the deed, but there the heading refers to Churchill county instead of Washoe county. The July deed contains the same meaningless notation on its face and the same reference to a different county in the acknowledgment.

(c) The notary's pointless notations on the two deeds are remarkably similar with respect to the position of the written lines, the spacing of the words, and certain characteristics by which the notary's signature on the face of each deed differs from her signature on the back of each deed.

(d) On each deed a rubber stamp was used to show the expiration date of the notary's commission. The stamped lines are of different length and could not have been made with the same rubber stamp.

(e) The embossed impressions left by the notary's seal on the two deeds, although identical in wording, are dissimilar in numerous details and could not have been made with the same seal.

Upon these facts it is evident that the chancellor was warranted in sustaining the priority of Griffin's claim to the half interest formerly owned by Dr. Raney.

Houston contends that even if his assertion of title to Dr. Raney's interest is rejected his judgment lien for an attorney's fee is nevertheless valid as against the title subsequently acquired by Griffin at the sheriff's sale. Houston testified, however, that he had satisfied the record of the judgment, and this had the effect of releasing the lien upon the land. *Fields* v. *Jarnagin,* 210 Ark. 1054, 199 S. W. 2d 961. It is also argued that the chancellor should not have taxed the costs against Houston. This matter rested in the chancellor's discretion, and we cannot say that Houston's equitable position is so markedly superior to Griffin's that an abuse of discretion occurred. *Fry* v. *White,* 132 Ark. 606, 201 S. W. 1105.

Griffin in turn insists that the trial court erred in upholding Houston's claim for contribution with respect to a purchase money mortgage (incurred by the Raneys) which Houston discharged and with respect to taxes which Houston paid. These obligations were encumbrances upon the land held by the parties as tenants in common; the chancellor was right in requiring Griffin to bear his fair share of the burden. *Cocks* v. *Simmons,* 55 Ark. 104, 17 S. W. 594, 29 A. S. R. 28.

Affirmed on direct and cross appeal, the parties to bear their own costs of appeal.

HICKINBOTHAM *v.* CORDER.

5-1253 301 S. W. 2d 30

Opinion delivered April 15, 1957.

[Rehearing denied May 13, 1957]

Kenneth Coffelt, for appellant.

Bailey, Warren & Bullion, for appellee.

PAUL WARD, Associate Justice. Involved is this question: Under what circumstances will a chancery court enjoin the violation of the penal provision of a city ordinance?

On July 9, 1956 the City of Little Rock enacted Ordinance No. 10206 which contains, among other provisions, the following which are pertinent to this case: Section 1 says it shall be unlawful for any person within the corporate limits of the city, on the first day of the week, commonly called Sunday, to open to the public any grocery store. Section 2 provides that any person violating the above provision shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than $25 nor more than $100 for each separate offense. It is not denied that appellant, H. V. Hickinbotham, has repeatedly violated the above ordinance, or that he threatens to do so in the future.

On August 17, 1956 appellees, A. B. Corder and some 20 other residents of Little Rock filed a complaint against appellant, H. V. Hickinbotham, making the City of Little Rock a party defendant also.

The essential allegations in said complaint are the following: The plaintiffs are engaged separately and individually in the retail grocery business in the City of Little Rock, being duly licensed, and they bring this action in their own behalf and on behalf of other citizens and residents of said City who are similarly situated or who desire to join therein; The defendant (Hickinbotham) is a resident of said City and is engaged in operating a retail grocery store; The plaintiffs have built up

substantial property rights in their respective businesses; The City of Little Rock has passed the ordinance above mentioned; The plaintiffs, who are included in the terms of said ordinance, having no way to ascertain its constitutionality except to violate its provisions; Plaintiffs believe said ordinance is constitutional, but ask the court to enter a declaratory judgment construing its validity and constitutionality. The complaint further states: The defendant, Hickinbotham, has kept his place open on Sundays in plain and open defiance of the law, having done so over a period of years; Said defendant has indicated that he intends to continue to operate his grocery store on Sunday in the future; Said defendant is a competitor of the plaintiffs and other persons operating grocery stores within the City; That by his said conduct said defendant is causing the plaintiffs injury and damage and is unfairly competing with them in the conduct of their businesses, for which they have no adequate remedy at law. The complaint also states: That the penalty provided for the violation of said ordinance, which is limited by Ark. Stats. § 41-3802, is so small and inadequate as to render said statute ineffectual to protect the rights of the public, and to deter the defendant from openly and defiantly violating the aforementioned ordinance and statute. The prayer was for a declaratory judgment construing the validity and constitutionality of said Ordinance No. 10206, and for an order restraining and enjoining the defendant, Hickinbotham, from further conducting a grocery store within the City of Little Rock on Sunday.

To the above complaint appellant, Hickinbotham, entered a special demurrer on the grounds that the court was without jurisdiction over the subject matter and the parties either to issue a declaratory judgment as prayed for or to enjoin appellant from operating a grocery store on Sunday. After the court had overruled his demurrers appellant, Hickinbotham, answered with a general denial, and also stated that the court was without jurisdiction over the subject matter or the parties.

After hearing the testimony of witnesses on both sides the chancellor, on October 8, 1956, entered a de-

cree in favor of appellees, finding that the court has jurisdiction, and that said Ordinance 10206 is constitutional, and ordering Hickinbotham permanently enjoined from violating the provision of the said ordinance.

Appellant urges a reversal of the chancellor's decree on the grounds that (a) "The trial court was without jurisdiction over the parties or the subject matter", and (b) "The evidence is not sufficient to justify the finding, and judgment of the trial court."

(a) We have reviewed the authorities dealing with questions similar to the one here presented, and have come to the conclusion that the trial court had jurisdiction over both the parties and the subject matter. It is a general rule that chancery courts will not enjoin the commission of a criminal offense when such commission is the only thing involved. It is equally well settled that chancery courts have jurisdiction, in many instances, to enjoin the commission of a nuisance. This court on two different occasions, in *State* v. *Vaughan,* 81 Ark. 117, 98 S. W. 685, and *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4, has said: "The criminality of the act will neither give nor oust jurisdiction in chancery."

From our analyses of the several decisions of this court it appears that when two elements are present or two conditions exist chancery court will assume jurisdiction to enjoin the commission of a criminal offense. One, when the enforcement of the criminal law will not deter violation. Two, the complaining party or parties must show an injury.

One. Inadequacy of the enforcement of criminal laws takes many forms and may be expressed in several different ways. In the *Vaughan* case, *supra,* it was noted that the criminal processes are inadequate to afford relief "from connivance of the officers or other persons." Equity jurisdiction was justified in *State Ex Rel. Attorney General* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327, this way: "We sum up: by the weight of authority, equity may act to suppress a public nuisance, even though the maintenance of the nuisance is a crime, where there

is alleged in addition to the public nuisance, some facts which show the remedy at law, by prosecution of the criminal, *is inadequate and incomplete to effect relief.* (emphasis supplied)". The same idea was expressed in different words in the *Seifert* case, *supra,* where 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* (emphasis supplied)". 52 L. R. A. 79 contains annotations from numerous decisions of other jurisdictions which hold, in varying language, that equity jurisdiction may be invoked where the enforcement of criminal statutes does not afford adequate protection against injury to property rights. Typical of these holdings is the one set forth in *United Traction Co.* v. *Smith,* 187 N. Y. Supp. 377, where we find this language: " 'While the regular remedy for the prosecution of those who violate the penal laws of the state lies in arrest and punishment, the court will not compel parties whose rights are clear to rely on peace officers to protect them in their enjoyment of those rights. 'There is a preventive as well as a remedial justice'."

Two. In order to invoke injunctive relief in chancery court it is not enough, of course, to show merely that the criminal laws are not being properly enforced, for whatever reason, but it is also necessary to show that the complaining party has been injured in some way, either involving property rights or civil rights. In many cases of this nature coming before this court the complaining party was the State. In such instances it is held that there must be shown an injury of a public nature, such as a public health or public welfare. Such instances are the *Vaughan* case, *supra,* and the *Lyric Theater* v. *State,* 98 Ark. 437, 136 S. W. 174. In the former case the court said: ". . . 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." In the *Lyric Theater* case, *supra,* it stated that "before an injunction could issue restraining acts constituting a public nuisance, it was necessary that the public nuisance should affect the civil or property rights or privileges of the public, or the public health; . . ." It is of course easy to understand why the injury must be of a public nature where the State itself is seeking the injunction.

If however, as in the case under consideration, certain individuals are seeking injunctive relief it is necessary only that the injury be to their personal property rights. In the *Vaughan* case, *supra,* this court recognized the jurisdiction of chancery court to enjoin the violation of a criminal offense where an injury was threatened to the property rights of individuals. There the court quoted with approval: "The difference between a public nuisance and a private nuisance is that one affects the public at large and the other only the individual. The quality of the wrong is the same and the jurisdiction of the courts over them rests upon the same principle and to the same extent." In the *Seifert* case, *supra,* Myer, on behalf of himself and other property owners, sought to enjoin Seifert from violating City Ordinances No. 277 and 386 of the City of Stuttgart which prohibited the erection of a frame building in a restricted district. The court upheld appellant's right to injunctive relief on the ground that the plaintiff "made a substantial showing of probable damages to his own and other adjoining properties . . ." even though it was urged ". . . that the ordinance prescribes criminal punishment, making violation a misdemeanor punishable by fine . . ."

In the *Karston* case, *supra,* where injunctive relief was upheld to prevent the commission of a crime, there was present the element of lack of adequate law enforcement but not the element of injury to property. Thus, on first impression, that case might appear to contradict the "two elements" rule we have just announced above, but a closer study shows such is not the case. There the court recognized the general rule as we have stated it, and then said: "The question then, is, does

the complaint here allege 'some other ground of equity jurisdiction, calling for injunction'." The court then found the "other ground" to be that, at common law, the maintenance of an open gambling house in violation of law was a public nuisance, and, as such, could be enjoined.

(b) We do not agree with appellant that the evidence is insufficient to support the findings and judgment of the trial court. Several witnesses stated that their businesses, as grocerymen, were adversely affected by reason of the fact that grocery stores were kept open on Sundays. One witness said his business was thus affected to the extent of $1,000. All of appellees had made large investments in the grocery business, varying from $20,000 to $150,000. There was introduced no evidence to the contrary.

During the trial appellant objected to the court's rulings on several matters regarding the introduction and exclusion of testimony, but these matters are not listed in his "Points" nor are they discussed in his brief.

Affirmed.

Chief Justice HARRIS and Justice MILLWEE concur.

BLAND *v.* WINDSOR AUDIT COMPANY.

5-1238 301 S. W. 2d 34

Opinion delivered April 15, 1957.

[Rehearing denied May 13, 1957]

[redacted]

Luke Arnett, for appellant.

Bailey, Warren & Bullion, for appellee.

SAM ROBINSON, Associate Justice. This case concerns a rule adopted by the Administrator of the Arkansas Employment Security Act. Appellees filed this suit to enjoin the enforcement of the rule. The Chancellor granted the injunction, and the Administrator has appealed. Appellee, Windsor Audit Company, represents about one hundred thirteen employers subject to the Arkansas Employment Security Act. Act 391 of 1941 provides:

"It shall be the duty of the Commissioner to administer this Act; and he shall have power and authority to adopt, amend or rescind such rules and regulations, . . . as he deems necessary or suitable to that end. Such rules and regulations shall be effective upon publication in a manner not inconsistent with the provisions of this Act, which the Commissioner shall prescribe."

For a period of about seventeen years prior to November 1, 1955, the Administrator had furnished to Windsor daily a list of all claims filed against the account of the employers represented by Windsor. On that date, the Administrator adopted a rule which is the subject of this litigation. The rule provides:

"Any claimant shall be supplied with information from the records of the Division to the extent necessary for the proper presentation of his claim in any proceeding under the Act. Any employer (or his authorized legal representative) shall have made available to him for examination affecting the account of said employer all information in the manner hereinafter provided, except forms, notices and records theretofore furnished said employer.

"Said claimant or employer (or his legal authorized representative) shall notify the Agency twenty-four

(24) hours in advance that he will appear in the office of the Employment Security Division at a given hour and date to obtain the information; said notice shall show (1) the name of the employer or employing unit requesting said information; (2) employer's account number; and (3) claimant's name and social security number, that he desires information with respect thereto. Notice to be in writing and received by the Agency twenty-four (24) hours in advance of the request for delivery."

Appellees contend that the rule is unreasonable in requiring twenty-four hours notice to obtain the desired information; the principal complaint is that the employer has only seven days after a claim is filed in which to protest the allowance thereof, and it is claimed that, in many instances, it would be rather difficult, if not impossible, for the employer to file a protest in the required time if there must be a twenty-four hour notice in order to obtain desired information about the account. The employers further contend that their problem of keeping up with the claims that may be allowed against their respective accounts, and other information pertaining to the status of their account, is greatly facilitated by the method used in the past by their representative, Windsor, in keeping a daily record of claims that have been allowed.

The question is whether the rule requiring twenty-four hours notice is reasonable. The Chancellor held that it is unreasonable. Ark. Stats. § 81-1114 provides that the information must be made available at all times. Undoubtedly, the statute should be construed to mean "at all reasonable times." No one would contend that the information should be available every minute of the twenty-four hour day. The Administrator does not have to take advantage of the full twenty-four hour period. He may, and in many instances, no doubt he will furnish the desired information immediately upon the request being made, but the rule merely allows the Administrator twenty-four hours in which to furnish the requested information. It appears that it is not so much the contention of appellee that the twenty-four hour period is unreasonable as it is that a rule allowing the Administra-

tor any time would be unreasonable. But, there are 28,-500 employers and 245,000 employees in the State subject to the act; certainly, the Administrator should be allowed some reasonable time in which to furnish the required information. If twenty-four hours is unreasonable, what would be reasonable? Just where is the dividing line? We could safely say that requiring five minutes notice would not be unreasonable, and we could with certainty say that one week would be unreasonable; but we cannot say that twenty-four hours is unreasonable.

Mr. J. L. Bland, the Administrator, testified that certain information contained in the files is confidential. Mr. Bland said: "I promulgated Regulation No. 24, which was simply to stop what had been a practice of searching through the files and obtaining all sorts of information, both confidential and non-confidential, which practice was making some of our employees subject to criminal prosecution . . . But I would want to eliminate the free searching of the files, not only by any representative of employers but any of my own people . . . And I might add another reason for promulgating the regulation is a complaint from other sources that we are giving preferred service for one agent which enabled him to obtain claims much easier . . . I have been advised that the manner in which that was being handled was a violation of the law." Mr. M. P. Filiatreau, Chief of Benefits of the Employment Security Division, testified that the files contain confidential information. He said: "Now, we are attempting to take the file of the employer down to a desk and give it to him (Windsor), leaving the confidential information in the file, and they can't see that. Prior to this, he (Windsor) got the whole file and would go through the whole thing. I might add, not only was he allowed to look at the claims in which his clients were represented, but he was going through the entire list of claims having been received from everybody in the State. Under the regulation and our present operation, we are at-

tempting to segregate that information he is entitled to see and deliver it to him outside of the files. And that is the only difference."

Reversed.

McFaddin, J., dissents.

Brod *v.* Brod.

5-1271 301 S. W. 2d 448

Opinion delivered April 22, 1957.

Tom Gentry, Thorp Thomas and *James L. Sloan,* for appellant.

Kenneth Coffelt, Ben M. McCray and *Fred Briner,* for appellee.

Carleton Harris, Chief Justice. Billy Warren Brod, age 19, a resident of Saline County, Arkansas, died intestate in Saline County on October 8, 1956, leaving as survivors his widow, Linda Brod, age 19, his father, M. L. Brod, age 39, and his mother, Cleo Brod, age 38, all residents of Saline County, Arkansas. On October 15, 1956, M. L. Brod petitioned the Saline County Probate Court for appointment as administrator of the estate of his deceased son. The court approved the petition, and entered an order naming Brod (appellant herein) administrator; appellant qualified, and letters of administration were issued to him. Three days later,

the widow, Linda Brod, appellee herein, filed her petition alleging that the appointment of appellant, her father-in-law, as administrator, was premature, without notice to her, and that as the surviving widow of Billy Warren Brod, she desired to exercise her right of priority under the statute to nominate the administrator of the estate of her deceased husband; that the previous order appointing appellant as administrator was void and should be cancelled, set aside, and held for naught. Her petition was later amended by a prayer to designate her father, Gordon Richardson, as administrator of the estate of Billy Warren Brod. The petition further alleged that she expected to give birth to a child of her deceased husband about January 1, 1957. The matter was heard by the Probate Court on October 29th, and at the conclusion of the hearing, the court found that appellee, as widow of the deceased, had the right to nominate the administrator for her husband's estate, and that Gordon Richardson, so nominated by appellee, was a fit and proper person to serve and should be appointed; that "the order of this court authorizing the appointment of M. L. Brod as administrator of the estate of Billy Warren Brod, deceased, be, and the same is hereby vacated, and superseded, and the letters of administration issued to M. L. Brod are hereby nullified, cancelled, set aside, and held for naught; it is further considered and ordered that Gordon Richardson, nominee of the widow, be, and he is hereby appointed administrator of the estate of the said Billy Warren Brod, deceased. * * *" From such order, appellant brings this appeal.

For grounds of reversal, appellant argues two points. First—"That appellee had no right under the law to nominate an administrator for she was herself disqualified as such. Thus the appointment of, and issuance of letters of administration to, the appellee's nominee contravene the pertinent statutory provisions and are void." It is next contended that "The order which 'vacated and superseded' the appellant's appointment as administrator and 'nullified, cancelled, set aside and held for naught' his letters of administration, was

completely unwarranted under the evidence and without justification of the law." We proceed to a discussion of each contention as heretofore set out.

I.

Let it first be said that the right of persons to serve in the capacity of administrator is governed entirely by statute, and accordingly, cases cited from other jurisdictions are of no assistance unless the statute bears close similarity to our own. The Arkansas Statute reads as follows: § 62-2201. "*Persons entitled to domiciliary letters.* — a. ORDER OF PERSONS ENTITLED. Domiciliary letters testamentary or of general administration may be granted to one or more of the persons hereinafter mentioned, natural or corporate, who are not disqualified, in the following order of priority: (1) To the executor or executors nominated in the will. (2) To the surviving spouse, or his or her nominee, upon petition filed during a period of thirty days after the death of the decedent. (3) To one or more of the persons entitled to a distributive share of the estate or his or her nominee, as the court may in its discretion determine, if application for letters be made within forty days after the death of the decedent, in case there is a surviving spouse, and if no surviving spouse, within thirty days after the death of the decedent. (4) To any other qualified person. b. — WHO IS DISQUALIFIED. No person is qualified to serve as domiciliary personal representative who is (1) Under twenty-one years of age, or (2) Of unsound mind, or (3) A convicted and unpardoned felon, either under the laws of the United States or of any state or territory of the United States, or (4) A corporation not authorized to act as fiduciary in this state, or (5) A person whom the court finds unsuitable, or (6) A non-resident of this state unless he meets all of the following conditions: * * *"

Appellant, in support of his contention, cites several cases from New York, but the New York statute* is quite different from that quoted above. Under the New York

* New York Surrogate's Court, Act of 1920.

statute, one under twenty-one years of age is disqualified from serving, and administration must be granted to persons entitled to share in the personal property, who are competent, with preference given the surviving husband or wife. The statute does not mention the right of the surviving spouse to nominate another, but does provide that if the person entitled to take the entire personal estate is an infant, his guardian shall have the right to letters in his place and stead. It further provides that "administration may be granted to a competent person not entitled, upon the consent of all the persons entitled to take or share in the estate whether within or without this state and competent. * * *"

Appellant cites the North Carolina case of *Boynton* v. *Heartt, Public Administrator,* 158 N. C. 488, 74 S. E. 470, which contains this language: "* * * Generally, if a person entitled to the administration is incompetent for any cause, his right of nomination fails, and, except as above stated, no right of nomination exists. * * *" Let it first be said that this case dealt with the right of four children under 14 years of age, who were non-residents, to nominate, through their guardian, also a non-resident, the administrator of their uncle's estate. The North Carolina Supreme Court upheld the action of the lower court in refusing to grant letters to the nominee of said guardian. Petitioner (Boynton) argued that the disqualification of a non-resident to administer, was in the same category as one under 21 years of age, and that it had been previously held in *Wallis* v. *Wallis,* 60 N. C. 78, that an infant, who could not administer, might nominate. The court pointed out that an examination of the *Wallis* case showed that particular question was not raised, and the statement in the opinion to the effect that the lower court might have granted letters to the nominee of the widow was dictum. The court then added, "* * * If, however, the law is stated correctly in the *Wallis* case, there is a distinction between disqualification on account of non-age and non-residence, because, in the first, the right to administer continues to exist, while the exercise of the right is suspended during the minority, and in the case of a non-resident, he

has never had the right to administer. * * *" At any rate, let us examine the North Carolina Statute.* It gives preference to the husband or widow, but makes no mention of the specific right of either to nominate another. One under the age of twenty-one years is disqualified from serving. The statute does not permit any person to nominate another until that person renounces his right to qualify as administrator, when he may "at the same time nominate in writing some *other*[1] qualified person to be named as administrator. * * *" It would seem from this language that the statute of North Carolina only permits *a qualified person* to nominate an administrator to serve in his stead. It will be noted that the Arkansas statute makes no such distinction. Under subsection (b) of our statute, in setting out those who are disqualified to serve, it would have been simple enough, had the Legislature so intended, to have written the statute as follows: "No person is qualified to serve as domiciliary personal representative *or to nominate another*[2] who is (1) under twenty-one years of age. * * *"

In the case of *Rivers, et al.* v. *Alsup,* 188 Ga. 75, 2 S. E. 2d 632, the Supreme Court of Georgia quoted from an earlier case dealing with the interpretation of a statute which provided that the widow, if qualified, is first entitled to the grant of letters of administration, and after her, "the next of kin at the time of the death." From the opinion, "Under the ruling in *Headman* v. *Rose,* 63 Ga. 458 (2, 6) 465, 'if the widow of an intestate is disqualified from taking letters of administration on his estate, she may nevertheless name some person who is qualified for that purpose,' even as against contesting claimants, who after the widow were entitled to the administration or the selection of the administrator. * * *"

Cases from other jurisdictions have been noted which permit the guardian or next friend of a disqualified person to nominate.[3]

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* General Statutes of North Carolina, 1943

[1] Emphasis supplied.

[2] Italicized words supplied.

[3] Among others, Michigan and Iowa.

Our statute is similar to those of Arizona and Montana. The Arizona statute gives preference to "the surviving husband or wife, or some competent person whom he or she may request to have appointed."* One is prohibited from serving who is under the age of majority. *In re Graham's Estate,* 27 Ariz. 167, 231 Pac. 918, dealt with the right of the guardian of a surviving husband, who was insane, to nominate one to serve as administrator, as against the right of the deceased wife's mother (who was also custodian of the minor child of the parties) to serve. The Arizona Supreme Court upheld the right of the mother, stating "* * * if the person first entitled does not choose to qualify, or if the law makes him imcompetent, he cannot, nor can his guardian, nominate another as a substitute to the exclusion of the right which the statute gives to those next in order. * * *"

The Montana Statute provides that letters of administration must be granted first "to the surviving husband or wife or some competent person whom he or she may request to have appointed." The statute likewise provides that no person is competent or entitled to serve as administrator who is "under the age of majority."[1]

The case which appears to be nearest in point, from our research, is *In re Stewart's Estate,* 18 Mont. 595, 46 Pac. 806. There, the widow was a minor, 16 years of age, and sought to nominate one Keith as administrator. The trial court denied her petition, and proceeded to grant letters to another. Upon appeal, and in reversing the trial court, the Supreme Court of Montana said: "* * * The respondent's contention must be that, where the widow is a minor, she is necessarily incompetent to serve herself, and that, inasmuch as she is incompetent to serve herself, she is also incompetent to name some competent person whom she may request to have appointed. But we do not think this contention can be sustained. The first right to administer is granted to the surviving husband or wife; yet it might often happen that such survivor would be, * * * or other disqualification, incompetent to serve. But the statute,

* Arizona Revised Statutes, 1956, 14-417-418

[1] Revised Code of Montana, 1947, Sec. 91-1401, 91-1405

as if made especially to cover such a contingency, gives to the surviving husband or wife the right to name some competent person who can serve. This right of the surviving husband or wife to nominate is not made dependent upon the competency to serve of the person occupying such relationship. It is a right of nomination given by virtue of the fact that the person who exercises it stands in the relationship of surviving husband or wife. It is independent of the competency of such husband or wife himself or herself to serve. The person named for appointment by such surviving husband or wife must be legally qualified, as required by Section 59, above quoted. But we must not lose sight of the distinction between the right to name the one who shall serve, and the competency of the person who does serve, for the distinction makes the case simple. * * *"

We prefer the Montana construction, and the quoted language expresses our thought in the matter. Let it also be pointed out that appellee is nineteen years of age, and accordingly, under our statute, has attained her majority.[4] We conclude that even though appellee was disqualified from serving herself, such disqualification did not preclude her from nominating a person of her choice. It might be mentioned that our statute, while giving a right of priority to certain persons to serve as administrator (as set out in § 62-2201) does not make it compulsory for the court to make such appointment inasmuch as the statute says, "Letters testamentary * * * *may* be granted to one or more of the persons hereinafter mentioned. * * *" For sufficient cause, and unusual circumstances, the court might well refuse to appoint the person who is given preference under the law, or his or her nominee. In the instant cause, the qualifications of neither appellant nor Richardson are questioned.

II.

Appellant contends that the court had no authority under the law and evidence to set aside the letters of administration which had been issued to him, and in sup-

[4] § 57-103 Ark. Stats. (1947) Anno.

port of such contention cites the statute. It reads in full as follows: "§ 62-2203. *When personal representative may be removed.* When the personal representative becomes mentally incompetent, disqualified, unsuitable or incapable of discharging his trust, has mismanaged the estate, failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by § 70 b (6) (b) (62-2201), then the court may remove him. The court on its own motion may, or on the petition of an interested person shall, order the personal representative to appear and show cause why he should not be removed. The removal of a personal representative after letters have been duly issued to him does not invalidate his official acts performed prior to removal."

It is not necessary that we discuss the provisions of this statute, as it is well established under decisions of this court that a trial court has the inherent right to set aside any orders made during the term, and may even do so on its own motion. *American Building and Loan Association* v. *Memphis Furniture Manufacturing Company,* 185 Ark. 762, 49 S. W. 2d 377. In the instant cause, the order appointing appellant was entered on October 15, 1956, and such order was vacated and set aside on October 29, 1956. The Saline County Chancery and Probate Court commences on the third Monday in May and the third Monday in November;* accordingly the Saline Probate Court had full authority to set aside any orders made and entered prior to November 19, 1956. We therefore conclude that appellant's argument is without merit.

The cause is affirmed.

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* Act 25, 1951.
See also Act 31, 1953.

5-1254 301 S. W. 2d 445

Opinion delivered April 22, 1957.

[Rehearing denied May 20, 1957]

Barham & Swift, for appellant.

Marcus Evrard and *James M. Gardner,* for appellee.

J. SEABORN HOLT, Associate Justice. On October 29, 1954, appellants, D. C. Parker and wife and Clem Whistle and wife, appellees, entered into a contract under the terms of which the Parkers agreed to sell and convey to the Whistles 1410 acres of land, more or less, for a consideration of $261,800. Of this amount the Whistles were to pay $51,000 in cash. Ten thousand dollars, as a part of this $51,000, was paid as earnest money, and the Whistles placed this $10,000 with an escrow agent for this purpose. The contract also provided that the Whistles were to assume "principal balance due on first mortgage as of December 1, 1954, in the amount of

$140,000.00; . . . principal balance due on second mortgage as of December 1, 1954, in the amount of $70,000.00; immediate possession of all lands clear of crops," and the Whistles were to be given possession January 1, 1955. This contract further provided: "It is understood and agreed that if the title is not good and cannot be made good within a reasonable time after written notice is given that title is defective, specifically pointing out the defects, then this earnest money, which has been deposited with Seminole Title & Insurance Company, Agent, is to be returned to purchaser and the usual commission is to be paid the said Agent by the Seller. But if the title is good and the property not paid for as herein specified, this earnest money is to be forfeited to the seller and divided equally between the seller and Seminole Title & Insurance Company, agent. It is expressly understood and agreed, however, by both parties hereto that such forfeiture shall in no way affect the right of either party to enforce the specific performance of this contract. The seller hereby agrees to pay Seminole Title & Insurance Company, agent, $5,600.00 per cent of the total sale price on the real estate as commission."

It appears that they actually took possession about December 1, 1954 and worked part of the farm for some ten days. On December 9, 1954, a warranty deed was prepared by the Parkers (to the Whistles) in accordance with the contract terms, and this deed with abstract of title was tendered to the Whistles and demand made on them for the purchase price. The Whistles refused to pay, whereupon the Parkers on February 8, 1955, brought the present suit alleging the contract breached by the Whistles, claimed the $10,000 earnest money and additional damages. The Whistles answered with a general denial and in a cross complaint alleged that the number of acres in the farm had been misrepresented as containing 1,410 acres, when in fact it contained less than 1,370 acres, and they were not bound by the contract. They prayed that the contract be cancelled and that they recover the $10,000 earnest money.

A trial resulted in a decree for the Parkers for $1,148.24. This appeal followed.

For reversal appellants rely on these points: "1. The judgment is contrary to the evidence and contrary to the law. 2. Plaintiffs are entitled to damages from the defendants, Whistle, for the breach of contract by Whistle in excess of the sum allowed by the trial court . . . Plaintiffs are entitled to the sum of $10,000 deposited in escrow and in the registry of the court as earnest money and partial payment under the contract as a forfeiture under the terms of the contract; it being the intention of the parties from their actions to consider said sum of money as compensation to the plaintiffs for damages in the event of breach."

After review of all the testimony and the record presented, we have concluded that appellants' contention that they are entitled to the $10,000 earnest money as liquidated damages under the terms of the contract, must be sustained. As indicated, the Parkers sold and the Whistles bought the farm here referred to as the "Dutch Parker Farm", containing 1410 acres more or less, in gross. Whistle went over this farm and noted its boundaries. We find no evidence that he bought by the acre, in fact, the evidence showed there was about 1401 acres in the farm. We find no evidence of any fraud or misrepresentation on the part of Parker, the seller. In *Ryan* v. *Batchelor,* 95 Ark. 375, 129 S. W. 787, we said: "When a vendor conveys for a specified price a tract of land which is described by metes and bounds or otherwise, with the words added, containing a specified number of acres, more or less, this is a contract not by the acre, but in gross, and does not by implication warrant the quantity."

As indicated, the contract here provided: "But if the title is good and the property not paid for as herein specified, this earnest money is to be forfeited to the seller and divided equally between the seller and Seminole Title and Insurance Company, agent." There is no evidence that the title was defective. This earnest money was either to be liquidated damages or a penalty. The evidence tended to show that the Parkers were damaged even more than $10,000. Parker enumerates them as follows: Interest payment on the mortgage debt past

due from December 1 to January 1, $1,148.24, cost of labor and material in complying with Whistle's request for possession—some $3,000, and also an estimated loss of $16,000 in selling at a sacrifice his farm equipment. There was involved here a purchase price of $261,800 and $10,000 obviously is little more than 4% of this amount. We think it clear in the circumstances that this earnest money, which had been paid by the Whistles on the purchase price and held in escrow, was intended by the parties as liquidated damages and to cover any substantial loss that might occur should the buyer fail to perform, and $10,000 was mutually fixed.

In the case of *Hall* v. *Weeks,* 214 Ark. 703, 217 S. W. 2d 828, a situation was presented similar, in effect, to that presented here. There it appears that earnest money in the amount of $4,000 was paid by the buyer, Weeks. We there said: "Penalty, or Liquidated Damages?—That part of the contract affecting the check is a printed form, concluding with an acknowledgment by Welch as agent that the earnest money had been received. Should the buyer default it would 'forfeit' to the seller," and we held: Headnotes "1. Damages—Deposit to Guarantee Performance of Contract.—Check for $4,000 was given as earnest money when contract to purchase tourist court for $40,000 was signed. Purchaser repudiated the agreement by stopping payment on the check. Held, the amount represented by the dishonored check should be treated as liquidated damages, there having been a stipulation that proceeds should be divided between the seller and a named realtor . . . 3. Damages—Agreement to Pay Specified Sum.—The general rule governing liquidated damages is that a promise in advance of breach of contract will be enforced if the sum named is a reasonable forecast of just compensation for the injury, if the harm is difficult or incapable of accurate estimation. 4. Damages—Agreement That Initial Payment be 'Divided'.—Language of a contract disclosing intention of the parties that check for $4,000 be cashed and proceeds 'divided' between designated persons; showing extent of the transaction contemplated, nature of the business offered for sale, (from which the diffi-

culty of estimating in advance what loss would result from a breach)—these considerations were sufficient to warrant the conclusion that liquidated damages were contemplated when the contract was signed." Also in 6 ALR 2d p. 1406, ". . . the amount stipulated to be paid or forfeited in case of a breach is an important consideration; if it bears a reasonable relationship to the probable actual damages, the construction, other things being equal, will be in favor of liquidated damages, . . . if the amount of such damages is . . . uncertain and difficult of estimation the disputed clause will *prima facie* be interpreted as one for liquidated damages."

Having concluded that appellants were entitled to recover the full $10,000 as liquidated damages under the terms of the contract, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion.

McCollum *v.* McCollum.

5-1219 301 S. W. 2d 565

Opinion delivered April 22, 1957.

[Rehearing denied May 27, 1957]

J. B. Reed, for appellant.

William C. Daviss, for appellee.

ED F. MCFADDIN, Associate Justice. From a decree granting the wife a divorce,[1] the husband prosecutes this appeal urging only the two points herein discussed.

I. *Appellant's First Point.* "The appellee failed to prove and corroborate a cause of action against the appellant." The parties were married in 1937 and lived together until May, 1955. They have two sons, aged 15 and 16 respectively. Mrs. McCollum filed this suit shortly after the separation and alleged:

"That prior to their separation, defendant for a long period of time has pursued a course of rudeness, contempt, studied neglect, physical abuse and open insult toward plaintiff, in an habitual and systematic manner so as to make plaintiff's condition in life intolerable. That plaintiff did at no time do anything to merit such treatment, and that, in fact, on several occasions, defendant has recognized or admitted his mistreatment of plaintiff and has promised to refrain from such treatment."

The evidence sustained the quoted allegations. Mr. McCollum struck and beat his wife on numerous occasions, as shown by several witnesses. Not only were there repeated acts of physical violence committed by Mr. McCollum, but many other acts, shown and corroborated, sufficient to support a decree against him either on the ground of cruel and barbarous treatment or on the ground of indignities.[2] To recount all of these

[1] The decree awarded the wife custody of the two children, alimony, attorney's fees, and property rights. The correctness of the decree regarding these items is not an issue on this appeal.

[2] These are in the fifth sub-division of § 34-1202 Ark. Stats.

would serve no useful purpose. It is sufficient to say that the appellant was guilty of acts sufficient to support the decree and that the wife's testimony was corroborated by several witnesses.

II. *Appellant's Second Point.* "Both parties were equally guilty of mistreatment of the other and the appellee should have been denied a decree in her favor." Appellant cites § 34-1209 Ark. Stats., the germane portion of which reads: "If it shall appear to the Court that . . . both parties have been guilty of . . . such other offense or injury complained of in the bill, then no divorce shall be granted or decreed."

Appellant says:

"For many years, it was consistently held by this Court that, in cases where the spouses were equally at fault, neither could obtain a divorce. *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840; *Healey* v. *Healey,* 77 Ark. 94, 90 S. W. 845; *Strickland* v. *Strickland,* 80 Ark. 451, 97 S. W. 659; *Wilson* v. *Wilson,* 128 Ark. 110, 193 S. W. 504; *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675."

The language of our statute and cases—that where each of the parties is guilty of an act of divorce then the court denies relief to both of them—is known as the "Doctrine of Recrimination".[3] As applied to divorce cases, "recrimination" is defined in Black's Law Dictionary as "a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce".

In some of our cases we have affirmed a decree granting a divorce to a spouse of whom we have said, "she was not without fault". The same can be said of the appellee in the case at bar. But "*fault*" does not mean "*guilty of conduct which is a cause for divorce*"; and before the rule of recrimination can be applied, it

[3] In *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, we discussed the history of recrimination. In 3 Ark. Law Review 132 there is an article on "Mutual Misconduct in Arkansas Divorce", which discusses recrimination. Also in 17 Am. Jur. 267 *et seq.* there is a discussion of recrimination. For some of our recent cases involving recrimination see: *Franks* v. *Franks,* 211 Ark. 919, 204 S. W. 2d 90; and *Evans* v. *Evans,* 219 Ark. 325, 241 S. W. 2d 713.

must be shown that the party has been guilty of conduct which is a cause for divorce. Hardly any human being is always and forever free of *fault*. In *Franks* v. *Franks*, 211 Ark. 919, 204 S. W. 2d 90, the lower court, in granting the wife a divorce, had said of the parties: "Both of them have done things that should not have been done, and neither of them was free from blame for their troubles . . ." On appeal, the appellant argued that such statement by the lower court prevented the wife from having a divorce. But Mr. Justice McHaney, speaking for this Court, said of the language of the lower court as quoted:

"In using the language above quoted, the court did not make any finding that appellee had been guilty of any indignities to appellant and none are claimed by him, and the court, no doubt, had reference to the fact, freely admitted by her, that she had on social occasions partaken of intoxicants in small quantities with her husband and others, but never to excess, and that she had played cards for small stakes, such as penny ante poker. We agree with the trial court that this kind of conduct should not have been indulged in by either of them, especially by appellee . . . We think the court was warranted in finding that appellee's indiscretions and misdeeds in these respects were not sufficient to justify a denial of the decree, and that the rule relied on by appellant, stated in the Widders Case,[4] and a number of others cited, is not here violated."

Before the rule of recrimination could have been invoked to bar Mrs. McCollum from a divorce in the case at bar, Mr. McCollum had to prove that she had been guilty of conduct which is a cause for divorce. We find no such evidence. That she had at spasmodic intervals consumed intoxicants did not prove that she was "addicted to habitual drunkenness for a space of one year", as is the statutory ground.* That she had quarreled with Mr. McCollum when both were drinking does not show "such cruel and barbarous treatment as to endanger"* his life, or that she had been guilty of "such indignities to

[4] This is *Widders* v. *Widders*, 207 Ark. 596, 182 S. W. 2d 209.

the person of the other as to render his condition intolerable''.* Mr. McCollum admitted that he was the greater drinker of the two. While Mrs. McCollum's conduct on a number of instances is subject to criticism, nevertheless Mr. McCollum failed to show that she had been guilty of conduct which is cause for divorce; so he cannot successfully claim the application of the rule of recrimination.

The decree is affirmed, with all costs against appellant, and also $100.00 additional to be taxed as attorney's fees for services by Mrs. McCollum's attorney in this Court.

CARLETON HARRIS, Chief Justice, not participating.

* The statute referred to and quoted is § 34-1202 Ark. Stats.

ARK. STATE HIGHWAY COMM. *v.* O. & B., INC.

5-1240 301 S. W. 2d 5

Opinion delivered April 22, 1957.

W. R. Thrasher and *Dowell Anders,* for appellant.

Catlett & Henderson, for appellee.

MINOR W. MILLWEE, Associate Justice. This is an action by appellant, Arkansas State Highway Commission, condemning certain lands in Pulaski County for the relocation and reconstruction of U. S. Highway 67 between North Little Rock and Jacksonville, Arkansas. The suit involved numerous tracts but the instant appeal concerns only two parcels containing 12.98 acres belonging to the appellees, O. & B., Inc., and H. & B., Inc.

Barney Elias, Raymond Rebsamen and Edward Elias were partners doing business as Statewide Homebuilding Company in April, 1954, when they purchased from Dr. Ewing Nixon, Ruth Nixon and Ruth Wilson about 30 acres known as Oakview Subdivision to the City of Jacksonville, Arkansas, and 66.03 acres known as Edgewood Subdivision to said city. Included in Oakview Subdivision was a 4.16-acre strip 200 feet wide known as "Plot A" and in Edgewood an 8.82-acre strip similarly designated as "Plot A", which are the lands involved here.

The replat of Oakview Subdivision filed in the circuit clerk's office by the Nixons and Ruth Wilson on May 31, 1954, specifies that Plot A shown thereon is "Reserved by Owner for Sale to Arkansas Highway Department." The plat of Edgewood Subdivision filed by the same owners on October 5, 1954, states that Plot A shown thereon is "Reserved for Highway Use." The plats dedicate "all streets, alleys, walks, parks and other open spaces to public use as noted" thereon. Bills of as-

surance also filed by the owners provide for dedication to the public of the "streets and easements" as set out on the plats.

Shortly after appellant filed the instant suit on December 27, 1955, Statewide Homebuilding Company conveyed Plot A, Oakview Subdivision, to appellee, O. & B., Inc., and Plot A, Edgewood Subdivision, to appellee, H. & B., Inc. Appellees are Arkansas corporations owned in equal interests by the partners of Statewide Homebuilding Company. Appellant deposited $8,650 as estimated just compensation for the two tracts in a declaration of taking filed January 16, 1956. In its answer O. & B., Inc., asserted it had been damaged in the sum of $38,500 by the taking of the 4.16-acre tract while H. & B. Inc., sought damages of $63,000 for its 8.82 acres.

At the trial four expert witnesses for appellees fixed the market value of the 4.16-acre tract at the time of taking at amounts varying from $19,600 to $23,040 and the 8.82-acre tract at amounts from $39,200 to $66,714. Two witnesses for appellant placed a market value of $750 per acre on all the lands for a total value of $10,000. All the witnesses agreed that if the property had not been taken by appellant the highest and best use to which it could be put was for residential lot development and some witnesses stated that was the only use to which the property could logically be put. All the lots in Oakview Subdivision except Plot A had been sold at the time of trial but none of the lots in Edgewood had been sold at that time. The population of Jacksonville had more than doubled and property values in the vicinity had increased 200 per cent, or more, since 1953 on account of the construction there of the Little Rock Air Force Base. The number of residential subdivisions increased from seven to sixteen in the same period. The jury returned a verdict in favor of O. & B., Inc., in the sum of $12,480 and in favor of H. & B., Inc., for $26,460. The instant appeal is from the judgment based on this verdict.

The principal contention for reversal is that the two parcels in question were dedicated to the public for high-

way purposes and appellees were, therefore, entitled to recover nothing on account of the taking. Appellant says this is clearly shown by the plats and bills of assurance filed by the owners and that the court erred in refusing its request for a peremptory instruction to the jury to that effect. Reliance is had on *Mebane* v. *City of Wynne,* 127 Ark. 364, 192 S. W. 221, and many similar cases holding that where owners of land lay out a town, or an addition to a city or town, platting it into lots and blocks, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate to the public use the streets, alleys and other public places marked on the plat, and such dedication is irrevocable.

Appellant also cites the following statement of the textwriter in 16 Am. Jur., Dedication, Sec. 24: "Even such an indefinite expression as 'the place' or the word 'reserved', may operate, in the light of the circumstances under which it is used to show a dedicatory intention, while open or vacant spaces may be held devoted to public use where from their position on, and relation to, the plat, or from symbols used, such appears to have been the intention of the owner, although they are not named. Where reservations for specified public purposes have been made with no apparent intention on the part of the dedicator of reserving title in himself, but with the sole object of benefiting the public, such a reservation has been given effect and, of course, has been held to constitute a dedication. It has been held, however, that where a designated space on a map or plat is marked 'Reserve' or 'Reserved' although there is an absence of statement of the purpose of the reservation, there is no intention to grant to the public and no dedication takes place."

The question whether the terms "Reserved by Owner for Sale to Arkansas Highway Department" and "Reserved for Highway Use" used on the plats filed in the case at bar constituted a dedication to the public use was decided adversely to appellant's contention in *Ft. Smith & V. B. Bridge Dist.* v. *Scott,* 111 Ark. 449, 163 S. W. 1137. In that case appellee's predecessor in title platted land which became a part of the town of Van Buren

with Water Street running parallel with the Arkansas River on its North bank. An irregular strip lying between the south boundary of Water Street and the river was marked "Reserve" on the plat and map. A portion of this strip was condemned by the bridge district for construction of abutments and had been used by appellee and his predecessors as a ferry boat landing. In rejecting the district's contention that the strip was dedicated to the public the court said: "The irregular strip of ground between it (Water Street) and the banks of the river, as above indicated, has well defined boundaries marked on the map, and, in addition thereto, it is marked 'Reserve', thereby indicating an intent on the part of the dedicator not to dedicate it to the public. When all these facts, as shown by the map itself, are considered, there can be no doubt that the owner intended that the strip of ground marked 'Reserve' should be excepted from the dedication, and that it was to be reserved or withheld from public purposes, and that it should be and remain the property of the dedicator." Other cases to the same effect which also involve use of similar words on city or subdivision plats are: *Morris* v. *Avondale Heights Co.,* 218 Ky. 356, 291 S. W. 752; *Fortner* v. *Eldorado Springs Resort Co.,* 76 Colo. 106, 230 Pac. 386; *Harris* v. *City of St. Helens,* 72 Ore. 377, 143 Pac. 941.

We have also frequently said that the question whether an owner intended to dedicate his land for public use is one of fact to be determined by the jury where such intention is not expressed in writing without ambiguity. *Ayers* v. *State,* 59 Ark. 26, 26 S. W. 19; *Davies* v. *Epstein,* 77 Ark. 221, 92 S. W. 19. The question was submitted to the jury by the trial court here under an instruction requested by appellant. The terms used by the owners plus other facts and circumstances bearing on their intention are ample to sustain the jury's finding that there was no intention to dedicate the property to the public. Dedication is ordinarily considered as just the opposite of reservation and it would appear somewhat anomalous for one desiring to donate his land to public use to reserve it "for sale" to the public agency involved.

Appellant also contends that, even if there was no dedication, the land was without market value because its use was restricted for highway purposes under the rule usually applied with respect to such properties as schools and churches that are used for service and not for profit. This point was also resolved against appellant's contention in *Ft. Smith & V. B. Bridge Dist.* v. *Scott, supra,* where the court said: "Finally it is insisted by counsel for appellant that there is no testimony tending to support the finding of the circuit court as to the value of the land taken. They contend that the only value to the land, as shown by the testimony of appellees themselves, was its use as a ferry landing, and that this is not an element of value that can be considered by the court in awarding damages in a condemnation suit. It is true that the testimony on the part of appellees tended to show that the land in question was not dedicated to the public, but was reserved in the dedicator on account of its value as a ferry landing. The court, however, is not concerned with the purpose which caused the dedicator to reserve the land. He might reserve it for ferry purposes as well as for any other purpose. The question to be determined by the court in awarding damages in this case was the value of the land taken, and in determining this value, its availability for any use to which it is plainly adapted can be considered." The lands here were "reserved for" and not "restricted to" highway usage by the owners and appellees could have used the plots for building sites or any other lawful purpose if appellant had not located the highway across the land.

Nor do we agree with the further contention that the court erred in admitting testimony relative to the division of the two plots into residential lots and its net value for such purposes after deduction of improvement costs. The established rule in this state in cases like this is that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market. *Little Rock Junction R. Co.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792,

4 Am. St. Rep. 51; *Kansas City Southern R. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375.

Appellant concedes that potential use of land for subdivision purposes may be considered in establishing market value but says it is error to show the number and value of lots into which a certain tract may be divided. Cases from other jurisdictions supporting this argument involve facts quite different from those in issue here. This is not a case where use for subdivision purposes is merely speculative and too remote to influence present market value. As previously indicated, it is undisputed that the land of appellees was adjacent to and surrounded by well developed residential sections of the fast growing City of Jacksonville and that its best and most logical use was for residential lot development. In these circumstances we have held the testimony objected to by appellant to be admissible to establish market value.

In *St. Louis I. M. & S. Ry. Co.* v. *Theo Maxfield Co.,* 94 Ark. 135, 126 S. W. 83, the court said: "The chief question involved in this case is whether or not, in determining the value of the land, the fact can be taken into consideration that the land is suitable for division into lots and blocks and an addition to the adjacent city; and whether or not the witnesses can take into consideration the value of such lots and blocks in arriving at their opinion as to the market value of the land. It is contended by the appellant that the land, although thus laid out on the plat in lots and blocks, was actually enclosed and cultivated as a farm; and while one or two streets had been opened up along the sides of the tract, the streets were not actually opened up through the tract, and the lots were not actually at the institution of the suit indicated on the land; and it urges that the value of the lots as laid out on the plat should not be considered in arriving at the value of the tract of land. But the measure of the damages which the owner is entitled to recover for property taken for public use or depreciated by such use is the market value of it. This market value is determined, not solely by the uses to which the property has been put or is put at the time of the condemnation proceeding, but by all the purposes to which it is

adapted". After noting that the land was situated similarly to that involved here, the court further said: "In the case at bar we are of opinion that the witnesses, in estimating the market value of the tract of land that was appropriated for the right-of-way, could take into consideration its value for the purposes of town lots, and that they and the jury could fix the value thereof upon that basis of the market value of such lots." See also, 29 C. J. S., Eminent Domain, Sec. 160.

On the question of adaptability of the land for building lots the trial court told the jury: "Now from the testimony, you have heard that the maximum value of the other similarly situated lands for any reasonable use is for subdivision purposes. And in that connection let me caution you that it is the value of the entire tract that you must determine and not the lots into which it might be divided. You are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold nor at what price per lot. You should not inquire what a speculator might be able to realize out of resale in the future, but you should consider what a purchaser would have been willing to pay for it on January 16, 1956, in the condition it was then in." The jury evidently followed this admonition in fixing the market value and there is no contention that the verdict is excessive. Since the instruction was perhaps more favorable to the appellant than the facts warranted, it is hardly in position to now argue that same was inconsistent with the evidence, or that appellant was in any manner prejudiced by the giving of the instruction.

The testimony of appellees' agent as to his intention in respect to the alleged dedication of the two plots in question was admissible under the general rule that such evidence may be considered in connection with all the other facts and circumstances for the purpose of throwing light on the acts of the dedicator, where such acts do not manifestly indicate the intent to dedicate. See 26 C. J. S., Dedication, Sec. 46 (c).

We find no prejudicial error, and the judgment is affirmed.

KING *v.* HILL.

5-1252 301 S. W. 2d 9

Opinion delivered April 22, 1957.

Wiley A. Branton, for appellant.

John Harris Jones, for appellee.

GEORGE ROSE SMITH, J. Two separate suits against the appellee, George W. Hill, were consolidated by the court below for the purpose of passing upon the defendant's plea of *res judicata* in each case. The chancellor sustained the plea in both cases and dismissed the complaints without a trial on the merits. The plaintiffs in each suit have appealed.

In one of the complaints Thomas W. Morgan and his wife assert that they own two lots in Jefferson county, that Hill owns the property lying north of the plaintiffs' lots, and that Hill is encroaching on the Morgans' land by maintaining thereon a butane gas tank and a portion of a fence that extends across the boundary line between the two tracts. The plaintiffs ask that Hill be required to remove the encroachments and to respond in damages for his wrongful use of the plaintiffs' land.

To this complaint Hill pleads as *res judicata* the decree that was affirmed by this court in *Morgan* v. *Hill,* 224 Ark. 39, 272 S. W. 2d 67. That was also a dispute between these two neighbors. There, however, Morgan asserted in his complaint that the two tracts were separated by a public road and that Hill was maintaining fences and other obstructions in the public thoroughfare. Hill denied the existence of the alleged public street and successfully contended that he had title by adverse possession to the land within his fences.

We agree with the chancellor's conclusion that Morgan's present complaint against Hill presents essentially the same issues that were involved in the earlier litigation between these parties. Although Morgan averred in the first case that a public street lay between the two properties, Hill denied this assertion and insisted that the parties were really adjoining landowners. According to the transcript in that case, which was considered at the hearing below, Hill testified in the former litigation that his land extended clear over to Morgan's property, that a fence separated the two, and that the butane gas tank owned by Hill was located on his side of the line. Thus Hill defended and won the prior case upon the theory that only a private boundary line was involved and that he owned the land on his side of the fence that marked the boundary. By his present complaint Morgan concedes that the parties are adjoining landowners, but he contends that the division fence is on his side of the true boundary line. It is evident that this question—the correct location of the boundary between the two tracts—was within the issues presented by the former case and is therefore not open to re-examination. *Timmons* v. *Brannan,* 225 Ark. 220, 280 S. W. 2d 393. On this branch of the case the decree is affirmed.

The other complaint now before us was filed by Love King and others. These plaintiffs allege that they own property fronting on Thirty-second Street, that certain of Hill's fences and a part of his residence encroach upon the street, and that the plaintiffs have suffered special damages as a result of the interference with public trav-

el. The prayer is that Hill be required to remove the obstructions complained of. This is the same grievance that Morgan asserted in his first suit against Hill. Hill contends, and the chancellor held, that the earlier case was in effect a class suit on the part of Morgan and that the present plaintiffs, as members of the class, are therefore concluded by the prior decree.

This contention is not sound. We may concede, without having to decide, that Morgan, had he chosen to do so, might have brought a class suit on behalf of himself and everyone else whose rights were affected by Hill's encroachments upon the public street. But Morgan did not frame his complaint on that theory. He did not purport to act for anyone except himself, which negatives the suggestion that his suit was a representative one. Rest., Judgments, § 86, Comment b. Morgan alleged that he had suffered special injury from Hill's conduct; without that allegation he would have had no standing in court. *Ruffner* v. *Phelps,* 65 Ark. 410, 46 S. W. 728. As far as the earlier complaint disclosed, Morgan was asserting only a cause of action personal to him. Had his neighbors examined that complaint they would not have been pointedly informed that the litigation was to afford them their only day in court.

Hill argues that since a decree in Morgan's favor, requiring the removal of the obstructions in the street, would have afforded the plaintiffs the same relief they now seek, the earlier suit should be treated in substance as a class action. It is said that Hill should not be required to defend more than one suit involving the same fact situation. This argument was rejected, in similar circumstances, in *Connor* v. *Thornton,* 207 Ark. 1113, 184 S. W. 2d 589. There one inhabitant of a residential area had unsuccessfully brought suit to enjoin the operation of a sawmill, asserting it to be a nuisance. Later on other residents unsuccessfully brought an action for damages said to have been caused by the operation of the mill. In still a third suit the owners of the mill contended that the prior cases, though not representative in form, should be treated as class actions binding all in-

habitants of the area. In denying this contention we said: "While it is unfortunate that a decree involving persons who have for the third time been required to defend must be set aside, we are not willing to say that plaintiffs in the Circuit Court action (which was not designated as a class suit) were acting for all property owners in the affected area." It follows that King and his coplaintiffs are not concluded by the earlier decree in favor of Hill. With respect to these appellants the decree is reversed and the cause remanded for further proceedings.

HARRIS, C. J., disqualified and not participating.

JONES *v.* COX.

5-1217 301 S. W. 2d 12

Opinion delivered April 22, 1957.

C. Van Hayes, for appellant.

Ben M. McCray, for appellee.

PAUL WARD, Associate Justice. On June 23, 1954 Wesley N. Jones, d/b/a, Jones Ready-Mix Concrete, appellant, purchased from appellees, a partnership composed of William A. Cox, Samuel M. Cox and William T. Cox, a Ford 3 ton truck together with a concrete mixer installed thereon. The purchase price for said equipment, including finance charges, amounted to $9,085.44. On the date first above mentioned the parties executed a Conditional Sales Contract in the usual form which provided for 24 monthly payments of $378.56 each and which provided for the title to remain in the sellers until the equipment was paid for. After appellant had reduced the principal indebtedness to the sum of $5,418.24 he failed or refused to make any further payments.

On September 29, 1955 appellees filed a complaint in the chancery court setting forth, in substance, the facts above mentioned, and also stating that said equipment was in the possession of appellant, that it was no longer covered with insurance, and that the court should order the sheriff to take said equipment and hold it subject to the orders of the court. The prayer was for a judgment against appellant in the sum of $5,418.24 together with interest, that the equipment be sold by the sheriff and the proceeds therefrom be applied on the judgment.

To the above complaint appellant entered a general denial, and further stated that the said equipment "was to be entirely and absolutely paid for out of all the net profits, if any, realized from the operation of said equipment . . ." and that "said truck and mixer did not *secure* any profit other than that which was paid . . ." It was further stated in the answer that upon failure of the profits to pay for the truck and concrete mixer all of the equipment was to be returned to appellees without any further obligation or responsibility on the part of appellant.

After a trial on the issues above set forth the chancellor, after finding that said equipment was in the possession of appellant, entered judgment in favor of appellees in the amount sued for and authorized the sheriff to attach and sell said equipment, after having adver-

tised the same, with the proceeds therefrom to be applied to the judgment.

For a reversal of the decree of the trial court, appellant relies on three separate grounds, viz: I. The terms of the Conditional Sales Contract were later changed; II. Appellees waived their right to sue for the balance due, and; III. The decree is inequitable. We shall discuss these points in the order mentioned.

I.

Appellees purchased the concrete mixer which it sold to appellant from an equipment company in Little Rock. On the day the sale was closed, June 23, 1954, appellant and Sam M. Cox (one of appellees) were in Little Rock and talked with Mr. Leonard R. Clark, who was connected with said equipment company. It is appellant's contention that on this occasion, and after the Conditional Sales Contract had been executed on the same day, he had an agreement with Mr. Sam M. Cox that the equipment would be paid for solely and absolutely out of the net profits derived by appellant from the use of such said equipment, and that if and when such profits were insufficient to make the payments, he, appellant, would have the right to return the equipment to appellees and thereby cancel all indebtedness. The chancellor found against this contention of appellant, and we think such finding was not against the weight of the testimony.

After the matter was discussed it was reduced to writing and signed by Sam M. Cox and Wesley N. Jones, and was sworn to before a notary public, on June 23, 1954. This note or writing reads as follows: "Any and all net monies acquired from the truck and mixer applies to the purchase price agreed upon, which is the amount of the unpaid balance of the contract with the Universal CIT Credit Corporation, Little Rock, Arkansas." It will of course be noted that this writing contains no provision that the equipment would be paid for entirely and absolutely out of the net profits and nothing else. It seems unlikely that Mr. Jones and Mr. Cox

would have omitted from the writing anything as essential as that contended for by appellant if it had in fact been agreed upon. Appellant apparently relies entirely on the writing set forth above, for we find this statement in the record made by his attorney: "The note will reflect that the money will be paid out of the profits of the mixer and that is what we stand on." Mr. Clark's testimony relative to the purported oral agreement does not entirely bear out appellant's understanding of the same. In answer to a question Mr. Clark stated: "I put everything (in the note) I thought that would protect my customer." Clark was also asked this leading question. Q. "You made a further statement that Mr. Cox said if something happened where profits wouldn't pay for it, then Mr. Jones wouldn't have any further responsibility?" A. "As I said before, I don't remember the exact words, however he said words to that effect." Moreover, since the parties put their agreement in writing, oral testimony would not be admissible to engraft other agreements or understandings made or had at the same time. The rule that permits testimony to show a *subsequent* oral agreement (as announced in *Von Berg* v. *Goodman,* 85 Ark. 605, 109 S. W. 1006) is not applicable here, because, if there were any such oral agreement as appellant contends for, it was contemporaneous with and not subsequent to the written agreement which Jones and Cox signed.

II.

Appellant says appellees waived their right to sue for the balance due by taking possession of the equipment before trial and by having the sheriff take it after suit was filed. Appellant's position cannot be sustained on either count. Appellant is relying on the rule well established by many decisions of this court that the seller, upon breach of a Conditional Sales Contract has two remedies: One, he can take possession of the merchandise thereby cancelling the obligation of the buyer to pay, or; Two, he can treat the sale as consummated and sue for the balance of the purchase price, and; The exercise of one remedy excludes the right to exercise the other remedy.

The testimony shows that appellant remained in possession of the equipment at all times, and that he never at any time turned it over to appellees. On one occasion an employee of appellees inquired of a Mr. Baker if he would be willing to assume the payments on appellant's contract in event appellees had to take the property back from appellant. This, of course, did not justify the court in finding that appellees had repossessed the property.

Appellees' procedure, in asking the court to direct the sheriff to hold the equipment pending the outcome of the trial, was not a taking of possession in the sense referred to in the rule mentioned above, but was in accordance with Ark. Stats. § 34-2301 and § 34-2302, and the decision in the case of *Olson* v. *Moody, Knight & Lewis, Inc.,* 156 Ark. 319, 246 S. W. 3.

III.

We see no merit in appellant's argument that it would be inequitable to permit the judgment of the lower court to stand. The Conditional Sales Contract was transferred, by appellees, with recourse, to the Universal Credit Corporation. When it became apparent that appellant was not going to pay for the equipment, it became necessary for appellees to repay C.I.T. and repossess the contract and note, which at that time showed a balance of $5,418.24. In so doing appellees gave C.I.T. their check for $2,418.24 and at the same time they cancelled out $3,000 of a reserve which they had with the said credit company. We can see nothing irregular or inequitable about such a transaction. Appellees paid for the contract just as effectively as if they had given a check for the entire amount.

Affirmed.

SEWER IMPROVEMENT DIST. NO. 4 OF MORRILTON *v.* DAVIS.

5-1246 301 S. W. 2d 15

Opinion delivered April 22, 1957.

Townsend & Townsend, for appellant.

Phillip H. Loh, Felver A. Rowell, Jr., Clay Brazil, Charles Eddy and *Clyde Brewer,* for appellee.

SAM ROBINSON, Associate Justice. Sewer Improvement District No. 4 of Morrilton, Arkansas was created in 1924. Subsequently, owners of property not located in the district connected sewer lines from such property to the system owned by District No. 4 without paying anything for the privilege and without obtaining permission for such connections from the Commissioners of the District. Later, the district filed suit against such property owners to recover connection charges. This court held that the statute of limitations had run on the debt owed by some of the defendants, but the court specifically pointed out that the property owners had acquired no vested right in the use of the sewer system. The court said: "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." *Morrilton Homes Inc.* v. *Sewer Improvement District No.* 4, 226 Ark. 22, 287 S. W. 2d 581.

The case at bar was filed by the district asking that the owners of property outside the boundaries of the district be required to pay a reasonable sum for the use they are making of the sewer system, or that they be enjoined from using it. The chancellor sustained demurrers to the complaint filed by some of the defendants and refused to enter default judgments against other defendants who failed to answer the complaint, and the district has appealed. The demurrers were sustained on the theory that the district was attempting to collect a service charge and that such a charge is not authorized by law.

Ark. Stats. § 20-332 provides: "All sewer districts shall have authority to permit lands outside the boundaries of the district to connect sewer lines serving such lands with the sewer lines and mains of the district and to make a charge for such privilege." Ark. Stats. § 20-333 provides: "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 benefitted lands within the district, and in case such connections have heretofore been made without the payment of a charge for such connection, the district may refuse to allow sewer service to such lands until permission for such connection is granted and the charge for such service is paid to the district."

The Commissioners have authority to permit land outside the boundaries of the district to connect with the sewer system belonging to the district. But, the Commissioners have the right to exercise their discretion as to whether such connections will be allowed, and under the provisions of the statutes, the district has the right to refuse to allow service to lands outside the district; the owner of such lands can use the sewer system only

with permission of the Commissioners of the district. The mere fact that the property owners have sewer lines from their property connected with the District No. 4 system for more than three years gives them no vested right to the use of such sewer system, as pointed out in *Morrilton Homes Inc.* v. *Sewer Improvement District No.* 4, *supra.*

Reversed, with directions to proceed in a manner not inconsistent herewith.

BROWN *v.* STAIR.

5-1259 301 S. W. 2d 16

Opinion delivered April 22, 1957.

Dobbs, Pryor & Dobbs, for appellant.

Warner, Warner & Ragon, for appellee.

SAM ROBINSON, Associate Justice. The appellee, John Stair, was damaged when his automobile, which he was driving East on Rogers Avenue in Fort Smith, was struck from the front by a car driven by Coleman Smith and struck from the rear by an automobile driven by appellant, Sanford Brown. There was a judgment in favor of Stair against both Smith and Brown. Brown has appealed.

The principal issues on appeal are whether Brown and Smith are joint tort-feasors, and whether there is any substantial evidence of negligence on the part of Brown. Appellant contends there were two collisions sufficiently separated in point of time as to make inapplicable the principles of joint tort-feasor; and that there was no negligence on his part. Brown was traveling about one hundred twenty feet behind Stair; they were both going in the same direction. Coleman Smith, traveling in the opposite direction, got over on the wrong side of the road and collided head-on with Stair. There is evidence to the effect that, practically simultaneously with the head-on collision, the Brown car struck Stair from the rear. Stair testified that, in an attempt to avoid the collision, he put on his brakes when he saw Smith get over on the wrong side of the road. Brown testified that he did not see the Smith car prior to the collision, and did not see Stair attempting to stop; there is a reasonable inference that if Brown did not see the Smith car he was not keeping a proper lookout and negligently failed to observe Stair stopping his car in an attempt to avoid a collision with Smith; and this theory would explain Brown's action in striking the Stair car from the rear. Brown claims that the Stair automobile was knocked back into his car, but these were questions for the jury.

Brown argues that there were two separate accidents; first, that Smith and Stair collided head-on and at an appreciable time later, Brown collided with the Stair car and that, in these circumstances, the second wrongdoer is not a joint tort-feasor with the party who was negligent in the first instance. Assuming appellant's theory of the law on this point is correct, according to the evidence it cannot be said as a matter of law that this principle is applicable in the case at bar. After testifying about being struck from the front by the Smith car, Stair said: "I felt the second impact almost instantaneously."

By his requested Instruction No. 3, the appellant asked the court to tell the jury as a matter of law there were two separate accidents, but, in view of the evidence

in the case the court was justified in refusing the instruction. Instruction No. 4 requested by appellant, and refused by the court, assumes there were two separate accidents. In view of the evidence, the court could not adopt this assumption.

Affirmed.

EXCHANGE BANK & TRUST CO. *v.* TEXARKANA SCHOOL DIST. NO. 7.

5-1267 301 S. W. 2d 453

Opinion delivered April 29, 1957.

B. L. Allen, for appellant.

Smith & Sanderson, for appellee.

CARLETON HARRIS, Chief Justice. On December 30, 1952, McDougald Construction Company, a partnership composed of G. W. McDougald and B. V. McDougald (hereinafter called McDougald) entered into a contract with Texarkana School District No. 7 of Miller County, Arkansas, for the construction of a senior high school building. Under the contract, McDougald was to furnish all material and perform all work, receiving as compensation therefor the sum of $377,111. McDougald furnished to the district two performance bonds, with United States Fidelity and Guaranty Company as surety, under the terms of which the principal and surety agreed to the faithful performance of the terms and conditions of the construction contract, and the surety agreed that in case of default of the contractor to perform, the surety

would, to the extent of the bond, make good any such default. It was agreed between the school district (sometimes called owner) and McDougald that the owner would pay the contract price in monthly installments as the work progressed. The amount of each installment was to be based on estimates covering the preceding month's progress, work done, and materials delivered on the job, with ten per cent retained until final completion and acceptance of the entire job. McDougald was to furnish satisfactory evidence of payment of all laborers, materialmen, and subcontractors, and owner was authorized to withhold from McDougald's unpaid compensation a sum of money sufficient to pay any and all such unpaid claims. The contract provided that in paying any unpaid bills of McDougald, the owner was deemed the contractor's agent, and any payment so made was to be considered as a payment made under the contract by the owner to the contractor. In furnishing the bond, McDougald entered into an agreement with the United States Fidelity and Guaranty Company, (hereinafter called surety), under which McDougald agreed "* * * to indemnify the Company (surety) against all loss, damages, claims, suits, costs and expenses, whatever, including court costs and counsel fees at law or in equity, or liability therefor, which the Company may sustain or incur by reason of: executing or procuring said bond, or making any investigation on account of same, or procuring its release or evidence thereof from same, or defending, prosecuting or settling any claim, suit or other proceeding. * * *" To secure the surety, McDougald did "* * * assign and convey to the Company as collateral to secure the obligations herein and any other indebtedness or liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, all the right, title and interest of the undersigned in and to: (a) said contract[1] and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said

[1] Referring to construction contract between McDougald and school.

contract, change, addition, substitution or new contract) * * *; such assignment to be effective as of the date of the construction contract but only in event of (1) any breach of any of the agreements herein contained or of said contract or performance bond or of any other bond executed or procured by the Company on behalf of the applicant herein. * * * " This agreement was executed on December 30, 1952.

On January 27, 1953, McDougald executed another assignment of its rights under the contract with the school district, to the Exchange Bank and Trust Company, appellant herein, to secure advances to be made to it. The stipulation does not reflect that all such advances were made in connection with McDougald's performance of his contract with the district, and no advances were made after November 13, 1953. Appellant notified the district of its assignment. Based on eleven monthly estimates covering the construction period from the beginning of the contract through November, 1953, installments of the contract price were made to McDougald for its account amounting in the aggregate to $272,556.41. Ten per cent of such monthly estimates, amounting in the aggregate to $27,055.23, was retained by the school district. The eleventh such estimate, covering work done and materials furnished in November, 1953, was filed by McDougald with the district after December 1, 1953, and payment based thereon was remitted for McDougald's account by owner on December 10, 1953.[2] Around the middle of December, McDougald was in such financial straits that it was unable to meet its payroll, and on December 28, 1953, formally notified appellee owner that it was unable to continue in the performance of the contract in question. Two days later, the owner notified intervener of McDougald's default, and intervener elected to complete the performance of the construction contract in its capacity as surety under the bond, and in accordance with its obligation. Shortly after January 1, 1954, McDougald filed its twelfth esti-

[2] Checks were made payable to McDougald, but from March, were transmitted by mail to McDougald's assignee, appellant.

mate covering work done during the month of December. At the time of default, the aggregate of the retained percentages under the construction contract, which was being held by the school district, was $27,055.23. This amount was subsequently paid to the surety, who completed McDougald's contract at a cost of $206,414.89. Appellant filed suit against the school district, alleging that the district owed it $14,469.39.[3] This was based upon the assignment from McDougald to appellant, wherein appellant was to receive all monies due McDougald under the contract. (The amount sought was the total sum of indebtedness due the bank from McDougald.) The school district filed its answer, setting up that the United States Fidelity and Guaranty Company, as surety, "* * * under equitable subrogation, became entitled to receive all of the contract price stipulated for in said construction contract which remained at the time of contractor's said default unpaid, upon the completion by surety of the performance of the construction and improvements in accordance with the terms of the construction contract after contractor's default thereunder * * *." The United States Fidelity and Guaranty Company filed its intervention, adopting the answer of the school district. At the conclusion of the hearing, the court entered its decree dismissing appellant's complaint. From such decree comes this appeal.

There is really only one question to be determined in this litigation, *i.e.*: "Was the right of appellant to funds in the hands of appellee, Texarkana School District No. 7, superior to the right of appellee, United States Fidelity and Guaranty Company?" At the time of McDougald's default, it owed its materialmen, subcontractors, and employees for work done and materials furnished during the month of December, the sum of $28,147.54. For work done and materials furnished on the job prior to December 1, 1953, it owed the additional sum of $71,418.58. This amount was past due and remained unpaid until paid by the surety. Appellant contends that it had a valid assignment from McDougald, which

[3] Appellant is presently seeking only $11,384.54.

was accepted by the school district, and that no subsequent assignee of McDougald, and no creditor, could acquire any rights superior to the rights of the bank, the first assignee, and any monies due McDougald for work done in December should properly have been paid to appellant. It is also contended that appellant is entitled to a sufficient amount of the retained percentages as will liquidate McDougald's indebtedness to it. We do not agree. There was nothing due (to McDougald or appellant) because of McDougald's failure to pay for work done and materials furnished. This constituted an amount far greater than any sum due under estimate twelve. Each estimate did not constitute a separate or completed contract. The contract was indivisible, and these estimates were made under its provisions. It is conceded by appellant that under prior decisions of this Court, the United States Fidelity and Guaranty Company would be entitled to equitable subrogation as to the funds in the hands of the school at the time of McDougald's default. *American Bank & Trust Co.* v. *Langston,* 180 Ark. 643, 22 S. W. 2d 381; *City of Texarkana* v. *F. W. Offenhauser & Co.,* 182 Ark. 201, 31 S. W. 2d 140. It is contended, however, that Act 118, of 1945 (Ark. Stats. (1947) 68-805) contravenes the earlier holdings of the Court and is controlling in this matter. Said statute reads as follows:

"Every written assignment made in good faith, whether in the nature of a sale, pledge or other transfer, of an account receivable or any moneys due or to become due on an open account or on a contract, except for wages and salaries (all of which shall hereinafter be referred to as 'account'), with or without the giving of notice of such assignment to the debtor, shall be valid and complete at the time of the making of such assignment, and shall be deemed to have been fully perfected at that time. Thereafter, no *bona fide* purchaser from the assignor, no creditor of the assignor, and no other assignee or transferee of the assignor, in any event shall have or be deemed to have acquired any right or interest in the account so assigned or transferred or in the pro-

ceeds thereof or in any obligation substituted therefor, superior to the rights and interest therein of the assignee. In any case where, acting without knowledge of such assignment or transfer, the debtor in good faith pays all or part of such account to the assignor, or to such creditor, subsequent purchaser or other assignee and transferee, all payments so made shall be acquittance to the debtor to the extent thereof, and such assignor, creditor, subsequent purchaser or other assignee and transferee, shall be a trustee of any sums so paid and shall be accountable and liable to the prior assignee thereof.

"Provided further, however, that any defense of the debtor against any account so assigned or transferred shall be good as against any subsequent purchaser or other assignee and transferee."

We cannot agree with appellant's contention. This statute does not enlarge the rights of assignee as compared to the rights of the assignor (against a debtor), nor does it take away any defense available against the assignor. The title of this Act is "AN ACT to Benefit Small Business by Facilitating the Obtaining of Loans and Financial Assistance by Merchants and Other Businessmen Through the Assignment of Accounts Receivable and Amounts Due or to Become Due on Open Accounts or Contracts Whether or Not the Debtors Thereon Are Notified of Such Assignments and Providing That Non-Notification of Such Debtors of Such Assignments Shall Not Affect or Impair the Validity Thereof." It is not necessary to consider this act in detail in the instant litigation. It is sufficient to state that we consider appellant's construction to be erroneous.

Let it be remembered that appellant's action here is derivative through McDougald, and appellant may not maintain any action against the appellee school district that McDougald could not assert. That McDougald was in default is not disputed; that it was indebted for labor and materials on the job in an amount in excess of funds held by the district is not disputed. Accordingly,

it would not be contended that the district should have paid the monies over to McDougald. The same reasoning applies to the rights of the surety. There was a clear duty and obligation upon the United States Fidelity and Guaranty Company to pay the outstanding indebtedness of its principal, and to complete the contract. This it did at a cost stipulated to be reasonable. The doctrine of equitable subrogation clearly applies.

Affirmed.

WYNN *v.* HALE.

5-1275 301 S. W. 2d 466

Opinion delivered April 29, 1957.

Tom Kidd, for appellant.

G. W. Lookadoo, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, J. W. Hale, brought this suit to require appellants to remove certain cattle guards and gates erected on a public road, and which he alleged were obstructions. The facts appear to be undisputed and the appellee says: "The only questions involved in this law suit are whether or not the appellants had a legal right to place the cattle guards and gates across the road, and whether or not the cattle guards and gates are obstructions."

The trial court found the issues in favor of appellee and ordered the cattle guards and gates removed. This appeal followed. The chancellor's findings contained this recital: "That plaintiff and defendants own adjoining real estate in Pike County, Arkansas; that a road is on the land line between the adjoining owners; that this road or highway has been in use by the public for a period of more than fifty years, openly, continuously and adversely, and that the public has acquired an easement by prescription of which it cannot be dispossessed by the owners of the land in fee:

That plaintiff and his wife have used this road for more than fifty years and now are using it in going from their home that is located on said highway to their mail box and to church and to Nashville, Dierks, Murfreesboro and other places; that this is their only means of ingress and egress to their home; that the road is a public highway and is now used by the plaintiff and the public generally;

That defendants bought their real estate during the year 1943 and, at the time that they purchased this land, it was enclosed and there was a fence built on each side of the public road involved in this controversy; that defendants, in 1952, built two cattle guards and swinging gates, one at the east end and one at the west end of the road herein between defendants' land;

That plaintiff does not own a car but that he does own a wagon and team, and in traveling over this road he is required to stop and open and close the gates; . . ."

We have concluded that the court erred in holding that the gates and cattle guards were obstructions and should be removed. It is conceded that appellee and the public generally have acquired from long usage a prescriptive right to use this road. We hold that the obstructions do not prevent its free use to appellee in going to and from his farm. His complaint is that he had no motor vehicle and cannot drive over the cattle guards with a team of horses or mules and must, therefore, stop when he reaches the cattle guard, open, drive through,

and close the gate, which is an inconvenience to him. We think this slight personal inconvenience, which is no different from that suffered by the public generally, does not warrant removal of the cattle guards and gates.

