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PINE CREST MEMORIAL PARK *v.* BURTON.

5-1530 312 S. W. 2d 919

Opinion delivered May 12, 1958.

McMillen, Teague & Coates, for appellant.

John F. Park, for appellee.

CARLETON HARRIS, Chief Justice. Pine Crest Memorial Park is a privately owned cemetery, organized and operated under the terms of a certain declaration of trust, dated January 30, 1930. The management of the cemetery is the responsibility of a board of trustees. Under the authority of the Declaration, the trustees are empowered to make rules and regulations for the operation of the property, and rule 42 provides that only bronze markers shall be used.[1] In 1936, appellee's mother purchased from appellant a cemetery lot having four grave spaces. Appellee's father was buried on this lot in 1936, and in 1955, the mother was buried in one of the spaces. Appellee, M. P. Burton, decided to purchase a double marker for the graves of his father and mother, and found a satisfactory marker at the Wyatt-Monahan Monument Company for the installed price of $173.40. Appellant refused to permit the installation of this marker, contending that certain rules of Pine Crest had not been complied with. Upon hearing the case, the Chancellor held that the rules in question were unreasonable and arbitrary, and perpetually enjoined and restrained appellant and its board of trustees from enforcing or attempting to enforce such regulations. From such decree of the court, comes this appeal.

The deed conveying the cemetery lot to Mrs. Burton provides as follows:

"It is expressly agreed and understood that this conveyance is made subject to the provisions and restrictions specified in the Rules and Regulations of said Memorial Park at the present time, and which are made a part of this conveyance or which said Trust may hereafter make in conformity with the laws of the State of Arkansas, one of which Rules and Regulations, among other things, reserves to the Trust the exclusive right to control, regulate, install or have installed, all markers, and further reserves to the Trust the right to ap-

[1] This particular regulation is not under attack.

prove and supervise all construction, care and up-keep of all lots, burial spaces and graves in said PINE CREST MEMORIAL PARK.

The said Trust hereby covenants and agrees with the said grantee to set aside ten per cent of the gross sale price of this and all other deeds by it issued for lots and burial spaces in said PINE CREST MEMORIAL PARK, said fund so constituted to be known as the PERPETUAL CARE FUND, the principal of which shall remain intact and the income of which shall be applied toward the cost of the care, up-keep, and maintenance of said PINE CREST MEMORIAL PARK forever."

It is admitted by appellee that appellant has the right to make reasonable rules and regulations. It is, on the other hand, admitted by appellant that appellee would not be bound by an arbitrary or unreasonable rule. The issue therefore, in this case, is whether the particular rules and regulations of Pine Crest Memorial Park, herein under attack, are arbitrary and unreasonable.

The controversial regulations, applying to grave markers, are as follows:

"48. (b) The Bronze Alloy shall consist of:[2]

Not less than	87% Copper
Not less than	5% Tin
Not more than	2½% Lead
Not more than	5% Zinc
All other elements in total not to exceed	1%

49. With all bronze markers or memorials not purchased through the Park, the Owner offering such marker or memorial for installation must furnish the Park an affidavit of analysis from an independent laboratory made on a test bar run from the heat from which the specific memorial or marker offered for acceptance by the Park was cast. Analysis of smelter of ingot supplied to the manufacturer is not acceptable.

[2] One exception to the content is permitted—a marker furnished a veteran by the United States government.

52. All markers or memorials shall be installed by the Park, on foundations built by the Park, at the cost of the Owner, and the Park shall assume responsibility for the proper construction of the foundation and the proper installation of such marker or memorial; but the Park shall not be liable for any defective materials or defective workmanship beyond replacement or repair of such defective materials as have been furnished by the Park. All foundations shall be of the size and material specified by the Park.

54. If the marker or memorial is purchased from an outside agent and is approved by the Park as hereinbefore more particularly set forth, the charge for service and installation shall be on the basis of seven cents (7c) per square inch of the size of the marker and an additional charge or contribution of seven cents (7c) per square inch of the size of the marker to the Perpetual Care Fund, to be used for the maintenance and operation of the Park. No installation shall be made until both the service charge and the contribution to the Perpetual Care Fund have been paid in cash in advance." We proceed to a discussion of each regulation.

The marker purchased by Mr. Burton from Wyatt-Monahan has an alloy content of: 85 per cent copper; 5 per cent lead; 5 per cent tin; 5 per cent zinc. Appellee argues that such content substantially complies with the regulation mentioned above. Mr. D. A. Newman, secretary of Newman Brothers, Inc., manufacturer of the marker, testified that his firm has, for many years, used the 85-5-5-5 alloy for casting markers. He stated that each manufacturer has his own preference for a certain analysis, some using the same alloy as Newman Brothers, and others using a different formula . . . there is no set formula from which bronze markers should be cast . . . among twelve manufacturers of bronze markers, nine different alloys were being used, ranging in copper content from 83 per cent to 88 per cent; tin, 2 per cent to 6 per cent; lead, 1.5 per cent to 5 per cent; zinc, 4.25 per cent to 11 per cent . . . tests at the company indicated their markers would meet all reasonable standards for durability, corrosion and discol-

oration resistance. Mr. Newman is 32 years of age and holds a bachelor of laws degree from Cincinnati University. He received no metallurgical training in college, and testified that his knowledge of the subject has come from association in the business, and the reading and studying of various materials. Mr. William E. Hockenberger of Pittsburgh, Pennsylvania, was an important witness for appellant. Mr. Hockenberger is vice-president, metallurgist, and metallurgical engineer of the Pennsylvania Industrial Supply Company, a copper, brass, and aluminum warehouse. He graduated as a metallurgical engineer from the Carnegie Institute of Technology, following which he served as research engineer and subsequently as metallurgical engineer for Chase Brass & Copper Company before entering his present employment. Mr. Hockenberger testified that copper, tin, and zinc form a true alloy, *i. e.,* one which will mix together in any proportion and their components are not discernible. He stated lead does not enter into any composition at all . . . "* * * does not enter into alloys. It separates in the matter and can readily be seen under the microscope." He stated lead served no useful purpose other than to "make it more machineable." Mr. Hockenberger testified that he had examined the Pine Crest rules and regulations, and that this particular regulation contained the minimum for bronze. When asked if he was familiar with the composition of 85 per cent copper, 5 per cent zinc, 5 per cent tin and 5 per cent lead, he stated:

"A. 85 and three five's is widely used ingot due to the fact that it is easy to fabricate. It is easy to case and is a fast color, used in plumbing materials, various jobs in castings. I would say it is an industrial alloy more than anything else. It is known as leaded red brass.

Q. It is widely used for plumbing fixtures?

A. Yes, probably the most common one it is used for.

Q. In these books you have here, which I understand from you to be the leading books on standards, how is the composition 85,5,5,5 listed?

A. 85,5,5,5 is listed in A. S. T. M.[3] and all books as leaded red brass. It is not bronze.

Q. What would be the effect of five per cent of lead in there on weather?

A. In case of weathering I would say it would be a detriment in large quantities of lead, some of which would be on the surface, it would probably weather out. I would say it would certainly weather out. The corrosion products are undesirable."

On cross examination, Mr. Hockenberger further testified:

"A. Repeating again, 5 per cent lead in there is a detriment. It is a detriment to the alloy, performs no function. It just discolors it after weathering.

THE COURT: Makes it cut easier?

A. Yes. I am sure somebody that buys a marker is not interested in how it cuts. The manufacturer would be.

Q. That small a difference in the percentage makes a whale of a difference in the marker?

A. What percentage?

Q. 85 per cent copper and 87 per cent copper and 5 per cent tin in both—in other words, Newman requires 85 per cent copper, Pine Crest requires 87 per cent, two per cent difference in copper. Newman requires 5 per cent tin, so does Pine Crest. Newman requires 5 per cent lead and Pine Crest requires 2 1/2 per cent. Would that make all that difference of softness and discoloration?

A. You are doubling the quantity.

Q. There is 100 per cent in that marker and 2 1/2 per cent is not going to soften and discolor 97 1/2 per cent, is it?

A. If it was in the alloy, no, but it is not in the alloy, and the more lead in the mixture, the more difficult it is to get it finally disbursed.

[3] American Society for Testing Material.

Q. What I am getting at, there is only 2 1/2 per cent difference in the Pine Crest marker and in the Newman marker with reference to lead?

A. That's right.

Q. Newman has 2 1/2 per cent more lead?

A. That's right.

Q. Would that additional 2 1/2 per cent prevent the disbursal of all the other alloys to the extent it would soften it or make it accessible to discoloration to any great extent.

A. You are doubling the lead content. You have more chance of it being on the surface and be in larger globules."

According to the testimony, the Battelle Memorial Institute at Columbus, Ohio, an independent research laboratory, has done various tests on bronze alloys in connection with bronze memorials, and on the basis of such tests, has made the following recommendation as to mixture: 86 per cent to 90 per cent copper, 5 1/2 per cent to 6 1/2 per cent tin, 1 per cent to 2 per cent lead, and 3 per cent to 5 per cent zinc. The principal objection to the formula used in the Wyatt-Monahan monument seems to be the amount of lead contained in same, and we are persuaded that the 2 1/2 per cent difference in the amount called for under the regulations, and the amount contained in the purchased marker, is great enough to make a difference in the durability of the monument. It might be said here that this case has been well briefed by both sides, and numerous authorities cited,[4] in support of their respective positions as to each rule herein contested, some being favorable to appellant

[4] Among such cases are: *Orlowski* v. *St. Stanislaus Roman Catholic Church Society,* 161 Misc. 480, 292 N. Y. S. 333; *Roanoke Cemetery Company* v. *Goodwin,* 101 Va. 605, 44 S. E. 769; *Wetherby* v. *City of Jackson,* 264 Mich. 146, 249 N. W. 484; *A. W. Carlson, Inc.* v. *Judd,* 133 Conn. 74, 48 A. 2d 269; *Chariton Cemetery Co.* v. *Chariton Granite Works,* 197 Iowa 403, 197 N. W. 457; *Roselawn Memorial Park* v. *DeWall,* 11 Ill. App. 2d 66, 136 N. E. 2d 702; *Johnson* v. *Cedar Memorial Park Cem. Assn.,* 233 Iowa 427, 9 N. W. 2d 385; *Zimmer* v. *Congregation of Beth Israel,* 203 Cal. 203, 263 P. 232; *Abell* v. *Proprietors of Green Mount Cemetery,* 189 Md. 363, 56 A. 2d 24, 174 A. L. R. 971.

and some to appellee. Practically all the pertinent cases deal with particular requirements of various cemeteries, and all were determined on the basis of discrimination or the reasonableness or unreasonableness of the particular regulation in question. We are of the opinion that the rule here under discussion is reasonable. Appellee is not compelled to purchase a monument of this specific content. It is only a minimum standard. For instance, one containing 90 per cent copper would be permissible. A marker prepared under the required formula can certainly be obtained. As the evidence shows, there are dealers who would prepare this particular alloy. Appellee says that the content of 85-5-5-5 is substantial compliance with the Pine Crest regulation, but, under the proof, we cannot agree.