The applicable rule in such a situation as is presented here is announced by the text writer in 40 C. J. S. § 226(b), p. 225, in this language: ". . . a property owner has no right of action where the obstruction does not prevent access to his land but merely causes him personal inconvenience in being compelled to take a more circuitous route in going from his property to necessary points. A mere traveler on the highway cannot bring an action to abate an obstruction unless he shows some injury greater than personal inconvenience suffered by the necessity of taking a more circuitous route in reaching his destination."

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

Mr. Justice McFaddin dissents.

LYNCH *v.* GARNES.

5-1191 301 S. W. 2d 739

Opinion delivered April 29, 1957.

[Rehearing denied June 3, 1957]

Luke Arnett and *John F. Park,* for appellant.

Linwood L. Brickhouse, Langston & Walker and *Wayne Foster,* for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation involves the dealings and transactions between the appellant, S. J. Lynch and Mrs. Annie Engelberger, a lady now 91 years of age. For a period of approximately twenty years, Mr. Lynch was the agent, business adviser, and property manager, of Mrs. Engelberger; and he also borrowed considerable sums of money from her at various times. In June, 1955 Mrs. Engelberger filed her complaint against Lynch, praying, *inter alia*: (a)

that she have judgment against him and his wife[1] for the amounts due on certain notes and mortgages, together with foreclosure thereof; (b) that she have a complete accounting of Lynch's dealings as her fiduciary; and (c) that she have judgment against Lynch for all that he owed her as disclosed by the accounting. To the complaint there was filed an answer and a cross-complaint.

In October, 1955 Mrs. Annie Engelberger—on petition of her three daughters and three grandchildren—was declared mentally incompetent; and her daughter, Mrs. Tillie Engelberger Garnes, was appointed as guardian of Mrs. Engelberger and was substituted as plaintiff in the said suit that Mrs. Engelberger had filed. Various interlocutory orders were made[2]; and by agreement an accountant was appointed to audit the books.

Trial in the Chancery Court resulted in a decree of April 10, 1956, finding *inter alia:* (a) that Mrs. Annie Engelberger had been "since 1946 mentally incompetent and incapable of transacting business matters"; (b) that Lynch and wife had borrowed money from Mrs. Engelberger, evidenced by notes, at intervals from 1942 to 1950, and still owed Mrs. Engelberger a total balance on three notes of $13,975.27 and interest at 10% from February 2, 1956 until paid; (c) that certain mortgages executed by Lynch and wife to Mrs. Engelberger should be foreclosed; (d) that certain contracts and powers of attorney executed by Mrs. Engelberger to Lynch should be cancelled; (e) that Lynch was entitled to a deed to one property upon payment of a certain amount; and (f) that Lynch was liable for $752.35 damages he had inflicted on a building.

From this decree, Lynch and wife have appealed; and Mrs. Garnes, as Guardian, has cross appealed. The

[1] Mrs. Lynch was a party defendant because she had joined her husband in signing notes and mortgages to Mrs. Engelberger. Judgment was rendered against Mrs. Lynch for several such items; and she is an appellant here; but since Mr. Lynch is the principal party, we will refer to him as "the appellant."

[2] Lynch filed a cross complaint against Marion Gisler (daughter of Mrs. Engelberger) who responded with a cross complaint against Lynch. In the final decree the Chancery Court dismissed both cross complaints without prejudice, so this appeal does not involve the Lynch-Gisler controversy.

appellants have listed seven points on their direct appeal[3]; and the appellee has listed five points on her cross-appeal[4]. We group and discuss the points in suitable topic headings.

I. *The Amount Due By Lynch On The Notes To Mrs. Engelberger.* The record shows there were four notes executed by Lynch to Mrs. Engelberger:

Note No. 1 was dated April 24, 1942 for $3,800. The mortgage securing this note was duly released of record in November, 1942: so the Trial Court correctly held this note to have been fully satisfied and no judgment was rendered against Mr. Lynch on this note.

Note No. 2 was dated October 2, 1942 for $3,800. Lynch's pleadings admitted that this was a valid note, but he claimed many credits on it. The Chancery Court allowed credits totalling $1,348.69 and found that the balance of principal and interest due on February 2, 1956 was $5,940.65.

Note No. 3 was dated June 21, 1950 for $3,450. Lynch's pleadings admitted that this was a valid note, but he claimed many credits on it. The Court allowed credits totalling $1,450 and found that the balance of principal and interest due on February 2, 1956 was $3,080.

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[3] These points are: I. Evidence Insufficient upon Which to Base Finding of Incompetency. II. Court Erred in Excluding Testimony of John L. Sullivan. III. Conduct and Actions of Appellees Refute the Charge of Incompetency. IV. Entire Absence of Proof of Unfair Dealings or Overreaching on Part of Appellant. V. So-called Audit is Worthless to Strike a Balance Between the Parties or to Arrive at Any Amount upon Which Judgment Could be Returned. VI. The Court Erred in Rendering a Judgment for Demolishing the Front of Building at 508-510 Main Street, North Little Rock, Arkansas. VII. Material Inconsistencies in Court's Findings and Final Decree.

[4] These points are: I. The ruling of the court that the purchase of the lot from the incompetent is a valid contract and not subject to cancellation is inconsistent and erroneous. II. Contracts with incompetents, except for necessities, are void *ab initio*. III. Appellee is entitled to have her title quieted as against the appellant without respect to improvements, especially since appellant has sought recovery of his improvements against a third party, which matter is not before this Court. IV. It is clear by a preponderance of the evidence that the appellant is guilty of violations of the fiduciary trust reposed in him, and that the court overlooked the fact that the contract of purchase carries fraud on the face of it. V. Appellant is, in effect, a trustee *ex maleficio*; and, as such, cannot recover for any improvements made by him upon this property.

Note No. 4 was dated July 13, 1950 for $3,200. Lynch's pleadings admitted that this was a valid note, but he claimed many credits on it. The Court found that there were no credits on this note and that the balance of principal and interest due on February 2, 1956 was $4,954.62.

Thus, the Court found that the total on notes Nos. 2, 3, and 4, due February 2, 1956, was $13,975.27; and Lynch says that he is entitled to many credits that the Chancery Court failed to allow him. When Lynch admitted that notes 2, 3 and 4 were valid, the burden devolved on him of proving payment. *Caldwell* v. *Hall,* 49 Ark. 508, 1 S. W. 62; *Barnett* v. *Bank of Pangburn,* 147 Ark. 500, 228 S. W. 369; *Toulmin & Toulmin* v. *Underwood,* 172 Ark. 813, 290 S. W. 377; and *Daugherty* v. *Merrifield,* 190 Ark. 537, 80 S. W. 2d 72. Mr. Lynch failed to discharge this burden beyond the amounts allowed by the Chancery Court. Early in the course of the litigation it became evident that there would have to be an audit of Mr. Lynch's books in order to learn of his dealings as Mrs. Engelberger's agent. Accordingly, *by agreement of both sides,* an order[5] was made on November 25, 1955 appointing Mr. O. B. Courtney to make the audit. Mr. Courtney undertook to audit Mr. Lynch's books, in keeping with the Court order; and on December 16, 1955 Mr. Courtney filed his 14-page report. He also testified in the case.

It is apparent that Mr. Lynch kept very inadequate records. There were no entries prior to November 16, 1948, and no entries after July, 1955. Furthermore, it

[5] The order recited in part: "On this day, by agreement of all parties hereto, it is ORDERED: O. B. Courtney, an accountant of the City of Little Rock, be and he is hereby authorized and directed by the Court to make an audit of the books and records of the plaintiff, *Anna* Engelberger, (sic) the defendants, S. J. Lynch and Theresa Lynch Raines, and the cross-defendant, Mary Gisler, with reference only to the dealings and transactions between the parties to this cause as set forth in the pleadings in said action. . . . Said O. B. Courtney is authorized and empowered to have access to and inspect all and only such records, books, receipts, cancelled checks, documents, bank accounts and all correspondence of all of the parties hereto that have reference to the dealings and transactions between them, that may in any way aid the court in arriving at a final determination of the controversy between the parties."

was impossible to determine whether certain expense items were paid on account of Mrs. Engelberger's property or for personal expense of Mr. Lynch on his own property. Not only was the burden on Mr. Lynch to prove any payments he claimed on his notes to Mrs. Engelberger, but also it was his duty as agent to keep an accurate record of his dealings for her. As stated in 2 Am. Jur. 226 ("Agency" § 286) on the duty of an agent to keep and render accounts:

"The duty of an agent to account for moneys of his principal coming into his hands is well recognized. As stated by the American Law Institute, unless otherwise agreed, an agent is subject to a duty to keep, and render to his principal an account of, money or other things which he has received or paid out on behalf of the principal."

In view of the duties of Mr. Lynch and the poor records that he kept, and the uncorroborated nature of his testimony, we cannot say that the Chancery Court was in error in its holding in regard to credits claimed by Mr. Lynch. So we affirm the decree as to amounts due on the notes.

II. *The Decree Ordering The Guardian To Execute A Deed.* The decree reads in part as follows:

"The prayer of the defendant S. J. Lynch for an order of this Court to require the incompetent to execute a deed to him to Lot 1, Block 16, Holt's Industrial Addition to North Little Rock is hereby granted. Tillie Engelberger Garnes, guardian of the estate of Annie Engelberger, shall forthwith execute said deed and convey said Lot to S. J. Lynch upon payment to said guardian of $1,450 together with interest on said sum . . ."

The appellee has cross appealed from this portion of the decree; but we affirm the said quoted portion of the decree on the cross appeal. The evidence did not show that Mrs. Engelberger was incompetent at the time of the contract. The evidence shows that the price for this property was fair at the time of the contract, and that Lynch had spent considerable money on the

property in reliance on the contract. We conclude that substantial equity was accomplished by the decree concerning this property.

III. *The Judgment Against Lynch For Damages.* The evidence showed that Lynch had ordered that the front of a business building in North Little Rock be torn down preparatory to having the front rebuilt. The Court found that by reason of Mr. Lynch's orders the building had been damaged a total of $1,205; and that Lynch had spent $452.65 on repairs on the property for which amount he was entitled to credit. After allowing the credit, the Court rendered judgment against Lynch of $752.35 as damages to the building.

We hold that the damage judgment was erroneous. Lynch had caused the front of the building to be torn down in order to abate a dangerous situation. Mr. J. P. Caldwell, Chief of the Fire Department of North Little Rock, testified that, to his personal knowledge, the building in question had been in existence fifty years or more; that in 1953 he first notified Mr. Lynch that the building was unsafe and would be condemned unless it was repaired; and that certain repairs were made, but that the dangerous condition of the front wall existed until Mr. Lynch tore it down in 1955[6]. It was not shown that Mr. Lynch had acted negligently or wrongfully in any way in this building matter; so the damage judgment of $752.35 against him is reversed and set aside.

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[6] Here is a portion of Mr. Caldwell's testimony: "Q. Now do you remember the instance of Mr. Lynch having the brick torn out from the top there, Chief? A. Yes. Q. Have you had occasion to inspect those beams? A. Yes, sir. Q. Now will you tell the Court, Chief, what condition those beams are in and were in when he tore the brick out? A. Well, the front wall was leaning out there three or four inches and the roof had been bad and rain water had soaked in there and deteriorated the beams and he asked—he did make a statement that he was going to have it fixed. . . . Q. Were those beams in good condition or bad condition? A. Well, to a certain extent I would say they were in bad condition. Q. Do you think in repairing or rebuilding, those old beams should have been used? A. Well, some of them could, yes. Q. Did you notice the brick above them that were resting on those front beams? A. That's right, I did. Q. What condition were those brick in? A. Those brick were old bricks and they were deteriorated. Q. Were they tight or loose? A. They were loose. Q. Was there any danger of people passing there from those brick or the front leaning like it was? A. Well, they had two or three signs there and I advised them to take the signs down for, of course, I am no engineer or anything like that but I didn't think that the front wall was perfectly safe."

IV. *The Cancellation Of The Other Contracts Lynch Had Obtained From Mrs. Engelberger.* Lynch obtained several contracts from Mrs. Engelberger:

(a) On October 30, 1945 he persuaded her to sign a contract which gave him 16 years in which to sell the property owned by her at 508 Main Street in North Little Rock and also certain property she owned in Levy[7].

(b) On September 9, 1952 Mr. Lynch persuaded Mrs. Engelberger to execute to him an unlimited power of attorney to do as he wished with any and all of her property.

(c) On September 11, 1952 Lynch persuaded Mrs. Engelberger to give him a contract allowing him fifteen years to sub-divide and sell a 20-acre tract in Levy[8].

The Chancery Court cancelled all three of these contracts, as above referred to, and Lynch claims error. As regards the contracts of 1952, they are subject to cancellation because of Mrs. Engelberger's mental condition at the time of execution, all of which will be discussed in Topic V, *infra.* As regards the contract of October 30, 1945, we hold that it should have been cancelled as an imposition on Mrs. Engelberger. In 1945 Lynch had acted as Mrs. Engelberger's fiduciary for ten years and in such a position of trust and confidence he persuaded

[7] This contract reads: "For and in consideration of the services rendered and to be rendered by S. J. Lynch in selling or assisting me to sell or exchange the property described on the reverse side of this contract, of which I am the sole owner, I agree that S. J. Lynch shall have the sole and exclusive agency of sale for said property for a period of 16 years from date hereof, and thereafter until notified by me orally or in writing of its withdrawal from sale; and I hereby authorize them to sell or contract with purchaser for the sale and conveyance by warranty deed of said premises according to the price and terms herein given, title to be shown by abstract of title which I agree to furnish. If said property be sold or otherwise disposed of by Annie Engelberger during the above period, I agree to pay to their order the sum of $ being the customary commission of 5 per cent on the gross amount of said sale, or the value at which it may, with my consent, be exchanged for other property. I further agree to pay said commission to S. J. Lynch if said property be sold or otherwise disposed of by any other person, firm or corporation including the undersigned, during the above period, or after the above period, on information given, received, or obtained through this agency. (Signed) Mrs. Annie Engelberger."

[8] This contract was on the same form as the previously numbered exhibit.

a lady then past 80 years of age to give him an exclusive listing for a period of 16 years on her valuable property. In short, Lynch was getting all the benefit of whatever might happen to property values from 1945 to 1961, without being required to do anything during that time. It was unconscionable for him to take such a contract from Mrs. Engelberger in view of the relationship then existing. The Trial Court was correct in cancelling the 1945 contract; and the Trial Court was also correct in cancelling the 1952 contracts, in view of the matter now to be discussed.

V. *Mrs. Engelberger's Mental Condition.* In 1955 the Probate Court made an adjudication that Mrs. Engelberger was then mentally incompetent, and appointed her daughter, Mrs. Tillie Engelberger Garnes, as her guardian; and the guardian was substituted as the plaintiff in the pending litigation, which is now before us. Of course, the Probate adjudication is not *conclusively* binding on the Chancery Court in a case like the one at bar. (*Feild* v. *Koonce,* 178 Ark. 862, 12 S. W. 2d 772, 68 A. L. R. 1303 and annotation; *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S. W. 2d 470; and *Dew* v. *Requa,* 218 Ark. 911, 239 S. W. 2d 603). So the Chancery Court heard a vast array of witnesses as to Mrs. Engelberger's mental condition in order to determine when she actually became mentally incompetent.

The Chancery Court found and decreed: "The Court finds that the said Annie Engelberger is now, and has been since 1946, mentally incompetent and incapable of transacting business matters". Appellant says that the date of 1946 is in error; and we agree that the preponderance of the evidence shows the date to have been later than 1946. Dr. E. J. Ritchie, Mrs. Engelberger's personal physician, was called as a witness by appellee. He testified that he had known Mrs. Engelberger for twenty years; that she suffered with hypertension, generalized arteriosclerosis, and arteriosclerotic heart disease; that he began to notice the failing of her faculties in about 1947; that her condition in 1950, as compared with 1956, would be a "thing of degree"; that she had progressively grown worse since 1947; and that she was senile.

There was testimony by many lay witnesses, some interested and some disinterested; but we find that Dr. Ritchie's testimony is the most enlightening evidence in the record on this matter of geriatrics. When a person has reached the age that Mrs. Engelberger had in 1952 and has her afflictions, then at times such a person might be normal and at other times abnormal. Such cases as *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695; and *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539, shed light on such situations.

At all events, we cannot say that every act of Mrs. Engelberger after 1946 was the act of an incompetent: rather we hold that each act is to be tested as of its own date and surrounding circumstances. But beginning with 1952 the evidence shows Mrs. Engelberger to be totally mentally incompetent. Certainly the contracts of September 9, 1952 and September 11, 1952 must fail because of her mental condition.

VI. *Refused Testimony.* In connection with the mental condition of Mrs. Engelberger, the appellant complains of the refusal of the Court to allow Hon. John L. Sullivan to testify when called as a witness by appellant. Mr. Sullivan, as her attorney, had prepared a will for Mrs. Engelberger; and appellant called Mr. Sullivan to testify as to Mrs. Engelberger's mental condition at the time the will was executed. Mr. Sullivan did not desire to violate the confidence of his client and asked the Trial Court to protect him against being required to answer[9]. Also the appellee objected to the appellant interrogating Mr. Sullivan because of the relationship of attorney and client; and the Court ruled that Mr. Sullivan would not be required to testify.

Appellant complains of the Court's ruling; but the point is without foundation because the appellant made no offer to prove what the testimony of Mr. Sullivan would have been if he had been required to testify.

[9] Mr. Sullivan stated in this regard: "If the Court please. May I get my position clear in this matter. During the period of time that I knew Mrs. Engelberger and transacted business with her, I acted as her attorney. I am willing to give any information pertaining to any transaction where the Court will hold that I am not bound by my professional interest in the matter."

Boland v. *Stanley,* 88 Ark. 562, 115 S. W. 163; *Ward* v. *Ft. Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085. So, even if Mr. Sullivan's testimony had been competent against the claim of confidential relationship between attorney and client — a point we need not decide—still appellant made no offer to show what Mr. Sullivan's testimony would have been.

CONCLUSION

We affirm the Chancery Court on both direct appeal and cross appeal on every point except the damage judgment, as discussed in Topic III. The damage judgment is reversed and set aside; but, because the damage judgment is a very small portion of the case, we adjudge the costs of this Court against the appellant, S. J. Lynch. The costs in the Trial Court have already been adjudged against him by the decree of the Chancery Court.

KARR *v.* STATE.

4868 301 S. W. 2d 442

Opinion delivered April 29, 1957.

Claude F. Cooper, for appellant.

Bruce Bennett, Atty. Gen.; Ben J. Harrison, Asst. Atty. Gen., for appellee.

MINOR W. MILLWEE, Associate Justice. Appellant was convicted of the crime of false pretense under Ark. Stats. Sec. 41-1901 by falsely and fraudulently obtaining the signatures of two cosigners on his promissory note for $3,000. His punishment was fixed at three years in the penitentiary.

The principal contention for reversal is that the evidence is insufficient to support the verdict. Appellant resided in Blytheville, Arkansas, in 1952 when he procured a franchise as a salesman or distributor of farm machinery and equipment for the Winpower Manufacturing Company of Newton, Iowa, upon a commission basis. He maintained his office in his residence and solicited orders from retail dealers in parts of Arkansas, Mississippi, Tennessee and Louisiana. The company sold forage boxes or beds which were supplied by another manufacturer under Winpower's brand name. In January or February, 1954, the company notified appellant and its other distributors that it had discontinued the sale of forage boxes.

W. L. Walker operates an insurance agency in Blytheville and J. F. Scrape is a farmer living near there. Walker had known appellant about five years in the early part of 1955 when the three men became friends

in connection with a Dale Carnegie course which they took. Walker and Scrape testified that in July, 1955, appellant solicited their assistance in a business deal upon which he stood to make a generous profit; that he represented to them that he had orders for eight forage boxes from retail dealers in Mississippi and Louisiana which had already been placed with the Winpower Manufacturing Company; and that the sum of $2,891.28 was necessary to effect the release of the equipment and the balance of a $3,000 loan was needed for traveling expenses to insure proper delivery. Acting on these representations, Walker and Scrape became cosigners on appellant's note to the First National Bank of Blytheville for $3,000 on July 23, 1955, payable in 90 days. When appellant defaulted Walker and Scrape paid the note and secured a judgment against him which remains unsatisfied. When Scrape and Walker talked to appellant after the note became due he declined to identify the dealers from whom he claimed to have orders for eight forage boxes.

F. K. Bauer, Secretary of Winpower Manufacturing Co., testified of notices to appellant in 1954 that the company had discontinued the sale of forage boxes; that the company had no orders for such equipment from appellant in July 1955; and that the last shipment of any kind to appellant's account was made on May 10, 1955.

In his testimony appellant admitted representing to Walker and Scrape that he had orders for eight forage boxes from dealers in Mississippi and Louisiana and that $2,891.28 was required to complete said orders but denied representing that the orders had been placed with the Winpower Company. Instead he stated he had orders from four dealers for eight boxes which were placed with another company and so informed Walker and Scrape; and that three of the dealers cancelled their orders for two boxes each before delivery. Shortly after procuring the loan appellant transferred the proceeds to a Memphis bank. He introduced an invoice and check for $723.32 to another company in support of his statement that he sold and delivered two forage boxes to a dealer

in Mississippi shortly after July 23, 1955. He spent the balance of the $3,000 on personal bills. Although he stated that he had documentary proof of the other three orders and cancellations, none was produced.

The false pretense which constitutes an offense under Sec. 41-1901, *supra,* is a false representation of an existing fact or past event by one who knows that it is not true and of such nature as to induce the party to whom it is made to part with something of value. *Fisher* v. *State,* 161 Ark. 586, 256 S. W. 858. The burden is on the State to prove the falsity of the representations as an essential ingredient of the offense. *Fox* v. *State,* 102 Ark. 451, 145 S. W. 228. While it was disputed by appellant, the testimony offered by the State warranted a jury finding that appellant fraudulently obtained the signatures of Walker and Scrape to the $3,000 note which they were forced to pay by falsely pretending he had orders for eight forage boxes which had already been placed with the Winpower Manufacturing Company and that the sum of $2,891.28 was necessary to effect the release of the boxes; and that such representations were false and known to be so by appellant and were relied on by Walker and Scrape in signing the note. The credibility of the witnesses was a matter for the jury and the evidence was sufficient to satisfy the requirements of the statute and sustain the verdict of guilty.

The record reflects that immediately before the first witness was called the trial court stated: "In the opening statement of Mr. Harrison for the State he stated to the jury that, he thought that the witnesses would testify in a cerain manner, to which an objection was made by Mr. Cooper for the Defendant, on the ground that this was an expression of opinion on the part of the Prosecuting Attorney, which objection was overruled and exceptions noted. Later in his opening statement Mr. Harrison, for the State, stated to the jury that he thought that the testimony of the witnesses would justify a finding of guilty by the jury. This statement was objected to by Mr. Cooper, for the Defendant, and said objection is being overruled by the Court and exceptions

noted thereto." There is nothing else in the record to indicate the nature and contents of the remarks of the prosecuting attorney in his opening statement. The principal object of the opening statement is to give the jury an outline of the evidence to be introduced by both sides and the nature of the issues to be tried. (Ark. Stats., Secs. 43-2110 and 2111). Good faith is generally the test in passing upon the conduct of the prosecuting attorney in his preliminary presentation of the case and much discretion in what may be stated is given to the trial court. *Stanley* v. *State,* 174 Ark. 743, 297 S. W. 826. We will not presume that the undisclosed remarks of the prosecuting attorney were improper and we find nothing in the court's narrative to sustain appellant's argument that counsel's statements were prejudicial or made in bad faith.

There are several assignments of error in connection with the admission or exclusion of evidence, some of which are too indefinite to ascertain what appellant was objecting to. We have carefully examined other assignments relating to certain questions asked by the prosecuting attorney which were unanswered and we find no error in the court's action in overruling appellant's objections thereto. Appellant also argues error in the court's refusal to strike the testimony of Walker and Scrape to the effect that they had a conversation with appellant after the note became due in which they asked him to identify the dealers who ordered the eight forage boxes and he failed to do so. We cannot agree that such testimony was wholly irrelevant, incompetent and immaterial to the issues in the case. The jury had a right to consider it as well as its denial by the appellant along with all the other facts and circumstances in determining guilt or innocence.

We find no prejudicial error in the record, and the judgment is affirmed.

5-1262 301 S. W. 2d 439

Opinion delivered April 29, 1957.

[redacted]

Chas. F. Cole, for appellant.

Wayne Boyce, for appellee.

GEORGE ROSE SMITH, J. The appellee sued the appellant upon a $700 account for labor and materials furnished in the construction of a dwelling. The summons was served on January 16, 1956, but as a result of Walden's failure to bring the matter promptly to his attorney's attention the defendant's answer was not filed until February 22. On motion of the plaintiff a default judgment was entered on October 15, the court being of the opinion that Acts 49 and 351 of 1955 mandatorily require the entry of such a judgment when the defendant fails either to plead or to obtain an extension of time for pleading within twenty days after the service of summons. Ark. Stats. 1947, §§ 27-1135, 29-401, and 29-410. During the same term of court Walden's motion

to set aside the default judgment was overruled, and he has appealed.

Upon the facts now before us, which involve no suggestion of unavoidable casualty, the trial court was correct in his interpretation of the 1955 statutes. The legislative intention that led to the enactment of Acts 49 and 351 must evidently be determined by comparing these statutes with the law as it existed before their passage.

A defendant was formerly required to file his defense by noon of the first day of a regular or adjourned session of court held twenty days or more after the service of summons. Ark. Stats., § 27-1135, as it read before the 1955 amendment. Despite this requirement, the court had broad discretionary authority to allow the filing of an answer after the expiration of the time limited. Ark. Stats., § 27-1160; *Blauvelt* v. *Blauvelt,* 199 Ark. 710, 136 S. W. 2d 201. And before rendering judgment by default the court might for good cause allow further time for the filing of a defense. Ark. Stats., § 29-401, as it read before the 1955 amendment.

As every practicing lawyer knows, the statutes just mentioned allowed much unnecessary delay in the conduct of litigation. It was not unusual for a defendant to file a demurrer or a dilatory plea on the last day allowed. After this pleading had been disposed of additional time had to be given for the filing of an answer —all of which often prevented a trial on the merits until at least another term of court. If the terms were held at six-month intervals the trial might easily be delayed for a year or more.

It cannot be doubted that Acts 49 and 351 were adopted as a means of reducing needless delay in the trial of cases. Section 2 of Act 49 requires the defense to be filed within twenty days after the service of summons, without reference to any term of court. Ark. Stats., § 27-1135, as amended. Section 3 provides for judgment by default and requires that a defendant's application for further time be made before the expiration of the period within which the defense should have been filed. Ark. Stats., § 29-401, as amended. Act 351 per-

mits the courts to dispose quickly of defenses that do not go to the merits of the case. Ark. Stats., §§ 27-1162, 27-1163, and 29-410, as amended.

In view of the unmistakable language of the acts in question we cannot sustain the appellant's contention that the courts still have unlimited discretion to grant further time to a defendant already in default. If that were true the 1955 acts would, as far as we can see, have made no change whatever in the law as it already existed.

In holding the two acts to be mandatory we do not mean to foreclose the possibility of relief to a defendant who has been prevented by unavoidable casualty from making his defense. For nearly a hundred years such a misfortune has been a basis for vacating a judgment after the expiration of the term. Ark. Stats., § 29-506. The 1955 acts do not purport to change the law in this respect. Since there might be no good reason for requiring a defendant to wait until after the term before asking relief on the ground of unavoidable casualty, it may well be true that the statute can also be invoked before the lapse of the term. In the case at bar, however, there is no indication of unavoidable casualty or misfortune; so we need not explore this question in detail.

There is no merit in the further contention that the court below erred in entering judgment by default without requiring the plaintiff to present proof. There was filed with the complaint a verified statement of the account, which is sufficient to support the judgment. Ark. Stats., § 28-202; *Clarke* v. *John Wanamaker,* 184 Ark. 73, 40 S. W. 2d 784.

Affirmed.

PYLE *v.* AMSLER, JUDGE.

5-1256 301 S. W. 2d 441

Opinion delivered April 29, 1957.

Talley & Owen and *William L. Blair,* for petitioner.

Cockrill, Limerick & Laser, Abner McGehee, Jacob Sharp, Jr., for respondent.

PAUL WARD, Associate Justice. The petitioner by this writ seeks an interpretation of the language used in Section 2 of Act 49 of the Acts of 1955, which section is also § 27-1135 of Arkansas Stats. Supp. For the purpose of this opinion the material part of the aforementioned section reads as follows: "The defense to any complaint or cross complaint must be filed the first day after the expiration of the periods of time set forth below, as the case may be: First. Where the summons has been served 20 days in any county in the State;"

On September 11, 1956, Lakeside School District No. 1 filed a complaint in the Pulaski Circuit Court, Second Division, against the petitioner, J. E. Pyle, seeking damages in the amount of $1,500 for, allegedly, defective workmanship on a certain building. The return on the summons issued against Pyle shows that it was served on September 13, 1956 in Pulaski County.

On October 11, 1956 (no answer or other pleading having been filed by Pyle) the said School District was granted a default judgment against the petitioner by the trial judge, sitting as a jury, in the amount of $1,385.

On October 24, 1956 Pyle filed a motion to set aside the default judgment against him on the ground that he had not been notified by registered mail of the said School District's intention to ask for such judgment.

On November 2, 1956 the trial court entered an order granting the above mentioned motion and setting aside the default judgment theretofore entered. Said order states it was made "during term time." On the same day, November 2, 1956, Pyle tendered an answer, and the court refused to allow it to be filed "for the reason that said answer has not been filed according to the provisions of Section 2 of Act 49 of 1955."

Upon the trial court's refusal to permit him to file an answer Pyle presented his petition to this court for a Writ of Mandamus, asking us to command the respondent, the Hon. Guy Amsler, Judge, to permit him to file an answer to the complaint above mentioned. We are not here concerned with the trial judge's reason for setting aside the default judgment, and need not be since he did so during term time.

The question herein raised has been decided against the petitioner's contention by the decision in the case of *Owen Walden* v. *Charles Metzler, Jr.,* handed down by this court today. Therefore the petition for a Writ of Mandamus is denied.

WOMACK *v.* MANER.

5-1266 301 S. W. 2d 438

Opinion delivered April 29, 1957.

Kenneth Coffelt, for appellant.

James C. Cole and *O. Wendell Hall, Jr.,* for appellee.

SAM ROBINSON, Associate Justice. The complaint in this case alleges: "From time to time, and at various intervals, . . . the plaintiff has paid to the defendant the sum of $1,675 . . . for the consideration of the defendant, as the Judge of the Circuit Court of Saline County giving to the plaintiff whatever protection was necessary to prevent the plaintiff from being prosecuted or suffering punishment in said court for engaging in the unlawful business of gambling in Saline County which the plaintiff was engaged in with the full knowledge, consent and approval of the said defendant as the Judge of said Court. Plaintiff alleged, that the consideration for his paying to the defendant the said sum of money as herein above set forth is void and unlawful and was void and unlawful when said money was paid by him to defendant, . . . Wherefore, plaintiff prays, that he have judgment against the defendant for his cause of action herein stated, in the sum of Sixteen Hundred and Seventy Five Dollars; for his costs herein expended, and for all proper relief."

The defendant demurred to the complaint on the ground that a cause of action is not stated. The demurrer was sustained by the trial court, presided over by a judge on exchange. The plaintiff, Womack, has appealed.

The appellant relies on *Lane* v. *Alexander,* 168 Ark. 700, 271 S. W. 710, as authority for his alleged right to recover. In that case, Alexander filed suit to replevy bonds valued at $20,100. As a defense, Lane alleged that he had won the bonds from Alexander at the gaming table. Chief Justice McCulloch said: "The answer tendered no valid defense, for the statutes of this State expressly authorize the maintenance of an action for the recovery of money or property lost at any game or gaming device or on any bet or wager." Crawford & Moses' Digest, § 4899 (Ark. Stats. § 34-1601).

But, we have no statute authorizing the recovery of money alleged to have been paid as a bribe. It is firmly established that in a situation such as is set out in the complaint the law will not aid either party to the alleged illegal and void contract. According to the allega-

tions in the complaint the parties are *pari delicto,* hence, plaintiff cannot recover.

In *Edwards* v. *Randle,* 63 Ark. 318, 38 S. W. 343, this court said: "The transaction, taken altogether, plainly shows that the sale and purchase of the office of postmaster was the main thing, . . . This court cannot lend its aid to either party in respect to any claim or thing involved in such a contract."

"The general rule is, that where an illegal contract has been made, neither courts of law nor of equity will interpose to grant any relief to the parties, but will leave them where it finds them, if they have been equally cognizant of the illegality." *Shattuck* v. *Watson,* 53 Ark. 147, 13 S. W. 516.

"Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party." *Neece* v. *Joseph,* 95 Ark. 552, 129 S. W. 797.

"Any contract, therefore, the consideration of which is to conceal or withhold evidence of a crime or to abstain from the prosecution therefor, is void, . . ." *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326, 144 S. W. 198.

In *Patterson et al* v. *Hamilton,* 19 Ky. L. Rp. 825, 42 S. W. 88, it was held that there can be no recovery of money paid as a bribe.

The United States Supreme Court said, in *Clark* v. *United States,* 102 U. S. 322, 26 L. Ed. 181: "Clearly this was bribery, and placed the claimants and the man they corrupted *in pari delicto.* They could not recover back from him the money they paid, . . ."

And, in *United States* v. *Galbreath,* 8 Fed. 2d 360, it was said: "Petitioner therefore was guilty at least of an attempt to commit bribery, if not of that crime itself. It is of course unthinkable that a court of justice will assist in the recovery of property voluntarily surrendered under such circumstances."

Affirmed.

Opinion delivered May 6, 1957.

J. Harrod Berry, for appellant.

Reed W. Thompson and *C. Byron Smith, Jr.,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant was convicted of violating Section 3 of North Little Rock city ordinance No. 490, approved April 8, 1918, which provides as follows:

"It shall be unlawful for any person or persons to keep, store, pile, erect, maintain or permit upon any premises owned, occupied by, or under the control of him or them, or upon any street, alley, or sidewalk adjacent thereto, any inflammable or combustible material such as hay, straw, shavings, rags, wool, packing cases, packing materials, inflammable waste materials, lumber or other substance in such a manner as to endanger from fire any building or structure within the city limits."

Under this language of the ordinance, appellant was charged with "creating a fire hazard on May 21, 1956." After conviction, in a trial before the court only, a new trial was granted, and the cause set for jury trial. On hearing the evidence, the jury returned a verdict of guilty, and appellant was fined $25, from which he appeals. Appellant's principal argument for reversal is that the city ordinance, and more particularly Section 3, is unconstitutional and void: (1) For vagueness and uncertainty; (2) For being, as a penal law, too indefinite; (3) For being an improper delegation of authority to the City Fire Department; (4) As an unreasonable restraint on a proper, legitimate business operation.

The Section (quoted above) provides that it is "unlawful * * * to keep, store, pile, erect, maintain or permit upon any premises owned, occupied by, * * * an inflammable or combustible material such as * * *

lumber or other substance in such a manner as to endanger from fire any building or structure within the city limits." It is true that the ordinance does not "spell out" specific acts that would violate the phrase *"in such a manner,"* and appellant accordingly contends that the ordinance is vague and uncertain. We do not concur with this argument. Actually, in dealing with this particular subject (fire hazards) it would be extremely difficult to specify each act that would constitute a hazard. This is true because many conditions and circumstances must be considered in determining whether particular premises create a hazard . . . the location or neighborhood of the business, the age and type of the material, the method of maintenance, etc. The same material which might well constitute a fire hazard in one location might well be permissible in another location. The same lumber, neatly stacked, might well prove hazardous if carelessly piled or thrown upon a heap. As every camper and outdoorsman knows, wood will burn more easily and quickly when loosely arranged, because of the circulation of oxygen.

Cases cited by appellant in support of his contention do not apply here. *State* v. *Bryant,* 219 Ark. 313, 241 S. W. 2d 473, dealt with what constituted a "small farm vehicle." *Green* v. *Blanchard,* 138 Ark. 137, 211 S. W. 375, 5 A. L. R. 84, dealt with construction of an act regulating the practice of dentistry. Both of those cases involved statutes, the provisions of which, average men might well disagree upon. We do not think that true in the instant cause. The Supreme Court of Michigan, in the case of *People* v. *Sarnoff,* 302 Mich. 266, 4 N. W. 2d 544, 140 A. L. R. 1206, said:

"Sarnoff contends that Section 2969 of the Ordinance No. 131-D amending Ordinance No. 354-C of the City of Detroit, known as the Building Code, is unconstitutional, because the provision requiring a dwelling and the parts thereof to 'be kept in good repair by the owner' is too broad and indefinite and therefore, fails adequately to inform the owner of the particular act or acts prohibited. * * *"

"However, the words 'good repair' have a well known and definite meaning. * * * They sufficiently inform the ordinary owner that his property must be fit for the habitation of those who would ordinarily use his dwelling. *It would be difficult, if not impossible, to lay down a rule of conduct in more exact terms which would at the same time cover the varying conditions presented in each individual case.* * * *" (Emphasis supplied)

The Supreme Court of Tennessee, in the case of *Mayor and Aldermen of Town of Jonesboro* v. *Kincheloe,* 148 Tenn. 688, 257 S. W. 418, in a very lengthy opinion, aptly discussed a similar situation. There, the Court was considering a municipal ordinance, which, in part, provided as follows:

"That it shall be unlawful for any person, firm or corporation to keep, or allow to be kept on his, their or its premises, within the corporate limits of said town, calves overnight, for the purpose of sale or shipment, in such way or manner as that they will disturb the residents thereof by their noises."

We quote in part from the decision.

"The municipal codes of all of our cities contain numerous illustrations of ordinances enacted for the purpose of preserving public peace, which necessarily leave to the enforcing officials a very large discretion, such as those making it an offense to disturb public worship, or schools, to use abusive or insulting language in public, and broadly, to conduct oneself in a 'disorderly' manner in any public place to the annoyance of others. Such ordinances are all subject in a sense to the general charge of indefiniteness, but their validity is not questioned on this account. What constitutes disorderly conduct is always a question of fact under the particular circumstances. The particular ordinance under discussion is directed at the offense of bringing the animals described into the corporate limits and keeping them overnight in such a manner as that they disturb the peace and quiet of the community. If they can be brought

in and kept in such condition, and under such supervision and control, as that they do not disturb the community by their noises, no offense arises under the ordinance. No disorder has resulted and the ordinance has not been violated. This question of fact would be the one to be determined in every case presented. * * *

"The court will determine whether or not the calves have been kept in such a way as to 'disturb' the residents of the town, just as whether or not any person had conducted himself in such a way as to 'disturb' an assemblage.

"Again, by § 2857, Shannon's Code, it is made an offense to 'overdrive, overload' etc., any animal, and it is left to the discretion of the authorities to determine whether or not, on the facts of the given case, the offense has been committed. With respect to all such laws there is some degree of indefiniteness in defining the offense, but these laws are nevertheless valid and enforceable.

"Both statutes and ordinances are in force in some of the states and cities of the country regulating the speed of automobiles without fixing a limit of certain miles per hour, but providing in general terms that the driver shall not move at such a speed as under the conditions will endanger life, and the test of violation is one of fact as to whether or not the defendant was driving recklessly. * * *

"The necessity for definiteness is founded upon the principle that one may not be lawfully punished for a violation of a statute or ordinance which does not by its terms give notice of the nature of the offense. It must be 'certain and definite, so that the average man may with due care after reading the same, understand whether he will incur a penalty for his actions or not.' Otherwise it is void for uncertainty. 19 R. C. L. 810.

"The ordinance before us is sufficiently certain in the definition of the offense, and also with regard to the penalty. Any average man reading it will readily understand that he commits an offense under this ordinance

whenever he keeps, or allows to be kept, at night, on his premises within the corporate limits, calves for the purpose of sale or shipment, without so handling or controlling them as to keep them from disturbing the residents of the community by the noises which calves thus kept, in places strange to them and removed from their accustomed surroundings, as wont to make. * * *" We consider the ordinance to be sufficiently clear as to apprise an individual of acts that would be prohibited under the Section.

It is also contended that the ordinance gives an improper delegation of authority to the city fire department. Ark. Stats. § 19-2401 which act was passed in 1875, provides: "Municipal corporations shall have the power to make and publish, from time to time, bylaws or ordinances, not inconsistent with the laws of the State, for carrying into effect or discharging the powers or duties conferred by the provisions of this act, and it is hereby made the duty of the municipal corporation to publish such bylaws and ordinances as shall be necessary to secure such corporations and their inhabitants against injuries by fire, * * * and they shall have power to make and publish bylaws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof." Thus, there was clear legislative authority for the enactment of the ordinance. Subsequent legislative acts gave authority to the State Insurance Commissioner and State Fire Marshal to enforce all laws in the state regarding the prevention of fires.[1] Section 8 of Act 115 of 1927 provided that chiefs and assistant chiefs of all fire departments, along with certain other officials, should be assistants to the Commissioner and State Fire Marshal, and Section 9 authorized any such assistants to enter any building or premises within their jurisdiction for purposes of inspection. The

[1] The 1925 legislature abolished the office of State Insurance Commissioner and State Fire Marshal, and the duties were then placed upon the Commissioner of Insurance and Revenues. Act 115 of 1927 recreated the office of Insurance Commissioner and State Fire Marshal.

law was subsequently changed by Act 254 of 1955, known as the "Fire Prevention Act." This act empowers the Director of the Arkansas State Police to create and maintain a division of fire prevention in said department, and Section 4 provides that "All mayors, members of fire departments, and peace officers shall be ex-officio deputies to the Director. * * *" Section 5 requires the Director "* * * and his officers and deputies to enforce all laws and ordinances with regard to the following: (1) The prevention of fires; * * *" Section 7 gives the authority to the Director or deputies to "* * * inspect all buildings and premises within their jurisdiction, and issue orders for the compliance with such regulations. * * *" It is obvious that the authority to determine what conditions constitute a fire hazard would have to be placed in some designated official, and we know of none better qualified than an official of the fire department,[2] for certainly this is in conjunction with his ordinary duties. *Smith* v. *Twin State Gas and Electric Co.,* 83 N. H. 439, 144 A. 57, 783, 61 A. L. R. 1015. It should be pointed out that a finding by such an official that a hazard does exist, is not conclusive. The one charged is not "automatically guilty" because of such determination. He still has the right of trial and may offer his evidence, including that of expert witnesses, that the condition complained of does not create a fire hazard. It then becomes a matter for the jury, as it properly should.

Appellant argues that the ordinance is an unreasonable restraint on a legitimate business. We do not agree. Under the police power, the municipal corporation has full authority to protect the health, safety and general welfare of the citizenry. *Geurin* v. *City of Little Rock,* 203 Ark. 103, 155 S. W. 2d 719. *Springfield* v.

[2] Section 1, ordinance No. 490, designates the Chief of the Fire Department as Fire Warden of the City, and empowers him to require owners or occupants of premises which he considers unsafe to correct such conditions so as not to be dangerous in promoting or causing fires. Section 2 empowers the Chief or any member of the Fire Department appointed by him to "enter any * * * place for the purpose of inspecting the same or in the performance of any duty pertaining to the Fire Department."

City of Little Rock, 226 Ark. 462, 290 S. W. 2d 620. We conclude that the ordinance is valid.

It is also contended the court erred in refusing to instruct the jury that before they could find appellant guilty, they must first find that his "acts or omissions, if any, were willful." Webster's New International Dictionary, Second Edition, in defining the word "willful", includes "intentional." In Vol. 45, Words and Phrases, page 198, it is said, "In Statutory offense, created under police power, unless wrongful intent or guilty knowledge, commonly designated by words 'willfully' or 'maliciously', is made essential element of prohibited act, intent to disobey law is immaterial." The ordinance herein involved does not include the word "willful." From 14 Am. Jur., § 24, 784: "* * * A criminal intent is not a necessary element of offenses which are merely *malum prohibitum* or of prohibitive statutes which cover misdemeanors in aid of the police power where no provision is made as to intention. * * *" As stated by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Closson,* 229 Mass. 329, 118 N. E. 653, "* * * It is immaterial that he was not actuated by any criminal intent. In prosecutions for misdemeanors created by statutes under the police powers, proof of a guilty mind or corrupt purpose is not essential to a conviction. * * * The use of the streets by travelers of every description is not prohibited. It is only the mode of operation by drivers of vehicles which is regulated * * * and their violation is punishable as a criminal offense. * * *" Likewise, in *City of Hays* v. *Schueler,* 107 Kans. 635, 193 Pac. 311, the Supreme Court of Kansas passed upon the validity of a city ordinance requiring a red rear light to be displayed between certain hours. The defendant contended that the ordinance was invalid because willfulness or wrongful intent was not made an element of the offense, and that a light might go out without willfulness or intentional fault, and in spite of the utmost care. Relative to this argument, the Court said: "* * * If it were necessary to validity of an ordinance that conditions of the character indicated in the

motion to quash should be inserted, the full protection which the regulation is designed to afford could not be secured, and evasion would be so easy the regulation would practically, if not utterly, fail. The regulation falls, therefore, within the numerous class in which diligence, actual knowledge, and bad motives are immaterial, and the fact of noncompliance entails penalty. * * *"

It is next argued that the evidence was insufficient to support the verdict. Captain John Finn of the North Little Rock fire department testified he talked with appellant on March 8, 1956, and again on May 9, 1956, advising that the condition of his (appellant's) premises constituted a fire hazard, and directing that same be "cleaned up." He described to the jury the conditions that existed, and testified that the hazard still existed at the time of obtaining the warrant. Captain Earl Eller testified that a fire hazard existed, and explained the conditions. Certain photographs were introduced which very clearly showed a condition that needed correction. We conclude the evidence was sufficient to justify the jury in reaching their verdict.

Appellant contends that the photographs (heretofore mentioned) were improperly admitted because (1) they did not correctly reflect what was purported to be shown, and (2) the photographs were taken on May 9, 1956, while the offense was charged to have been committed on May 21, 1956. In regard to the first contention, it was clearly explained to the jury by the photographer that the camera could not record depth; that in certain instances there would be space between lumber and the fence (subject matter of some pictures) not shown by the photograph because of the flatness of the pictures. These facts were made clear to the jury through cross-examination by appellant's counsel, and he was not prejudiced thereby. It is immaterial that the pictures were taken on May 9th, though the offense was charged as of May 21st. The rule announced in the cases of *Medlock* v. *State,* 18 Ark. 363, and *Scoggins* v. *State,* 32 Ark. 205, to the effect that the day on which the offense, as charged, is alleged to have been committed, is not, in

general, material, has been many times reiterated by this Court. It is sufficient if the actual offense was committed prior to the finding of the indictment and on any day within the statute of limitations.[3]

It is contended that the court erred in permitting Captains Finn and Eller to testify regarding the condition of appellant's premises in earlier years, and that they had talked with him relative to same. We consider this evidence admissible to show that appellant was familiar with the nature of conditions considered a fire hazard, and which would subject him to a charge of violation of the ordinance; nor was he prejudiced, since the court instructed the jury, at the request of the appellant, as follows:

"The jury is instructed that this case arose out of a warrant obtained by Captain John Finn of the North Little Rock Fire Department, the prosecuting witness, on May 21, 1956. You are further instructed that the date of the obtaining of the warrant fixes the date on which the defendant is charged with having committed the alleged offense, and that in determining whether or not Mr. Kirkham has violated the law you must therefore consider the circumstances as they were on said date, May 21, 1956."

While this instruction was erroneous, as heretofore mentioned, it was given at the request of appellant, was to his advantage, and he could have been helped by it. Certainly, his rights were not prejudiced.

Finding no reversible error, the cause is affirmed.

[3] Exceptions to the rule include instances where a special day is essential, or where time is the essence of the offense.

5-1163 302 S. W. 2d 78

Opinion delivered May 6, 1957.

[Rehearing denied June 10, 1957]

Dinning & Dinning, for appellant.

D. S. Heslep, for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves the validity of two deeds. Appellant, Mary G. Norton, a widow, and the mother of Richard D. Norton, appellee, and four other sons, on June 18, 1955, executed and delivered two deeds to her son, Richard, in one of which she conveyed to him 480 acres of farm land in Phillips County for consideration of $7,000 and other valuable consideration, and described as follows: "Northeast Quarter (NE ¼) of Section Eleven (11) and the North Half (N ½) of Section Twelve (12) all in Town-

ship Two (2) South, Range One (1) East, containing 480 acres more or less," and in the other she conveyed town property (residence) in Marvell, Arkansas, for a consideration of $1,000 and other valuable consideration and described as follows: "One Hundred Twenty Two and one-half (122 ½) Feet off of the West End of Lots Number One (1), Two (2), and Three (3) of Mayo's Subdivision of the Town of Marvell, Arkansas." In both deeds she reserved a life estate.

On September 22, 1955, Mrs. Norton filed suit against her son Richard and wife, (residents of Jackson, Tennessee) to cancel and set aside the two deeds on the grounds that they were fraudulently obtained from her through intimidation and false representation; that no part of the consideration named in each of the deeds was ever paid, and was grossly inadequate. On October 20, 1955, Richard, by his then attorney,—who later withdrew from the case,—answered with a general denial. With the issues thus joined, trial was begun February 21, 1956. Mrs. Norton testified at length. Her testimony on direct and cross-examination covered some 54 pages of the record. At the close of her testimony and after a thorough cross-examination by Richard's then attorney, Mrs. Norton rested her case and Richard's then attorney asked permission to withdraw from the case, since he felt that he should become a witness. This permission was granted and an adjournment was taken until February 28, 1956. At the conclusion of the trial, at which the attorney, over appellant's objections, was permitted to become a witness and testify on behalf of appellee, Richard, there was a decree in favor of appellees, and this appeal followed.

For reversal appellant contended that "1. The testimony of the attorney was privileged and inadmissible for any purpose for the reason that he was then, and had been for ten years, the regular attorney of the appellant (Mrs. Norton). 2. The burden of proof under the facts in this case rested upon the defendant and this was overlooked by the Chancellor in making his finding of law that the burden rested upon the plaintiff to prove by clear, cogent and convincing testimony that fraud or un-

due influence was exercised in procuring the execution of the deeds. 3. The clear preponderance of the competent testimony in this case rests with the appellant and the court erred in basing his decision upon testimony that was clearly incompetent."

Mrs. Norton, as indicated, is the mother of five sons including appellee, Richard. It appears undisputed that neither of the sums named in the two deeds was ever paid by Richard. The Chancellor found, and we think the testimony supports this finding, that the 480 acre farm conveyed in one of the deeds was worth $75,000 and the town property $15,000. It was appellant's primary contention that when she signed the two deeds she thought she was signing a will. Her testimony was to the following effect: She testified that before the instruments were executed she sold a few acres of land adjoining the 480 acre tract with the idea of building a home in Marvell. That Richard, who lived in Jackson, Tennessee and was an experienced contractor, volunteered to build the house for her without any charge for his services and that she paid for the cost of material and labor used in building the house, which amounted in the aggregate to $12,271.68. That she had a savings account of $3,000 in Helena, a checking account of some $1,000 to $2,000, and in a building account $10,000, or a little more. At the time she was suffering with cancer and needed medical and hospital care. Richard told her he loved her and realized that she was sick and was giving his services that she might be taken care of in her old age. Richard partly built the house, spent the $12,000 for labor and materials. In building the house Richard charged her with items that he promised to give her, and at the end, in order to keep him from losing she told him she would make a will and that it would be prepared in the office of her attorney. I told him, "At my death you will get the house, but I want the rest of my property to be equally divided with the rest of the boys." He told her that the other boys wanted to take over the property and send her to the insane asylum, "I think the thing for you to do, Mama, is just turn the property over to me and I will take care of you

as long as you live." I said, "No, I will have to investigate that and find out about it, I will go in and see Mr. Cracraft about it." The firm represented me at that time. She was so ill, she forgot all about it. She further testified that the only thing she undertook to do was to make a will for Richard covering the house, which he had helped her to build. Sometime in September or October she went with Richard to Florida to see her brother and when she returned home she found for the first time, that she had executed deeds conveying all the property, that she thought it was her will when she signed the deeds. That these two deeds had been prepared by Richard's attorney of Jackson, Tennessee; that Richard, in company with his attorney, brought the deeds to Marvell for Mrs. Norton's signature. She suggested that the instruments be executed in the office of her attorneys, who had represented her for some ten years. That at the time she signed the two instruments she inquired of Richard why there were two and he informed her that one of them was for her and the other one for him; that it was a will and one was a copy of the other, and she believed what he told her to be true. She did not read them. She signed the two instruments in the presence of her attorney who took her acknowledgment.

Following their return from Florida and as she was leaving Richard's home to return to Marvell, he (Richard) followed her to the car and told her he wanted to buy the farm, and that she replied, "Richard, I have told you and told your wife, Carolyn, that I would never sell that farm as long as I live. That is my security." He put his arm around her and said, "I am your security, honey." I replied, "You can't talk to me about the farm." He said, "It won't hurt if I talk to the other boys about it," and I replied, "You can talk to the other boys about it after my death." At that time she didn't realize that she had signed deeds conveying to him the property, which stripped her of everything in the world she had, and left her without means to secure hospital and medical treatment. That she had been going to a hospital in Little Rock, but that her son, Earl, who

lives in Marvell has been bearing all the expenses, along with a son, Gaines, who lives in Little Rock. That she was so ill she did not recall the date when the house was finished but following its completion and after she learned that she had executed the deeds and not a will (as she intended) she telephoned Richard and asked to see him, that she had cancer and had to go to a hospital in Little Rock, but that he replied that he didn't have time to fool with her. From the time he got the deeds and since the completion of the house he has never been to see her.

Her son, Earl, testified that Richard did not put any money in the house, that he (Earl) was not present when the instruments were signed in the attorney's office. "I didn't know that she was signing any deeds, I knew that she was going to fix a will for Richard to get the house."

Richard testified at length in his own behalf. He positively denied the material parts of his mother's testimony and brazenly asserted in his testimony that she had testified falsely on material matters. We think the testimony of this son, who, in trying to hold fast to an alleged gift of some $90,000 worth of property, for which he paid nothing, and who testified, in effect, that he did not believe his own mother on oath, shows a great disregard of the filial love and respect a child should have, and tends to discredit him.

Richard's wife, Carolyn, one of the appellees and vitally interested, testified that Mrs. Norton was with her, Richard, their two children, and a friend on a trip to Florida, and that Mrs. Norton on several occasions on the trip stated that she wanted Richard to have all the property including the farm. That one of these statements was made in the presence of Mrs. Norton's brother, D. F. Gaines, in whose home Mrs. Norton visited during their stay in Florida. Mr. Gaines (a retired businessman) tended to contradict this testimony of Richard's wife. ". . . it was the first time I had seen my sister in several years and her statements were that her money had paid for the labor and materials for the

new house and that she intended to will this home to Richard after her death but never was any statement made by her that she had deeded it or would deed it to him."

We consider now the testimony of the above attorney, which the trial court admitted, over the objections of appellants, as proper, and which it appears largely influenced the court's findings and decree. Its findings contained this recital: "The court has reached the conclusion that if the testimony of Mr. Cracraft is accepted as being true then there can be no question but that at the time of the execution of the instruments Mrs. Norton knew what she was doing and that her acts in so doing were done freely and without any compulsion or undue influence or under any misapprehension as to the effect of her acts. The sympathy of the court is with the plaintiff and it has a deep regret that it cannot find some legal means by which the relief sought by plaintiff can . . . be granted. There is no question that she now regrets the execution and delivery of these deeds by which she deprives herself and her other sons of any hope on inheritance to the fee in this property. Certainly the defendant and his wife have not filled the offices of devoted children toward the mother in her time of trouble and terrible sickness, but the court is not able to find that plaintiff has met the burden the law places on her to cancel the deeds in this action."

The attorney had testified, in effect, that he took Mrs. Norton into his private office, took her acknowledgment and gave her advice as to the nature and effect of the instruments, and further testified as to what Mrs. Norton told him during this conference. The firm, of which this attorney, Cracraft, is now a member (before he became a member) had probated the will of Mrs. Norton's late husband, secured the appointment of an executrix, and, as indicated, had represented her as her attorney for some 10 years. We emphasize that Mr. Cracraft at all times acted in a fine and upright manner, and nothing herein is a reflection on him in any way. We have concluded, however, in the circumstances that the testimony of the said attorney was in the na-

ture of privileged communication between attorney and client and should not have been admitted in evidence. § 28-601 Ark. Stats. 1947 provides: "The following persons shall be imcompetent to testify: * * * An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent." "The rule as to privileged communications between attorney and client extends to statements of each to the other. It is not material whether the evidence relates to what was said by the attorney, or what was said by the client, in their private conversation on the business in which the attorney is professionally employed," 58 American Jurisprudence, § 483, p. 270. The Circuit Court of Appeals, the 9th Circuit, in the case of *Baldwin* v. *Commissioner of Internal Revenue,* 125 F 2d 812, 141 A. L. R. 548, wherein it was insisted that a deed in question had been executed for publicity and that there was no confidential relationship existing between the attorney and client, the court said: "But this argument overlooks the true nature of attorney Cosgrave's testimony. His testimony, and the testimony on which the Board based its decision, was as to the *legal reasons* for the execution of the deeds. He testified that he had advised the mother to deed the property rather than leave it by will and thus avoid probate expenses. It is our opinion and we hold that it was error for the Board to admit the testimony of Cosgrave concerning the exchange of deeds between the mother and the son. Without the attorney's testimony there is no testimony in support of the Board's decision that the transfer was one intended to take effect in possession or enjoyment at or after death, nor is there evidence to support a finding that it was in contemplation of death."

When all the competent testimony in this record is considered, we hold that appellee has failed to meet the burden of proof required, in the circumstances, in the present case, which is between the mother and son, where the most intimate and confidential relationship existed, where there was no money consideration and nothing more than a gift was intended by the instruments in question. The duty rested on appellee, Richard, to show

that these instruments were freely and voluntarily executed. Our oft repeated rule running through our decisions is stated in *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495, in this language: "The general rule is that where special trust and confidence exists between the parties to a deed, the gift to the party holding the dominant position is *prima facie* void. In *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1, cited by appellees, the court announces the doctrine from which there has been no deviation, as follows: 'It has been the well-established doctrine in equity that contracts, and most especially gifts, will be scrutinized with the most jealous care when made between parties who occupy such confidential relation as to make it the duty of the person benefited by the contract or bounty, to guard and protect the interests of the other and give such advice as would promote those interests. And this is not confined to cases where there is a legal control . . . They are supposed to arise wherever there is a relation of dependence or confidence, especially that most unquestioning of all confidences which springs from affection on one side and a trust in a reciprocal affection on the other. The cases for the application of the doctrine can not be scheduled. They pervade all social and domestic life. The application may sometimes be harsh, and one might well wish that an exception could be made, but there is a higher policy which demands that it should be universal. The language of Lord Kingsdowne, in *Smith* v. *Kay,* 7 H. of Lords Cases 750, has been considered striking. He says that relief in equity will always be afforded against transactions in which 'influence has been acquired and abused, in which confidence has been reposed and betrayed'."

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

Chief Justice Harris and Mr. Justice Ward concur.

Paul Ward, Associate Justice (concurring). I concur in the result reached by the majority, but I think the reason

on which that result rests is wrong, or at least very misleading.

At the beginning of the next to the last paragraph in the opinion this language is found: "When all the competent testimony in this record is considered, we hold that appellee has failed to meet the burden of proof required, in the circumstances, in the present case, which is between the mother and son, . . ."

I am at a loss to understand (for the opinion does not explain) just at what point in the trial of the case the burden shifted to appellee. Does the majority mean to say or imply that the burden shifted from the plaintiff (appellant) to the defendant (appellee) when the relationship of mother and son was shown? Frankly, I can think of no other testimony that could remotely tend to shift the burden. If it is meant that the showing of the mother and son relationship cast the burden of proof on appellee, then I submit that there is a grave possibility that thousands of similar transactions in this state are in jeopardy. It is common knowledge that quite frequently a parent will deed property to a child, or vice versa. It has never been my understanding that such a transaction cast a cloud of suspicion on the grantee which he might some day be called upon to explain away.

And how can the burden of explaining away the cloud be met? The majority opinion sheds some interesting light on that point, for it says: "The duty rested on appellee, Richard, to show that these instruments were freely and voluntarily executed." This poses a novel situation, for how can a grantee be expected to make positive proof that his grantor acted "freely and voluntarily."

I feel that those making the majority opinion have misapplied the rule they rely on. In this case there is no showing of any special confidential relationship existing between the parties other than parental, and it is not shown that any positive duty rested on the son to advise his mother. To the contrary, the mother

actively sought and obtained the advice of a law firm of her own choosing.

The time honored rule is that the burden rests on the one seeking to set aside a deed, and I think it would be much safer to apply it here, especially where it can be done and reach the same result.

HARRIS, C. J., joins in this concurrence.

WILSON *v.* HARRIS.

5-1260 302 S. W. 2d 86

Opinion delivered May 6, 1957.

[Rehearing denied June 10, 1957]

J. R. Wilson, for appellant.

W. C. Medley and *Joe H. Schneider,* for appellee.

ED F. MCFADDIN, Associate Justice. The question posed is, the right of persons—not parties to original litigation—to intervene in the case after the final decree has been rendered. The Chancery Court denied the right; and we affirm the holding under the facts here shown.

On October 24, 1952 McGrew Harris, *et al.,* filed suit No. 1588 in the Calhoun Chancery Court against "Unknown Trustees of C. E. Harris Company and Newark Oil Corporation", seeking (a) to have half of the mineral interest in certain lands quieted in the plaintiffs;

and (b) to obtain certain money in the registry of the Court to the credit of the named defendant companies. An attorney ad litem was appointed and made his report; a warning order was published; and proof of publication was made. On November 24, 1952 the Calhoun Chancery Court, being regularly in session, rendered a decree[1] in the cause, giving the plaintiffs the prayed relief; and this decree was filed on November 25, 1952.

Thereafter, on December 29, 1952, the present appellants, Miss Sallie Lou Wilson and Mrs. Iszora Wilson (hereinafter designated as interveners), filed a pleading in the said case No. 1588. The pleading was entitled: "Intervention of Sallie Lou Wilson and Mrs. Iszora Wilson, and Petition to Quiet Title and Prayer for Partition when and if Title is Quieted and the Ownership legally determined". In the said pleading (which is referred to as "intervention") the interveners claimed to own all of the surface and half of the minerals in and under the SE ¼ NW ¼ and NW ¼ SW ¼ Sec. 23, Twp. 15 S., R. 14 W., in Calhoun County. This 80 acre tract was a portion of the land concerning which the Court—by the decree of November 24, 1952—had quieted the title to one-half of the minerals in McGrew Harris, *et al.* In their said pleading the interveners: (a) deraigned their title to the surface and half the minerals; (b) alleged that on April 4, 1949 the interveners and Carter Oil Company had conducted a proceeding against the Newark Oil Corporation in the Calhoun Chancery Court under the provisions of § 53-401 *et seq.* Ark. Stats.; (c) alleged that in the 1949 proceedings an oil and gas lease on the interest of the Newark Oil Corporation had been duly authorized and executed; (d) alleged that the money in the registry of the Calhoun Chancery Court belonged either to the Newark Oil Corporation or to the State of Arkansas under the law of escheat; and (e) denied that McGrew Harris, *et al,* were entitled to any relief in the case No. 1588.

[1] The decree recites, *inter alia:* "And the Court proceeds to a hearing of this cause upon the complaint of the plaintiffs heretofore filed, the affidavit for Warning Order herein, the Proof of Publication of Warning Order, the Response of the Attorney ad Litem, and other evidence adduced for the consideration of the Court."

McGrew Harris, *et al.,* moved that the said intervention be dismissed as filed too late, and this motion was granted by the Court on September 7, 1956.[2] From the said dismissal the interveners prosecute this appeal, making seven points as to alleged irregularities or illegalities in the proceedings leading up to the decree of November 25, 1952. But we conclude that our holding in *Ferrell, Admx.* v. *Holland,* 205 Ark. 523, 169 S. W. 2d 643, precluded the intervention in the case No. 1588 by the interveners *after the decree had been entered.* In *Holland* v. *Ferrell* we said:

"The cause was submitted to the chancery court on June 6. The decree was rendered on August 16. The petition of Wyatt to intervene was not filed until September 3. Section 1318 of Pope's Digest provides: 'Where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court *may* order it to be done.'

"This was § 37 of the Civil Code; and cases construing this section are cited by Mr. T. D. Crawford in his annotated volume of the Civil Code of Arkansas. In 39 Am. Jur. 943, the rule is stated: '. . . the general rule is that after litigation has progressed to final judgment or decree it is too late for third persons to be allowed to intervene as parties to the litigation. Ordinarily, intervention is not allowed after a final judgment or decree has been entered, or when an appeal therefrom is pending.'

[2] The time lag from 1952 to 1956 is not explained in the briefs but is mentioned merely to show that we have not misstated the years. The order dismissing the intervention recited, *inter alia:* "And the Court finds upon hearing of this matter that a Final Decree was entered in the above entitled cause of action November 24th, 1952 and filed with the Clerk of the Calhoun Chancery Court on November 25th, 1952 and entered of record. That the Intervention of the Interveners was not filed in the Calhoun County, Arkansas Chancery Court until December 29th, 1952, more than one month after final decree had been entered of record in this action. That after litigation has progressed to a final judgment or decree it is too late for third persons to be allowed to intervene as parties to the litigation. That the Motion of Plaintiffs for the Intervention to be dismissed and struck from the file in this action, should be granted and sustained by the Court."

"An annotation on this point may be found in 127 A. L. R. 668. The rule as announced in American Jurisprudence was impliedly recognized by this court in *Files* v. *Watt,* 28 Ark. 151."

These interveners were not named as defendants in the original suit No. 1588: so they cannot invoke the provisions either of § 27-1907 Ark. Stats. (as to time to set aside judgment rendered on constructive service), or of § 29-404 Ark. Stats. (as to essentials of valid judgment on constructive service). If these interveners feel that the decree, entered in case No. 1588 in the Calhoun Chancery Court in November, 1942, casts a cloud on their title, then they are free to file a separate suit to remove such cloud. They are also free to file any plenary suit they desire, and the holding in the present case is in no sense *res judicata* against them. But, in a case in which they were not parties, they do not have the right to intervene *after the decree* and have the entire case reopened, as they have attempted to do.

Affirmed.

COMMR. OF REVENUES *v.* TRANSCONTINENTAL BUS SYSTEM, INC.

5-1257 301 S. W. 2d 569

Opinion delivered May 6, 1957.

Herrn Northcutt, for appellant.

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

MINOR W. MILLWEE, Associate Justice. This appeal involves separate suits by two interstate passenger bus companies to recover income tax payments made under protest in compliance with deficiency assessments by the Arkansas Revenue Department based on the statutory formula prescribed in such cases. The cases were consolidated and the Commissioner of Revenues has appealed from a decree granting the relief prayed.

Appellees, Continental Southern Lines, Inc. and Transcontinental Bus System, Inc., operate general passenger bus services partly within and partly without Arkansas. Continental operates in 9 states and Transcontinental in 14 states. In their corporate income tax returns filed with appellant, Continental reported a net loss on its Arkansas operations of $50,517.73 for the year 1951 while Transcontinental claimed similar losses as follows: For 1950, $90,789.92; 1951, $64,287.86; and 1952, $52,107.78. However, each company reported a very substantial net income on its system-wide operations during the same periods. Upon examination of said returns, the appellant found that the statutory method of determining taxable income for Arkansas had not been followed by appellees. Pursuant to recomputations in accordance with the statutory formula appellant made deficiency assessments against Continental of $1,214.80 plus interest for 1951 and against Transcontinental in the total amount of $2,832.61.

The formula under which the appellant made the deficiency assessments is set forth in Ark. Stats., Sec.

84-2003 (d) and (e). Subsection (e) reads in part: "When the business of such utility is partly within and partly without the State, their net income within the jurisdiction of this State shall be ascertained by taking their gross 'operating revenues' within the State, including in this gross 'operating revenues' within the state the equal mileage proportion within the State of their interstate business and deducting from their gross 'operating revenues' the proportionate average of operating expenses or operating ratio for their whole business as shown by the Interstate Commerce Commission standard classification of accounts.

"To the net operating revenues thus determined shall be added revenues from miscellaneous operations within the State and other nonoperating income from sources within the State, together with a proportionate part based upon the ratio of gross operating revenues from sources within the State to their entire gross operating revenues of all non-operating income from sources other than within this State and deducted therefrom miscellaneous operating expenses within the State and a proportionate part of all deductions from gross income as set forth in the Interstate Commerce Commission classification of accounts based upon the proportionate average of operating expenses for their whole business."

Now it is conceded that the amounts of the deficiency assessments made by the Commissioner are correct if the statutory formula is properly applicable. Nor do appellees find any fault with the formula except as it may be applied in determining the deductible item of operating expenses allocable to Arkansas. In making the assessments, the Commissioner accepted the returns made by appellees as to gross operating revenues and expenses for the years in question and arrived at a net operating income by determining the operating expenses allocated to Arkansas in accordance with the various factors prescribed in the statutory formula. Appellees used a different method and determined the operating expenses allocated to Arkansas upon a "system cost per

bus mile" basis by dividing the total number of miles into total operating expenses to ascertain the average cost per bus mile and multiplying this by the number of bus miles driven in Arkansas.

In passing on the validity of state income tax statutes which provide a method or formula for allocating to the taxing state a portion of the total income of a business that extends into other states, where the business within the state is not separable, the courts generally hold that such formula, if fair on its face, will be upheld unless the taxpayer sustains the burden of showing that it produces an arbitrary and unreasonable result as applied in the particular case. 130 A. L. R. 1209. One of the leading cases which involved a statutory formula identical with our own is *Norfolk & W. R. Co.* v. *North Carolina,* 297 U. S. 682, 80 L. Ed. 977, 56 Sup. Ct. 625. In sustaining the validity of the statute as there applied, Justice Cardozo pointed out that both the taxpayer and the state would be swamped with administrative difficulties if left to struggle through every case without the aid of a formula of ready application. He also indicated that a formula, though valid on its face, or in its general operation, may be unworkable or unfair when applied in particular conditions to a particular carrier. In reference to the instant formula, he said: "The statutory formula is not framed on an assumption that gross operating revenues are uniform actually for every mile throughout the system. It is not framed on an assumption that for every mile of the system there is uniformity of expense. Such assumptions, if made, would be contrary to notorious facts. What the formula does assume is this, that barring exceptional conditions there will be throughout the system such an average relation between revenues and expenses as will cause the net income of a party to vary, in proportion to the mileage, with the net income of the whole."

Appellees earnestly contend that their own "direct accounting" method of allocating operating expenses is fairer than the statutory formula which they say is based on the false premise that operating expenses have a def-

inite relation to the percentage that Arkansas revenues bear to system expenses; that there is actually no need for the use of a formula in the instant case; and that due to the comparatively low traffic density in Arkansas and other less important "cost factors" involved here, use of the statutory formula produces an unrealistic, arbitrary and unconstitutional result. Similar contentions were thoroughly considered and determined against the carrier under facts and circumstances perhaps more favorable to it than those involved here in *Cook, Commissioner of Revenues* v. *Kansas City Southern Railway Company,* 212 Ark. 253, 205 S. W. 2d 441. Certiorari was denied by the U. S. Supreme Court in 333 U. S. 873, 92 L. Ed. 1150, 68 Sup. Ct. 902. In that case deficiency income tax assessments were made and sustained against the railway by the same accountant using the same formula as in the case at bar and we reversed the trial court's holding that the carrier was entitled to substitute a different method along the lines advocated by appellees in this case. There, as here, the state's comparatively low traffic density together with certain less important factors prompted the attempted deviation from the statutory formula. The principles announced there are controlling here and in harmony with those laid down in *Norfolk & W. R. Co.* v. *North Carolina, supra.* We accordingly conclude that appellees failed to sustain the burden of proving the statutory formula oppressive and discriminatory, or that they have been deprived of any constitutional right by reason of its application in the instant case.

The decree is, therefore, reversed, and judgment will be entered here in favor of the appellant for the deficiency assessments.

ALTSCHUL *v.* MARTIN.

5-1263 301 S. W. 2d 571

Opinion delivered May 6, 1957.

[redacted]

Brockman & Brockman, for appellant.

Pat H. Mullis and *Lloyd B. McCain,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee, who does business as Martin Chevrolet Company, to collect $428.49 assertedly due upon a conditional sales contract by which Martin sold a used truck to the two appellants, Altschul and Rose. The defense is a plea of usury. In appealing from a judgment for the plaintiff the appellants contend that the contract was usurious as a matter of law and that the court's instructions to the jury were erroneous.

The testimony of the three litigants is substantially in agreement. Rose originally owned the truck in question and wanted to sell it for $900 to Altschul, who was a laborer on Rose's farm. Rose sought Martin's assistance in arranging a credit sale so that Altschul could pay for the truck by working for Rose. Martin at first refused to take part in the transaction, but he finally agreed to an arrangement by which he was to be paid $100 for his trouble. He explained that he could not transfer the contract to General Motors Acceptance Corporation, the finance company with which he did

business, unless he was the seller of the vehicle. To meet this difficulty it was agreed in substance that Rose would sell the truck to Martin and that Martin would resell it to Altschul. There is a dispute as to why Rose signed the conditional sales contract as a copurchaser with Altschul, but that point is immaterial.

There was no concealment of the facts from Altschul, who understood that he was to pay Rose $900 for the truck and Martin $100 for his services. The two sales were completed at the same time, on April 6, 1955. Martin first handed Rose a check for $900, representing the purchase price that Martin was paying to Rose for the truck. Rose in turn gave Martin a check for $600, which was understood to be a loan to Altschul which the latter was to repay by working for Rose. This $600 was credited as a down payment of $500 to Martin as seller, with the other $100 being Martin's profit.

A conditional sales contract was prepared, by which Martin sold the truck to Altschul and Rose for a cash price of $900. The purchasers were credited with the down payment of $500, leaving a balance of $400 to be paid on December 6, 1955, together with an insurance charge of $1.68 and an interest charge of $26.81. Martin endorsed the contract, with recourse, to GMAC. When the purchasers failed to make the payment of $428.49 that was due on December 6 Martin paid that amount to GMAC and brought the present suit upon the contract.

It is contended by the appellants that the contract is usurious even if the $100 payment to Martin is disregarded. We do not agree with this argument. The seller was legally entitled to charge interest at the rate of ten percent per annum on $401.68 from April 6 to December 6. Excluding the first day but not the last, this is a period of 244 days. The maximum legal interest would therefore be $26.85 (244/365ths of 10% of $401.68). The interest charge was actually $26.81; so the legal rate was not exceeded if the contract is con-

sidered without reference to the $100 payment to Martin.

The testimony as a whole presents several possible issues of fact as to the exact legal nature of the $100 payment. According to some of the statements in the record, this money was paid to Martin for his services in arranging to have the unpaid balance financed by GMAC. In this view Martin was a loan broker or intermediary between the borrowers and the lender. It is settled by our decisions that if such a broker is the borrower's agent his fee is not treated as interest on the loan, but the rule is otherwise if the broker is the lender's agent. *Jones* v. *Phillippe,* 135 Ark. 578, 206 S. W. 40; *Smith* v. *Eason,* 223 Ark. 747, 268 S. W. 2d 389. The decisive question is that of agency.

This is actually the only question of fact that was submitted to the jury. At the plaintiff's request the court gave an instruction to the effect that if Martin acted as the agent of Rose in the transaction the verdict should be for the plaintiff. The court quite properly gave on its motion a companion instruction to the effect that if Martin acted as the agent of GMAC and not of Rose the verdict should be for the defendants. We do not think that these instructions were inherently erroneous as being in conflict with each other or as disregarding the defense of usury. Both instructions were directed to that defense, and together they submitted the issue of the presence or absence of usury. If the defendants thought that the wording of the charge could be improved it was their duty to make a specific objection.

Other possible questions of fact were not submitted to the jury and, with the evidence open to several interpretations, cannot be decided by this court on appeal. It is of course true that if Martin received $100 merely for lending money to Altschul and Rose the loan would be void for usury. But this is not the only inference to be drawn from the evidence; the payment might have been for his services as a broker or might have been

part of the purchase price in a *bona fide* sale of the truck. Such issues are not before us for review in the absence of a request at the trial for correct instructions on the subject. The defendants' requested instruction number 9 was not correct, for it would have told the jury in effect that the $100 payment to Martin rendered the transaction usurious as a matter of law.

Affirmed.

WHITE *v.* AVERY.

5-1173 302 S. W. 2d 88

Opinion delivered May 6, 1957.

[Rehearing denied June 10, 1957]

Melvin E. Mayfield and *Surrey E. Gilliam,* for appellant.

G. E. Snuggs, for appellee.

PAUL WARD, Associate Justice. On January 13, 1941 Robert Avery and his wife Will (often referred to as Willie) Avery, executed a regular quitclaim deed, conveying 120 acres in Union County, Arkansas, to G. E. Van Hook, administrator of the estate of Joe White. The consideration recited in the deed was $10. Immediately after the execution of said deed appellants took possession of said property (with the exception hereafter mentioned) and have remained in possession of and paid taxes on said lands until the present time. At the time the deed was executed Robert Avery and Willie Avery, his wife, were living in a small house located on said lands and continued to do so until Robert Avery died the following year and Willie has continued to live there until this time.

On September 26, 1952, some eleven years after the above mentioned deed was executed and delivered to the said grantee, Willie Avery (widow of said Robert Avery) and the children of Robert and Willie Avery filed a complaint against the heirs of Joe White, deceased, and the administrator of his estate. In this complaint it was alleged in substance: That the recited consideration was never paid; that although Robert and Willie Avery were or had been indebted to the estate of the said Joe White deceased yet the lien securing that indebtedness was barred by the statute of limitation and also the said administrator agreed to sell the mineral rights on and under said lands to pay said indebtedness; That when this was done he would deed the lands back to the grantors, that it was with this understanding that the deed had been executed and delivered, and; That the said administrator has sold timber, oil and gas leases for which no accounting has been made. The prayer was that the said deed be cancelled as a cloud on plaintiffs' title, and that an accounting be made, and any indebtedness due the administrator be paid.

Answering the above complaint the administrator and the heirs of Joe White entered a general denial to all material allegations; they admitted they had sold a small amount of timber from the lands and that they

had executed an oil and gas lease thereon but deny that the plaintiffs were entitled to any accounting or any of the proceeds; they claim title by virtue of the deed described above and by virtue of seven years adverse possession and payment of taxes.

Upon the issues above joined both sides introduced testimony together with exhibits. Based thereon the trial court, on February 21, 1956 found that the plaintiffs' complaint should be dismissed for the want of equity and that a life estate should be vested in the plaintiff, Willie Avery, and, subject thereto, that title to the 120 acres of land be quieted and confirmed in the defendants. The court adjudged that the plaintiffs should pay two-thirds of the costs and that the defendant should pay one-third thereof.

On direct appeal the heirs of Joe White deceased and the administrator of his estate contend that the trial court was in error in decreeing a life estate in said lands to Willie Avery. On cross-appeal Willie Avery and the heirs of Robert Avery deceased contend that the court committed error in refusing to cancel the deed and to order an accounting.

We agree with appellants that it was error for the trial court to decree a life estate to Willie Avery. In the first place there is no contention on the part of Willie Avery or any of the heirs of Robert Avery that she was to have a life estate in said lands. Their contention was that the deed should be cancelled and the fee simple title vested in them. The allegations of the complaint filed by appellees amount, in substance, to a charge that they were induced by fraud to execute the deed.

It would serve no useful purpose to set forth and comment on the voluminous testimony contained in the record, but it suffices to say that there is no testimony from which the chancellor could have found that Willie Avery was to retain a life estate when she and her husband executed the quitclaim deed to the administrator of Joe White's estate. The testimony shows that Robert Avery and Willie Avery were indebted to the White estate in the sum of approximately $1,700 and that

this amount was a consideration for the execution of the deed in question. The trial court could not have dismissed appellees' complaint without having first found, as it did, that no fraud or misrepresentation was practiced upon Robert Avery and his wife in connection with the execution of the deed to the administrator, and we cannot say that the court's finding was against the weight of the testimony.

However the administrator G. E. Van Hook, and he alone did testify that at the time of the execution of the said deed he told Robert Avery and his wife that they could live in the small house situated on said lands as long as they lived. This assurance of the privilege of living in the house does not amount to the granting of a life estate in the 120 acres of land involved. It is not denied that appellants had possession of the lands, sold timber, executed oil and gas leases and paid the taxes for more than eleven years. All of which is inconsistent with the life estate in Robert and Willie Avery. See 33 Am. Jur. 820, § 313 where, among other things, it is said:

"A life tenant of real estate is entitled to the issues and profits of the property during the period of the life estate. A life tenant of realty, for example, is usually entitled, under the doctrine of emblements, to the crops sown on the land, and if he dies before maturity of such crops thus sown, they go to his personal representative. He may be entitled to certain mineral rights, or the use or income of money received from their disposition, under particular fact situations, and also, under some circumstances, is entitled to the proceeds derived from the sale of timber."

While appellee, Willie Avery, is not entitled to a life estate in all of the property involved in this case yet it is just and right, and not against the wishes of appellants apparently, that she should be accorded the right to live in the house and to use so much of the ground adjacent thereto as is reasonably necessary for domestic purposes, during her lifetime.

What we have already said heretofore leads to the obvious conclusion that appellees cannot prevail on their cross complaint. As indicated above the chancellor found that appellees had not established the allegations in their complaint, and after a careful examination of the record we cannot say that the chancellor's finding was against the weight of the testimony.

We cannot agree with appellees that appellants withdrew or failed to file an answer in this case. Appellees' contention is based on this situation. On October 8, 1952 the several defendants filed a full and complete answer to which we have previously referred. Later certain of the defendants filed what is designated as "Amended and Substituted Answer." This document consisted of only one page and refers to the fact that one of the named defendants was dead at the time the suit was filed and that two of them had already disposed of their interest in the lands, etc. It is appellees' contention, citing authorities, that the Amended and Substituted Answer took the place of the original answer. To take advantage of this fact appellees, on February 21, 1956, filed a "Motion for Summary Judgment" setting forth the facts and contentions referred to above. This motion was overruled on the same day that it was filed. We think the court was justified in overruling appellees' motion and in refusing to strike appellants' original answer for the reason that on the same day appellants filed a motion to amend the title designation of their second pleading mentioned above on the ground that it was the result of an error. The record shows that this motion was granted by the court.

We have considered and rejected appellants' contention that the trial court should not have required them to pay one-third of the costs. This was a matter which addressed itself to the discretion of the trial court, and an abuse of discretion does not appear.

It follows from what we have said that this cause is and should be affirmed on cross-appeal, and that, on direct appeal, it is reversed with directions to the trial court to enter a decree in conformity with this opinion.

WHIDDON *v.* UNIVERSAL C. I. T. CREDIT CORP.

5-1195 301 S. W. 2d 567

Opinion delivered May 6, 1957.

[redacted]

Melvin T. Chambers, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether a usurious rate of interest was charged on the balance owed on the purchase price of an automobile. Appellant, Glen Whiddon, purchased from Dolly Parker Motors, Inc., of Magnolia, Arkansas, an automobile for the price of $2,201.98. Whiddon was allowed $1,501.98 on his old car, leaving a balance of $700. He bought, through the automobile dealer, collision insurance, for which he was charged a premium of $210. He was also charged $143.36, which included the premium for a life insurance policy, the premium on a disability policy, and the interest on the entire balance owed. The contract, as finally consummated, showed a balance owed of $1,053.36, payable in twenty-four monthly instalments of $43.89 each. The contract was transferred by the dealer to Universal C. I. T. Corporation. Whiddon made five monthly payments, and then filed this suit to void the contract on the alleged ground of usury. Both the dealer and the credit company were made defendants.

At the trial, the defendants introduced evidence to the effect that when the credit company bought the contract it was discovered that Whiddon had been charged a premium of $210 for collision insurance, whereas he should have been charged $51 less than that amount; and the defendants introduced evidence to the effect that

Whiddon was given credit for the $51 overcharge, plus $8.04 interest thereon, and that he was notified of such credit. Whiddon denies receiving any information about being given a credit.

This case turns on the point of whether the $51 charged excessively as a premium on collision insurance, plus interest thereon, was an honest mistake or whether it was a subterfuge to cover up an illegal rate of interest. The circumstances arouse suspicions of usury. In the first place, the purchase contract is prepared on a form furnished by the defendants, and the collision insurance premium is not referred to as a premium for insurance, but is designated "territorial differential." There is no way of determining from the contract that territorial differential means collision insurance, and we have found no other way of making such determination from any other source of authority.

But another item arousing even greater suspicions is the manner in which the defendants handled the interest charge, and the premiums on the life insurance and disability insurance. These three items were lumped together, and a charge made of $143.36, in the contract prepared on defendant's form. From the evidence introduced in the case, but not from the contract, it can be determined that $42.13 was for life insurance and $2 was for personal accident insurance, which would leave $99.23 charged as interest. The $143.36 charge appears as Item 7 in the purchase contract, as follows: "7. Finance Charge (including insurance not in Item 4)." It will be recalled that Item 4 was "territorial differential". It is impossible for the purchaser or his lawyer to examine the contract of purchase and determine the amount of interest charged. In fact, Mr. Ramsey, an employee of the finance company, a witness for defendants, testified that the $143.36 item was taken from a rate chart furnished by the finance company, and it was impossible for the dealer to determine from the chart the amount that was interest and the amount that represented insurance.

The interest charged on the transaction, after the $8.04 credit on interest, totals $91.19, which does not amount to usury if the excessive premium charged and the interest thereon was a mistake and was not a part of a scheme and device to hide a usurious charge. There is no showing that the premiums finally charged on the insurance are exorbitant and there is no showing that the appellees made a practice of charging an excessive amount as an insurance premium. In other words, there is nothing here to show that the situation presented is anything other than an isolated instance of its kind.

Mr. T. J. Patterson, who lives in El Dorado, and is district manager for the credit company, testified that the overcharge was a mistake; that Mr. Whiddon was due the rebate on the premium because the car was not used in business and no one under twenty-five years of age drove it; that he personally wrote Whiddon informing him he was being given credit for the overcharge, and that this letter was written just two days after the credit company purchased the contract. The trial court had an opportunity to observe the witness and was in a much better position than this court is to judge his credibility. We cannot say the trial court reached the wrong conclusion, notwithstanding the suspicious circumstances above mentioned. In deference to the trial court's conclusion as to the veracity of the witness, the decree is affirmed.

MILLWEE, J., dissents.

McILVENNY *v.* HORTON.

5-1210 302 S. W. 2d 70

Opinion delivered May 13, 1957.

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

Wade & McAllister, for appellee.

J. Seaborn Holt, Associate Justice. This was a suit by William M. Horton and wife, sellers, against Michael McIlvenny and wife, buyers, to recover $1,200 for an alleged breach of contract for the sale of real estate in Washington County. Trial was had in the Washington Chancery Court July 18, 1956, and at the close of appellees' proof, appellants demurred, challenging the sufficiency of appellees' evidence,—under the provisions of § 27-1729 Ark. Stats. 1947. The court overruled the demurrer. Appellants elected to stand on this demurrer, refused to offer proof or to plead further, whereupon the court entered a decree in favor of appellees for the full amount claimed, $1,200, plus interest and costs. This appeal followed.

For reversal appellants rely on two points: "1. The Chancery court lacks jurisdiction over the subject matter of the cause . . . 2. The Vendors are not entitled to recover deposit made with escrow agent by

vendees where vendee breached contract, vendors accepted breach, and showed no damage nor agreement that the deposit was liquidated damages."

No. 1

The answer to appellants' contention that the court lacked jurisdiction is that they did not question jurisdiction. The record reflects that they did not ask that the cause be transferred to law, in fact, it appears that they asked affirmative relief in their answer, in which they prayed: ". . . that the plaintiffs complaint be dismissed; that the $1,200 be paid over to these defendants and that they have judgment against said plaintiffs in the sum of $500 for compensatory damages, and $500 for punitive damages." Clearly, we think, they have waived any right to ask for a transfer to law. We said in the case of *Love* v. *Bryson,* 57 Ark. 589, 22 S. W. 341, "Conceding, without deciding, that the defendant in this case had a constitutional right to a trial by jury of an issue of fact, it is sufficient to say that he waived it by voluntarily submitting to a trial of all the issues by the court sitting in equity, without making an effort to obtain a jury trial." Also, in *Hayes* v. *Bishop,* 141 Ark. 155, 216 S. W. 298, we said: ". . . no request to have the cause transferred was made, and, in the absence of that request, appellant will be held to have waived the right to ask for a trial at law of the issues raised."

No. 2

On May 14, 1955, appellees, Horton and wife, and appellants, McIlvenny and wife, entered into a written contract under the terms of which appellees for a consideration of $7,500 agreed to sell to the McIlvennys certain real estate in Washington County. This contract, among others, contained these provisions: "The buyers (appellants) promise to deposit Twelve Hundred Dollars ($1,200) of the purchase price and promise and agree to deposit the balance of the said purchase price in the sum of Sixty-three hundred Dollars ($6,300) within thirty (30) days after date. . .

"In the event of a default by the seller (Hortons) to fully perform this agreement, the Escrow Agent shall return the money deposited hereunder to the Buyer, but said return of money so deposited shall not release the said Sellers from their liability for breach of contract.

"In the event of a default of performance of this agreement by the buyers the said deed, together with the abstract of title shall be returned to the seller and the money deposited hereunder shall be returned to the sellers and this contract shall become null and void." (initialed) B.M.H., M.P.Mc, A.Mc

It appears that appellants (buyers) did not question the title to the property, but after placing the $1,-200 in escrow with the bank as earnest money breached the contract and refused to go through with the deal. Appellee, Horton, testified that appellees (sellers) had fully complied with all the terms of the contract and were ready, able and willing to deliver possession to the buyers upon payment of the balance of the purchase price. He further testified that the initials on the contract opposite the provision striking out the word "buyers" and substituting "sellers", along with other signatures on the contract, were already on it when he signed the contract. Appellants offered no testimony to contradict Mr. Horton.

Was the provision, that the $1,200 deposit be made by appellants, intended to be a penalty or a stipulation for liquidated damages? If the former, it was not enforceable. This question is one of fact, and must be determined by the facts presented. The test in a situation such as is presented here is announced in *Wait* v. *Stanton & Collamore,* 104 Ark. 9, 147 S. W. 446, in this language: "Usually, the surest test of liquidated damages is where the actual damages caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation for the injury occasioned by the failure to perform the contract. The purpose for permitting such stipulation for damages as compensation is to render definite and certain that which appears to be uncertain and not eas-

ily susceptible of proof. But the damages so stipulated for must be such as to amount to compensation only, and not so excessive or unreasonable as to amount purely to a penalty without being confined to the elements of fair compensation.

"The authorities, however, show that where the intention to liquidate the damages is not obvious, the stipulated sum will be given the effect of a penalty if it exceeds the measure of a just compensation and the actual damage sustained is capable of proof (citing authorities). But where the contract is of such a nature that the damage caused by its breach would be uncertain and difficult of proof, the sum named by the parties is generally held to be liquidated damages if the form and language of the instrument are not unfavorable to that construction and the magnitude of the sum does not forbid it.

"Upon the whole, the general observation we can make is that in each case we must look at the language of the contract, intention of the parties as gathered from all its provisions, the subject of the contract and its surroundings, the ease and difficulty of measuring the breach in damages, and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case.

"Guided by the principles above announced, it will be seen that each case must be decided according to its own peculiar facts."

We think that here it was intended by the parties, and that the contract, in effect, provided for a penalty. The damages sustained, however, by appellees are ascertainable and when all facts are considered the amount agreed upon ($1,200—16% of the purchase price) to be paid as a penalty or forfeiture was out of all proportion to the probable damages, and, as indicated, should be construed as a penalty and not liquidated damages. The undisputed testimony, however, shows that the Hortons, as a result of appellants' breach of the contract, have been required to expend $460, itemized as follows:

Greer Abstract Company $46.25, Revenue Stamps $8.25, E. J. Ball $5.00, Escrow Fee $3.50, Ovid Hiveley $375 (real estate agent), Survey $22. Total $460.

Although, as indicated, the case was decided on demurrer to the evidence, it was incumbent on the plaintiffs to prove, as an essential part of their cause of action, that the contractual provision sued upon represented liquidated damages and not a penalty. As indicated by the *Wait* case, *supra,* the test is whether the sum stipulated bears a reasonable relationship to the actual damages sustained. This is a matter that lies peculiarly within the plaintiffs' knowledge and means of proof. To require the defendants to assume the burden of proving that the plaintiffs' actual damages do not bear a reasonable relation to the stipulated sum would impose upon them the difficult, if not impossible, burden of proving the negative.

Despite the fact that the contract provided for a penalty, the appellees are entitled to recover their actual damages. *Stillwell* v. *Paepcke-Leicht Lbr. Co.,* 73 Ark. 432, 84 S. W. 483, 108 A. S. R. 42; *Dilley* v. *Thomas,* 106 Ark. 274, 153 S. W. 110. Viewing the evidence in its light most favorable to the plaintiffs, as we must (*Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225), the proof shows that the appellees' recovery must be limited to their actual damages of $460. The chancellor correctly overruled the demurrer to the evidence, for the plaintiffs did not entirely fail to establish a cause of action, but there is no substantial evidence to support a recovery in excess of $460. The judgment is therefore reduced to that amount, plus six per cent interest from July 18, 1956, and as so modified is affirmed. Costs of this court and the trial court are assessed against appellants.

ARNOLD *v.* CITY OF JONESBORO.

4874 302 S. W. 2d 91

Opinion delivered May 13, 1957.

[Opinion amended and rehearing denied June 10, 1957]

[redacted]

W. B. Howard and *Frank Sloan,* for appellant.

Gerald E. Pearson, for appellee.

ED. F. MCFADDIN, Associate Justice. The question posed is the validity of an ordinance of the City of Jonesboro (hereinafter called "City") which makes illegal the erection and use of business buildings in a district restricted exclusively to residences.

In 1956 appellant, Arnold, applied to the City for a permit to build a restaurant building in a residential district. Even though the City denied the permit, Arnold erected the building and proceeded to operate a restaurant therein until arrested for violation of the city ordinance, No. 828, adopted April 16, 1951 (amendatory of an earlier 1931 ordinance) which reads in part:

"It shall be unlawful for any person . . . to hereafter build, construct or erect . . . for business purposes any . . . building, or to open or establish any business of any kind . . . within the residence district, . . ."

It was conceded that the appellant's restaurant building was and is within the residential district described in the ordinance; and it was shown that the ordinance No. 828 was amendatory as to territorial limits

of Ordinance No. 604 adopted on August 3, 1931. Both in the municipal court and in the circuit court on appeal, Arnold was convicted of violating the Ordinance No. 828; and on appeal here he urges the same defense made in the lower court: that both the 1931 ordinance and the 1951 ordinance are void because the City failed to pursue the procedure required by the zoning Act, which is Act No. 108 of the General Assembly of Arkansas of 1929. This brings us to a consideration of the several legislative enactments involving the power of cities to restrict buildings in certain described areas.

(a) The Third Extraordinary Session of the 44th General Assembly was in session from June 23rd to June 30, 1924, and is referred to as "Third Extra Session of 1924". At the said Extraordinary Session, the General Assembly adopted Act No. 6 (approved July 1, 1924), captioned: "An Act to Confer on Cities of the First Class the Power of Regulating the Character of Buildings".[1] The act provided in part:

"SECTION 2. Cities of the first class are hereby authorized to establish zones limiting the character of buildings that may be erected therein, and that such zones may be of three classes: first, portions of the city where manufacturing establishments may be erected or conducted; second, portions of the city where business other than manufacturing may be carried on; third, portions of the city set apart for residences.

"SECTION 3. When the city council shall have laid off such zones it shall not be lawful for anyone to construct or carry on within a given zone any business not authorized by the ordinance of such city establishing the same, unless with special permission granted by the council of said city . . ."

Jonesboro is, and was at all times here, a city of the first class; and on August 3, 1931 adopted Ordinance No. 604, which in all matters here concerned is

[1] This Act was within the purview of the call of the said Extra Session: it was the third item in the Governor's Proclamation calling the Special Session.

the same[2] as the Ordinance No. 828 previously quoted. It is clear that this Ordinance No. 604 was passed under the authority granted cities of the first class by the said Act No. 6.[3] Inherent in appellant's contention here is the question whether Act No. 108 of 1929 impliedly repealed the said Act No. 6 and destroyed the power of cities to have ordinances restricting buildings except and unless the cities followed all the procedure stated in the Act No. 108 of 1929.

(b) So we come to a consideration of Act No. 108 of 1929. This Act was captioned: "An Act to Provide for City Planning, Zoning and Sub-division Control and the Creation of a Planning Commission, in Cities of the First and Second Class; and For Other Purposes".[4] By it any city was empowered to adopt a general zoning plan ordinance. This was not a law merely empowering cities to regulate the character of buildings: It went into the entire matter of zoning. Neither repeals by implication nor amendments by implication are favored in construing statutes. (*Pruitt* v. *Sebastian County C. & M. Co.*, 215 Ark. 673, 222 S. W. 2d 50). The Legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together. Without detailing all of the reasons for such holding, we conclude that the powers given cities of the first and second classes by the zoning ordinance (Act No. 108 of 1929) were in addition to, and not superseding of the powers given cities of the first class by the Act No. 6 of 1924.

[2] The Ordinance No. 828 changed some of the boundary lines of the residential district. The appellant's business was within the residential district as described in either or both of the ordinances.

[3] In *Little Rock* v. *Pfeiffer*, 169 Ark. 1027, 277 S. W. 883, it was stated that the City of Little Rock had adopted an ordinance under the power granted by said Act No. 6. The ordinance involved in Gammill v. Blytheville, —Ark.—, 291 S. W. 2d 503, was apparently adopted under the power granted cities by the said Act No. 6.

[4] The Act No. 108 (now found in § 19-2811 *et seq.* Ark. Stats.) has many times been before this Court. In *Gammill* v. *City of Blytheville*, 226 Ark. 572, 291 S. W. 2d 503, we listed some such cases, although that case involved a restrictive ordinance and not a zoning ordinance.

(c) One of the reasons for our conclusion stated immediately above is the existence of Act No. 312 of 1949. That Act clearly shows that the Legislature of 1949 did not consider Act No. 6 of 1924 to have been repealed: because by the Act No. 312 of 1949 the Legislature *amended* the Act No. 6 of the Third Extra Session of 1924 so as to include cities of the second class, as well as cities of the first class. The said Act No. 6 had become § 10056 of Pope's Digest; and the Act No. 312 of 1949 stated:

"That Section 10056 of Pope's Digest of the Statutes of the State of Arkansas is hereby amended to read as follows: 'Cities of the first and second class are hereby authorized to establish zones limiting the character of buildings that may be erected therein. Such zones may be of three classes: first, portions of the city where manufacturing establishments may be erected or conducted; second, portions of the city where business other than manufacturing may be carried on; third, portions of the city set apart for residences.' "

Thus, the legislature, by Act No. 312 of 1949, re-enacted a law that gave cities of the first class the power to regulate the character of buildings, and extended that power to cities of the second class. After the passage of Act No. 312 of 1949, Jonesboro, on April 16, 1951, by its Ordinance No. 828, re-enacted (with territorial changes immaterial in this case) the restrictions on business buildings in residential districts. Certainly after Act No. 312 of 1949, all possible questions were answered as to the power of the City of Jonesboro to adopt its Ordinance No. 828. The power had been originally granted by Act No. 6 of the Third Extra Session of 1924, had not been impliedly repealed by Act No. 108 of 1929, and had been affirmatively sanctioned by the Act No. 312 of 1949. The Ordinance No. 828 was valid and the uncontradicted evidence shows that appellant acted in violation of the ordinance.

Affirmed.

JONES *v.* JONES.

5-1281 301 S. W. 2d 737

Opinion delivered May 13, 1957.

[redacted]

Ted Goldman and *Chas. C. Wine,* for appellant.

Shaver, Tackett & Jones, for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee to cancel an assertedly usurious contract by which he bought a car from the appellant, an automobile dealer. The appellant contends that he did not intend to charge excessive interest and merely made a mistake in the amount of the premium for insurance on the vehicle. The chancellor found the agreement to be void for usury and ordered its cancellation.

The net price for the car, after an allowance for the value of a mortgaged truck that was traded in by the buyer, was $957. By the contract the buyer was required to pay $1,200 in twenty-four equal monthly in-

stallments. It is conceded that the difference of $243 was intended to represent nothing except interest and insurance. The actual insurance premium was at the rate of $118 for the two years, which leaves an apparent interest charge amounting to more than ten per cent per annum. The appellant insists, however, that by mutual mistake the contract was prepared upon the erroneous assumption that the insurance premium would be $140, which would bring the amount attributable to interest within the legal limit.

The chancellor's rejection of this contention is not against the weight of the evidence. The appellant testified that before preparing the contract he telephoned an insurance agent and was told that the premium would be $140. He says that he passed this information on to the appellee. The latter denies that the amount of the premium was ever mentioned. He says that he signed the contract in blank upon the understanding that the seller would insert the correct charge for the insurance on the car. Upon either of these versions the mistake, if it actually occurred, would evidently be a mutual one.

The appellant's testimony is corroborated only by the fact that the correct premium would have been $140 if the purchaser had meant to use the car in his business as a plumber. There is at least some evidence to support the view that the vehicle was to be so used, and we are asked to find that the premium should in fact have been $140. This request is beside the point, for the question is whether the parties agreed to a contract affording the lender an excessive rate of interest. If the evidence requires an affirmative answer to that question, it is plain that the agreement cannot be purged of usury by the extraneous fact that the insurer might have charged a greater premium if it had chosen to do so.

There are several circumstances tending to rebut the appellant's insistence that a genuine mistake occurred. First, the supposed error is attributed solely to the incorrect information that the appellant says he received from his insurance agent. That this agent was

not called as a witness, nor his absence accounted for, suggests that his testimony would not have been favorable to the appellant. *Rutherford* v. *Casey,* 190 Ark. 79, 77 S. W. 2d 58.

Second, the written contract contains no statement whatever of the amount to be paid either as interest or as the premium for insurance. On its face the agreement appears to be usurious, for it recites only the factors making up the net price of $957 and the buyer's obligation to pay $1,200 in twenty-four installments of $50 each. When, as here, the lender writes the contract he has the opportunity to put down in black and white an intelligible description, and the exact amount, of every charge that is being added to the principal of the debt. Last week we pointed out that the practice of attaching meaningless labels to such charges weakens the lender's position when usury is asserted. *Whiddon* v. *Universal C. I. T. Credit Corp.,* 227 Ark. 824, 301 S. W. 2d 567. The same criticism can fairly be made of a contract that gives the borrower no information at all about the deferred charges being exacted by the lender. In either case the trier of the facts is justified in assuming, until he is convinced by proof to the contrary, that the difference between the principal of the loan and the face amount of the contract represents interest on the debt.

Third, the appellant paid the insurance premium within four or five days after the sale of the car and must then have known with certainty that an overcharge had been made. Unlike the lender in the *Whiddon* case, *supra,* the appellant made no effort to inform the borrower of the overcharge until after this suit had been filed, some months later. It is indicated by the appellant's testimony that he considered himself entitled to the windfall resulting from his mistake, as he assumed that he could not have collected from the borrower if the mistake had been in the latter's favor. To accept this explanation as a basis for upholding the contract would

establish a precedent giving every lender unlimited freedom to make similar mistakes without risking the penalty of usury.

Affirmed.

RUNNING *v.* SOUTHWEST FREIGHT LINES, INC.

5-1265 303 S. W. 2d 578

Opinion delivered May 13, 1957.

McMath, Leatherman & Woods, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

PAUL WARD, Associate Justice. The questions for decision are: Did the Circuit Court have the discretionary right to refuse to take jurisdiction of a certain cause of action, and, if so, did it abuse that discretion?

On November 5, 1953 appellant, Clifton Running, filed a complaint in the Circuit Court of Pulaski County, Arkansas against appellee, Southwest Freight Lines, Inc., containing the following material allegations: Appellant is now and at all times mentioned was a resident of Missouri; Appellee has at all times mentioned been a corporation existing under the laws of Missouri with its principal place of business in Kansas City, Kansas, it is authorized to do business in Arkansas, and had appointed a resident agent for Arkansas; On December 27, 1950 appellant was injured in the State of Illinois because of the negligence of appellee's agent while driving a truck loaded with merchandise, and; As a result of such negligence and injury he was damaged in excess of $150,000.

Service of summons on appellee was had by delivering a copy to the said agent for service in Little Rock, Arkansas.

On November 25, 1953 appellee filed a motion to dismiss the above complaint upon the following grounds: 1. The Court is without jurisdiction of the cause; 2. Appellant, on July 21, 1953, filed a complaint on the same cause of action against the same appellee in the Circuit Court of Jackson County, Missouri, and thereafter, on August 14, 1953, voluntarily dismissed the same. Also the maintenance of this cause of action is contrary to *public policy* and constitutes a *burden* on the courts of Arkansas, and; 3. The alleged cause of action is barred by the statute of limitation in Illinois and appellee pleads the same.

On June 2, 1953 the parties stipulated substantially as follows: The facts set forth in the complaint, relative to dates and residences, are correct; This cause of action does not arise out of any business or operation of either appellant or appellee in the State of Arkansas, and; The allegations in the motion to dismiss relative to the suit and non-suit in Missouri are correct.

On June 22, 1956 the trial court considered appellee's motion to dismiss, presented on the complaint and

stipulation, and sustained the same on the ground that acceptance of jurisdiction would constitute a *burden* on the courts of Arkansas.

For a reversal, appellant bases his argument on three grounds, *viz:* I. The lower court had jurisdiction; II. This Court, by its former decisions, has established the rule that jurisdiction will be accepted in this type cause of action, and; III. Even though it be held that the trial court had discretion in the matter, it was an abuse of discretion in this instance to refuse jurisdiction.

I

We agree with appellant that the trial court in this case, had a right to exercise jurisdiction if it had chosen to do so. This fact is not disputed by appellee, and it has been established by the decisions of this court. See, *St. Louis & San Francisco Ry. Co.* v. *Brown,* 62 Ark. 254, 35 S. W. 225; *St. Louis I. M. & S. R. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893; *Yockey* v. *St. Louis-San Francisco Ry. Co.,* 183 Ark. 601, 37 S. W. 2d 694.

II

We cannot agree, however, that the decisions above cited, or any decisions of this court, have established a rule which binds, or should bind, the courts of this State to accept jurisdiction in this case. A careful examination of our cases disclosed that they do not deal with the exact question presented here. Either there was not the same situation as to location of parties and cause of action as here or the question of jurisdiction was not raised.

In the opinions of many courts and textwriters it is important that courts have some discretion in accepting or rejecting jurisdiction in this kind of case in order to protect themselves and the people from the burden ensuing from imported cases, and in order to avoid hardships on and inconveniences to litigants. The necessity for this discretion has found expression in the doctrine known as *forum non conveniens.* The California Law

Review, Vol. 35 page 388, gives credit to a law review writer for bringing the term into American law, "contending that all American Courts had inherent power to decline jurisdiction under the doctrine." It is also there stated that: "After this article the use of the term became so general that in 1941 Justice Frankfurter referred to the 'familiar doctrine of *forum non conveniens* as a manifestation of a civilized judicial system which is firmly imbedded in our law.' "

We recognize that not all courts have adopted the doctrine of *forum non conveniens* or recognize the discretion to reject jurisdiction where the court had power to exercise it, but we think the doctrine is sound. At least we are unwilling to hold that a court of this State has absolutely no discretion under any circumstances in cases of this nature.

Some of our own decisions indicate, if they do not exactly hold, that our courts can exercise discretion in the matter of accepting or refusing jurisdiction. In the case of *Grovey* v. *Washington National Life Ins. Co.*, 196 Ark. 697, 119 S. W. 2d 503, the court quoted with approval from R. C. L. the following: " 'But in actions between nonresidents based on a cause of action arising outside the state, the courts are not obliged to entertain jurisdiction. They may and usually do so on principles of comity, but not as a matter of strict right. In other words, it lies within the discretion of the courts whether or not they will entertain such a transitory action.' " Likewise in *Altshuler* v. *Altshuler*, 222 Ark. 271, 258 S. W. 2d 545, this court in referring to the doctrine of *forum non conveniens* as it is discussed in Am. Jur., said:

"Without quoting, it suffices to say this authority recognizes that the matter of forum, in instances like the one presented here, involved 'the exercise of judicial discretion' on the part of the trial judge, . . ."

Many other jurisdictions uphold the discretionary powers of court to accept or reject jurisdiction in certain cases, and many of them recognize and apply the doc-

trine of *forum non conveniens.* See: *Driscoll* v. *Portsmouth K. & Y. St. Ry.,* 71 N. H. 619, 51 A. 898; *Foss* v. *Richards,* 126 Me. 419, 139 A. 313; *Stewart* v. *Litchenberg,* 148 La. 195, 86 So. 734; *St. Louis-San Francisco Ry. Co.* v. *Superior Court,* Okla., 290 P. 2d 118; *Price* v. *Atchison, T. & S. F. Ry. Co.,* 42 Cal. 2d 577, 268 P. 2d 457, and; *Johnson* v. *Chicago, Burlington and Quincy Railroad Co.,* 243 Minn. 58, 66 N. W. 2d 763.

III

Having concluded that the trial court could exercise discretion in the matter of assuming or rejecting jurisdiction under the facts and circumstances of this case, then the question presented is: Did the trial court abuse its discretion in refusing jurisdiction?

The answer to the above question must be considered in the light of the fact that neither side introduced any evidence. Appellee takes the position that the facts shown in the pleadings and the stipulation are ample to sustain the trial court's action (or discretion) in refusing to assume jurisdiction, but we do not agree. The facts referred to may be listed as follows: (a) Appellant is a resident of Missouri; (b) Appellee is domiciled in Missouri and is authorized to do business in Arkansas; (c) The cause of action arose in Illinois; (d) Appellant filed and dismissed a suit on this same cause of action in Missouri, and; (e) The statute of limitation has run on the cause of action in Illinois. Without much question facts (d) and (e) can be eliminated. The former could have no possible bearing on the matter, and the latter is equally favorable to appellant. See: *Price* v. *Atchison, supra.* Thus it is seen that the only facts presented to the trial court were those which are necessary to raise the question being here considered, and none on which to base choice or discretion. Consequently, there is no way or means by which this court can intelligently determine whether or not the trial court abused its discretion.

Our examination of the cases applying the doctrine of *forum non conveniens* reveals that several factors

have a bearing on the question of accepting or rejecting jurisdiction, such as; the inconveniences that might accrue to either side in the matter of obtaining witnesses or documents. Whether considered included in the said doctrine or not, we see no reason why the trial court should not properly consider other facts and factors of a different nature, such as the condition of the trial docket, the probable expense of the trial, and any other facts or circumstances affecting a just determination.

Since the record in this case contains no testimony upon which the court could base its discretion, and, consequently no testimony on which we can say whether the trial court abused its discretion, it becomes necessary to determine which party had the duty of producing such testimony. It is our conclusion, after careful consideration, that this burden rested on appellee. In the ordinary motion to dismiss, where testimony is required, the burden is always on the moving party to produce evidence to sustain the allegations of his motion, and we know of no good reason why the same rule should not apply here.

Since the questions involved on this appeal are somewhat novel and there has been announced no rule to guide trial courts in such matters, we think justice would be served by reversing this cause with directions to proceed further on appellee's motion in accordance with this opinion, and it is so ordered.

Justice McFaddin concurs.

Justice Millwee would affirm.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the reversal of this case; but I regret very much to see the majority adopt by judicial legislation the doctrine of *forum non conveniens* in regard to transitory tort actions.[1] This is the usual transitory tort action: the plaintiff is a resident of Missouri; the alleged tort occurred in Illinois; and the suit is brought in Arkansas where

[1]*Grovey* v. *Washington Natl. Ins. Co.*, 196 Ark. 697, 119 S. W. 2d 503, was not a transitory tort action, but rather a foreign contract matter. There is a big distinction between actions *ex contractu* and actions *ex delecto*.

service was obtained on the defendant. The defendant interposed the plea of "forum non conveniens"; and this Court now sanctions that plea. I think the doctrine of *forum non conveniens* should not be applied to transitory tort actions, absent any legislative enactment. To demonstrate why I entertain such views is the purpose of this concurrence.

Volumes have been written on this (to Arkansas) new strange doctrine of *forum non conveniens.* In 35 Calif. Law Review (1947) at page 380 there is an exhaustive article on the subject; but I haver never yet found a good definition of *forum non conveniens* as applied to transitory tort actions. In *Gulf Oil Co.* v. *Gilbert,* 330 U. S. 501, 91 Law. Ed. 1055, 67 S. Ct. 839, the Court said: "The principle of *forum non conveniens* is simply that a Court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." No one is imposing on the jurisdiction of the Arkansas courts when such a person files a transitory cause of action in this State. Our statutes on venue may be found in § 27-601 *et seq.* Ark. Stats. After prescribing the venue in various kinds of actions, § 27-613 says: "Every other action may be brought in any county in which the defendant . . . is summoned." The Constitution of the United States in Art. IV, Section 2, says: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States". If Running had been a citizen of Arkansas he could have maintained this cause of action in Arkansas. Why refuse him right to redress because he is a resident of Missouri? Notwithstanding what the Supreme Court of the United States said in *Missouri ex rel. Southern Railway Co.* v. *Mayfield,* 340 U. S. 1, 95 Law. Ed. 3, 71 S. Ct. 1, and in the other cases cited therein, I am still of the view that the doctrine of *forum non conveniens,* when applied in a State court on a transitory cause of action against a non-resident

of the State, is in violation of the said quoted section of the United States Constitution.[2]

Aside from the constitutional question, there are other reasons why I think the majority, in the case at bar, has made a mistake in adopting any part of the rule of *forum non conveniens.* Three points suffice:

I. *The majority is in effect overruling some of our earlier cases in point.* In *St. L. S. F. Ry. Co.* v. *Brown,* 62 Ark. 254, 35 S. W. 225, the plaintiff was a resident of Indian Territory; the tort occurred in Missouri; and the railroad company was sued in Arkansas wherein it had an agent for service of process. The railroad company objected to the suit on a plea not designated as *forum non conveniens* in 1896, but almost to the same effect. This Court, in a unanimous opinion delivered by Chief Justice BUNN, said, and I quote at length:

"The principal argument of defendant's counsel is devoted to its contention that, since plaintiff was a resident of the Indian Territory, and since the injury was done in the state of Missouri, and since the case must be adjudicated according to the laws of the latter state, therefore it is contrary to the public policy of this state to lend the aid of her courts to settle the controversies of parties so situated, and thus the trial court was without jurisdiction. On this particular subject, we cannot better express our views than by quoting from others. In the case of the *Chicago, St. Louis & New Orleans Railroad Company* v. *Doyle,* 60 Miss. 977, Chief Justice CAMPBELL, in delivering the opinion of the court, said: 'The right of action for damages for killing a husband, given by the statute of Tennessee, may be asserted in the courts of this state, because of the coincidence of the statutes on this point, and, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced

[2]For cases from some courts either directly holding or pointing in the direction stated, see *Eingartner* v. *Ill. Steel Co.,* 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Morgan* v. *Neville,* 74 Pa. 57; *Steed* v. *Harvey,* 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789; *Bourestom* v. *Bourestom,* 231 Wis. 666, 285 N. W. 426.

here, when it does not conflict with the public policy of this state to permit its enforcement; and our statute is evidence that our policy is favorable to such rights of action, insteading of being inimical to them . . .' —citing *Dennick* v. *Railroad Co.,* 103 U. S. 11; *Nashville etc. R. Co.* v. *Sprayberry,* 8 Baxter 341; *Selma etc. Ry. Co.* v. *Lacey,* 49 Ga. 106; *Leonard* v. *Columbia etc. Co.,* 84 N. Y. 48 . . .

"We append a list of authorities touching each phase of this question, or rather the reason of the rule from the different standpoints from which the question has been discussed. The common law rule is that, where the right of action is transitory in its nature, courts everywhere, when the defendant may be lawfully summoned to appear therein, have jurisdiction; and, when the suit is governed by statute of the state in which the injury is committed, courts of another state, having similar laws, or where it is not contrary to its public policy, will enforce such laws, by the rule of comity. *Eureka Springs R. Co.* v. *Timmons,* 51 Ark. 459; *Boyce* v. *Ry. Co.,* 63 Ia. 70; *Morris* v. *R. I. & Pacific R. Co.,* 65 Ib. 727; *Herrick* v. *M. & St. L. R. Co.,* 31 Minn. 11; *Tex. & Pac. R. Co.* v. *Cox,* 145 U. S. 593; *Wintuska* v. *L. & N.R. Co.;* 20 S. W. 819."

Our holding in the foregoing case allowed a transitory tort action to be brought in this State wherever service of process could be obtained. Other cases on down through the years reaffirming this rule are: *St. L.I.M. & S. Ry. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893; *Viking Frt. Co.* v. *Keck,* 202 Ark. 663, 153 S. W. 2d 166, 152 S. W. 2d 554; and *Yockey* v. *St. L. S. F. Ry. Co.,* 183 Ark. 601, 27 S. W. 2d 694. In the light of these cases recognizing the right of a plaintiff to bring a transitory tort action in any jurisdiction in Arkansas in which the defendant could be served, I cannot see how this Court can now recede from these holdings and embrace this new and strange doctrine of *forum non conveniens.*

II. *In adopting the rule of forum non conveniens this Court is engaging in judicial legislation.* As here

tofore stated, our various statutes on venue may be found in § 27-601 *et seq.* Ark. Stats. After prescribing the venue in various kinds of action, § 27-613 says: "Every other action may be brought in any county in which the defendant . . . is summoned." In *Chambers* v. *Gray,* 203 Ark. 858, 158 S. W. 2d 926, we held that plaintiff's cause of action for injuries sustained in an auto collision in another state was a transitory cause of action and — under said § 27-613 — could be brought in any court in which service could be obtained on the defendant. Section 27-613 has not been changed by the Legislature. But the majority is amending it in the case at bar.

Hon. Robert A. Leflar[3] in his volume on "Conflict of Laws" in § 82 has the following:

"Generally speaking, causes of action for tort are transitory, that is, can be sued upon anywhere that service is had on the defendant tort feasor."

After pointing out that Arkansas regularly allowed such suits, Dr. Leflar has this to say regarding the rule of *forum non conveniens*:

"A few states apply discretionary doctrine of *forum non conveniens* to exclude suits between non-resident parties on foreign causes of action, on the theory that they can be more fairly and less expensively tried at some other forum, but Arkansas has not yet availed itself of this useful exclusionary rule; . . ."

and in § 6 of the same volume Dr. Leflar, in speaking further of *forum non conveniens,* says: "In states like Arkansas where the doctrine has not yet been established, a statute may be necessary to establish it . . ."

Now, since 1938 the leading Arkansas authority on conflict of laws has been of the opinion that it would take a legislative enactment to put into effect in Arkansas this doctrine of *forum non conveniens* in transitory tort actions; yet this Court is now adopting the

[3]Former Dean of the University of Arkansas School of Law and former Justice of the Arkansas Supreme Court.

doctrine without any legislation. Therefore, I insist that the majority is engaging in judicial legislation.

III. *The majority adopts the doctrine of forum non conveniens but leaves it undefined and unlimited.* No one can now tell, from the majority opinion in this case, what kind of evidence a defendant would be required to offer to a trial court in order to get that court to hold that the doctrine of *forum non conveniens* applied. None of the Federal cases would help in the matter because the Federal rule on *forum non conveniens* is for a *transfer* of the proceedings and not a *dismissal.* In U.S.C.A. Title 28, § 1404, the statute reads: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . ." It is one thing to *transfer* a pending suit to some other court nearer to the place of the witnesses — as is the Federal rule — and quite another thing to outright *dismiss* a case. Furthermore, if the dismissal is because the defendant is a non-resident, I maintain that such constitutes a discrimination against him under the United States Constitution previously mentioned.

CONCLUSION

So I reiterate, the majority opinion in adopting the rule of *forum non conveniens* in regard to transitory tort actions is departing from our ancient holdings, and embracing a new doctrine that embarks us on a sea of "discretionary jurisdiction" which will take us years to adequately define.

5-1279 301 S. W. 2d 745

Opinion delivered May 13, 1957.

[redacted]

Shaver, Tackett & Jones, for appellant.

Tompkins, McKenzie & McRae, for appellee.

SAM ROBINSON, Associate Justice. This action grows out of a collision between two vehicles on a country road. The appellees, Lois Grimes, and her husband, E. S. Grimes, plaintiffs in the Circuit Court, were traveling west in a pickup truck owned by Mr. Grimes and being driven by Mrs. Grimes. Appellant, Clyde Amos, was driving his automobile east; the two vehicles collided head-on. There was a judgment for the plaintiffs. The jury made a finding that 77% of the cause of the collision was due to the negligence of the appellant, Amos, and that the appellee, Mrs. Grimes, was 23% to blame. Appellant contends there is no substantial evidence of negligence on his part, and that the trial court erred in submitting the case to the jury. We do not agree that there is no substantial evidence of negligence on the part of Amos.

The road on which the mishap occurred is a graveled country road, perhaps wide enough for two lanes of travel, but traveled in such manner that only one lane of travel is habitually used. Vehicles going in both directions use the same lane of travel except, of course, when passing. This well traveled portion of the

road, used almost exclusively, is squarely in the center of the highway. The terrain in the vicinity is hilly. Appellees were going up a short, steep hill at a speed of some fifteen to twenty miles an hour when appellant, Amos, came over the hill driving at a rapid rate of speed. He attempted to stop his car, but could not do so; his automobile skidded a distance of 45 feet and struck the Grimes truck. The hill on which the collision occurred is so steep that the occupants of cars on the opposite sides thereof cannot see a vehicle approaching from the other side until a point is reached almost at the very top of the hill. Amos was familiar with the situation, and the fact that he drove over the hill in the existing circumstances at such a rapid rate of speed is substantial evidence of negligence. Amos testified that he was going 45 miles per hour, and there is other evidence that he was going 65 or 70 miles per hour; pictures of the damaged cars, taken after the collision, indicate that the impact must have been terrific. There is evidence that Mrs. Grimes attempted to get out of the way, but was unable to do so. However, the jury found her partly at fault.

The other points argued on appeal apply to the action of the court in giving certain instructions and in failing to give other instructions. It is contended that the court erred in the failure to give five instructions requested by appellant, and in giving five instructions requested by appellee. Some of the requested instructions were very long and to discuss each of these instructions in detail would unduly extend this opinion. Suffice it to say that we have examined carefully all of the instructions given, and all of those refused, but find no error.

Appellant lays particular stress upon the court's failure to give a requested instruction submitting to the jury the theory of an unavoidable accident. In support of this contention appellant cites *St. Louis-San Francisco Railway Company* v. *Bryan,* 195 Ark. 350, 112 S. W. 2d 641; *Booth & Flynn Company* v. *Pearsall,* 182 Ark. 854, 33 S. W. 2d 404; *St. Louis-San Francisco*

Railway Company v. *Burns,* 186 Ark. 921, 56 S. W. 2d 1027; *Missouri Pacific Railroad Company* v. *Medlock,* 183 Ark. 955, 39 S. W. 2d 518. But in all of those cases there was evidence that the mishap was due to an unavoidable accident.

In *Crown Coach Company, Inc.* v. *Palmer,* 193 Ark. 739, 102 S. W. 2d 853, this court sustained the action of the trial court in refusing an instruction submitting the issue of an unavoidable accident because "no evidence was introduced to show the injury resulted from an unavoidable accident." Likewise, in the case at bar, there is no evidence of an unavoidable accident. The evidence shows that the collision was due to the negligence of Amos in driving over the hill at a speed which was excessive in the circumstances, or in negligence on the part of Mrs. Grimes in failing to get out of the way in time to avoid the collision; the jury found there was negligence on the part of both parties.

Affirmed.

SOUTHWESTERN PUBLISHING CO. *v.* NEY.

5-1276 302 S. W. 2d 538

Opinion delivered May 20, 1957.

[Rehearing denied June 24, 1957]

Daily & Woods and *Shaw, Jones & Shaw,* for appellant.

Eichenbaum, Scott & Miller, and *Thomas Harper,* for appellee.

CARLETON HARRIS, Chief Justice. American Television Co., Inc., (hereinafter called American) held a

construction permit issued by the Federal Communications Commission for a Channel 5 television station in Fort Smith. H. S. Nakdimen was the sole stockholder and president of American. Appellee, George T. Hernreich, held an option to purchase 50% of the stock of American. Hernreich and American agreed, by written contract, to assign said construction permit to appellant for a monetary consideration subject to approval of the Federal Communications Commission.[1] The assignment agreement obligated appellant, American, and Hernreich to file application seeking FCC's approval of the assignment, and to further cooperate in preparing and filing additional information or amendments to the application for the purpose of obtaining the Commission's approval. The assignment provided that the agreement between the parties should be void unless the Federal Communications Commission approved the application for the assignment of the permit by February 1, 1955, except said agreement be extended by the contracting parties. All parties did agree to such extension in writing, setting the new expiration date as April 1, 1956. Shortly after the extension agreement, Mr. Nakdimen died. Appellee, Jerome M. Ney, as chairman of a group styled "Citizens Group for Two Television Stations in Fort Smith," filed a petition with the Commission asking that the group be permitted to intervene as a party to the proceedings, and requesting that the Commission reopen the record, set the matter for oral argument, set aside the initial decision, and remand the proceedings to the examiner for further hearings.[2] Because of the requests of this group, the Commission, on its own motion, set the matter for oral argument, which was heard on March 20. Since it appeared that a decision on the approval of the assignment might not be rendered before April 1st, appellant sought a further extension from the officers and directors of

[1] Separate forbearance agreements were also entered into between appellant, Hernreich, and American Television Co., whereby the latter two agreed that for a period of seven years they would not engage in broadcasting at Fort Smith or in any community within a radius of 150 miles of said city.

[2] On September 29, 1955, the hearing examiner of the Commission had approved the assignment of the construction permit to appellant.

American and from Hernreich. This was refused. On June 20th, the Commission entered its order providing: "In our view, all the pleadings now before us for disposition, filed by Southwestern, are moot by virtue of the expiration of the assignment contract, and accordingly, they must be denied." Appellant thereafter filed suit against appellees, later amended its complaint, and subsequently amended the amended complaint, seeking damages in the sum of $250,000. A further prayer was "that it be adjudged and decreed that any interest in or right to acquire the aforesaid television construction permit for Channel 5 at Fort Smith, held by the defendants or either of them, is held unlawfully and is impressed with a constructive trust in favor of plaintiff." Appellees filed their separate demurrers to the complaint, amended complaint, and amended amended complaint, stating that such pleadings did not state facts sufficient to constitute a cause of action. Said demurrers were sustained by the court and the complaint dismissed; from such action comes this appeal.

Let us first examine the allegations against appellees which appellant relies upon as stating the cause of action. It is alleged that Ney "* * * with full knowledge and understanding of the provisions of said assignment agreement and the duties and obligations therein imposed on the defendant, Hernreich, maliciously and unlawfully interfered in said assignment agreement between the parties thereto and induced the defendant, Hernreich, to join with him in a conspiracy to breach the terms of that agreement to the injury of the plaintiff. * * *" It is alleged that Hernreich, though required by his agreement to cooperate to obtain the approval of the construction assignment, entered into said conspiracy to breach the terms of the agreement; that "* * * All such acts of conspiracy on the part of the defendants were performed with malice and with the purpose of preventing approval of said assignment during the life of said agreement and to the end that said assignment agreement would expire unapproved in order to permit the defendants, in their scheme and plan, as a part of said conspiracy, to ac-

quire said construction permit for their own monetary gain to the loss of and damage to the plaintiff. As a further part of their said conspiracy, the defendants jointly and severally undertook to persuade and induce the holders and beneficial owners of the stock of American Television Co., Inc., under the Will of Mr. Nakdimen, to cause its officers and directors to decline to execute any further extension of said agreement and so to cause said agreement to expire unapproved by the Commission. * * *" It is further alleged that "* * * the defendants and each of them, separately and together, made trips to Washington, D. C., seat of the Federal Communications Commission, and employed a former attorney of the plaintiff to prepare pleadings to be filed with the Federal Communications Commission containing derogatory charges concerning the plaintiff to the end that the approval of the above described assignment would be delayed before the said Commission until the expiration of said assignment agreement. The defendants did cause to be filed with the Federal Communications Commission pleadings urging and encouraging the Commission to deny approval of said assignment and reciting that should same be denied by the Commission that the defendant, George T. Hernreich, would individually, or in concurrence with the American Television Co., Inc., construct said station under the permit theretofore issued to American Television Co., Inc., * * * and induced numerous and sundry other persons, including employees of each defendant, to join with them in petitions to the Commission in order to withhold, delay and deny approval of said assignment. Said numerous and sundry third parties who were persuaded by the defendants to join with them in said application to the Commission were induced to do so by insincere representations made to them by the defendants that the defendants were acting solely in the public interest in an endeavor to procure two television stations in Fort Smith, Arkansas, and that the defendants had no other interest when, in truth and fact, the defendants' purpose and design was to acquire the Channel 5 construction permit for their own personal

monetary gain and to injure the plaintiff. * * *" Further, "* * * The defendants by written pleadings and other direct and indirect representations persuaded the Commission to hold an oral argument on the said assignment. By this act and the other acts and tactics performed and committed by the defendants as above recited, they succeeded in causing delays and postponements and interruptions in the normal proceedings of the Federal Communications Commission in its hearings on the application for approval of said assignment beyond April 1, 1956, thereby succeeding in their plan and conspiracy to prevent final Commission approval of said assignment before the expiration of the last extension of said assignment agreement; and except for said acts of the defendants, the Federal Communications Commission, in the normal course of its proceedings, would have granted final approval of said assignment prior to April 1, 1956. * * *" Still further, "* * * The Federal Communications Commission would have finally approved the assignment to the plaintiff of the construction permit for the operation of a Channel 5 television station in Fort Smith, Arkansas, under the terms of said assignment agreement, in the absence of the acts on the part of the defendants hereinabove alleged, and the plaintiff would have thereupon acquired the right to construct said station under said permit. As a result of the malicious, unlawful, unjustified and concerted acts of the defendants hereinabove alleged, the plaintiff has lost the right to acquire and obtain the construction permit for the operation of a Channel 5 television station in Fort Smith, Arkansas. * * *" The trial court held that no cause of action had been alleged against either appellee.

We will first dispose of appellee's argument that the demurrers should be sustained for the reason the entire assignment contract was wholly invalid. This contention is based on the concurrent forbearance agreement between appellant and Hernreich that appellant would pay to Hernreich the sum of $35,000 in return for his agreement not to engage in broadcasting within Fort Smith or any community within a radius of 150

miles for a period of seven years. Appellees contend that this constituted illegal restraint of trade, and the entire agreement was therefore void. This matter was not mentioned by the trial court in its rather exhaustive opinion, and we consider it sufficient to state that the complaint does not put into issue the validity of the forbearance agreement. No one seeks to enforce the agreement, or to rescind or cancel it; *i. e.,* no relief is sought by any party with reference to same.

In holding that no cause of action had been stated against Hernreich, the court said:

"* * * The issue appears to be whether or not an allegation which is not susceptible of proof is to be accepted by the court as one which is well plead and admitted by a demurrer. It appears incumbent upon the court to accept the position that no litigant should be permitted to hold another at bay in court to await trial when the allegations of the complaint are, on their face, not susceptible of proof. * * * Since it must be conceded that Hernreich was under no duty to agree to an extension, the case must rest squarely upon the proposition that the Federal Communications Commission would have granted the assignment but for the acts of the defendant Hernreich. Is this ultimate issue susceptible of proof? This court must, after full deliberation, answer this question in the negative. In reaching this conclusion, the court is of the opinion that the proof necessary to sustain the plaintiff's contention could come only from one source, the Federal Communications Commission itself, and learned counsel's representations, sincere and earnest though they are, cannot convince the court that a Federal agency such as the Federal Communications Commission would either gratuitously, or by order of this court, investigate and rule on what they would or would not have done under all of the contingencies of this situation, and do so simply to accommodate the parties to this lawsuit. A candid and objective appraisal of the many considerations that would be involved in such a course, without enumeration here, makes it apparent that this requisite avenue of proof

would, and as a matter of principle could not be, opened as a course of evidence in causes such as the one at bar. The litigants may speculate and conjecture as to what this Governmental agency would or would not have done if the game had been played differently, but the courts are not a forum for such disputes. * * *"

We entirely concur that Hernreich was under no duty to grant an extension and also agree that in order to obtain a substantial recovery, it is mandatory that appellant prove that, but for the acts complained of, the Federal Communications Commission would have granted the assignment. But we are not here dealing with a matter of proof. We are only dealing with a matter of allegations. Therefore, *we are not presently concerned with whether the allegations can be proved.* The reasoning of the trial court as to the difficulties in proving this necessary assertion may well be correct, but whether such averment can be sustained is immaterial at this time. As stated by the court in the case of *Weiner* v. *Eastern Airlines,* 330 Mass. 337, 113 N. E. 2d 859, 40 A. L. R. 2d 806: "* * * Whether the plaintiff will be able to sustain by evidence the case made out in the declaration is a matter not to be decided on demurrer. * * *" Likewise, in *Attorney General* v. *Trustees of Boston Elevated Railway Co., et al.,* 319 Mass. 642, 67 N. E. 2d 676, the court said: "* * * We take the allegations at their face value in determining their sufficiency when challenged by a demurrer. The question is not as to the adequacy of evidence to prove the alleged conduct of the trustees, but is whether, assuming the allegations to be true, the information sets forth a cause of action. * * *" It is well settled by our own cases that a demurrer admits facts that are well pleaded.[3] *Wann* v. *The Reading Company,* 194 Ark. 541, 108 S. W. 2d 899. Every reasonable intendment should be indulged to support a pleading. *City of Marianna* v. *Gray,* 220 Ark. 468, 248 S. W. 2d 379. Allegations of complaint on demurrer must be given such effect as they appear *prima facie* to have. *Church of*

[3] For the purpose only of determining the sufficiency of the pleadings.

God in Christ v. *Bank of Malvern,* 212 Ark. 971, 208 S. W. 2d 770. The validity of the complaint against Hernreich is not dependent upon the existence of the alleged conspiracy, for his alleged acts, standing alone, constitute a cause of action. We conclude that a cause is stated against Hernreich.

We come now to a consideration of the court's action in sustaining the demurrer as to Ney. If the complaint states a cause of action against this appellee, it must be on the basis of the alleged conspiracy, wherein it is averred that Ney "* * * with full knowledge and understanding of the provisions of said assignment agreement and the duties and obligations therein imposed on the defendant, Hernreich, maliciously and unlawfully interfered in said assignment agreement between the parties thereto and induced the defendant, Hernreich, to join with him in a conspiracy to breach the terms of that agreement to the injury of the plaintiff. * * *"

Corpus Juris Secundum, Vol. 15, 996, states: "A civil conspiracy means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. * * *" In Words and Phrases, there are several definitions of the term. In addition to the one quoted above, (which is the most usual definition), we find at page 425, Vol. 8,: "A 'conspiracy' is a combination of two or more persons by some concerted action to accomplish an unlawful purpose." At page 418 of the same Volume: "A 'conspiracy' is the combination of two or more persons to do something that is unlawful, oppressive, or immoral, or something that is not unlawful, oppressive, or immoral, by unlawful, oppressive or immoral means, or something that is unlawful, oppressive or immoral, by unlawful, oppressive, or immoral means."

While in some instances, we recognize that an unlawful purpose[4] can be reached through a series of law-

[4] This court has held that to breach a contract is unlawful. *Lion Oil Co.* v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569.

ful acts, generally the acts which are committed in furtherance of accomplishing the unlawful purpose are either illegal acts, or acts tainted with elements of deceit, trickery or chicanery. The acts attributed to Ney are legal acts. It was not unlawful for him to oppose the granting of the permit — it was not unlawful for Ney to get others to join in the protest—it was not unlawful for Ney to employ an attorney to file with the Commission a petition protesting the approval of the assignment. Though malice is alleged in the complaint, and while in the Iowa case of *Kuiken* v. *Garrett,* 243 Iowa 785, 51 N. W. 2d 149, it was held that legal conclusions may properly be alleged where supported by proper allegations, we are unable to say that the allegations herein meet that requirement. Not only were the acts of Ney, standing alone, entirely legal, but such acts were in furtherance of a hearing before a public forum. This conduct is entirely the antithesis of acts generally committed in a plot to injure some individual. Here, there was no "cover up", nor artifice. Ney proclaimed to the world that he was against the assignment of the contract.

It is true that our Court, as early as 1908, in the case of *Mahoney* v. *Roberts,* 86 Ark. 130, 110 S. W. 225, held that persons who aid another to violate a contract with a stranger, whether for the purpose of injuring the latter, or for the purpose of benefiting themselves at the latter's expense, to his injury, are guilty of an actionable wrong, and are liable for damages. Again in *Hogue* v. *Sparks,* 146 Ark. 174, 225 S. W. 291, this Court said: "* * * that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the injured party may institute an action against the wrong-doer. * * *" Other Arkansas cases are cited to the same effect, but when all are analyzed, it appears that in each instance such cases involved either the enticement of laborers from their contract (which is prohibited by statute as well as common law) or the element of trickery, deceit or chicanery was present. For instance, in *Mahoney* v. *Roberts, supra,* Roberts and Ma-

honey dissolved their partnership, and Mahoney, for a consideration, agreed with Roberts that he would not engage in business in competition with Roberts in Argenta, Arkansas. Mahoney, being unable to engage in said type of business directly, without violating his agreement, conspired with one Collins to operate the same (type of business) in Collins' name, and ostensibly as Collins' business. Collins proceeded to carry out his part of the plan, though Mahoney furnished all equipment and actually owned the business. The complaint alleged a conspiracy to carry out the "fraudulent enterprise," and sought judgment against Collins, as well as Mahoney, because of said conspiracy. Collins was held liable for inducing and assisting Mahoney to violate his agreement. This is entirely a different set of facts from those alleged in the instant litigation; likewise, the facts in *Hogue* v. *Sparks, supra,* are vastly different.

We will not say that a conspiracy, which is to culminate in the commission of an unlawful act, cannot be reached by a series of acts, in themselves lawful, but we do say that the acts alleged here against Ney in furtherance of the alleged conspiracy, do not constitute such as to allege a cause of action.

Civic minded citizens may well petition and appear before tribunals to protest the granting of radio or television permits, the elimination of air, railway, or bus services, the increase of rates by public utilities, and similar instances too numerous to mention. They may well appear before Congressional and Legislative Committees to voice their opposition to legislation desired by some individual, corporation, or business establishment. We do not desire to establish a rule in this state which would discourage individuals from exercising their privileges as free citizens. As stated by the trial court in its opinion: "* * * The constitutional guarantees of liberty of opinion and freedom of speech would soon be impaired if citizens exercising those rights were to be compelled to defend their actions in expensive litigation, instituted by persons who resented and characterized the exercise of such rights as interfer-

ence in their private affairs. * * *" Concluding, when the words "maliciously" and "unlawfully" are removed, the complaint fails to state a cause of action against Ney, and those words, standing alone, do not supply the deficiency. The action of the court in sustaining Ney's demurrer was entirely proper.

Appellant contends that the court erred in dismissing the amended complaint, as amended, without giving it the opportunity to plead further. The trial court's opinion was filed October 5, 1956, and the precedent (approved as to form by appellant's attorneys) was filed on October 11th. Without entering into a detailed discussion of the alleged error, let it suffice to say that the record does not reflect any request for permission to again amend or to plead further. We consider appellant's contention to be without merit.

For the error in sustaining the demurrer and dismissing the complaint as to appellee Hernreich, the judgment of the Circuit Court is reversed, and the cause is remanded with directions to overrule the demurrer as to Hernreich and for further proceedings not inconsistent with this Opinion.

Justices WARD and ROBINSON dissent to the reversal as to Hernreich.

Justices MCFADDIN and GEORGE ROSE SMITH dissent to the affirmance as to Ney.

PAUL WARD, Associate Justice (dissenting). In my opinion the action of the trial court should be sustained as to Hernreich. I just can't imagine how appellant can ever possibly prove what the Federal Communications Commission would have done. From any angle you look at it, the majority is entering a field of speculation, and we have often said that speculation is no sound basis for a jury verdict. Consequently, as I see it, this court should assume its responsibility to prevent unnecessary litigation with all its attending expense. We have said many times, also, that courts will not do a vain and useless thing, yet I believe the majority is doing just that in this case.

Not only is it incumbent on appellant to prove (in a new trial) that the Federal Communications Commission would have approved the assignment, but it must prove also that the approval would have been given before April 1, 1956. Here is where the majority find themselves in a dilemma. On the above date the Federal Communications Commission either had all the information it desired, or it did not have. In the first eventuality it could have approved the transfer if it had wanted to do so (but it did not). In the latter eventuality it would be ridiculous to predict what the Federal Communications Commission would have done because there is no way of knowing what information it might have received later.

It is significant to note the exact wording in appellant's complaint. The first clause in paragraph XI reads: "The Federal Communications Commission would have *finally* (emphasis mine) approved the assignment . . ." As already pointed out, this allegation is not sufficient to state a cause of action.

STEVENS *v.* FRENCH.

5-1268 302 S. W. 2d 286

Opinion delivered May 20, 1957.

[Rehearing denied June 17, 1957]

McCourtney, Brinton, Gibbons & Segars, for appellant.

French & Camp, for appellee.

J. Seaborn Holt, Associate Justice. This litigation involves a boundary line dispute. Appellant, Stevens, owns a 40-acre tract in Clay County and appellee, French, his neighbor, owns 26 acres immediately east and adjoining the south two-thirds of appellants' 40 acres, for a distance of about 900 feet. December 8, 1955, appellants filed suit against French alleging that appellee had constructed a new wire fence some 25 ft. to 40 ft. west of appellants' east boundary line for a distance of 900 ft. and over on appellants' land. They prayed for injunctive relief, and that appellee be required to remove the fence. Appellee answered with a general denial and affirmatively pleaded: "that he did build a fence but that said fence was built on his own property, that said fence was built east of an old boundary fence between defendant's property and that of petitioners, which old division fence has been in existence for a period of more than twenty years and that the defendant has cultivated, pastured, and used said lands for a period of more than twenty years and that defendant has had open, notorious, continuous, peaceable, and adverse possession of said lands for a period of more than twenty years, and further that petitioners have no valid claim whatsoever on the lands upon which said fence was built."

Trial was had and the court found for appellee, French, and dismissed appellants' complaint. This appeal followed. For reversal appellants contend that the preponderance of the evidence is against the chancellor's findings and "if the line between the properties has not been established, the court should have ordered it established."

The evidence shows that sometime in 1955 appellee, French, built a new "barbed wire" fence on his land between his land and appellants, on the north-south boundary line between these properties for a distance of approximately 900 ft. This new fence was built east of the old boundary division fence. French testified that he has owned his 26 acre tract since 1936, and has paid the taxes since he acquired it—some 21 years; that

the old fence to his knowledge had been up since 1936; that he has owned, used and claimed this land at all times up to the old fence and no question arose as to the boundary line until appellants had a survey made in August 1955 by Knight Laird. Appellee's son, Otis, corroborated his father's testimony, and there was also other testimony on behalf of appellee of a corroborating nature, which we do not detail.

Appellant, Stevens, testified that he acquired his 40 acre tract in July 1949 and at that time there was an old fence separating the two tracts in question; that he knew nothing about his property prior to 1949 and had seen it only some two or three weeks before he bought it.

Laird testified on behalf of appellants that he had a Bachelor of Science degree in engineering from Duke University and has had experience in land surveying. He was not the county surveyor of Clay County; that he surveyed the boundary line in question solely at appellants' request. He further testified that: (appellants' abstract) "The point I used in starting my survey was the northwest corner of section twenty, as shown me or told me by men who helped Jim Ryan on survey work through there; the center of the bridge and the center of the ditch was the section corner; that is what they told me as to where that corner was; as to physical evidence or markers of any kind, the witness trees have all been cut down years since, but that corner has been maintained though by knowledge of those who helped on the survey when the trees were there; the starting point I took was (purely from hearsay) from what people told me." The plat of his survey was not introduced in evidence. Appellant informed appellee that he was having this survey made and appellee made no objection.

. . . After reviewing all the evidence we have concluded that appellants have failed to show by a preponderance thereof that the new fence in question was on their land. On the contrary we hold that the preponderance of the testimony shows that this fence was built on appellee's tract, title to which he has established by a preponder-

ance of the evidence by adverse possession (§ 37-101 Ark. Stats. 1947). See *Harris* v. *E. B. Mooney, Inc.*, 211 Ark. 61, 199 S. W. 2d 319. We think Laird's survey has little or no probative value for the reason that he did not connect his survey with established monuments but the starting point was established by pure guess and speculation, as shown by his own testimony above, and is entirely too indefinite.

Finding no error, the decree is affirmed.

TRIMBLE & WILLIAMS *v.* STATE.

4871 302 S. W. 2d 83

Opinion delivered May 20, 1957.

Charles L. Carpenter and *Terral & Rawlings,* for appellant.

Bruce Bennett, Atty. General, and *Russell Morton, Ass't. Atty. General,* for appellee.

MINOR W. MILLWEE, Associate Justice. The appellants, Warren "Son" Trimble and Bobby Dale Williams, were convicted of the crime of robbery by forcibly taking and stealing an automobile from K. C. Parker on March 3, 1956.

At the trial K. C. Parker testified he was asleep in his car which was parked at a cafe about 1:30 A.M. when appellants attacked him, demanded his money and drove his car to the airport where he escaped and notified the police. He also testified that, acting upon

information he gave the police, appellants were arrested about three days later and placed in the county jail where he identified them as the parties who robbed him.

The only other witness for the State was a deputy sheriff who was permitted to testify, over appellants' objections and exceptions, that he was present when K. C. Parker came to the county jail and made a "line-up" identification of the appellants as the parties who had robbed him. The sole issue is the admissibility of this testimony.

The authorities are divided as to the competency of evidence of so-called "extrajudicial identification" in a trial where the accused's identity as the guilty party is in dispute. Most courts subscribe to the proposition that the prior consistent statements of a witness who has not been impeached are not admissible in evidence for the purpose of corroborating or bolstering his testimony. We are committed to the view that evidence of extra judicial identification is incompetent as either substantive or corroborative evidence if there has been no impeachment of the prosecuting witness or his testimony.

In *Gill* v. *State,* 194 Ark. 521, 108 S. W. 2d 785, we said: "This character of evidence is referred to in the law books as extrajudicial identification and, according to the weight of authority, is not admissible even though the identifying witness or witnesses had been impeached by any method known for impeaching witnesses. *Burks* v. *State,* 78 Ark. 271, 93 S. W. 983, 8 Ann. Cas. 476. There is no authority whatever for admitting an extrajudicial identification as original evidence of guilt. This court said in the case of *Warren* v. *State,* 103 Ark. 165, 146 S. W. 477, Ann. Cas. 1914B, 698, that: 'But nowhere, so far as we can ascertain, has it ever been held that a so-called extrajudicial identification is admissible as original evidence; and it was, therefore, in any view of the case, inadmissible for there was no attempt to impeach the witness by contradictory statements or otherwise. The testimony was introduced as original evidence, and it was clearly inadmissible, for it was not

competent to corroborate the identifying witness by proof of former identification'." As Judge McCulloch said in *Burks* v. *State, supra:* "After all, the effect of proof of previous consistent statements could only be to corroborate the statement of the witness under oath by his own words uttered on another occasion. It would add nothing to his statement upon the witness stand, either as to his testimony on the main issue, or as to his denial of the contradiction." See also, *Rogers* v. *State,* 88 Ark. 451, 115 S. W. 156, 41 L. R. A. (N. S.) 857; *Birones* v. *State,* 105 Ark. 82, 150 S. W. 416; and cases collected in annotations in 70 A. L. R. 910 and 140 A. L. R. 176.

Admission of the testimony of the deputy sheriff resulted in prejudicial error. The judgment is accordingly reversed, and the cause remanded for a new trial.

DELONY *v.* RUCKER.

5-1248 302 S. W. 2d 287

Opinion delivered May 20, 1957.

CITY OF LITTLE ROCK *v.* LITTLE ROCK AND WESTWOOD WATER & LIGHT DISTRICT NO. 2.

5-1249

Opinion delivered May 20, 1957.

Spitzberg, Bonner, Mitchell & Hays, for appellant.

Martin, Dodds & Kidd, for appellee.

Spitzberg, Bonner, Mitchell & Hays, for appellant.

Talley & Owen, Max Howell and *Gene Worsham,* for appellee.

George Rose Smith, J. These two appeals involve the validity of § 7 of Act 321 of 1955, which reads: "A municipality owning a waterworks system shall operate its entire system in a governmental and not proprietary capacity. The municipality shall have the option of extending its services to any consumer outside the municipal boundaries, but it shall not be obligated to do so. No municipality shall be obligated to supply any fixed amount of water or water pressure to non-resident consumers, nor shall a municipality be obligated to increase the number or size of, or change the location of any mains or pipes outside its boundaries. Water may be supplied to non-resident consumers at such rates as the Legislative Body of the municipality may deem just and reasonable, and said rates need not be the same as the rates charged residents of the municipality. All laws

in conflict with this section are hereby repealed." Ark. Stats. 1947, § 19-4257.

The specific issue here is whether the Little Rock municipal waterworks may charge its nonresident consumers higher rates than those paid by residents of the city. For many years after the municipal plant was acquired in 1936 resident and nonresident customers were charged alike. In 1954 the city council, to finance the acquisition of an additional water supply, undertook the preparation of a new rate schedule. Rate specialists were employed, and public hearings were held. In April of 1955 the city council adopted an ordinance putting the recommended schedule into effect. In addition to increasing the charges within the city limits this ordinance provides that the graduated rates for nonresident patrons (except those in the highest bracket of consumption) shall be 25 per cent more than the corresponding rates within the city.

By these two suits the appellees seek a declaration that the statute and ordinance are void and an injunction against the collection of higher rates outside the city. In Case No. 5-1248 W. S. Rucker, who owns a tourist court near Little Rock, asserts that the statute and ordinance violate the due process clause, the equal protection clause, and other provisions of the state and federal constitutions. Similar allegations are made in Case No. 5-1249, which is a class suit brought by three nonresident domestic consumers and by a water improvement district, the latter also asserting that the increased rate schedule impairs the obligation of a contract which is in force between it and the city. In the courts below it was held in each case that the challenged legislation is void and that the collection of higher rates outside the city should be enjoined.

Neither the statute nor the ordinance is void on its face, as the appellees contend. Granted that the rates charged by a municipally owned public utility must be reasonable and free from arbitrary discrimination, it

does not follow that the exaction of an increased charge for services supplied beyond the city limits is *prima facie* invalid. A city's first duty is to its own inhabitants, who ordinarily pay for the municipal plant, directly or indirectly, and who therefore have a preferred claim to the benefits resulting from public ownership. Upon this reasoning it is held by the decided weight of authority that "the municipality, in the absence of any legislative limitation, may make a discrimination as to rates based solely on the political boundaries of the municipality." Case note, 101 Pa. L. Rev. 160; McQuillin, Municipal Corporations (3d Ed.), § 35.37; *Collier* v. *Atlanta,* 178 Ga. 575, 173 S. E. 853; *Louisville & Jefferson etc. Dist.* v. *Seagram,* 307 Ky. 413, 211 S. W. 2d 122, 4 A. L. R. 2d 588; *Childs* v. *City of Columbia,* 87 S. C. 566, 70 S. E. 296, 34 L. R. A. N. S. 542. The two cases following the minority view are readily distinguishable from the cases at bar. In *City of Texarkana* v. *Wiggins,* 151 Tex. 100, 246 S. W. 2d 622, the court held that higher rates for nonresidents are not permissible in the absence of statute; in Arkansas Act 321 of 1955 provides that statutory authority. And in *City of Montgomery* v. *Greene,* 180 Ala. 322, 60 So. 900, the court stressed the fact that by Alabama law a municipality operates its waterworks as a private corporation and not in the exercise of the power of local sovereignty. In Arkansas, however, the municipality is held to be acting in its governmental capacity, and Act 321 reaffirms this rule. *North Little Rock Water Co.* v. *Water Works Com'n of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194. Thus it is fair to say that no decision supports the view that the Little Rock rate schedule is void on its face.

In holding that the ordinance before us is ostensibly valid we do not imply that there is no limit to the rates that a city may impose upon its nonresident patrons. Although that view prevails in South Carolina, *Childs* v. *City of Columbia, supra,* as a general rule it is held that the municipality's charges must be "fair, rea-

sonable, and just, uniform and nondiscriminatory." McQuillen, *loc. cit.;* cf. *City of Altoona* v. *Pennsylvania Public Utility Com'n,* 168 Pa. Super. 246, 77 A. 2d 740. Act 321 recognizes the traditional view, for it provides: "Water may be supplied to non-resident consumers at such rates as the Legislative Body of the municipality may deem just and reasonable . . ." Needless to say, the reasonableness of the rates fixed by the city council is a matter open to judicial review. *North Little Rock* v. *Rose,* 136 Ark. 298, 206 S. W. 449; *Camden Gas Corp.* v. *Camden,* 184 Ark. 34, 41 S. W. 2d 979.

The burden of proving the city's rate schedule to be arbitrary and unreasonable rested upon the plaintiffs, for the ordinance is entitled to the presumption of validity that legislative enactments ordinarily receive. *Camden Gas Corp.* v. *Camden, supra.* In the cases at bar the plaintiffs contended that the variation between urban and suburban rates is unauthorized as a matter of law; no testimony was offered to show that the difference is unjustified as a matter of fact. On the latter point the city, though not having the burden of proof, adduced testimony that tends to sustain the higher charges imposed upon nonresident consumers. This proof shows that on the average the service to nonresidents involves greater expense to the city than to residents. The filter plant, from which the water is distributed, is inside the city. It is obvious that in any given direction the suburban areas lie farther from this plant than the intervening urban territory. These greater distances are shown to entail increased costs in the installation and maintenance of water mains and in the pumping of water. That the outlying districts are less densely populated than the city itself involves a greater average expense in the reading of meters and the making of service calls. There is in the record no contradiction of the witness Jackson's statement that "prior to the 1955 ordinance we discriminated against our city customers in favor of our nonresident customers." On the undisputed evidence we must conclude

that the appellees failed to meet the burden of proving the new rate schedule to be unreasonable and arbitrary.