To the contrary, we consider rule 49 to be unreasonable. The requirement that an affidavit of analysis from an independent laboratory made on a test bar run from the heat from which the specific marker was cast, would be most difficult to obtain. The rule provides analysis of smelter and ingot supplied by the manufacturer is not acceptable. Not only does this provide an extra burden and expense, but, likewise, is discriminatory. This requirement relates only to markers "not purchased through the park." As stated in Vol. 14, *Corpus Juris Secundum,* Sec. 30, page 89:

"The proprietors of a cemetery may make rules and regulations for the care and management of lots in the cemetery, * * *. The rules and regulations must be reasonable, equal in their operation and uniform in their application to all owners of lots in the cemetery."

It appears that the particular effect of this rule is to practically give appellant a monopoly on supplying grave markers in the cemetery, and we hold the Chancellor was correct in holding this requirement to be unreasonable and arbitrary, and thus unenforceable.

After purchasing his marker from Wyatt-Monahan, Mr. Burton selected that company to install same. Pine Crest refused to permit this to be done, contending that under their regulations, they had the exclusive right to

install monuments. The trial court held this regulation to be unreasonable and enjoined appellant from enforcing or attempting to enforce such rule. Under the facts of this case, we approve rule 52, though in doing so, we should like to clearly emphasize that we are not, in general, approving a regulation which gives a cemetery the exclusive right to install monuments. Here, the cemetery regulations[5] provide that the marking of each grave is "restricted and limited to flat bronze tablets, set flush with the turf." The testimony reflects that after a period of years, these monuments may shift or tilt from their original position, and it is necessary to reset them. Pine Crest, having agreed with the lot purchaser, to furnish perpetual care, may well be required at some time in the future, possibly even several times, to reset any marker installed by Burton. This being true, the cemetery should have the privilege of originally installing the monument in a manner that, from its experience, will least necessitate an early resetting.

Having decided rule 52 to be valid, we conclude that the charge of 7c per square inch for installation, set out in rule 54,[6] is also reasonable. Certainly, the charge is not exorbitant. Appellee states that this provision is discriminatory in that it only applies to persons who purchase their markers from outsiders, but the testimony reflects that the installation charge is included in the price of the monuments sold by Pine Crest. In other words, all lot owners pay this charge, irrespective of the source from which their monument is purchased. However, we do not agree that the 7c per square inch charge for the Perpetual Care Fund is valid, for the reason that Mrs. Burton, in purchasing this lot, had already contributed to this fund. As previously set out, the trust agreed with the grantee to set aside 10 per cent of the gross sale of the lot as a "PERPETUAL CARE FUND, the principal of which shall remain intact and the income of which shall be applied toward the cost of the care, up-keep, and maintenance of said PINE CREST MEMORIAL PARK forever." Appellant argues that

[5] Rule 47.
[6] This rule was adopted in 1955.

the intent of rule 54 is to provide a fund "for the perpetual care of markers rather than for the park," but the regulation plainly states otherwise. We conclude that this portion of rule 54 constitutes a duplicate charge.

Summarizing, we hold:

(1) Rule 48 (b) is reasonable, and therefore valid.

(2) Rule 49 is unreasonable and discriminatory, and therefore invalid.

(3) Rule 52 is valid.

(4) The portion of rule 54 providing for a charge for service and installation is valid; that portion providing for a charge to the Perpetual Care Fund is invalid.

It is so ordered.

Justice WARD dissents, being of the opinion that all regulations are proper. Justice ROBINSON dissents.

SAM ROBINSON, Associate Justice. In 1936 appellee's mother, Mrs. J. W. Burton, purchased from appellant a certain cemetery lot having four grave spaces. J. W. Burton was buried on the lot in 1936. In 1955 Mrs. Burton was buried in one of the spaces. Not being satisfied with the marker purchased in 1936 for the grave of his father, appellee, M. P. Burton, decided to purchase a double marker for the graves of his father and mother. The appellant offered to sell such marker for $250.00, plus an installation charge of 7c per square inch, amounting to $40.04, or a total of $290.04. On shopping around appellee found a marker satisfactory to him at the Wyatt-Monahan Monument Company for the installed price of $173.40. Appellant refused to permit the installation of the Wyatt-Monahan marker, contending that certain rules of the appellant had not been complied with. It goes without saying that appellee would not be bound by just any rule appellant could adopt. Certainly a rule providing that nothing except solid gold markers could be installed would be unenforceable. In fact, the appellant makes no contention that the rules can be sustained if unreason-

able. Appellant says: "The issues is this case are as to whether or not the rules and regulations of Pine Crest Memorial Park are arbitrary and unreasonable."

The marker from the Wyatt-Monahan Company has an alloy content of: 85% copper; 5% lead; 5% tin; 5% zinc. Mr. D. A. Newman, secretary of Newman Brothers, Inc., manufacturer of the Wyatt-Monahan marker, stated that for many years his firm and other foundries have used 85-5-5-5 alloy for casting markers. The cemetery rules require a marker consisting of not less than 87% copper; not less than 5% tin; not more than 2½% lead; not more than 5% zinc.

In my opinion a preponderance of the evidence shows that for all practical purposes there is no distinction between the marker supplied by Wyatt-Monahan Company and those appellant has for sale. True, there is some difference, but the only real difference is the price. So far as looks are concerned, it takes a magnifying glass to tell there is any difference at all. And there is no evidence to the effect that there is any practical difference in the lasting qualities. In my opinion, the evidence fully sustains the chancellor, and the decree should be affirmed. Therefore I respectfully dissent.

CHILDERS *v.* CHILDERS.

5-1559 313 S. W. 2d 75

Opinion delivered May 12, 1958.

[Rehearing denied June 2, 1958.]

Wm. C. Jenkins & Herrn Northcutt, for appellant.

Green & Green, West Plains, Mo.; *Oscar E. Ellis,* for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Roy L. Childers, secured a divorce from his wife, Lucille L. Childers, in Mammoth Spring, Arkansas, October 8, 1957 under our three year separation statute (Sec. 34-1202 Ark. Stats. 1947). He had moved from Thayer, Missouri, to Mammoth Spring, Arkansas, in October 1956 and resided there since. He and his wife had lived together at Thayer, Missouri, for approximately 25 years, but had not lived together as man and wife since 1953. The parties are each 49 years of age. Two children, a minor daughter, Alberta Sue, who will be 18 years of age June 30, 1958, and a married son, 22, were born to this marriage.

In the divorce decree Mrs. Childers, appellee, was awarded use of the homestead, which they own as tenants by the entirety, at Thayer, Missouri, together with the furniture and household goods (until further orders of the court), $30 per month alimony for her support, $35 per month for the use and benefit of their minor daughter in addition to $55 per month the daughter was receiving from the rental of a salvage yard, which they also own as tenants by the entirety, and attorney's fee of $200 for appellee's counsel. From that decree comes this appeal.

For reversal appellant relies on these points: "1. The court did not take proper consideration of the appellant's financial and physical condition in the award to the appellee and the child of the parties hereto and therefore there is an abuse of discretion. 2. In award of attorney's fee for counsel for the appellee proper consideration was not given to the financial and physical condition of the appellant and therefore there is an abuse of discretion. 3. The court should have determined the property rights of appellant and appellee."

The evidence showed that all the real property owned by the parties was as tenants by the entirety and consisted of the home in Thayer, Missouri, of approximate value of $10,000 and the salvage yard worth about $6,500. Mrs. Childers testified that her husband, according to a bank deposit book in evidence made deposits covering the period from February 2, 1952 to and including June 3, 1952, of approximately $9,950 (prior to the separation in 1953), or an average of about $1,990 per month over this 5 month period. It appears that these deposits represented gross receipts from appellant's salvage yard and the expenses of operation are not shown.

Appellee further testified: (appellant's abstract) "the salvage lot was covered with salvage when he gave me $2,000 in July 1952; he continually sold salvage after that but never gave me anything after the $2,000; I had the children in the home and the cost of living was high during that time; the boy is 22, married, and the daughter 17, a senior in high school; she gets $55 from the rent of the yard; not a penny was given for son's upkeep and I paid his hospital bill out of the $2,000; I have had to help the girl as $55 is not enough to support her; he gave the boy a car and $5.00 weekly allowance and I had to pay the insurance and tires; I have used very little of the $2,000 for myself; I have had the utility bills, upkeep and repairs on the house to pay myself and I have had very little money for myself . . . I do not think he divided the money in half; he gave me $2,000 before he left home and has sold scrap iron, a lot of radios, batteries and tin since that . . . The only real estate we own is the home and the salvage lot; I do not have any first hand knowledge of the appellant's business income; I think it will take $75.00 to $100.00 to support our daughter; her expenses this month and last have been very high, our daughter is a senior in high school, my average earnings for the past year has been $30 to $40, I work only part time and try to be at home when our daughter is there . . ."

Appellant testified (appellant's abstract) "I sold my brother what was on the salvage yard for $2,000 and leased the property with him for $35 per month, he paid

$900 and owed $1,100, the arrangements were made to pay my daughter $55 a month, this being $35 a month from the lease and payments from the $1,100 owed; I gave it to my daughter and added $1,000 to it and I got nothing at all out of the deal in 1952; my wife has had the use of the home all of the time and bonds in the amount of $500 or $600, all bonds being made to me or her or to the children and she now has possession of such bonds, I gave to daughter the receipts of the scrap-iron." He further testified that he was averaging about $85 per month as a part time welder; that he had received a back injury that prevented his working full time. His employer corroborated this testimony. Mrs. Childers testified that she did not know what he was earning.