The separate contention made by the water improvement district may be answered quickly. In 1925 the private company which then owned what is now the municipal waterworks system agreed to sell water to the residents of this district at the same rates that were then, or might later be, in effect within the city. The performance of this contract was assumed by the municipality when it purchased the system in 1936. It is now asserted by the district that the imposition of the higher nonresident rates constitutes an unconstitutional impairment of the obligation of its contract. To this contention there are two answers. First, an agreement fixing public utility rates to be charged in the future is subject to the sovereign's reserved power of rate regulation and must yield to the exercise of that power. *Camden* v. *Ark. Light & Power Co.,* 145 Ark. 205, 224 S. W. 444; *North Little Rock Water Co.* v. *Water Works Com'n of Little Rock, supra.* Second, this particular contract contains no provision fixing the period of its duration; it is therefore terminable at the will of either party. *Fulghum* v. *Town of Selma,* 238 N. C. 100, 76 S. E. 2d 368; *Childs* v. *City of Columbia, supra.*

Reversed.

MILLWEE, J., dissents.

5-1190 302 S. W. 2d 73

Opinion delivered May 20, 1957.

John F. Park and *House, Moses & Holmes,* for appellant.

Bailey, Warren & Bullion, for appellee.

PAUL WARD, Associate Justice. This litigation arises out of a dispute over a small triangular parcel of land in the Northwest ¼ of the Southwest ¼ of Section 18, Township 3 North, Range 13 West, in Pulaski County. Highway 65 runs east and west across the north portion of the said Northwest ¼ of the Southwest ¼.

Appellee Henley, who was the plaintiff below, claims title to a rectangular strip of land which, for later reference and convenience, we will describe as follows: Beginning at a point hereafter referred to as (A) where the south line of Highway 65 intersects the west line of the above described 40 acres, thence east along the south line of Highway 65 218 feet to a point called (B), thence south 807 feet to a point, thence west 218 feet to a point, thence north 807 feet to the point of beginning.

On February 28, 1948 appellee Henley received a deed from Orville E. Bennett in which the land was described as follows:

"The North four (4) acres of all that part of the fractional NW ¼, SW ¼ of Section 18, Township 3 North, Range 13 West, that lies south of the right of way of Highway No. 65 (Little Rock and Conway Highway), and west of the county road leading from said highway south across the NW ¼, SW ¼ of said Section 18; said plot of ground being 807 feet long north and south, and approximately 218 feet wide on the north and south end thereof."

Bennett purchased the land, by the same description, in 1946. Appellee's chain of title goes back to about the year 1934 (to a common source with the title of appellants) with the land always being described as above set forth.

The difficulty giving rise to this litigation comes about in this way. In 1934 it was only 120.7 feet from the point (A) heretofore described to the west line of the "Crystal Hill Road" which, at that time, left Highway 65 and ran in a southeasterly direction for approximately 115 feet to where its course changed to due south. However, when appellee received his deed in 1948 that portion of the Crystal Hill Road first above described was no longer in existence and all traces of it had disappeared. Just when all trace of this part of the road disappeared does not clearly appear, but it was some time after 1936 and before 1948 and most likely before 1946. Some time after 1936 Crystal Hill Road was changed to run due north to its intersection with Highway 65. This change in the road has resulted in confusion relative to the title of the triangular parcel of land (or a part of it) lying somewhere between the present location of Crystal Hill Road and its former location.

Appellee, Henley, takes the position (a) that he has record title to all the rectangular parcel of land (218 feet by 807 feet), or if not, (b) that he has ac-

quired title to said parcel by adverse possession. Appellant, Mode, contends (c) that he has a good record title to the small triangular parcel, in the northeast corner of the rectangle, and if not, then (d) he has title by adverse possession. After the introduction of voluminous testimony and exhibits, the trial court held in favor of appellee, Henley, and quieted his title to the rectangular parcel of land above described, which, of course, includes the disputed triangular parcel, and the trial court also ordered appellant, Mode, to remove a building which he had erected on the triangular parcel of land which is in dispute. After a careful examination of the record we have concluded that the trial court was correct and that its decree must be affirmed.

(a) In our opinion appellee Henley cannot rely on his record title. When the land which he now claims was first described many years ago the Crystal Hill Road limited the conveyances to all the land on "the west side thereof," which, as before set out, consisted of approximately 120.7 feet on the north side. Such a description, at that time, did not convey any land east of the Crystal Hill Road. See: *Paschal* v. *Swepston,* 120 Ark. 230, 179 S. W. 339, where in speaking of descriptions, it was said that "distances must yield to courses, and courses to monuments."

(b) The testimony showing that appellee had adverse possession of the disputed parcel of land for more than 7 years before this litigation orginated is not exactly satisfactory but we cannot say that the chancellor's finding on this point was against the weight of the evidence. To begin with, it is easy to understand how appellee could have in all good faith thought he owned the triangular parcel of land fronting 218 feet on Highway 65, because, when he got his deed in 1948, there was nothing to indicate that any of the land might lie east of Crystal Hill Road. This fact, while it does not strengthen his record title, must be considered in connection with his claim of adverse possession. Bennett testified that he thought he was getting the full rectangular parcel of land, that he had it surveyed, and that he erected a marker or stake at the northeast cor-

ner which was 218 feet east of the point heretofore designated as (A). Appellee testified that when he got his deed in 1948 he had the land surveyed and marked off 218 feet frontage on Highway 65. He further stated that Mr. Bennett and a Mr. Jack Milam were with him when he measured the line by a steel tape, and that he had claimed and occupied the full 218 feet frontage since February 1948. He further testified that he spent something like $7,000 improving his property. It appears that that portion of the rectangular parcel just south of Highway 65 is much lower than the surface of the highway, and that appellee and Bennett over the years placed thereon a large amount of dirt. We get the impression that this dirt was placed on the entire 218 feet frontage adjacent to Highway 65. At least the contrary was not made to appear upon cross examination. When he learned that Mr. Mode was thinking of erecting a building close to the east line of his property appellee marked off boundaries of the land that he was claiming and advised Mode not to encroach thereon. Appellee admits that there is a strip of land approximately 30 feet wide between the east line of his property and the west line of Crystal Hill Road (as now located) to which he does not claim title. Jack Milam testified that he was with appellee in 1948 and that they found he had 218 feet frontage on Highway 65. He says that they measured from the point (A) heretofore mentioned along the south line of the highway for 218 feet and that they drove a stake down at that point. He further stated that the only old road which he could see or knew anything about was one that apparently went down to some cabins which had been built on the rectangular parcel of land. The record discloses that several buildings had been placed on the rectangular parcel of land by appellee and his predecessors. It seems that there was one large stucco building near the north end of the property and several small ones to the south. Exhibit No. 3 introduced into the record shows that one of these cabins was located within 10 feet of the east line of the rectangular parcel heretofore described. Since nothing was brought out on cross examination to discredit the

above testimony it was sufficient, we think, to sustain the findings of the chancellor that appellee had claimed and occupied the entire rectangular parcel of land for more than 7 years, and that the chancellor was correct in quieting title thereto in appellee.

(c) Appellants' claim to a record title covering the lands in dispute cannot be sustained for the reason that the description upon which they depend is not definite. It reads:

"A part of the NW ¼ of the SW ¼ of Section 18, Township 3 North, Range 13 West, in Pulaski County, Arkansas; more particularly described as follows, to-wit: Beginning at the northeasterly boundary line of the old Crystal Hill Road; thence east 98 feet; thence south 162 feet to a point; thence northwest 220 feet to the point of beginning."

From the above description it is impossible to locate the beginning point and there is nothing to show that the land is adjacent to Highway 65.

(d) Appellant makes no serious effort to establish a title to the disputed land by adverse possession. There is no testimony that the land in dispute was occupied by anyone other than appellee until appellant began erecting a building shortly before this litigation began.

Therefore we conclude that the trial court was correct in ordering appellants to remove the encroachments from appellee's land and in quieting appellee's title to a rectangular parcel of land fronting 218 feet on Highway 65 as correctly and more particularly described in the trial court's decree.

Affirmed.

GARLAND COUNTY BOARD OF ELECTION COMMISSIONERS
v. ENNIS.

5-1289 302 S. W. 2d 76
Opinion delivered May 20, 1957.

R. Julian Glover, for appellant.

E. C. Thacker, for appellee.

PAUL WARD, Associate Justice. On September 18, 1956, a petition was filed in the Garland County Court, signed "Garland County Board of Election Commissioners, By R. Julian Glover, its Attorney." In this petition it was alleged that, due to changes in modes of travel and in population, etc., certain rural townships in the county "should be abolished, annexed and consolidated as follows:" (Here is set out in detail the proposed changes in several townships.) The prayer was that the matter be set for hearing by the Court on October 2, 1956, after advertising notice of said hearing for two weeks in a newspaper. Following the petition, in the record, appears (with no filing date) a petition signed by 28 people asking to retain the voting place in Buckville Township.

On October 2, 1956 E. C. Thacker as attorney for a number of affected citizens filed a motion to continue the hearing until after the November 1956 election. This motion was evidently granted, because the Board of Commissioners (appellants) filed an amendment to their

petition (affecting certain townships) on November 20, 1956, and on the same day, respondents (appellees) filed a response to the petition, and also a motion to dismiss. Among other things, it was stated that the County Board of Election Commissioners was not a legal entity and had no authority to institute such an action.

On December 5, 1956 the matter was presented to the County Court on the above pleadings and on "testimony *ore tenus* on behalf of the petitioners and protestants," and the Court found "That the petition and amended petition of the petitioners should be granted as changed and set out in this order." (The changes in the several townships are set out in detail.) On the following day respondents filed an affidavit for an appeal to the Circuit Court which was granted on the 17th of December, 1956.

In the Circuit Court, appellants filed an amendment to their petition, on January 8, 1957, setting forth the names of the County Board of Election Commissioners, and stating that they were qualified electors and taxpayers of Garland County.

On January 24, 1957 the matter came on for hearing on the pleadings and the transcript from the County Court. The trial Court took the view that there was no necessity for it to hear the cause upon its merits, for the reasons that the County Board of Election Commissioners lacked legal capacity to bring the action in the County Court, and also that the amendment to the petition filed in the Circuit Court should be stricken. The Court thereupon reversed the judgment and action of the County Court and dismissed the cause of action. This appeal follows.

Under our view of this matter it is unnecessary to decide whether the County Board of Election Commissioners is a legal entity and as such had the right to institute and maintain the cause of action, or whether appellants had a right to amend their petition after

the appeal from the County Court had been lodged in the Circuit Court. There is no question we think but that this matter was properly before the County Court regardless of who was the initiating party. Under Ark. Stats. § 18-101 the County Court itself could have initiated this proceeding. This section reads as follows: "The county court of each county in this state, shall from time to time, as occasion may require, divide the county into convenient townships, subdivide those already established, and alter township lines." Moreover the protestants (appellees) themselves appeared in the County Court and sought affirmative relief. When the County Court's judgment was adverse to the respondents they had a right under Ark. Stats. § 27-2001 to prosecute an appeal to the Circuit Court which they did in this case. When the cause of action reached the Circuit Court the matter then should have been heard *de novo* as provided by Ark. Stats. § 27-2006. In the case of *Barker* v. *Wist,* 163 Ark. 511, 260 S. W. 408, this court reiterated that ". . . appeals have been uniformly granted as a matter of constitutional right from all judgments of the county court to the circuit court, and no distinction has been made between administrative matters and judicial causes, and that appeals were heard *de novo.*"

It was therefore the duty of the Circuit Court to hear any evidence that either side desired to present.

In the order of the County Court it is stated that the matter was heard on oral testimony. We presume, since such oral testimony is not included in the record before us, that it was not in the transcript on appeal to the Circuit Court. If however such testimony was in the transcript on appeal to the Circuit Court and if no other testimony is presented, the trial court should make its decision on the same testimony and pleadings that were presented to the County Court, as was done in the *Baker* case, *supra.*

The cause of action is therefore reversed and remanded to the Circuit Court with directions to proceed in a manner consistent with this opinion.

5-1319 302 S. W. 2d 85

Opinion delivered May 20, 1957.

Wendell Utley, for appellant.

Henry B. Whitley, for appellee.

SAM ROBINSON, Associate Justice. The City of Buckner, Arkansas adopted an ordinance submitting to the voters of the city the question of a $12,000 bond issue to finance the construction of a water system. In the case at bar, the appellant, N. L. Eddy, is contesting the validity of the bond issue. The chancellor made a finding in favor of validity, and Eddy has appealed.

Appellant contends there was error in the schedule of bond maturities as set out in the notice of the special election caused to be published by the Mayor, and it is further maintained that the ballot title contained a similar error. Appellant says that, notwithstanding the fact that all of the citizens voting on the question cast their ballots in favor of the bond issue, it was rendered invalid by the alleged errors. The ordinance provides for a $12,000 bond issue, and the maturity dates of the bonds as set out in the ordinance are as follows:

"In the year 1960 $500; in the year 1962 $500; in the year 1964 $500; in the year 1966 $500; in the year 1968 $500; in the years 1970 to 1984, both inclusive, $500; in the years 1985 and 1986, both inclusive, $1,000."

The Sheriff's proclamation of the election gave the correct total of bonds to be issued and the correct maturity dates, as provided by the ordinance. The maturity dates as shown by the notice published by the Mayor,

and the maturity dates appearing on the ballot title are incorrect. They are as follows:

"The question to be voted upon at said election is whether or not the City of Buckner, Arkansas, will issue $12,000 in negotiable serial, coupon bonds bearing interest at not in excess of 3¾%, due as follows:

"In the year 1960, $500; in the year 1962 $500; in the year 1964 $500; in the year 1966 $500; in the —— 1968 $500; in the years 1970 to 1984, both inclusive, $1,000."

The notice published by the Mayor and the ballot title were correct with reference to the total amount of bonds to be issued: $12,000. But, it will be seen that, according to the incorrect maturity dates, the bonds add up to $17,500; hence, if the voters were misled at all it was to the effect that a larger amount of bonds were to be issued than the amount authorized. If the voters had been led to believe that the bond issue would be for a smaller amount than the actual amount of bonds to be sold, then they would have a legitimate cause of complaint; but it is hard to conceive of any one complaining that he was misled into voting for a larger amount than would be issued. This would be like a person protesting the installation of the water system because it did not cost more. In the *Harvard Law Review,* Volume 70, Number 6, page 1079, it is said: "But most courts have recognized that a defect in the statement of the technical financial provisions of a bond issue is unlikely to affect the choice of the electorate and have thus regarded such defects as insubstantial."

The City of Buckner has a population of about five hundred. There were seventy-four citizens who cast their votes in favor of the bond issue; there were no votes against it. The complaint does not allege that any one was misled by the mistakes as to the maturity dates of the bonds, as shown in the publication of notice by the Mayor or in information appearing on the ballot.

In discussing the subject of election on indebtedness, or bond issues, it is said, in *McQuillin Municipal Cor-*

porations, 3rd Edition, Volume 15, page 279: "While a taxpayers' suit may be maintained to test the validity of the election, in the absence of fraud, or attempt to mislead the voters, or express declaration in the law to the contrary, mere irregularities, which do not prevent a full and free expression of opinion of the will of the electors, and do not affect or change the result, will not invalidate the election."

Affirmed.

STREULI *v.* WALLIN-DICKEY & RICH LUMBER CO.

5-1290 302 S. W. 2d 522

Opinion delivered May 27, 1957.

Mann & McCulloch, for appellant.

J. H. Spears, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves only the question as to whether appellee, Wallin-Dickey & Rich Lumber Company, is entitled to a materialman's lien in the amount of $1,571.52 against the real estate on which appellants, Ruby B. Streuli and R. A. Streuli have a motel and restaurant.[1]

Disregarding earlier purchases, which have no bearing on this appeal, the Streuli's began a round of construction on June 17, 1953. Construction continued fairly regularly thereafter with items being furnished until February 16, 1954. The record reflects that no items were furnished Mrs. Streuli[2] after February 16, 1954, until December 13, 1954, and the last item charged to appellants was under date of January 26, 1955. The amount due appellee for materials furnished prior to December 13th was $1,545.33. Appellants contend, and so contended before the trial court, that for appellee to be entitled to a lien for this amount, same should have been filed within 90 days from February 16, 1954. The lien was filed on April 6, 1955. Appellee has consistently contended that the lien filed relates back and covers all of the materials furnished. At the conclusion of the trial, the Chancellor granted appellee judgment for $1,571.52, and impressed a lien on certain real estate upon which the aforementioned buildings are located. From such action of the court, in declaring the judgment a lien, comes this appeal.

Section 51-613 of Ark. Stats. (1947) Anno. provides as follows:

"It shall be the duty of every person who wishes to avail himself of this act to file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated, and within ninety (90) days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of

[1] Other issues were raised by the pleadings in the trial court and acted upon, but are not here on appeal.

[2] The transactions between appellants and appellees were handled by Mrs. Streuli.

the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit."

Under our decisions, there appear to be two exceptions to the above statutory requirement. The first exception is where the items were furnished under a definite contract between the parties, and the second exception is where the items were furnished under a "running" or open account, in which there was no specific contract between the parties, but under circumstances in which this court held the statute not to apply. The first exception applies to cases where the owner and materialman contract for the materialman to furnish material for the construction of a particular structure. Perhaps items are furnished over a considerable period of time, and the lien is not filed until the last are furnished. We have uniformly held that if the last items furnished are a part of the original contract, the materialman may wait until the last is delivered before filing his lien, and in such case, the lien will relate back and cover all items furnished from the beginning. *Planters Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 280 S. W. 999. In the instant cause, it is admitted there was no contract between the lumber company and the Streulis. Appellee's case therefore must come within the second exception, and it (appellee) relies largely upon *Kizer Lumber Co.* v. *Mosely,* 56 Ark. 544, 20 S. W. 409. There, materials were furnished on nine different days . . . March 11th, 23rd, 24th, 28th, April 1st, 4th, 7th, and 14th, and May 4th, and the account to secure a lien was filed with the clerk of the court on July 8th. The amount claimed was $184.10, though only $21.26 was due for lumber furnished within 90 days before the filing of the account. Quoting from the Opinion:

"* * * When the defendant purchased of the plaintiffs the first lot of lumber, he made no contract to buy any other material, *but said to them that he might need more.** He did need it, and called upon them from time to time to furnish the same, which they did, and

* Emphasis supplied.

charged it to him on account. *It was furnished at short intervals,** and it seems, was appropriate to the progress of his house, and he used it in building the same. The presumption is, it was furnished under one contract; and the amounts due for the same should be treated as one demand. The consequence is, the time for filing the account for all the materials furnished commenced running from the date of the last item of the same, and plaintiffs have a lien for the whole of it. * * *"

The rule was further stated by the Court in the following language:

"* * * If, however, he began to furnish 'without any specific agreement as to the amount to be furnished,' or the time within which they were to be furnished, and there was a *'reasonable expectation that further material' would 'be required of him',** and he was 'afterwards called upon from time to time to furnish the same,' he should file it within ninety days after the last item was delivered. * * *"

In the cause presently before us, the record does not reflect that at the time of the last purchase in February, 1954, anything was said by Mrs. Streuli to the effect that she might need more materials. Nor does the record reflect that there was a "reasonable expectation that further materials" would be required. It might be added that 10 months would hardly constitute a "short interval," but the first points control the litigation.

The evidence in this cause, as introduced by appellee, only reflects that Wallin-Dickey & Rich Lumber Company sold the materials and delivered them to appellants. Mrs. Streuli testified that the materials were used in various improvements of the premises. *The evidence in nowise reflects that these last improvements were contemplated either at the time of the original purchase, or on February 16, 1954, when the purchases ceased until the following December.*

* Emphasis supplied.

To hold that appellee is entitled to a lien from the evidence before us, would have the same effect as saying that an individual can obtain his materials, build a house, complete same as he had planned, fail to pay the materialman, and, after a long number of months, or perhaps years, deciding that he wants to add a room, purchase material from the same materialman, again fail to pay, and the materialman is then entitled to file his lien, not only for the last material furnished, but for all that furnished in the original construction of the house. Such a holding would extend the recognized exceptions much farther than our present cases allow.

Summarizing, the burden was on appellee to either prove compliance with the statute or that it was entitled to its lien under the exceptions heretofore set out. This burden of proof has not been met except as to $26.19, which covers the balance due on materials bought from December 13, 1954, through January 26, 1955, and which purchases accordingly were made within 90 days of the filing of the lien. This item is not disputed by appellants, who have tendered said amount with interest. Under the conclusions reached, the question as to the priority of liens, involving the mortgage holder, Woods, becomes moot.

The cause is accordingly reversed and dismissed.

BAILEY *v.* STATE.

4866 302 S. W. 2d 796

Opinion delivered May 27, 1957.

[Rehearing denied July 1, 1957]

Thad D. Williams, for appellant.

Bruce Bennett, Atty. Gen'l.; Thorp Thomas, Asst. Atty. Gen'l., for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Luther Bailey, was convicted of the crime of rape and the death penalty was assessed,—§ 41-3401—41-3402—41-3403, Ark. Stats. 1947. From the judgment comes this appeal.

For reversal appellant has assigned 31 alleged errors in his motion for a new trial. The first three assignments question the sufficiency of the evidence. The prosecuting witness (a widow, 49 years of age, mother of two daughters and supervisor with the Independent Linen Company) testified that in the early morning (about 12:30 a.m.) of June 14, 1956, she was awakened by the barking of her neighbor's dogs, heard noises in her house and got up to investigate. As she was going into the kitchen a man seized her, carried her into a bedroom where he forcibly and against her will, and holding a knife at her throat, had intercourse with her. There was actual penetration. Immediately following the first assault on her, he forced her to give him her purse, (later found in his car) containing about $190—cut the telephone wire—and while in her living room forcibly and against her will had intercourse with her again. He dropped his identification cards in her bedroom. He then left.

She immediately went to the home of a next door neighbor and reported what had happened. This neighbor, Mr. Pitts, testified that the prosecuting witness, at between 1:00 and 1:30 a.m. on June 14, "came hammering on my door . . . she was dressed in a gown and had a robe on and a pair of shoes . . . She was very upset . . . nervous and crying . . . on her leg there was a bruise and on her throat scratches and cuts or some kind of lacerations and also her hands and arms were bruised." He called the police and one of her daughters within five minutes after she came in. He went with the police to her house, found it locked and entered by unlocking the back door. The light switch had been turned off. They found a billfold with appellant's name on it on the floor of her bedroom. A small window in the pantry, some 6½ feet from the ground,

had been raised. There was a torn window screen on the ground. It had been on the window the day before. There was other evidence tending to corroborate the prosecuting witness. However, corroboration was not necessary to a conviction of rape. In *Hodges* v. *State,* 210 Ark. 672, 197 S. W. 2d 52, we said: "Headnote 1. Rape—Prosecuting Witnesses Need Not Be Corroborated.—In the prosecution of appellant on a charge of rape, it was not necessary that the testimony of the prosecuting witness be corroborated." Also see *McDonald* v. *State,* 225 Ark. 38, 279 S. W. 2d 44.

Appellant admitted that he did have intercourse with the prosecuting witness, but stoutly insisted that she did not object but voluntarily submitted to him. This made a question of fact for the jury. We think there was ample substantial evidence to support the jury's verdict. The jury is the sole judge of credibility of the witnesses and the weight to be given their testimony.

In Assignment 4, error is alleged because the court denied his motion to consolidate along with the charge of rape, the charges of robbery and burglary. The answer is that § 43-1010 Ark. Stats. 1947 provides specifically what offenses may be joined in any indictment, and no provision is made for the joining of rape, burglary and robbery.

In Assignment 5, appellant says the court erred in refusing to allow him to take an "oral deposition" of the prosecuting witness, relying on Act 335 of the Acts of 1953. We do not agree with this contention. We hold that Act 335 applies only to civil cases and that the legislature so intended. Reference is made repeatedly throughout the act to the "parties", "a party", or to any party—a defendant is not used. The applicable statute is § 43-2011 Ark. Stats. 1947 which provides: "Depositions.—The court, or judge in vacation, or a judge of the Supreme Court, may authorize a defendant to take the deposition of a material witness where there are reasonable grounds to apprehend that, before the trial, the witness will die or become mentally in-

capable of giving testimony, or physically incapable of attending the trial, or of becoming a nonresident of the state. The materiality of the testimony, and the reason for taking his deposition shall be shown by affidavit." Here no showing by affidavit was made by appellant that the prosecutrix was about to die, would become mentally or physically incapable to testify, or was about to become a nonresident, or that she would not be available at the trial. Had the legislature intended Act 335 to apply to criminal cases (as well as civil) it could easily have so declared. Furthermore, the appellant, himself, introduced in evidence the statement that the prosecutrix made to Deputy Prosecuting Attorney Jernigan.

In Assignments 6 and 7 appellant contends "that the court erred in not allowing the Jury Commissioners, for the March term 1952 to the March term 1956 inclusive, to testify, as these Jury Commissioners would have testified to the matters, allegations and other things set out in Luther Bailey's motion to quash the regular and special jury panels for the March 1956 term; that the court erred in overruling defendant's motion to quash the regular panel and the special panel of the petit jury."

Mr. Louis Rosteck, Deputy Clerk of the Circuit Court, testified in effect that his record shows that two negroes were selected by the jury commissioners for the March 1952 term, out of a total of 24. It is the general procedure of this court to select 24 jurors on the regular panel and 12 alternates. These two negroes actually served. There was one negro on the jury panel for the September 1952 term. There were two negroes selected for the March 1953 term. Five negroes served during the September 1953 term; three were on the extra panel and two on the regular panel. For the special panel five jurors were selected out of 21. There is nothing to indicate on the record whether they were white or colored. There were two negroes on the March 1954 term. There were 24 persons on the special panel; only five were selected. The record does not indicate whether the remainder were colored or white. Two negroes were selected on the panel for the September

1954 term. There was a special panel for that term of 100 names; seven persons were selected; they were all white. He did not know whether the remaining people on the list were colored or white. Three negroes served on the March 1955 regular panel. One person was used from the special panel of 100 names. Four negroes were included in the 100. Only one person out of 100 was used on the September 1955 special panel. There were three negroes on the regular panel. Three negroes were selected on the regular panel for the March 1956 term. The first special panel selected has 150 names on it; it does not indicate colored and white. The first 100 on this list were ordered to report this morning; 27 of them are here; none are negroes; . . . "Record of Poll Tax receipts issued in Pulaski County for the years 1954 and 1955.

Total number colored

(1954) 10,180 14.8% (1955) 8,557 13.3%

Total number white

(1954) 58,484 85.2% (1955) 55,980 86.7%"

We think the court did not err in refusing to allow the jury commissioners to testify. They had not been subpoenaed to appear as witnesses and were not present. Furthermore, after the court had denied his request that they be permitted to testify, appellant failed to show what the jury commissioners would have said had they testified. See *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24.

Appellant next argues that the above testimony of Louis Rosteck alone was sufficient to show racial discrimination. We do not agree. We think Rosteck's testimony,—which speaks for itself,—does not show an intentional and systematic limitation of negroes on the jury list. The rule appears to be well settled that an accused is not entitled to a jury composed in part of members who are of his race. *Cassell* v. *Texas,* 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629; *Akins* v. *Texas,* 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276. Neither was appellant entitled to proportionate representation on the

jury panels. "Fairness in selection has never been held to require proportional representation of races upon a jury . . . The mere fact of inequality in the number selected does not in itself show discrimination," *Smith* v. *State,* 218 Ark. 725, 238 S. W. 2d 649. Also see *Virginia* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667; *Thomas* v. *Texas,* 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393.

In Assignment 8, appellant contends, that the court erred in permitting witness Charles Pitts to testify as to the prosecutrix's physical appearance when he admitted her to his home, on the night the crime was committed, at about 1:30 a.m. on June 14. We have held contrary to this contention in *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9, "Headnote 4. Rape—Evidence.—In a prosecution for assault with intent to rape, evidence that the prosecutrix had a scratch on her face the day after the alleged assault, and that her side was so badly hurt that she consulted a doctor three or four days later, was competent."

In Assignments 9, 10, 11 and 15, appellant contends, in effect, that the court erred in allowing certain officers to testify as to a statement, or confession, made and signed by him. We do not agree. The record reflects that appellant made the statement freely, voluntarily and without threats, duress or any promise of leniency, and after being warned that it might be used against him. See *Morris* v. *State,* 197 Ark. 695, 123 S. W. 2d 513 and *Wooten* v. *State,* 220 Ark. 750, 249 S. W. 2d 964. Furthermore, appellant introduced his own statement in evidence in his defense.

In Assignments 12, 13, 14 and 16, appellant contends that the court erred in admitting in evidence (a) a billfold belonging to appellant, found in the prosecutrix's bedroom, (b) her purse found in appellant's car and (c) certain photographs showing the bruises on her body, as above indicated. No error is shown here. The evidence reflects that appellant admitted to two officers that the folder found in the bedroom belonged to him. At the time of appellant's arrest Officer Turner found prosecutrix's purse in appellant's car. Another officer

testified that this purse was turned over to him by Officer Turner and was in substantially the same condition as when received. In *Grays* v. *State*, 219 Ark. 367, 242 S. W. 2d 701, where the facts were similar in effect to those presented here, we said: "The pocketbook was identified by the widow of the deceased as being his and, though some of the money had been taken out, the pocketbook had been in no way altered. It was competent to show a connection between the defendant and the murder." As to the photographs in question, the prosecutrix and a physician testified that they accurately represented her injuries, showing the area and the condition of the bruises on her body. In *Oliver* v. *State*, 225 Ark. 809, 286 S. W. 2d 17, we said: "The admission and relevancy of photographs must necessarily rest largely in the discretion of the trial judge. We find no abuse of discretion in the admission of photographs in the instant case. Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe and the jury better to understand, the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible." See also *Jones* v. *State*, 213 Ark. 863, 213 S. W. 2d 974; *Black* v. *State*, 215 Ark. 618, 222 S. W. 2d 816; *Smith* v. *State*, 216 Ark. 1, 223 S. W. 2d 1011; *Perkins* v. *State*, 217 Ark. 252, 230 S. W. 2d 1.

In Assignments 17 and 18, appellant challenges the correctness of the court's striking the testimony of Irene Wright. She testified that appellant lived close to her and that she had received several telephone calls for him from a person who identified herself as the prosecuting witness. She did not know the prosecutrix and was not sure that the voice was that of a white woman. We think this testimony was properly excluded for the reason that the identity of the person who talked to the

witness over the telephone was not satisfactorily identified. "Generally, in order to introduce evidence of a telephone conversation or communication, otherwise unobjectionable, the identity of the person, who is claimed to have talked over the telephone, must first be satisfactorily established by the party seeking the introduction of the telephone conversation. To hold one responsible for statements and answers made over the telephone by unidentified persons would open the door for fraud and imposition," 20 Am. Jur., Evidence, § 366, p. 334.

In the remaining assignments, 19—31, appellant contends that the court erred in giving certain instructions offered by the State and in refusing to give his requested instructions 1, 2, 3, 4, 5, 9, 12, 13, 14, 15 and 20. It appears that only a general objection was made by appellant to the court's refusal to give all of his requested instructions above with the exception of Instruction 20 (to which refusal a specific objection was made), which was a requested instruction on the lesser offense of assault with intent to commit rape. As indicated, other than the specific objection to the court's refusal to give his Instruction 20, only a general objection was made to the refusal to give the other instructions. It was appellant's duty by specific objection to point out any vice in these instructions. This he failed to do. See *Rutledge* v. *State,* 222 Ark. 504, 262 S. W. 2d 650. We have examined these instructions to which appellant was content to make only a general objection and find no error in any of them.

We think there was no error in the court's refusal to give appellant's Instruction 20 on assault with intent to commit rape. The prosecutrix's testimony tended to show that appellant was guilty of rape. The appellant admitted that he did have intercourse with her but testified that she did not object—but consented. In these circumstances we think the court properly refused to instruct the jury on the lesser offense of assault to rape. We said in *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, "Moreover, there was no testimony to justify the court in giving an instruction allowing the jury

to return a verdict for an assault with intent to commit rape. The testimony of the prosecutrix certainly tended to prove that the appellant was guilty of the crime of rape, and nothing less. On the other hand, the testimony of the appellant himself tended to prove that the appellant was not guilty of any offense. Therefore the court correctly instructed the jury that, under the testimony in the case, they should either find appellant guilty of the crime of rape as charged, or they should acquit him altogether." See also *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785.

Affirmed.

(ORDER OF JULY 1, 1957)

Rehearing denied. HOLT and WARD, JJ., upon reconsideration think the petition for rehearing in this case should be granted on the sole ground that the trial court erred in refusing to give the instruction, requested by appellant, on the lesser offense of an assault with intent to commit rape.

PARKER *v.* PARKER.

5-1277 302 S. W. 2d 533

Opinion delivered May 27, 1957.

[Rehearing denied June 24, 1957]

D. D. Panich, for appellant.

Charles S. Harley, for appellee.

ED. F. MCFADDIN, Associate Justice. The decisive question in this case is, whether a divorce decree rendered in open court is effective from the date it was ac-

tually rendered, or from the date the decree was entered of record.

Iva Thornton Crawford sued S. R. Crawford for divorce in the Pulaski Chancery Court. The case was No. 102787; and on August 22, 1955 there was entered a decree in that cause which stated, *inter alia:*

"On this 9th day of August, 1955, came on for hearing the above styled cause, plaintiff appearing in person and by her solicitor, Thorp Thomas, and it appearing that due service of process by summons personally served upon the defendant for the time and in the manner prescribed by law, issued on the complaint herein, has been had in this cause; and this action having been reached upon call of the calendar is submitted to the Court for its consideration and judgment upon the complaint of the plaintiff, the answer of the defendant, and the oral testimony of the plaintiff, and that of Mrs. Nell Cartwright and Mrs. Tom Wood in her behalf; and the oral testimony of the defendant; from all of which, argument of counsel and other matters, things and proof before the Court, the Court doth find:

"That plaintiff and defendant were married on the 21st day of July, 1934 and that they lived together as husband and wife until September of 1954; that plaintiff had just cause for a dissolution of said bonds of matrimony, in that the defendant was guilty of such indignities as to render plaintiff's condition in life intolerable . . .

"It is therefore by the Court considered, adjudged and decreed that the bonds of matrimony existing between plaintiff and defendant be, and the same are hereby cancelled, set aside and held for naught; that plaintiff's maiden name of Iva Thornton be, and hereby is restored."

From the foregoing it will be observed that the cause was heard in open Court on August 9, 1955, and the decree announced although the decree was not actually entered of record until August 22, 1955. Such time lag caused the present litigation: after the Court

announced the divorce decree on August 9, 1955, the plaintiff, Iva Thornton, being advised by her attorney that she had a divorce, married Charles A. Parker on August 12, 1955.

On August 3, 1956 Charles A. Parker filed suit seeking a divorce from Iva Thornton Parker; and, although the complaint in that case is not before us, it seems that some question arose as to whether Iva Thornton Parker was a single woman on August 12, 1955 when she married Charles Alton Parker. On November 20, 1956, the Pulaski Chancery Court, after due notice, directed that the *Crawford* v. *Crawford* decree, entered on August 22, 1955, be entered *nunc pro tunc* as of August 9, 1955. From such order Charles A. Parker, as appellant, brings this appeal, seeking to have vacated the *nunc pro tunc* order of November 20, 1956. Iva Parker is the appellee.

This case might be decided on either one of several points, but we rest our opinion on the holding that the divorce decree was effective on August 9, 1955, even though the decree was not actually entered of record until August 22, 1955. This is not a case in which the cause was taken under submission by the Court and decree rendered in vacation. In such an event the decree would be effective only from the date the decree was actually entered. See § 22-433 Ark. Stats.; *Red Bud Realty Co.* v. *South,* 145 Ark. 604, 224 S. W. 964; *Jelks* v. *Jelks,* 207 Ark. 475, 181 S. W. 2d 235; *Cates* v. *Wunderlich,* 210 Ark. 724, 197 S. W. 2d 482; and *Meadows* v. *Costoff,* 221 Ark. 273, 252 S. W. 2d 825. But this is a case in which the Court heard the testimony of the witnesses *ore tenus* and rendered the decree on August 9, 1955; and the decree became effective on that date. In a long line of cases we have recognized that decrees rendered in open court are effective from the date they are *actually rendered,* and not from the date of *entry of record. Ex Parte Morton,* 69 Ark. 48, 60 S. W. 307; *American Mortgage Co.* v. *Williams,* 103 Ark. 484, 145 S. W. 234; *Chatfield* v. *Jarratt,* 108 Ark. 523, 158 S. W. 146; *American Investment Co.* v. *Hill,* 173 Ark. 468,

292 S. W. 675; *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44. In the last cited case, we quoted from *Hollabaugh* v. *Taylor,* 134 Ark. 415, 204 S. W. 628: "A decree becomes effective from the date of its rendition and not from the date of its entry of record". We also quoted in *McConnell* v. *Bourland* from 34 C. J. 44, saying as to a judgment: "Upon its rendition, and without entry, a judgment is final, valid, and enforceable as between the parties, in the absence of any statute to the contrary, although for many purposes entry of judgment is also essential". See also 19 C. J. 185 and 27 C. J. S. 834.

In the recent case of *Norfleet* v. *Norfleet,* 223 Ark. 751, 268 S. W. 2d 387, we held that under Act No. 555 of 1953 the time for appeal commences on the entry of the judgment; but we also recognized that the effective date of the judgment was from the day it was pronounced by the Court. We said:

"Here the decree was rendered on January 9, but it was not entered until some days later. The distinction lies in the fact that the rendition of a judgment is a judicial act on the part of the court, while the entry of a judgment is a ministerial act performed by the clerk. *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44."

So, in the case at bar, the divorce decree was effective on the 9th day of August, 1955; and the Court was correct when, in its order of November 20, 1956, it in effect recognized that the divorce decree was valid from the date of rendition, *i.e.,* August 9, 1955.

Affirmed.

HARMONY GROVE SCHOOL DIST. NO. 1 *v.* CAMDEN SCHOOL DIST. NO. 35.

5-1286 302 S. W. 2d 281

Opinion delivered May 27, 1957.

J. S. Brooks and *M. P. Matheney,* for appellant.

Gaughan, McClellan & Laney, for appellee.

MINOR W. MILLWEE, Associate Justice. In 1944 the United States acquired a large body of land in Ouachita and Calhoun counties for the construction and operation of a naval ammunition manufacturing plant pursuant to the provisions of the Constitution of the United States, Art. 1, Sec. 8 Clause 17,[1] and Ark. Stats., Sec. 10-1101.[2] All the land lying in Ouachita County was within and a part of the appellant, Harmony Grove School District No. 1. For several years after acquisition of the land and operation of the munitions plant by the federal government some of the children in the area attended the schools of the Harmony Grove District while others attended the schools of appellee, Camden School District No. 35, pursuant to various orders of the appellant, Ouachita County Board of Education.

On June 21, 1955, the County Board of Education entered an order assigning all school children in the

[1] This section provides that Congress shall have power to exercise exclusive legislation over all places purchased by the United States, "by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings . . ."

[2] By this statute the state consents to such purchases by the United States and cedes state jurisdiction over such properties to the United States with certain exceptions.

area in question to the Harmony Grove District and directed the proper officers to effect such assignment and allot all financial benefits of state aid and county apportionment to said district. The Camden District and 90 patrons appealed from the order on the grounds that it was illegal and contrary to the best interests of the children and patrons involved. The County Board of Education and Harmony Grove District intervened and answered in the Circuit Court where a jury was waived and the cause submitted for a determination of one question under a stipulation of the following facts pertinent thereto:

"That both the Camden District and the Harmony Grove District are regularly organized and existing common school districts, lying within the boundaries of Ouachita County, Arkansas.

"That on Dec. 6, 1944, the Federal Government acquired title to the area here in dispute, for construction and operation of a Naval Ammunition manufacturing plant. Prior to such acquisition, this area was a part of The Harmony Grove District, in Bradley Township, Ouachita County. The said Federal area does not touch the boundaries of The Camden District. After the Government's acquisition, 150 or more children of school age have resided in the Area, formerly a part of The Harmony Grove District. Since its acquisition, the United States has continuously held title to the area in question as an integral part of the Naval Ammunition Depot, which has been engaged in the manufacture of munitions."

The following question was submitted as the sole issue for decision under the stipulation: "Were the legal rights or jurisdiction of the Harmony Grove District, for school purposes, divested by the acquisition of the land within the geographical boundaries of said district by the federal government in 1944, as to the territory thus acquired, and the formation by the government into a federal area now known as the Naval Ammunition Depot Area?" The instant appeal is from the judg-

ment of the Circuit Court answering the posed question in the affirmative. Other findings in said judgment are not in issue here.

In support of the able trial court's holding the appellees earnestly insist that the United States having acquired the area in 1944 with the consent of the state and having since maintained it as an arsenal, or munitions plant; it inescapably follows that the area is no longer a part of the Harmony Grove District which has since such acquisition been divested of all jurisdiction and legal rights for school purposes. We cannot accede to this view.

The legislatures of the respective states are required by constitutional provisions to provide a system of free public schools whereby all children may receive an education.[3] 47 Am. Jur., Schools, Sec. 7. We are cited to no instance in which the federal government has assumed this most important duty and function traditionally exercised by the several states in those areas ceded to the government for military purposes. Nor are we cited to any authority directly in point on the exact question at issue. However there is authority for the proposition that the acquisition by the federal government of land situated within a school district for military purposes does not detach or remove such territory from the district, but it remains a part thereof, and the validity of the district is not thereby impaired. 78 C. J. S., Schools and School Districts, Sec. 30 (a).

In answer to the contention that a school district ceased to validly exist as to that portion of its territory acquired by the United States for military purposes in *Hufford* v. *Herrold,* 189 Iowa 853, 179 N. W. 53, the court said: "The acquisition by the United States government of a portion of the territory included within said district for military purposes, it is true, deprived

[3] "Intelligence and virtue being the safe-guards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction." [Ark. Constitution, Art. 14, Sec. 1.]

the district of the right to levy and collect taxes therefrom, but our attention is called to no statutory provision or other authority to the effect that such action changed the boundaries of said district, or took the land thus acquired by the government out of the territorial limits of the district . . . If the United States government shall in the future restore the land taken to private ownership, it would doubtless be subject to the payment of taxes, the same as though the government had not acquired it for military purposes."

In sustaining the validity of a state statute authorizing the state board of education to establish independent school districts upon U. S. military reservations located within the state, we find this statement by the Texas court in *Central Education Agency* v. *Independent School Dist.,* 152 Texas 56, 254 S. W. 2d 357: "At the time the Federal government enlarged the area of the Fort Bliss Military Reservation, the added area was a part of various school districts in El Paso County, other than El Paso Independent School District. The taking over of this area by the Federal government did not remove such area from the respective school districts, nor did it serve to change the boundaries of these districts. It is true that the state and all of its subdivisions lost all power to tax or control the area and the property situated thereon, except as may be agreed upon by the State and Federal authorities. But for the two orders passed by the State Board of Education attaching and including such area to the El Paso Independent School District, the area would have remained in, and as a part of, those other school districts to which it belonged at the time of the taking over of such area by the Federal government." That case also reflects the policy of the federal authorities to leave the education of children within the area of U. S. military reservations to state and local agencies charged with such duty and the disposition on the part of such authorities to cooperate with such agencies in the discharge of that duty.

In addition Congress has enacted several statutes[4] in recent years in recognition of federal responsibility for the impact which projects like this have had on school construction needs in the affected area as well as other financial burdens placed on state and local educational agencies by reason of such acquisitions and operations. In providing federal financial assistance to the state and local school districts in these statutes Congress has fully recognized the authority and jurisdiction of such local agencies over the affected area for school purposes. The recognition of such authority in no manner interferes with the proper exercise of federal jurisdiction of the area for military or defense purposes. In carrying out the state's constitutional duty to educate its children the local school district is not exercising any jurisdiction contrary to that of the United States in the operation of its arsenal. This does not mean that the federal government could not set up and operate schools in the area if it saw fit to do so. Thus it has been held that land ceded to the federal government and used by it for the operation of an Indian school is no longer a part of the local district in which it is situated. *School Dist. No. 20* v. *Steele,* 46 S. D. 589, 195 N. W. 448. But the government is not engaged in the operation of a school here. Nor has Congress seen fit to exercise the discretionary power of "exclusive legislation" given it under the Constitution (Art. 1, Sec. 8, *supra)* over areas, acquired by the government for military purposes such as the one involved here.

We hold that the jurisdiction or legal rights of the Harmony Grove District for school purposes over the area in question were not divested by its acquisition by the United States in 1944; and that the posed question should be answered in the negative. The judgment is reversed and the cause remanded with directions to enter judgment accordingly.

[4] Public Law 815 enacted September 23, 1950; Public Law 874 enacted September 30, 1950; Public Law 248 of August 8, 1953; and Public Law 382 passed August 12, 1955.

LYNCH *v.* CYPERT.

5-1284 302 S. W. 2d 284

Opinion delivered May 27, 1957.

John B. Driver and *Virgil D. Willis,* for appellant.

N. J. Henley, for appellee.

GEORGE ROSE SMITH, J. An abandoned railroad right of way, 200 feet in width, lies between the appellant's land on the north and the appellee's land on the south. The appellant brought this action in ejectment to recover possession of the south half of the 200-foot strip. The complaint alleges that the entire strip was conveyed to the railroad company by one of the plaintiff's predecessors in title, Mike Mathis, and that the entire strip therefore reverted to the plaintiff when the railroad company removed its trackage in 1949. It is asserted that the defendant, whose land lies on the south side of the right of way, has wrongfully constructed a fence along the center line of the strip and taken possession of the south half thereof. The circuit court, sitting without a jury, rejected the plaintiff's contention that the entire strip had reverted to him, and judgment was accordingly entered for the defendant.

In conveying the 200-foot strip to the railroad company Mathis executed two separate instruments. There is no controversy about the first instrument, which was executed in 1902. That deed conveyed a 100-foot easement across a forty-acre tract "for the actual construction, use, maintenance and operation of said railroad."

The case turns upon the correct interpretation of the second instrument, which Mathis executed in 1903. This conveyance is in form a warranty deed, with the

usual granting clause, habendum, and covenant of warranty. It conveys "the following land lying in Searcy County, Arkansas, to-wit: 50 feet on either side of the 100 feet of right of way heretofore deed[ed] to said St. Louis & N. Ark. Ry. Co. for depot grounds between stations 5074 and 5095," etc. It is stipulated that Mathis owned no land south of the 200-foot right of way, the southern boundary of that strip being also the southern boundary of his forty-acre tract. The trial court held that the second deed conveyed the fee simple title to the fifty feet lying on each side of the original easement and that therefore there had been no reversion to the appellant, since his land borders on a strip that the railroad company owned in fee. The court concluded that the appellant had not proved his own title and so could not prevail in ejectment.

We agree with the trial court's view. If the words "for depot grounds" had not been inserted in Mathis' second deed the instrument would undoubtedly have conveyed the fee simple, and there would be no plausible basis for the contention that some lesser estate was intended. Hence the appellant's argument boils down to the assertion that the grantor's reference to depot grounds (together with the fact that a nominal consideration of one dollar was recited) overrides all the rest of the instrument and keeps it from being an absolute conveyance.

At the outset it will be observed that the pivotal words, "for depot grounds," seem by their position in the deed to refer to the 100-foot easement already granted and not to the additional land being conveyed by the second instrument. No attempt was made to clarify this ambiguity by proof of the use that has actually been made of the 200-foot strip. On this record we are left in doubt about what land the parties expected the railroad company to use for depot grounds.

If it be assumed, however, that the reference was to the outer areas along the original easement, there is still no persuasive reason for saying that the words "for depot grounds" change the legal effect of the instru-

ment. The appellant, citing *Daugherty* v. *Helena & Northwestern Ry.*, 221 Ark. 101, 252 S. W. 2d 546, intimates that a mere easement for depot purposes was meant. The instrument construed in the *Daugherty* case did not purport to be a warranty deed and differed in many respects from that now before us. That deed was expressly "for a right of way," which brings to mind the thought of an easement, while a depot site suggests a more extensive use of the land. In the only case that seems to be directly in point, *Texas & P. Ry. Co.* v. *Martin,* 123 Tex. 383, 71 S. W. 2d 867, a warranty deed to a railway company contained two recitals that the land was to be used for depot purposes. The court held that the deed was nevertheless a fee-simple conveyance.

Nor can it well be said that Mathis's second deed created a defeasible fee in the grantee. The language of the instrument is not that ordinarily employed to describe such an estate. *Davis* v. *St. Joe School Dist.,* 225 Ark. 700, 284 S. W. 2d 635. And as a general rule a bare recital of the purpose for which the land is conveyed is not enough to justify a finding that a determinable fee or fee on condition subsequent was intended. Powell on Real Property, § 187; *Fitzgerald* v. *Modoc County,* 164 Calif. 493, 129 P. 794; *Fuchs* v. *Reorganized School Dist. No.* 2, (Mo.) 251 S. W. 2d 677.

Affirmed.

HALPERIN *v.* HOT SPRINGS STREET RAILWAY COMPANY.

5-1272 302 S. W. 2d 535

Opinion delivered May 27, 1957.

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

House, Holmes, Roddy, Butler & Jewell and *Charles J. Lincoln,* for appellee.

PAUL WARD, Associate Justice. On April 5, 1955 appellant, Tillie Halperin, a woman 61 years of age, was injured as she was trying to alight from a bus owned by appellee, Hot Springs Street Railway Company, and operated by one of its employees, after the bus had stopped on Central Avenue in front of the Arlington Hotel in Hot Springs.

On April 11, 1955 appellant filed her complaint for damages against the Railway Company, charging the company with negligence in the following particulars: The driver of the bus "negligently and carelessly failed to pull the bus into the designated bus stop, negligently failed and omitted to give the plaintiff due and timely warning or any warning at all of the dangerous condition of the street;" That the driver of said bus came to a stop "approximately 3 feet from the curb and approximately 13 feet from the regular designated bus stop, and that there was a deep hole in the pavement immediately in front of the rear door where the passengers alight;" That the driver of said bus saw, or should have seen, that if he opened the door to permit passengers to alight at the point where he did stop the passengers would be in danger of falling into said hole in the street and that it was not a safe place to stop the bus for discharging passengers, and; Her injury was a direct result of appellee's negligence as set out above. To the above complaint appellee entered a general denial and later, by amendment, pleaded contributory negligence on the part of appellant.

At the close of appellant's testimony the trial court, on motion, instructed the jury to return a verdict in favor of the Railway Company. This action by the trial judge apparently (judging from his remarks to the attorneys) was based on the grounds that the testimony showed no negligence on the part of the Railway Company or its employee but did show contributory negligence on the part of appellant.

We think the court was in error. While the record is somewhat voluminous, the facts essential to this opinion are relatively few and, for the most part, undisputed.

Appellant was at the time of the accident, and for several months previously, had been working for Doctor McWorter in the Medical Arts Building which is located on Central Avenue, just across the street from the Arlington Hotel. She rode to work each morning

on a bus belonging to the appellee company. On many such occasions she alighted from the bus at the same place where it was supposed to have stopped at the time of the accident. On the day of the accident, April 5, 1955, appellant had eaten lunch on Central Avenue some considerable distance south of the Arlington Hotel. After lunch she boarded the bus in question to return to her place of employment. When the bus stopped in front of the Arlington Hotel she was injured while attempting to alight. The following facts are undisputed: The bus did not stop where it was supposed to stop, but did stop some distance (alleged to be 13 feet) to the south. When the bus came to a stop it was some 2 or 3 feet from the curb, and just in front of the rear door (which appellant used in departing) was a storm sewer opening in the curbing. This opening was 4 or 5 feet in length and apparently 8 or 10 inches high. Starting back in the street about 26 inches from the opening the street sloped gently to the opening. Several pictures of the opening and the adjacent portion of the street and curb are in the record.

Since no one who testified was in a position to know the details of just how the accident happened except appellant, it is important, and we shall attempt, to set out her material testimony in detail. She stated: When the bus stopped I "got up and walked toward the rear door of the bus . . . " "I held on to the rail, I guess you call it a rail, inside the bus—there is a seat on the side, see? I held on to that rail with my right hand and stepped down with my right foot on the bus step; and I didn't see the drain because in glancing the way I was standing the view was obscured, and I just gripped on to the door before I started to step, and when I had hold of the door and started to step is when I realized what I was getting into. I realized that the hole was there and I gripped frantically to the door with my right hand, trying to pull my foot back, and by that time it had hit the pavement, down in the drain, the incline, you know. And I was trying to get my foot back; and in some manner I must have pulled

my foot back enough and I felt my hand give way and I fell to the—gutter, with my left foot kind of up under my right leg . . ." "I grabbed onto the door with my right hand, to keep from going into that drain." I don't think the bus was more than 2 feet from the curb. I was pretty close to it and my foot was going into the drain. "Well, I figure I would have gone into the hole with my left foot if I hadn't started pulling myself back and tried to keep out of it." ". . . it happened so suddenly that I really—for a second there I didn't know when I fell, when my hand gave way and I fell, then I was kind of stunned." When I fell my left foot was under my right leg and "my right leg was stretched out over the drain." "Well, it all happened so quickly. I looked when I got hold so I could support myself in stepping down but I was stepping practically at the same time and I didn't see the hole and didn't expect it there."

Viewed under the applicable rules, we think the above testimony presented a question for the jury. As stated in *Missouri Pacific Transportation Company* v. *Robinson,* 191 Ark. 428, 86 S. W. 2d 913, and other cases, ordinarily negligence and contributory negligence are questions for the jury. Our decisions also are uniform in holding that, where a verdict is directed in favor of a party, the testimony will be given its strongest probative force for the party against whom it is directed. In the *Robinson* case cited above, it was said, at page 432 of the Arkansas Reports, "The law imposes the highest degree of skill and care upon common carriers consistent with the practical operation of their cars to furnish their passengers a safe place to get on and off."

Appellee attempts to justify the action of the trial court on the ground that the testimony shows appellant was guilty, as a matter of law, of contributory negligence, but such contention cannot be sustained.

It is true that appellant apparently could have seen the opening in the curb if she had looked for it, but she had alighted at the same bus stop (at the proper

place) many times before and, of course, knew there was no such hazard as an opening in the curb. Her testimony on this point was: Q. "Let me interrupt Mrs. Halperin. You stated you had stepped off the bus a good many times before. You mean the regular bus stop?" A. "At the regular bus stop, yes."

It cannot be said, as a matter of law, that appellant's injury was caused solely by her negligence in letting go of the railing. It might be that she acted as she did because of the situation of peril in which she unexpectedly found herself — as a result of the bus failing to stop at the proper place. All these situations raised questions which, we think, presented themselves to a jury, as before stated. Consequently the cause must be reversed for further proceedings.

Several questions concerning the admissibility of evidence are discussed in the briefs. By stipulation, appellant took the deposition of Modine Grisham with appellee's attorney present. On cross examination, appellee's attorney asked several questions which (in most instances) called for answers based on conclusions or hearsay. In some instances the trial court refused to admit the answers. We think this was error. The rule is, as stated in Professor Conrod's work on Modern Trial Evidence, Vol. 2 at page 371, "A party litigant cannot object to evidence which he himself has solicited." Appellee recognizes this rule but thinks it does not apply to discovery depositions. It is unnecessary for us to decide whether the rule does or does not so apply because a discovery deposition is not involved here. We feel that the above comments will prevent any further disagreements over the admissibility of similar testimony.

Therefore the cause is reversed for further proceedings consistent with this opinion.

5-1207 302 S. W. 2d 786

Opinion delivered June 3, 1957.

[Rehearing denied July 1, 1957]

Lovell & Evans and *Darrell D. Dover,* for appellant.

Crouch & Jones, Russell Elrod, Wade & McAllister, and *DeLoss McKnight,* for appellee.

CARLETON HARRIS, Chief Justice. John Norman, a sales representative for Trailmobile, Inc., appellant herein, called upon Joe Robinson, appellee herein, who is engaged in the wholesale produce and trucking business in Springdale, Arkansas, for the purpose of soliciting an order for refrigerated trailers. Robinson was sufficiently interested in two used refrigerated trailers held by the company in Kansas City, and priced at $12,500 each, to go with Norman to Kansas City to examine them. On the return trip, appellee offered to purchase these refrigerated trailers for $23,800, and the following morning, after contacting company officials, Norman presented appellee with a sales order dated June 8, 1955, for two used 1955 CID 8512 Trailmobile Trailers with Thermo-Kings. On the next day, appellee executed his promissory note to appellant in the sum of $23,731.22, said note being secured by a chattel mortgage on the equipment purchased. This note was payable in thirty-five equal successive monthly installments in the amount of $659 each, (final payment to be $666.22), commencing on July 10, 1955. The note provided for interest after maturity at the highest lawful rate, together with reasonable attorney's fees. It further provided that upon failure to pay any installment when due, all remaining installments should, at the option of the holder, become immediately due and payable. The

chattel mortgage, of even date, securing the note, described the equipment as follows:

Name of Manufacturer	Manufacturer's Serial No.	Type & Model	Description of Body	Year	Other Identification
Trailmobile	1-00972	C-8512	Insulated Van	1955	Shiftable Tandem Thermo-King TK-5192
Trailmobile	1-00973	C-8512	Insulated Van	1955	Shiftable Tandem Thermo-King TK-8232

The two trailers were delivered to appellee, one being equipped with a 1955 model Thermo-King refrigeration unit, and the other with a 1952 model Thermo-King refrigeration unit. The invoice showed the price of the trailers as $11,900 each. About three weeks after the purchase, the 1952 model Thermo-King unit "broke down", and had to be repaired. A representative of Thermo-King sent a message to Robinson inquiring if he (appellee) knew that he had an "old model Thermo-King on that new trailer." Appellee, who had, a short time previously, sent a check to appellant as his first payment on the note, stopped payment on the check. No adjustment was made, and no further payment was made, and on the due date of the second payment, appellant filed suit on the note alleging it had elected to accelerate the entire balance of the note, seeking judgment for $23,731.22, together with 10% interest from July 10, 1955, and 10% of said sum as attorney's fees. An order of attachment for the property was sought and prayer was that the sheriff of Washington County hold the vehicles subject to the outcome of the action; that said vehicles be sold to satisfy the judgment, and "the plaintiff herein have judgment for any deficiency between the sale price of the said vehicles and the cost of this action and the amount of said judgment against the defendant herein. * * *" Bond for specific attachment in the sum of $50,000 was made. Appellee filed

a corporate surety bond in the sum of $23,731.22, plus interest thereon from July 10, 1955, at the rate of 10% per annum, and the costs of the action, conditioned that Robinson "shall perform the judgment of the court in this action." Robinson filed a general denial and a counterclaim alleging a breach of warranty, and asking for judgment for $4,000. An amendment was filed to the counterclaim and later an amended and substituted counterclaim was filed. After the filing of additional pleadings by appellant, the cause was set for trial for March 16, 1956. On March 15, appellee filed an amendment to his Amended and Substituted Counterclaim. The gist of appellee's contentions, as set forth in the pleadings, was that he did not receive the kind of Thermo-Kings that he was supposed to receive under the contract; that he was due two used 1955 models, but instead, received one 1955 model and one 1952 model; that the 1952 model was defective and unfit for the purpose for which it was purchased; that appellant refused to make any adjustment, and had breached the contract. The following day, appellant filed its motion to strike said amendment from the pleadings. The court declined to do so, and the cause proceeded to trial. At the conclusion of the evidence, the jury returned a verdict for appellant in the amount of $20,931.22, plus interest from July 10, 1955. Subsequent thereto, appellee filed motion for Judgment Notwithstanding Verdict, setting up that the jury, in finding that appellee was entitled to a credit in the amount of $2,800, actually found that appellee was not in default at the time of the filing of the suit and issuance of attachment, and that a proper instruction and form of verdict would have given the jury an opportunity to specifically find that appellee was not in default of the note sued upon, and that appellant accordingly was not entitled to accelerate the indebtedness. Appellant filed its response to the motion setting up that it should be overruled in all particulars, and on April 19, 1956, the court entered the following judgment in compliance with the motion:

"On this the 16th day of March, 1956, this cause comes on to be heard. The plaintiff appearing in per-

son and by attorneys and the defendant appearing in person and by attorneys; whereupon, both parties announced ready for trial.

"A jury composed of Bob Stout and eleven others of the regular panel of petit jurors of this court was selected and impaneled and sworn according to law to try the issues of fact arising in this case; and after hearing all the evidence introduced; the instruction of the Court and the argument of counsel, the said jury retired to consider its verdict; and after deliberating thereon, returned into Court the following verdict:

'We the jury find for plaintiff and fix his amount of recovery against the defendant at sum of $20,931.22 plus interest from July 10, 1955.

(Amount of recovery not to exceed $23,731.22 and not) (to be less than $20,931.22).

(s) Bob Stout Foreman'

"whereupon defendant, Joe Robinson, filed Motion for Judgment notwithstanding Verdict on March 28, 1956, to which Motion plaintiff Trailmobile, filed Response dated April 5, 1956. The Court, having taken the Motion For Judgment and Response under advisement, finds as follows:

"1. That plaintiff, Trailmobile, filed writ of attachment and posted surety bond at commencement of suit, August 10, 1955, to recover $23,731.22 principal and interest on note.

"2. That plaintiff, Joe Robinson posted surety bond in the sum of $23,731.22, signed by The Employer's Liability Assurance Cor. Ltd. dated August 11, 1955, guaranteeing to pay any judgment of the Court and that posting of said surety bond constituted tender and that Joe Robinson was not in default at time of filing of suit or at any time during pendency of this suit.

"3. That Joe Robinson filed counterclaim for $4,000 and that the jury found defendant, Joe Robinson, was entitled to $2,800 set off against claim of plaintiff.

"4. That Joe Robinson has tendered into Court, on March 20, 1956, and April 10, 1956, the sum of $3,790, as balance of principal and $85.13 interest on payments due on July 10, August 10, September 10, October 10, November 10 and December 10, 1955, and January 10, February 10, March 10 and April 10, 1956.

"5. That plaintiff is entitled to judgment against defendant for payments from July 10, 1955 to April 10, 1956, same being a total of $6,590, less $2,800 set-off leaving a balance of $3,790, principal, and $85.13 interest.

"IT IS, THEREFORE, ORDERED AND ADJUDGED, that Trailmobile, Inc., do have and recover of and from Joe Robinson, the sum of $3,790 and $85.13 interest, which sums having been tendered into Court are ordered paid to plaintiff by the Clerk of this Court and that the said judgment in the sum of $3,875.13 is thereupon satisfied in full.

"Judgment prepared and entered this 19th day of April, 1956.

(s) Maupin Cummings

Circuit Judge"

From said judgment, appellant brings this appeal, basing its contention for reversal on several alleged errors, which we shall proceed to discuss.

It is first contended that the court erred in refusing to grant appellant's motion to strike the Amendment to the Amended and Substituted Counterclaim. As this Court has many times said, the matter of permitting amendments to pleadings is one that lies largely within the province of the trial court. *Austin* v. *Dermott Canning Co.,* 182 Ark. 1128, 34 S. W. 2d 773. Nor does it appear that the issues were drastically changed by the amendment. No motion for continuance was filed by appellant, and we conclude that the court did not abuse its discretion in permitting the filing of the amendment.

It is next contended that the court erred in permitting parol evidence to explain the sales order signed by appellee. Appellant contends that the admission of such oral evidence enabled appellee to vary the terms of the agreement; that the agreement was not ambiguous, and accordingly, the admission of such testimony was error. The sales order described the property to be sold as "2-Used 1955 CID 8512 Trailmobile Trailers with Thermo-Kings (Nos. R-42-76 and R-42-77)", and the chattel mortgage made further identification (as heretofore set out in stating the case). The trial court held that these instruments did not clearly identify the property (Thermo-Kings) to be purchased, and that parol evidence was thereby admissible. We agree that the contract is ambiguous. A mere reading of the instruments does not make clear as to whether the parties contracted for two used 1955 trailers and two 1955 Thermo-Kings or whether the contract called for two used 1955 trailers with Thermo-Kings of any year model. Parol evidence was therefore admissible. In *Lutterloh* v. *Patterson,* 211 Ark. 814, 202 S. W. 2d 767, Mr. Justice Robins, in speaking for the court, said: "Therefore the lower court should have admitted the testimony as to the circumstances surrounding the execution of the contract and as to the construction the parties themselves, by their words and actions, put upon it; and should have permitted the jury, upon a consideration of all the competent testimony, to say what was intended by this uncertain language." The above finding makes unnecessary any discussion of the third point, which is that the court erred in refusing to direct a verdict for appellant in the amount sued for.

It is next contended that the court erred by giving a binding instruction to the jury, and in defining the law relative to parol evidence. In paragraph four of its instructions, the court stated: "It is the contention of the defendant in his counterclaim that the contract entered into between the parties, which contract is admitted, calls for the delivery of two pieces of used equipment, namely two Trailmobile trailers with Thermo-Kings attached, 1955 model." Appellant argues that

by telling the jury the contract was admitted, the court bound the jury to find that said contract called for 1955 Thermo-Kings. We do not agree with this interpretation. The execution of the contract was admitted by both parties, and the instruction makes clear that it is *only the contention* of appellee that the contract called for 1955 model Thermo-Kings. Appellant contends that other paragraphs of the court's instructions bind the jury, but we have examined each contention, and find no merit in them, nor can we agree that the court erroneously defined the law relative to parol evidence. This brings us to a discussion of appellant's strongest contentions.

It is asserted that the court erred in granting a judgment notwithstanding the verdict, and further, the judgment entered is erroneous because the redelivery bond given by the appellee to the sheriff was not a tender of the amount due, and appellee was in default at the time the action was filed. We will discuss first the sufficiency of the tender.

Appellant vigorously argues that the redelivery bond filed by appellee did not constitute a valid tender, contending that a "tender" is an unconditional offer of payment, consisting in the actual production, in current coin of the realm, of a sum not less than the amount due on a specific debt or obligation. We deem it well to quote from Vol. 12, Am. Jur., Sec. 334, p. 891:

"It may be pointed out that some misapprehension or confusion appears to have arisen from the mode of expression of a tender or offer by the parties, as applicable to the case of mutual and concurrent promises. The word "tender" as used in such a connection does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, nothing further remains to be done, and the transaction is completed and ended; but it means only a readiness and willingness accompanied with an ability on the part of one of the parties to do the acts which the agreement requires

him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed imply, an offer or tender in the sense in which those terms are used in reference to mutual and concurrent agreements. It is not an absolute, unconditional offer to do or transfer anything at all events, but it is, in its nature, conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement. * * *"

In the instant litigation, appellee contended that appellant had not performed its contract (in that he (appellee) received a 1952 Thermo-King instead of a 1955 model), and testified that appellant was unwilling to make an adjustment. It would indeed be unfair to require one to make tender of a specific amount of money claimed by another, when the first party did not receive the specific property that he originally purchased. Appellee was entitled to show that appellant had breached its contract before tendering a money payment. The jury, by its verdict, found that appellant had breached the contract, and the execution of the redelivery bond showed a "* * * readiness and willingness accompanied with an ability * * *," to do that required of him, provided appellant would do that which it was required to do under the contract.

It is urged that the court committed reversible error in entering the judgment *non obstante veredicto*. Though it is called a "judgment notwithstanding verdict", actually, the action of the court amounted only to correcting or amending the verdict to conform to the findings of the jury. Let it be remembered that the entire litigation hinged upon the question as to whether appellee was to receive two 1955 model Thermo-Kings under his contract. The verdict rendered by the jury was, of course, entirely contradictory, for on the one hand, they found that appellee's contention was correct, and that he was entitled to judgment on his counterclaim for $2,800. This had the effect of finding that

appellee was not in default, since the amount of his recovery was greater than the amount due appellant at the time of the filing of the suit. On the other hand, the verdict found the entire indebtedness due appellant (less the $2,800) to be due and payable. Appellant, of course, was not entitled to accelerate the indebtedness except that appellee be in default. This was a complete inconsistency. In finding for appellee on his counterclaim, the jury could not properly or legally accelerate the indebtedness. The question of amendment of the verdict was discussed in the case of *Woodruff* v. *Webb,* 32 Ark. 612. Under Headnote 3 we find:

"VERDICT: Amendment of. Where the intention of the jury to return a verdict responsible to the issue is manifest, but under a mistake of law, and not of any fact in the case, their intention is incorrectly expressed, it is the duty of the court below to have the verdict reduced to, and entered in proper form. * * *"

From the language of Justice Harrison:

"* * * The obvious intention of the jury was to find for the plaintiff, the amount of the principal and interest of the note; but under a misapprehension as to the rate of interest it bore after maturity, and which was a mistake as to law, and not as to the facts of the case, their intention was incorrectly expressed. * * *" Justice Harrison then quoted from cases from other jurisdictions as follows:

"* * * It needs only to be understood what the intent of the jury was, agreeably to which, the verdict may afterwards be molded into form. * * *"

Again:

"* * * The courts are competent to collect the meaning of the jury from the terms of their verdict, * * * the general rule is that, although the verdict may not conclude formally or punctually in the words of the issue, yet, if the point in issue can be concluded out of the finding, the court shall work the verdict into form, and make it serve according to the justice of the case."

To the same effect is the holding in *Colky* v. *Metropolitan Life Insurance Company,* 320 Ill. App. 120, 49 N. E. 2d 830. As stated in Vol. 89, *Corpus Juris Secundum,* 198:

"While the court has no power to look into the evidence and revise or amend the verdict as to a finding of fact, or in any manner to invade the province of the jury by substituting or adding the conclusion or verdict of the court as to a substantial or material matter, there are numerous cases to the effect that the court has the power to put a manifestly irregular or defective verdict in such form as to make it conform to the intention of the jury, and carry their findings into effect, where the intention can be ascertained with certainty, * * *."

We therefore conclude that the action of the trial court was proper.

Since the jury, by its verdict, found that appellant had breached its contract, and since the amount awarded appellee was greater than any sum due appellant at the time of institution of the suit, it must accordingly be held that appellee was not in default. Since he was not in default, appellant is not entitled to attorney's fees.

The judgment of the trial court is, in all things, affirmed.

Justice McFaddin dissents.

Ed. F. McFaddin, Associate Justice (dissenting). While I think that the Circuit Court judgment, as finally entered, probably accomplished substantial justice, nevertheless I am compelled to dissent, because:

1. I think it was error to admit oral evidence concerning the written contract.

2. I am convinced that the bond filed by Robinson was not such a *tender* as the law requires in tender cases.

3. I am also convinced that the judgment entered by the Court should not have been entered. It is not a

judgment *non obstante veredicto,* but is a judgment construing what the Trial Judge thought the jury intended to accomplish. It is my view that the most the Trial Court could have done was to set aside the verdict and grant a new trial: the Judge could not enter a judgment of his own in the place of a judgment on the jury verdict.

COMER *v.* PIERCE.

5-1285 302 S. W. 2d 547

Opinion delivered June 3, 1957.

Fred M. Pickens, Jr., and *John D. Eldridge,* for appellant.

Forrest E. Long and *Lloyd Henry,* for appellee.

J. SEABORN HOLT, Associate Justice. This is a Workmen's Compensation Case; — § 81-1301 — 81-1349, Ark. Stats. 1947.

Appellee, Pierce, filed his claim with the Workmen's Compensation Commission for an award of compensation for injuries he received on August 27, 1954, while in the employ of appellant, Comer, at a lumber mill and during the course of such employment. May

18, 1955, a hearing before a single commissioner resulted in a finding in appellee's favor, and on appeal to the full commission, the findings of the single commissioner were affirmed. Thereafter, on October 8, 1956, the Circuit Court affirmed the action of the Commission. This appeal followed.

It appears that no determination of the amount of compensation due appellee has yet been made, and only two jurisdictional questions are presented for our determination. 1. Was appellant, Comer, at the time appellee was injured, regularly employing five or more persons in the operation of his lumber mill as contemplated by § 81-1302 (c) Ark. Stats. 1947, and; 2. Was appellee, at the time of his injury, engaged in "agricultural farm labor" as that term is defined in § 81-1302 (c)?

Section 81-1302 (c) Ark. Stats. 1947 provides: "Employment means every employment carried on in the State in which five (5) or more employees are regularly employed in the same business or establishment, except . . . agricultural farm labor, . . ." After a careful review of the evidence, we think the following is, in effect, a fair summation thereof by the Commission: "Respondent is engaged in operating two or three large farms in Woodruff County, Arkansas. In 1954 he was engaged in the process of clearing the timber from some of his lands so that he might use it for planting rice. For a time respondent (appellant) cleared the land and sold the cut timber as it was. He then determined that he could make more money if he obtained a sawmill and cut the timber into lumber and sold the lumber. Respondent purchased a sawmill and began operating in the summer of 1954.

"In the operation of this mill respondent had some employees who worked at the mill and did not work on the farm, and there were other employees who at times worked on the farm and at other times worked at the mill. In the operation of this mill a large majority of the time more than five employees were employed to work at the mill. As a matter of fact, it appears that

for a full crew it took about eight or ten men to operate the mill. The record in this case is clear that more than five employees were employed at the sawmill on August 27, 1954, on which date claimant suffered an accidental injury that arose out of and during the course of his employment while he was operating a tractor moving logs at the skidway at the mill. The tractor turned over onto the claimant and he was injured.

"Claimant was employed by respondent to do whatever work respondent deemed necessary and part of the time claimant was employed in doing work about the farm; that is, he fixed fences, operated a tractor and did a considerable part of the planting. Claimant was then directed by the employer to work at the sawmill, where he had been working for several days prior to the time of his injury on August 27, 1954.

"Respondent advertised in the McCrory newspaper during the period from about August 19, 1954 until about March 24, 1955 rough lumber for sale at $55 per thousand and dressed lumber for $65 per thousand at the mill. Respondent did sell lumber to the general public, and it is his testimony that he used some of the lumber on his farms. Respondent also did custom sawing; that is, he sawed logs which belonged to other persons into lumber and charged these persons on the basis of so much per thousand feet of lumber. At the time of the hearing of this case on May 18, 1955 it was respondent's testimony that he had on hand between 375 and 400 thousand feet of lumber which he had sawed in his mill and which he would be willing to sell."

On these findings of facts, the Commission concluded that "respondent (appellant) was not engaged in agricultural farm labor in the operation of his sawmill and that he had five or more employees employed in his mill at the time the claimant was injured, as well as prior and subsequently thereto . . . that the parties to this cause come within and are bound by the provisions of the Arkansas Workmen's Compensation Law and this Commission has jurisdiction over this claim."

Under our settled rule the findings of fact by the Commission are on appeal given the same verity that would attach to a jury's verdict and will be sustained if supported by any substantial evidence. See *Williams* v. *Gifford-Hill & Co.*, 227 Ark. 340, 298 S. W. 2d 323, 326 and *Sherwin-Williams Co.* v. *Yeager,* 219 Ark. 20, 239 S. W. 2d 1019. In determining the sufficiency of evidence doubts should be resolved in favor of claimant and the evidence should be reasonably and liberally construed in his favor. See *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252.

We think there was ample substantial evidence to support the Commission's findings that appellant Comer had in his employ, at the time of Pierce's injury, five or more employees working at his mill and that appellant was not engaged in agricultural farm labor in the operation of his sawmill in the circumstances here. In effect, Allen McCain, the mill manager, testified, that the mill had been in operation since June 1954 and that from about July 9, 1954, the mill was never operated with less than five men, that it ran steadily from June 18, 1954, five days a week most of the time. There was other testimony tending to corroborate McCain. It thus appears that five or more men had been regularly employed at the mill for a month or more prior to August 27, when Pierce was injured.

We also agree with the Commission's finding that at the time Pierce was injured appellant was not engaged in agricultural farm labor. In one of our earliest cases, in construing our Workmen's Compensation Act, we said: "These Compensation Acts are entitled to and have universally received a liberal construction from the courts. The humanitarian objects of such laws should not, in the administration thereof, be defeated by overemphasis on technicalities—by putting form above substance." *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380.

As indicated, appellant Comer, in addition to his farm operations, was engaged in the saw mill business on his farm, to an extent far beyond supplying lumber

for his own needs. He sold lumber to the general public, and did custom sawing for certain parties upon request. His employees worked some eight to ten hours a day at the mill, when it was in operation, and the mill ran some 8,000 to 10,000 feet daily and there was, according to witness McCain, at this mill site upwards of 378,000 feet of lumber. Clearly, we think Pierce was not engaged in *farm labor* at the time of his injury. In an Oregon case,—*Farrin* v. *State Industrial Acci. Commission* (1922), 104 Or. 452, 205 Pac. 984,—the facts showed that a sawmill was owned by a farmer and operated by him on his own farm. The Oregon Supreme Court, in holding that coverage of an injury to an employee, under the Workmen's Compensation Act, was not barred under a provision in the act excluding "farming and all work incidental thereto", used the following reasoning, which we think is sound and applicable here: "Every workman employed in a sawmill is engaged in a hazardous employment, whether that sawmill is owned and operated by a farmer upon his farm, or by some capitalist upon a city block. The location, the ownership, or the size of the mill has not one thing to do with the matter of his coming within the provisions of the Workmen's Compensation Law. The Workmen's Compensation Law was created for the protection of all hazardous occupations therein enumerated, regardless of their extent, and for all workers in such occupations, however, brief their employment. If sawmills owned and operated by farmers are to be excluded from coming under the act automatically, such exclusion must be by legislative enactment, and not by construction."