The allowance of alimony and child support in cases of this nature is largely within the sound discretion of the trial court: "The amount to be allowed as alimony is within the sound discretion of the trial court; and all the circumstances of the particular case should be considered in fixing it, such as the husband's ability to pay, the station in life of the parties, and the conduct of the wife bearing upon the cause of separation." *Johnson* v. *Johnson,* 165 Ark. 195, 263 S. W. 379. After a careful review of all the evidence, we have concluded that the preponderance of the evidence is not against the trial court's allowance of $30 per month to appellee as alimony, in addition to the property and other allowances to her and their daughter, Alberta Sue. While of foremost consideration is the husband's ability to pay (See *Coltharp* v. *Coltharp,* 218 Ark. 215, 235 S. W. 2d 884), the appellant here will be relieved of any legal obligation to support his daughter after she reaches her majority in June 1958, when she will be 18 years of age; "Ordinarily the legal obligation of a parent to support a normal child ceases upon majority of the child," *Worthington* v. *Worthington,* 207 Ark. 185, 179 S. W. 2d 648. Obviously appellant will be in a better position to pay the $30 monthly alimony awarded his wife when he is relieved of the $35 monthly payment to his daughter, out of his earnings.

Our rule is well established that the court may in its discretion award the homestead property, owned by the entirety, to the wife for her use and occupancy for her life subject only to the right of survivorship of the husband. See *McClain* v. *McClain,* 222 Ark. 729, 263 S. W. 2d 911.

We find no error in the allowance of $200 for attorney's fee.

We conclude, therefore, that, while the allowances —especially to the daughter—were somewhat liberal, the evidence does not warrant a finding by this court, at this time, that the decree and findings of the trial court were against the preponderance of the evidence.

Affirmed.

WARD, J., dissents.

HUGHES v. HOLDEN.

5-1550 316 S. W. 2d 710

Opinion delivered May 12, 1958.

[Opinion on rehearing delivered October 6, 1958.]

J. H. Spears, for appellant.

Frierson, Walker & Snellgrove, for appellee.

ED. F. MCFADDIN, Associate Justice. This case involves the claim of usury. The appellant, Hughes, filed the action against Appellee Holden, seeking to recover $4,128.90 because it was claimed that Holden had charged usury. The cause was tried before the Circuit Court without a jury; and the findings were made that the original contract and payments thereunder were free of usury. Accordingly, the judgment was in favor of Holden; and there is this appeal.

Holden owned a farm of several hundred acres in Crittenden County. In January, 1954 Hughes rented certain lands from Holden as a tenant, agreeing to pay Holden as rent one-third of the cotton and corn and other crops. Holden sold Hughes on credit certain farming implements, consisting of a tractor, plow, cultivator, etc., for a total in excess of $1,700. In addition, Holden, as landlord, furnished Hughes, as tenant, cash and supplies used in making the crop and amounting to several thousand dollars. There is no claim of usury in any such dealings.

The farming operations for 1954 were not financially successful, and in December of that year the parties made a new contract to rescind and supersede the landlord-tenant contract and the sales contract, both of which had been oral. In the new contract (likewise oral,

but conceded by all parties herein) Hughes agreed (a) to surrender to Holden all the farming implements without regard to value; (b) that the relation between Hughes and Holden for the crop year of 1954 was that of share-cropper instead of landlord-tenant; (c) that Hughes would receive the proceeds of only one-half of the crop instead of two-thirds of the crop; and (d) that Holden would charge all furnishings against Hughes' half of the crop. Among other things, the effect of this was to relieve Hughes of all obligation to pay for the farming implements. All of the 1954 cotton had been sold and the proceeds retained by Holden except nine bales, and Holden took over Hughes' half interest in this cotton at 33 cents a pound, and credited the amount against the furnishing account.

After the December agreement, changing the relationship from landlord-tenant to sharecropper as above mentioned, there were no further furnishings by Holden to Hughes and no further payments by Hughes to Holden. Some time thereafter, Hughes wanted a statement from Holden as to the final result of the 1954 operations; and Holden furnished Hughes a statement which showed that, after giving Hughes credit for all of the proceeds of his half of the crop and after charging Hughes with all furnishings, Hughes still owed Holden a balance of $740.05. This statement showed charges against Hughes of $5,093.81 and credits to Hughes' account of $4,353.76. Included in the charge items against Hughes there was this: "Finance Charge, $370.00." This is the item of usury.

Hughes moved from Holden's farm to the State of Mississippi; and then on March 14, 1955 filed the present action, seeking to recover the sum of $4,128.90, being the alleged value of all of Hughes' one-half of the crops. It was Hughes' contention that the charging of usury on the said statement in December, 1954 brought the previous dealings of the entire year within the interdiction of our Usury Statute (§ 68-601 *et seq.* Ark. Stats.)

But the defect in Hughes' argument is in the fact that usury never entered into any phase of the original

contract and was not brought into the dealings between the parties until the statement that Holden furnished Hughes after all dealings had been completed. The Trial Court found that in the original contract, "There was no provision for the payment of interest for moneys advanced to the plaintiff."[1] We can find no evidence that interest on the account was ever discussed in the conversations for the "new contract" in December; so the first appearance of any interest charge was in the statement furnished Hughes by Holden; and that was after all furnishings had been made and all crops accounted for. In short, the usury appeared only *after* the contract had been executed.

We have many times held that the taint of usury in a subsequent usurious contract does not invalidate a prior lawful contract, and the original contract may be enforced if clearly separated from the usury of the subsequent contract. *Walter* v. *Adams,* 138 Ark. 411, 211 S. W. 365; *Bank of Malvern* v. *Burton,* 67 Ark. 426, 55 S. W. 483; *Hynes* v. *Stevens,* 62 Ark. 491, 36 S. W. 689; *Johnson* v. *Hull,* 57 Ark. 550, 22 S. W. 176; *Tillman* v. *Thatcher,* 56 Ark. 334, 19 S. W. 968; and *Humphrey* v. *McCauley,* 55 Ark. 143, 17 S. W. 713. In 102 A. L. R. 573 there is an annotation entitled, "Contract not tainted with usury in inception as affected by subsequent usurious transactions in connection therewith"; and cases were cited from more than a score of jurisdictions to sustain the general rule that subsequent usurious transactions

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[1] We copy a portion of the findings of the Trial Court: "(1) The plaintiff and defendant entered into a landlord and tenant agreement at the outset of 1954 whereby the rent reserved was one-third (1/3) of the crops grown on defendant's land. As a further consideration, defendant agreed to furnish plaintiff with money and supplies necessary to make the crop, and to sell to plaintiff a tractor and certain tools to use in making the crop. *There was no provision for the payment of interest for moneys advanced to the plaintiff.* (Italics supplied.)

"(2) The parties farmed under this agreement until some time in December, at which time it appeared to both that the contract was an unprofitable one for both parties. Plaintiff could not pay for the tractor and tools, and plaintiff could not pay for previous advances of money and supplies out of his share of the proceeds of the crop.

"(3) The parties then agreed that in consideration of the surrender of the tractor and tools and the mutual surrender of their respective rights under their contract they would substitute a new contract . ."

will not invalidate an original contract free of usury. See also 91 C. J. S. 640. Applying the rule of these cases to the case at bar, we are clearly of the opinion that Hughes is not entitled to recover any part of the proceeds of the crops because those proceeds were applied to his account by mutual consent before any usury ever entered into any of the dealings. So, on the main issue the judgment of the Trial Court is affirmed.

There is, however, a phase of this case which entitles Hughes to some relief, although it is a "Pyrrhic victory." In his complaint, Hughes alleged that the finance charge of $370.11 was usurious on the furnish account and Hughes prayed for "all other relief." He proved that the $370.11 was usurious; so he was entitled to a judgment finding that the finance charge was usurious and that Holden could not recover any part of the $740.05. When the Court dismissed Hughes' complaint, the effect was to leave it appearing that Hughes owed Holden a balance of $740.05. But when the Court found, as it did, that the usurious $370.11 entered into the balance of $740.05, then the Court should have found that the usury tainted the balance claimed by Holden against Hughes. The effect of such a finding would have been to cast Holden for the costs in the Trial Court as well as in this Court. So, we affirm the Trial Court in all respects except in the taxing of costs; and the effect of this modification is to charge all costs of all courts against Holden.

George Rose Smith and Ward, JJ., dissent as to the modification.

ON REHEARING

George Rose Smith, J. In a petition for rehearing the appellee contends that we erred in modifying the trial court's judgment, by awarding the appellant his costs. We have concluded that this contention must be sustained. The circuit court was not asked to declare that the balance ostensibly owed to Holden was uncollectible, on account of usury, and in fact such a declaration would have added nothing to the legal effect of

the judgment. This is so because the appellant's complaint put in issue the account between the parties, and by the doctrine of *res judicata* the defendant's failure to assert a counterclaim precludes his enforcing it at a later date. Ark. Stats. 1947, § 27-1121; *Robinson* v. *Mo. Pac. Transp. Co.,* 192 Ark. 593, 93 S. W. 2d 311; *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S. W. 2d 193. By his complaint Hughes sought a money judgment only, for $4,128.90. He recovered nothing either in the trial court or by his appeal to this court; so he is not entitled to his costs. Ark. Stats. 1947, § 27-2316; *William* v. *Buchanan,* 86 Ark. 259, 110 S. W. 1024; Supreme Court Rule 24.

The appellee's petition for rehearing is granted, and the trial court's judgment is affirmed without modification. The appellant's petition for rehearing is denied.

McFaddin, J., dissents.

Ark. Power & Light Co. *v.* Cox.

5-1563 313 S. W. 2d 91

Opinion delivered May 12, 1958.

House, Holmes, Butler & Jewell, for appellant.

Rolland A. Bradley, for appellee.

MINOR W. MILLWEE, Associate Justice. Ernest E. Cox was local manager for the appellant, Arkansas Power & Light Company, in the territory served by its office in Malvern, Arkansas, for 27 years prior to November 5, 1955. On that date he was accidentally killed by the upset of an automobile furnished him by his employer while driving on U. S. Highway 51 west of Malvern. The instant appeal is from a judgment of the Hot Spring Circuit Court affirming an award of compensation by the Workmen's Compensation Commission to appellee, Mrs. Ollie B. Cox, his widow.

Appellant contends that the injury and death of Cox did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Law (Ark. Stat. Sec. 81-1301 to 81-1349). It is argued that there was no substantial evidence to support the Commission's finding that Cox had permission to make the trip out of which his death arose or to support the conclusion that he was acting within the scope of his employment.

There is little dispute in the material facts. The territory served by Cox as appellant's local manager embraced all of Hot Spring and parts of Garland and Grant counties. The automobile furnished him by appellant, and driven by him at the time of his fatal injury, was equipped with a two-way radio with which he kept in touch with the office, the other employees of appellant in the field and appellant's district office at Hot Springs, Arkansas, while he was not in the office in Malvern. He also used the car, which was maintained entirely at appellant's expense, in attending periodic meetings of local managers in Hot Springs. As a local manager, he had the responsibility of seeing that continuous electric service was rendered to appellant's customers within his territory. He was not confined to any particular hours or

places of work but was subject to call on a 24-hour basis and was expected to keep himself and the car available at all times in case of such emergencies as storms and wrecks involving company property. These emergencies occurred about 20 or 25 times a year.