As indicated, the evidence seems clear to us that appellant in operating the sawmill in question here was doing so not only to assist him in clearing operations of his land, but for profit. In fact, he admitted as much: (appellant's abstract) "Two or three years ago, at Mr. Matkin's sawmill I had some (logs) sawed. I realized that I could make more money or profit out of my logs by owning my own sawmill, because of the over-

sawage. The mill was acquired not only to use in assisting in the clearing operations but to enable me to make a profit."

Finding no error, the judgment is affirmed.

GRIFFIN *v.* ISGRIG.

5-1251 302 S. W. 2d 777

Opinion delivered June 3, 1957.

[Rehearing denied July 1, 1957]

Frank J. Wills, for appellant.

Gordon H. Sullivan and *Harry C. Robinson,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit involving lands in Sections 22, 23 and 24, in Township 1 North, Range 11 West, in Pulaski County. All the parties to this litigation concede that these present lands are accretions.[1]

Appellees, W. B. Isgrig and Southern Investment Company, filed this suit against appellant, W. H. Griffin. Isgrig claimed that he owned the E ½ of Sec. 22; the S ½ SW ¼ Sec. 23; the Frl. SE ¼ Sec. 23; and the Frl. NW ¼ Sec. 23, together with all accretions. The Southern Investment Company claimed that it owned the N ½ SW ¼ Sec. 23 and the S ½ SW ¼ NW ¼ Sec. 24, with all accretions. Both plaintiffs claimed that Griffin was trespassing and cutting timber on the lands owned by the plaintiffs, and should be enjoined and restrained. Plaintiffs also prayed to have their title quieted to the lands they owned, as just described. Griffin claimed the lands (a) by deeds; (b) by adverse possession; and (c) by reason of certain previous litigation asserted by him as being *res judicata* against the plaintiffs.[2]

The Chancery Court[3] appointed a Master, who heard the evidence over a period of several months and made a report of 30 pages. The Chancery Court entered a decree based on the Master's Report and quieted the title of Isgrig and Southern Investment Company to all of the lands in Sections 22, 23 and 24, except a specific tract awarded Griffin on his plea of adverse possession. From failure to recover all of the lands in Sections 22, 23 and 24, Griffin has appealed; and Is-

[1] The survey of 1857 in the office of the State Land Commissioner (of which survey we take judicial notice—see West Ark. Digest "Evidence", Key No. 23—), shows lands in existence in said sections in 1857. But the parties herein seem to agree that the Arkansas River changed its course southerly and southwesterly, so as to erode the original lands, and then later changed its course northerly and easterly, so as to form accretions to the riparian shore. No one herein has made any claim involving the application of § 10-203 Ark. Stats., so we treat the lands herein involved as accretions to the riparian shore.

[2] As hereinafter stated, the *res judicata* matter is not urged on appeal.

[3] Griffin at one time sought to have the cause transferred to law as an ejectment action, but later abandoned that claim and filed a cross complaint against his grantor, Baldwin. The cross complaint against Baldwin is not now before us in this case.

grig and Southern Investment Company have cross appealed from so much of the decree as awarded Griffin the small particularly described tract of a few acres in Section 23.

Appellant argues the case in this Court under six assignments, being: (I) The Chancellor was not legally bound to adopt the Master's recommendations; (II) Appellant's demurrer to the evidence should have been sustained; (III) the decree is against the preponderance of the evidence; (IV) there is no competent proof upon which to determine the accretion boundaries; (V) the fee of appellees' engineer should not have been taxed as costs; and (VI) appellant should have been awarded damages.

I. *Appellant's First Point: "The Chancellor was not legally bound to adopt the Master's recommendations."* The appellant objects to certain language that the Chancellor used in entering the decree based on the Master's Report. Of course the Chancery Court was not *legally bound* to adopt the Master's Report (see § 27-1815 Ark. Stats.); but in this case the Chancellor did adopt the Master's Report and entered a decree in accordance with it. The question, here, is whether the decree as entered is against the preponderance of the evidence or erroneous for some other reason. Having disposed of the procedural point, we will group appellant's other points under convenient topic headings; and will consider, first, Griffin's claims to the lands involved. As heretofore stated, he claimed by (a) deeds, (b) adverse possession, and (c) *res judicata.* The matter of *res judicata* is not argued on appeal and is therefore abandoned, so we consider the other two claims.

II. *Griffin's Claim Based On Deeds Of Record.* There were only two conveyances offered to support Griffin's record title.

(a) There was a deed from R. F. Baldwin and wife to W. H. Griffin, dated May 17, 1940, and conveying "all of the lands of the grantors lying north and east of Fourche Bayou, and all accretions thereto, in Sec-

tions 9, 10 and 15, in Township 1 North, Range 11 West, and more particularly described as follows". In the "particularly described" lands there is no reference to any lands in any sections except 9, 10 and 15. The only way that Griffin could claim that this deed covered the lands involved in this litigation, which are admitted to be south of the south line of Section 15 as extended,[4] would be to show that said lands were accretions to the riparian shore of lands in Sections 15, 10 and 9. There is no sufficient proof that the lands involved in this litigation—south of the south line of Section 15 as extended easterly—are accretions to any lands in Sections 9, 10 or 15. The deed from Baldwin to Griffin did not invest Griffin with a title sufficient to award him the lands herein involved.

(b) There is a quitclaim deed from Gertrude W. Johnson, widow of Dr. Chas. F. Johnson, to W. H. Griffin and wife, dated December 20, 1952, and conveying certain definitely described lands in Section 15, Township 1 North, Range 11 West, "and all accretions thereto". What we have said in regard to the Baldwin deed above applies equally here. In short, we find that Griffin failed to establish his title under his claim of *deeds of record.*

III. *Griffin's Claim Based On Adverse Possession.* Griffin points to the following to establish his adverse possession:

(a) That in 1934 he leased from R. F. Baldwin all of Baldwin's lands lying between Fourche Bayou and the Arkansas River; and that he (Griffin) continued to hold the Baldwin lands under said lease until he purchased them in 1940 by the deed from Baldwin hereinbefore mentioned.

(b) That in 1952 Griffin executed a timber deed to McBurnett Corporation.

[4] It is well known that Section 15 is immediately north of Section 22, and that Sections 23 and 24 lie east of Section 22. So the south line of Section 15 extended easterly to the river would place all of Sections 22, 23 and 24 south of such extended line.

(c) That in 1940 Griffin had certain lands placed on the tax books of Pulaski County and began the payment of taxes on same, among which lands were included "accretions to Frl. SE ¼ of Section 15 and accretions to NW ¼ NW ¼ Section 15", both in Township 1 North, Range 11 West; and

(d) That from 1934 (when he first leased the lands from Baldwin) until the present time, Griffin has pastured not only the lands north of the south line of Section 15, but also the lands south of the south line of Section 15 as extended; that at one time he erected some sort of a fence that embraced some of these lands (although the fence was soon washed away); that later he blazed trees to indicate his claimed boundary; that people in the vicinity from time to time got his permission to cut timber from the lands for firewood purposes; that many people knew he was claiming these lands in Sections 22, 23 and 24.

It must be remembered that—based on adverse possession—the Chancery Court awarded Griffin a small definitely described portion of lands south of the south boundary line of Section 15, since it was shown that Griffin had such small tract under fence and in cultivation. But, with the exception of this small tract so awarded him, we hold that Griffin's proof of adverse possession for all of the remainder of the lands, south of the south boundary line of Section 15 as extended, fails to measure up to the quantum and quality of proof of adverse possession as required by law.

There is a line of cases holding that one in possession of land under a valid deed describing the tract, by actually holding and occupying a portion of the tract is deemed to have adverse possession to the extent of the boundaries described in the deed. *Nall* v. *Phillips,* 213 Ark. 92, 210 S. W. 2d 806; *Connerly* v. *Dickinson,* 81 Ark. 258, 99 S. W. 82; *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299. But the case at bar is not like the cited cases: because, here, Griffin does not have a deed of record, describing his boundaries, to any lands south of the south line of Section 15 as extended. So, in or-

der to prevail on his claim of adverse possession, Griffin must show actual or pedal possession to the extent of his boundaries. (*Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236.)

In the recent case of *Adkisson* v. *Starr,* 222 Ark. 331, 260 S. W. 2d 956, we had occasion to consider this matter of adverse possession of accretions; and the evidence in the case at bar is no stronger on this matter of adverse possession than was the evidence rejected by us in *Adkisson* v. *Starr.* So, we hold that Griffin has failed in his plea of adverse possession to any of the lands south of the south boundary line of Section 15 as extended, except that small portion specifically described and awarded him in the decree herein.

IV. *The Decree Quieting Appellees' Title.* Having decided that Griffin cannot prevail on his claim to any of the lands involved except the small portion awarded him, we come next to the question of whether the Chancery Court should have quieted the title of the appellees, Isgrig, *et al,* on the showing they made. They merely showed that they held deeds from their immediate grantors to the lands described in Sections 23 and 24. The appellees did not attempt to deraign the title of their grantors back to the sovereignty of the soil, nor did appellees establish that they or their grantors had acquired title to the lands by adverse possession. Thus, appellees only showed that they had deeds of record describing the premises. Such a showing is good for some purposes, but is not sufficient to justify a decree quieting title. In *Coulter* v. *O'Kelly,* 226 Ark. 836, 295 S. W. 2d 753, we held: "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". So appellees did not offer sufficient proof to justify the decree quieting their title.

The decree quieting appellees' title was rendered by the Chancery Court on May 17, 1956; and our decision in the case of *Coulter* v. *O'Kelly, supra,* was not announced until October 29, 1956. We confess that prior

to *Coulter* v. *O'Kelly, supra,* there was language in some of our opinions, such as *Robeson* v. *Kempner,* 182 Ark. 746, 32 S. W. 2d 616,[5] and *Skelton* v. *Ferguson,* 222 Ark. 847, 262 S. W. 913,[6] which could have misled appellees and the Chancery Court into believing that the appellees in the case at bar were not required to deraign a title. Thus, in order to afford complete equity, we are remanding the case to the Chancery Court to allow appellees to offer proof of title sufficient to support a decree under the holding in *Coulter* v. *O'Kelly, supra.* The proof will be limited to that one point, and future costs on that point will naturally be taxed against the appellees.

V. *Cross Appeal.* As heretofore stated, the appellant was awarded a small particularly described tract of a few acres in Section 23 because of his proof as to adverse possession; and appellees have cross appealed from that portion of the decree. A review of the evidence fails to convince us that the decree is in error in this regard, so the decree is affirmed on the cross appeal.

VI. *Costs.* Some complaint is made about the taxing of costs. We find no error on any item except the $420 survey fee of Chris Wright. The Chancery Court ordered this item paid equally by appellant and appellees. We hold that the appellees should pay this entire item. See *Ark. State Game & Fish Comm.* v. *Kizer,* 222 Ark. 673, 262 S. W. 2d 265. The costs in this Court are taxed against appellant.

Affirmed in part; reversed and remanded in part.

Mr. Justice Robinson disqualified and not participating.

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[5] In *Robeson* v. *Kempner* we used this language: "Our Statutes do not require that plaintiffs in suits of this character be required to set out therein their chain of title. In ejectment suits, the statutes make such requirements. In suits in equity to quiet titles, allegations of ownership are sufficient upon which to base or found the actions."

[6] In *Skelton* v. *Ferguson* there is this statement: "In a suit to quiet title, plaintiff is not required to deraign his title".

ALEXANDER *v.* ALEXANDER.

5-1261 302 S. W. 2d 781

Opinion delivered June 3, 1957.

[Rehearing denied July 1, 1957]

House, Holmes, Roddy, Butler & Jewell and *Shaw, Jones & Shaw,* for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

MINOR W. MILLWEE, Associate Justice. The principal issue in this divorce suit is whether the appellant, Verna Cook Alexander, is entitled to a division of appellee's property as the injured party under our three-year separation statute (Ark. Stats. Sec. 34-1202 (7)) which reads: "Where either husband or wife have lived

separate and apart from the other for three (3) consecutive years, without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether such separation was the voluntary act or by the mutual consent of the parties, and the question of who is the injured party shall be considered only in cases wherein by the pleadings the wife seeks either alimony under Section 34-1211, Arkansas Statutes 1947, or a division of property under Section 34-1214, Arkansas Statutes 1947, as hereby amended, or both."

Appellee, A. B. Alexander, was reared in Spartanburg, S. C., where he was engaged in the insurance and patent medicine businesses for some time. These ventures had proved unsuccessful in 1932 when he came to Hot Springs, Arkansas, where he obtained a divorce from his first wife. Appellant, who is 13 years younger than appellee, was reared in Malvern, Arkansas, where her father, A. B. Cook, was then president and principal stockholder of the Malvern Brick & Tile Company and the A. B. Cook Company, which was engaged in the lumber business. A. B. Cook was killed in an automobile accident in August, 1934, and the parties to this suit were married in October, 1934, and moved to Spartanburg, S. C., where they maintained their principal place of abode until their separation in 1952.

A. B. Cook and the two companies were heavily indebted at the time of his death and his widow used the greater portion of $350,000 in life insurance left by her husband to pay debts of the corporations and to acquire certain shares of the Malvern Brick & Tile Co. owned by others than Mr. Cook at the time of his death. Appellee and two friends of the Cook family assisted the widow in these negotiations. Mr. Cook left his estate to his widow and two daughters in equal shares with the widow designated as trustee for the daughters. They each received substantial income in the form of salaries from the two corporations for several years.

The two corporations had again become in poor financial condition in 1943 when appellee was employed as manager, and he later became president of the com-

panies. He made certain advances to the corporations which prospered under his management with assets increasing from approximately $400,000 in 1943 to about $3,000,000 in 1955. In addition appellee participated individually in the creation of separate building corporations from which he received considerable income. The manufacturing companies were forced to sell scarce construction materials to the separate corporations at O.P.A. prices but the latter concerns, whose stockholders were ineligible to hold stock in the manufacturing corporations, made much higher profits in their operations. In 1946 appellee negotiated a purchase of the stock of the two corporations owned by Mrs. Cook and appellant's sister. After taking charge of the corporations appellee spent much of his time in Malvern, Arkansas where the companies still maintained the Cook family residence and at a hotel penthouse in Hot Springs also maintained by the companies. Appellant spent much of her time in Florida looking after a $300,000 demonstration or show house maintained by the companies for advertising purposes. She also spent considerable time in other sections of the country in an effort to restore the health of their only child, a son, who died in November, 1954.

The marital troubles of the parties began in the latter part of 1951 primarily over stock ownership and the controlling interest of the two corporations. It was precipitated by his persistent refusal to give her possession of certain stock certificates belonging to her or to transfer such stock on the company books. It was also about this time that appellee, acting on "gossip", allegedly became suspicious of appellant's association with a wealthy Florida widower who was a close personal friend and business associate of both parties. Although appellee stated he wrote a letter of warning to his friend about the matter, their business relations continued as usual and the man remarried shortly after the incident. Appellee also stated, and the appellant as stoutly denied, that she made apologies for the incident.

In October, 1952, the parties separated and became involved in a long and bitter suit over their respective interests in the two corporations in which litigation appellee first contended he was sole owner of the corporate stock but later reduced his claim to at least 50% ownership. The trial court found that Mrs. Alexander owned 71% and appellee 29% of said stock and we affirmed in *Malvern Brick & Tile Company* v. *Alexander,* 224 Ark. 74, 272 S. W. 2d 77, which was handed down October 18, 1954. In the meantime separate divorce suits by appellant in Hot Spring County, Arkansas, and by appellee in South Carolina were dismissed. After the appellant gained control of the corporations from the appellee, he sold his interest in the Malvern Brick & Tile Company to the corporation for $625,000 receiving about $160,000 in cash and notes of the corporation for the balance payable over a period of several years.

Appellee moved to Ft. Smith, Arkansas shortly before January 16, 1956, when he brought the instant suit for divorce on the ground of three-years separation without cohabitation. In her cross-complaint for divorce appellant admitted the separation for three years which she alleged was occasioned by his cruel treatment, false accusations, habitual drunkenness and general indignities such as to render her condition in life intolerable. She made specific allegations as to his actions in connection with the long legal battle over control of the companies which will be referred to later. She also asked for statutory allowances in his property and alimony.

After another lengthy trial a decree was entered granting appellee a divorce and awarding him two items of jewelry. Appellant was given certain household furnishings in the Spartanburg home and $5,000 for legal and travel expenses but denied alimony or any division of appellee's property. In a memorandum opinion rendered as a basis for the decree the chancellor found that both parties were somewhat at fault in the separation but that money and the control of the Malvern

Brick & Tile Company were the main source of their trouble. In considering the question of who was the "injured party" under Sec. 34-1202 (7), *supra,* the court found the equities against the appellant.

Appellant does not question the court's action in granting the divorce to appellee under the three-year separation statute, but earnestly contends there was error in the refusal to find she was the "injured party" and entitled to a division of his property under the statute. But preliminary to a decision of this issue are the questions whether the court erred in excluding proof of any alleged misconduct on appellee's part that occurred prior to five years before commencement of the suit and the admission of proof offered by appellant as to incidents that happened after the separation in 1952. We hold the court erred in excluding the former but was correct in admitting the latter testimony.

The chancellor held that evidence of misconduct occurring prior to the five-year period before commencement of the suit was inadmissible under Ark. Stats. Sec. 34-1208 which provides that the plaintiff, to obtain a divorce, must prove that the cause of divorce occurred, or existed, within five years next before the commencement of suit. We think such evidence was material and admissible to show who was the injured party within the meaning of the three-year separation statute. Appellant was not attempting to establish her cause of action for divorce by such testimony. As appellant suggests, if appellee's contention is correct a spouse might be absolutely precluded from introducing any evidence to establish who was the injured party in a case where the parties had been separated five years or longer at the time of the filing of a divorce complaint under the three-year statute. This was certainly not the purpose of Sec. 34-1208, and that is the effect of our holding in *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S. W. 2d 633, where we approved the chancellor's consideration of incidents that transpired more than five years prior to commencement of the suit in determining who was the injured party under the three-year separation stat-

ute. In this connection however, it should be pointed out that the appellant did not offer to show what the witnesses would testify to if they had been permitted to give such testimony.

We cannot agree that the chancellor was precluded from considering evidence of any events which transpired subsequent to the separation in determining who was the injured party or at fault in wrecking the marriage venture. In *Larsen* v. *Larsen,* 207 Ark. 543, 181 S. W. 2d 683, the appellant-husband was guilty of adultery committed after the separation and we held that such misconduct should be taken into consideration in determining property and alimony rights under a prior statute practically identical with Sec. 34-1202 (7), saying: "The fact that appellant has been guilty of adultery would not alone be sufficient to preclude his right to divorce under the three-year statute, quoted *supra.* In the recent case of *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, in construing the effect of this section of the statute, we said: 'The Legislature has eliminated all consideration of which spouse is the guilty party, except in settling property and alimony rights . . . In other words, recrimination is abolished as a defense under this three-year separation statute.' So here, the trial court in settling and determining the property rights of the parties and appellee's alimony rights, must take into account appellant's adulterous conduct."

Each party made numerous charges and counter charges against the other relative to alleged misconduct which occurred both before and after the separation in an attempt to prove the "injured party" status. Appellant's charges that appellee was guilty of improper relations with a dancing teacher at Hot Springs and another young lady employed in his office were about as weak and as ineffectively proved as his accusations of her misconduct with their Florida friend and a deputy sheriff who appeared as a witness in her behalf. While there was some evidence of excessive drinking on his part, habitual drunkenness was not shown; besides she also took a cocktail when she got ready and the serving of liquor in the home was "routine."

We concur in the trial court's determination that both parties were at fault and that the principal source of their trouble was money and control of the corporations. But we think a preponderance of the evidence is contrary to the conclusion that the equities are against appellant on the question of who is the injured party within the meaning of the statute. While either might have been hard pressed to establish a ground for divorce other than the three-years separation, we think appellee's conduct immediately before and following the separation demonstrates he was perhaps more at fault than appellant. His persistent and wrongful refusal to recognize her interests in the companies prior to the separation must be viewed in the light of his subsequent conduct.

It is remembered that appellee was president and in complete control of the Malvern Brick & Tile Company from 1946 and during the pendency of the stock suit. While the suit was pending in chancery court he caused appellant's ouster as vice-president and secretary of the company, cancelled all her company credit cards, cut off the salary she had drawn for years, which was then her principal means of livelihood, and eliminated her as beneficiary in his life insurance policies. At that time he was contending he owned 50% of the company stock and that appellant owned 50% less one share owned by their son. In the Fall of 1953 he had himself appointed guardian of their son in an *ex parte* proceeding in South Carolina. In January, 1954, shortly after the chancery decree in the stock suit, he filed an affidavit for "Inquisition of Incompetency" against appellant in the county court of Broward County, Florida, and caused her to be confined in a mental institution for several days pending an examination and observation on said charge. The proceeding was *ex parte* and neither the examining physicians nor the presiding judge saw appellant prior to her confinement. The charge was found to be unwarranted and appellant was promptly adjudged "not incompetent" and discharged on a writ of *habeas corpus*. We are not impressed by appellee's assertion that all this was done in order to

effect a reconciliation with his wife. It rather serves to demonstrate the validity of her apprehension that he was prompted by other less charitable motives.

In view of this situation the next question is whether the appellant is entitled to one-third of appellee's personalty absolutely under Ark. Stats., Secs. 34-1202 (7) and 34-1214, *supra.* The latter statute provides that the wife shall be entitled to such interest in the husband's property where she is granted a divorce. It is also true that the wife would ordinarily be entitled to such an award under the three-year separation statute where she is found less at fault, or the injured party, in the marital debacle. But there are other factors to be considered here which would render it inequitable to award her as much as one-third of his wealth. This three-year separation statute is unusual in several respects as we indicated in *Young* v. *Young, supra,* where we held recrimination was no defense to a divorce action brought under it. In making a property division here we have an unusual situation when we consider the respective incomes and financial condition of the parties. Appellant is about three times as wealthy as the appellee and her income from properties worth approximately $3,000,000 is far in excess of that earned by appellee.

Under all the circumstances, we conclude the decree should be modified so as to allow appellant one-sixth of appellee's personal property not already disposed of by agreement. We are also of the opinion that the chancellor erred in ordering appellant to return the diamond necklace and pearl lavaliere to appellee. While the evidence is in dispute as to whose money was used to purchase the lavaliere and a portion of the necklace, we think it is clear that both were intended as gifts to the appellant. The decree is accordingly reversed and the cause remanded for purposes of modification as indicated. In all other respects the decree is affirmed.

AMERICAN REPUBLIC LIFE INSURANCE COMPANY *v.* CLAYBOUGH.

5-1287 302 S. W. 2d 545

Opinion delivered June 3, 1957.

Talley & Owen by *Robert L. Rogers, II,* for appellant.

L. A. Hardin, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee to recover all premiums paid upon a policy of health and accident insurance issued in 1944 by American Republic Insurance Company and later assumed by the appellant. It is the plaintiff's theory that the insurer repudiated its contract by wrongfully declaring a cancellation in 1955. *Mutual Relief Ass'n* v. *Ray,* 173 Ark. 9, 292 S. W. 396. The insurer insists that the policy lapsed for nonpayment of a quarterly premium and that in any event the policyholder recognized the can-

cellation by accepting a refund of the premium that was assertedly tendered after its due date. The circuit court, sitting without a jury, found for the plaintiff and entered judgment for the amount of all premiums paid upon the policy, with interest and an attorney's fee.

A quarterly premium of nine dollars was due on June 20, 1955. Claybough testified that on July 11 he received from the company a second notice that the premium was due. That afternoon his wife paid the premium in cash at the insurer's office, receiving a handwritten receipt instead of a printed official receipt. On July 12 the insurance company wrote Claybough this letter:

"Please be advised that the above numbered policy was due June 20, 1955 and lapsed July 5, 1955 for non-payment of premium. Since this is not a form of policy which the Company is reinstating, we regret that you have allowed it to lapse.

"Enclosed please find Company Check in the amount of $9.00 in lieu of cash tendered by you on July 11, 1955. This refund of premium cancels the Temporary Receipt given you on said date. We regret that we are unable to further serve you."

Claybough cashed the company's check within a day or two and brought this suit some eleven months later.

The trial court was justified in finding that the policy did not in fact lapse. Although the contract provides that premiums must be paid on their due date, without days of grace, it is shown that the company repeatedly accepted overdue payments, the delays ranging from two to seventeen days. By this conduct the insurer waived its right to insist, without notice, upon a strict compliance with the contract. *Universal Life Ins. Co.* v. *Bryant,* 196 Ark. 1143, 121 S. W. 2d 108. At the trial the company introduced testimony tending to prove that it had voluntarily adopted a practice of allowing its policyholders fifteen days of grace

in the payment of premiums. Claybough's rights, however, cannot be said to have been affected by this decision on the part of the insurer, for it is not contended that he was ever informed of it.

Nor can it be said as a matter of law that Claybough's acceptance of the refunded premium prevents him from maintaining this action. It is true that the parties to an insurance contract may, with full knowledge of the facts, enter into a binding agreement for its cancellation. *Missouri State Life Ins. Co.* v. *Hill,* 109 Ark. 17, 159 S. W. 31; *Illinois Bankers Life Assur. Co.* v. *Petray,* 195 Ark. 144, 110 S. W. 2d 1070. But the agreement to cancel is not binding if the insured's consent was obtained by fraud or misrepresentation. *Glickman* v. *New York Life Ins. Co.,* 16 Calif. 2d 626, 107 P. 2d 252; *Riddle* v. *Rankin,* 146 Kan. 294, 69 P. 2d 722; *Independent Life Ins. Co.* v. *Evans,* 162 Ky. 150, 172 S. W. 105. Here there is substantial evidence to support the trial court's conclusion that the company's positive statement that the policy had lapsed on July 5 was a misrepresentation of fact which induced Claybough to accept a return of the premium.

The court erred, however, in allowing the plaintiff an attorney's fee under the authority of Ark. Stats. 1947, § 66-524. That statute applies by its language to suits by the insurer to cancel or alter the policy, to suits for a declaratory judgment upon the policy, and to suits by the insured for reinstatement. Owing to its penal nature a statute like this one is to be strictly construed. *National Fire Ins. Co.* v. *Knight,* 185 Ark. 386, 47 S. W. 2d 576. Since the statute does not in any way refer to suits for the recovery of premiums paid upon a policy wrongfully cancelled, we cannot read that language into the act. The award of an attorney's fee must therefore be set aside.

With this modification the judgment is affirmed.

5-1292 302 S. W. 2d 524

Opinion delivered June 3, 1957.

J. B. Milham, for appellant.

David J. Burleson, for appellee.

PAUL WARD, Associate Justice. This is a suit brought by the vendor of a parcel of land against the vendee for a breach of the sales contract by the latter, asking for judgment for the balance of the purchase price, and that the land be sold if the judgment is not paid. From a decree in favor of the seller, comes this appeal. The principal question relates to the description of the said parcel of land.

On October 13, 1954 Helen M. Bishop (appellee) entered into a written contract to sell Edna W. Bryan (appellant) a parcel of land described as follows:

"A part of the NE ¼ of NE ¼, 16-20-26, described as follows, to-wit: Commence at the SE corner of said

forty; thence North 107 feet for a place of beginning; thence West 154 feet; thence North 189 feet; thence East to the West line of Spangler tract; thence South to the point of beginning. . . ."

The total purchase was $4,500, of which $500 was paid as earnest money, $1,250 was to be paid on or before November 1, 1954 "and upon approval of title by buyer", and the balance at the rate of $50 per month including interest at 6 per cent. The contract further provided: "Upon payment of the $1,250, as aforesaid, seller will have abstract of title brought to date, showing good, merchantable title"; A deed, the contract, and the abstract were to be placed in escrow; It was provided that "When the entire balance *is* due is paid then the deed, abstract and other papers are to be turned to buyer"; (We consider the word *is,* above, as surplusage and meaningless); Failure of the buyer to meet any installment when due entitled the seller to declare the entire balance due, and to bring suit on 10 days notice, and; The buyer was to pay the taxes and keep the property insured, there being a house on the parcel of land.

Sometime before November 1, 1954 appellant made the $1,250 payment and took possession without making any objection to the title or the description. She made a $50 payment on December 1, 1954, and January 1, 1955, moved out of the property, secured a renter, and collected the rents.

When no further monthly payments were made by appellant the parties, on June 10, 1955, executed an extension agreement whereby appellant was to make certain small payments on furniture and interest, and payment on the principal balance of the purchase price was extended for a period of 6 months.

Although appellant was either occupying the property or was collecting the rents thereon, no further payments were made on the purchase price, and on December 12, 1955 appellee filed suit against appellant asking for judgment of the balance of the purchase price, that said judgment be declared a lien on the land, and if

not paid that the property be sold by a special commissioner. Service on appellant was by publication. She did not appear in the trial court but later filed an answer and an appeal to the Supreme Court. In the meantime the trial judge set the decree aside, and this court sanctioned a new trial on the merits in a *per curiam* order dated May 7, 1956.

In her answer appellant admits the execution of the contract and agrees that she made only the payments heretofore set out, amounting in all to $1,850. In her cross complaint and in her amended cross complaint she makes, in substance, the following allegations: Appellee breached the sales contract on November 1, 1954 and continues said breach to this date; Appellee failed to make the warranty deed and furnish an abstract of title showing a good and merchantable title as provided in the contract; Appellee does not have good title to the property in question, and; The description to appellee's property is defective. Her prayer was that she be allowed to recover the money she had paid to appellee together with a reasonable attorney fee. In the alternative appellant asked that she be allowed a reasonable time to pay the balance due appellee and that appellee be required to furnish her a good and merchantable title.

After the introduction of testimony by both sides the trial court, on September 24, 1956 found the issues in favor of appellee and rendered judgment against appellant for the balance of the purchase price together with interest, all in the amount of $2,997.32. It is further ordered that said judgment should be a lien on the lands in question which should be sold by a special commissioner if the judgment was not paid within 30 days.

For a reversal appellant relies on three separate grounds, to-wit: 1. Appellee did not furnish an abstract showing good and merchantable title as agreed to in the contract of sale; 2. The court erred in failing to require appellee to execute and tender a warranty deed conveying the lands in question to appellant, and;

3. The judgment is excessive. We shall discuss the above questions in the order mentioned.

1. We cannot agree with appellant on the first assignment for the reasons hereinafter mentioned. In the first place, we are unable to tell from the testimony at what time appellee delivered the abstract to appellant, if in fact it was ever delivered. We do gather from the record however that the abstract was in the hands of the escrow agent and could have been obtained by appellant by asking for the same. In the second place, we have concluded that appellant has waived many rights that she had under the terms of the written contract. Although the terms of the contract are somewhat vague there is no doubt but that appellant could have had the abstract carefully examined before she made the $1,250 payment which was apparently due on or before November 1, 1956. Instead of doing this however appellant went into possession of the property for a few months and when she moved away she put a renter in charge and collected the rents. During this period of time no complaint seems to have been made by appellant regarding the abstract, the deed, the title or the description of the property. Even after the extension agreement was executed on June 10, 1955 no objections were made by appellant before the first foreclosure suit was filed. In fact the record does not disclose any demand by appellant upon appellee for the deed or the abstract, or any objection to the title or the description prior to April 11, 1956 when appellant's first answer and cross complaint were filed. Appellant cannot now complain about appellee's failure to present her with the abstract and deed. A similar question was presented in the case of *Sturgis* v. *Meadors,* 223 Ark. 359, 266 S. W. 2d 81, where the court said: "Appellant looked over the land and therefore knew what she was buying. Appellant stopped payment on the check before appellees had time to perfect their title and thereby rendered further efforts useless on appellees' part." Here appellant had stopped making payments and had entered into possession of the property.

In addition to the above appellant earnestly insists that the description contained in the contract is indefinite and that appellee has not shown that she is able to convey the land to her by a definite description. Most of the testimony and most of appellant's arguments revolve around this point. As above stated appellant has already waived her right to insist on the correction of mere irregularities in the description that can be cured. If appellant had any such objections and had made the same known to appellee, appellee would have been entitled to a reasonable time in which to make the corrections. The sentence following the above quote from the *Sturgis* case, reads: "Appellees were entitled to a reasonable time to perfect their title."

Appellant has not, in our opinion, shown that the description in question is so defective that it cannot be cured or made definite. It is true that the description standing alone is somewhat indefinite. For instance the north line runs "East to the West line of Spangler tract, . . ." and there is nothing in the description to show where the Spangler tract is located. There are other portions of the testimony however which, to our mind, make the location of the property certain and definite.

From appellant's pleadings we gather that she is disturbed because the description in the contract does not read the same as the description in the deed by which the land was conveyed to appellee. This discrepancy however is explained in this way. Appellee received title to a parcel of land in the shape of a parallelogram. The north and south sides of which were 154 feet in length and east and west sides were 326 feet. However in selling to appellant, appellee left out a strip of land 47 feet in width squarely off the south side of the above described parcel. There is nothing to indicate that appellant expected to get the latter strip of land and it is in no way involved in this suit. The description was clarified by the testimony of the County Surveyor who testified with reference to a survey which

he made on June 9, 1956 and by a plat which was attached to the record. The substance of his testimony was that the parcel of land in question is definitely described by beginning at the southeast corner of the northeast quarter of Section 16, Township 20 North, Range 26 West and run north 107 feet to the point of beginning, thence west 154 feet, thence north 189 feet, thence east 154 feet, thence south 189 feet to the place of beginning. He stated that he measured the south line and found it to be 154 feet and that the north line had to be the same length because the east and west lines were parallel. This constitutes a definite description of the land.

It would unduly extend this opinion and would serve no useful purpose to set forth the testimony in detail, much of which is more confusing than enlightening relative to the description of the parcel of land in question. The burden was on appellant to prove the title was not merchantable. See *Ray* v. *Robben,* 225 Ark. 824, 285 S. W. 2d 907. The chancellor found the issues in favor of appellee and we cannot say that such finding is against the weight of the testimony. He was able to see the witnesses and understand their references to the exhibits. In some instances here it is impossible for us to understand the testimony of the witness. For example when one witness was asked with reference to a certain point in connection with the description of the land, his reply was: A. "This point right here. (Witness indicates on map which reporter could not see.)" On another occasion we find this testimony: Q. "Do you know how much is that street out there, under that escrow agreement?" A. "This portion right here. (Witness indicates on map.)"

2. What we have already said makes it unnecessary to discuss the second ground relied on by appellant. Her own course of action previously set forth made it unnecessary for appellee to tender the deed.

3. We have carefully reviewed the record and do not find that the amount of the judgment is excessive. There is no merit in appellant's contention that she

should have been given credit for $219.38 for lumber which she had purchased and had used in the repair of a building situated on the land in question. Under the contract she had no right to repair the building and it was at her own risk that she attempted to do so. It is appellant's contention that she should not be charged with interest after December 12, 1955 because appellee had not furnished a deed and title as contracted for. It is obvious from what we have already said that this contention is untenable.

Affirmed.

JONES *v.* DIXON.

5-1297 302 S. W. 2d 529

Opinion delivered June 3, 1957.

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

Lindell Hile and *Alfred Featherston,* for appellee.

SAM ROBINSON, Associate Justice... This suit was filed in the county court to contest an election on the question of building a county hospital under authority of Amendment No. 17 to the Constitution, as amended by Amendment No. 25. The principal issue is whether the county court has exclusive original jurisdiction to hear the election contest.

The election was held on December 22, 1956, and on the 26th day of December the county court entered an order declaring that a majority of the electors had voted for construction of the hospital. On January 10, less than twenty days later, this action was filed. The complaint alleges that the election was invalid, and assigns various reasons therefor. The contestees, appellees here, on the 26th day of January, 1957, filed a demurrer to the complaint. On February 2, the court sustained the demurrer on the ground that the county court did not have jurisdiction to try the election contest. Contestants, appellants here, appealed to the circuit court; on February 9, that court sustained a demurrer on the ground that the appeal was not taken within thirty days of the entering of the order by the county court finding the result of the election.

Amendment No. 17 to the Constitution, as amended by Amendment No. 25, authorizes the holding of county elections to determine whether a county hospital shall be constructed and authorizes the levy of a tax to defray the cost and expenses thereof. Section 4 of Amendment No. 17 provides: "It is hereby made the duty of the usual Election Officers to prepare the ballots and to hold such election in manner and form as is now or hereafter may be provided by law, and to certify the returns thereof to the County Court. If a majority voting in such election shall vote for such improvement, then the County Court shall make and enter of record an order showing the total vote for and the total vote against such." . . . Amendment No. 17 was adopted at the General Election in 1928. Act No. 294 of the General Assembly for the year 1929 was adopted as an enabling act for Amendment No. 17. The last sentence

in Section 4 of Act 294 provides: "Any elector and any property owner of the county may appeal from the finding of the County Court as to the result of the election within thirty (30) days thereafter; and if no appeal is taken within that time, such finding shall be conclusive." Ark. Stats. § 13-1216.

Amendment No. 25 was adopted at the General Election in 1938. It provides that it shall be self-executing, and amends Amendment No. 17 by authorizing an election on the question of the construction of a county hospital, as well as a court house and county jail as authorized by Amendment No. 17. In *Hughes* v. *Jackson, County Judge,* 213 Ark. 243, 210 S. W. 2d 312, this court said: "Act 294 of 1929 facilitates the purposes intended to be served by Amendments 17 and 25. Although this statute was enacted before Amendment 17 was amended, our decisions are to the effect that when substance of Amendment 25 was brought into Amendment 17, the latter (prospectively) would be treated as having been enlarged, hence Act 294 is germane where its terms do not conflict with the basic law."

It is the contention of the contestees, appellees here, that Act 294, limiting the time of appeal from the order of the county court finding the result of the election, is controlling; and, since the contestants did not appeal from such finding within the thirty day period, they have lost their right to contest the election; and this was the holding of the circuit court.

The finding of the county court as to the number that voted for the submitted proposal and the number that voted against it is one thing, and an election contest is something entirely different. An analogous situation was presented in *Parsons et al* v. *Mason,* 223 Ark. 281, 265 S. W. 2d 526. Act No. 403 of 1951 deals with school elections. Section 1 of the Act provides: ". . . Within ten days after the election the county court shall canvass the returns and declare the result of the election by an order entered of record. This order shall be final unless an appeal is taken from it to the circuit court within fifteen days after it has been

entered." In the *Parsons* case, we said: "That court (county 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." See also *Jones* v. *Lawless,* 226 Ark. 110, 288 S. W. 2d 324.

The Constitution requires the county court to make a finding as to the number of votes cast for and against the proposal submitted to the electors, and according to Act 294 of 1929 (Ark. Stats. § 13-1216), any one dissatisfied with the tabulation as announced by the court must appeal within thirty days. But such finding by the court does not amount to a judgment rendered in an election contest. *Patterson* v. *Adcock,* 157 Ark. 186, 248 S. W. 904, also supports the view that an entry of the result of the election is not an election contest.

We come now to the proposition of which court has jurisdiction in an action to contest an election held on the question of constructing a county hospital. Article 19, Section 24, of the Constitution provides: "The General Assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this Constitution." Pursuant to this provision of the Constitution the General Assembly adopted Ark. Stats. § 3-1205, which places in the county court jurisdiction for the contesting of elections for county officers except that of county judge. In *Glidewell* v. *Martin,* 51 Ark. 559, 11 S. W. 882, it is said: "It is patent that the legislature was expected to confer this jurisdiction upon *some board, council or tribunal* which might be inferior to the circuit court."

Article 7, Section 11, of the Constitution gives the circuit court jurisdiction in all cases where exclusive original jurisdiction is not placed in some other court by the Constitution. But Article 7, Section 28, gives to

another court — the county court — exclusive original jurisdiction in all matters of internal improvement and local concerns; it provides: "County courts shall have exclusive original jurisdiction in all matters relating to . . . the internal improvement and local concerns of the respective counties." Is an election on the question of building a county hospital an internal improvement or a local concern of the county? If so, then according to the Constitution, the county court has exclusive original jurisdiction in the case at bar.

Some of our cases, which may appear to hold that the circuit court has jurisdiction in cases of this kind, are easily distinguished from the case at bar. For instance, *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161, and *State ex rel Attorney General* v. *Sams,* 81 Ark. 39, 98 S. W. 955, hold that the circuit court has jurisdiction, but, upon examination, it will be seen that the issue in those cases was whether there had been an usurpation of office. They were not cases concerning internal improvements or local concerns of the county, but were prosecuted under authority of the Civil Code, Section 525, Ark. Stats. § 34-2203. The cases of *Payne* v. *Rittman,* 66 Ark. 201, 49 S. W. 814, *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652, and *Purdy* v. *Glover,* 199 Ark. 63, 132 S. W. 2d 821, were contests of elections for municipal offices; Article 7, Section 28, of the Constitution does not apply to municipalities.

It was held, however, in *Patterson* v. *Adcock,* 157 Ark. 186, 248 S. W. 904, and *Alexander* v. *Stuckey,* 159 Ark. 692, 253 S. W. 9, that the circuit court has original jurisdiction in contests over county stock laws, but neither of these cases mentions Article 7, Section 28, of the Constitution giving the county court exclusive original jurisdiction in matters of internal improvement and local concerns. In the *Patterson* case, *Payne* v. *Rittman* and *Whittaker* v. *Watson* were cited, but, as above mentioned, both of those cases involve contests of an election for a municipal office. *Sumpter* v. *Duffie,* 80 Ark. 369, 97 S. W. 435, is cited also, but that case involved a contest of an election for county judge. It is pointed

out in the *Sumpter* case that Article 19, Section 24, of the Constitution provides that the General Assembly shall provide by law the mode of contesting an election and that the statutes give to the circuit court jurisdiction in a contest of a county judge election. Citing Act 34 of the Acts of the General Assembly of 1875 (Ark. Stats. § 3-1201). But the legislature has not given the circuit court jurisdiction of the contest of an election such as the one involved in the case at bar. Act 34 of 1875 also gives the county court jurisdiction of election contests for county offices other than the office of county judge. Evidently it was considered that it would be less complicated to give circuit court jurisdiction in the contest of election for the office of county judge than it would be to substitute another county judge to try the case. And, in *Alexander* v. *Stuckey, supra,* it was held that the circuit court has jurisdiction in stock law elections, and that the suit must be filed within six months. On the jurisdiction question, no authority is cited except the *Patterson* case.

But, in *Russell et al* v. *Jacoway, Judge,* 33 Ark. 191, and in *Willeford et al* v. *State, ex. rel.,* 43 Ark. 62, it was held that the county court has exclusive original jurisdiction in the contest of an election to remove the county seat. Likewise, the county court has exclusive original jurisdiction in the contest of elections on the liquor question. *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680; *Yarbrough* v. *Beardon,* 206 Ark. 553, 177 S. W. 2d 38. And the county court also has exclusive original jurisdiction in the contest of an election for road overseer, *Condren* v. *Gibbs,* 94 Ark. 478, 127 S. W. 731; and for the office of school director, *Ferguson* v. *Wolchansky,* 133 Ark. 516, 202 S. W. 826. Certainly, an election on the question of whether a county hospital should be constructed and the levying of a tax against the property in the county to defray the expenses of such construction, is a matter of local concern just as much as it is possible for anything to be, and exclusive original jurisdiction to try an election contest in connection with such question is, therefore, in the county court.

The only remaining question is whether the suit was filed in time. The election was held on December 22nd; the county court entered an order showing the result of the election on December 26th; this suit contesting the election was filed on January 10th, less than twenty days thereafter. *Buffington* v. *Carson,* 219 Ark. 804, 244 S. W. 2d 954, was a contest of an election pertaining to the county road tax (the jurisdictional question was not raised). It was pointed out that we have two statutes fixing the time for bringing an election contest: Ark. Stats., § 3-1202, fixing a limitation of one (1) year for election of Supreme Court Judges and six (6) months for other offices; and § 3-1203 fixes a period of twenty (20) days to contest an election of any person to any county, city or township office. It was held that the twenty day limitation applied; that a county road tax is more like an election for a county officer than one for a state officer. Likewise, in the case at bar, we think the twenty day statute is more applicable to an election on the question of construction of a county hospital. Here, the complaint was filed within the twenty day period, and since it was filed in apt time in a court of competent jurisdiction, the county court erred in sustaining the demurrer; and on appeal to the circuit court, the cause should have been remanded to the county court for a trial on the merits.

Reversed, with directions to remand to the county court.

HARRIS, C. J., and HOLT & MILLWEE, JJ., dissent.

DAVIS *v.* DAVIS.

5-1232 302 S. W. 2d 769

Opinion delivered June 10, 1957.

Surrey E. Gilliam and *Melvin E. Mayfield,* for appellant.

James M. Rowan, Jr. and *Brown & Compton,* for appellee.

CARLETON HARRIS, Chief Justice. Mrs. Mable Flaherty, age 59, a resident of Camden, suffered a stroke on October 7, 1948. Prior to such time, she had worked as a secretary at the South Arkansas Grocery, but never returned to work after suffering the stroke. On July 11, 1953, Mrs. Flaherty suffered a second stroke, and remained a total invalid thereafter.[1] Richard H. Davis, a brother, was duly appointed guardian on October 16, 1953. On December 7, 1953, subsequent to petition of the guardian, the court found that Arlene K. Davis, appellant herein, and former wife of Richard H. Davis, had in her possession certain postal savings certificates, series "E" U. S. Savings Bonds, and a pass book for a joint account of Mrs. Flaherty and Mrs. Davis in the Citizens National Bank of Camden, all of which belonged to Mrs. Flaherty, and ordered appellant to deliver same to the guardian. The court further found that Arlene K. Davis, in her response to the guardian's petition, alleged the existence of a trust relationship between Mable Flaherty and the respondent, (appellant) and had moved the court to transfer the cause to Chancery for the purpose of determining that issue. In compliance therewith, the court

[1] Mrs. Flaherty died subsequent to the trial of this cause, and her estate is being administered by the guardian under the provisions of Section 231 of Act 140 of 1949.

did make such transfer. The guardian, (appellee herein) filed a reply in Chancery Court on April 20, 1955, alleging that appellant was still holding funds and properties belonging to the incompetent, and that appellant should be required to render an accounting, and further required to make restitution of any funds or property which she had received from Mrs. Flaherty, and which had been applied to appellant's use or gain. Following the filing of various motions, the court proceeded to hear the cause on March 23, 1956, and entered its decree on May 31, 1956, in which the following findings were made:

1. That plaintiff's ward, Mable Flaherty, suffered a cerebral hemorrhage on or about October 7, 1948, and as a result thereof was rendered incompetent, and from such date was not legally competent to transfer or dispose of her property.

2. That during the month of February, 1952, Mrs. Flaherty had certain U. S. government bonds re-issued to add the name of the defendant, Arlene Davis, as co-owner. That on October 27, 1953, the defendant, Mrs. Davis, cashed these bonds and received therefor the sum of $12,200.75, and that said defendant converted said sum to her own use and benefit.

3. That on January 28, 1952, the said Mable Flaherty directed the Merchant & Planters Bank to add the name of Arlene Davis as co-owner of the savings account of Mrs. Flaherty in that bank. That between July 27, 1953, and December 7, 1953, the defendant withdrew from said bank account the sum of $1,236.50 and used the same for defendant's own benefit.

4. That sometime after October 7, 1948, the defendant, Arlene Davis, came into possession of a valuable diamond ring owned by Mrs. Flaherty and that the defendant now has said ring in her possession.

5. The court further finds that none of the said transactions constituted a valid legal gift.

In accordance therewith, the court rendered judgment for appellee against appellant in the total sum of

$13,437.25 together with interest at 6% per annum from such date until paid, and directed appellant to return the diamond ring to appellee. From such judgment comes this appeal.

Appellant first contends that the court was without authority to transfer the cause from Probate Court to Chancery Court, and erred in ordering such transfer; that all subsequent pleadings filed were of no effect whatsoever because the transfer was without any force or validity. The matter of transferring causes from Probate to Chancery Court was passed upon by this Court on November 26, 1956, in the case of *Merrell, et al.,* v. *Smith, Special Administrator, et al.,* 226 Ark. 1016, 295 S. W. 2d 624. There the Court approved such a transfer with the following language:

"* * * While it properly admitted the will to Probate, the Probate Court lacked the 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."

Appellant argues that the mental incapacity of Mrs. Flaherty to make a gift is not shown by a preponderance of the evidence. This, of course, is the main issue in the litigation. No point would be served in reviewing all of the evidence. Some eleven witnesses, mostly neighbors, testified to the effect that Mrs. Flaherty did not act in her normal manner after suffering the first stroke in October, 1948. Most of the witnesses testified to a "silly giggle" that she developed after the stroke, occurring most of the time when nothing humorous had been said. Various witnesses testified that she had been a quiet, conservative type of person prior to the stroke, and that a marked difference was observed thereafter. It was testified that she would go to the back lot and transfer different trees and pine bushes, then go over to the next lot and bring back two or three brick in her hand; perhaps next day she would move the plants to another location and move the brick. She would sit on the wet and cold ground, and would go barefooted. In conversations,

she would not stay on one subject, would talk at random, and her answers to questions would not be responsive. She was careless about her personal appearance, whereas prior to the stroke she had been careful about her grooming and was attractive and neat. She wanted to give things away, and endeavored on one occasion to give an expensive Kodak to a neighbor who refused to accept it. Another neighbor, Mr. W. G. Hatch, testified that she would come over to his yard, steal his flowers, and take them over and put them in her yard; then she would weed her flowers and bring the weeds over into his yard. Mr. Hatch, whose home was only 8 or 10 feet from Mrs. Flaherty's bedroom, further testified that she frequently had crying spells, and would awaken him at night crying; that she would find a sunny spot in the yard and lie down "like a dog,"—and all of these actions had only occurred since the stroke. Her mother testified that Mrs. Flaherty had an "awful appetite" and would become angry when she felt she had not had enough to eat, would throw dishes around, and when her mother left the house, would go out and pull up the flowers in the yard. This was entirely contrary to her actions prior to the stroke.

On the other hand, a Camden banker and a Camden attorney, who witnessed the execution of a will by Mrs. Flaherty on March 19, 1951,[2] testified that at that time she appeared competent. The attorney, who prepared the will, testified that she seemed to have a clear understanding of the property she owned, and what she wanted to do with it. However, he stated that he had never seen Mrs. Flaherty except on two occasions, including this particular instance. Dr. Perry Dalton of Camden testified that from his observations of Mrs. Flaherty between 1948 and the time of the second stroke, nothing was noted in her mental behavior that would have necessitated a guardian; however, he stated he did not know her before the stroke, and assuming that she was the type of person

[2] The will left $10 to Mrs. Flaherty's daughter, $10 to her son, and the rest of her estate to appellant.

described in the hypothetical question,[3] would say that there was more change in her reactions than he had observed and possibly more brain damage than he had observed. Dr. John P. McAlister, who treated Mrs. Flaherty for diabetes for approximately two weeks in July of 1952, and also saw her on September 29, 1952, testified that, in his opinion, she was generally competent. He stated that she was aware of her surroundings and knew time, place, and person. He had not known Mrs. Flaherty before being called to attend her. Dr. McAlister stated that he did not believe she had the same mental aptness with regard to making decisions that she would have had, except for the stroke. He testified that he did not think she could make out the grocery list for the day, and doubted if she could think what had to be done in the house the next day, or could plan too much in the future, but at a given instant, she was competent. He stated that she was going through periods of melancholy. In his words, "In fact, I believe that most of the time she was very unhappy, but I will not put the stigma of insanity upon this woman." He further testified that he did not know, from his observation, as to whether she had sufficient mental competence to understand what property she owned. Joe Coan, cashier at the Merchant and Planters Bank, testified that, at the time of the re-issuance of the bonds to include the name of appellant as co-owner, he had no doubts concerning Mrs. Flaherty's competence

[3] The following hypothetical question was propounded: "Q. Doctor, based upon your experience in the medical profession, if a woman who has been described by her neighbors, friends, and family as a quiet, reserved, intelligent person, who sought to improve her mind, who had worked continuously in secretarial capacity for a number of years, had been frugal in saving her money, had done nothing so far as her family and friends could observe that would be classed as abnormal or out of the way in any way; in other words, a person who is described as above average intelligence; if that person suffered a cerebral hemorrhage causing brain damage, temporary or permanent, or with or without healing, but anyway there was a cerebral hemorrhage, after that time, according to her family, neighbors, and friends, she was different in almost every respect, that she was subject to violent emotions, which she had never been subject to before, she had a hysterical giggle which occurred on many occasions when something was not funny, when she would go out in the yard and lie down in the sun like a dog, when she was unable to carry on any ordinary conversation that she had been able to carry on prior to that stroke, and taking all of those things into consideration, Doctor, would you say that such a person would be competent to handle her business affairs?"

or ability to understand what she was doing. He stated that he asked her that question, and she "flared up" at being asked, and said, "Yes, it is certainly my intentions, and I know exactly what I want done."

Appellant testified that Mrs. Flaherty and the members of her family did not get along well, that she (appellant) visited Mrs. Flaherty three times a day while she was in the hospital in 1953; that she had frequently given Mrs. Flaherty shots for her diabetes; that she often, after the stroke, would go by and carry Mrs. Flaherty riding in her car; that Mrs. Flaherty and her daughter frequently had words, and that the two would throw things at each other and would slap each other;[4] that Mrs. Flaherty's son, when young, lived with appellant and appellee (during their married life) for about three years. The evident point for this testimony was to show a reason for Mrs. Flaherty's alleged gift to appellant. In her words, "* * * So she told me one day she wanted to give me the bonds, is what she wanted to do, and I said, 'Oh, law, Mable, I don't know anything about something like that, I don't know anything about it at all,' and she said, 'Well, how can you do it?' and I said, 'Well, the only thing I know to do is just go see a lawyer, the only thing I know to do.' * * * Q. Did you ever at any time render any service to Mable Flaherty with the expectation of being rewarded for it or paid for it? A. Not one bit. Q. In reference to the particular bonds that are in controversy in this action, the bonds in which the original issue was cashed out in February of 1952 at Merchants and Planters Bank, at the time you testified about when Mable Flaherty gave the bonds to you, would you state to the court every expression that she said at the time she gave you those bonds? A. These bonds were in my box and after she had made, well, she had made the will before that, and she told me at this time, said 'Arlene, I want to give you these bonds.' And I said, 'Well, O. K.' So we went up there and she got them. I got the envelope out of the lock box, and she took the bonds out of there, and she signed

[4] These alleged difficulties between mother and daughter occurred before the stroke.

them and she gave them to me. She said, 'Now I want you to have them and you can do whatever you want to with them.' She says, 'Now I want to give them to you. You can do whatever you want to with them.' So that's what she did.'' With reference to the ring:

''Q. Did you ever have any discussions with Mable Flaherty, other than the ones you have mentioned here about the bonds, pertaining to any other properties that Mable Flaherty owned or had possession of?

A. Well, yes, she, back in I guess '49 or '50 she gave me her ring, and she gave it to me one day, and she said, 'I want you to have it; I won't wear it any more; but now you know the mounting is worn and you can't wear it until it is fixed.' But she said, 'You can have it fixed and wear it.' And of course I didn't get it fixed right then, I just kept it and finally one day she said, 'Why don't you go ahead and get the ring fixed and go ahead and wear it?' And so I had it remounted, and then I have been wearing it ever since. And she told me she wanted me to have it, to keep it just as long as I lived.''

Appellant does not contend that any part of the monies in the bank were given to her, but states that such sums expended were used entirely for the benefit of Mrs. Flaherty. However, no statements or bills which she had paid on behalf of the latter were placed in evidence.

After a careful study of the testimony in this cause, we are unable to say that the Chancellor's findings are against the preponderance of the evidence. It is noteworthy that appellee's witnesses were, on the whole, much better acquainted with Mrs. Flaherty than the witnesses on behalf of appellant; likewise, they had better opportunity to observe her actions, and according to the evidence, did, much more often, see and talk with her. It must also be remembered that neither of the physicians knew Mrs. Flaherty before being called in attendance.

To summarize, the question as to whether Mrs. Flaherty was competent or incompetent from the period after October 7, 1948, resolves itself into purely a question as

to what evidence made the most profound impression on the court. The Chancellor heard the case, had the opportunity to observe the demeanor of the witnesses, apparently gave close study to the testimony, and the contentions of each litigant. The rule, so many times reiterated, is to the effect that while this Court tries Chancery cases *de novo,* still it will not reverse a Chancellor's decree unless his findings are against the weight of the evidence. *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686 (1946). We are unable to make such a finding in this cause.

This determination makes unnecessary any discussion of the court's finding that none of the transactions constituted a valid legal gift.[5]

The judgment of the chancery court is affirmed in its entirety.

[5] This finding was based upon the fact that since Mrs. Flaherty remained a co-owner of the bonds, and upon gaining possession, could have cashed them at any time herself, no absolute gift was made.

ROBERTSON *v.* GRIFFIN.

5-1270 302 S. W. 2d 773

Opinion delivered June 10, 1957.

T. O. Abbott, for appellant.

Mahony & Yocum, S. E. Gilliam, A. D. Pope, and *Melvin E. Mayfield,* for appellee.

CARLETON HARRIS, Chief Justice. G. L. Robertson, now deceased, was, on May 29, 1920, the owner in fee simple of certain lands situated in Union County. On said date, Robertson, and his wife, Nanna Robertson, appellant herein, executed to J. D. Trimble, trustee, two deeds of trust, covering said lands, to secure an indebtedness of $3,450 plus interest. On April 20, 1922, Robertson and his said wife, executed and delivered to J. O. Kinard, a mineral deed conveying to the grantee an undivided one-half interest in the mineral rights to a portion of said lands; likewise, on May 11, 1922, Robertson and wife executed to John A. Cobb an undivided one-half interest in the mineral rights of other portions; likewise, on June 14, 1922, Robertson and wife executed a similar deed to A. G. Griffin. At all times heretofore mentioned, Nanna Robertson had only an inchoate dower interest in said lands, though she joined as a granting party in the granting clause and as a warranting party in the clause warranting the title. Subsequent thereto, G. L. Robertson died, and Nanna Robertson was appointed executrix of the estate. Suit was instituted by the mortgagee and trustee to foreclose the mortgages heretofore mentioned, and same were foreclosed under decree dated January 10, 1925. None of the claimants under the mineral deeds were made parties to the foreclosure suit or were served with summons, and none intervened in said suit. On February 24, 1925, the Commissioner in Chancery sold the lands at public sale to H. V. Betts, trustee. Betts conveyed the lands to George M. LeCroy,[1] on May 15, 1925, and on the same date, LeCroy and wife conveyed an undivided one-third interest in the lands to Mattie Robertson, a child of the deceased G. L. Robertson and Nanna Robertson; and conveyed to appellant an undivided two-thirds interest in said lands. Mattie Robertson later conveyed her one-third interest to one Decimus Cates.[2] Appellant and others instituted suit in the Chancery Court against ap-

[1] LeCroy represented appellant in the foreclosure action.

[2] Cates was a party plaintiff in this cause, and the court upheld his one-third interest in said lands, cancelling said mineral deeds insofar as they affected his interest. No appeal has been taken therefrom.

pellees,[3] setting up that the various mineral owners had not redeemed from the foreclosure sale, that such right of redemption was then barred, and asking that title to the mineral rights in the above lands be quieted and confirmed as against appellees. The Chancellor held that the after-acquired title of Nanna Robertson inured to the benefit of Cobb, Kinard and Griffin, and those holding title under and through them, and entered a decree confirming title to the mineral interests involved, in appellees. From such holding comes this appeal.

For reversal, appellant urges that the court erred in failing to consider the complaint amended to conform to the proof made in the case, under which proof she contends the Court should have reformed the three mineral deeds executed by Robertson and appellant, to show the true intention of the parties (claiming that it was only the intent of appellant to release and relinquish to said grantees the only interest she then owned, her inchoate dower interest). Appellant further contends that the trial court erred in holding that the law of after-acquired title applies to her since she only owned a dower interest at the time of the execution of the conveyance.

Section 50-404, Ark. Stats. (1947) Anno., provides as follows:

"If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired, shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance."

This statute has been upheld in numerous cases by this Court. *Sheppard* v. *Zeppa, Trustee,* 199 Ark. 1, 133 S. W. 2d 860. *Hayes* v. *Coats,* 218 Ark. 678, 238 S. W. 2d 935. It is therefore clear that appellant cannot pre-

[3] Appellees had acquired their mineral rights either by direct or mesne conveyance from the grantees of Robertson and appellant.

vail unless the deeds are reformed so as to eliminate her as a grantor. Appellant testified that at the time of executing the mineral deeds, she claimed no interest in the property and signed the deeds purely because her husband asked her to. There is no evidence that fraud was practiced upon appellant, nor evidence of any questionable conduct on the part of either appellant's husband or the grantees. When asked as to whether or not she remembered signing the deeds, appellant testified:

"A. I certainly do, but at the time I figured he[4] would make me a living and I did not even question him.

Q. You just signed because he asked you to?

A. That's right."

Certainly this is not evidence of a mutual mistake; and this Court has held that to reform a written instrument upon the grounds of mistake, it must be shown that the mistake was mutual. *Kromray* v. *Stobaugh,* 212 Ark. 377, 206 S. W. 2d 171. Accordingly, no grounds for reforming the deeds have been established. It might also be stated that while this complaint was filed in 1941, and the decree entered in 1956, no pleading was ever filed in the trial court asking for reformation of the deeds, and this relief is sought for the first time here on appeal.

Finding no error, the cause is affirmed.

[4] Referring to her husband.

CUMMINGS *v.* LORD'S ART GALLERIES.

5-1296 302 S. W. 2d 792

Opinion delivered June 10, 1957.

[Rehearing denied July 1, 1957]

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

R. Julian Glover and *D. D. Panich,* for appellee.

J. Seaborn Holt, Associate Justice. This litigation involves an auction sale of a diamond ring. Appellant, Cummings, a non-resident, while a visitor in Hot Springs, Arkansas [on July 1, 1954] and attending an auction of appellee's, made a bid of $900 on a ring which contained a 2.28 carat diamond surrounded by four smaller diamonds "weighing 10 points". His bid of $900 was the highest and the auctioneer closed the sale to appellant for this amount. [Federal excise tax and state sales tax when added to the sale price made a total of $1,008.] Following the sale, Cummings paid $50 cash and gave his personal check for $158, on which he later stopped payment, and refused to pay the balance. On November 29, 1955 he filed suit against appellee alleging, in effect, that at the time he purchased the ring appellee represented to the plaintiff that the said diamond ring was a part of and came from the estate of the late Fanny Brice; that the Chase National Bank of New York City, at the instance of the executors of the Brice Estate, had appraised the ring at $5,250; that appellee knew that such representations and warranties were fraudulent when made, were made with the intent that appellant should rely thereon and that he purchased the ring in reliance on said representations and warranties. He further alleged that "upon learning that said warranties and representations were

not true, he rescinded the sale and demanded a return" of $50 cash which he had paid on the purchase price. He further alleged that "the said false and fraudulent representations were made knowingly, were willful and made with malice for the purpose of deceiving and defrauding this plaintiff."

Appellant prayed "that the purchase price of the ring One Thousand Eight Dollars, ($1,008.00), less the Fifty Dollars ($50.00) now in the hands of the defendant, its agents, servants or employees, return of which has been refused, be deducted from the value of said ring as warranted and that he have judgment against the defendant for the sum of Four Thousand Two Hundred Ninety Two Dollars ($4,292.00) . . ." and that he be awarded also $10,000 as punitive damages. Appellees answered with a general denial. On the day of trial appellee tendered into court the $50 paid by appellant, and at the close of all the testimony asked for an instructed verdict in favor of appellee, which the court refused to give. The jury returned a verdict in appellant's favor for $51 actual damages and $2,000 punitive damages. This appeal followed.

For reversal appellant first contends that: "The court erred in granting defendant's motion for judgment notwithstanding the verdict."

The record reflects that on November 17, 1956, appellee filed a motion in which it prayed that the trial court set aside its judgment previously entered on the jury's verdict and enter a judgment in appellee's favor notwithstanding the jury's verdict. Thereafter, on December 5, 1956, the trial court granted this motion of appellee. The court's order granting this motion contains this recital: "The court erred in failing to sustain the motion or motions for directed verdict for the defendants. [appellees] The evidence before the court is clear and convincing that plaintiff [appellant] breached his contract by stopping payment on his check in the sum of $158.00, given as a down payment for the diamond ring mentioned in the complaint. The evidence shows plain-

tiff, at the time he breached his contract, had no knowledge of the value of the said ring, had no knowledge of its market value or anything else concerning said ring, since the ring had never been in his possession. The contract was executory rather than executed."

We have concluded that the court was correct in sustaining this motion. The evidence, in addition to that stated above, tends to show that after the ring had been sold to appellant, as above indicated, he left his seat in the auction gallery, went to the rear of the room where he paid $50 in cash to appellee, and gave his personal check for $158 on the purchase price, and agreed to pay the balance within two weeks and receive the ring. The parties were strangers to each other and were dealing at arm's length. Following the sale the diamond ring was placed in an envelope and sealed, in the presence of appellant Cummings. The envelope bore a duplicate tag showing the same number, as was on the envelope, in which the diamond was placed, and there was marked on the duplicate ticket, which was delivered to appellant, the price of the ring, the amount deposited and balance due. The ring was then put in appellee's safe. The next morning appellant returned. He testified: "So the next day I went back down and told him that I didn't know anyone in Hot Springs; that I knew one of the vice presidents in the First National Bank in Shreveport appraised all the diamonds for the bank and I would like for him to mail it down there to them for appraisal, that I would be there about twenty days longer. As soon as the appraisal came back, if it met the value, or anything like the value he had stated it had, that I would give him a check for the balance due. But he wouldn't do it. He said, 'No. You go ahead and buy the ring. You can have anybody appraise it you want to.' " Appellant further testified that when appellee refused to allow him to send the ring out of the state for appraisal he became suspicious and immediately stopped payment on the $158 check.

We find no evidence in the record that it was a part of appellee's agreement with appellant that appellant

would be given possession of the ring with permission to send it out of the state for appraisal before appellant paid the purchase price. Appellee does not deny that it represented to appellant that he could have the ring appraised by anyone of his own choosing, anywhere, after he had paid the purchase price. This identical ring was sold by appellee to another party on August 7, 1954, for $900.

We think the undisputed evidence shows that when appellant stopped payment on the $158 check above, he breached his contract with appellee and, therefore, that appellee was justified in treating the contract as rescinded by appellant. "The failure of one party to a contract to comply with its terms releases the other party from compliance with it." *Grayling Lumber Co.* v. *Hemingway,* 128 Ark. 535, 194 S. W. 508. Also see *Ford Hardwood Lbr. Co.* v. *Clement,* 97 Ark. 522, 135 S. W. 343.

Next appellant argues: "That the lower court erred in failing to grant plaintiff's motion for judgment by default and in allowing defendant to file its answer after more than 20 days subsequent to the service of summons without proper application having been made by the defendant for an extension of the time within which to file an answer within the 20-day period." In connection with this contention, the record shows that the order of the filing of pleadings in this case is correctly summarized and stated by the trial court in his "Memorandum Opinion" on September 4, 1956, as follows: "The defendant [appellee] filed a motion requesting the plaintiff to make his complaint more definite and certain and reserving the right to plead further. This motion was filed with the Clerk on December 27, 1955; however, the Clerk has filed an affidavit to the effect that his office was closed from December 22, 1955 until December 27, 1955, and that all pleadings received by his office during that time were marked filed on December 27, 1955. The defendant has also filed the affidavit of one Lucille Steele to the effect that she was the secretary of D. D. Panich, Attorney, for the defendant, and that on the 22nd day of December, 1955 she placed in the United States Mail the motion to

make more definite and certain above referred to, a copy of which motion was mailed to counsel for the plaintiff on December 22, 1955. The plaintiff, in his memorandum brief, makes the following statement: 'Plaintiff will ignore defendant's contention that he mailed the said motion to the Clerk of the Court on the 22nd day of December.' On January 9, 1956, the defendant filed an answer to the complaint. On the following day, January 10, 1956, the plaintiff filed a motion for default judgment for the reason that the defendant had not filed an answer within the statutory time . . . The court holds that the motion filed by the defendant to make the complaint more definite and certain was filed within the twenty-day period after the service of summons, and that the motion tolled the running of the statute as to judgment by default . . . The motion of the plaintiff for judgment by default is overruled . . ."

The court then found from the above pleadings that the motion filed by appellee was, in effect, to make appellant's complaint more definite and certain and that same was filed within the 20-day period after the service of summons and thereby tolled the running of the statute as to judgment by default, [Act 49 of 1955, now § *27-1135 Ark. Stats. 1947*] and overruled appellant's motion for judgment by default. We think the action of the court in the circumstances was correct.

As indicated, appellee's motion, the record shows, was mailed from attorney Panich's office in Little Rock by his secretary on December 22, 1955, and she on the same date forwarded by mail to Mr. Thomas, appellant's attorney, a copy of said motion. In due course these motions so mailed should have reached the office of the Clerk of Garland County, and appellant's attorney, on December 23, the following day after posting. Since the clerk testified that his office was closed from December 22 to December 27 [Christmas holidays] and he did not file the motion in question until December 27, in the circumstances, we hold that but for what amounted to an unavoidable casualty or misfortune the motion would have reached the clerk in due course on the 23rd, and,

therefore, the trial court correctly held that the motion must be considered as having been filed within the 20-day period after the service of summons and that the appellee, by filing this motion and pleading put him in court and entered his general appearance for all purposes, and preserved appellee's right to file his answer January 9, 1956, setting up any defense that he might have. "Any action on the part of defendant, except to object to the jurisdiction which recognizes the case as in court will amount to a general appearance. 3 Cyc. 504. Any taking part in proceedings will constitute a general appearance." *Sager* v. *Jung & Sons, Co.*, 143 Ark. 506, 220 S. W. 801.

Finding no error, the judgment is affirmed.

ROBERTSON *v.* ROBERTSON.

5-1282 302 S. W. 2d 810

Opinion delivered June 10, 1957.

Eugene M. Munger, St. Louis, Mo., and *Langston & Walker* and *Wayne Foster,* for appellant.

George M. Booth and *John L. Bledsoe,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal by the plaintiff from a decree in which the Trial Court, *sua sponte,* dismissed the entire case without hearing any evidence.

On July 27, 1956, the complaint was filed in the Chancery Court. The plaintiffs were (a) M. O. Robertson, individually, and (b) Mary Etta Robertson, a minor, by M. O. Robertson, her father and next friend. The defendant was Opal Robertson, who is the divorced wife of M. O. Robertson and who is the mother of Mary Etta Robertson. The complaint attempted to state three separate causes of action, to-wit: (1) Mary Etta Robertson, a minor, acting by her father and next friend, M. O. Robertson, joined him in asking that the Court set aside a deed that M. O. Robertson had executed in 1947 to Mary Etta Robertson and Opal Robertson, her mother, in which was conveyed forty acres of land in Craighead County; (2) Mary Etta Robertson, by her father and next friend, sought to have a Receiver appointed for the said forty acres of land and have an accounting from Opal Robertson for Mary Etta Robertson's half of all rents and revenues collected by Opal Robertson from the entire forty acres of land from 1947 to 1956; and (3) M. O. Robertson individually sought to set aside the said deed that he had executed to Opal Robertson in 1947, conveying the said forty acres.

As aforesaid, the Chancery Court, *sua sponte,* dismissed all three causes of action, without hearing any evidence. The correctness of the dismissal will be considered regarding each cause of action.

I. *The First Cause of Action.* The first cause of action was that of Mary Etta Robertson, acting by her

father and next friend, M. O. Robertson, to cancel and set aside the deed that M. O. Robertson had executed in 1947 in which the grantees were Mary Etta Robertson and Opal Robertson. The Chancery Court was absolutely correct in refusing to allow M. O. Robertson to act as next friend for Mary Etta Robertson in this cause of action, because the complaint showed on its face that M. O. Robertson's interests were adverse to those of Mary Etta Robertson. He had executed a deed conveying to Mary Etta Robertson an undivided one-half interest in the land for love and affection to his said daughter. She is still a minor and her father has her custody and control. Thus, the complaint affirmatively showed that setting aside the said deed would not be for the best interest of the said minor. Section 27-823 Ark. Stats. says:

"The action of an infant must be brought by his guardian or his next friend. Any person may bring the action of an infant as his next friend; *but the court has power to dismiss it if it is not for the benefit of the infant,* or to substitute the guardian of the infant, or another person, as the next friend. (Civil Code, § 46; C. & M. Dig., § 1111; Pope's Dig., § 1327)." (Italics our own.)

In *Wood* v. *Claiborne,* 82 Ark. 514, 102 S. W. 219, in considering this Statute, we said:

"Our Statute provides that 'any person may bring the action of an infant as his next friend; but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend.' "

See also 27 Am. Jur. 839. As to setting aside the deed, M. O. Robertson's personal interests were hostile and adverse to the interests of Mary Etta Robertson because he had made the deed to her for love and affection. There was no money consideration to be recovered: setting aside the deed would merely deprive her of one-half interest in the forty acres of land. The Trial Court could have appointed some other person to act as next friend, or could —as it did in view of the other causes of action in the complaint—dismiss the attempt by M. O. Robertson to act

as next friend of Mary Etta Robertson in any effort to set aside the deed.

Therefore, as to the effort of M. O. Robertson to act as next friend of Mary Etta Robertson in an attempt to set aside the deed, the Trial Court was correct in dismissing the said first cause of action.

II. *The Second Cause of Action.* Mary Etta Robertson, by her father and next friend, M. O. Robertson, sought an accounting from Opal Robertson for Mary Etta Robertson's half of all the rents and revenues collected by Opal Robertson for the forty acres of land from 1947 to 1956. The complaint alleged that M. O. Robertson had the custody and control of his said daughter, Mary Etta Robertson, a minor; and the complaint also alleged:

"Seventh: And comes M. O. Robertson, as father, next friend, and natural guardian of the above named minor and states and alleges for and on behalf of said minor that immediately upon the execution of said deed, the Defendant Opal Robertson took possession of said real estate and continuously since has exercised exclusive proprietorship thereof; and that she has failed, refused, and neglected to account to the minor, Mary Etta Robertson, for any part of the income, rents or profits therefrom; that during the years 1947, 1948, and 1949 this defendant collected for each year approximately $850.00, said land being rented for crop rent; that for the year 1950, she rented the same for $1,000.00 in cash; for each of the years 1951 and 1952 the sum of $1,200.00 cash and for the years 1953, 1954, 1955, and 1956 each the sum of $1,000.00, a total in rents collected by said Defendant of $9,950.00, which far exceeds the value of the real estate.

"Eighth: The plaintiffs allege that the Defendant is a non-resident of the State of Arkansas . . .

"Ninth: Plaintiffs allege that the non-resident Defendant is insolvent; that matters and things herein involved require accounting; that they have no proper and adequate remedy at law.

"Tenth: Plaintiffs further allege that the Defendant has rented said lands to one Gerald Nall for the crop year, 1956, and possibly for future years, for which said tenant has agreed to pay the sum of $1,000.00; that a receiver should be appointed forthwith to collect said rents, and to manage, rent, pay taxes, and do such other things as may become necessary during the pendency hereof."[1]

The Chancery Court was in error in dismissing this second cause of action. Equity has jurisdiction of matters of account that are intricate or complicated. *Trapnall* v. *Hill,* 31 Ark. 345; *State* v. *Churchill,* 48 Ark. 426, 3 S. W. 352-880; *Rogers* v. *Yarnell,* 51 Ark. 198, 10 S. W. 622; and *Ferguson* v. *Rogers,* 129 Ark. 197, 195 S. W. 22. If the Chancery Court concluded that the accounting desired in this case was not sufficiently intricate or complicated to justify equity jurisdiction, then the Court should have transferred the cause of action to law. (Section 27-208 Ark. Stats.; *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282; and *Simmons* v. *Turner,* 171 Ark. 96, 283 S. W. 47.) At all events, the cause of action should not have been dismissed since the complaint did not show on its face—and there was no other showing to so indicate—that M. O. Robertson was acting other than *bona fide* as next friend of Mary Etta Robertson in this matter of accounting.

[1] The complaint was filed on July 27, 1956; and on August 13, 1956 the Chancery Court, by written stipulation and agreement of the parties, appointed a Receiver to take charge of the land. The order appointing the Receiver reads as follows: "On this 13th day of August, 1956, the same being a regular adjourned day of the above styled Court, came on for hearing Petition of Plaintiffs for the Appointment of a Receiver herein, and came the Plaintiffs by their attorneys, Eugene M. Munger and Denver L. Dudley, and came the Defendant by her attorney, George M. Booth; and by written stipulation and agreement of the parties filed in open Court, and the Court being well and sufficiently advised in the premises: IT IS CONSIDERED AND ORDERED that Ned Fraser be and he is hereby appointed Receiver herein to take charge of any proceeds that may be due either of the parties from the lands described in the complaint herein, to issue his receipt therefor, and to keep same until the further order of this Court; and the said Ned Fraser is further ordered and directed and he is hereby empowered to do all such things as may become necessary as such Receiver, including the payment of taxes, and the renting of said lands, subject to the approval of this Court."

In view of the foregoing, we hold that the Chancery Court was in error in dismissing *sua sponte* the cause of action relating to the accounting. The decree involving that phase of the case is reversed and the cause is remanded, with directions to reinstate the suit for accounting and proceed in a manner not inconsistent with this opinion.

III. *The Third Cause of Action.* M. O. Robertson, as an individual, sued Opal Robertson and sought to set aside the deed he had executed in 1947 wherein he conveyed to Opal Robertson an undivided one-half interest in the forty acres of land. He alleged that he had executed the deed to settle the property rights between himself and his wife, Opal Robertson. The complaint also alleged:

"Fifth: Plaintiff, M. O. Robertson, alleges that his marriage to the Defendant was null, void and of no effect; as well as later purported marriage contracted at Paragould, Arkansas, on November 17, 1951; that at the time of contracting marriages with Plaintiff M. O. Robertson, Defendant was in fact the wife of one Cachwend, a living husband, a fact which said Defendant well knew but concealed from said Plaintiff and which he did not know until long after execution of said deed and remarriage of the parties. The execution of deed as before alleged, by way of property settlement, constituted fraud on the Plaintiff M. O. Robertson, was without consideration, and said deed should be set aside."

To this complaint Opal Robertson filed several defensive pleadings, consisting of a general denial and also pleas of limitation, laches, and estoppel; but when the case came for trial, the Chancery Court refused to hear any evidence, saying:

"The Court is holding that the major facts involved in allegations of the complaint are not denied by the Defendant and that by reason of the state of the pleadings the only question involved in this litigation at this point

is a question of law, therefore, the Court will not entertain the admission of testimony or other evidence."[2]

Thus, the Chancery Court, acting *sua sponte*, sustained a demurrer to that part of the complaint which sought cancellation of the deed, and then dismissed the complaint as failing to state a cause of action.[3] If the Chancery Court was of the opinion that the complaint failed to state a cause of action for cancellation, then the Court could have sustained a demurrer, but should have given Robertson additional time to amend his complaint before dismissing it. See § 27-1117 Ark. Stats.; *Dickerson* v. *Hamby & Haynie,* 96 Ark. 163, 131 S. W. 674; and *Bradley* v. *Mo. Pac. Rd. Co.,* 144 Ark. 604, 223 S. W. 35.

Therefore, in the state of the record before us, the decree dismissing this third cause of action is reversed and the cause is remanded, with directions to give M. O. Robertson a reasonable time to amend his complaint; and then the Court will proceed in a manner not inconsistent with this opinion.

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[2] In finally dismissing the case, the Court said: "This is an action in which the Plaintiff seeks to set aside a deed to a tract of land which he formerly conveyed to a woman to whom he believed himself to be married at the time of the conveyance and to the child of that marriage if any marriage existed . . . Next, we consider the status of the deed of September 5, 1947, as it relates to the adult Plaintiff and the Defendant. The deed states upon its face that it was issued in consideration of $1.00 in money and in consideration of love and affection which the grantor bore at the time to the grantees. This deed is an instrument under seal and would be set aside by this Court only if it were proved, first of all if it were alleged and satisfactorily proved that the instrument was procured through fraud. The Court finds one allegation in the complaint containing the word 'fraud' to this effect, 'The execution of a deed as before alleged, by way of a property settlement, constituted fraud on the part of the Plaintiff, M. O. Robertson, was without consideration, and said deed should be set aside.' The Court holds said allegation to be completely and entirely a conclusion of law and not reinforced by the complaint by a single allegation of a fraudulent act. For the reasons stated and any other which the Court doesn't find necessary to state, the complaint will be dismissed for want of equity at the cost of the Plaintiff, M. O. Robertson."

[3] The record reflects most clearly that the defendant, Opal Robertson, wanted to try the case on her pleas because she offered various documents as going to sustain her pleas. The Court made a record of these, but refused to consider them; and summarily dismissed the complaint; without (a) giving M. O. Robertson time to amend his complaint; or (b) giving Opal Robertson a hearing on her pleas.

McFALL *v.* FARMERS TRACTOR & TRUCK CO.

5-1294 302 S. W. 2d 801

Opinion delivered June 10, 1957.

[Rehearing denied July 1, 1957]

McCourtney, Brinton, Gibbons & Segars, for appellant.

Kirsch, Cathey & Brown, for appellee.

MINOR W. MILLWEE, Associate Justice. This is a workmen's compensation case in which denials of appellant's claim by a referee and the full Commission were affirmed by the Circuit Court.

The following statement by the Commission contains a fair summation of the evidence: "On the morning of May 4, 1955, claimant was effecting repairs to a tractor at his employer's place of business in Manila, Arkansas. The weather was hot, a high of 89 degrees having been recorded in Blytheville that day, and the work involved occasional heavy lifting. The work was being done in a modern repair shop equipped with several electric fans. At about 11 A. M., after claimant had been at work some four hours, claimant became ill, went to the bathroom on the employer's premises and vomited, and then returned to his labors. Shortly thereafter claimant went home for lunch, and while at home suffered a seizure which rendered him unconscious. Claimant was hospitalized, re-

ceived medical treatment, and returned to work the latter part of May 1955. Claimant worked about a week and a half, and then entered a hospital in Memphis, Tennessee, after suffering a second seizure while sitting in his car. Claimant was operated upon during his stay in the hospital in Memphis, and some three or four weeks after entering the hospital he again returned to work, worked about three weeks, and then was dismissed, because, according to claimant 'I was off work too much on account of this trouble I was having.'

"The record discloses that claimant had a policy of insurance with the Equitable Assurance Society which provided coverage in case of illness or accident not covered by workmen's compensation insurance, and claimant received the benefits provided for in that policy after filing a claim application wherein it was stated that claimant did not intend to present a claim for workmen's compensation benefits.

"The medical evidence is to the effect that the true reason for claimant's seizure is unknown, but there is a suspicion of epilepsy, as well as possible brain tumor, or subarachnoid hemorrhage . . ."

Upon consideration of such evidence the Commission found that appellant had not discharged the burden of proving the occurrence of an accidental injury arising out of and in the course of his employment. In so finding the Commission concluded: "We have many times held that if one's breakdown is attributable to the work he was doing, or to the conditions under which the work was being done, then there is an accidental injury as defined by the Workmen's Compensation Law. The evidence in the case now before us falls short of connecting claimant's seizures with the work he was doing, or with the conditions under which the work was being done."

So the issue here is whether the Commission's conclusion, that appellant failed to establish a causal relation between the employment and his disabling seizures or illness, is supported by substantial evidence.

As appellant suggests and appellees concede, this court is committed to the proposition that the Workmen's Compensation Law should be given a liberal construction and doubtful cases resolved in favor of a claimant in determining whether a disabling condition arose out of the employment. But this rule of liberal construction does not relieve a claimant of the burden of showing a causal relation between his injury and the employment. In discussing the proper construction to be given the statute on this point we have frequently approved the following statement from *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532; "The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause." *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Scobey, Administratrix* v. *Southern Lumber Company,* 218 Ark. 671, 238 S. W. 2d 640.

While there is some circumstantial evidence to the contrary, we cannot say the Commission's finding that appellant failed to show a causal connection between his seizures and his employment is without substantial evidence to support it. As the Commission indicated, none of the three doctors whose reports were introduced in support of appellant's claim would say there was any causal connection between his condition and his work although one was of the opinion that there "could have been". Neither doctor saw appellant have a seizure and their opinions were based on the history he gave plus various tests and examinations which revealed "nothing significant of a pathological nature".

The judgment is affirmed.

Opinion delivered June 10, 1957.

[Rehearing denied July 1, 1957]

Q. Byrum Hurst, for appellant.

Bruce Bennett, Atty. Gen'l.; Thorp Thomas, Asst. Atty. Gen'l., for appellee.

GEORGE ROSE SMITH, Associate Justice. This purports to be an appeal from a judgment imposing a fine and suspended jail sentence for the possession of untaxed liquor. Ark. Stats. 1947, § 48-934. Whether an appeal was perfected is open to question, for the record does not clearly show that the circuit court granted an appeal, as the law requires. Ark. Stats., § 43-2708. Instead, counsel filed a notice of appeal and designation of the record, apparently in the belief that the procedure is governed by Act 555 of 1953. That statute, as its title indicates, ap-

plies only to civil cases. Nevertheless, the record sufficiently presents the principal point in the case; so the procedural irregularity is unimportant.

It is contended that the trial court's judgment, even if originally valid, was rendered void by Act 293 of 1957 and should be set aside by this court. In view of this contention we may properly treat the purported appeal as a proceeding by certiorari to quash a void judgment and in this way reach the merits of the issue.

The case was tried below on February 11, 1957, which was during the sixtieth regular session of the legislature. On the day of trial the accused filed a motion for continuance, on the ground that his regularly employed attorney, Senator Q. B. Hurst, was a member of the General Assembly. The order denying this motion indicates that Senator Hurst was not employed in this particular case until the day before trial, that the accused had previously engaged another lawyer to defend him, and that the lawyer first employed had discussed the case with the deputy prosecuting attorney on the morning of February 11, before the opening of court.

Under the statute then in force the court's denial of the motion was not error. That statute provides that when any attorney in a pending case is a member of the General Assembly, or a clerk, sergeant-at-arms, or doorkeeper thereof, the proceedings shall be stayed for not less than fifteen days before the convening of the General Assembly and for thirty days after its adjournment. Ark. Stats., § 27-1401. Although this statute is regarded as mandatory in cases to which it properly applies, it does not require that a continuance be granted when the litigant is represented by other counsel or when the member of the legislature is not the litigant's regular attorney and is employed after the legislative session has begun. *Cox* v. *State,* 183 Ark. 1077, 40 S. W. 2d 427; *Lynch* v. *State,* 188 Ark. 831, 67 S. W. 2d 1011. Hence, under the law as it then existed, the court did not exceed its jurisdiction in refusing a continuance.

Thereafter the legislature passed Act 293 of 1957, which (by reason of an emergency clause) became effective March 27, 1957. Section 1 of the act is a verbatim re-enactment of the existing law, Ark. Stats., § 27-1401. Sections 2 and 3 of Act 293 read as follows:

"Section 2. (b) Proceedings shall be stayed in such pending suits without regard to when, where, how or why any member of the General Assembly or the aforesaid employees became employed or associated in the suit; and, without regard to the number of other attorneys that may also represent party litigant.

"Section 3. (c) Any judgment, decree, sentence or fine that may have been or may hereafter be rendered in any judicial proceedings in this State after Motion for Continuance shall have been filed by a member of the General Assembly, its clerks or Sergeant-at-Arms, within the time aforesaid, and after said motion shall have been overruled or disregarded, is hereby declared to be void, and no officer of this State shall attempt to enforce such void order."

By its explicit language Act 293 undertakes to compel every court, within the specified period surrounding each legislative session, to grant a continuance whenever it is requested by a member or employee of the General Assembly. By the terms of the act the courts have no discretion in the matter; the sole power of decision rests with the member or employee of the legislature. The question is whether the General Assembly can, consistently with the separation of governmental powers, take from the courts the power to decide what is essentially a judicial question.

It must, of course, be conceded that the legislative branch of the government does not have unlimited authority over the judiciary, for the constitutional separation of powers would then be a mere fiction. The legislature cannot, for example, require this court to deliver a written opinion in every case. *Vaughn* v. *Harp*, 49 Ark. 160, 4 S. W. 751. Again, in a case that goes far toward controlling this one, it was held that the General Assemb-

ly cannot assume the exclusive power of determining whether a continuance should be granted in a judicial proceeding. *Burt* v. *Williams,* 24 Ark. 91. There a statute requiring that all cases be continued until the ratification of peace between the United States and the Confederate States was held to be an unconstitutional attempt by the legislature to exercise judicial power. From the opinion: "Granting a continuance is either an exercise of judicial discretion upon particular facts, or an application of legal rules to them, the facts being ascertained by the court, and the discretion used, or application of law made by the court; and in either case is exclusively a judicial act. A legislative act is an annunciation by the legislative authority that certain results shall follow particular actions or conditions; but the ascertainment of the act or condition and the application of the consequences belong to the courts."

We recognize without hesitation that attorneys serving in the legislature are often entitled to have their cases continued for that reason and that a statute affording them reasonable protection in that respect is constitutional. Service in the legislature is usually undertaken at a personal sacrifice and involves public duties of the greatest importance. Obviously a lawyer cannot devote his entire time to legislative matters unless some provision is made for excusing him from appearances in court. If the public is to have the benefit of legal training and legal knowledge among its senators and representatives it is evident that lawyers in the General Assembly must be allowed to suspend their practice while that body is in session.

Sections 2 and 3 of Act 293, however, cannot be justified by the considerations that we have mentioned. These sections clearly go beyond the needs of the situation and in fact transfer the control of judicial dockets from the courts to any attorney who is a member, clerk, sergeant-at-arms, or doorkeeper of the General Assembly. A case may be supposed in which litigation of great consequence had been set for trial, with the court postponing other matters to leave several days open for the hearing. Jurors

and witnesses might have been summoned at substantial expense to the public and to the parties. The case might present questions of public interest that should be settled as quickly as possible. Despite these considerations, under Act 293 the proceedings could be halted at any stage upon the arbitrary demand of any attorney having the required connection with the General Assembly. And this would be true even though that attorney had been employed only for delay, had no knowledge of the case, and was not expected to take part in the trial.

Statutes providing for continuances to accommodate lawyers serving in the legislature have been upheld in other states, but we know of no decision sustaining legislation as extreme as Sections 2 and 3 of Act 293. To the contrary, when it has been suggested that such an act should be construed to deprive the courts of any discretion in the matter, the opinions have pointed out that such an interpretation would render the act unconstitutional. The question was considered in detail in *Johnson* v. *Theodoron,* 324 Ill. 543, 155 N. E. 481, where the statute provided for a continuance upon a showing by affidavit that the presence of an attorney member of the legislature was necessary to a fair trial. In rejecting a contention that the court was required to grant a continuance whenever the statutory affidavit was filed the court said:

"Whether the attendance in court of a particular attorney for a party to a pending suit is necessary to a fair and proper trial of such suit is a judicial question, to be determined by the court in which an application for continuance is made . . . Where a statute requires that a certain conclusion shall be made to appear as a ground of proceeding by a court, the facts from which that conclusion follows must be proved to the court by documentary evidence or testimony under oath. The court must be placed in a position where it can exercise its own judgment and not be compelled to accept the opinion of the affiant . . . In construing this statute a contrary holding was made in *Wicker* v. *Boynton,* 83 Ill. 545, where it was held that the statute does not require that the affiant shall state the facts showing the necessity of the attor-

ney's presence for a fair and proper trial of the suit. This construction of the statute would render it unconstitutional. The Legislature does not have the power to declare what shall be conclusive evidence of a fact . . . nor can it say that a court is bound to act in accordance with the opinion of a party to a suit, or of his attorney, expressed in the form of an affidavit. It is not within the power of the Legislature to exclude from the courts that which proves the truth of the case nor to compel them to receive that which is false in character. It cannot direct what orders shall be entered by the court in pending actions. It may enact statutes which affect pending actions, but the application of the statute to a particular case is a judicial function, and the determination of what order shall be entered in such a case is the exercise of judicial power which does not belong to the Legislature."

A statute similar to the Illinois act was considered in *Kyger* v. *Koerper,* 355 Mo. 772, 207 S. W. 2d 46, where Judge Hyde, speaking for a majority of the court, pointed out that the act should be construed to permit the court to reach its own conclusion: "I think that any other construction would make this statute unconstitutional. We have held that an act which arbitrarily imposes an unreasonable or unnecessary delay upon the administration of justice would be contrary to Section 10, Article II, Const. of 1875 . . . Also as stated, 16 C. J. S., Constitutional Law, § 128, p. 329, the Legislature cannot entirely exclude the exercise of the discretion of the Court. To do so is an encroachment of one department of Government upon the functions of another, prohibited by Article III, Const. of 1875 . . . If the Court is not permitted to determine this issue, which it could only do from a consideration of some facts about the case and the situation of the parties and attorneys, then its decision is arbitrarily compelled merely by the conclusion stated by the party making the affidavit regardless of what justice to others may require. Such a construction takes away all the judicial function of the court in making continuances applied for under this section."

Since Sections 2 and 3 of Act 293 attempt to deprive the courts of the power to determine a judicial question, *i.e.,* whether a continuance should be granted in a given case, we conclude that these sections are unconstitutional for the reasons given in the decisions cited. It follows that the judgment of the trial court is not void.

It is also contended that the evidence introduced by the State is insufficient to support a finding of guilt. Even if we assume that the case is properly before us by appeal, the appellant's failure to file a motion for a new trial precludes us from reviewing the sufficiency of the evidence. *Holliman* v. *State,* 213 Ark. 876, 213 S. W. 2d 617.

Affirmed.

WHAYNE *v.* GILLIA.

5-1306 303 S. W. 2d 246

Opinion delivered June 10, 1957.

John S. Mosby, for appellant.

Giles Dearing, for appellee.

PAUL WARD, Associate Justice. Appellee, Roy Gillia, owned and operated a drug store on Highway No. 70, in Shelby County, Tennessee, known as Roy's Drug Store. On May 30, 1951, appellee sold his stock of merchandise and fixtures in the drug store to one A. E. Whayne, who, at the time, was an employee in said drug store. On said date appellee for $10 and other valuable considerations conveyed to A. E. Whayne said stock of merchandise and fixtures, setting forth numerous items of indebtedness against the stock of merchandise amounting to $3,595.11. In said Bill of Sale it was also stated that the First National Bank of Memphis, Tennessee held title to the fixtures in said drug store under a Conditional Sales Contract to appellee and that there was a balance due on said fixtures in the amount of $2,928.52.

Also on May 30, 1951, A. E. Whayne and his mother who is the appellant in this case executed to appellee 34 promissory notes in the aggregate amount of $6,880.43. The first note was for $100 and was due on or before June 20, 1951. The other notes [in varying sums] were due and payable monthly thereafter in successive order. At the same time A. E. Whayne and his mother executed a chattel mortgage to appellee in which they conveyed to William Walsh, as trustee, all their right and interest in the said stock of merchandise and fixtures. Said conveyance was upon condition that the signers should pay the notes heretofore described, but upon failure to pay any part of the indebtedness when it became due all of the said indebtedness would become immediately due and payable, and the said trustee would be authorized and empowered to sell said property after having first given 10 days notice by posting three notices, one of which was to be posted at the Shelby County Court House and the other two were to be posted at public places in the county. It was noted in the chattel mortgage that it was subordi-

nate to the Conditional Sales Contract to the First National Bank of Memphis.

After operating the drug store a short while A. E. Whayne was apparently unable to make the payments to appellee as they became due, and on September 7, 1951 he went into voluntary bankruptcy. From this source $695.12 was received by appellee and applied to the payment of Whayne's indebtedness. Appellee secured a release of the fixtures from the referee in bankruptcy and proceeded to foreclose his chattel mortgage. At this sale the fixtures were sold for $1,000 of which amount $58 was deducted for expenses of the sale and the balance of $942 was applied to Whayne's indebtedness.

In October 1953 appellee, Roy Gillia, filed a complaint against A. E. Whayne's mother, Mrs. Ira Mae Whayne [appellant herein], in which the facts set forth above were alleged in detail, and asked for a deficiency judgment against Mrs. Whayne in the amount of $3,850.78 with interest at 6 per cent from May 30, 1952 until paid and for the sum of $169.22 with interest from September 30, 1953 until paid. In her answer appellant admits the execution of the notes and chattel mortgage, but alleges that her signature as a co-maker was obtained through fraud and misrepresentation. She also denied that the chattel mortgage was duly foreclosed or that the property was sold according to the laws of Tennessee. It was further alleged by appellant that it was understood between her and appellee that she was to be bound only to the extent of $2,500 and not to the full amount of the indebtedness.

On May 18, 1954, upon motion of appellee, the cause of action was transferred to the chancery court. Upon the issues above set forth there was a trial in the chancery court, and on August 8, 1956 that court entered a decree giving appellee, Roy Gillia, judgment against Mrs. Ira Mae Whayne, appellant, in the amounts prayed for as set forth above. From this decree appellant has appealed to this court for a reversal.

We deem it unnecessary to discuss all the different grounds relied on by appellant for reversal in view of the conclusions which we have reached. It is our judgment that the cause must be reversed for two reasons which are somewhat related, viz: 1. The sale of the fixtures was not fairly conducted, and; 2. Appellee having purchased the fixtures at the sale is, accountable to appellant for the fair value thereof.

1. While no actual fraud is shown in connection with the sale of the fixtures under the chattel mortgage, yet there are several incidents which convince us that appellee did not protect appellant's interest as he should have done. In Vol. 10 Am. Jur., page 883, under the title of Chattel Mortgages, in § 261 what appears to be the general rule is expressed in this language: "If the sale is attacked, the burden is on the mortgagee to show that it was openly and fairly conducted and that the price was not so inadequate as to raise a presumption of bad faith . . ." The record shows that appellee purchased the fixtures for $1,000 and that one year later he sold the same for $4,500 notwithstanding the fact that the fixtures had been damaged to some extent in the meantime. It further appears that only 4 or 5 people were present at the time of the sale and that the first bid offered by appellee was $800. Following this one person present offered $900. Immediately thereafter appellee had a private conversation with the last bidder and no other bids were offered except appellee's later bid for $1,000. Although appellant at that time resided in Arkansas, and still does, appellee and his attorneys knew that the Whaynes' had an attorney in Memphis, Tennessee. The record shows that on October 23, 1952 appellee caused a letter to be written to said attorney notifying him that the sale would be held on the following day—and the sale was held at 10 o'clock A. M. on October 24, 1952. The result is that appellee, at the time this suit was filed in the Circuit Court of Poinsett County, had already received a substantial portion of the indebtedness due him. Appellee chose as a forum a court of equity in this state and in so doing he is required to do equity.

The views we have expressed appear to be in harmony with the holdings of the Tennessee Courts. In the early case of *Lyon* v. *Jones*, 25 Tenn. (533), the matter of the necessity of good faith and fair dealing by a mortgagee purchaser was discussed. Among other things the court said: "The relation in which the mortgagee or creditor in a deed of trust stands to the vendor or debtor, imposes upon him the observance of fairness and good faith; and if he make an improper use of the power which he has over the trustee and over the sale, and becomes the purchaser, he will be held, in equity, as entitled to retain the property only as a security for his debt." It was said in the case of *Brown* v. *Eckhardt,* 23 Tenn. App. 217, 129 S. W. 2d 1122, at page 1133, that: "The mortgagee or creditor in a deed of trust may purchase at a trust sale if he acts with fairness in the transaction, and his title will be good." In the early case of *Wade's Heirs* v. *Harper, et al.,* 11 Tenn. 383, the Tennessee court went even further in putting the burden of fair dealing on the mortgagee purchaser. There Wade [father of appellants] had given a deed of trust to Harper. The latter, on foreclosure, bought the property, worth $4,000 for $1,000. In commenting, the court said: "We cannot distinguish the relation of Harper to this transaction, from that of a commissioner of a bankrupt, where the trustee makes the sale of the assets. In such case, the commissioner has a duty to perform, to make the estate bring the best price, and cannot buy without being subject to have the sale set aside at the election of the creditors."

As we view the facts and circumstances in this case, appellee has not met the burden of showing that he in good faith tried to realize, for appellant's benefit, the full value of the drug store fixtures.

2. According to the Tennessee decisions there is some doubt as to whether a mortgagee is allowed to purchase property sold under the power of a chattel mortgage. In the *Harper* case, *supra,* the court held that the mortgagee could not, but in the case of *Brown* v. *Eckhardt, supra,* it was held that he could. The holdings in

the two cases however can be reconciled as was apparently done in the *Brown* case itself, for it was there said:

"Complainants also insist that the mere fact that defendant Eckhardt became the purchaser at the sale is sufficient to set the sale aside since he was the holder of the debt secured by the deed of trust. This on the theory that under these circumstances he became a *quasi* trustee for complainants and must account for the actual value of the land, not being authorized to bid at the sale." (citing cases) "It is only necessary to say that in these cases it does not appear that the holders of the debt were authorized by the mortgages or deeds of trust to bid at the sale. It was no doubt to meet the holding of these and other similar cases that clauses were inserted in mortgages and deeds of trust allowing mortgagees and holders of debts secured by trust deeds to bid and become purchasers at sales held under the instruments."

Following the above the court noted that the deed of trust under consideration contained a provision giving the creditor a right to bid at any sale held under the trust conveyance.

We have examined the chattel mortgage in the case before us and it contains no provision authorizing appellee to purchase at the sale. It is also pointed out here that, as shown by the record, the trustee in the chattel mortgage here was selected by appellee and was his regular attorney.

In either event, whether appellee failed to show he acted in the best interest of appellant or whether he had no right to purchase the fixtures at the sale, he will be held to have taken possession of the fixtures as a trustee for the appellant and must account for their fair value. Fortunately in this instance, the value of the fixtures has been fixed at $4,500, which is the price he admits receiving for them a year later.

Taking as true the figures set out in appellee's complaint, and charging him with $4,500 less $942 [which is the amount bid at the sale and applied on the indebted-

ness] we find that he is entitled to judgment against appellant in the sum of $1,019.46. The cause is therefore reversed with directions to the trial court to enter a decree in accordance with the above.

YOST *v.* STUDER.

5-1316 302 Ark. 775

Opinion delivered June 10, 1957.

Wood & Smith, for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

SAM ROBINSON, Associate Justice. W. F. Yost filed this suit, alleging property damages and damages due to personal injuries sustained when his automobile, which he was driving, was struck by an automobile operated by appellee, Charles Studer. There is no question about the negligence of Studer; the only issue is the amount of damages. There was a judgment for the plaintiff, Yost, in the sum of $2,293.00 for medical expenses, pain and suffering, and damages to his automobile. Subsequently, Yost died, and this appeal is prosecuted by the administratrix of his estate.

On appeal, appellant contends that the trial court erred in refusing to submit to the jury the question of whether Yost, who was a dentist, had been damaged by loss of time from the practice of his profession. It was shown that he lost about two weeks from his work, but there is no evidence whatever as to his earning capacity. The court refused to give an instruction requested by

Yost, authorizing recovery for "the value of his time during periods of total or partial disability". The court offered to re-open the case, and permit Yost to introduce evidence of damages due to loss of time, but this offer was not accepted.

Appellant relies on *Coca Cola Bottling Company* v. *Jones,* 226 Ark. 953, 295 S. W. 2d 321. In that case, Jones, who operated a small grocery store, was injured when a bottle exploded; he conducted his own business and was disabled for several weeks due to his injuries. We said: "His absence from the grocery store involved a financial loss that the jury were entitled to consider . . . 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 situation in the case at bar is quite different from the *Jones* case. Here, when plaintiff finished his case, not a scintilla of evidence had been introduced as to any damages he may have sustained because of loss of time. The jury had the benefit of no evidence whatever to be guided by in determining such alleged damages. Any verdict based on such alleged loss of time would have been pure speculation. There was no inkling as to whether such loss, if any, was $50.00 or $5,000.00 In these circumstances, it would have been utterly impossible for the jury to have reached an intelligent conclusion as to such alleged damages. We think the rule as stated in 15 Am. Jur. 507 is applicable here. There it is said:

"In the case of a professional man the proper measure of damages for loss of time is the amount he would have earned by the practice of his profession.

"In order to recover for loss of time, a professional man must prove the amount he would have earned in the practice of his profession during the time in question, and the jury should consider the probability of his being employed during the period for which he seeks to recover.

Testimony as to what he had previously been receiving for his services is admissible, and he may show his actual earnings during the period of the previous year corresponding to that in which he was injured. If he was not engaged in the practice of his profession immediately before the alleged loss of time, but resumed it immediately thereafter, it is proper to show what he earned thereafter, not as establishing in itself the value of his time, but as evidence to aid the jury in fixing it."

In the case at bar, there is absolutely no evidence of the earning capacity of the appellant. The jury, therefore, had nothing to use as a measure of damages for loss of time, and the court was correct in refusing to submit the issue of damages for loss of time to the jury.

Affirmed.

MARTIN *v.* REYNOLDS & WILLIAMS.

5-1301 302 S. W. 2d 803

Opinion delivered June 10, 1957.

[Rehearing denied July 1, 1957]

Paul K. Roberts, for appellant.

Mehaffy, Smith & Williams and *Robert V. Light,* for appellee.

SAM ROBINSON, Associate Justice. Appellant, Elgin Martin, was an employee of appellees, Reynolds & Wil-

liams, a partnership, composed of S. P. Reynolds, James H. Reynolds and C. W. Williams, contractors engaged in constructing a highway in Lincoln County, Arkansas. Martin was discharged on November 8, 1956; on January 5, 1957, he filed this action against appellees, alleging that he was due certain wages when he was discharged; that such wages have not been paid and that the defendants are indebted to him in the penal sum of $744.40, in addition to the unpaid wages. The defendants demurred to that part of the complaint seeking to collect a penalty for failure to pay the wages due within seven days after the employee was discharged. The trial court sustained the demurrer, and Martin, the plaintiff has appealed.

Appellees first contend that the appeal should be dismissed because the order sustaining the demurrer is not appealable, but they are mistaken in that contention. Not only did the court sustain the demurrer but dismissed the complaint insofar as it pertained to the penalty issue. The dismissal of the complaint was a final judgment, and appealable.

Ark. Stats. § 81-308 provides:

"Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause or refuse to further employ any servant or employee thereof, the unpaid wages of any servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employee may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within seven [7] days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal

to further employ, at the same rate until paid. Provided, such wages shall not continue more than sixty [60] days, unless an action therefor shall be commenced within that time. Provided, further, that this act [§§ 81-308—81-310] shall apply to all companies and corporations doing business in this State, and to all servants and employees thereof, and any such servants or employees who shall hereafter be discharged or refused further employment may request or demand the payment of any wages due, and if not paid within seven [7] days from such discharge or refusal to longer employ, then the penalties hereinbefore provided for railway employees shall attach."

The issue here is whether the statute applies to individuals. If not, then the trial court's action in sustaining the demurrer must be affirmed. Ark. Stats. § 81-308 is Act No. 61 of 1889, as amended by Act No. 155 of 1903 and Act No. 210 of 1905. In the case of *Leep* v. *St. Louis I. M. & S. Ry. Co.,* 58 Ark. 407, 25 S. W. 75 (1894), this Court held that the 1889 act was unconstitutional when applied to individuals.

In *Combs* v. *Bunn W. Robertson, Inc.,* 205 Ark. 20, 166 S. W. 2d 665, this court said:

"The legislation upon which the suit for the penalty is predicated appears to have had its inception in Act 61 of the Acts of 1889, p. 76, entitled, 'An Act to provide for the protection of servants and employes of railroads.' The Act appears as § 6243, Sandels & Hill's Digest, and the Digester appended the following note to that section: 'This act as originally passed applied to persons as well as corporations, and was held valid as to corporations and invalid as to natural persons in *Leep* v. *St. Louis I. M. & S. Ry. Co.,* 58 Ark. 407, 25 S.W. Rep. 75, 23 L.R.A. 264, 41 Am. St. Rep. 109, and all portions applying to natural persons is stricken out.' The opinion in the Leep case recites the Act as it reads after the unconstitutional portions had been stricken — the Act having been held separable — and the Digester conformed the Act to that opinion.

"The Act was amended by Act 155 of the Acts of 1903, p. 272, so as to make receivers of railroad companies, in applicable cases, liable for the penalty, and, as thus amended, appears as § 6649, Kirby's Digest.

"This section of Kirby's Digest was amended by Act 210 of the Acts of 1905, p. 537, by the addition of the following proviso: 'Provided further, that this Act shall apply to all companies and corporations doing business in this State, and to all servants and employees thereof, and any such servants or employees who shall hereafter be discharged or refused further employment may request or demand the payment of any wages due, and if not paid within seven days from such discharge or refusal to longer employ, then the penalties hereinbefore provided for railway employees shall attach.'

"As thus amended the Act appears as § 7125, Crawford & Moses' Digest, and as § 9111, Pope's Digest. The obvious purpose and effect of the 1905 amendment was to make the provisions relating to penalty apply to all corporations, including railroads."

Here, the employers are individuals. The act is highly penal and if it had been the intention of the Legislature that the act should apply to individuals doubtless such intention would have been clearly expressed. In the *Combs* case, decided in 1942, this court construed the amended act as applying to all corporations, and the General Assembly has not amended the act since that decision. We are urged to overrule the *Leep* case, but we do not think that individuals are liable for the penalty under the present act, as amended, and, therefore, the *Leep* case is not controlling.

Affirmed.

McFaddin and Millwee, JJ., dissent.

5-1302 304 S. W. 2d 939

Opinion delivered June 17, 1957.

[Rehearing denied Sept. 30, 1957]

[redacted]

Claude F. Cooper and *Frank C. Douglas,* for appellant.

Giles Dearing, for appellee.

CARLETON HARRIS, Chief Justice. This case is here on a second appeal[1] from a judgment of the Cross Chancery Court, which, in each instance, entered its decree quieting and confirming title in appellee to three lots in the city of Wynne, Arkansas. Appellee has maintained his home upon the property in question since January, 1942. Appellant, Ella Brown, is claiming title under a

[1] See 222 Ark. 669, 262 S. W. 2d 145.

deed from the State dated December 19, 1945, and based upon a sale for the 1941 taxes. In the first trial, the Chancellor found that appellee had acquired title by seven years adverse possession. Appellant contended in her earlier appeal that the Chancellor erred in so holding, and the case on appeal was remanded for further proof. Quoting from the Opinion, "* * * Since the proof was not fully developed on the question of whether the lots were subject to taxation for the year 1941, we have concluded that justice would be best served by a further hearing on that issue." On trial after remand, the court held that the sale of the lots to the State for the non-payment of taxes for the year 1941 was invalid, that the deed from the State to Ella Brown should be cancelled and set aside, and that appellee's title should be quieted as against any right, title, or interest of appellant. From such decree comes this appeal.

It is admitted that the lots involved were subject to 1941 general taxes, and that these taxes were not paid by appellee; that the lots forfeited and were sold to the State, title confirmed, and that appellant received a deed from the State. It is therefore true, and the Chancellor so held, that when the lots sold in 1942 for the 1941 taxes, there was no conflicting title, in either the State under prior sales, or in any improvement district. Appellant contends that this was the only question which remained open for proof, under the mandate and Opinion in *Brown* v. *Bridges,* 222 Ark. 669, 262 S. W. 2d 145, and that she must accordingly prevail. She therefore contends that the trial court erred in permitting the complaint to be amended and in taking testimony relative to the allegations contained in the amendment.[2] We do not agree. Perhaps the mandate and Opinion in *Brown* v. *Bridges, supra,* were not entirely clear, but it was certainly the intent of this Court that additional evidence be heard on the question of the validity or invalidity of appellant's tax deed. In the paragraph preceding the order re-

[2] The amendment alleged that appellee had tried to pay the 1941 taxes, but that the collector refused to take his money; that appellant's deed was void. Alternative relief for recovery of costs of improvements was also prayed, but no proof was offered on this point.

manding the cause, in the Opinion, is this language, "* * * *If appellant's deed from the state is valid,*[3] appellee had not held possession for the full seven years when he instituted this suit. * * *" Accordingly, the actual meaning of the language herein quoted in paragraph one was "Since the proof was not fully developed on the question of whether the lots were subject to taxation *or sale*[4] for the year 1941 * * *." We therefore hold that the trial court proceeded properly in admitting evidence relating to the validity of the sale.

Appellee testified that he attempted to pay the taxes on the property in February, 1942 (1941 taxes) but that the sheriff would not accept the money.[5] He further testified that he endeavored to pay the taxes for the years 1942, '43, and '44, but that the sheriff still refused to accept the payments.[6] This evidence is not disputed by appellant, other than it is contended that he (appellee) testified differently during the first trial of the cause. Parts of his testimony do appear to be, to some extent, contradictory; however, the very first question that appellee was asked on cross-examination during the first trial, and answer given, was as follows: "Q. Mr. Bridges, you told Mr. Dearing you had paid the taxes since you went in that property in 1941? A. No, I paid them when I got the place paid for, and they should have been paid up, but I found a flaw——." Here, the witness was interrupted, and the "flaw" was never explained. Appellee contends that this answer had reference to the sheriff's reason for not accepting his money in payment of the taxes in 1942.

The Chancellor saw, and heard appellee testify, had ample opportunity to observe his appearance on the witness stand, and was in a position to best determine whether the witness was telling the truth. This was a

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[3] Emphasis supplied.

[4] Italicized words supplied.

[5] Witness testified as to the reason given by the sheriff for not accepting the money, but this was hearsay evidence and inadmissible.

[6] The lots had been sold to the State in November, 1942. Appellee also offered to pay the 1945 taxes, but same had already been paid by appellant; he has regularly paid the taxes each year thereafter, (1946-47-48-49-50 and '51).

finding of fact, and we have held that we will not reverse a Chancellor's decree unless his findings are against the weight of the evidence. *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686 (1946). In addition, the court gave some consideration to the testimony of the county clerk, who had testified in the first trial. From the Opinion of the trial court: "* * * There are even some circumstances in the tax records of Cross County which would tend to give support to the positive testimony of the plaintiff. The court refers here to the testimony of the County Clerk wherein he says that the lands were first set up on the tax books for the year 1941 in the name of the State and that was stricken out and the name of Mrs. G. J. Durham (plaintiff's grantor) written in. * * *" As heretofore mentioned, no evidence was offered on behalf of appellant to contradict the testimony that appellee, in good faith, had endeavored to pay the 1941 taxes.

We have repeatedly held that where an owner attempts to pay his taxes, and the oversight or mistake of the collector prevents him from doing so, the sale of the land, because of failure to pay such taxes, is void. *Schuman* v. *Lunnie, Administratrix,* 219 Ark. 645, 243 S. W. 2d 937; *Schuman* v. *Person,* 216 Ark. 732, 227 S. W. 2d 160. We accordingly conclude that the sale was void. Appellant contends that if the State deed did not convey good title to her, then she has title under a quitclaim deed from Sewer District No. 1 of Wynne, dated November 9, 1954. This contention was not raised by the pleadings, nor considered by the trial court. Appellant has relied entirely upon her deed from the State in both the first and second trials.

Appellant is entitled to have refunded the $10.93 which she paid for her deed from the State, together with interest at the rate of 6 per cent per annum. *Buschow Lumber Co.* v. *Witt,* 212 Ark. 995, 209 S. W. 2d 464. In addition, the proof shows that she paid $12.95 for taxes for the year 1945, which she paid under a claim of ownership, and which should be refunded to her, together with interest at the rate of 6 per cent. She is also entitled to have refunded the amount paid for the Sewer District

deed, together with interest at the rate of 6 per cent. The amount so paid is not shown in the record. The judgment of the Chancery Court is accordingly modified to the extent that appellee is directed to pay to appellant the sum of $23.88, together with interest, as herein set out, and the cause is remanded with directions to ascertain the amount paid by appellant for the Sewer District deed, and to grant judgment to appellant for same, together with interest at the rate of 6 per cent. Costs, in both the trial court, and here on appeal, shall be borne equally.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J., dissenting. I think that the chancellor erred in permitting the plaintiff, after the case was remanded, to bring in a new cause of action by amendment to the complaint. No doubt that procedure would have been permissible had the case been tried in the circuit court; for it is well settled that when an action at law is remanded for a new trial the cause stands as if there had never been a trial, and the pleadings are therefore open to amendment. *Stewart-McGehee Const. Co.* v. *Brewster,* 176 Ark. 430, 3 S. W. 2d 42; *Sanders* v. *Walden,* 214 Ark. 523, 217 S. W. 2d 357, 9 A. L. R. 2d 1040.

In equity, however, the rule is and should be quite different. Chancery appeals, unlike those at law, are tried *de novo* by this court, and ordinarily we render final judgment on the record without having to remand the case. Occasionally it is necessary, as it was in this instance, to send the cause back for additional proof on a particular issue; but we have repeatedly held that the chancellor is then limited to that issue and cannot permit the injection of new issues that should have been presented at the original trial. The rule was clearly stated in *Felker* v. *McKee,* 154 Ark. 104, 241 S. W. 378:

"The only question presented for determination on this appeal is whether the court erred in overruling appellant's motion to permit him to offer further proof upon two of the issues presented by the pleadings in

the cause. His case was submitted upon the merits in the original trial. Ample opportunity was given him to fully develop his case upon all issues presented by the pleadings. To construe a reversal and remand of a cause for further proceedings, which had been submitted originally upon the merits, to mean that appellant might further develop his cause would enable him to proceed in his case by piecemeal and try it over every time he secured a reversal *ad infinitum.*"

Similarly, it was held in *Cruce* v. *Hill,* 156 Ark. 224, 245 S. W. 485, a chancery case, that a new issue could not be raised by an amendment to the pleadings after remand. "The issue of compensation as commissioner was brought into the case only by amending the pleadings after the remand of the cause and taking further testimony, and, as has been said, no authority for that action was given."

In the case at bar there was no suggestion on the first appeal that the tax sale was void because the plaintiff had attempted to pay his taxes and had been prevented by the collector from doing so. That is a wholly new issue that was not originally raised either in the pleadings or in the proof. Our statement in the first opinion was this: "Since the proof was not fully developed on the question of whether the lots were subject to taxation for the year 1941, we have concluded that justice would be best served by a further hearing on that issue. The decree is accordingly reversed and the cause remanded for that purpose." In view of our earlier holdings I think it plain that this direction did not permit the appellant to bring into the case a new issue that should have been pleaded and proved when the case was first tried on its merits.

5-1298 303 S. W. 2d 239

Opinion delivered June 17, 1957.

[redacted]

Wood & Smith, for appellant.

Albert G. Sexton and *Edwin E. Dunaway,* for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves alleged damages growing out of the existence of a dam and concrete spillway across the mouth of Fishtrap Slough, a short distance upstream from its juncture with Bayou Meto in Lonoke County. Appellant, Jack Naylor, as owner of a large tract of farm land some three miles upstream and north of the dam, within the watershed of Fishtrap Slough, [and the other appellants as his tenants] sued appellee, Eagle, for damages allegedly

caused by overflow backwaters from said dam and asked for a mandatory injunction requiring appellee to remove the dam. Appellants alleged in their complaint that the above farm land "adjoins a natural drain, improved by dredging in 1922, known as Fishtrap Slough, which generally parallels Bayou Meto, . . . 3. that Eagle is owner of a 40-acre tract at the junction of Bayou Meto and Fishtrap Slough. He has constructed on Fishtrap Slough near such point a concrete dam which obstructs the natural drainage and raises the water level above by several feet. The effect has been to cause an impoundment of water on the land of plaintiffs, upper proprietors, and make planting and cultivation impossible in some areas and to greatly increase cost and reduce yield in others. Despite notice of the damage caused and which will continue as long as the dam is permitted to remain, defendant has refused to remove or lower the dam. Future damage will occur unless defendant is enjoined from maintaining the dam and plaintiffs have no adequate legal remedy. 4. As a direct result of the dam's presence water remained on plaintiff's land until the latter part of July, having risen in the latter part of May after some crops had already been planted and had come up, causing loss of the planted crops and reduced yield in others. Specifically plaintiffs have suffered the following damage."

Appellee answered with a general denial and also pleaded the 3-year statute of limitations as a bar. Trial resulted in a decree in favor of appellee on all issues, and this appeal followed.

For reversal appellants first contend that the court erred in holding that the action was barred by limitations. We agree with appellants' contention on this point. It appears that this dam in question was installed in May 1952. Appellants concede that the chancellor's finding that it was so erected is not against the preponderance of the testimony. The present suit was filed December 13, 1955. This installation date, however, in the circumstances is not material. Unless it should appear that the obstruction caused by the dam was of such

nature that its effect must have been apparent with reasonable certainty, then limitations would not begin to run on an action for damages until such damages actually occurred. . . . . .

Our governing rule in cases such as this has been many times stated by this court. In *Missouri Pacific R. R. Company* v. *Holman,* 204 Ark. 11, 160 S. W. 2d 499, we said: "Upon consideration of the question as to the application of the statute of limitation to these overflow cases, the permanency of the structure or obstruction impeding the flow of water is not the controlling question. Indeed, the question cannot arise unless the obstruction is of a permanent nature, but its permanency does not of itself determine whether the damages, which result from its erection, are original or recurring. If it is of such a construction as that damage must necessarily result, and the certainty, nature and the extent of this damage may be reasonably ascertained and estimated at the time of its construction, then the damage is original and there can be but a single recovery, and the statute of limitations against such cause of action is set in motion on the completion of the obstruction. If it is known merely that damage is probable, or, that even though some damage is certain, the nature and extent of that damage cannot be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitations is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries."

Here we think the preponderance of the evidence showed the damages were probable and their nature and extent could not be reasonably known and estimated at the time the dam was built. Appellee himself so testified, in effect. "Q. When you installed the last concrete spillway was it reasonably certain that the installation of that spillway would cause the damage that has resulted here? . . . A. No, sir. . . . . Q. So the presence of the spillway from the very beginning of the time this last one was put there was not known to you or anyone else that it would cause any damage, was it? A. No, sir." There

was also the testimony that appellant's farm was some three miles upstream and after the dam was built the weather up to May 1955 had been unusually dry and the rainfall insufficient to test the flooding effect of the dam.

Appellants next argue that: "The chancellor erroneously held that appellee could obstruct a natural drain when the effect, according to the undisputed testimony of the engineer [Crist] who testified for appellants, was to materially retard drainage off the Fishtrap Slough watershed. Under decisions of this court a determination of the technical aspects of drainage is restricted to the testimony of experts. Since the testimony of appellants' expert is undisputed the chancellor's decision is against a clear preponderance of the evidence," and that appellants were entitled to crop damages. We have concluded, after carefully reviewing all the testimony, that the chancellor's finding on this issue, to the effect that the dam did not cause the damages claimed by appellants, is not against the preponderance thereof.

There is no dispute here as to the applicable law in cases of this nature. It appears well settled by our decisions that one riparian owner along a non-navigable stream has no right to obstruct the natural flow of said stream to the detriment or damage of other riparian owners. *DeVore Farms, Inc.* v. *Butler Hunting Club, Inc.*, 225 Ark. 818, 286 S. W. 2d 491. The question, whether appellee's dam flooded appellants' land to their damage, is purely factual. To sustain their contention of flood damage, appellants lean heavily on the testimony of their engineer, Crist, and argue that his is the only competent testimony "on the issue of whether the dam obstructs Fishtrap Slough to such an extent that appellants' land was flooded and damaged by the rain that fell May 26 and 27, 1955." We do not agree that the testimony in this case must be confined to that of this engineer. We have many times announced the rule that the testimony and opinion of lay witnesses, non-experts, is competent when the witness lays a proper foundation by stating facts and observations upon which his opinion is based.

We said in *Burdine* v. *Partee Flooring Mill,* 218 Ark. 60, 234 S. W. 2d 193, "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 issue upon their own fair judgment.' *Arkansas Power & Light Co.* v. *Bollen,* 199 Ark. 566, 134 S. W. 2d 585." There was much testimony from lay witnesses, on behalf of appellee, tending to contradict Crist. Appellee Eagle testified that he, together with the Lonoke County Surveyor, had gone all around Fishtrap Slough and had determined the water level and that the dam had not caused any damages to property owners. In this connection he testified: "A. I waited until the water went down within its channel. I don't know anything about 206 and things like that, but I know that no engineer can beat a water level, so I walked the level in the woods. All of this was in woods back in there then and it has all been cleared up since then, most of it. I walked it and I had a 22 and I would mark it at the water ledge and I would later after I marked it—I called that a bench mark, I don't call the stobs a bench mark, I call a hack in a tree, the old fashioned country way is the only way I know about these levels, so I marked it with a water level. Later I confirmed it with shots that our county surveyor put there for me."

Ben Daniels testified: "Q. Is your farm between Mr. Eagle's dam and spillway and Mr. Naylor's farm and both adjoining Fishtrap Slough? A. Yes, sir, I am west of Mr. Naylor's. Q. But your property is adjacent to or joins on to Fishtrap Slough? A. Yes, sir. Q. And

the water that affects you would affect him or vice versa? A. Yes, sir. Q. Mr. Daniels, how much crop did you make on your rice or how many bushels per acre in 1955, after that water went off of it? A. Well, approximately one hundred bushels to the acre."

Jeff Cates, another farmer who owns land adjacent to Fishtrap Slough and between the dam and Naylor's property, testified, in effect, that the water got higher than the fence posts following the big rain in 1955; that there is very little difference in the elevations of the lands in the Fishtrap Slough basin away from Bayou Meto down to the mouth of Fishtrap Slough and land up above; that in this area the lands are similarly situated and there is a difference of about 2 feet or 3 feet only in elevation; that the land slopes slightly and gradually south towards Bayou Meto and Fishtrap Slough. He further testified, in effect, as did several other witnesses owning lands in between that of appellants and appellee, that he had not been damaged by the presence of the spillway and made normal crops in 1955. There was other testimony to the effect that every year water backs out of Bayou Meto and floods the country for several miles north of appellee's dam and spillway.

As indicated, while the testimony of the engineer, Crist, tended to contradict appellee's witnesses and without attempting to detail the testimony further, we have concluded that the chancellor's findings are not against the preponderance of the evidence. Accordingly, we affirm.

5-1243 303 S. W. 2d 242

Opinion delivered June 17, 1957.

[redacted]

T. O. Abbott, for appellant.

H. D. Dickens, James M. McHaney and *Owens, McHaney, Lofton & McHaney,* for appellee.

ED. F. MCFADDIN, Justice. This case began as an effort by the appellant, Griffin, to avoid a note on the ground of usury. On March 19, 1955, Griffin purchased a new Rambler Hudson station wagon from Kelly Motors, Inc. of Little Rock, and executed a title retaining note for $2,396.70, as explained hereinafter. Kelly Motors, Inc. immediately transferred the note to Murdock Acceptance Corporation. The note and title retaining contract were on forms furnished by Murdock Acceptance Corporation (hereinafter called "Murdock"); so, under our holding in the Hare case,[1] we treat Murdock as having been the original lender.

Griffin traded an old car to Kelly Motors, Inc. as part payment, and owed a balance of $1,793.79 on the new Hudson Rambler. In addition, Murdock delivered to Griffin certain insurance policies, so that the note signed

[1] See *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973.

by Griffin was for $2,396.70 as a total of the following items:

Balance on Car		$1,793.79
Insurance Premiums:		
Collision and Comprehensive	$209.00	
Accident and Health	59.92	
Credit Life Insurance	59.92	
Total Insurance Premiums		328.84
Total Interest Charge		274.07
Face Amount of Note		$2,396.70

The note was payable in thirty monthly payments of $79.89 each. No payments were made on the note; and on May 17, 1955 (just short of sixty days from the original purchase) Griffin — claiming usury — brought this suit against Murdock to have the note and conditional sales contract cancelled. Murdock denied the usury and sought judgment on the note and the enforcement of the vendor's lien. (§ 34-2301 Ark. Stats.) The Chancery Court refused Griffin's claim of usury and rendered judgment for Murdock as prayed. This appeal followed, in which Griffin urges only two points for reversal.

I. Griffin says: *"The appellant contends that the conditional sales contract is usurious: the premium for the health and accident insurance in the sum of $59.92 was imposed upon the appellant, against his will. Appellant specifically told the agent for the insurance company, who was also the agent for the seller, the kinds of insurance he wanted: that he had plenty of accident and health insurance with his employer."*

The burden of appellant's argument on this point is, that he did not want the health and accident insurance but was compelled to obligate himself for the premium of $59.92 in order to purchase the car on the time pay-

ment plan. The Trial Court held against the appellant on this point; and the evidence amply supports the finding of the Trial Court.

Assuming that the health and accident premium of $59.92 could be successfully urged as a cloak for usury, still the facts remain: (a) that the appellant received the health and accident policy, (b) that he was not overcharged for the premium, and (c) that he enjoyed the protection of the policy. Also, Griffin admits that he signed a written application for the health and accident insurance policy. He claims that he did not read the application and did not know what he was signing; but the automobile salesman testified that he explained the insurance in full to Griffin, and that Griffin said he wanted all possible coverage: "I want it all." Without detailing all the other testimony, we conclude that the Chancery Court was correct in finding against appellant on this first contention.

II. The appellant says: *"The conditional sales contract is usurious: in spite of the fact that the appellant, at the time of the purchase of the car, and at all times thereafter, was entitled to a class 'H' classification rate with a premium of $189.00 for the collision and comprehensive coverage, he was instead arbitrarily placed in class 'I' rate, and charged a premium of $209.00, resulting in an excess charge of $20.00 for this insurance coverage."*

This point presents a more serious issue. Murdock admits that there was a $20.00 overcharge on the insurance premium for the comprehensive and collision insurance; that is, the premium should have been $189.00 instead of $209.00, as charged. Also, it is conceded that the total interest charge of $274.07 is less than 10 per cent if there had been no $20.00 error, but is slightly more than 10 per cent if the $20.00 overcharge for the insurance was really a cloak for usury. So, the case turns on whether there was an honest mistake in the overcharge of $20.00 on the insurance premium, or whether the "mistake" was made in order to collect more than 10 per cent interest.

Thus we have a fact question; and the case at bar is strikingly similar to two of our recent cases: one being *Whiddon* v. *Universal CIT Credit Corp.*, 227 Ark. 824, 301 S. W. 2d 567; and the other being *Jones* v. *Jones*, 227 Ark. 836, 301 S. W. 2d 737. In the Whiddon case the Chancellor, after seeing the witnesses and hearing the evidence, held that there was an honest mistake; and we affirmed the Chancellor. In the Jones case, the Chancellor, after seeing the witnesses and hearing the evidence, held that the mistake was a cloak for usury; and we affirmed the Chancellor. In the case at bar, the Chancellor, after seeing the witnesses and hearing the evidence, found that there was an honest mistake and that Murdock acted with reasonable promptness in correcting the mistake; and we conclude that the Chancellor's findings are not against the preponderance of the evidence.

The evidence, here, shows that the car was purchased on March 19, 1955; that Griffin was entitled to a 1,000-mile check-up and a 2,000-mile check-up; that when he had the 1,000-mile check-up in the early part of April he went to see Murdock about the insurance policies which he had received; and that the policies were explained to him. One of the policies was for collision and comprehensive insurance; and the premium charged on that policy was $209.00 because the car had been classified as "I." Cars are classified by symbols ranging from "A" through "R," depending on the year and model of the car, the age of the drivers, and the use to which the car is being subjected. On Griffin's second visit about the middle of April, 1955, he informed Murdock that an insurance agent in El Dorado had advised him (Griffin) that the car should have been classified as "H" instead of "I"; and that the correct premium was $189.00 instead of $209.00. Murdock had remitted the premium of $209.00 to the Universal Security Insurance Company; and Murdock promised Griffin to look into the matter and write him.

Just a few days later, and under date of April 19, 1955, Murdock wrote Griffin and admitted the mistake. Griffin testified that Murdock told him that when he

made his first payment on the note, he could deduct the $20.00 from such payment. The foregoing, and other facts in the record, amply support the Chancellor's finding that the $20.00 insurance premium overcharge in this case was an honest mistake, and that as soon as Murdock discovered the mistake, it promptly made correction and offered restitution. As aforesaid, under these facts and circumstances, we cannot say that the Chancellor decided against the weight of the evidence in holding that the mistake in this case was not a cloak for usury.

III. *The Cross Appeal of Murdock Against Columbian Carbon Company.* On May 24, 1956, the Chancery Court entered judgment in favor of Murdock and against Griffin for $2,370.11, together with interest and costs and attorney's fee, "for all of which execution may issue"; and the Court ordered that the automobile be sold under the vendor's lien statute (§ 34-2301 Ark. Stats.), with the proceeds of the sale to apply on the judgment. On May 31st Griffin gave notice of appeal from the judgment.

On June 13th Murdock obtained a writ of garnishment after judgment (§ 30-501 *et seq.*, Ark. Stats.), and obtained service on Columbian Carbon Company, requiring it to answer within twenty days as to any moneys or properties in its hands belonging to D. E. Griffin. This garnishment was served on June 13th; and on June 18th, on motion of Griffin, the Chancery Court quashed the writ of garnishment.[2] On July 16th Murdock filed in the Chancery Court a notice that it was appealing[3] to the Supreme Court from the order quashing the writ of garnishment.

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[2] The order recited in part: ". . . said writ of garnishment be and the same is hereby quashed and the garnishee, Columbian Carbon Company, be and is hereby released from answering herein."

[3] The record does not disclose that Columbian Carbon Company was ever served with any notice of appeal; but in this Court, Murdock argues in its cross appeal: "Accordingly, the action of the lower court in quashing the writ should be reversed with directions to enter judgment against Columbian Carbon Company for the amount of judgment remaining unpaid. In the alternative, appellee submits that Columbian Carbon Company should be required to answer what goods, chattels, moneys, credits and effects it had in its possession belonging to appellant from the date of service of said writ until the return day thereof, and that judgment be entered against Columbian Carbon Company in said amount."

Assuming, but not deciding, that Murdock has properly brought to this Court an issue on quashing the garnishment, nevertheless we hold Murdock is entitled to no judgment against Columbian Carbon Company on the said writ of garnishment heretofore issued. This holding is true because Murdock never superseded the order of the Chancery Court that quashed the writ of garnishment. In *Hot Springs Concrete Co.* v. *Rosamond,* 180 Ark. 690, 22 S. W. 2d 368, we cited from the earlier case of *American National Bank* v. *Douglas,* 126 Ark. 7, 189 S. W. 161, L. R. A. 1917B 588, and held that when a writ of garnishment was quashed, and no supersedeas bond was filed to supersede the order of quashing, then the garnishee was fully released from the garnishment. That case is ruling here; so Murdock's cross appeal is without merit.

Affirmed.

SPRINGFIELD *v.* HOUSING AUTHORITY OF CITY OF LITTLE ROCK.

5-1310 304 S. W. 2d 938

Opinion delivered June 17, 1957.

[Rehearing denied Sept. 30, 1957]

O. W. Pete Wiggins, for appellant.

Mehaffy, Smith & Williams, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellee, Housing Authority of the City of Little Rock, Arkansas;

brought this suit in circuit court to condemn 7½ residential lots with 27 dilapidated dwellings located thereon for a slum clearance and urban development project. The case was transferred to chancery court, where the appellants, as owners, contested appellee's right to take the property on numerous grounds. Trial resulted in a decree finding that the properties comprised a portion of a blighted slum area which appellee was entitled to condemn and take in its slum clearance project. The court further established just compensation for the taking at $48,740.00, for which amount appellants were awarded judgment against appellee.

Appellants have abandoned all contentions concerning the right of appellee to take the properties in question and the sole issue on this appeal is the amount fixed as compensation.

The testimony in regard to valuation of the properties followed the usual pattern in cases of this kind. Each side presented three real estate experts as witnesses. The three experts presented by appellants inspected the properties as a "committee" and each fixed the fair market value at $75,450.00. One of appellee's witnesses fixed the fair market value at $42,040.00, another fixed it at $43,400.00 and the third found said value to be $44,740.00.

The six experts were well qualified and it would serve no useful purpose to detail the various factors, methods, considerations and reasons given by each in reaching his opinion as to the market value of the several properties which are near and similar to those involved in the recent case of *Springfield* v. *City of Little Rock,* 226 Ark. 462, 290 S. W. 2d 620. In this connection, we cannot agree with appellants' insinuation that appellee's witnesses are not well qualified and their conclusions incomplete and inaccurate merely because they were not members of the National Society of Residential Appraisers and did not follow a particular formula advocated by that organization in fixing fair market value. Contrary to appellants' further contentions, an examination of the

evidence also discloses that appellee's witnesses gave consideration to rental income and the value of the houses located on the several lots in reaching their conclusions as to market value.

Appellants also argue that the trial court erred in viewing the properties in question. However, no objection to the court's action in this respect was made at the trial and the question cannot be raised for the first time on appeal. *Koelsch* v. *Arkansas State Highway Commission,* 223 Ark. 529, 267 S. W. 2d 4. In addition to a personal inspection of the property, the chancellor also had the advantage of observing the witnesses as they testified and was in a more favorable position than we are to evaluate their testimony. It is certain that he did not wholly accept the testimony of any particular witness and we cannot say his findings and conclusion as to fair market value are against the preponderance of the evidence. The decree is accordingly affirmed.

BASS *v.* WILLEY.

5-1300 304 S. W. 2d 943

Opinion delivered June 17, 1957.

[Rehearing denied Sept. 30, 1957]

Arthur R. Macom, for appellant.

Virgil Roach Moncrief, John W. Moncrief and *Sharp & Sharp,* for appellee.

George Rose Smith, J. On March 25, 1946, the appellee's predecessor in title, C. F. Willey, obtained a default decree which found that C. F. Willey was the owner of Fractional Section 1, Township 8 South, Range 4 West, "and all accretions adjoining or contiguous thereto, situate in the Southern district of Arkansas County." The decree enjoined the present appellant, T. P. Bass, from trespassing upon the land, removing timber from it, or interfering in any manner with Willey's possession.

In 1947 Willey filed a petition asserting that Bass had violated the 1946 decree and should be punished for contempt of court. Bass defended the contempt citation by attempting to prove that the 1946 decree was a nullity. It was his contention that fractional Section One, as originally surveyed by the United States in 1819, had been completely eroded away by a gradual northward movement of the Arkansas river. Bass further contended that the river, after having eaten away the entire section, had then retreated southwards even beyond its original 1819 channel and by that retreat had re-created land which by the law of accretion became a part of other lands owned by Bass and lying north of what had once been Section One. It was Bass's theory that the 1946 decree referred only to nonexistent lands and was therefore void. The chancellor rejected this contention and entered a decree for the plaintiff on December 1, 1948. We affirmed that decree, on the ground that Bass had conveyed Section One to Willey in 1930 and was accordingly estopped to deny the existence of the property described in his deed. *Bass* v. *Willey,* 216 Ark. 553, 226 S. W. 2d 980.

The present petition, which involves only certain land that lies outside the boundaries of Section One as it was surveyed by the Government in 1819, was filed by

the appellee a few months after our affirmance of the 1948 decree. In this petition Willey charges that Bass has again violated the court's decrees by cutting timber from the area now in controversy. In defending this citation for contempt Bass concedes that he no longer has any claim to the land within the original boundaries of Section One, but he insists that he is entitled to assert title by accretion to land outside the original section. In answer to this contention Willey pleads the 1946 decree and the 1948 decree as *res judicata.* The chancellor, considering this issue upon the present pleadings and the record in *Bass* v. *Willey, supra,* held that Bass is precluded by the doctrine of *res judicata* from disputing Willey's title to the land now in controversy.

We are unable to say that either of the earlier decrees established Willey's title to any land lying outside the boundaries of Section One as it existed in 1819. The 1946 decree may be laid aside without much discussion, for it confirmed Willey's title only to the original section "and all accretions adjoining or contiguous thereto." It is plain enough that this decree left open, as a question of fact, the issue of whether any particular piece of land was actually formed as an accretion to the original section. That is the issue that Bass seeks to have determined in the present phase of the litigation; clearly it is not foreclosed by the 1946 decree.

The more difficult question is whether the 1948 decree went beyond the earlier adjudication and permanently settled this issue of fact. It will be remembered that in 1948 Bass attempted to prove that the original section had been wholly destroyed by erosion and had been later replaced by other land that gradually emerged from the river as an accretion to Bass's property lying farther to the north. Bass undoubtedly contended then, as he contends now, that the re-created land was not an accretion to Section One as it existed in 1819. Since Bass unsuccessfully made that contention in 1948 the appellee very plausibly argues that the issue cannot be re-examined.

Whether the present question of fact was considered by the chancellor in 1948 cannot be definitely determined from the wording of the decree. The chancellor declared that Bass had failed to sustain the burden of proving the nonexistence of Section One. This conclusion disposed of the case; so there was no reason for the chancellor to say whether the original section had been enlarged by accretions. Hence Willey's plea of *res judicata* rests not upon the express language of the 1948 decree but upon the implication that all questions raised were decided adversely to Bass.

This implication, however, is effectively rebutted by the language of the opinion affirming the chancellor's 1948 decree. In that opinion we specifically limited our decision to the single point that the chancellor had correctly refused to set aside the earlier decree of March 25, 1946. The original opinion began with these words: "The only question to be decided on this appeal is whether the Chancery Court was correct in refusing to set aside a decree rendered at a former term. Other questions, injected into the record and briefs, concern (a) accretion and avulsion, and (b) determination of County boundary lines. These matters, however, are not necessary to a decision of the stated question; and are mentioned for the purpose of negativing any idea that this opinion decides them." Despite this language unmistakably limiting the scope of the decision it was suggested in Bass's petition for rehearing that we had inferentially approved a survey that tended to support Willey's position on the matter of accretions. In denying a rehearing we delivered a supplemental opinion that closed with this paragraph: "We deny a rehearing; but in order to remove any doubt, we point out that we did not approve the Kramer survey, or any other survey made subsequent to the decree of 1946; we held that the 1946 decree should not be vacated."

That opinion became the law of the case and governs all future proceedings in this litigation. *Williams* v. *Fulkes,* 103 Ark. 196, 146 S. W. 480. According to that opinion the first contempt proceedings had no force as a

precedent except to hold that the 1946 decree should not be set aside as a nullity. Thus the effect of those proceedings was merely to leave undisturbed the earlier decree, which referred in general terms to Section One and all accretions thereto.

Furthermore, common fairness is opposed to the plea of *res judicata* in this instance. An examination of the record and briefs on the first appeal shows that Bass offered proof to establish the nonexistence of Section One (which of course would also establish the nonexistence of any accretions thereto) and also argued the point on appeal. We declined to decide that issue and limited our holding to another question. It is obvious that we cannot with consistency refuse to consider a question on the first appeal on the ground that it is not presented and then refuse to consider it on the second appeal on the ground that it has already been decided. The doctrine of *res judicata* is designed to prevent a litigant from trying the same issue twice; to apply the doctrine in this case would effectually prevent Bass from trying the issue at all.

Reversed and remanded for further proceedings.

HARRIS, C. J., disqualified and not participating.

CITY OF MAGNOLIA *v.* KENDRICK.

5-1309 304 S. W. 2d 945

Opinion delivered June 17, 1957.

[Rehearing denied Sept. 30, 1957]

[redacted]

William I. Prewitt and *Joe D. Woodard,* for appellant.

Henry B. Whitley, for appellee.

SAM ROBINSON, Associate Justice. In 1951, the appellee, J. W. Kendrick, was City Clerk of the City of Magnolia, and, as such, he was ex-officio Clerk of the Municipal Court. The City Council fixed his salary as Clerk of the Municipal Court as $1,800.00 per year; by agreement, the city paid one-half of the salary and the County one-half. Kendrick contends that he should have been paid a salary of $2,400.00 per year as Clerk of the Municipal Court. He filed suits against the county and the city for the difference between the $1,800.00 per year and $2,400.00. The cases were consolidated; demurrers to the complaints were overruled; the defendants elected to stand on the demurrers and refused to plead further. Judgment was rendered on the complaints and the county and city have appealed.

Prior to 1951, Ark. Stats. § 22-713 provided: "The Judge of the Municipal Court may appoint a Clerk for the court who shall be designated and known as the Municipal Court Clerk, and the salary of such clerk shall be $1,800.00 per annum, payable in equal monthly installments. * * *; Provided, the city council of any city subject to this act may fix the salary of the Municipal Court Clerk at any sum not exceeding eighteen hundred dollars ($1,800.00) per annum, and may designate that the duties of such clerk be performed by any other officer of the city." The General Assembly of 1951 adopted Act 280, which amended the above statute by providing that the salary should be $2,400.00 per year, but that the city council could fix the salary at "any sum" not exceeding $3,000.00 per year. The 1953 General Assembly, by Act 313, amended the statute by adding the provision, "in county-seat towns with less than 2,400 population, the City Council may fix the salary of the clerk at any sum

not to exceed eighteen hundred dollars ($1,800) per annum."

Appellee maintains that the 1951 amendment fixed the salary at $2,400.00 per year and that the city has no authority to pay less than that amount. We do not agree with the appellee in that respect. The 1951 amendment merely fixes the salary at $2,400.00 in the event the city does not elect to pay some other sum not exceeding $3,000.00 per year. The amendment clearly states: "* * * Provided, the city council of any city subject to this Act may fix the salary of the Municipal Court Clerk at any sum not exceeding three thousand dollars ($3,000.00) per annum, and may designate that the duties of such clerk may be performed by any other officer of the city." Obviously, it was the intention of the General Assembly to permit the city to assign the duties of the Clerk of the Municipal Court to some officer of the city who was already drawing a salary from the city. The act permits the city to pay such officer an additional sum not exceeding $3,000.00, but considered as commensurate with the work that he would do as Clerk of the Municipal Court, which, as a matter of fact, might require very little of his time. To hold that the city could not pay an amount less than $2,400.00 as salary to one serving as Clerk of the Municipal Court would be to read out of the act the words: "any sum not exceeding three thousand dollars ($3,000.00) per annum."

The 1953 amendment is not applicable; the City of Magnolia is not within the classification of cities affected by that amendment.

Reversed, with directions to sustain the demurrer.

Opinion delivered June 24, 1957.

[redacted]

Kenneth Coffelt, for appellant.

Bruce Bennett, Atty. Gen'l.; Thorp Thomas, Asst. Atty. Gen'l., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, H. V. Hickinbotham, over a period of weeks, was convicted of twenty violations of Ark. Stats. (1947) Sec. 41-3802 (keeping grocery store open on Sunday). On appeal to Circuit Court, the cases were consolidated, and tried January 18, 1957. The court directed a verdict for the State, leaving only the question of proper punishment to be determined by the jury. The jury assessed a fine of $25 in each case. From such convictions, comes this appeal. Appellant, in his motion for a new trial and amendment thereto, sets out twenty assignments of error; however, he argues only one point in his brief. This being a misdemeanor case, it is appellant's duty to abstract the record and brief the case on the points that he desires to have considered. If this is not done, such alleged errors are waived. *Fields* v. *State,* 219 Ark. 373, 242 S. W. 2d 639; *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673. The only assignment appellant argues here, and therefore the only one we consider, is that he is being dis-

criminated against in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Taylor* v. *City of Pine Bluff,* 226 Ark. 309, 289 S. W. 2d 679, the defendant was convicted of keeping his grocery store open on Sunday. This Court, in upholding the trial court's action in refusing to permit the introduction of evidence by the defendant relative to Sunday sales by drug stores, hotels, filling stations, restaurants, etc., said, "* * * Sunday laws applicable only to grocery stores and meat markets have been held to represent a reasonable classification.[1] * * * 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. * * * It is our conclusion that a Sunday law applying only to grocers would be valid and therefore, appellant is entitled only to be treated in the same manner as other grocers. * * *" Accordingly, the only question to be considered on this appeal is whether appellant established that he was being discriminated against by the law enforcement officers of Little Rock and Pulaski County, *viz,* that he was being systematically arrested for violations of the law while the officers knowingly permitted other *grocery stores* to remain open on Sunday and carry on their business without interference.

[1] Numerous cases from other jurisdictions are cited.

The question may well arise, "Just what constitutes 'discrimination'?" Certainly not that one person is apprehended while another who commits the same offense goes free. If such were a defense, convictions would never be obtained, for it is common knowledge that murderers, thieves, robbers, and rapists are sometimes never apprehended, though fortunately, in a vast majority of the cases, they are apprehended and pay the penalty for their crimes. No one could reasonably argue that because every felon is not caught and punished, all other felons should go unpunished. Applying such a system of law enforcement would, of course, bring on a chaotic condition and a complete breakdown of law and order. Applying such reasoning to this case, it would not be sufficient substantiation of appellant's claim of discrimination to simply show that other grocery stores were operating on Sunday. Certainly it would have to be further shown by cogent evidence that the officers *knowingly* permitted others to continuously and systematically remain open, while making it a point to see that appellant did not operate unhindered. It is not necessary that we discuss just what proof or circumstances would be necessary to sustain such a contention. Suffice it to say that discrimination is not established by the record in this cause.

The officers testified that they had directions to arrest all grocery store operators. Officer Waggoner stated, "We observed all grocery stores that came within our eyesight as we drove down the street, and if we thought they were selling groceries, we checked them, and Mr. Hickinbotham's store was open." Officer Mackey testified: "Q. Did you have a directive to arrest all grocery stores that were open on Sunday? A. Yes, sir. Q. Did you follow that directive to the best of your knowledge? A. Yes, sir." Officers Cranford, Satterwhite, Whitener, Biggs and Brians all testified to the same effect. The last mentioned officer testified, "We checked all places which was possible in our tour of duty. You can only check so many places in a given length of time and we checked all places that we thought might have been selling grocery items." Officer Mackey

testified that on one of the Sundays, they found a certain Deason's Grocery open, but that Deason had a confectionary license, and stated that he was selling only milk, ice cream, and bread; that the confectionary was separate from the grocery department, although they were under the same roof. Certainly, no discrimination was established from the testimony of these officers.

Appellant's only witness was J. H. Hickinbotham, father of the defendant. From his testimony:

"Q. Since last July, have you made a close observation of businesses in Little Rock, similar to yours—that is, that sell the same articles that you do — and which have remained open on Sunday?

A. Yes, sir.

Q. How many businesses would you say there are that have continuously and systematically remained open on Sunday? I am fixing it from last July because that is the time affected in this case. How many are there that sell the same articles you sell in your store, including groceries?

Mr. Holt: I object to him answering the question. It is framed exactly like he had it before.

The Court: Objection overruled.

A. What was the question, please?

Mr. Coffelt: Read the question to him. (The reporter reads the question.)

A. I didn't make a complete survey, but I listed a few here that I had passed by on my way to lunch or some other time.

Q. I don't care about identifying them now, but are there a large number of them?

A. Yes, sir.

Q. Are they on busy corners?

A. Some are on corners and some are in the middle of the block.

Q. Were they open on these Sundays at places where it would be easy for the police officers to observe in case they were making an inspection?

A. Yes, sir."

If the cause should have been submitted to the jury, it would have had to be on the basis of the testimony above quoted. In the first place, the testimony is vague in the extreme. No definite locations are mentioned . . . no dates are mentioned . . . no names are mentioned. We are unable to determine what is meant by "a large number," nor can we determine the meaning of "observation of businesses similar to yours." As previously herein set out, this Court, in *Taylor* v. *City of Pine Bluff, supra,* held that discrimination is not tested solely on the basis that other establishments sell some of the same articles sold by a grocery store. "They were open where anybody could observe them" adds little or no weight to the testimony. No attempt was made to show that the officers were in the vicinity, or, if there, deliberately passed up such places in making their inspection. No testimony was offered, nor witnesses called, to offer evidence that particular grocery stores were open for business, or that any such stores were being permitted to operate. Two newspaper advertisements of January 5, 1957, and January 12, 1957, were offered which stated that Owen Henderson's Super Market would "be open all day tomorrow." This evidence, of course, was inadmissible as not being the best evidence, nor did it occur during the period of the offenses for which appellant was being tried. It was excluded by the trial court on the latter ground.

The above testimony falls far short of establishing that appellant has been a victim of discrimination within the holdings in our cases or those of the United States. *Taylor* v. *City of Pine Bluff, supra; Taylor* v. *City of Pine Bluff,* 226 Ark. 749, 294 S. W. 2d 341; *Yick Wo* v. *Hopkins,* 118 U. S. 356; 6 S. Ct. 1064, 30 L. Ed. 220, *Snowden* v. *Hughes,* 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397. Accordingly, the trial court's action in directing a verdict of guilty was entirely proper.

In his amendment for motion for new trial, appellant states that on Sunday, January 20, 1957, he made a careful inventory and investigation of the places of business remaining open, that he found 178 places of business open in Little Rock; that at least 50 of these places were selling and offering for sale grocery items; that he was the only person arrested for violation of the law on that date; that the law enforcement authorities refused to file charges or prosecute these persons. According to such amendment, "he is not only being discriminated against, and being singled out and arrested for the law violation, but he is being discriminated against in that the arresting officers and the courts, and all enforcement agencies, deliberately refuse to make other arrests, or prosecute thereon, even when information is furnished them by this defendant with the request to make affidavit as to the charges and to post bond for costs; that this discrimination violates the constitutional rights of the defendant under the equal protection clause of the Fourteenth Amendment to the Federal Constitution." It would be repetitious to again say that the sale of particular items which might be classified as grocery items does not constitute violation of the law; further, these alleged violations did not occur during the period of the violations for which appellant was being tried, but rather, on January 20th, which was after appellant had been tried and convicted, and thus cannot be considered as newly discovered evidence.

Affirmed.

JUSTICE ROBINSON dissents for the same reasons stated in his dissent in *Taylor* v. *City of Pine Bluff*.