The deceased had two homes. One in Malvern and the other near Jones Mill on Lake Catherine where he and his family spent 6 or 8 weeks out of each year. He always used the specially equipped company car in traveling to and from both homes and the appellant not only expected but required him to do so. Upon reaching the home it was his custom to leave the two-way radio on until late at night. He usually arrived at his home on Saturdays and other days of the week, except Sunday, at from 5:30 P. M. to 7 P. M. On Saturday November 5, 1955, he left Malvern about 5:45 P. M. for his home on the lake where he planned to have dinner with his wife and visiting relatives. A few minutes later he was killed by upset of the company car while proceeding on the most direct route to the lake home. Death was instantaneous and the first person to reach the scene found the headlights of the car burning and the radio receiving set in the car turned "on" as indicated by a green dash light on the vehicle.

While there was some dispute in the testimony concerning deceased's right to use the company car on trips to the lake home when he and his wife were not actually residing in the home, there was substantial evidence to the effect that deceased kept and used the car on all trips to both homes and other places in his territory with the full approval of appellant; and that, being subject to call 24 hours each day, the appellant required him to do so in order to be available for all emergencies.

Injuries sustained by employees while going to and returning from their regular place of employment are not, as a general rule, deemed to "arise out of and in the course of the employment" within the meaning of the Workmen's Compensation Law. This is commonly referred to as the "going and coming rule." However, one of the many well established exceptions to this gen-

eral rule is that off-premises travel injuries are compensable if the employee is on his way to or from work in a vehicle owned or supplied by the employer. We recognized the exception in *Blankenship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S. W. 2d 778, where we approved the following statement by the Washington Court in *Venho* v. *Ostrander Railway & Timber Co.,* 185 Wash. 138, 52 P. 2d 1267:

"When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within 'the course of his employment,' as contemplated by the act. In other words, when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor.

"This exception to the rule may arise either as the result of custom or contract, express or implied. It may be implied from the nature and circumstances of the employment and the custom of the employer to furnish transportation." See also, *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; and *Tinsman Mfg. Co.* v. *Sparks,* 211 Ark. 554, 201 S. W. 2d 573; *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S. W. 2d 646; *Frank Lyon Co.* v. *Oats,* 225 Ark. 682, 284 S. W. 2d 637.

The applicable rule is stated by the textwriter in 58 Am. Jur., Workmen's Compensation, Sec. 218, as follows: "As an exception to the general rule that an employee is not in the course of his employment while going to or returning from his work, it is generally held that where transportation to or from work is furnished by the employer as an incident of the employment, an accidental injury sustained by the employee while being so transported arises out of and in the course of the employment." Many cases from other jurisdictions on the subject are collected in an annotation in 145 A. L. R. 1033. Other recognized exceptions to the general rule applicable here, and under which off-premises injuries are held

compensable, involve situations (1) where the employee is subject to call at all hours; and (2) when the employee has a duty to perform for the employer while en route home.

Appellant relies heavily on the recent case of *Martin* v. *Lavender Radio & Supply,* 228 Ark. 85, 305 S. W. 2d 845, but the employer there did not furnish the means of transportation. The majority held there was no causal connection between the accident and the employment when the workman, in driving his own car to work, had not yet reached the point where he usually decided whether he would go by the postoffice for his employer's mail or send some other employee for it after reporting for work. Here the deceased was a managerial employee subject to call at all times and there is substantial evidence to the effect that it was his duty to take the specially equipped automobile of his employer with him to the lake home for the mutual benefit of himself and his employer, and that he was performing for his employer a substantial service required by his employment at the very moment of his fatal injury. In these circumstances we cannot say the Commission erred in concluding that his death arose out of and in the course of his employment. The judgment sustaining the findings of the Commission is, therefore, affirmed.

HICKERSON *v.* LYON.

5-1543 312 S. W. 2d 930

Opinion delivered May 12, 1958.

[redacted]

John E. Harris & Clinton R. Barry, for appellant.

Warner, Warner & Ragon, for appellee.

George Rose Smith, J. This suit was brought by the appellant, George Hickerson, to obtain cancellation of a deed by which he conveyed certain business property in Fort Smith to his daughter, Elma Dell Lyon, and her husband, the appellees. It is asserted that the grantees led Hickerson to think that he was executing a will instead of a deed and, further, that the deed is void for want of a proper acknowledgment. The chancellor held the deed valid as between the parties and therefore dismissed the complaint for want of equity.

The preponderating evidence rebuts the charge of fraud. The property was originally purchased in 1945, soon after Elma Dell's husband, Gloyd Lyon, had returned from military service. Title was taken jointly in the names of Hickerson and his first wife and Lyon and his wife. The two couples improved the property, and for some years Hickerson and his son-in-law, Lyon, together operated a filling station and a liquor store in part of the building that had been put on the land. In 1948 Gloyd and Elma Dell conveyed their half interest in the property to Mr. Hickerson. The parties are not in agreement as to whether any consideration was paid for that conveyance.

Elma Dell's mother, the first Mrs. Hickerson, died in 1949, and Hickerson remarried three years later. There is evidence, which Hickerson denies, that his second wife left him early in 1956. At that time Hickerson expressed a desire to make a will in favor of Elma Dell, his only child. According to Elma Dell, it was decided, however, that Hickerson would execute a "life estate deed" instead of a will, to be certain that Hickerson's second wife would not receive anything more than her dower in the property. An attorney was employed to prepare the deed now in question, by which Hickerson conveyed the property to his daughter and son-in-law, with a life

estate being reserved to the grantor. This deed was admittedly signed by Hickerson at the attorney's office on January 31, 1956, but Hickerson insists that he was induced to believe that the instrument was a will.

The chancellor was fully warranted in rejecting the charge of fraud. It is true that a confidential relation exists between a father and his daughter, but this does not prevent either from making a voluntary gift to the other. *Giers* v. *Hudson,* 102 Ark. 232, 143 S. W. 916. Such a gift is closely scrutinized in equity and will be set aside if it appears that the person in the dominant position has overreached the other. *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495. We do not find that the father's confidence was abused in this instance.

When the deed was executed Hickerson was an experienced businessman, in his early sixties. He had previously bought and sold real estate on several occasions. It cannot be said that he was under his daughter's influence; to the contrary, his seems to have been the more forceful character of the two. The other two persons present at the execution of the deed—Elma Dell and the lawyer—both testify that the nature of the conveyance was fully explained to Hickerson and that he understood its effect. In the circumstances it was not unnatural for Hickerson to give a vested remainder to his daughter and son-in-law, in view of Hickerson's apparent dispute with his second wife and in view of the Lyons' original interest in the property, which they may well have conveyed to him without receiving any consideration. All these facts are sufficient to overcome Hickerson's unsupported statement that he believed the instrument to be a will.

The second point involves the effect of an invalid acknowledgment. The attorney who prepared the deed testified that his stenographer had not yet qualified as a notary public and that he, with Hickerson's consent, took the deed down the street and had it notarized. It is conceded that Hickerson did not appear before the notary. The appellant, citing cases such as *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34, and *Hall* v. *Mitchell,* 175

Ark. 641, 1 S. W. 2d 59, contends that the invalidity of the acknowledgment rendered the conveyance void.

The cited cases do not apply here, for they involved the effect of a wife's failure to acknowledge the execution of an instrument affecting the family homestead. In those cases we merely gave effect to the statute which provides that a conveyance affecting the homestead is of no validity unless the wife joins in the execution of the instrument and also acknowledges it. Ark. Stats. 1947, § 50-415. Here the property was not the grantor's homestead, and consequently the unacknowledged deed was good as between the parties. *Williams* v. *Kitchell,* 212 Ark. 114, 204 S. W. 2d 873; *McSwain* v. *Criswell,* 213 Ark. 775, 213 S. W. 2d 383. It may be true that the notary public violated the criminal law in executing a false certificate, Ark. Stats., § 41-1818; but titles without number would be upset if we should hold that his wrongdoing made the deed void.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* WATKINS.

5-1556 313 S. W. 2d 86

Opinion delivered May 12, 1958.

Mehaffy, Smith & Williams, W. R. Thrasher, Dowell Anders & Bill Demmer, for appellant.

Wayne W. Owen & H. B. Stubblefield, for appellee.

PAUL WARD, Associate Justice. This is a condemnation proceeding involving 15.51 acres of land belonging to appellees. All testimony relative to the value of the land taken from appellees by the Arkansas Highway Department in this suit was directed to a parcel of land consisting of 28.955 acres. The 15.51 acres mentioned above is arrived at as follows: All four of the appellees own an undivided one-half interest in 26.885 acres, amounting to an entire interest in 13.44 acres, and all four appellees own the entire interest in 2.07 acres, making a total taking of an entire interest in 15.51 acres.

A jury awarded appellees damages in the sum of $45,000. Thus the judgment places a value of slightly more than $2,900 per acre for the land actually taken for highway purposes. It will be noted that in arriving at the acreage value above no allowance is made for severance damage or damage to adjoining property. We think, however, as will be later shown, there is no substantial evidence to sustain very little if any such allowances. Moreover we are unable to see how the jury could have fairly included in its total verdict such allowances since it appears that all the adjoining land is owned by only part of the appellees.

On appeal appellant urges two points for our consideration. *One*: It was reversible error for the court to permit the introduction of Exhibit 5 which is a plat showing the subject land and adjacent land divided into

lots, blocks, and streets, and also in permitting the introduction of testimony relative thereto. *Two*: The verdict is excessive in that it is not supported by substantial evidence. Before discussing these points a summary of the essential background facts should be helpful to a better understanding of that discussion.

The subject land is located approximately four air-miles in a northeasterly direction from the Main Street bridge in Little Rock, and is to be used by the Highway Department in the construction of a new super-highway from Little Rock *via* Jacksonville. It is approximately four-fifths of a mile long (running generally north and south) and is 300 feet wide except that it is wider near the middle. The wider portion will be utilized for an over-pass and access roads on both sides of the highway. Approximately half (the south half) of the strip coincides with or includes a portion of the present highway No. 67. The land adjacent to and surrounding the subject strip is not in cultivation but is covered with small oak trees, and the strip is approximately one mile from the Lakewood Addition to North Little Rock.

One: The evidence shows that the best and most valuable use that could be made of the subject land and the adjacent land is for residential purposes. It is not disputed that appellees had the right to introduce competent testimony to establish and explain the suitability of the land for that purpose. In attempting to do that, appellees exhibited a Plat (shown as Exhibit 5) to the jury which showed the subject land and the adjacent land to be laid off in lots, blocks, and proposed streets. According to this exhibit there were approximately 70 lots on the subject strip, with approximately 140 lots on the east side, and approximately 190 lots on the west side thereof. After the Plat had been handed to the reporter and marked for identification only, the following occurred:

Questions by Mr. Stubblefield:

Q. Just hold that, if you will, so the jury can see your explanation, and tell the jury what that is.

A. This is a map prepared by me showing the land being condemned in the different colors due to identification and by parcel numbers, the red lines show the existing highway and showing where the project starts through the land owned by Mr. Matthews. This is shown over a layout of streets and roads which is the normal way that we arrive at land cost and values of land.

The Plat was offered in evidence over the objections of appellant and when the witness admitted the area had not "been platted as indicated by the map," the court sustained the objection. It is not clear to us however, whether the Plat was later considered in evidence. As stated before, the Plat is a part of the record here, marked Exhibit 5, without further explanation, and it was shown to the jury. In any event, we think the effect of the court's ruling, in sustaining appellant's objection, was erased by what occurred thereafter. On re-direct examination of the witness (Arthur H. Thomas) he was asked to explain to the jury in a little more detail about the number of lots the land was going to be divided into, when appellant again objected. The Court stated: "He may testify as to how he arrived at it without reference to the exhibit." Witness was then asked: "Q. "You arrived at the figure by figuring out how many lots?".

Again appellant objected, but was overruled. Exceptions were saved by appellant. Witness then stated:

A. There is one tract of this land that lies adjacent and along an existing paved road which can be used for development; where the road is already dedicated, you can get four lots of the type and size that is being developed in Lakewood per acre and I put a per front foot on that property of $25.00 per foot which is about $2,000 per lot. I think that is a very conservative figure since we are getting $3,500 per lot in Lakewood. On the land being condemned, not fronting on existing pavement, I used three and a half lots per acre and a figure of $1,600 per lot for those eighty-foot wide lots and arrived at this figure that way.

Q. And that in your opinion was the value per acre on March 12, 1957?

A. I think that is a very conservative figure because we are getting much more than that in Lakewood right now.

Previously the witness had stated that lots in Lakewood sold for $6,000 to $12,000 a piece. Finally the witness stated that in his opinion the land in question was worth $6,000 per acre.

There can be little doubt that the above testimony and other testimony of a similar nature might have influenced the jury in fixing a value on the subject land. Such testimony allowed the jury to compare the value of the subject lots in Lakewood Addition without any knowledge of numerous factors that would have to be considered in order to make the comparison fair and equitable. It necessarily follows then that the jury's verdict would be based on conjecture and speculation. Our research of the numerous authorities dealing with testimony of this nature indicates it is universally condemned. The general rule is well stated in Nichols, Eminent Domain, Third Edition, Chapter 12, Sec. 3142(1) in the following language:

"It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush or boulders. The measure of compensation *is not* (emphasis supplied) however, the aggregate of the prices of the lots into which the tract could best be divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all the lots are disposed of cannot be ignored and it is too uncertain and conjectural to be computed. The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use."

In *United States* v. 620 *Acres of Land, Etc.,* 101 Fed. Supp. 686, which concerned the condemnation of land in Marion County, Arkansas, the Court, at page 690, approved this statement:

"To warrant the admission of testimony as to value for purposes other than that for which it is actually used, however, regard must be had for existing conditions and wants of the community, or such as may reasonably be expected in the immediate future. The uses considered in fixing value must be so reasonably probable as to have an effect upon the present market value of the land and a speculative value cannot be considered."

In the case of *Carolina Power and Light Company* v. *Clark,* 243 N. C. 577, 91 S. E. 2d 569, the court, in dealing with fixing the value of property based on its best adaptable usage, said that consideration must be given to existing business "or wants of the community, or such as may be reasonably expected in the immediate future to affect present market value." It was then said by the court: "purely imaginative or speculative value should not be considered," citing a long line of cases. This court, in *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, made this pertinent observation:

"One who anticipates an increase in the value of his property may feel it a hardship to surrender it without receiving more than its present market value, but it would be a hopeless task to either measure or satisfy the anticipations of a sanguine land owner."

Applicable to the question here considered is the language approved in *Louisiana Ry. & Nav. Co.* v. *Baton Rouge Brickyard,* 136 La. 833, 67 So. 922:

"At the time of the institution of this suit the tract in question had not been subdivided, and the question before the jury was as to the market value as a whole, considering all the uses to which it was adapted. The value of the tract for town lot purposes was one of the factors to be considered, but what the owner or purchaser might realize by a subsequent subdivision of the property and sale of lots partakes too much of the character of speculation to serve as a basis of valuation at the date of the institution of the present suit."

"It is proper to show that the property is suitable for division into village lots, and that it is valuable for that purpose, but it is not proper to show the number and value of such lots." Lewis Eminent Domain, Vol. 2 (2nd Ed.) P. 1058.

The matter of determining the value of property on the basis of a future subdivision into lots was under consideration in *City of Philadelphia* v. *United States,* 53 Fed. Supp. 492. There this question was asked: "Into how many lots would you subdivide this land?" The court in commenting on the propriety of the above question, said: "The question was not framed to test the basis of the witness" estimate, but was designed to circumvent the prohibition against introducing figures of subdivision. To have permitted this question, even on cross-examination, would have introduced a speculative feature to the minds of the jurors and would have been contrary to the well settled law of Pennsylvania." The court then quoted, with approval, the following:

"Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued."

The reason for the rule above set out is well demonstrated in the case under consideration. While some of appellees' witnesses explained that, in comparing the value of subject land and lots with other subdivisions of Little Rock and particularly with Lakewood Addition; they had taken into consideration the location and the necessity of supplying paved streets, water and sewerage, etc., yet that fact in no way eliminates the element of chance and speculation. On the other hand, such explanation merely emphasizes that element. Any attempt to determine the cost of such improvements would have entailed the use of time and technical knowledge beyond the scope of practicability and reason. In addition to the above, many more speculative matters would arise for

consideration. For example: How much other land in the vicinity is available for subdivisions; What will be the future demand for additional building sites; How long will it be before the subject land is made ready for the erection of dwellings; How fast will the lots be sold, and how much will be the finance charges, and; What will be the cost in real estate commissions for selling the property, and what will be the expense of numerous other items that could be mentioned?

It has been suggested that this court has approved the introduction of a Plat in a case similar to the one under consideration in *Ark. State Highway Comm.* v. *O. & B. Inc.,* decided April 22, 1957, 227 Ark. 739, 301 S. W. 2d 5. The facts in that case, however, were entirely different. There the subject land was a part of existing subdivisions of the city of Jacksonville. In that case the court pointed out the vital distinction to which we have referred by stating:

"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."

For the reasons set out and explained above we conclude, therefore, that the admission of the indicated testimony constituted reversible error.

Two: We have also concluded that the judgment for $45,000 is excessive. In order not to unduly extend this opinion we shall, in attempting to justify this conclusion, rely on all pertinent portions of what has already been set forth and upon a brief summary of the rest of the testimony relative to the value of the 15.51 acres of land.

A little more than a year before this litigation was instituted appellee Matthews bought and appellee Watkins sold the subject land (as a part of a 1,000 acre tract) for $225 per acre. The record shows that both parties knew at the time of the probability that the new highway would be built. It further appears from the contract of sale that the parties themselves anticipated some of the land might be taken by condemnation, and that they apparently thought the remuneration would not amount to more than $600 per acre.

Appellant's witness, Harry A. Pittard, who showed a familiarity with the subject land and also the development in Lakewood, placed the market value of the subject land at $582 per acre at the time of taking. Wesley Adams, another witness for appellant, who showed a familiarity with the subject land and lands in the vicinity, and who, like Pittard, took into consideration all mentioned factors bearing on its utilization for residential development, valued the subject land in several different parcels as it is described in the pleadings and as shown by Exhibit 5. The highest value was $750 per acre for certain portions and the lowest for any of it was $500 per acre. James H. Larrison, another witness for appellant, who was experienced in the sale and valuation of real estate in the Little Rock vicinity and who had inspected and appraised property for many years, made an inspection of the property in question. After taking into consideration the best usage of the property for residential purposes he fixed a value of $500 per acre.

Over against the above appellee, Matthews, together with other witnesses who were apparently as well qualified as appellant's witnesses, fixed the value of the subject land as high as $6,000 per acre. Matthews admits paying $225 per acre for 1,000 acres but said two-thirds of that acreage was not as valuable as the subject land. It seems to follow from this that one-third of the purchased land at $6,000 per acre would amount to much more than the total purchase price—in fact to $1,775,000 more. It must also be remembered that the other appellee sold the land for the same price that Matthews

paid for it. In addition, appellees estimate that other land, not taken, was damaged several thousands of dollars, and that they were entitled to still more damages on account of severance.

We cannot escape the impression that appellees were over impressed with the value of the subject land based on their expectations of what it would be worth sometime in the future when it might be ultimately improved and sold as lots. However, as heretofore pointed out, full credence cannot be given to testimony based on such eventualities in arriving at present market value.

We do not think appellees are entitled to severance damages. One witness at least stated he did not know appellant's plans provided for a wide over-pass across the subject land with walkways on either side, and also for a complete system of access roads. The record reveals such to be the plans. We find no substantial evidence to show that other lands belonging to appellees, or any of them, will be reduced in value because of the construction of the new highway. The evidence on the part of appellant was that the value of the said lands would be increased rather than decreased. Such would appear to be the implied effect of appellees' testimony. That is, the lands which one of them sold for $225 per acre a short time previously are now worth around $5,000 or $6,000 per acre.

In summing up we find, under the most liberal view, no substantial evidence to support a valuation of the subject land in excess of $1,500 per acre.

Since the error pointed out in the first part of this opinion does not reach appellant's liability for damages in some amount, this court can, in accordance with established procedure, offer a remittitur. See: *Chicago, Rock Island & Pacific Railway Co.* v. *Caple, Administrator,* 207 Ark. 52, 179 S. W. 2d 151; *McCord* v. *Bailey and Mills,* 195 Ark. 862, 114 S. W. 2d 840, and; *St. Louis, Iron Mountain & Southern Railway Company* v. *Adams,* 74 Ark. 326, 85 S. W. 768.

Therefore, if appellees will enter a remittitur so as to permit a recovery of only $23,265, the judgment so reduced will be affirmed by us. Otherwise, if such remittitur be not entered within 17 calendar days after the date of delivery of this opinion, the judgment of the trial court will be reversed and the cause remanded for a new trial.