5-1299 304 S. W. 2d 260

Opinion delivered June 24, 1957.

Brockman & Brockman, for appellant.

Lasley & Lovett, for appellee.

J. SEABORN HOLT, Associate Justice. Troy L. Whitener died intestate September 14, 1954, and left surviving his widow, Vera Whitener, his mother, Jennie, and two brothers, Homer and Jewell. He left no children. Vera Whitener was appointed administratrix of his estate September 30, 1954, and has acted in that capacity since. On January 13, 1955, the administratrix filed her first inventory along with a preliminary accounting from October 1954 to December 1954.

On January 14, 1955 the appellants, Mrs. Jennie Whitener and Homer Whitener, filed an intervention, alleging, in effect, that appellee had not filed a complete and correct inventory, in that she had not included therein certain farming equipment of the value of $2,000 owned by her husband at the time of his death, and that she be required to include this machinery in her inventory. They further prayed that the court determine their rights in the estate, alleging that appellee had waived her dower rights under the terms of a certain property settlement entered into between appellee and her husband September 13, 1951. On a hearing August 23, 1955, the trial court sustained appellants' exceptions

to the inventory as to the farm implements (of the undisputed value of $2,000) and ordered that they be included in the inventory and administered along with the other assets of the estate.

On September 18, 1955, appellee, within less than one month after the court had held that she had no title to the farm implements, filed her claim against the estate for $2,000 as an absolute obligation of the estate. Thereafter (November 30, 1956) the court allowed appellee this $2,000 claim holding that it fell within the class of contingent claims, was filed within the time allowed by statute, and the accounting filed by appellee was approved. The court further found, in effect, that all the property of the estate was a new acquisition; that one-half of the personal property was sufficient to pay all debts, except a certain mortgage indebtedness secured by real estate; that appellee (as the widow), under § 61-206 Ark. Stats. of 1947, was entitled as her dower to one-half of the real estate in fee, to one-half of the personal property as against collateral heirs; and should more than one-half of the estate be required to pay the debts the widow should have the remainder. The judgment further recited that the widow's one-half in the real estate should be subject to one-half of the mortgage indebtedness thereon.

The case comes to us on appeal and cross-appeal. For reversal appellants rely upon these points: "1. The claim of Vera Whitener, filed on September 18, 1955, is not a contingent claim, and therefore is barred by § 62-2601 (A) of Ark. Stats. 1947. 2. Vera Whitener elected to maintain title to the farming implements as her individual property, and therefore, failed to file a claim against the estate as required by § 62-2601 (A) of Ark. Stats. 1947. 3. The Property Settlement Agreement dated September 13, 1951 bars Vera Whitener from any claim for dower in the Estate of Troy L. Whitener. 4. If the Court holds that the property settlement agreement does not bar Vera Whitener from claiming dower, then she is entitled to a one-third interest only as her dower, free from debts and expenses."

Appellee on cross-appeal contends that the trial court erred in holding that the widow's part of one-half of the real estate was subject to one-half of the mortgage indebtedness thereon.

Material facts appear not to be in dispute.

1.

Appellants' first contention that the $2,000 claim filed by appellee on September 18, 1955, is not a contingent claim and, therefore, barred under § 62-2601 (A) Ark. Stats. 1947, cannot be sustained. We think the record clearly shows that it was contingent. In July 1951 it appears that Vera and her husband separated and Vera sued for divorce. On September 13, 1951, while this suit was pending, the parties entered into a property settlement and on September 21, 1951, by agreement, the divorce action was dismissed with prejudice. Thereafter, in December 1951, the parties resumed their marital relations and lived together until the husband's death, September 14, 1954. It further appears that, on November 29, 1952, Vera and her husband adjusted and settled certain financial accounts between them. He was at the time indebted to Vera in the amount of $7,910.88, consisting of two notes, one for $4,100 and the rent note for $3,000, along with other smaller amounts making up the total. This indebtedness is not disputed and was paid by the husband conveying to his wife a tract of land for a consideration of $4,900 and certain farm implements of the value of $2,000, which amount his wife credited him on his indebtedness to her. The balance of the indebtedness was paid in cash. In these circumstances Vera, claiming and believing that she was the owner of the farm implements, did not include them in the inventory as assets of the estate.

She successfully contended in the trial court that she had no enforceable claim against the estate for this $2,000 item (farm machinery) until the court, on August 23, 1955, held that this machinery did not belong to her, as she believed, but should have been included in the inventory as assets of the estate. Appellants, on

the other hand, contended that her claim for $2,000 became absolute when they filed exceptions to her inventory and since she did not file her claim within six months of the filing of their exceptions, it was barred by the statute of non-claims. We do not agree with appellants' contention. As indicated, we think the trial court properly held that this claim, in the circumstances, was clearly a contingent claim and was filed by Vera within the time permitted after it became absolute, and was, therefore, not barred. Under § 62-2610 Ark. Stats. 1947, a contingent claim which becomes absolute six months or more prior to the order of final distribution must be presented within six months after becoming absolute, as was done here.

As indicated, we think, that following the filing by appellants of exceptions to Vera's inventory, whether there would ever be a valid claim against the estate by Vera for the $2,000 clearly depended upon an uncertain future event, that is, the decision of the Probate Court on appellee's right to this $2,000. We have defined a contingent claim in this language: "According to the ordinary acceptance of the term, a contingent claim is one where the liability depends upon some future event which may or may not happen, and which therefore, makes it wholly uncertain whether there ever will be a liability," *Turner* v. *Meek Excr.*, 225 Ark. 744, 284 S. W. 2d 848.

2.

On appellants' second point, what we have said above on the first contention applies with equal force. As indicated, until the Probate Court determined that Vera was not entitled to the consideration of $2,000 she had allowed her husband on his indebtedness to her, and until she had been directed by court order to include this amount in her inventory as assets of the estate, she had no claim against the estate. We think she has pursued the only remedy left open to her in the circumstances.

3 and 4.

We consider appellants' third and fourth contentions together since they appear to be interrelated. We do not agree that the property settlement of September 13, 1951, barred the widow (appellee) of her dower rights.

The trial court held that the settlement agreement "does not under the evidence in the case bar the dower rights of the widow, Vera Whitener, in the estate of the deceased husband," and we think the court was correct in so holding. The only way a wife could relinquish her dower interest in her husband's property is by valid deed. § 50-416 Ark. Stats. 1947 provides: "A married woman may relinquish her dower in any of the real estate of her husband by joining with him in the deed of conveyance thereof, or by a separate instrument executed to her husband's grantee or anyone claiming title under him and acknowledging the same in the manner hereinafter prescribed." The property settlement agreement here, however, was not sufficient to convey her dower rights in the real property under the above statute. Such was the effect of our very recent holding in *Marshall* v. *Marshall,* 227 Ark. 582, 300 S. W. 2d 933. Also see *Bowers* v. *Hutchinson,* 67 Ark. 15, 53 S. W. 399. In the latter case (*Bowers* v. *Hutchinson*) a similar question was involved as here, there the wife for a consideration entered into a settlement agreement (denominated "A Deed of Separation or Articles of Agreement") whereby she would not at any time in the future make any claim because of interest in the real estate owned or that might thereafter be acquired by her husband: ". . . intending to relinquish, release, remise and forever quitclaim unto said first party (her husband), his heirs and assigns . . . all claims, interest, right, demand or possibility of dower that might or could hereinafter be allotted and assigned to her by virtue of her said intermarriage with said first party." There, as here, this agreement was set up as a bar to the widow's claim of dower. We there said: "The deed (of separation or articles of agreement) which consti-

tuted the defense in this action was without effect as a relinquishment of dower in real estate . . . Under these (our) statutes, this Court has repeatedly held that 'a married woman can relinquish dower only by joining with her husband in a deed of conveyance to a third person.' " In subsequent decisions we have uniformly adhered to this principle. In *Roetzel* v. *Beal,* 196 Ark. 5, 116 S. W. 2d 591, our holding in the Bowers case *supra* was reaffirmed. We, therefore, conclude that appellee's attempt to convey her dower in the settlement agreement was not effective to convey her dower rights.

Finally, appellants' contention that the court erred in holding that the widow was entitled to one-half the personal property is, we think, untenable in the circumstances. The trial court held: "That under the applicable statute, § 61-206 of the 1947 Statutes of Arkansas, the widow of Troy L. Whitener is endowed in fee simple of one-half of the real estate and one-half of the personal property absolutely and in her own right. This statute means that the widow is entitled to one-half as against collateral heirs, even though it takes all the remainder to pay the debts, and if more than one-half of the estate is required to pay the debts, the widow is, as against collateral heirs, entitled to the remainder. . . (and) that the widow's one-half interest in this real estate shall be subject to one-half of the mortgage indebtedness thereon; . . ."

The inventory shows the personal property to be of the value of $9,768.89 and with the amount of $2,000 (farm equipment), which the court directed should be added to the inventory, makes the gross amount of the personal estate $11,768.89. Since it appears that a part of this gross estate consisted of the value of a crop without any deductions for the cost of harvesting and preserving it, admitted to be $1,586.90, this amount should be deducted, leaving a total personal property value of $10,-181.99. It further appears that the indebtedness due and owing by Mr. Whitener at the time of his death, excluding the secured indebtedness, but including Vera Whitener's claim of $2,000 allowed by the trial court, plus the

expenses of administration, amount to a total of $2,934.14. Thus, since the total of the personal property amounted to $10,181.99, one-half of this amount ($5,090.99) was substantially more than the unsecured indebtedness and expenses of administration. The evidence shows that in making the above calculations the appellee used the inventory and accountings of the administratrix, all of which were approved by the court, and to which it appears no exceptions were filed. We, therefore, conclude that the chancellor's findings, that one-half the personal property was sufficient to pay the unsecured indebtedness of the estate and that the widow was entitled to one-half the personal property as her dower as against collateral heirs, were correct. We, therefore, affirm on appellants' direct appeal.

On cross-appeal, appellee earnestly contends that the trial court erred "in holding that the widow takes an undivided one-half interest in the real estate subject to the mortgage indebtedness thereon." We do not agree.

In the above contention appellee relies largely on § 62-2701 Ark. Stats. 1947 (Act 140 of 1949). This identical question was answered contrary to appellee's contention in the very recent case of *Cranna, Adm.* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828. There, after construing the effect of statutes prior to Act 140 (§ 66, Pope's Digest, and § 62-2401 Ark. Stats. 1947) and § 62-2701, (§ 124, Act 140 of 1949 above) we there said: "Sec. 62-2701, Ark. Stats., in abolishing the priority between personal property and real property for the payments of the debts of the deceased, applies *after* it has been determined that the lands are necessary for the payment of debts. That section does not change the long established rule of our cases, as above cited." We reaffirm the above holding. Before real estate may be resorted to for the payment of debts of the estate the personal property must first be resorted to.

Accordingly, we affirm on both direct and cross-appeal.

Mr. Justice George Rose Smith concurs.

Harris, C. J., disqualified and not participating.

BRIMSON *v.* BRIMSON.

5-1280 304 S. W. 2d 935

Opinion delivered June 24, 1957.

[Rehearing denied Sept. 30, 1957]

Robert W. Griffith and *Fred A. Newth,* for appellant.

Martin, Dodds & Kidd, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal presents the questions of (a) which spouse is entitled to a decree of divorce, and (b) what property and allowances should the wife receive.

The parties (Dr. and Mrs. Brimson) were married in 1934 and lived together for many years. In August, 1956, Mrs. Brimson filed suit for divorce on the ground of indignities (Fifth ground in § 34-1202 Ark. Stats.)* She also sought property rights and alimony (§ 34-1214 Ark. Stats.). Dr. Brimson denied her charges of indignities; cross-complained for divorce on the three-

* These sections were re-enacted by Acts numbered 161 and 348 of 1953.

year separation statute (Seventh ground in § 34-1202 Ark. Stats.):* claimed that he was the injured party; and that Mrs. Brimson was entitled to neither dower nor alimony. After hearing the witnesses, the Chancery Court entered a decree finding: (a) that Mrs. Brimson was not entitled to a divorce; (b) that Dr. Brimson was entitled to a divorce on the grounds of three years separation; (c) that Dr. Brimson was the injured party; (d) that Mrs. Brimson was not entitled to any dower or alimony; and (e) that Mrs. Brimson should receive only $100 attorney's fee and $10 court costs. The decree also affected property held by the parties in estate by entirety. From that decree Mrs. Brimson prosecutes this appeal; and we shall dispose of the issues under the hereinafter stated topic headings.

I. *Which Spouse Is Entitled to a Divorce?* Appellee says (a) that the Chancery Court granted Dr. Brimson a divorce under the three-year separation statute; (b) that appellant has not listed as one of her points on appeal any assignment that the Court was in error in such regard; and (c) that this Court, therefore, cannot review the decree granting Dr. Brimson a divorce. We do not agree with appellee's said contentions. Appellant's first point is: "The clear preponderance of the evidence entitled her to a divorce on the ground of indignities". We agree with appellant on her first point and hold that the Chancery Court should have awarded her a divorce.

The evidence shows that the parties were married in 1934; that after their marriage they lived in the back end of the Brimson Drug Store for about ten years; that later she moved into an upstairs apartment which he had furnished for her; that he continued living in the back of the drug store throughout their married life; that she worked in the drug store seven days a week during the 22 years duration of their marriage; that she did all of the cleaning of the drug store, the mopping of the floors, the keeping of the stock, the ordering, and the waiting on customers.

* These sections were re-enacted by Acts numbered 161 and 348 of 1953.

The evidence — amply corroborated as to specific instances — also shows that Dr. Brimson repeatedly abused and cursed his wife; that he cursed her in front of customers; that when she went down in the drug store in the morning, if she made any noise he would curse her; that if customers came in during such time he would yell at them to shut up and go home; that on at least three occasions he struck her; that he falsely accused her of unfaithfulness; and that such mistreatment of her by him went on consistently over the years and adversely affected her health.

We hold that Mrs. Brimson was entitled to a divorce on the ground of indignities; and such holding necessarily nullifies the Chancery Court decree awarding Dr. Brimson a divorce on the three-year separation statute. But, even so, we think it not amiss to point out that until five months before the filing of this suit, the parties continued to work together in the drug store; that she had an apartment in a nearby building, to which he had a key; and that he used her bathroom regularly. In other words, to all outward appearances, they were living together. How — under such circumstances—could it be held that these parties lived "separate and apart from each other for three consecutive years," within the purview of our statute? Whether they had cohabitation is a disputed point; but, under the admitted facts, they certainly did not live "separate and apart from each other". So we reverse the decree awarding Dr. Brimson a divorce and award Mrs. Brimson a divorce on the ground of indignities.

II. *Property Rights.* The Chancery Court held that Dr. Brimson was the "injured party" under § 34-1202 Ark. Stats., as amended; and for that reason deprived Mrs. Brimson of all dower and allowances. Having found, as we have, that Mrs. Brimson is entitled to a divorce on the ground of indignities, it necessarily follows that she is the "injured party" and is entitled to dower and certain allowances, as hereinafter discussed.

(a) By the authority of § 34-1214 Ark. Stats. we award Mrs. Brimson one-third, absolutely, of all of the

personal property of Dr. Brimson; and this includes, among other items, the merchandise and fixtures in the drug store, the cash on hand, and one-third of all other items of personal property.

(b) By authority of § 34-1214 Ark. Stats. we award Mrs. Brimson a life estate in one-third of all the real estate, the title to which is in Dr. Brimson only; and necessarily this carries with it one-third of the net rents and revenues from the said property for and during her natural life.

(c) There are several parcels of real estate owned by entirety by Dr. Brimson and Mrs. Brimson, and acquired subsequent to the effective date of Act No. 340 of 1947 (see § 34-1215 Ark. Stats.). Such real estate — with the exception of the 5-acre tract hereinafter to be discussed — may be sold on order of the Court, on motion of either party, and the net proceeds divided equally.

(d) *The 5-acre Tract.* The parties acquired an 80-acre parcel of land *prior* to the effective date of said Act No. 340 of 1947; so the 80-acre tract could not be sold except by mutual consent. But the parties acquired by entirety a 5-acre parcel of land *after* the effective date of Act No. 340 of 1947; and this 5-acre parcel was ordered sold and the proceeds divided. The evidence shows that the 5-acre parcel lies between the 80-acre parcel and the highway; that the 5-acre parcel is a means of entrance to the 80-acre parcel; and the sale of the 5-acre parcel would materially and adversely affect the sale of the 80-acre parcel. Under such circumstances, we hold that the 5-acre parcel and the 80-acre parcel should be handled together; and the 5-acre parcel should not be sold — absent mutual consent — until the 80-acre parcel is likewise sold.

(e) There are several parcels of real estate which are owned by the entirety and which were acquired *prior* to the effective date of Act No. 340 of 1947; and, under our holding in *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, such parcels cannot be sold or par-

titioned — so as to pass a good and clear title — during joint lifetime of the parties, unless both consent thereto. In the decree from which comes this appeal, the Trial Court gave Dr. Brimson the exclusive custody, control and management of these parcels, with right to rent and lease them, collect the rents, and then divide the net proceeds. Dr. Brimson was shown to be a man who never kept any books of accounts. He concealed his money in secret hiding places and rarely, if ever, used a bank. Under such conditions it would be almost impossible for Mrs. Brimson, or any other person, to know whether she was receiving her just portion of the net proceeds. Therefore, on remand, if the parties cannot agree on a mutual third person to handle these parcels, or cannot mutually agree to a sale, then the Chancery Court should appoint some suitable person or rental agency as receiver.

(f) *Rents Since Filing Of Suit.* Mrs. Brimson filed this suit on August 8, 1956, and she is entitled to her net portion of all of the rents received from all the entirety properties since that date. The Trial Court refused her this relief; but on remand Dr. Brimson should be required to account for all such items and to pay Mrs. Brimson her portion.

III. *Alimony, Attorney's Fees, And Court Costs.* Having made the property awards herein, we hold that these awards are sufficient and that Mrs. Brimson is not entitled to alimony (§ 34-1211 Ark. Stats.); but we hold that she is entitled to a total of $500 attorney's fees, and is also entitled to recover all costs of all courts to the present time, with future costs to be determined as such costs may arise.

CONCLUSION

The decree is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion, and for further proceedings not inconsistent herewith.

BURNETT *v.* AGENT.

5-1322 303 S. W. 2d 575

Opinion delivered June 24, 1957.

[redacted]

Dobbs, Pryor & Dobbs, for appellant.

Hugh M. Bland, for appellee.

GEORGE ROSE SMITH, J. This is an action brought by the appellant, Joe Burnett, under the statute permitting contribution among joint tortfeasors. Ark. Stats. 1947, § 34-1002. Service of process upon the appellee, Jane Agent, was obtained by serving a summons on the Secretary of State under the act relating to nonresident motorists. Ark. Stats., § 27-342.1. The trial court sustained the appellee's motion to quash the service, on the ground that the act providing for substituted service on nonresident motorists does not apply to a suit of this kind.

Burnett and Miss Agent were involved in an automobile accident in Fort Smith last year. Miss Agent, a resident of Oklahoma, was driving a car belonging to her father, Watie Agent. In litigation in the federal court Watie Agent obtained a judgment for $1,200 for the damage to his car, with the jury fixing Burnett's negligence at 80 per cent and Jane Agent's negligence at 20 per cent. Burnett paid the judgment and brought this action to enforce his claim for contribution in the amount of $240.

The statute provides that a nonresident who drives a motor vehicle on the highways of this state is deemed

to have appointed the Secretary of State as his agent for service "in any action or proceedings against him . . . growing out of any accident or collision" in which the nonresident may be involved while operating a motor vehicle on our highways. Ark. Stats., § 27-342.1. The other statutory conditions being present, the only question is whether this action grows out of the accident.

We have no doubt that it does, and the point has invariably been so decided elsewhere. *Dart Transit Co.* v. *Wiggins,* 1 Ill. App. 2d 126, 117 N. E. 2d 314; *Southeastern Greyhound Lines* v. *Myers,* 288 Ky. 337, 156 S. W. 2d 161, 138 A. L. R. 1461; *McKay* v. *Citizens Rapid Transit Co.,* 190 Va. 851, 59 S. E. 2d 121. We are not convinced by the appellee's argument that this action grows instead out of the proceedings in the federal court. A jury verdict cannot be regarded as creating a liability where none existed before. It is merely a step in the procedure by which an unliquidated tort liability is reduced to a fixed sum. The intervention of the federal court case does not break the direct connection between the appellee's liability, which arose at the time of the collision, and the present suit for contribution.

Reversed.

STEGALL *v.* RUMPH.

5-1255 303 S. W. 2d 571

Opinion delivered July 1, 1957.

S. Hubert Mayes, Shackleford & Shackleford, by *J. M. Shackleford, Jr.,* for appellant.

L. B. Smead and *Mahony & Yocum,* for appellee.

CARLETON HARRIS, Chief Justice. Mrs. Bessie Stegall, 62 years of age, was a passenger in an automobile with several members of her family, on the night of January 18, 1955, when said automobile was involved in a head-on collision with another car, driven by one Raymond Dennis, on the Magnolia highway, a few miles from the city limits of El Dorado, Arkansas.[1] An ambulance was dispatched from the Rumph Mortuary to the scene of the collision to carry the injured persons to the hospital. The ambulance (a 1952 Cadillac) was driven by Clarence Biggers, an employee of the mortuary, who was accompanied by Clarence Strother, another employee. At the scene of the collision, Mrs. Stegall, her grandson, and her daughter, were transferred from their automobile to the ambulance. Mrs. Stegall was placed on a stationary cot located on the right side of the rear compartment; her grandson was placed on a cot on the left side of the compartment; and the daughter took a seat on the floor immediately back of the driver's seat. Strother assumed a standing position in the aisle between the cots. Biggers left the scene intending to go to the Warner Brown Hospital in El Dorado. At the intersection of West Avenue and Main Street, the ambulance collided with an automobile being driven by appellee, Lucille (Mrs. W. E.) Hickman, which was traveling east on Main. Mrs. Stegall was transferred to another ambulance and taken on to the hospital where she remained for eighty-eight days. During this period, her left breast was removed,[2] and she received treatment for fractures to both legs, fractured ribs, broken nose, and other injuries of a less serious nature.

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[1] Mrs. Stegall and her husband brought suit against Dennis in the Union Circuit Court for damages suffered on account of injuries to Mrs. Stegall in this collision. The suit was settled on December 6, 1955, for $6,750.00.

[2] Because of a malignant tumor.

On March 10, 1956, Mrs. Stegall and her husband instituted this action against appellees, jointly and severally, seeking damages for injuries alleged to have been received in said ambulance collision. The complaint alleged that both appellees were guilty of negligence. Appellee, Rumph Mortuary, answered, denying negligence and denying that appellant, Mrs. Stegall, was injured. Appellee, Lucille Hickman, answered, denying any negligence on her part, alleging negligence on the part of the ambulance driver, and by amendment to her answer, alleged that whatever injuries Mrs. Stegall received were suffered in the previous collision with Dennis. On trial of the case, a jury verdict was returned in favor of the Rumph Mortuary and Lucille Hickman. From such verdict, appellants bring this appeal, contending the verdict is contrary to both the law and the evidence, and asking that said cause be remanded for a new trial.

The verdict was general; accordingly, there is no way to determine whether the verdict was based on a finding of no negligence on the part of the appellees, or whether it was based on the finding that Mrs. Stegall did not establish that she was injured in this collision (or both).

Appellees first contend that Mrs. Stegall was not injured in the second accident. No point would be served in detailing the testimony relating to the alleged injuries received, though some of the same injuries appear to have been also alleged in the suit against Dennis. Mrs. Stegall testified that the impact knocked her down between the two cots on her left side . . . her legs were still on the bed . . . that Strother fell on the cot across them . . . she felt pain in her ankles . . . she felt pain in her left side . . . her left breast struck the wheel of the cot upon which the grandson was lying. Biggers testified that after the collision, Mrs. Stegall's body, from the waist up, was still on the cot, that her hips were off, and her feet on the floor between the cots. Strother testified likewise, and further testified that he was not thrown upon Mrs. Stegall's body. Two physicians, in answer to a hypothetical

question embodying appellants' theory of the case, (as to the manner in which Mrs. Stegall's injuries were sustained) testified that the leg fractures could have been received in the second collision, and one testified that the breast could have been injured by striking the wheel of the cot, but neither would testify that said injuries did occur at the time of the second collision. Two other physicians, in answer to hypothetical questions embodying appellees' theory, testified, that, in their opinion, the leg injuries were sustained in the first collision, and one testified that he thought the rib injuries occurred in the first. While the physicians fairly well agreed that the breast cancer would not have been caused by the injury complained of, and that Mrs. Stegall was afflicted with this malignancy before either of the collisions, they were in disagreement as to whether or not an injury would aggravate this condition or hasten the necessity of the removal of the breast.

Rev. Cecil Owen, a minister, testified that he was the first person to arrive at the scene of the Dennis collision, that the car in which Mrs. Stegall was riding "was a total loss," and that Mrs. Stegall was in the front "between the dashboard and the seat, and just crumpled down there on the floor board." In manner to the question as to the position of her feet and legs below the knees, he replied:

"Well, they was under her; I don't know just how they were folded. * * * She was wedged against the seat with her back against the seat and her chest was against the dashboard, and the rest of her weight down on the floorboard with her feet and legs down under her."

Quoting further from the testimony:

"Q. In that position, state how much space between the dashboard and seat she occupied.

A. I don't . . . she might . . . she bent the dashboard in as the impact happened. And she had the whole space full up."

Further quoting:

"Q. How did you take her in the ambulance?

A. She went in by her main body, her head went first.

Q. In which door?

A. Well, there is a door up on the right side.

Q. Are you sure she wasn't put in the back end of that ambulance?

A. No, sir; she went in this front side.

Q. And how many men were carrying her?

A. Three.

Q. Why didn't you let her walk?

A. Well, I don't think she was able to walk.

Q. Why don't you think she was able to walk?

A. Well, she didn't seem to have any use of her legs, in the first place. That's the main reason.

Q. Was she complaining?

A. Well, yes, sir, she complained of her chest, she complained of her legs, and also the cut or gash, whichever it was, about her nose there."

Certainly there was substantial evidence that Mrs. Stegall's injuries were sustained at the time of the first collision, and this may well have been the reason for the jury's returning a verdict for appellees. The jury was properly instructed as to the law relative to determining whether Mrs. Stegall was injured in the second collision, and it is not contended otherwise by appellants; in fact, it is not argued that any of the instructions given in the case were erroneous. This court, of course, will not disturb the verdict of a jury if there is any substantial evidence to support same. *Humphries* v. *Kendall,* 195 Ark. 45, 111 S. W. 2d 492.

We come now to consider the question as to whether appellees were guilty of negligence. Here, too, if there be substantial evidence to support the finding of

the jury, the verdict will not be disturbed. The evidence showed that a drizzling rain was falling, and that the weather was somewhat windy and foggy on the night in question. On entering the city limits, the ambulance was traveling on Hillsboro, and continued on that street until reaching West Avenue. West Avenue is the main street going from the city, and is well congested with traffic. The ambulance turned north on West Avenue and proceeded down the street. Biggers testified that he went through three street intersections with the traffic light showing green, and that as he went through the third (at Cedar Street) he observed that the light at the intersection of West Avenue and Main (1 block away) had changed to amber. He proceeded on and entered the intersection, but was unable to say as to whether the light was still amber or had turned to red at the time he entered. According to his evidence, the intersection of West Avenue and Main is a "blind" corner because the telephone building is located on the edge of the street. Consequently, traffic approaching from the left could not be observed, and he did not see Mrs. Hickman until he had entered the intersection. He testified that at the time, he was driving at a speed of 25 to 30 miles per hour, was sounding his siren, and flashing the emergency lights. Appellee, Mrs. Hickman, testified that when she entered the intersection, the traffic light was green, and she was in second gear. She further testified that she did not hear the siren, nor did she ever see the ambulance. Under the law, the ambulance being an emergency vehicle, it was the statutory duty of Mrs. Hickman to stop her car and remain stationary until the ambulance had passed, provided the ambulance driver was signaling his approach by siren.[3] We conclude that there was plainly a jury question as to whether the collision was caused by the negligence of Biggers or of Mrs. Hickman — of both — or of neither. All of these issues were properly submitted to the jury by the court.

On March 11, 1957, this court entered an order, in compliance with motion of appellees, to require appellants to pay costs of furnishing additional portions of

[3] Ark. Stats. (1947) Anno., Vol. 6, Sec. 75-625.

the record. This amounted to $100. After a study of the complete record, we conclude that this particular cost item should not be borne by appellants. Appellees are accordingly directed to repay said amount to appellants.

With such modification, the cause is affirmed, with costs adjudged against appellants.

DOUGLAS *v.* DOUGLAS.

5-1313 304 S. W. 2d 947

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

B. Ball, for appellant.

Paul K. Roberts, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from the order of the Chancery Court of Bradley County, entered on January 8, 1957, in setting aside a divorce decree which had been rendered on August 30, 1954. In setting aside said decree, the court held same to be void for the reason that no regular, adjourned, or special term of the court was set for August 30th, nor such time set by rule or order of the court for the transaction of

business, and appellee had not been given notice of the August 30th date. In other words, the court held that the decree of August 30, 1954, was rendered in vacation and without notice.

The record reflects that appellant filed a suit for divorce against appellee on July 2, 1954, and appellee was duly served with summons. On July 13, a restraining order was issued restraining appellee from "molesting" appellant in the use of certain property described in the pleadings, and this order was served upon appellee.[1] Thereafter, on July 30, no answer or other pleading having been filed, the court heard the testimony of appellant and her witnesses, and a docket notation was made as follows:

"* * * the 'cause was submitted upon complaint, other pleadings and exhibits and the testimony of witnesses listed on margin (plaintiff, Mrs. W. M. Jackson, Mrs. Johnson, W. C. Kind). Decree of divorce granted to plaintiff, custody of child granted plaintiff, $30.00 per month child support granted. Resulting trust declared in land and other property in favor of plaintiff. Restraining order made permanent as per precedent.' * * *"

No precedent was signed by the Chancellor, and on August 30, 1954, the Chancellor endorsed upon the chancery docket the following:

"Upon motion of plaintiff, the judgment rendered herein on 7/30/54, having inadvertently been rendered prior to the proper elapse of time, is set aside, and being now re-heard upon the pleadings and testimony, the defendant, having had prior notice of this action and still failing to appear and plead herein, the plaintiff is granted the custody of the child, a divorce from the defendant and the prayer for constructive trust is granted in and to the real and personal property of the parties and the temporary restraining order is made permanent, as per precedent."

[1] The supplemental pleading seeking this relief and the order of the court granting same were lost from the files, and a carbon copy was substituted by stipulation of the parties.

A precedent was signed incorporating all of such findings except that portion relating to setting aside the judgment of July 30th. The then in office Chancellor testified in the present case that the fact the matter had been heard before the expiration of 30 days[2] had been called to his attention, which was the reason for nullifying the previous notation.

Appellee, under the law, had 20 days in which to file an answer, or other pleading, after being served with summons. As of August 30th, a date far beyond the period in which the answer should have been filed, he still had filed no pleading, nor requested additional time to do so. This was true, though he knew the cause was pending, had already been served with a summons, had been served with a restraining order, and had further been advised, according to the testimony, by the Chancellor, that if he had any defense and wanted to assert it, an attorney should be consulted. Apparently, from the record, two attorneys were consulted, but no answer was filed.

Appellee argues that he had until noon of October 25th (first day of the new term) to file his answer. This would be true if the court had not been in session for business in Bradley County from the time of the filing of the complaint until October 25th, or if the 20 days time for filing answer had not expired before August 30th, but this contention is without merit under the facts in the cause before us. Subsequent to August 30th, through various attorneys, appellee filed one motion and four suits to set aside this decree, the last one, filed on September 5, 1956, occasioning the instant litigation. In stating his grounds in the suits to set aside the decree, appellee never alleged he was under the impression that he had until the first day of the next term to file an answer; to the contrary, he alleged that he had been lulled into a false sense of security by appellant; that appellant told him, after filing her suit, that she was not "going any further" with it, and that she sent their

[2] See Act 47 of 1953.

daughter to him to convey the same information.[3] In the motion, (first pleading filed) he alleged, as his reason for not filing answer, that he had been financially unable to employ an attorney. In other words, appellee was not depending upon the provisions of Section 27-1135,[4] but was depending entirely upon other grounds. Further, there was no sufficient showing of unavoidable casualty, or that appellant had made the statements to appellee upon which he allegedly relied.

As stated in the opening paragraph, the order of the court in setting aside its decree of August 30th was based upon the finding that the decree was rendered at a time when the court was not legally in session, that is, the decree was rendered in "vacation," and the same was therefore void. We do not agree with this conclusion. Section 22-408.1, Vol. 3, Ark. Stats. (1947) Anno., provides as follows:

"* * * There shall be no adjournments of Courts of Chancery, but such courts shall be deemed in recess while not engaged in the transaction of business. * * *"

Section 22-408.2 further provides:

"At any time while mentally and physically competent, and physically present in the geographical area of the Chancery Circuit which he serves as Chancellor, the Judge of a Chancery Court may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any Chancery Court over which he presides, subject to such notice of the time, place and nature of the hearing being given, as may be required by law or by rule or order of the court, provided that no *contested case* can be tried *outside the county of the venue of said case,*[5] except upon the agreement of the parties interested."

[3] Both appellee and the daughter vigorously denied this assertion in their testimony. The parties hereto did not again live together after appellant filed her suit.

[4] Later superseded by Act 49 of 1955, which, in turn, has been superseded by Act 53 of 1957. See also Act 70 of 1957.

[5] Emphasis supplied.

The court was not in recess for it was engaged in the transaction of business. The hearing of the evidence and the signing of the decree on August 30th were normal transactions of a court in session. Appellee argues that regular or adjourned sessions of court were held in other counties of the district, between the Bradley County May and October terms, and this necessitated another order opening court in Bradley County each time the court returned to that county for the transaction of business. As authority for such argument, he cites a case decided many years before the passage of Act 6 of 1951 (Section 22-408.1 and 22-408.2). The argument is entirely contrary to the statute just mentioned, and is therefore without merit.

There is no showing in the record that the court had established any rules or regulations at that time (relative to the place and particular time for hearing evidence and rendering decisions) that were violated by hearing the cause on August 30th, or which caused appellee to be misled. Appellee was not due to receive notice, for he was in default. The court was not required to notify appellee, for he had forfeited the right to such notice by his failure to file an answer or otherwise plead. To the contrary, when appellee was served with a summons, he was given legal notice of the pending litigation, and was required to take steps to preserve his rights.

This was not a contested case, nor was it a case from another county in the district. The learned Chancellor apparently relied in large measure upon the case of *Howell* v. *Van Houten,* 227 Ark. 84, 296 S. W. 2d 428, but the facts in that case were far different from those with which we are presently concerned. There, an unlawful detainer action was brought in the Circuit Court of *Prairie* County, in which county were situated the lands said to be unlawfully detained. The Circuit Judge entered judgment against Howell while in chambers in *Lonoke, Lonoke County.* In the present cause, the suit was *filed in Bradley County*; the evidence was *heard in Bradley County,* and the decree was *ren-*

dered in Bradley County. We accordingly conclude that the court had full authority to render said decree.

Summarizing, it appears that though appellee knew about the pendency of the action, no steps were taken to defend same. Nearly two months elapsed after the rendition of the August 30th decree before any pleading was filed. Such pleading was the motion to set aside the decree, and was filed on October 23, 1954, and amended on January 29, 1955. No action was ever taken on this motion. A complaint was filed on February 12, 1955, seeking to set aside the decree. Appellee took a non-suit on April 15, 1955. Following such action, appellant remarried. A second suit was filed by appellee on April 16, 1955; non-suit was taken in September, 1955. A third suit was filed on December 3, 1955, and dismissed by the court on motion of appellant for want of prosecution. The instant action was commenced on September 5, 1956. It cannot be said that appellee has exercised diligence in asserting any alleged rights, and, in fact, it appears that his interest in instituting the various suits was largely influenced by the fact that appellant had instituted action in the Bradley Circuit Court to enforce certain property rights granted in the divorce decree.

For the reasons herein set out, we hold that the court erred in setting aside the divorce decree rendered August 30th. The cause is accordingly reversed and remanded with directions to reinstate said decree.

FITZGERALD *v.* FITZGERALD.

5-1321 303 S. W. 2d 577

Opinion delivered July 1, 1957.

R. H. Peace, for appellant.

H. L. Wilkinson, Pat Robinson and *Patsy Robinson,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, John Fitzgerald and appellee, Syble Fitzgerald, were married August 19, 1928. On April 16, 1955, appellee sued for divorce on the ground of personal indignities. She asked for the care and custody of a minor child, Mary Elizabeth, 9 years of age, and an allowance for her support. She further prayed for possession and the use of homestead property consisting of 75.61 acres, for certain personal property and for costs and attorney's fee.

Appellant answered with a general denial and in a cross-complaint asked for a divorce on the grounds of indignities and desertion.

Trial was had on October 25, 1955, and at the close of all the testimony the court took the case under advisement and thereafter, on September 10, 1956, rendered a decree dismissing appellant's cross-complaint for want of equity, and granting a divorce to appellee awarding her the care and custody of the little girl, with reasonable visitation rights to appellant. Appellee was also given possession and use of the homestead property along with all personal property connected with the homestead, the household furniture, their joint savings account in the amount of $250 and one-half of the cash maturity value of certain U. S. Government Bonds in the amount of $800. The decree further directed that appellant pay to appellee, for support of the minor child, $50 per month beginning January 1, 1956, and that appellant's one-half of the bonds, in the amount of $400, be applied on these nine back installments which amounted to a total of $450. Appellant was further required to pay all court costs including $150 to appellee's attorney.

For reversal appellant first contends that appellee's proof was not sufficient to support her ground for divorce and that her testimony lacked corroboration. We do not agree to either contention. After review of all the evidence, which we do not attempt to detail here, we cannot say that the findings of the chancellor were against the preponderance thereof. Appellee testified, in effect, that appellant habitually cursed, threatened and abused her. On occasions he accused her of unfaithfulness, which she denied. That his cruel treatment had become unbearable. On one occasion he struck her. Much of his mistreatment of her was in the presence of Mary Elizabeth, causing her to cry, to fear him, and to become so nervous and irritable that it became necessary to take her to a physician. Appellee's parents and other witnesses tended to corroborate material parts of appellee's proof.

In a contested divorce case, as here, the corroboration may be relatively slight since the purpose of this requirement is to prevent collusion. See *Ham* v. *Ham,* 224 Ark. 228, 272 S. W. 2d 446. We said in *Morgan* v. *Morgan,* 202 Ark. 76, 148 S. W. 2d 1078, "It is not necessary that the testimony of the complaining spouse be corroborated upon every element or essential of his or her divorce. It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion, the corroboration only needs to be very slight." As indicated, we hold that appellee's proof was sufficient.

Next appellant contends that "the decree awarding all the property to the appellee [especially the possession and control of the homestead] was against the statute governing the division of property in such cases." We do not agree. In a similar situation this issue, as to the homestead, was determined against appellant's contention in our very recent case of *Jarrett* v. *Jarrett,* 226 Ark. 933, 295 S. W. 2d 323. We there said: "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."

The court did not err in awarding costs and an attorney's fee to appellee. Such allowances are always within the sound discretion of the trial court and unless abuse of such discretion be shown, we will not disturb it. See *Plant* v. *Plant,* 63 Ark. 128, 37 S. W. 308 and *Gabler* v. *Gabler,* 209 Ark. 459, 190 S. W. 2d 975.

We further hold that the court did not err in directing the $50 monthly payment for child support to begin January 1, 1956, since it is undisputed that the court had the case under advisement from October 1955

until September 10, 1956, when the decree was rendered, and since this period of time, approximately 9 months, followed the trial and the completion of all the testimony.

Finally, appellant says "that the rights of visitation should have been made more definite and certain in the decree." On this point the decree recites: "Said defendant [appellant] shall have the right to visit said child at reasonable times and places," and further in the decree "that this court retains jurisdiction of this cause for any further necessary orders." Should appellant, therefore, at any time feel that he was being denied by appellee the opportunity of reasonable visitation, the trial court will be open to him to preserve his rights in this connection.

Finding no error, the decree is affirmed.

ST. LOUIS-SAN FRANCISCO RY. CO. *v.* ARK. PUBL. SERVICE COMM.

5-1273 304 S. W. 2d 297

Opinion delivered July 1, 1957.

George E. Bailey, St. Louis, Mo.; *Edward L. Westbrooke* and *Bernal Seamster,* for appellant.

John R. Thompson, Rose, Meek, House, Barron & Nash, Stanley E. Price and *W. Dane Clay,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves the ad valorem assessment of the St. Louis San Francisco Railway Company (hereinafter called "Frisco") for the year 1955. The Arkansas Public Service Commission[1] (hereinafter called "Commission") made the assessment (see § 84-606 *et seq.* Ark. Stats.); and Frisco appealed to the Pulaski Circuit Court (see Act No. 388 of 1953 as found in § 84-120 Ark. Stats. Cumulative Pocket Supplement). The Circuit Court entered its judgment; and Frisco appeals to this Court. We have three main questions; being extent of review, the valuation, and the ratio of assessment.

I. *Extent Of Review.* The first point is the extent of review in the Circuit Court of the assessment made by the Commission.[2] Prior to Act No. 388 of 1953 (see § 84-120 Ark. Stats. Cumulative Pocket Supplement), the applicable law was Act No. 191 of 1949, and it provided in Section 8 thereof that any person aggrieved by the findings of the Commission could appeal to the Circuit Court and the proceedings ". . . shall be tried *de novo* on the record made before the Commission." But in the Act No. 388 of 1953 the words "on the record made before the Commission" were deleted; so that the law now merely provides that there would be a *de novo* trial in Circuit Court.[3]

When we consider the entire matter of assessments and the power of the Courts over assessments, it is clear that this Act No. 388 of 1953 does not contemplate the kind of *de novo* trial in Circuit Court — in an appeal from the Commission — as one would have in a *de novo* trial in an appeal from a Justice of the Peace Court

[1] In this Court on motion of Frisco, and in order that all possible parties may be in the case, two newly created state agencies have entered their appearances, adopting and supporting the position of the Arkansas Public Service Commission. These two new agencies are the Arkansas Commerce Commission and the Arkansas Tax Assessment Coordination Department. (See Acts 132 and 234 of 1957.)

[2] In 2 Arkansas Law Review, page 67, there is an enlightening article entitled, "Judicial Review of Findings of the Arkansas Public Service Commission."

[3] Merely for information purposes, attention is called to Act No. 234 of 1957, in Section 6 of which the words are used: ". . . *de novo* on the record made before the respective Commission."

to the Circuit Court. The Circuit Court does not sit as an assessment or appraisal body when it hears the appeal from the Commission. In *Cook* v. *Surplus Trading Co.,* 182 Ark. 420, 31 S. W. 2d 521, we said:

"It is not within the province of the Courts to assess property, . . . Courts can only review the assessments made by the assessing officers, and have no power under our Constitution and laws to make the assessments."

The purpose of any Court appeal from an assessment or equalizing agency is to see that the assessment is neither erroneous in figures, nor arbitrary in measuring, nor confiscatory in results. In 84 C. J. S. 1123, the effect of the holdings is summarized in this language: "On an appeal from an assessment, the Court will not disturb the decision of the assessors unless it is clearly erroneous, or, unless, as required by Statute, the assessment is manifestly excessive, fraudulent, or oppressive. Ordinarily the Court has no jurisdiction to make a tax assessment, and if it finds error, it should remand the case to the assessing body for further proceedings in accordance with the Court's findings."

On appeal to the Circuit Court in this case, the record before the Commission was filed; and Frisco, as the objector, had the burden of showing that the assessment was erroneous in figures, arbitrary in measurement, or confiscatory in result. In its judgment, the Circuit Court found certain items misplaced or overvalued, and stated as to what extent the original assessment was a mistake in figures. It found that there was nothing arbitrary in the method of determination, nor confiscatory in the result. The Circuit Court remanded the matter to the Commission to make the proper corrections. This was the correct procedure because our Statute, then effective, (§ 84-611 Ark. Stats.) directed the *Commission* to certify to the assessor of each County affected, in which is located any property of the carrier, the correct amount of the assessment in order that the taxes shall

be extended and collection made, as in cases of other property.[4]

II. *Valuation Of Frisco's Property.* From the judgment of the Circuit Court Frisco appeals to this Court, claiming both mistake in figures, arbitrariness of the "yardstick," and confiscatory results of the valuation determined; and we proceed now to consider the matter of valuation. In this Court the Commission has submitted a concise tabulation which the Commission claims is Frisco's assessment, as made by the Commission and as modified by the Circuit Court judgment. We copy this tabulation:

I. Cost Value:

(A)	$449,827,713.00	RCN-D[5] as of 1/1/54
(B)	15,812,377.00	Net Plant Additions in 1954
(C)	465,640,090.00	RCN-D as of 1/1/55
(D)	10,605,882.00	Working Capital
(E)	9,274,023.00	Materials and Supplies
(F)	485,519,995.00	Cost Value

II. Capitalized Earnings Value:

(G)	16,674,770.00	5-year Average Net Operating Income
		6% Capitalization
(I)	277,912,867.00	Capitalized Earnings Value

III. Stock and Debt Value:

(J)	267,487,118.00	Stock and Debt as of 1/1/55
(K)	17,717,051.00	Non-Utility Property
(L)	249,770,067.00	Stock and Debt Value

[4] Some time ago the parties stipulated in this Court that, until the final decision in this case, Frisco might pay the taxes on a valuation of $5 million for the year 1955, conditioned that as soon as this case was finally decided, any additional tax and interest thereon, if any, would be promptly paid by Frisco. This will be covered in our directive contained in the section entitled "Conclusion".

[5] "RCN-D" means "Reconstruction New Less Depreciation".

IV. Recapitulation:

	485,519,995.00	
	277,912,867.00	
	249,770,067.00	
(M)	3/1,013,202,929.00	
(N)	337,734,310.00	System Value
(O)	10.33%	Arkansas Ratio to System
(P)	34,887,954.00	Arkansas Value
(Q)	20%	Assessment Ratio
(R)	6,977,591.00	Arkansas Assessment

It will be observed that each item is identified by letter; and later we shall explain and discuss the controversy on some of these items, likewise making reference to alphabetical identification. But before considering the matter of figures, there is the question of the "yardstick": by which is meant the factors that the Commission used to determine the valuation of Frisco's properties. The Commission considered three factors, being (I) cost value (lines A to F), (II) capitalized earnings value (lines G to I), and (III) stock and debt value (lines J to L). These three factors were given equal weight in determining the system value because in the recapitulation (IV), the three values were totalled and divided by three. This use of cost value, capitalized earnings value, and stock and debt value, is what we refer to as the "yardstick." Our applicable statute on method of valuing properties, as in this case, is § 84-606 Ark. Stats., and the germane portions of it provide:

"The valuation of the property of all . . . corporations required by law to be assessed by the Commission shall be made upon the consideration of what a clear fee simple title thereto would sell for under conditions under which that character of property is usually sold. As evidence tending to show what this would be the Commission, is so far as other evidence and information in its possession does not make it appear improper or unjust for it to do so, shall ascertain as nearly as it can

and consider the market or actual value of all outstanding capital stock and funded debt and the income of such companies, and also the estimated investments and valuation of said property as set up by the officers or agents of such companies as a basis for the adjustment of rates or charges for service to the public by such companies, and such other information as to value the Commission may obtain. (Acts 1927, No. 129, § 18 p. 400; Pope's Dig., § 2044).

The Statute requires the Commission to assess the property on what a ". . . clear fee simple title thereto would sell for under conditions under which that character of property is usually sold." Then, as evidence to aid the Commission in determining the "clear fee simple title" value, the Commission, if it is not improper or unjust to do so, shall consider (a) the market or actual value of outstanding capital stock and funded debt and the income of such companies, and (b) the established investments and valuation of the properties, and (c) such other information as to value as the Commission may obtain. These factors — cost value, capitalized earnings value, and stock and debt value — have been used by the Commission in this case (and the record shows have been used by the Commission in many other cases) as an aid, and as evidence of the actual clear fee simple title value, which is the ultimate desire in ad valorem assessments.

Is this method — of cost value, capitalized earnings value, and stock and debt value — a fair "yardstick" to determine the system value of Frisco's property? Frisco claims that the cost value is overweighted and that it should be given little, if any, consideration; and Frisco also claims that some of the other factors in the "yardstick" have been overemphasized. We hold that the "yardstick" used by the Commission in determining the system value of Frisco in this case is fair and not arbitrary. It is undenied that such a "yardstick" has been used by the Commission heretofore, and that such a "yardstick" is used in other states. One such case is that of *Chicago & Northwestern Ry. Co.* v. *Department*

of Revenues, 6 Ill. 2d 278, 128 N. E. 2d 722, decided by the Supreme Court of Illinois in 1955, with *certiorari* denied by the U. S. Supreme Court, 251 U. S. 950. This is not the only "yardstick" that could be used, but it is fair and equitable. As Mr. Justice BUTLER said, in 1934, in *Rowley* v. *Chicago & Northwestern Ry. Co.,* 293 U. S. 102, 79 Law Ed. 222, 55 S. Ct. 55, in discussing the assessment of railway properties by the State of Wyoming:

"The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and property may be taken into account to guide judgment in determining what is the money equivalent — the actual value — of the property."

We come then to the specific figures contained in the foregoing tabulation. Line (A) is the "Reproduction Cost New Less Depreciation," and is a figure furnished the Commission by the Interstate Commerce Commission. Line (B) — the plant addition figure — was furnished the Commission by Frisco. Lines (D) and (E) are self explanatory. So, the total of the cost value shown in line (F) is correct.

(G). In the tabulation the figure in line (G) is $16,674,700 as the "5-year average Net Operating Income." Frisco challenges this figure because it is the income *before the deduction of income tax.* The Commission concedes that this figure is before any deductions for income taxes. If there should be made a deduction for income taxes, the figure in line (G) would become $14,393,207. The question, therefore, is whether the 5-year average Net Operating Income should be listed *before* or *after* the payment of income tax. It must be borne in mind that the Commission was considering the "Capitalized Earnings Value" to aid in determining the clear fee simple value of the Frisco system. In-

come tax is calculated on *net earnings*. The tax may be great or small, depending on the needs of the taxing power. Prior to World War I, income tax was either non-existent or negligible; there was a period between World War I and World War II when the tax was small; at present the tax is large. Deduction of income tax is not an aid in determining "Capitalized Earnings Value" because the invested capital has made an earning regardless of the income tax rate. This is an *ad valorem tax* case and not an *income tax* case. It is not a question of what dividends go to the stockholders, but what is the "Capitalized Earnings Value." So we see no merit to Frisco's claim that the income tax should be deducted *before* listing the operating income.

(H) In the tabulation, in line (H) the figure of 6% is used by which to capitalize the earnings value. Frisco complains of this 6% figure and says it is too high; but we consider 6% to be a fair figure. It was stated by the Commission's witnesses, and without serious denial by Frisco, that the Commission had used this same figure for a number of years and that other Commissions and tax assessing bodies used the same figure. Certainly it cannot be said that the Commission acted arbitrarily in using the 6% figure for capitalization in this case.

(K) In the tabulation, line (K) contains the figure of $17,717,051 as a deduction for non-utility property. Section 84-610 Ark. Stats. requires that all property — owned by such a taxpayer as Frisco in this case — not used in the utility operation shall be assessed by the County Assessor of the County wherein such property is located; and § 84-613 Ark. Stats. requires that the Commission, in assessing the true value of such a utility as Frisco, shall deduct the value of all property ". . . not used in the utility operation of the Company." Therefore, the Commission undertook to exclude the value of the non-utility property of Frisco. At the time the Commission made the assessment, the latest report made to it by Frisco was one made in early 1954 (as required by § 84-601 and § 84-603 Ark. Stats.); and that report showed the value of Frisco's non-utility prop-

erty to be $17,717,050, which is the same figure shown in line (K) of the tabulation. Frisco claims that it made a mistake in its 1954 return and that the correct figure that should have been in the return was $63,611,641. But when an analysis is made of Frisco's larger figure, it shows that it was not a mere mistake by Frisco, but that the larger figure was based on items that appear to have been an afterthought. For instance, in the larger figure of $63 million plus now claimed by Frisco, there is the stock market quotation of December 31, 1954 of some stock owned by Frisco in the New Mexico and Arizona Land Company. That stock market quotation could not have been in existence when Frisco made its return to the Commission in early 1954. Also, in Frisco's larger figure of $63 million plus, there is included an item of temporary cash investments in excess of $11 million. These cash investments might have been used by Frisco as asset available for use in its public utility operations. At all events, we cannot say that the Commission made a mistake or was arbitrary, in using in line (K) the identical figure furnished by Frisco to the Commission, rather than a figure urged by Frisco much later. So, we find no error in the figure used by the Commission in line (K) of the tabulation.

(O) In discussing the "yardstick," we said that line (N) was the total system value of Frisco. The next step of the Commission was to determine the portion of the total system value that might be considered as being in Arkansas.[6] In line (O) of the tabulation there is the figure of 10.33% as the Arkansas ratio to the system; and Frisco challenges that figure and in-

[6] Section 84-610 Ark. Stats. says in part: "The Commission shall then ascertain and fix the value of the total utility operating property, tangible and intangible, in this State, by taking such proportion of the true market or actual value of the entire operating property, tangible and intangible, of such company, actually used in its public utility business, as its total lines within this State bear to the total lines both within and without this State, or as its total receipts or income from operation within this State bear to its total receipts or income from operation both within and without this State, or by using such other recognized method, or combination of methods, as will, in the judgment of the Commission, result in a just and equitable apportionment to this State of its due proportion of the value of the total utility operating property."

sists that it is too large. In view of the state of the record before us and our holding on the Extent of Review (as discussed in Topic I, *supra*), we conclude that Frisco is correct in this contention. The Commission, in making its determination of the tax assessment of Frisco, fixed the "Arkansas ratio to the system" separately on each of the three principal items. That is to say: on "I. Cost Value" the Commission fixed the "Arkansas ratio to the system" to be 10.40%; on "II. Capitalized Earnings Value" the Commission fixed the "Arkansas ratio to the system" to be 9.14%; and on "III. Stock and Debt Value" the Commission fixed the "Arkansas ratio to the system" to be 9.71%. The average of these percentages is 9.75% and not 10.33%. When the case went to the Circuit Court, that tribunal held that the "Arkansas ratio to the system" should be determined after the total system value had been found (as in Line N, *supra*) rather than on each of the three separate items. It is true that in the Circuit Court hearing the Commission attempted to show additional factors to be considered in fixing the "Arkansas ratio to the system," some such being: car and locomotive miles, traffic units, traffic miles, etc.[7]; and the Commission now claims that with these other factors the percentage should be 10.33% rather than 9.75%. But under our holding in Topic I, *supra* (on the Extent of Review), it is clear that the hearing in the Circuit Court was not for the purpose of allowing the Commission to have the Circuit Court make an *increase* in assessment: rather the hearing in the Circuit Court was for the purpose of allowing Frisco to show either that the assessment was erroneous in figures, arbitrary in measurement, or confiscatory in result. Under such circumstances, the Commission cannot now justify its claim that Line (O) should be 10.33%. Instead, the figure in Line (O) as the "Arkansas ratio to the system" should be 9.75%, which is

[7] We are not holding that these factors could not have been considered by the Commission originally: we are merely holding that these factors could not be brought into the Circuit Court hearing for the first time in order to thereby *increase* the percentage already fixed by the Commission.

the average of the figures used by the Commission in making the assessment. This change from 10.33% to 9.75% will reflect a difference in Lines (P) and (R) of the tabulation. The correct figures for Lines (P) and (R) will be stated in the paragraph of this opinion entitled "Conclusion."

To summarize: we have considered, by reference to lines in the tabulation, all of the lines (A) to (O), inclusive, that have been challenged by Frisco seriously enough to justify discussion; and we have approved all lines down to Line (N) and now change Line (O) to 9.75%.

III. *Assessment Ratio.* Leaving Lines (P) and (R) for the portion of this opinion entitled "Conclusion," we come to Line (Q) of the tabulation which showed the assessment ratio at 20%; and this figure is so seriously challenged by Frisco that we have assigned it a topic heading. Property in Arkansas is not assessed at its actual value but only at a percentage of the actual value; and in line (Q) of the tabulation the Commission determined that the property of Frisco in Arkansas would be assessed at 20% of its actual value. Frisco says that other property in Arkansas is not assessed so high, and that 12.32% is correct instead of 20%. Section 84-714 Ark. Stats. provides that the Commission shall sit as the State Board of Equalization in each year for the purpose of equalizing the "taxable valuation" of all property. Such Board examines and compares the returns from the several counties, hears witnesses, and makes investigations ". . . so that all the taxable property throughout the State shall be assessed uniformly . . . at such percentum thereof as has been duly certified by the Commission." Section 84-103 (c) requires the Commission to certify to each County in the State in advance of the assessing period ". . . a certificate showing the percentum of true and full market or actual value that it has used, or will use, in valuing for taxation for that year the property the Commission is required to assess." The evidence

in this case shows that the Commission had certified 20% of the true or actual or market value as the assessment figure that the Commission had used and would use; and the County assessing authorities were required to use the same figure in their assessments.[8]

To justify its claim that the 20% as used by the Commission is too high and that the correct figure should be 12.32%, Frisco offered in evidence its Exhibit Q, being a document of twenty-five pages, dated March 1, 1956, and purporting to be a "Report of Committee to study ratio of 1955 Arkansas ad valorem property assessments to 1954 real estate sales."[9] This report is a very interesting document, but even if sufficiently authenticated to constitute evidence—a point we need not decide—it is nevertheless only a sample check or a series of spot checks of a limited number of ad valorem property assessments, as compared to the consideration for the sale of such property as disclosed either by the Federal stamps on the deeds or the recited consideration. Certainly such a study of a limited number of transactions cannot prove that all transactions in the State would show that the property was only assessed at 12.32% of its value. Neither can this study irrefutably prove (a) that the Commission was in error in fixing 20% as the amount for which it assessed the properties it was required to assess, or (b) that the various County Assessors disobeyed the Statute and failed to assess the properties in their Counties at the figure the Commission had certified. The witness, Walter P. Hinton, Jr., who was Director of the Assessment Coordination Division of the Arkansas Public Service Commission, stated that under Act No. 153 of 1955 the State of Arkansas was attempting a complete ratio study and

[8] The witness, Earl Berry, who is Director of the Tax Division of the Arkansas Public Service Commission, testified that the 20% figure was used in this case because the Commission, under its order of December 18, 1954, had certified 20% of the true market value of the property as the percentage to be used in assessing.

[9] This report was made by and to the Missouri-Arkansas Association of Tax Representatives, which is an association composed of the tax representatives of various utilities, all of whom are interested in seeing that their property is not over-assessed.

that it would not be completed until the latter part of 1957. Until a complete study is shown to have been made, we think it would be improper to allow a partial study to refute the duty of the local assessing authorities to assess at the figure certified by the State Commission.

We recognize that obtaining a fair assessment of property has been a serious problem in this State for many years; but we know that considerable headway has been made toward more equitable assessments. Act No. 153 of the Legislature of 1955 shows the labor that the State is undertaking in this regard;[10] and in Section 4 of that Act the same figure of 20% is used. Some classes of property in Arkansas are assessed at more than 20%; other classes are assessed at less than 20%; but the State is striving for a 20% figure. In this case Frisco has failed to show either that the Commission was in error in fixing the figure at 20%, or that the said figure was arbitrary, or that the said figure would result in confiscation.

CONCLUSION

The Commission has cross appealed, complaining of certain rulings of the Circuit Court; but in approving, as we have, Lines (A) to (N) of the tabulation, we have thereby disposed of the cross appeal.

We come now to Lines (P) and (R) of the tabulation. These must be changed because of the change made in Line (O) from 10.33% to 9.75%. Here are the concluding lines of the tabulation as revised and corrected by this opinion:

(N)	$337,734,310.00	System Value
(O)	9.75%	Arkansas Ratio to System
(P)	32,929,095.00	Arkansas Value
(Q)	20%	Assessment Ratio
(R)	6,585,819.00	Arkansas Assessment

[10] Some of our cases arising because of this Act, or other tax assessing acts, are *Latham* v. *Hudson*, 226 Ark. 673, 292 S. W. 2d 252; and *Strawn* v. *Campbell*, 226 Ark. 449, 291 S. W. 2d 508.

This revised tabulation shows the Arkansas assessment of Frisco for 1955 to $6,585,819. Frisco has failed to show that such figure is either erroneous, or arrived at by an arbitrary method, or would result in confiscation. Therefore, we determine that figure to be correct, and we remand this case to the Circuit Court with directions to remand to the Commission to use the said figure and to take all steps for the Arkansas collecting agencies to collect the tax and interest from Frisco based on said figure. Interest on the balance of the tax due by Frisco will be calculated at 6% from November 1, 1956 until paid; and if not paid within thirty days after the determination of the balance actually due by the divisions, then the full statutory penalty, interest and costs will attach to said balance, the same as for delinquent taxes. The costs of this case are assessed against the appellant.

GEORGE ROSE SMITH, J., not participating.

[redacted]

CLAUSS *v.* BAUMGARTNER.

5-1291 305 S. W. 2d 116

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

[redacted]

M. Steele Hays and *Richard Mobley,* for appellant.

Robert J. White, for appellee.

ED. F. MCFADDIN, Associate Justice. This case involves accretions claimed by adjacent riparian owners

on the west bank of the Arkansas River in Logan County. The appellants insist that the accretions should be apportioned according to the rule stated in *Malone* v. *Mobbs,* 102 Ark. 542, 145 S. W. 193, 146 S. W. 143 and reiterated in *Hamilton* v. *Horan,* 193 Ark. 85, 97 S. W. 2d 637. The appellees recognize the rule of these cases; but claim that in this case there was an agreement as to the boundary line, and that such agreement is decisive of the case.[1]

Appellants, Mr. and Mrs. Clauss, owned lands in Section 3, Township 8 North; and appellees, Baumgartner *et al.* owned lands adjacent to the *north* and being in Section 34, Township 9 North. The Arkansas River is the east boundary of the lands in said sections.[2] Mr. and Mrs. Clauss filed suit on January 13, 1955, claiming that the Arkansas River, in moving easterly from 1927 to 1955, had added accretions on the west bank; and that under the rule of apportionment stated in the Arkansas cases previously cited, the line of division of such accretions would give Mr. and Mrs. Clauss river frontage of approximately one-quarter of a mile extending northerly into the lands now in Section 34. The defendants, Baumgartner *et al.,* claimed, *inter alia,* that it had been agreed many years ago by the owners of Section 34 and Section 3, that the south boundary line of Section 34 (being also the north boundary line of Section 3) extended easterly to the Arkansas River was the division line of the accretions. The Chancery Court found that the said agreement had been made; and therefore entered a decree for the defendants, Baumgartner *et al.* From that decree the plaintiffs, Mr. and Mrs. Clauss bring this appeal.

I. *Proof Of The Alleged Boundary Agreement.* Except for the agreement relied on by the appellees, the appellants would prevail on the apportionment of the

[1] This was one of the best tried cases on accretions that we have been privileged to examine. Appellants, having the burden in the lower court and also in this Court, have presented every available source of information on the course and changes in the river; and both sides have favored us with excellent briefs.

[2] In *Knight* v. *Rogers,* 202 Ark. 590, 151 S. W. 2d 669, we had occasion to consider the accretion on the north of said Section 34.

accretions; so we come directly to the agreement. Baumgartner *et al.* contracted to purchase their lands in Section 34 in 1932; received their deed in 1934; had a survey made in October, 1935; there was then a distance of 2,535 feet from the southwest corner of Section 34 easterly to the river; and Baumgartner *et al.* used the south line of Section 34 as the boundary line. In 1940 Pierce and Munn purchased the lands in Section 3; they had Colonel Stroop make a survey of the accretion land; after the Stroop survey, Munn and Baumgartner had a conversation about the boundary line; and it was agreed that the south line of Section 34 extended easterly to the river would be the division line of the accretions, and this boundary line would extend to the southeast corner of Section 34 if the river added accretions for that distance. A fence was constructed along the south line of Section 34 to the river bank; Baumgartner *et al.* cut timber and exercised other acts of ownership of the lands north of the division line; and Pierce and Munn cut timber and exercised other acts of ownership on the lands south of the division line. Portions of the fence along the division line were washed away in subsequent overflows, but the division line was blazed, and portions of the fence were still visible at the time of the trial in the Chancery Court.

Munn and Pierce sold the lands in Section 3 to Neumier in 1943; Neumier and his tenants remained south of the south line of Section 34 extended easterly; Neumier sold to Clauss in 1948; Clauss never made any overt claim to any of the lands north of the south line of Section 34 extended easterly to the river until a short time before the filing of this suit. Baumgartner *et al.* exercised all the possession that was exercised by anyone on the lands north of the south line of Section 34 extended easterly to the river; and neither Clauss nor anyone else ever attempted to exercise any possession of any kind north of the said line.

In view of the foregoing evidence, and others in the record, it is clear: (a) that up until 1940 there had been uncertainty as to the dividing line of the accretions; (b) that after separate surveys the then owners agreed

on the division line as being the south line of Section 34 extended easterly to the river; (c) that both parties making the agreement claimed up to the said dividing line and never claimed beyond it; and (d) that the successors in title to Munn and Pierce (Neumier and Clauss never openly claimed beyond the agreed boundary line until a short time before the filing of this suit.

It is true that the evidence is in sharp dispute on many of the matters we have detailed; and it is also true that Baumgartner's testimony as to the boundary line agreement was attacked as contradictory to that contained in his previous deposition. Nevertheless, the Chancery Court found that there had been an agreement as to the boundary line and that such agreement had been observed by the owners of Section 3 until shortly before the filing of this suit. From a careful study of the record, we cannot say that the finding of the Chancery Court is against the preponderance of the evidence on this factual question.

I. *The Validity And Efficacy Of The Boundary Line Agreement.* We have many cases on agreed boundary. Some of them are: *Sherman* v. *King,* 71 Ark. 248, 72 S. W. 571; *Cox* v. *Daugherty,* 75 Ark. 395, 36 S. W. 184, 112 Am. St. Rep. 75; *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B 661; *Malone* v. *Mobbs,* 102 Ark. 542, 145 S. W. 193, 146 S. W. 143, Ann. Cas. 1914A 479; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710; *Peebles* v. *McDonald,* 208 Ark. 834, 188 S. W. 2d 289; and *Jewel* v. *Shiloh Cemetery Assn.,* 224 Ark. 324, 273 S. W. 2d 19. We have many times quoted and applied the rule as clearly stated by Chief Justice HART in *Robinson* v. *Gaylord, supra*:

"... where there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the owners of the adjoining lands may, by parol agreement, fix a line that will be binding upon them, although their possession under such agreement may not continue for the full statutory period."

In the case of *Malone* v. *Mobbs, supra,* there was involved the application of the agreed boundary line rule

to accretions. In that case — just as here — adjacent land owners agreed that the extension of the section line would be the boundary line of the accretions. This Court upheld the agreement, saying:

"In the case of *Payne* v. *McBride,* 96 Ark. 168, we held: 'Where there is doubt, dispute or uncertainty as to the true location of the boundary line the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them although the possession is not for the full statutory period.'' To the same effect is *O'Neal* v. *Ross,* 100 Ark. 555; *Butler* v. *Himes,* 101 Ark. 409. It follows that the line agreed upon by Burrows and Hill is the true line between the parties as to the accretions.''

Appellants recognize the force of the rule just stated and its application to accretions; but offer two arguments in an endeavor to show that the rule should not be applied in the case at bar. In the first place, the appellants say that the 1940 agreement was nullified because the lands washed away after 1940 and were reformed. The Chancery Court found otherwise, and such finding is not contrary to the preponderance of the evidence, especially in view of one salient fact, which is: that portions of the wire fence, erected in 1935 on the accretions, are still visible. Certainly, the presence of this fence shows that the lands were never washed away and restored.

Secondly, the appellants contend that any such agreement about the division line being the south boundary line of Section 34 extended easterly to the river, even if made as detailed in Topic I, could only relate to the lands *then in existence* and not to lands subsequently formed by accretions. But we hold such contention to be without merit in this case. The record shows that at the time of the survey in 1935, the distance from the Southwest corner of Section 24 easterly to the river was 2,535 feet. It is not stated what the distance was when the 1940 agreement was made; but the maps in the record reflect that the west bank of the river is now some-

where in the SW¼ SE¼ of Section 34. A scaling of the map indicates that the west bank is now approximately 3,080 feet east of the southwest corner of Section 34. So a distance of approximately 545 feet has been added to the division line since the 1935 survey. Possession has been taken by Baumgartner *et al.* of the new accretions north of the division line just as rapidly as the accretions have been formed. In short, the agreement as to the boundary has been ". . . followed by possession with reference to the boundary so fixed . . ."[3] just as rapidly as the lands have formed.

In view of these facts, we think the 1940 agreement covers all the lands herein involved. The case of *Reeves* v. *Moore,* 105 Ark. 598, 151 S. W. 1025, does not hold that an agreement for such a short distance is unreasonable or void. In that case it was sought to make a boundary line agreement of 1870 apply to accretions formed as late as 1907, and to have the boundary line agreement extend for over a mile and across island lands. The factual situation here is vastly different.

Finding no error, the decree of the Chancery Court is affirmed.

GEORGE ROSE SMITH, J., dissents.

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[3] Quotation from *Payne* v. *McBride, supra.*

ARKANSAS COMMEMORATIVE COMMISSION *v.* CITY OF LITTLE ROCK.

5-1353 303 S. W. 2d 569

Opinion delivered July 1, 1957.

Bruce Bennett, Atty. Genl.; *John T. Haskins,* Asst. Atty. Genl., for appellant.

O. D. Longstreth, Jr., City Atty.; *Joseph C. Kemp,* Asst. City Atty., for appellee.

ED. F. MCFADDIN, Associate Justice. The Arkansas Commemorative Commission[1] (hereinafter called "Appellant") filed this suit against the City of Little Rock, and claimed that the appellant had acquired *by adverse possession* a portion of Water Street in Little Rock. From a decree of the Chancery Court refusing such claim of adverse possession, the appellant brings this appeal, and claims that the preponderance of the evidence requires a reversal.

The Old State House[2] in Little Rock occupies the area that is bounded by Markham Street on the south, Ashley Street on the east, Water Street on the north, and Conway Street on the west. In constructing its Riverfront Drive the City of Little Rock (hereinafter called "City") proposed to use a portion of Water Street. In about 1952 a fence was erected around the Old State House property, and this fence encroached into Water Street a distance of several feet. When the City proposed to remove that portion of the fence which so encroached into Water Street, the appellant filed this suit.

The City denied the fact of adverse possession and also claimed that adverse possession could not run against the City. The testimony showed that north of the Old State House the land slopes down sharply to the Arkansas River; and a number of years ago (about 1888) a wall was constructed to prevent the erosion of the soil. This wall (near or on which the 1952 fence was built) encroached on Water Street; and appellant claims that the construction of such wall constituted the

[1] The Arkansas Commemorative Commission was created by Act No. 256 of 1947 (see § 8-201 *et seq.* Ark. Stats.); and among other duties the Commission is charged with the responsibility of preserving the Old State House in Little Rock.

[2] By Act No. 81 of 1951 the building was officially designated as "the Old State House". (See § 8-301 Ark. Stats.)

beginning of adverse possession. The Chancellor, in deciding the case on the question of adverse possession, rendered an opinion which is so clear that we copy and adopt excerpts from it:

"*The Petitioner Failed To Prove Adverse Possession.* Assuming that the petitioner in this case could legally obtain title to the lands in question by adverse possession, there is absolutely no proof in the record to sustain such.

"To be adverse, possession of land must be actual, open, continuous, hostile, exclusive and be accompanied with an intent to hold adversely to the true owner. (*Watson* v. *Hardin,* 97 Ark. 33). There is no evidence in the record of this case to establish that the possession, if any, by the petitioner of the lands in question meets the requirements set out above. Instead, it appears that any possession or occupancy of said lands on the part of the petitioner was purely permissive by the City of Little Rock and the general public.

"It is true that witnesses testified that a wall had been built on part of the land in the late 1800's and rebuilt and rerouted in 1930, but there was no evidence that such wall was built by the petitioner or anyone else with intent to claim said portion of Water Street adversely from the City of Little Rock and the general public. Not a single member of the Arkansas Commemorative Commission testified in this hearing. Further, not a single witness who testified on behalf of the petitioner was able to state that there was ever any intent on the part of the petitioner (or anyone else) to claim this street adversely and to claim such as a part of the grounds of the Old State House Square.

"To the contrary, the testimony of the petitioner's witnesses was to the effect that the first wall was built by the Engineers' Club of the City of Little Rock and other civic-minded organizations to prevent erosion. There was undisputed testimony that the rebuilding and relocating of the wall encroaching on Water Street in

1930 was done by the City of Little Rock, the Marion Hotel, and the Big Rock Stone & Material Company without any intent to divert the use of Water Street to a purpose foreign to that of a street.

The circumstances under which the petitioner allegedly took possession are not shown; however, it appears that it was because the City did not need the street at that time or lacked sufficient funds to open it up. But, be that as it may, in the absence of any contract or Legislative recognition of a higher right, it will be presumed that such use and occupation by the petitioner were by sufferance merely and without any intent on the part of the Arkansas Commemorative Commission (or anyone else) to appropriate the land to itself. Now a permissive possession, however exclusive and however long in point of fact it may be endured, could never ripen into a title against anybody; for it is not considered as the possession of a precarious occupier but of him upon whose pleasure its continuance depended.

"The whole doctrine of title by adverse possession rests upon the acquiescence of the owner in the hostile acts and claims of the person in possession. Hence, possession, to be adverse, must be in hostility to, and not in subserviency to, the rights of the true owner. (*Pulaski County* v. *The State,* 42 Ark. 118.) . . .

"Thus, there is a complete lack of proof of adverse possession, . . ."

From a careful study of the record, we are unable to say that the Chancellor's finding of facts is against the preponderance of the evidence. We forego any discussion of (a) when public streets could have been acquired by adverse possession; or (b) whether a state agency can ever acquire title by adverse possession against a city. We rest our decision in this case on the points: (a) that the Chancellor held that there was no evidence to show that the erection of the wall over a portion of Water Street was for the purpose of starting ad-

verse possession; and (b) that we cannot say such finding of fact was against the preponderance of the evidence.

The decree is affirmed.

GREENE *v.* THOMPSON.

5-1377 305 S. W. 2d 136

Opinion delivered July 1, 1957.

[Rehearing denied October 7, 1957]

Downie & Downie, for appellant.

Barber, Henry, Thurman & McCaskill, for appellee.

ED. F. MCFADDIN, Associate Justice. This case involves the deed in trust executed by Governor and Mrs. George W. Donaghey. Specifically, the question is: under the facts here presented, can the Trustees of the Donaghey Foundation continue to pay the net proceeds of the Foundation to the Little Rock Junior College if that institution ceases to be operated by or under the supervision of the School Directors of the Little Rock School District?

In the case of *Little Rock Junior College* v. *George W. Donaghey Foundation,* 224 Ark. 895, 277 S. W. 2d 79, we had before us the deed in trust executed by Governor and Mrs. Donaghey; and that opinion contains the

basic facts about the Donaghey deed in trust. The majority opinion in that case concludes with these two pertinent paragraphs:

"But little need be said about appellee's contention that since the college has incorporated, it is no longer under the supervision of the Little Rock School Board and is therefore not entitled to receive anything from the trust. Surely appellees do not have much confidence in that theory, for the payments to the college were continued after the four-year program was abandoned.

"The deed provides that the school be 'under the supervision of the *public school authorities* in said city.' The college was incorporated in 1947; section one of Article 5 of the Articles of Incorporation provides: 'The management and administration of the affairs of the corporation shall be vested in a Board of Trustees which shall always be composed of and limited to duly elected and installed Directors of the Little Rock School District.' Hence the college is under the supervision of the public school authorities of Little Rock just as much as it is possible to be under such supervision. By incorporating the institution and limiting the personnel of the Board of Trustees to duly elected and installed Directors of the Little Rock School District, the provision in the deed in trust pertaining to the college being supervised by the school authorities of Little Rock is fully complied with."

As stated in the foregoing paragraphs, the School Directors of the Little Rock School District incorporated the Little Rock Junior College (as a non-profit educational corporation under § 64-1301 *et seq.* Ark. Stats.), and the School Directors of the Little Rock School District were the Directors of the Little Rock Junior College corporation and thus retained the operation and management of the Junior College. But after our opinion in the case of *Little Rock Junior College* v. *George W. Donaghey Foundation, supra,* the School Directors of the Little Rock School District decided to surrender their directorship of the Little Rock Junior College corpora-

tion to other persons.[1] Thereupon, the present suit was instituted by James R. Greene, *et al.*, as plaintiffs, against Charles L. Thompson, John Rule, William Nash, Alfred Kahn, Leo Pfeifer, Henry Hollenberg, and Clyde Lowry, "Trustees of the Trust Created by the Deed in Trust executed by George W. Donaghey and Louvenia Donaghey under date of July 1, 1929."