HARRIS, C. J., and MCFADDIN, J., would affirm for the full amount.

RAINFAIR, INC. *v.* COBB.

5-1529 312 S. W. 2d 906

Opinion delivered May 12, 1958.

Shaver & Shaver, for appellant.

McMath, Leatherman & Woods, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a judgment of the circuit court affirming a decision of the Board of Review holding that certain former employees of appellant, Rainfair, Inc., are not disqualified under Ark. Stat. § 81-1106(a), as amended by Act 162 of 1953. This section provides for ten weeks' disqualification if employee voluntarily and without good cause connected with the work left his last work.

Appellant, Rainfair, employs about 107 workers. On the 2nd day of May, 1955, about 25 of the employees did not show up for work. On that same day Mr. James E. Youngdahl, director of organization for the Amalgamated Clothing Workers of America, notified Rainfair

by letter that the employees had gone on strike because of unfair labor practices. The letter from Mr. Youngdahl to Rainfair further states: "We are ready and willing to meet with representatives of your company at any time or place to make arrangements to have our majority status at Wynne, Arkansas, checked against your payroll by some neutral person as previously requested by myself of your officials at Wynne several weeks ago."

The issue between the workers and Rainfair was whether the Amalgamated Clothing Workers Union would be recognized by Rainfair as a bargaining agent for the employees, who were not at the time members of a union. On the same day, May 2nd, Rainfair sent the employees who had not come to work that day the following letter: "We notice that you did not come to work today. We do not know what the cause is for your being absent. You realize that it is necessary for us to have a full complement of employees in order to get our necessary production. Therefore, if you do not return to work by Thursday, May 5, 1955, we will assume that you have resigned and no longer wish to work for us. In that case it will be necessary for us to replace you. We hope that you return to work."

On May 18th the employees abandoned the effort to have the Clothing Workers Union recognized as the bargaining agent and offered to return to work unconditionally. On May 19th they went to Rainfair's place of business to go to work, but were told that no work was available. On June 20, 1955, they again informed Rainfair that they were on a strike. This second notification of being on strike was completely meaningless, because prior to that time they had been discharged.

The appellant, Rainfair, contends that the employees voluntarily quit their jobs and are therefore disqualified to receive unemployment compensation for a period of ten weeks as provided by Ark. Stat. § 81-1106, as amended by Act 162 of 1953.

The appellees contend that they did not voluntarily quit their work on May 2nd, but went out on strike; that

there was a labor dispute. They make no contention that they were entitled to compensation during the time they were on strike, as provided by Ark. Stat. § 81-1106(d). But they do contend that when they called off the strike and offered to return to work on May 18th and were refused work by Rainfair, they immediately became eligible for unemployment compensation.

This case is controlled by *Little Rock Furn. Mfg. Co.* v. *Commr. of Labor,* 227 Ark. 288, 298 S. W. 2d 56. There the court said: "When the claimants offered to return to work on November 30th, they removed themselves from the disqualification of Sub-division (d) of § 81-1106 . . ."

Appellant attempts to distinguish the case at bar from the Little Rock Furniture Manufacturing Company case on the theory that in the cited case the unemployment grew out of a labor dispute and that in the case at bar it is simply a situation where some employees voluntarily quit their jobs without a just cause. It is clear from the evidence that the employees did not quit their jobs in the usual sense of the word. They simply went out on strike, hoping thereby to prevail on the employer to recognize a union of their choice as their bargaining agent. When it was apparent that their strike would not succeed, they attempted to return to work, but the employer in the meantime had arranged to do without their services and the jobs they left were no longer available to them. This is the same situation as existed in the Little Rock Furniture Manufacturing Company case, and it was held that the employees were not disqualified under Ark. Stat. § 81-1106(a).

Affirmed.

HOLT and WARD, JJ., dissent.

PAUL WARD, Associate Justice, dissenting. I submit that the majority is wrong in holding this case is controlled by the *Little Rock Furniture Mfg. Co.* case [227 Ark. 288, 298 S. W. 2d 56]. Such a conclusion evades the real issue presented in the case under consideration; *i.e.* did appellees leave their employment voluntarily?

A summary of the material facts and issues in the two cases will show the distinction.

In the Furniture case it was conceded that there was a labor dispute preceding the strike. The opinion states: "The strike was called by the Labor Union in an effort to obtain certain desired economic benefits." The gist of the holding is this: "the claimants were disqualified under sub-division (d) of Ark. Stats. § 81-1106." That sub-division says "an individual shall be disqualified for benefits . . . for any week with respect to which it is found his unemployment is due to a *stoppage* of work which exists because of a *labor dispute* at the factory . . ." (emphasis supplied). The opinion then proceeds to hold that since the employees were disqualified under (d) they could not also be disqualified under (a) because "each sub-division [in § 81-1106] is mutually exclusive." The opinion did not discuss the facts or circumstances under which an employee might be disqualified for 10 weeks under § 81-1106(a). This sub-section says an employee must wait 10 weeks [after applying for work] before he can draw compensation *"if he voluntarily and without good cause connected with the work"*, leaves his employment.

The case under consideration is entirely different. Rainfair's contentions at all times have been: 1. Appellees were disqualified under subsection (a) because, 2. they left their work *voluntarily* and *without good cause* connected with their work.

1. If the majority opinion is right in holding, based on the *Furniture* case, that appellees cannot be disqualified for 10 weeks under (a) simply because they actually went out on strike, without attempting to show [as it does not] there was "a stoppage of work which existed *because of a labor dispute* at the factory", then the section just quoted has no meaning or significance. The result of the majority opinion would be to hold that any strike, whether it "exists because of a labor dispute" or not, can be successfully relied on to avoid the penalty provided in sub-section (a). That just does not appear to be a reasonable interpretation of the statutes.

2. If I thought the facts in the case under consideration showed a *bona fide* "labor dispute" I would concur in the majority opinion instead of dissenting, but I do not think so. This vital point was apparently deemed unimportant to the majority because it was not developed. I shall only summarily give my conclusions of what I think the evidence shows.

None of the employees had any complaint about wages, working hours, or working conditions as a basis for striking. Some of them didn't even know why they struck, and didn't know they were going to strike until they were told to do so. The Company's manager didn't know they were going to strike until after it was in effect. The nearest thing approaching a reason for the Union Officers to call the strike was their contention that the Company would not recognize the Union as a bargaining agent. The matter was mentioned about a month before the strike. But, as it appeared at the time and as it was proven later, the Union did not have a majority of the employees, and had no right to be recognized. The management told the Union Officers he would give the recognition when he was furnished with evidence of the required number. This certainly showed the Company's willingness to co-operate. Moreover the Union Officers well knew the law provided a way by which they could determine the extent of their membership—it was also pointed out to them by the manager—but they chose not to pursue that course.

Looking at the situation in its entirety, as it is disclosed by the record, in a common sense and impartial manner, I cannot believe the strike was called in good faith "because of a labor dispute at the factory." I have used the term "good faith" advisedly because I believe it is the only basis on which Labor and Management can successfully and peaceably operate for the mutual benefit of both.

Opinion delivered May 19, 1958.

[redacted]

Gordon H. Sullivan, for appellant.

Bruce Bennett, Attorney General, by *Thorp Thomas,* Ass't Attorney General, for appellee.

CARLETON HARRIS, Chief Justice. On May 24, 1956, petitioners, Tom Williams, Joe Standridge, and James Deaton, charged jointly with Grand Larceny, respectively entered a plea of guilty. Williams and Standridge were sentenced to five years' imprisonment in the state penitentiary, and Deaton received a three year sentence. The clerk of the court made out commitments in conformity with the court's docket entry, and the petitioners were returned to the penitentiary where they were

already serving other sentences.[1] Approximately two weeks after the commitments were issued and petitioners had been delivered to the penitentiary, the transfer agent for the Arkansas State Penitentiary called the clerk and advised him that under the commitments issued, the sentences of petitioners would run concurrently rather than consecutively, since said commitments were silent as to whether they should run concurrently with the sentences already being served, or consecutively thereto.[2] The court, upon being so advised by the clerk, instructed the latter to issue new commitments, adding the words "said sentence to begin at the expiration of the sentence defendant is now serving in the state penitentiary." A similar notation was added to the docket sheet by the court, and the new commitments bore the original date of May 24th. On February 4, 1958, Deaton, Williams, and Standridge, under authority of Act 419 of the Acts of the General Assembly of 1957, filed a petition alleging that since they had already been in the penitentiary for approximately two weeks before the new commitments were issued, the court had lost jurisdiction of the parties; that they received no notice of the issuance of the new commitments and were not present in court at the time same were issued; that the effect of the court's action was to give them additional sentences "without them being before the court or notice to the defendant, and without jurisdiction on the part of the Pulaski Circuit Court." They prayed that the second commitments issued be held null and void, and that the court declare the original commitments as the proper ones under which they were to serve their sentences.

[1] The record does not reflect when petitioners were first committed to the state penitentiary, the length of sentence being served, or why they were away from the penitentiary at the time of committing the instant offenses. Under the weight of authority, the general rule, hereinafter discussed, as to consecutive and concurrent sentences, is the same, whether one be sentenced on two charges at the same time, or at different times. See *People* v. *Sukovitzen*, 138 Cal. App. 2d 159, 291 P. 2d 107; *People* v. *Ragen*, 396 Ill. 565, 72 N. E. 2d 175; *Williford* v. *Stewart*, 355 Mo. 715, 198 S. W. 2d 12; *Ex parte Hodge*, 158 Tex. Cr. R. 549, 258 S. W. 2d 323.

[2] According to an opinion rendered by the office of the Attorney General to the superintendent of the penitentiary on March 18, 1953, in a similar case.

The court denied the petition, and from such denial, comes this appeal.

For reversal, appellant relies upon three points, but we need go no further than the first point to determine the issue. Appellant's first point is "When a person is legally committed to the State Penitentiary, the court loses jurisdiction of said cause, barring any clerical error."

First, it might be well to discuss the law applicable to the matter of concurrent and consecutive sentences. One of our earlier cases dealing with this subject is *Ex parte Brady,* 70 Ark. 376, 68 S. W. 34. There, this Court said:

"It is true that, where one is convicted of two or more offenses the punishment for which is imprisonment, the judgment should direct that the imprisonment in one case commence after the termination of it in the other, and if this is not done the terms of imprisonment may run concurrently, so that the prisoner will be entitled to his discharge on the expiration of the longest term adjudged against him."