The complaint alleged that the plaintiffs were citizens, taxpayers, and patrons of the Little Rock School District; that this suit was for the benefit of themselves and all others similarly situated; that the defendants were the present Trustees of the Donaghey Foundation; that the Little Rock Junior College was the beneficiary of the Donaghey Foundation; that the School Directors of the Little Rock School District were the Trustees charged with the responsibility of managing and operating the Little Rock Junior College; that the School Directors of the Little Rock School District were now attempting to put into operation a plan so that the Little Rock Junior College would be managed by persons other than the elected School Directors of the Little Rock School District;[2] that the defendants, as Trustees of the Donaghey Foundation, had agreed that they would continue to give the income derived from the Donaghey Foundation to the Little Rock Junior College, even under its new management; and that the Trustees of the Donaghey Foundation had no power, under the terms of the Donaghey deed in trust, to give any part of the income from the Donaghey Foundation to the Little Rock Junior College if it ceased to be operated or

[1] The plan of such surrender was this: the Directors of the Little Rock School District, acting in their capacity as the Board of the Little Rock Junior College corporation, undertook to amend the constitution of the Little Rock Junior College corporation so as to set up a Board of Directors of the Little Rock Junior College corporation to be selected by Trustees from various groups, such as Trustees of the Donaghey Foundation, Directors of the Little Rock School District, the Alumni Association of Little Rock Junior College, and the Little Rock Junior College Foundation Incorporated. In short, the proposed amendment to the constitution of the Little Rock Junior College corporation would relieve the School Directors of the Little Rock Junior College. The Trustees of the Donaghey Foundation were agreeable to this plan.

[2] The plan was detailed as stated in Footnote No. 1.

supervised by the Directors of the Little Rock School District.

The plaintiffs prayed that the defendants, as Trustees of the Donaghey Foundation, be enjoined from giving any of the money of the Donaghey Foundation to the Little Rock Junior College, in the event the operation or supervision of the Little Rock Junior College should pass from the Directors of the Little Rock School District. The defendants filed an answer, which in effect admitted the facts as alleged; and prayed ". . . that the Court interpret the deed in trust and that they be authorized, in their discretion, to continue to make payments to the beneficiary named in said deed in trust, that is, the Little Rock Junior College, during the time it is operated as a junior college and when and if it is advanced to a senior college, even though it is not operated by or under the supervision of the public school authorities of the City of Little Rock . . ."[3]

The deed in trust of Governor Donaghey was very specific as to the necessity of the Board of School Directors of the Little Rock School District continuing to manage and control the Little Rock Junior College. Here is the pertinent language:

"It is the object and purpose of this deed to convey the property herein described to said Trustees, their successors and assigns for the purpose of creating a fund or foundation to be used for the sole and exclusive benefit of the present Little Rock Junior College, an institution of learning in said city, at the present time operated under the management of the Board of School Directors of the Special School District of Little Rock, Arkansas, *investing said Trustees with full discretion to select some other public school or schools in said city, operated by or under the management or supervision of the Board of School Directors of the said Special School District of Little Rock,* and their successors in

[3] For reasons best known to themselves, neither side saw fit to make the School Directors of the Little Rock School District parties to this litigation; but neither side has raised any question of defect of parties, so we proceed to decide the question as stated in the first paragraph of this opinion.

charge of the public schools in the said City of Little Rock, *in the event the present Little Rock Junior College or its successors, should at any time cease to be operated by or under the supervision of the public school authorities in said city.*" (Italics our own.)

Notwithstanding the quoted language, the Pulaski Chancery Court held, in the case at bar, that the Trustees of the Donaghey Foundation could continue to pay the net proceeds of the Donaghey Foundation to the Little Rock Junior College, even though the School Directors of the Little Rock School District surrendered the directorships and the Little Rock Junior College ceased to be operated by or under the supervision of the School Directors of the Little Rock School District. We hold that the decision of the Pulaski Chancery Court was in error. The language we have italicized in the paragraph above is as clear as the English language can be made: ". . . in the event the present Little Rock Junior College or its successors, should at any time cease to be operated by or under the supervision of the public school authorities in said city . . .", then the Trustees of the Donaghey Foundation were to deliver the net proceed of the Donaghey Foundation to ". . . some other public school or schools in said city, operated by or under the management or supervision of the Board of School Directors of the said Special School District of Little Rock, and their successors in charge of the public schools in the said City of Little Rock . . ." No amount of semantics can change the plain language of the Donaghey deed in trust in this particular.

In *Morris* v. *Boyd,* 110 Ark. 468, 162 S. W. 69, this Court had before it a case in which the Chancery Court had rendered a decree changing the terms of a trust; and what we said in that case is enlightening and guiding in the case at bar. We quote at length:

" 'The rights and powers of a trustee . . . are derived from and measured and limited by the instrument creating the trust,' and 'they will not be permitted to change the nature, objects and purposes of the trust, or vary the rights of the beneficiaries.' 39 Cyc. 290.

"The power of courts over charitable trusts, so far as concerns the use to which the property conveyed is to be appropriated, is derived from the same source whence the authority of the trustees originates, namely, the instrument whereby the trust is created, and the directions of the donor must be adhered to as rigidly by courts as by trustees.

"Courts may define, but not enlarge, the powers conferred upon the trustee by the instrument creating the trust. That doctrine is concisely stated by a learned court in the following words: " 'It may be conceded that a court of equity has no power to make a new will for a testator, and that the extent of its power is to construe the will as presented to it. And, further, that such court can no more authorize an act to be done which is in excess of the powers conferred by the will than can the trustees therein do such act. As to these propositions there is, or can be, no question or doubt.' *Drake* v. *Crane,* 127 Mo. 85 . . .

"The facts of this case fairly illustrate the force of the doctrine we are undertaking to announce. The testator intended to create a trust upon certain contingencies and devote substantially all of his property to the purposes of the trust. He clearly expressed his purpose in his last will and testament. The contemplated settlement changes that and diverts the major portion of the property from the operation of the trust. It makes an appropriation of the testator's property contrary to his expressed intention . . .

"But the settlement or compromise involved in this case reaches to the very foundation of the trust and involves a direct change and setting aside of the will of the testator. This is as much beyond the power of the court as of the trustees themselves."

Other cases to the same effect are *Union National Bank* v. *Kirby,* 189 Ark. 369, 72 S. W. 2d 229; and *Atkinson* v. *Lyle,* 191 Ark. 61, 85 S. W. 2d 715. We realize that the School Directors of the Little Rock School District are faced with an almost superhuman task: anyone who serves as a School Director is certain-

ly doing a great public service. As the City has grown, the schools have grown, and the problems of school management are enormous; and it would certainly lighten the load of the School Directors of the Little Rock School District if they could pass over to others the responsibility of operating or supervising the Little Rock Junior College, which is soon to be the Little Rock University. But, as much as we sympathize with the School Directors in their labors, we still have the responsibility of seeing that the trust is observed in accordance with the plain directions of the settlors; and in order for the Little Rock Junior College to continue to receive the money from the Donaghey Foundation in preference to the other public schools of Little Rock, then the Little Rock Junior College must be ". . . operated by and under the supervision of the public school authorities in said city . . ." Should the School Directors of the Little Rock School District for any reason refuse to operate or supervise the Little Rock Junior College, then the power of equity to prevent the loss to the innocent beneficiary might be brought into play; but that situation is not here presented. The effect of our holding in the present case is to declare that the plan as proposed herein is in violation of the deed in trust.

Therefore, the decree is reversed and the cause is remanded, with directions to enter a decree construing the deed in trust in accordance with the holding herein.

WARD, J., concurs; HOLT and ROBINSON, JJ., dissent.

PAUL WARD, Associate Justice (concurring). My concurrence goes to this point: It appears to me that this court might well have granted the relief which the majority opinion, by insinuation, says can be granted in case the Little Rock School District should ever refuse to operate or supervise the Little Rock Junior College.

My interpretation of the pleadings in this case is that directors of the Little Rock School District have already refused to "operate or supervise the Little Rock Junior College." The complaint alleges that said school directors are attempting to put into operation a plan

whereby said college would be managed by other persons. This allegation is not denied, therefore I would take it as an established fact.

I can see no reason why this court should invite further litigation to achieve the result which the majority opinion has already pointed out would follow.

CREIGHTON *v.* HUGGINS.

5-1304 303 S. W. 2d 893

Opinion delivered July 1, 1957.

Sloan & Sloan, by *Frank Sloan,* for appellant.

Frierson, Walker & Snellgrove, for appellee.

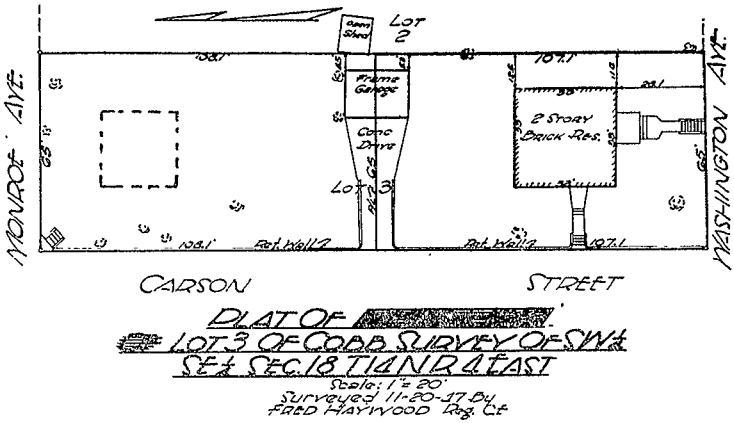
MINOR W. MILLWEE, Associate Justice. This is a suit by appellee, James C. Huggins, for specific performance of a contract under which the appellants, J. L. Creighton and wife, were to sell him a house and lot in Jonesboro, Arkansas, for $6,000. Appellee, Donald E. Gilbert, who executed the sales contract on behalf of the appellants, joined in the suit, claiming a 5% commission of the agreed purchase price was due him as a licensed real estate broker employed by the appellants. In their answer appellants alleged that appellees sought by parol evidence and circumstances to modify and alter

the written contract by adding to the property to be sold a strip of land 11.4 feet wide and 65 feet long; and that such attempted change was a void effort to modify the contract by parol evidence and within the statute of frauds which was pleaded as a complete bar to the suit.

This appeal is from a decree ordering specific performance of the contract, payment of a commission of $300.00 to appellee, Gilbert, and denying appellants' counterclaim for unpaid rents and damages. The principal issue is whether Appellee Huggins, under the statute of frauds, was entitled to specific performance of the contract where the description covered only a part of a larger tract owned by appellants and a determination of what part of the larger tract was intended to be included could not be made without resorting to parol evidence.

Appellant J. L. Creighton inherited a tract of land in 1934 described as Lot 3 of Cobb's Survey of the Southwest Quarter of the Southeast Quarter of Section 18, Township 14 North, Range 4 East, in the City of Jonesboro, Arkansas. The tract measures 65 feet east and west and 215.2 feet north and south. It is bounded on the north by Monroe Avenue, on the south by Washington Avenue and on the west by Carson Street. In 1934 the Creighton family residence was located on the south portion of the lot and known as "500 East Washington Avenue." This residence was subsequently converted into a four-unit brick apartment building. On the north part of the lot there was an old frame dwelling designated as "400 Carson Street," which was rented to tenants. There was a double garage between the two buildings, which was at first used exclusively by the Creighton family as occupants of 500 East Washington. About 1944 the old house at 400 Carson Street was torn down and materials from it used to convert the double garage to a small apartment which was numbered 400 1/2 Carson Street. In 1947 a new five-room frame dwelling was erected in place of the old house at 400 Carson Street.

Appellants have resided in California for several years. In early 1951 or 1952 Appellee Gilbert succeeded another agency as appellants' local agent for rental of their property. The garage apartment was rented to various tenants prior to 1952 when the city directed that such rental cease because of insufficient plumbing facilities. After 1952 the garage building was used for storage purposes by the tenants at both 400 Carson Street and 500 Washington Avenue. When appellants constructed the new house at 400 Carson Street in 1947 they caused a survey of Lot 3 to be made dividing it into approximately two equal parts; the east-west division line running through the middle of the garage apartment with one room located north and the other room south of said line. In accordance with said survey Lot 3 has been divided on the county tax books since 1948 as: "Lot 3 (less S. 107.1')" and "South 107.1' of Lot 3." In 1947 and 1952 appellants executed mortgages on the respective parcels, using the descriptions designated by the 1947 survey. A plat of said survey with a sketch of the dwelling at 400 Carson superimposed upon it as shown by another plat in evidence follows:



In the spring of 1955 Appellee Gilbert, as appellants' agent, rented the property at 400 Carson Street to Huggins for $55.00 per month. Gilbert wrote a letter to appellants on June 3, 1955, proposing "the sale of

400 Carson'' to Huggins for $6,000. In their reply dated June 13, 1955, appellants authorized sale of ''the house at 400 Carson'' on the terms suggested. On July 15, 1955, Gilbert, as appellants' agent, entered into a written contract with Huggins to sell the property described as: ''400 Carson St.—Jonesboro, Craighead, Ark.''

Appellee testified that when Gilbert rented the property to Huggins the latter was placed in possession of the garage apartment as a storage room and that tenants in the four-unit apartment were only allowed to so use it by permission from Huggins. This was stoutly disputed by the several tenants of the other apartments who admittedly kept items of personal property stored there and keys to a padlock placed thereon by one of said tenants. This tenant, who was a cousin of Huggins, denied the latter gave him permission to use the building and stated such permission was given by Mrs. Creighton's aunt who then lived in and had charge of the rental of the four-unit apartment. Gilbert was also permitted to testify over appellants' objection to a telephone conversation with appellant, J. L. Creighton, which allegedly took place twelve days after the sale contract was signed, as follows:

''The first part of the conversation concerned what the delay was in closing the sale with James Huggins. Then I told him the delay was because of the G. I. loan and he said, 'I know it takes a lot of time to close those things. How much longer will it take?' Then I said, 'If this survey goes all right it should not take but 15 or 20 days more.' And then I said, 'We have a hitch in the contract of sale with James Huggins. James Huggins has bought the garage apartment lot and now we find a line was established in this description to split the middle of the garage apartment.' And I told him I talked with James Huggins and he was not interested in this house without the garage apartment going with it and I had talked with the appraisers and they told me they could not approve the loan unless the garage was included and I then told him this $1,000 price on the garage apartment was more than twice its value and I thought it should go with the Carson Street property.

It could not be separated and after I explained to him what the situation was he said, 'Certainly. Let the garage apartment go with it.' ''

In admitting the testimony which Creighton denied, the chancellor stated it would not be considered as altering the terms of the contract.

When appellants refused to execute a warranty deed conveying the entire garage apartment or storage room as a part of 400 Carson Street, appellees instituted this suit. In their original complaint filed November 3, 1955, appellees alleged an agreement to sell Huggins: ''All of Lot 3 of Cobb's Survey . . . less and except the South 107.1 feet thereof in the City of Jonesboro, Arkansas, commonly known as 400 Carson Street . . .'' In an amendment to the complaint filed January 6, 1956, the following description was substituted in lieu of that set out in the original complaint: ''The North 120 feet of Lot 3 in Cobb's Survey . . in the City of Jonesboro, Craighead County, Arkansas.'' It is noted that the first description divides the garage apartment in the middle according to the 1947 survey and subsequent record transactions while the second description includes about 11.5 additional feet and takes in the entire garage building.

Before a court of equity will require specific performance of a contract to convey lands the property must be accurately described; and the contract must disclose a description which in itself is definite and certain, or one which is capable of being made certain by other proof the contract itself furnishing the key by which the property may be identified. *Fordyce Lumber Company* v. *Wallace,* 85 Ark. 1, 107 S. W. 160; *Routen* v. *Walthour-Flake Company, Inc.,* 221 Ark. 354, 253 S. W. 2d 208. Thus in order to satisfy the Statute of Frauds (Ark. Stats., Sec. 38-101) there must be a memorandum signed by the vendor which furnishes a key from which the location of the property may be ascertained by competent extrinsic evidence. Another applicable rule is stated in 37 C. J. S., Frauds, Statute of, Sec. 282 (b), as follows: ''While parol evidence is not admissible to *supply*

a description of the subject matter of a contract within the statute of frauds, if the memorandum contains matters capable of making identification certain, parol evidence may be admitted to *apply* the description therein." (Italics supplied). We approved this rule in *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671.

A designation of the premises in a contract or memorandum by street number ordinarily proves sufficient to satisfy the statute even though parol evidence must be resorted to in following the key furnished. This is particularly true where the vendor owns only one lot or parcel which may be readily located and identified from the address furnished. We recognized the rule in *Ray* v. *Robben,* 225 Ark. 824, 285 S. W. 2d 907, where the vendor of a tourist court consisting of several cabins which were used and considered as a single parcel at the street address given in the memorandum. But a different rule has been followed where, as here, the given street address covers only a part of a larger tract owned by the vendor and there is nothing of record or on the ground to support the theory of identification sought to be established by parol evidence.

As the author states in 49 Am. Jur., Statute of Frauds, Sec. 348: "The circumstance that the seller owns only one tract of land which answers the description given in the memorandum operates to render sufficient a description which under other circumstances might be too general to satisfy the statute. But notwithstanding the description is apparently of the vendor's premises at a certain place, if it appears that the sale was of a part only of such premises the description will be deemed insufficient to satisfy the statute unless it expressly defines the boundaries of the portion sold." This circumstance was recognized in *Hereford* v. *Tilson,* 145 Tex. 600, 200 S. W. 2d 985, in which the court denied specific performance because of the statute of frauds where the street address covered only a part of a larger tract owned by the vendor and there was nothing of record or on the ground to indicate what the buyer was to get, and the question of what part of the large tract was intended to

be included could not be answered without resorting to parol evidence. See also, *Maryland State Housing Company* v. *Fish,* 208 Md. 331, 118 A. 2d 491, where a "double house" was involved somewhat similar to that in question here. We consider these decisions sound and the principles announced as controlling here. There were no visible lines or signs on the ground in the instant case to identify the 11.4-foot disputed strip as a part of 400 Carson Street and a resort to all available record evidence tends to contradict rather than support such identification. In these circumstances the learned chancellor correctly held that the subsequent telephone conversation should not be considered as altering the terms of the written contract but erred in decreeing specific performance.

The decree is accordingly reversed and the cause remanded with directions to dismiss the complaint of appellees and enter judgment for appellants against James C. Huggins for delinquent rents to the date of the decree at the rate of $55.00 per month. Since we are of the opinion that Huggins held over under a *bona fide* though mistaken belief that he had a right to do so, appellants' prayer for double damages under Ark. Stats., Sec. 34-1516, will be denied. See *Lesser-Goldman Cotton Co.* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742.

HICKINBOTHAM *v.* WILLIAMS, CHANCELLOR.

4881; 4882 303 S. W. 2d 563

Opinion delivered July 1, 1957.

HICKINBOTHAM *v.* CORDER.

5-1253

Opinion delivered July 1, 1957.

Kenneth Coffelt, for petitioners.

Bruce Bennett, Atty. Genl., for respondent.

Kenneth Coffelt, for appellant.

Bailey, Warren & Bullion, for appellee.

George Rose Smith, J. Motions filed in this court by the Hickinbothams in these three cases present the question of whether a Little Rock ordinance requiring grocery stores and meat markets to close on Sunday was repealed by the passage of Act 367 of 1957, which became effective ninety days after the legislature adjourned on March 14 of this year.

For more than a hundred years there was in force a state statute requiring retail stores to remain closed on Sunday. Ark. Stats. 1947, § 41-3802. On July 9, 1956, under the authority of this statute, the city council of Little Rock adopted an ordinance making it unlawful for any person to operate a grocery store or meat market within the city on the Sabbath. This ordinance was upheld last December, it being then contended that the singling out of grocery stores and meat markets is such an unreasonable classification as to deny the equal protection of the laws. *Hickinbotham* v. *Williams,* 227 Ark.

126, 296 S. W. 2d 897, *cert. den.* 353 U. S. 961. In April of this year we affirmed a chancery court decree by which H. V. Hickinbotham was permanently enjoined from operating a grocery store on Sunday. *Hickinbotham* v. *Corder,* 227 Ark. 713, 301 S. W. 2d 30. Although our affirmance in the *Corder* case became final several weeks ago, Hickinbotham now moves that the judgment be vacated on the ground that Act 367 rendered the city ordinance ineffective. This motion must be denied, for an application to modify or dissolve an injunction should properly be presented in the first instance to the trial court. *Local Union No.* 656 v. *Mo. Pac. R. Co.,* 221 Ark. 509, 254 S. W. 2d 62.

After the decree in the *Corder* case had been affirmed by this court the chancellor cited H. V. and J. H. Hickinbotham for contempt and sentenced them to jail for having continued to operate a grocery on Sunday, in disregard of the injunction. The proceedings to review those two citations for contempt are not yet ready for submission to this court on the merits, but at a preliminary hearing we admitted the Hickinbothams to bail on condition that they cease doing business on Sunday until the final decision of this Court. We are now asked to strike this condition from the bail bonds and permit the petitioners to conduct a Sunday business during the pendency of their appeals from the sentences for contempt.

The Hickinbothams' argument is to this effect: The city ordinance closing grocery stores on Sunday was adopted pursuant to the state statute on the subject. That statute was repealed by Act 367. Hence, it is said, Act 367 nullified the city ordinance as well, and, until the city council passes a new ordinance under the authority of the 1957 act, there is no law prohibiting the operation of a grocery store on Sunday in the city of Little Rock.

This reasoning is not sound. It is true that if Act 367 had been limited to a simple repeal of the state Sunday law it would also have abrogated ordinances

that depended on that law for their validity. McQuillin on Municipal Corporations (3d Ed.), § 21.43. But Act 367 goes beyond a mere repeal of Ark. Stats., § 42-3802; the first section of the 1957 act reads as follows: "Hereafter, the city council or board of managers of any city or incorporated town shall have the authority, by ordinance, to regulate the operation of businesses within such cities or towns on Sunday." Section 2 of the act then repeals the state statute on the subject.

It is clear that the General Assembly, in enacting the 1957 law, intended (*a*) to repeal the general state statute requiring all retail businesses to close on Sunday and (*b*) to leave unimpaired the power of cities and towns to regulate the doing of business on Sunday within their corporate limits. It follows that there was no break in the continuity of the city's authority and therefore no need for the city council to go through the formality of re-enacting its 1956 ordinance, which presumably still represents its will in the matter.

The authorities are uniform in holding that existing city ordinances are not affected by the repeal of the state enabling act if the repealing statute simultaneously re-enacts the provisions of the original law. *Allen* v. *City of Davenport,* 107 Iowa 90, 77 N. W. 532; *People* v. *Brennan,* 142 Misc. Rep. (N. Y.) 225, 255 N. Y. S. 331. As McQuillin puts it in § 21.46 of his treatise: "Accordingly where pursuant to statute an ordinance is passed and subsequently the statute is repealed but re-enacted, the ordinance remains unimpaired. The statutory change does not have the effect of annulling the ordinance passed under the former identical grant of authority." Of course the new statute need not be in the exact language of the old; the decisive question is whether the legislature has manifested its intention to keep in force the relevant portion of the original law. *State* v. *Prouty,* 115 Iowa 657, 84 N. W. 670. In the case at bar we find no reason to doubt that this legislative intention existed. In drafting Act 367 the General Assembly obviously could not accomplish its twofold purpose by a verbatim re-enactment of the existing state

Sunday law, for the mandatory state-wide application of the old act was to be rescinded. In the same breath, however, the legislature expressed its desire to leave undisturbed the delegated authority by which each municipality might regulate Sunday businesses according to its own preference. That Section 1 of Act 367 begins with the word "hereafter" evidently does not mean that a new power is being created, for the municipality's authority undeniably existed already. Rather, the use of "hereafter" merely implies that a power formerly exercised concurrently by the state and its municipalities is in the future to be vested in the cities and towns alone. We find no good reason in logic or in law to require the city of Little Rock and all other municipalities to reassert their views by needlessly re-enacting ordinances already on the books.

Motions denied.

HARRIS, C. J., and WARD, J., dissent in part.

PAUL WARD, Associate Justice (dissenting). I do not agree with the majority that the injunction remained in force after the effective date of Act 367 of 1957.

I do not think that the right to "regulate" as the word is used in Section 1 of Act 367 carries with it the right to prohibit (the opening of grocery stores and other stores on Sunday) as must be applied in Ark. Stats. § 41-3802.

My conclusion is therefore that if Little Rock hereafter wants to "regulate" business houses on Sunday, it will be necessary to pass a new ordinance to that effect.

Practical considerations lead to this same conclusion. Neither this court nor any other court should be burdened with the task of attempting to reconcile all of the divergent views on this question. Now that the slate has, so to speak, been wiped clean by said Act 367 any new attempts at regulation should, I think, be enacted by the people of the affected municipalities.

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

5-1312 305 S. W. 2d 134

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

S. L. White, for appellant.

Talley & Owen, by *Gene Worsham,* for appellee.

GEORGE ROSE SMITH, J. This is an appeal from an order setting aside a default judgment rendered at the preceding term of court. The appellant contends that the proceedings below did not comply with the statute under which judgments may be vacated after the lapse of the term.

The action was brought by the city of Little Rock to condemn five acres of land. The complaint alleges that the appellant Bradley has a deed to the land and that the appellee Keith has a tax title to it. Bradley filed an answer asserting title to the property, but Keith failed to file any pleading in the case. At a preliminary hearing, with all parties present by their attorneys, it was agreed that the land was worth $1,000 and that the city might deposit that amount in the registry of the court and take possession of the property. The court's preliminary order recited that there was a dispute between the defendants as to the ownership of the land and directed that the cause be placed on the regular docket for a determination of that dispute.

At the trial on June 5, 1956, Bradley was present by his attorney, but Keith failed to appear. The court, after hearing evidence, found that Keith was entitled to the amount he had paid for his tax deed (which appears to be void on its face), with interest, and that Bradley was entitled to the rest of the fund deposited by the city.

The next day Keith filed an unverified motion to set aside the judgment, asserting that only a pre-trial conference had been scheduled for June 5 and that his attorney had been prevented by illness from being present. This motion was not presented to the court until after the lapse of the term. The court considered the motion at its next term and, acting only upon a statement of counsel, made a finding of unavoidable casualty and vacated the judgment.

The appellant is correct in his insistence that the record does not support the court's action. After the lapse of the term the court no longer had discretionary control over its judgment, which could then be vacated only in accordance with the statute that applies after the expiration of the term. *Dobbs* v. *Dobbs,* 225 Ark. 397, 282 S. W. 2d 812. That statute requires that the complaint to set aside the judgment be verified by affidavit, Ark. Stats. 1947, § 29-508, and we have repeatedly held that this requirement is jurisdictional. *Pattillo* v. *Toler,* 210 Ark. 231, 196 S. W. 2d 224; *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583; *Kirby* v. *Milum,* 218 Ark. 106, 234 S. W. 2d 518. Although the requirement may be satisfied by the introduction of sworn testimony at the hearing on the motion, *Pinkert* v. *Reagan,* 219 Ark. 822, 244 S. W. 2d 961, the trouble here is that no proof under oath was offered to sustain the motion to vacate the judgment. We do not doubt the statement that one of Keith's attorneys was ill on June 5; but if an unverified written motion is insufficient to invest the court with power to act after the term, the same holding must be made with respect to an unsworn oral statement of counsel.

Reversed.

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

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

Bruce Bennett, Atty. Genl.; *Thorp Thomas* and *Clyde Calliotte,* Asst. Attys. Genl., for appellee.

PAUL WARD, Associate Justice. Appellant, a Negro man 63 years old, was convicted of murder in the first degree for the slaying of George Wells on the early morning of October 20, 1956. The deceased and another white man named Fred Watkins were discovered by appellant in a car with a Negro woman, Hattie Mae Williams, parked near the house where appellant and his family lived. Circumstances later developed left no doubt that the white men and the Negro woman were engaging in a prolonged orgy of drinking and immoral conduct.

When appellant approached the car one of the men called him a revolting name and when he started to return to his house he was again accosted by one of the white men. Thereupon the parties in the car drove away and appellant, so he says, thought they had left. Appellant then got his shotgun and started to hunt squirrels (he says) but in a short while he discovered the same

three people parked by the side of the road approximately one-half mile from appellant's home. There he saw one of the men and the Negro woman engaged in sexual intercourse. Appellant decided that he was going to call the law and returned to his home and got his automobile in order to drive to the nearest telephone. In going to the telephone it was necessary for him to pass along that portion of the road where he had last seen the people above mentioned. Finding the party car at or near where he had just previously left it, appellant drove by. As he proceeded along the road the other car forced him to stop. Again there was abusive and threatening language and appellant shot the deceased.

When shotgun shells picked up at the scene of the shooting were found to match appellant's shotgun he admitted to the sheriff that he had killed the deceased and also the other white man and the Negro woman. Later he signed a written confession which was introduced in evidence and is contained in the record. Appellant also took the witness stand in his own behalf. More than a half dozen witnesses some of whom had known appellant for a quarter of a century and among whom there were a school teacher, a groceryman, a contractor and a farmer, testified that he had a good reputation as being a quiet and peaceable citizen and "a good man in the community."

For a reversal or modification of the judgment of the trial court appellant makes one primary contention, and that is that there is no substantial testimony in the record to show that the slaying of George Wells by appellant was done with deliberation and premeditation. After a careful review of all of the testimony in the record and of the many decisions of this court relative to the point in issue we have concluded that appellant is right in his contention.

There is no testimony of any witness, aside from the testimony of appellant in open court and his written confession, from which the jury could have found the existence of premeditation and deliberation. Neither do we find any circumstance which amounts to substantial

evidence upon which a finding of premeditation and deliberation could be based. Consequently we are led to conclude that the jury must have resorted to speculation rather than substantial evidence in arriving at a verdict of murder in the first degree.

Appellant testified in substance: I live about three miles southwest of Crossett on the Sulphur Springs road. On the early morning of October 20, 1956 I heard a noise and saw a car parked on the road near my garden. When I was within 14 or 15 feet of the car a man jumped out and said: "Hey, where in the hell you going, you goddam son-of-a-bitch, don't come any farther. Go back." I was returning to my house when the man said "you son-of-a-bitch, you come out here," but I did not do so. There were three people in the car and I could tell one was a colored woman. When the car drove off in the direction of Crossett I thought they were gone. I had planned all night to go squirrel hunting and I had told Mr. Houston Childress I was going squirrel hunting. So I went into the house and got my shotgun and started out to where I had seen the squirrels' signs. Later on I saw the same car parked in the road again. One man was backed up against the hood of the car and the other man and the woman were behind the car on the ground in the act of intercourse. I saw them but I did not want to come in contact with them so I went around the car, into the thicket and then on up to my house, and I said to myself "I am going to call the law. Those folks are going to do something to me." When I got into my car and was coming down the road I found that their car was no longer where I had last seen it. However a little further down the road I heard their car and they were parked to where I could barely get by. Just as I "squeezed" by their car started up — I held the center of the road "and I seen they were driving past and I pulled over and they just whipped over right ahead of me and stopped." I pulled over to the left, and one man jumped out of the car — the driver — and got right in the road said "stop, stop, you goddam son-of-a-bitch. Where are you going?" I said, "I am going to call the law to you all." He said, "Yeah, you are going to call

the law goddam you, don't you know I am going to kill you?'' ''Nothing to do but protect my life. This other man said, 'kill the son-of-a-bitch, kill him.' He got up and I don't know whether it was a two-door or a four-door, and he came up and stuck his head over the front seat of the car and I shot them both.'' On cross examination appellant admitted to Sheriff Courson that he killed the deceased.

On November 5, appellant made and signed a written confession but it does not differ in any material way from his testimony as set forth above.

The testimony shows that the two white men and the Negro woman had with them in the car several cans of beer, some of which had been opened and some had not.

This court has on many occasions had the opportunity to consider the importance of the elements of premeditation and deliberation in connection with murder in the first degree. In the early case of *Burris* v. *State,* 38 Ark. 221, this court said: ''. . . , in order to convict the defendant of murder in the first degree, it is not sufficient to barely prove the killing. The State must also prove, beyond a reasonable doubt, that the killing was done willfully, deliberately, maliciously, and with premeditation of mind.'' It was said in *Simpson* v. *State,* 56 Ark. 8, 19 S. W. 99: ''An unlawful killing may be presumed murder, but it will not be presumed murder in the first degree. The burden of proving it so lies on the Commonwealth.'' The court in the case of *Ferguson* v. *State,* 92 Ark. 120, 122 S. W. 236, announced the rule this way:

''When the fact of death alone is proved, the presumption is that the crime is murder in the second degree; and, before it can be determined that the crime is murder in the first degree, it is incumbent on the prosecution to prove further, by evidence, that the killing was done with premeditation and deliberation. The premeditation cannot be inferred from the fact of death, but there must be evidence of a prior intention to do the act of killing in question.''

In the case of *Harris* v. *State,* 119 Ark. 85, 177 S. W. 421, the appellant was convicted of murder in the first degree and this court reduced it to murder in the second degree. Appellant, a Negro, was at a party or dance when trouble arose, a fight ensued and he killed one Johnny Daniels. This court in recognizing that premeditation was an indispensable element of murder in the first degree stated that it need not exist for any particular length of time, but that it must be shown to exist. The court also took into account the element of provocation, stating: "True, the provocation was not sufficient to justify the extreme measures to which appellant resorted, and it was not sufficient to reduce the killing from murder to manslaughter; but it was sufficient to reduce the homicide from murder in the first degree to that of second degree." Provocation to a considerable degree was present in the case under consideration.

This court in the case of *Stanley* v. *State,* 183 Ark. 1093, 40 S. W. 2d 415, again reduced a conviction for murder in the first degree to second degree, giving as the principal reason that "the killing appears to have been the result of a sudden affray or row provoked and brought on by the deceased in the serving of appellant with a bowl of chili that he had ordered." There was a conflict in the testimony regarding how the killing occurred but the court took the view that it was one continuous difficulty and altercation, provoked by the deceased. In the case under consideration we adopt the language which the court used in reaching its decision in the *Stanley* case, to-wit: "(We) have concluded that, under the circumstances and according to the undisputed testimony the killing could not have been murder in the first degree, and that the evidence is insufficient to support a conviction for a greater offense than murder in the second degree . . ."

In the case of *Blake* v. *State,* 186 Ark. 77, 52 S. W. 2d 644, the court considered the conviction of appellant for murder in the first degree and reduced it to murder in the second degree. Blake was a tenant on the farm of Brad Polk and a difficulty arose between them regarding an accounting. The testimony showed that there had

been a disagreement and there was also testimony that threats had been made. The killing was not disputed. The facts regarding the issue here considered are, we think, comparable to the case under consideration. In reducing the degree of the conviction, the court said: "We have concluded that, while this testimony is sufficient to support a verdict of murder in the second degree, it is not sufficient to support a verdict of murder in the first degree. We think there is lacking that deliberation and premeditation required to constitute the higher degree of murder."

We think the facts set forth in the case of *Porchia* v. *State,* 196 Ark. 1039, 120 S. W. 2d 700, are as favorable to sustain the verdict of murder in the first degree as they are in the case under consideration. The appellant, a Negro, was convicted of murder in the first degree for killing a white man. The evidence shows that the deceased had been drinking and that he overtook appellant as he was walking along the road. An altercation ensued in which the deceased knocked the appellant down and the appellant wounded him fatally with his knife. The court said that the only question to be determined was whether the act was premeditated and in holding that it was not this language was used: "While ordinarily malice is to be implied from the nature of a homicidal transaction and the circumstances attending its commission, yet in the instant case the state's testimony tends to show that premeditation and deliberation were absent." Again we think that the language there used in announcing its conclusion is applicable in the case under consideration. The court said: "It is our belief that the ends of justice insofar as penalties can satisfy or appease justice will be met by a sentence confining penalties can satisfy or appease justice will be met by a sentence confining appellant in the penitentiary for 21 years." Likewise the language used by this court in *Gulley* v. *State,* 201 Ark. 744, 146 S. W. 2d 706, is applicable in the case here considered, where it said: "We think the evidence falls short of showing beyond reasonable doubt that appellant went to James Williams' home with the intent of killing Louis White." Neither

can we say with confidence that appellant here had any intention of killing the deceased when he got in his car and started to inform the sheriff. In the case of *McClendon* v. *State,* 197 Ark. 1135, 126 S. W. 2d 928, we affirmed that it is necessary to "show beyond a reasonable doubt that the killing was the result of malice," and then the court said: "Certainly it does not show beyond a reasonable doubt that it was the result of deliberation and premeditation." In that case appellant had seized an ax and hit the deceased on the head causing his death. The court, in reducing his conviction of murder in the first degree to second degree apparently relied on the fact that the killing was the result of a difficulty that arose suddenly and continued until the fatal blow was struck, and that the appellant and the deceased, had theretofore been friends.

It is obvious that the line of demarcation in many cases, as in the case under consideration, between deliberation and the lack of deliberation is not easily discernible. It is a safe rule that deliberation must be proven, and beyond a reasonable doubt. In our opinion there is no direct testimony in this case to support the finding that appellant shot the deceased after deliberation and premeditation. Also there is no circumstance which is inconsistent with the direct proof. We are especially impressed by the fact that if appellant had wanted to or had intended to kill the deceased he would have done so when he encountered him the second time. Appellant had his shotgun at that time and he found the deceased in a relationship with the Negro woman which was calculated to infuriate him to the extreme. If appellant had wanted or intended to kill the deceased we can think of no better opportunity for him to have done so than he had at that time. The mere fact that he did not (but went home to get his car so he could drive to a telephone and call the sheriff) necessarily negatives the assumption that appellant got his shotgun, in the first instance, with premeditation and murder in his heart. If the jury concluded appellant was lying about going to call the sheriff, then such conclusion rested on mere conjecture because there is no testimony in the rec-

ord to sustain it. As we view the record there is no testimony or circumstance to show (and certainly not to show beyond a reasonable doubt) that premeditation and deliberation were present in the mind of appellant when he fired the fatal shot.

Since the evidence is sufficient to support a verdict for murder in the second degree, the judgment will be so modified and appellant's punishment fixed at 21 years in the penitentiary, and, as so modified, the judgment of the trial court is affirmed.

Justices McFaddin, Smith and Robinson dissent.

Sam Robinson, Associate Justice (dissenting). The evidence in this case proves that the defendant killed three people in deliberate, cold-blooded murder. He was tried for one of the murders; the jury found him guilty as charged, and fixed the penalty at life in the penitentiary. In all probability, the life sentence was given instead of death in the electric chair because of the immoral conduct of the three people that appellant shot to death with a repeating shotgun. The trial judge was of the opinion that the evidence was sufficient to send the case to the jury on the question of whether the defendant was guilty of murder in the first degree. Twelve jurors selected with the approval of the defendant, from among the residents of the county where the crime was committed, after seeing all of the witnesses including the defendant, and listening to the testimony, and considering the law as given to them by instructions of the court, unanimously agreed that the defendant was guilty of murder in the first degree. It is hard for me to see how the jury could arrive at any other verdict if they did what they swore they would do, and that was to try the case according to the law and evidence, and render a true verdict thereon.

In stating that there is no substantial evidence in the record to support the first degree murder verdict, the majority has apparently overlooked and failed to consider important evidence in the record. In fact, the majority does not mention any of the evidence favorable

to the State's case and which goes to prove murder in the first degree, although, in my opinion, the record is replete with such evidence. It appears from the majority opinion that the only evidence considered in setting aside the jury verdict is the testimony of the defendant. To say the least, such testimony can hardly be unbiased. Moreover, the defendant's own testimony proves him guilty of first degree murder. The majority stresses the fact that there is no direct evidence proving premeditation and deliberation, which are necessary elements of murder in the first degree. A murderer who kills his victim after premeditation and deliberation rarely commits such crime in the presence of witnesses. If the State must produce eye witnesses to such crimes in order to get a conviction, then law enforcement in this State, as to such crimes, is virtually impossible. All the murderer has to do is catch his victim alone, kill him, and then testify there was no premeditation and deliberation. In the case at bar, however, the defendant did not find his victim alone; there were eye witnesses, but the defendant surmounted that difficulty merely by killing the witnesses. He was tried in this case, not for killing his first victim, but for killing one of the witnesses to the first crime.

Now for a consideration of the evidence in detail: On the morning of the 20th day of October, 1956, at about 6:10, Bob Bush, while on his way to work on the Sulphur Springs road about 3 1/2 miles Southwest of Crossett, saw an automobile parked on its proper side of the road. The parking lights were burning on the parked car, and it was headed toward Crossett. As Bush approached the parked car he noticed a man lying in the road near the left door of the car. Bush slowed down, and as he passed the parked automobile he noticed what appeared to be two injured people in the car. He got out of his automobile and found that the man on the ground was badly injured, or dead. He had been shot with a shotgun. It developed that the man on the ground was wounded seriously, and he died a short time later. Sitting on the right side of the front seat of the two-door parked car was a woman who had been

killed by a shotgun blast to the left side of her head. Seated on the right side of the rear seat, directly behind the woman, was a man who had been killed by two blasts from a shotgun; one load of shot had struck him in the left side toward the back, and one load of shot had struck him in the back of the head. Officers were notified and, upon their arrival at the scene of the crime, they ascertained that the man on the ground was Fred Watkins, the dead woman on the front seat was Hattie Mae Williams, and the dead man on the rear seat was George Wells.

The defendant in this case, Frank Simmons, was tried for the murder of George Wells, who was the man sitting on the rear seat of the car where he was killed by being shot twice with a 16 gauge shotgun loaded with No. 6 shot; one load of shot struck him in the side and the other in the back of the head.

The defendant lived on the Sulphur Springs road, a little over one half mile from the scene of the crimes. In the course of the investigation the officers talked to him concerning the killings; he denied any knowledge of who might have committed the crimes, but admitted that he owned a 16 gauge shotgun, and had some shells loaded with No. 6 shot. The officers obtained the gun from the defendant and sent it, with other 16 gauge shotguns which they had located in the community, and empty shells found at the scene of the killing, to State Police headquarters at Little Rock to be examined by a ballistics expert in an effort to determine if the empty shells found at the scene of the crimes had been fired from any of the guns the officers had obtained. Upon an examination by an expert it was learned that the empty shells found at the scene of the killing had been fired by the gun belonging to the defendant, Frank Simmons. When Simmons was confronted with this evidence, he admitted killing all three of the people heretofore mentioned.

In his testimony at the trial Simmons attempted to justify the crimes by asserting self-defense. He testified that Watkins got out of the car and that he (the

defendant) thought himself in great danger and gave that as his excuse for killing Watkins. He further testified that Wells leaned forward in the car and he, the defendant, shot Wells. But the defendant gave no explanation for shooting him twice, once in the back of the head and once in the side. The defendant testified that he then became alarmed and ran from the scene of the killing, but returned a short time later, and the woman said to him: "You God-dam son-of-a-bitch you kill me;" and then the defendant said, "and I did."

In my opinion, the circumstances alone are sufficient to support a verdict of murder in the first degree, and when the testimony of the defendant, given in his own behalf at his trial, is considered along with the circumstances, not only is murder in the first degree proved beyond a reasonable doubt, but is proved beyond any shadow of a doubt. Here are some of the circumstances that shed light on the occurrence, as will be hereafter pointed out:

The victims' car was parked on the shoulder of the road about 1 foot from the ditch on its proper side of the road.

The road is 17 feet wide.

There was ample space for other cars to pass.

Only the parking lights on the car were burning.

The first person the defendant killed was Watkins. When shot, Watkins was standing against the car door, which was closed. His blood ran down the side of the door.

The defendant fired four times, each shot taking effect. He was standing close to the car when three of the shots were fired; three of the empty shells which had been fired from defendant's 16 gauge gun were found within 4 feet of the left door of the victims' car.

The back windows were up (closed) on the car in which Wells was sitting on the back seat, and Hattie Mae Williams was sitting on the front seat. The win-

dows were not broken. Defendant's gun barrel must have been practically sticking through the open window on the left front door. The woman was sitting on the right side of the front seat and she was shot in the left temple.

Wells, for whose murder the defendant was tried, must have turned away when the woman was shot, as he was shot in the left side near the back, and another load of shot hit him in the back of the head.

Although defendant claims he was only going to call the officers and report the immoral conduct of his victims, he placed his shotgun in his car.

Without a doubt he put the gun in his car with the intention of shooting someone. He makes no claim that he was going squirrel hunting when he put the loaded gun in his car.

The persons he intended to kill were the persons he did kill. No one else was involved. This fact in itself is sufficient to make a case for the jury on the issue of first degree murder.

All of the victims of the killings were unarmed.

The following is the defendant's testimony as to the actual killings: "I went and got my car and cranked up and backed up and came on down. They had done moved from where they were at. I heard the car when it cranked up and I thought sure they were coming again. A little branch down the road, a little bridge, and they were just over that bridge, just barely room enough for a car to pass with a pretty good driver. I squeezed by and just as I got even they cranked up and I just cut across the road coming by and I held the center of the road and I seen they were driving past and I pulled over and they just whipped over right ahead of me and stopped. I hit my brakes and pulled over to the left, going past them, and one man jumped out of the car, the man driving jumped out of the car, and got right in the road and said, 'Stop, stop, you Goddam son-of-a-bitch. Where you going?' I

said, 'I am going to call the law to you all.' He said, 'Yeah, you are going to call the law — Goddam you, don't you know I am going to kill you?' Nothing to do but protect my life. This other man said, 'Kill the son-of-a-bitch, kill him.' He got up, and I don't know whether it was a 2-door or 4-door, and he came up and stuck his head over the front seat of the car and I shot them both.'' Later, he returned and killed the woman, as above mentioned.

The defendant's testimony, when viewed in the light of the proven facts in the case, shows conclusively that he did the killing because he was mad; he acted with malice, after premeditation and deliberation. According to the evidence, it was not necessary that he kill any one in order to protect himself. The undisputed evidence shows that the victims' car was parked on the side of the road, with the parking lights on. There was ample room for other cars to pass. In fact, according to the testimony of the defendant, he had passed the car occupied by those he killed before he ever stopped his car. It was not necessary for him to stop his car at all if he were going to a telephone to report the conduct of the victims of his anger. The jury would have been completely justified in disregarding his statement that he was going to a telephone, but, even giving him the benefit of telling the truth on that point, there was nothing to hinder him from continuing on his way to the phone. He was in his automobile, the other car had stopped; he had passed the other car; there was nothing to keep defendant from continuing on his way; he was between the other car and the telephone. The victims of the killings were unarmed; there is no contention that they made a display of any kind of weapon — of course, they could not make such a display because they had no weapon.

It appears from the evidence that this is what happened: The defendant had made arrangements to kill hogs that morning; in all probability, his story about squirrel hunting is made out of the whole cloth, and not a word of truth in it. Ordinarily, a person does not go

squirrel hunting for a short period of time and it is not likely that the defendant would go squirrel hunting on a morning when he had made previous arrangements to kill hogs. The evidence justifies the conclusion that defendant came upon the two men and the woman parked in an automobile on the side of the road. They probably gave him a cursing, and the defendant simply went home, got his shotgun, followed them up and killed them. According to the undisputed evidence, at the time the defendant stopped his car and got out, the victims of his anger were in a car parked on the proper side of the road — on the shoulder of the road only 12 inches from the ditch. The parking lights were burning. According to the defendant's testimony, he passed the car and there was nothing to prevent him from continuing on his way to a telephone if he were going to a telephone. But, instead of continuing on his way, he stopped, got out of his car, and started shooting. Undoubtedly Watkins was standing in the road, leaning against the door of his parked car when he was killed. He was found in the road at the door of the car, and his blood had run down the door. In order to kill the other two occupants of the car it was necessary that the defendant walk back to a point where he could stick the shotgun through the open window of the left front door, because the windshield was not broken and the rear windows of the car were not broken, although they were closed.

A repeating shotgun does not eject the shells to the front. They are ejected to the side and rear of the one using the weapon. The empty shells were found within four feet of the left front door of the car. This proves without a doubt that the defendant was standing right at the front door when he shot the woman and Wells. It will be recalled he was tried for killing Wells. Not only did the defendant shoot Wells once, but he shot him twice; either shot would have caused instant death. At that close range a shotgun is the most deadly and destructive of any gun. Wells was shot in the back of the head and could not have been making any movement toward the defendant. The jury was completely

justified, by the evidence in the case, in reaching the conclusion that the killing was committed in cold blood, with malice aforethought after deliberation and premeditation. The jury system may not be perfect, but it is certainly the best system that has ever been devised by man up to this hour. The defendant in this case had a fair trial before a fair judge, a fair prosecuting attorney, and a fair jury in the county in which the crime was committed, where the defendant had lived all of his life; and he was defended by most able counsel. It is clear from the record that nothing was said or done to arouse passion or prejudice against the defendant in any manner.

The killing of the two men and the woman was so closely connected in point of time as to be a part of one transaction, and hence, all of the evidence relating to the various killings was admissible in evidence. The manner of the killing of the woman in itself shows the defendant's frame of mind at the time he committed the crimes. He makes no contention that the woman was making any movement or display against him in any manner whatever. In her horror as to the crimes that had been committed, she merely said, why don't you kill me? This was at a time after the defendant had left the scene and returned, and his reaction to the woman's question was: "And I did.", meaning that he deliberately shot her down in cold-blooded murder. He did shoot her down in deliberate, cold-blooded murder, but the circumstances indicate that he killed her before he killed Wells, who was sitting in the back seat. The overwhelming evidence in this case supports the jury verdict and, in my opinion, the judgment should be affirmed. Therefore, I respectfully dissent, and I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

CROSS *v.* RIAL.

5-1323 305 S. W. 2d 129

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

[redacted]

Wood and *Smith,* for appellant.

W. H. Howard and *D. A. Clarke,* for appellee.

PAUL WARD, Associate Justice. The question presented on this appeal is whether or not appellant waived his right to rescind the purchase of a pickup truck from appellee. On November 26, 1955 appellant purchased a new 1956 pickup truck from W. W. Rial, appellee, who is the sole owner of the Rial Motor Company of McGehee, Arkansas. After a down payment of $977.48 (consisting of a trade in for $600 and $377.48 cash) the balance of the purchase price amounted to $2,747.52, payable as follows: $791.09 on May 25, 1956; $1,107.83 on November 25, 1956; and $875.64 on May 25, 1957. The Rial Motor Company (appellee) retained title to the said pickup truck in a Conditional Sales Contract executed by it and appellant on the date above mentioned.

Approximately one-third of the total purchase price mentioned above was for a four-wheel drive attachment manufactured and marketed under the trade name "Napco Powr-Pak." According to the understanding of appellant and appellee the four-wheel drive equipment was installed by the Dealers Truckstell Company in Memphis, Tennessee, at which place appellant was to, and did, accept delivery of the pickup truck after the installation had been made.

A short time after appellant accepted delivery of the pickup truck he noticed that the four-wheel drive equipment was not operating satisfactorily. He made several attempts, by taking the truck to appellee's garage and to other garages, to correct the defects. Finally after having driven the truck 6,288 miles he voluntarily left it parked on appellee's premises some time near the end of April, 1956. When the first payment became due on May 25, 1956 under the terms of the Conditional Sales Contract, appellant refused to make payment and appellee brought this action in the circuit court to collect the balance of the purchase price. After hearing all of the testimony the trial judge, sitting as a jury, rendered judgment in favor of appellee and against appellant in the amount prayed for. For a reversal of said judgment appellant prosecutes this appeal.

Much space in the able briefs of both parties is devoted to the question of whether or not, under all of the facts and circumstances attending the purchase of the equipment by appellant, there existed an implied warranty on the part of appellee that the four-wheel drive equipment, when installed on the truck, would operate satisfactorily for the purpose for which it was purchased.

It may be admitted for the purpose of this opinion that the four-wheel drive installation was defective and that it did not do the job for which it was purchased. However it is not necessary, and it would serve no useful purpose, for us to resolve the question above posed, because we have reached the conclusion that the judgment of the trial court must be sustained on the ground, assigned by the trial judge, that appellant waived his right to rescind the sale.

The trial court, after setting out the facts as it found them to exist, made the following conclusion of law:

"Defendant waived any possible right to rescission by executing the contract to purchase the truck at a time when he had actual knowledge of the fact that it had an objectionable feature, by failing and refusing to permit

Dealers Truckstell Sales, Inc., to service the 4-wheel drive accessory, by driving the truck 6,288 miles, by permitting others to work on the truck, and by requesting Plaintiff to sell the truck for him and stating that he would pay the difference if there was any loss."

The testimony, which is virtually undisputed, relating to appellant's waiver of the right to rescind is essentially and substantially as hereafter set out: Before appellant went to appellee's place of business to purchase a pickup truck equipped with four-wheel drive mechanism, he had already seen advertisements put out by the Napco Company describing Powr-Pak; At the time he closed the deal with appellee he understood that the four-wheel equipment would have to be installed by the Truckstell Company in Memphis, Tennessee, and; He was aware that the equipment was relatively new, that appellee did not install the equipment, and that appellee would not make a profit on the sale of the extra equipment. It is not disputed that the four-wheel drive mechanism did not function satisfactorily and efficiently, probably for the reason that it was not properly installed. As appellant was driving the truck (with the equipment installed) from Memphis he noticed what he considered to be too much vibration yet he went to appellee's place of business one or two days later and signed the sale agreement without making any objections. The record shows that appellant on different occasions had repairs made on the truck by the Rial Motor Company and others but it is not shown definitely on what dates the repairs were made or exactly what objections were made to appellee, if any. It was shown that on or about the middle of February 1956 the Rial Motor Company installed two universal joints in the truck and that appellant paid for them. Again it is not shown what objections were made to appellee on this occasion. It is not denied that the truck (with the four-wheel drive equipment) was not functioning properly and that this fact was made known to appellee. The record further discloses that appellee advised appellant to take the truck to Memphis in order that the Truckstell Company might try to correct the defects, but for some reason ap-

pellant failed or refused to do so. Appellee offered to take the truck to the Truckstell Company at Memphis, at his own expense, to have the defects remedied, but appellant would not consent, giving as his reason (according to Mr. Rial) that "he didn't believe they could fix it."

The record does not disclose that appellant at any time, even at the time of the return of the truck to appellee, after having used it 4 months, made the specific contention to appellee that there had been a breach of warranty or that he desired specifically to rescind the sale. For instance appellant, at one time, testified: "I told them it was vibrating, it wasn't right, it was hard to steer, the whole thing, but I never did bring it in and set it down and say, 'here it is, it has got to be fixed.' " On another occasion appellant stated: ". . . the first complaint that I ever talked to them about was the clutch slipping when I got it . . ."

In regard to the offer to take the truck to Memphis for repairs, Mr. Rial testified: Q. "Did he refuse to let you take it up there?" A. "He (appellant said he just wanted to trade the truck and get something he wanted better than, he would like better than the truck." Moreover appellant offered to reimburse appellee for any loss incident to another trade.

Ark. Stats. § 69-1469 offers a choice of remedies for the buyer to pursue where there is a breach of warranty by the seller. The facts disclosed heretofore place this case under the provisions of sub-section (3) of the above statute. This sub-section provides that: "Where the goods have been delivered to the buyer he cannot rescind the sale . . . if he fails to notify the seller within a reasonable time of the election to rescind . . ."

As was held in *Logue* v. *Hill,* 218 Ark. 797, 238 S. W. 2d 753, the determination of whether the buyer has made an election to rescind within a reasonable time depends on testimony. In other words it presents a question of fact for a jury.

In the case under consideration the determination of the fact question against appellant by the trial judge, sitting as a jury, must be sustained if it is supported by substantial evidence.

It is our conclusion that there is substantial evidence in this case to support the findings of the trial court and its judgment is therefore affirmed.

Affirmed.

Justice ROBINSON dissents.

SAM ROBINSON, Associate Justice (dissenting). It is the opinion of the majority that there is substantial evidence to the effect that Cross did not elect to rescind within a reasonable time, and, therefore, cannot prevail. In support of this finding, the majority cites *Logue* v. *Hill,* 218 Ark. 797, 238 S. W. 2d 753; but there is a vast difference between the facts in the *Logue* case and the case at bar. Logue bought a second-hand tractor in the early spring and used it in planting, cultivating, and gathering his crop, and made no attempt to rescind the purchase contract until after the crop season was over. But, even then, he was allowed to recover for a breach of contract, and he had filed only a general denial to the complaint.

Cross is a farmer, living at Pendleton, near Dumas, Arkansas. In his farming operation he needs a four-wheel drive truck. He had owned several four-wheel drive Jeeps, all of which had proven satisfactory. There is not a scintilla of evidence to the effect that he ever had any trouble with the four-wheel drive mechanism of his Jeeps; his experience with four-wheel drive automotive equipment had been good. He learned that a GMC truck, equipped with four-wheel drive, could be obtained and went to see appellee, W. W. Rial, the local GMC dealer, who was also the dealer in the four-wheel drive equipment. Rial contracted to sell Cross a GMC Pick-up Truck equipped with four-wheel drive mechanism. Mr. Rial did not have the four-wheel drive equipment in stock to put on the truck, but arranged to have the truck so equipped in Memphis. He therefore obtained a 1/2 Ton

Pickup Truck in Memphis and had it delivered to a concern known as Dealers Truckstell, where the four-wheel drive mechanism was installed on the truck. This four-wheel drive equipment is known as Powr-Pak.

There is no question but that Rial was the dealer who sold the four-wheel drive equipment to Cross as a part of the 1/2 Ton Pickup. The undisputed evidence is that the only way Cross could obtain the truck equipped with the four-wheel drive was through a dealer; he could not buy the four-wheel drive equipment from Dealers Truckstell, or from the manufacturers of the unit. Rial had literature in connection with the four-wheel drive mechanism. Among other things, this literature states:

"Now, you can go anywhere you want . . . in your GMC Truck equipped with Powr-Pak 4-Wheel Drive.

"You can climb 70% grades . . . plow through axle-deep snow or mud . . . haul heavy payloads over routes where you'd never dreamed a truck could go.

"With its powerful 'Powr-Pak' 4-Wheel Drive, the GMC is equally at home on or off-the-highway.

"Installation of the Napco Powr-Pak requires no frame cutting . . . nothing to weaken or distort the chassis. And at trade-in time it's a simple matter to remove the Powr-Pak and re-install it on your next GMC Truck.

"See following pages for further reasons why it will pay you to own a new GMC with Powr-Pak 4-Wheel Drive!

"Easiest-steering 4-Wheel Drive on the market because it has constant-velocity joints and proven low-friction advanced design. There's no highway whip or weave, even at high speeds. Turning radius is same as for standard 2-Wheel Drive models.

"Two-speed Napco transfer case gives 8 speeds forward, 2 in reverse. Allows you to shift in or out of 4-Wheel Drive at any Speed. Mounted on rubber for quiet

operation. Ground clearance with full load is 14 1/4″ at lowest point.

"6 Easy handling. Handles like a passenger car at all speeds. Short turning radius.

"7 Replacement parts and service available through every one of over 3,000 GMC Dealers in the U. S.

"8 Quiet operation. Transfer case mounted in rubber.

"9 Increased truck life. Because POWR-PAK utilizes engine torque more efficiently engines can 'loaf' at low rpm while pulling heavy payloads. No gunning, no racing, no clutch 'jumping' or chattering.

"10 PTO optional. PTO conveniently located on top of transfer case takes full engine RPM and torque. Ideal for driving winches, power saws, core and post hole digging, etc. Available at small extra cost.

"11 GUARANTEED . . . The Powr-Pak's outstanding durability makes it possible to offer the industry's *most liberal guarantee.*"

Rial had the truck equipped with four-wheel drive mechanism and sold the whole thing to Cross as a unit. Later, Rial refused to remove the four-wheel mechanism because it, along with the truck, had been sold by him as one unit. There was executed and delivered to Cross what is called an "Owner's Service Policy" which, among other things, provides that the dealer will "road-test vehicle for engine, clutch, transmission, axle, brake and steering operations and make necessary corrections." One of the faults with the truck sold to Cross was that it was very difficult to steer. The undisputed evidence is that it was almost impossible to handle the truck on any kind of rough road. In an effort to overcome this condition, Cross attempted to obtain power steering, but it was not available. Another serious defect was in the four-wheel drive transmission; in fact, the whole trouble appeared to be in this part, which caused the vibration, making the truck practically useless. The policy is for three months, or 4,000 miles. The truck was re-

turned to the dealer at the end of the three month period. According to the undisputed evidence the truck, as sold to Cross, was practically worthless. He was never able to use it with any satisfaction whatsoever, and this condition existed from the day he bought it until the day he returned it three months later. He purchased it on the 26th day of November and returned it on the 27th day of February. This is the positive testimony. One witness for Rial testified that he thought the truck was returned in April, but was not positive at all in his testimony on this point. During the time that Cross had the truck he did everything possible to cause it to operate in a satisfactory manner. It was only when he gave up in utter despair that he returned the vehicle to Rial, from whom he purchased it. In these circumstances, I do not believe it can be said that the evidence is substantial that Cross waited an unreasonable time in which to elect to rescind. He was not looking for excuses to avoid his contract, although he had been charged a total of $3,752.04 for a 1/2 Ton Pickup Truck. On the contrary, he was doing everything possible to have the truck put in condition where it could be used. As it now stands, he will have to pay a total of almost $4,000 for a 1/2 Ton Pickup Truck that is practically worthless and has never been suitable for any use whatsoever. It is my view that he has ample grounds for rescinding the contract, and there is no substantial evidence that he did not elect to rescind in a reasonable time. Therefore, I respectfully dissent.

MANN *v.* LOWRY.

5-1349 303 S. W. 2d 889

Opinion delivered July 1, 1957.

[redacted]

O. D. Longstreth, Jr., Joseph C. Kemp and *Joseph Brooks,* for appellant.

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

SAM ROBINSON, Associate Justice. Under authority of Act 99 of the General Assembly of Arkansas for 1921, Ark. Stats. § 19-702, a majority of the electors of the City of Little Rock voted to adopt the City Manager form of municipal government. During the campaign on the issue of whether the City Manager plan would be adopted it was explained to the people that the law then in effect authorizing the City Manager system was defective, and, to be workable in a satisfactory manner, amendments would be necessary. Subsequent to adoption of the new form of city government by the people, the 1957 General Assembly, by Act No. 8, amended Act 99 of 1921; but the amendment was adopted prior to an election to select the Board of Directors for the city under the City Manager plan. This suit was filed asking for a declaratory judgment; thirteen points were put in issue in the circuit court. The cause is here on appeal and cross appeal. The view we take as to the direct appeal makes it unnecessary to go into the cross appeal.

The appellants have listed six points which are relied on for reversal, but, when analyzed, there are really only four points at issue. The first three points go to the question of whether, since the adoption of the 1957 amendment, it is necessary that the question of changing to a City Manager form of government be again submitted to a vote of the people. In Point 4, the validity of the emergency clause is attacked, and, by Point 5, it is contended that Section 22 of Act 8 of 1957 constitutes local legislation, and is, therefore, void. Point 6: Appellants contend that misleading statements were made by sponsors of the City Manager plan which render the election on that question void.

The question in which the first three points are concerned is whether the City Manager form of government

may be put into effect under the 1921 Act, as amended by the 1957 Act, when the amendment had not been adopted by the General Assembly at the time the electors of the city voted in favor of the City Manager plan. The mere fact that the Board of Directors had not been selected at the time of the adoption of the 1957 amendment is of no importance. If the 1921 Act could be amended, after the election, on the question of whether the City Manager plan would be put into effect, the fact that directors had not been selected would make no difference. The real issue is this: The electors adopted a City Manager plan of municipal government under an existing law which set out the details of the operation of such manager plan. Now, can the legislature amend the original law under which the plan was adopted by making a change as to those details, and such amendment become effective without a vote thereon by the people?

The changes, as listed by appellants, are as follows:

"1. Qualification of Directors.

a. Under this original act, any citizen or resident of the community, twenty one (21) years old or older could be a candidate for Director. Under the amended act, no person under the age thirty (30) can be a candidate for Director.

"2. Qualifications of City Manager were completely changed.

a. Under the original act, the City Manager had to be a resident, citizen, and elector in the community of which he was appointed City Manager.

b. Under the original act, he was required to be a Constitutional Officer.

c. Under the new act an attempt was made to turn him into an employee.

"3. Under the original act certain elected officers were continued in office until such time as their term expired. After which, the said officers were subject to appointment by the City Manager.

These offices:

a. City Clerk

b. City Treasurer

c. City Attorney

Under this new act, the terms of these offices are terminated. They are subject to appointment by the Commission.

"4. Method of electing officers under act has been changed.

a. All reference to primary election to be held under Act 99 of 1921, has been eliminated by Act 8.

b. Act 8 provides that the results of said election shall be certified by the County Board of Election Commissioners to the City Clerk.

c. Act 8 also provides that instead of running at large, that said Directors running for office under City Manager form of government run for numbered positions.

"5. The act also creates new offices.

a. The office of Mayor is created.

b. The office of an Assistant Mayor is created.

c. These offices did not exist under the original act.

"6. The office of Mayor is given an unlimited expense account.

"7. The following commissions which were not exempt from control by the City Manager under the original City Manager Act were exempted from control under the provisions of the new act.

Water Works Commission

Sewer Committee

Airport Commission

Housing Authority

Board of Civil Service Commissioner

Auditorium Commission

Library Trustees

City Manager Planning Commission."

Appellants cite *O'Brien* v. *City of Highland Park,* 317 Mich. 220, 26 N. W. 2d 891, in support of their contention that, because of the 1957 amendment, the City Manager form of government cannot be put into effect without the people again voting on the question. In that case, the original statute authorized a local option election on the question of placing the city firemen on a civil service basis. Later, the statute was amended to provide for placing policemen on civil service. The Michigan court held that the policemen could not be given the status of civil service employees without the people voting on that particular question. The court pointed out that the question of establishing a civil service in the police department had never been submitted to the electors as provided by statute, and the court said: "The rule that an amended statute is to be understood as if it had read from the beginning as amended, must not be applied to defeat the plain intent of the legislature in amending it." In other words, the Michigan court was of the opinion that the legislature intended that there should be an election on the question of placing policemen on civil service.

In the case at bar, the 1957 amendment makes no radical changes in the 1921 Act. Actually, only one thing is involved, and that is, whether the city shall change from an aldermanic form of government to the city manager system; and the electors have voted in favor of the change. The 1957 amendment to the original act of 1921 goes only to certain details to effectuate a better operation of the act. It is true that under the original act the City Manager was an officer in a branch of the government, and, as such, under the Constitution (Art. 19, § 3), he was required to be a qualified elector. By the amendment he is made an employee, hence he is not now required to be a resident of the city at the time

he is selected as City Manager; and his salary is, therefore, not limited by the Constitution. This enables the Board of Directors to select a qualified manager, who may be from out of the State, and to fix his salary in accordance with many factors that must be taken into consideration, all of which leads to a better operation of the City Manager plan.

When the 1957 amendment was adopted, it became a part of the 1921 act, the same as if the act, as amended, had been in that form from the date of the adoption of the original act. In *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707, the City of Fort Smith had adopted the Commission form of government under Act No. 13 of 1913. This act fixed the salaries of certain officers at designated amounts. Later, the General Assembly of 1923 amended the original act by raising the salaries. This court said: "In this connection it may be stated that the amendatory provision of the special session of 1923 from and after its passage became a part of the act of 1913, and in its relation to the sections of that act affected by it, stood with reference to future transactions as though the act had originally been enacted in the amended form. *Mondschein* v. *State,* 55 Ark. 389, 18 S. W. 383; and *Abney* v. *Warren,* 143 Ark. 572, 219 S. W. 748." See also *Kelleher* v. *French,* 22 F. 2d 341.

Appellants maintain that on authority of *McClendon* v. *Board of Health,* 141 Ark. 114, 216 S. W. 289, the City Manager is an officer. In the *McClendon* case, decided in 1919 when there were five members of this court, the City of Hot Springs adopted the provisions of Act 114 of the Acts of 1917, providing for a Commission Manager of Municipal Governments for cities of the first class. The act had no provision as to whether the Commission Manager would be an officer or an employee of the city. This court, by a majority opinion, held that the city manager was an officer. Chief Justice McCulloch and Mr. Justice Frank Smith were of the opinion that the city manager was an employee and not an officer. If the act under consideration at that time (Act 114 of the Acts of 1917) had provided, as does the act under consideration in the case at bar, that the city manager

would be an employee and not an officer, the court would doubtless have given effect to that provision of the act by holding that the city manager was an employee.

Appellants further contend that the *duties* of the manager make him an officer, but it is admitted that all of his acts are subject to the approval of the Board of Directors. The Constitution does not make the manager an officer, and the legislature has specifically provided that he is an employee. There is no constitutional interdiction which requires the court to overrule the General Assembly by saying that the manager is an officer instead of an employee, as he has been designated by the General Assembly. It is further argued by appellants that, for all practical purposes, the City Manager would occupy the same position as that now held by the Mayor and would have the same duties as the Mayor, and therefore, he is an officer. But there are vast differences, among which is the fact that, in the aldermanic system, the Mayor is elected to office for a definite term by the people and he is answerable to the people only. In the City Manager system, the manager is hired as an employee by the Board of Directors; he must answer to the Board and may be discharged by the Board.

It is argued that the offices of City Attorney, City Clerk and City Treasurer are not abolished by the amendment; that they are constitutional officers and cannot become employees. It is further contended that the amendment conflicts with Ark. Stats. Section 19-907, providing that emoluments of office shall not be changed during the term of office. These contentions are answered by pointing out that constitutional offices are not involved; the offices were created by the General Assembly; they may be abolished at will by the General Assembly, and that is exactly what has been done in the case at bar. When the City Manager plan finally goes into effect the offices involved, as they exist today, will be abolished; the incumbents of those offices will no longer hold the offices as a matter of right. True, the present incumbents may be employed by the Board of Directors to carry on necessary work for the city, but

such employment will be solely within the discretion of the Board. In these circumstances, it cannot be said that the offices, as such, have not been abolished.

Next we come to the proposition of the emergency clause. It provides:

"It has been found, and is hereby declared, that the management form of city government authorized under this Act provides an improved and superior method for the administration and government of cities of the first and second class; that many Arkansas cities would be greatly benefited by immediately changing from the aldermanic to the management form of government but that Act 99 of 1921 (and prior amendments thereto) contained defective provisions, cured by the amendments contained in this Act, which grossly impaired the efficiency and desirability of the management plan of reorganization and constituted a deterrent to such municipal reorganizations; that the passage of this Act will make available to cities of the first and second class whose present government is inadequate or inefficient an opportunity to reorganize hereunder and thereby greatly improve the efficiency and economy of their respective municipal governments. Therefore, an emergency is hereby declared to exist and, this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

The legislature has made a finding that cities of the first and second class whose government is inadequate and insufficient should have an opportunity to reorganize, and that this is a matter of emergency. Every one may not agree that it is an emergency, but that is not the test. The question is whether reasonable people might disagree. In *Cunningham* v. *Walker,* 198 Ark. 928, 132 S. W. 2d 24, in speaking of the validity of an emergency clause, we said: "If fair-minded and intelligent men might reasonably differ as to the sufficiency and truth of the fact assigned, the courts will not interfere. Under this rule the courts determine whether the assigned fact is one with respect to which fair-minded and

reasonable men would differ. The precedent is analogous to that applied in sustaining the verdict of a jury: if there is substantial evidence it will not be disturbed."

It is also contended on appeal that Section 22 of Act 8 of 1957 constitutes the amendment local legislation. The section applies to:

"(a) All cities of the first and second class hereafter electing to reorganize under Act No. 99 of the General Assembly of 1921, approved February 10, 1921, as heretofore amended and as amended in this Act; and

"(b) All cities of the first and second class that have not yet consummated a reorganization into the management form of government but whose electors, prior to the enactment of this amendatory Act, may have voted through an election held pursuant to Section 19-702, Arkansas Statutes (1947) Annotated, to reorganize the city under said Act No. 99 as amended."
The fact that Little Rock may be the only city at the present time coming within the category mentioned in Paragraph (b) of Section 22 does not make the act local legislation. The act applies to all cities that may now or may hereafter be either of the first or second class. Therefore, the act is not local. *Lemaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327; *City of Blytheville* v. *Ray,* 175 Ark. 1089, 1 S. W. 2d 548; *McLaughlin* v. *Ford,* 168 Ark. 1108, 273 S. W. 707.

The validity of the 1957 amendment is also attacked on the ground that misleading statements were made to the public at the time the manager form of municipal government was adopted. We have examined the newspaper clippings in the record pertaining to the proposed change and do not find any indication that the public was misled.

Affirmed.

McFaddin, J., concurs; George Rose Smith, J., not participating.

WESTARK PRODUCTION CREDIT ASSOCIATION *v.* SHOUSE.

5-1278 305 S. W. 2d 127

Opinion delivered July 1, 1957.

[Rehearing denied Sept. 30, 1957]

Hardin, Barton, Hardin & Garner, for appellant.

Donald Poe, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Westark Production Credit Association, hereinafter referred to as Westark, filed this suit against appellee, F. A. Shouse, alleging that over a period of time it loaned to Shouse an amount in excess of $100,000, and that Shouse owes a balance on the account of $26,867.47, and interest thereon. Shouse contends that he has repaid to Westark all the money he borrowed. In fact, he says that he paid to Westark an amount in excess of that which he borrowed. The chancellor made a finding that Shouse had repaid all of the money he borrowed from Westark and that Westark had converted to its own use stock which Shouse owned in Westark of the value of $1,985. Westark has appealed.

The circumstances giving rise to this cause involve the activities of the former secretary-treasurer-manager of Westark, and his connections with appellee, Shouse. The secretary-treasurer-manager, hereinafter called manager, was found derelict in his duties after an accounting conducted by federal auditors, and suit was filed by Westark against the Fidelity & Deposit Company of Maryland to collect on a fidelity bond for the defalcation of the manager. There was a settlement be-

tween Westark and the bonding company, and the manager was relieved of further responsibility. In the suit filed by Westark against the bonding company it was alleged that the defalcation of the manager in connection with the Shouse account amounted to $29,403.33, and against this amount was credited $1,725 for stock which Shouse owned in Westark.

The evidence on the part of Westark in the case at bar consists of ledger sheets which reflect all charges to Shouse, both valid, and those made by the manager in the course of his manipulations, as well as the payments on the account made by Shouse. These ledger sheets show that Shouse owns 412 shares of Class B stock in Westark. The evidence is substantial to the effect that during the period of the various transactions covered by the ledger sheets there was a tendency on the part of the manager, Mr. Shouse, and other persons, to sign drafts in blank with the payees and the amounts unknown, and, generally, to conduct the business of Westark in a very slipshod manner. The manager apparently was engaged in procuring dairy cattle for several of Westark's customers, and had an arrangement whereby Shouse would purchase the cattle in Kansas, Missouri and Wisconsin, truck them to Arkansas and deliver them to customers of the manager. Shouse had a letter of credit signed by the manager, as such, of Westark in an unlimited amount, which reads as follows: "To whom it may concern: Re: F. A. Shouse. This is to certify that the above captioned person is hereby empowered and authorized to execute drafts to be drawn on our account through the First National Bank of Fort Smith, Arkansas."

It is unnecessary to detail the transactions which the chancellor found were improperly charged to Shouse's account, but they are in two categories: First, purchases made by Shouse for the benefit of the manager of Westark were erroneously charged to Shouse; second, fictitious loans for the personal benefit of the manager were charged to Shouse. Also, payments were made by Shouse for which he received no credit.

The records of the federal auditor made in connection with the investigation of the manner in which the manager of Westark conducted its affairs were introduced in evidence. These records, when considered along with the testimony of other witnesses, are convincing that the balance which the complaint alleges is owed by Shouse is the result of the wrongful manipulations of the manager. A preponderance of the evidence sustains the chancellor's finding that Shouse is not indebted to Westark in any amount.

The trial court was also correct in holding that there was a conversion of Class B stock of the appellee. Professor Prosser, in his work on Torts (*Prosser*: *Law of Torts,* page 66), defines conversion and states: "Conversion may be committed by acquiring possession of the goods, with an intent to assert a right to them which is in fact *adverse to that of the owner.*" (Emphasis ours). *Barnett Brothers Mercantile Company* v. *Jarrett,* 133 Ark. 173, 202 S. W. 474. The fact that the amount of loss claimed by Westark was occasioned by the manipulations of their own agent and the fact that Westark allowed the bonding company credit for the Class B stock of Shouse, together with refusal to recognize Shouse's ownership of the stock free of any indebtedness, show an intent to assert a right adverse to that of the owner.

Appellant cites *Young* v. *Westark Production Credit Association,* 222 Ark. 55, 257 S. W. 2d 274, as authority for his contention that there could be no conversion, but the *Young* case is clearly distinguishable from the case at bar; there, the appellant was attempting to offset the value of his stock against an unpaid balance. Here, the appellee has paid his debt to Westark.

We are unable to agree, however, with the trial court's determination of the amount involved. The federal auditor, in his report introduced in evidence, found

that the amount of $335.00, or 67 shares of Class B stock, had been erroneously credited to the account of Shouse. From the record, this report appears to be correct, and the appellee is entitled to a judgment on his cross complaint of $1,725 instead of $1,985, and the judgment is modified to that extent.

Affirmed, as modified.