This conforms to what presently constitutes Sec. 43-2311, Ark. Stats. (1947), which reads as follows:

"If the defendant is convicted of two or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others."

In 1923, the legislature passed an act (Act 152) which appears in our statutes as Sec. 43-2312, and which reads as follows:

"Hereafter when any person shall be convicted of more than one felony, the punishment for one of which begins before the expiration of the sentence imposed on the other, the court trying the cause shall have the authority to direct that said sentences shall run concurrently, if it shall be deemed best for society and the person convicted."

However, in the case of *Hayes* v. *State,* 169 Ark. 883, 277 S. W. 36, this Court held that the 1923 Act (Sec. 43-2312) did not repeal Sec. 43-2311 (then Sec. 3239 of Crawford & Moses' Digest). Chief Justice McCulloch, speaking for the Court, said:

"The statute last quoted does not repeal the former, and it is seen from a perusal of it that there is express authority for making the term of sentence in one case begin at the expiration of another term of sentence, * * * ."

Hence, it follows that unless the judgment specifically directs that one sentence shall commence upon the expiration of the other, the sentences will run concurrently. The State, through the Attorney General, does not argue that the law is otherwise, but contends that the action of the trial court in the present instance, was merely correcting a clerical error in the judgment. In *Fletcher* v. *State,* 198 Ark. 376, 128 S. W. 2d 997, this Court, citing several prior cases, held:

"If the trial court loses jurisdiction over the case when the statutory requirements for an appeal are complied with, and a transcript of the record is filed with the clerk of this court, it would seem that for a similar reason the trial court would lose jurisdiction of the case when it had issued its commitment of the defendant to the State Penitentiary, and the defendant had been transported there, and was serving his sentence.

So, in this State, there are two well known exceptions to the rule that the court has general power over its judgments during the term in which they are first rendered. One is that when an appeal has been perfected in this court and the other is that the defendant has served a portion of his sentence. In either case the trial court is without jurisdiction to modify its judgment, 'except to correct its judgment to make it speak the truth in aid of the jurisdiction of the appellate court.' "

This is in line with the general weight of authority, as stated in 168 A. L. R. 707.

"The great weight of authority supports the rule that when a valid sentence has been put into execution, the trial court cannot modify, amend or revise it in any way either during or after the term or session of the court at which the sentence was pronounced; any attempt to do so is of no effect and the original sentence remains in force."

As denoted by the last sentence quoted in the *Fletcher* opinion, it is true that we have several times held that a court has the power to correct clerical errors in its judgments, orders, or decrees. *McPherson* v. *State,* 187 Ark. 872, 63 S. W. 2d 282; *Hydrick* v. *State,* 103 Ark. 4, 145 S. W. 542; *Goddard* v. *State,* 78 Ark. 226, 955 S. W. 476. As stated by the Court in the *McPherson* case, *supra*:

"It is uniformly held that a court of record may correct mistakes in its record which did not arise from the judicial acts of the court but from the mistakes of its recording officers."

Here, there was no clerical error, though it appears the court, in sentencing petitioners, stated that their sentences would run consecutively to the ones petitioners were already serving. L. W. Rosteck, deputy clerk in the First Division Circuit Court, testified as follows:

"Q. You made out the commitment for Judge Kirby?

A. I made out the commitment.

Q. You failed to mention the word 'consecutive' that he used when you made out the commitment?

A. I didn't mention it in that I called it to the Judge's attention—the docket entry didn't indicate that the sentences were to run consecutively and he at that time said it didn't make any difference—that if he didn't say, it would automatically run consecutively.

Q. He did during the sentencing say that they would run consecutively?

A. That is true.

Q. In making up the commitment, you failed to incorporate the word 'consecutive' in the commitment?

A. I make the commitment from the Judge's docket—I don't make up the commitment on the verbal sentence—I make it up off of the entries on the Judge's docket, and when they did not reflect the word 'consecutive,' I called it to his attention and he said to let it go ahead like I had it written and they would automatically run consecutive—that was his impression."

Judge Kirby himself confirmed this testimony.

The passage of the 1923 act perhaps made confusing a correct interpretation of the law, and the court's error is understandable. Still, it was error, and necessitates a reversal.

The judgment of the court denying the petition is reversed, and the cause is remanded with directions to enter an order voiding the second commitments, and reinstating the original commitments issued on May 24, 1956.

ROBINSON, J., not participating.

BENNETT *v.* STATEN.

1571 313 S. W. 2d 232

Opinion delivered May 19, 1958.

W. B. Howard, for appellant.

Gerald E. Pearson, for appellee.

J. Seaborn Holt, Associate Justice. This action was a damage suit filed by appellee, Loren Staten, for personal injuries sustained when he was struck by an automobile driven by appellant, Captola Bennett, in the city of Jonesboro, July 14, 1956. At the time of the injury Staten was pushing a lawn mower on the east side of South Bridge Street in Jonesboro, in a northerly direction, when he was struck by an automobile coming from the rear, operated by appellant, Bennett. Appellee alleged various acts of negligence on the part of appellant and appellant answered with a general denial, and specifically pleaded various acts of contributory negligence on the part of appellee.

A trial to a jury resulted in a verdict in favor of appellee, and a judgment in amount of $2,750 was entered on the verdict. On appeal here appellant does not question the sufficiency of the evidence to support the verdict. For reversal she relies on the following points: "1. The court erred in failing and refusing to submit to the jury the issue of whether or not the plaintiff was guilty of contributory negligence in pushing his lawn mower in the street with his back to traffic instead of traveling on the sidewalk; as set forth in Defendant's requested Instruction No. 1. 2. The court erred in failing and refusing to submit to the jury the issue of whether or not plaintiff suddenly and negligently stepped in front of defendant's vehicle thereby causing the injuries; as set forth in defendant's requested In-

struction No. 2. 3. The court erred in failing to submit to the jury the issue of whether plaintiff kept a proper lookout and whether he was guilty of negligence in this respect; as set forth in defendant's requested Instruction No. 3. 4. The court erred in failing to tell the jury that a mere accident occurring without negligence gives rise to no liability as set forth in defendant's requested Instruction No. 4."

Appellant's position is stated in this language: "The evidence was undisputed that the appellee, while pushing a lawn mower, walked in the street instead of on the sidewalk and that he walked on the right side of the street with his back to traffic traveling in the same direction. It was appellant's theory, as set forth in the answer, that these acts constituted negligence on the part of appellee which caused or contributed to cause the injuries complained of. Appellant had a right to have the jury's attention directed to answering whether these acts constituted negligence which caused or contributed to cause appellee's injuries." Appellant frankly concedes that the court properly instructed the jury on appellee's allegations in his complaint that appellant was negligent in driving at an excessive and dangerous rate of speed; failed to keep a lookout for pedestrians, failed to keep her car under control and failed to give reasonable warning of her approach and to use every reasonable precaution to avoid injuring appellee. While she concedes that these instructions were correct, she insists that since she had specifically defended on the ground that appellee was negligent in walking on the wrong side of the street, and in the street instead of on the public sidewalk, darting in front of appellant's vehicle without warning, and failure to keep a proper lookout and pushing his lawn mower in the street instead of on the sidewalk, that she was entitled to have her theory of the case presented to the jury in her Instructions 1 and 2, which the court refused:

These instructions provided: "1. In your consideration of whether the plaintiff Loren Staten was negligent, you may determine whether or not an ordinarily

prudent person would have, under the same or similar circumstances; (1) Walked in the Street instead of on the sidewalk. (2) Walked on the right side of the street instead of the left side. (3) Pushed a lawn mower in the street instead of on the sidewalk. If you find that an ordinarily prudent person would not have done these things, then the plaintiff Staten was guilty of negligence, and if you further find that such negligence caused or contributed to cause the injuries complained of you will charge the plaintiff with such negligence. 2. The defendant contends that the plaintiff Staten suddenly and without warning changed his course and stepped in front of her vehicle. If you find that this contention is true and that such action was negligence on the part of the plaintiff which caused or contributed to cause the accident in question, then you will charge the plaintiff with such negligence."

We hold that these instructions were properly refused because they were in effect comments upon the facts presented and were fully covered by other instructions which fairly announced the law applicable to the facts in this case. A judge is ordinarily not permitted to comment on the facts. The record reflects that the court in general terms set out the theory upon which appellee was relying and also the theory of the defense, relied upon by appellant. He further instructed the jury to determine "which, if either, of the parties were guilty of negligence which caused, concurred, or contributed to cause the injuries complained of." He gave the accepted definition of negligence to the jury, and the definition of the meaning of proximate cause and contributory negligence as applied to both parties. The court further properly instructed the jury relative to certain recognized rules of the road which it would consider in determining whether either of the parties was guilty of any negligence. He further instructed covering several traffic statutes of the state pertinent to the facts presented relating to speed of motor vehicles, the duty of the motor vehicle operator upon approaching a pedestrian walking upon or along a public highway, in the language of the particular statute.

As indicated, appellant appears not to complain about these general instructions given by the court, which applied to both parties, but contends that they do not fully cover his theory of the case. We do not agree. As indicated, the instructions given by the court, when considered as a whole, correctly declared the law applicable to the facts presented. Appellant's requested instructions were fully covered by those which the court gave. The facts were not complicated. It was, therefore, not necessary for the jury to be instructed on any particular facts relied upon by appellant, in order to understand and answer appellant's theory of contributory negligence. The court fully and fairly covered appellant's theory of contributory negligence in the following instruction: "No. 5 Contributory negligence is the failure to use ordinary care for his own safety on the part of the person injured, which contributes directly or proximately to his own injury, and but for which, taken in connection with the negligence, if any, of the person sought to be charged, the injury would not have occurred."

Reversible error is committed only where no other instruction was given covering defendant's theory of defense. See *Cain* v. *Songer,* 176 Ark. 551, 3 S. W. 2d 315, and *Pacific Mutual Life Ins. Co.* v. *Smith,* 166 Ark. 403, 266 S. W. 279. In answer to interrogatory No. 1 propounded to the jury, the jury found that defendant (appellant) was guilty of negligence which caused, concurred or contributed to cause plaintiff's (appellee) injuries, and in interrogatory No. 2 the jury found that plaintiff (appellee) was guilty of no negligence causing, concurring or contributing to cause his injuries.

We find no error in the court's refusal to give appellant's Instruction No. 3, which was as follows: "You are told that a pedestrian has an obligation to keep a lookout for the presence of other persons and vehicles upon a street in order to protect himself and if you find that the plaintiff (appellee) failed to keep such a lookout, you may consider such fact upon the proposition of whether plaintiff was negligent." This instruction did not properly declare the law applicable to the facts here.

The court had correctly instructed the jury that "It is the duty of a pedestrian to exercise ordinary care for his own safety;" also, "Pedestrians, as well as motorists, are entitled to use the public highway, each must act with regard to the presence of the other." This was in harmony with our holding in *Walker* v. *Earnheart,* 187 Ark. 1110, 63 S. W. 2d 974, where we said: "The general rule is that a pedestrian has the same right to the use of a public street as the driver of a motor vehicle, and that each is obliged to act with due regard to the movements of the other, and neither is required to anticipate the negligence of the other. The rule is thus stated in *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. 2d 391, 393: 'Drivers of automobiles and pedestrians both have a right to the street, but the former must anticipate the presence of the latter and exercise reasonable care to avoid injuring them.' "

Finally, we find no error in the court's refusal to give appellant's following Instruction No. 4: "The court instructs the jury that if they believe from the evidence that the injuries, if any, sustained by the plaintiff were a result of a mere accident, that is, without negligence of anyone, then your verdict will be for the defendant." The facts did not warrant this instruction. What we said in *Newark Gravel Co.* v. *Barber,* 179 Ark. 799, 18 S. W. 2d 331, applies with equal force here: "The appellant urges a reversal of the case, first, on the ground that the injury was due to inevitable accident, and calls attention to authorities holding that no recovery can be had for a mere accident. It is useless to call attention to or to review authorities on this question, because this court has repeatedly held that no one is liable for a mere accident. Moreover, the jury was instructed fully on the question of negligence, and was told that appellee could not recover, unless the injury was caused by the negligence of Austin, and that this negligence must be the proximate cause of the injury . . . If Austin was guilty of negligence that caused the injury, it was not an accident, and appellant is liable. If Austin had been guilty of no negligence, then it would have been an inevitable accident, and there could have been no recov-

ery. These questions, however, were submitted to the jury under proper instructions, and the jury's verdict is against appellant on this issue. Moreover, there is no evidence in the record tending to show an unavoidable accident."

As indicated, the jury here, under proper instructions, had found that appellant was guilty of negligence and that appellee was free of any negligence. We find no evidence in this record that even tends to show an unavoidable accident. The text writer in C. J. S. Vol. 65, Sec. 264, Negligence, (e) announces the general rule applicable here in this language: "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. It is not raised and may not be submitted for consideration by the jury where either party was guilty of negligence in the situation which resulted in the injury, or if there is no evidence tending to prove that something other than the negligence of one of the parties caused the injury complained of . . ."

Finding no error, the judgment is affirmed.

BOLLINGER *v.* ARK. STATE HIGHWAY COMMISSION.

5-1499 315 S. W. 2d 889

Opinion delivered May 19, 1958.

[Rehearing denied September 29, 1958.]

Mark E. Woolsey, for appellant.

W. R. Thrasher, Edward Boyette, and *Bill Demmer,* for appellee.

ED. F. MCFADDIN, Associate Justice. The Arkansas State Highway Commission (hereinafter called "Commission") filed this suit to have obstructions removed from the right-of-way of State Highway No. 22 in the City of Charleston. It was claimed that the appellant,[1] Bollinger, had encroached on the right-of-way by placing his filling station, pumps, signs, etc. within the right-of-way fixed by the County Court order of 1927. Bollinger denied the validity and effect of the County Court order, denied the claimed width of the right-of-way, and denied any encroachment. The Chancery

[1] The defendants were Mr. Bollinger and his wife. She had only dower interest; and we will continuously refer to Mr. Bollinger as though he were the sole defendant and appellant.

Court heard the evidence *ore tenus* and rendered an opinion, which is in the record and has proved helpful to us. The Chancery findings and decree were in favor of the Commission; and Bollinger has appealed, presenting the points hereinafter to be listed and discussed.

I. *Validity Of The Entry Of The* 1927 *County Court Order.* In 1927, the Arkansas Highway Commission decided to construct State Highway No. 22, and the citizens of Charleston worked with the Commission to obtain the right-of-way. One of the citizens actively assisting the Commission was the appellant, Bollinger. On December 19, 1927, an order was entered, which appears in the County Court Records of Franklin County, and which laid out the highway right-of-way and fixed the width of the right-of-way on each side of the center line. The Commission claimed that this order made the right-of-way ninety feet wide in front of the Bollinger property here involved, being forty feet on the north side of the center line, and fifty feet on the south side of the center line; and that Bollinger's filling station, pumps, etc. encroached on the right-of-way. Bollinger claimed that the order of 1927 was void for several reasons; and that he was not encroaching on the true right-of-way. It was conceded by all parties that in 1927 Bollinger's father owned the particular property here involved, with a fence along the right-of-way, thirty feet from the center of the highway; that appellant, Bollinger, acquired the property here involved in 1938; and removed the fence and constructed a filling station, pumps, etc. thereafter.

It is appellant's contention that the County Court was not legally in session when the particular order here involved was entered: that in 1927 the terms of the County Court[2] of Franklin County were the third Monday in January, April, July, and October; that the regular October term convened on October 17, 1927; that

[2] Franklin County is divided into two Districts (see Act No. 51 of 1885); but the District in which the County Court met does not enter into this case, as both parties admitted in oral argument. Sec. 2266 C. & M. Digest gives the terms of the Franklin County Court applicable in 1927.

the Court then duly adjourned to November 12, 1927; and that when the Court adjourned on November 12, 1927, there was a lapse of the term because the adjourning order says, "Court adjourned until .....''; and that the effect of this unfilled date was to lapse the term. Appellant cites and relies on the case of *Ex Parte Baldwin,* 118 Ark. 416, 176 S. W. 680.

It was admitted that the County Quorum Court duly met[3] on November 14, 1927; that following the adjourning of the Quorum Court, the County Court records show, "Court adjourned until December 19, 1927''; and that the order here attacked bears date of December 19, 1927 and duly appears in the County Court Records as a part of the proceedings of that date, and has been of record since 1927. Notwithstanding these admissions, appellant says that the *failure to complete the date* in the adjourning order of November 12, 1927, as heretofore copied, lapsed the County Court until the January, 1928 term; and that the purported order of December 19, 1927 was not a County Court order but the action of the County Judge.

There are several sufficient answers to appellant's contention:

(a) The order of December 19, 1927 has been of record and unassailed since 1927; and after all these years presumptions must be indulged in favor of its validity. *Parsley* v. *Ussery,* 198 Ark. 910, 132 S. W. 2d 1; *Cannon* v. *Price,* 202 Ark. 464, 150 S. W. 2d 755.

(b) The contention made by the appellant in the case at bar is a *collateral* attack on the County Court order, and for that reason cannot prevail. *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S. W. 106; *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508.

(c) Even if the County Judge had merely acted as an agent of the County in making the order of December 19, 1927, still the County Court adopted and ratified the order by paying out County money arising

[3] This was fixed by Act No. 340 of 1927, which was prior to the law as now found in § 17-401 Ark. Stats.

for right-of-way claims because of the order. *Watts & Sanders* v. *Myatt,* 216 Ark. 660, 226 S. W. 2d 800; *Wilcox* v. *McCallister,* 186 Ark. 901, 56 S. W. 2d 765.

So, for the reasons stated, we find no merit in appellant's attack on the validity of the entry of the 1927 County Court order.

II. *Invalidity Of The* 1927 *Order Because Of Lack Of A Definite Description.* The 1927 Court order, changing widening and laying out the right-of-way of State Highway No. 22, described a road which began on the west side of Franklin County and proceeded easterly. The order described the center line of the highway for the entire distance,[4] and then stated the width of the right-of-way by reference to stations[5]—that is, 100-foot distances from the point of beginning.

Appellant says that the order is too indefinite to be valid; but we see no merit to such claim. We have cases which hold certain descriptions to be indefinite (see *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729; and *Wallace* v. *Desha County,* 194 Ark. 848, 109 S. W. 2d 950); but the highway location in the case at bar is so definite that "a stranger with a compass and a chain" could follow the road as laid out in the order. The road

[4] We copy the beginning point and a few calls in the description of the center line of the road in order to illustrate the statement: "Beginning at a point in the present traveled road 1,888 feet North of the corner of Sections 9, 10, 15, and 16, Township 7 North, Range 29 West: running thence North 68 degrees 45 minutes East for a distance of 134.7 feet; thence around a 3 degree curve to the right for a distance of 522.22 feet; thence North 84 degrees 25 minutes East for a distance of 3,384.85 feet; thence around a 2 degree curve to the right for a distance of 515 feet; . . ."

[5] We copy a portion of the order to illustrate our statement: "The right-of-way widths required for the alignment as hereinbefore described to be as follows:

Station to Station	Lineal Feet	Width to Left of Center Line	Width to Right of Center Line	Total Width Feet
00 to 56	5600	40	40	80
56 to 66	1000	50	50	100
66 to 71	500	40	40	80
71 to 74	300	40	50	90
74 to 120	4600	40	40	80
120 to 143	2300	30	30	60
143 to 192	4900	40	50	90"

Appellant's property lies between Station 143 and Station 192.

has a beginning point, a definite course, a length, and a width. The order describes a definite line which can be located by any competent surveyor. Several located the line and testified in the case at bar. The County Court order says that for certain distances—stations of 100 feet each—the highway right-of-way will be a designated number of feet on the left (north) side of the center line, and a designated number of feet on the right (south) of the center line. In *People* v. *Board,* 20 N. Y. S. 7, the Court, in approving an order laying out a highway, said: "The order laying out the road in question was legal. The center line of the road was accurately given, and the width of 25 feet on each side of said center line. This was sufficient. *People* v. *Commissioners,* 13 Wend. 310." To the same effect see also 39 C. J. S. 1003.

In the case at bar, we hold that the order was entirely definite; and, therefore, we reject appellant's second contention.

III. *Encroachments On The Right-of-way.* Appellant claimed that the highway right-of-way was only sixty feet wide (that is, thirty feet on either side of the center line) in front of appellant's service station; that appellant's pumps, etc., claimed to be encroachments, were more than thirty feet north of the center line of the highway; and that, therefore, there were no encroachments by appellant. The Commission claimed that the highway right-of-way, as laid out by the 1927 order, was ninety feet wide in front of appellant's service station, being forty feet north of the center line and fifty feet on the south of the center line. To substantiate this claim of encroachments, the Commission alleged and offered proof to establish that appellant's service station is between Station 145.00 and 146.10. According to the 1927 order, the right-of-way is ninety feet wide between Station 143 and Station 192, or a distance of 4,900 feet. Several witnesses supported the Commission on the question of appellant's encroachment. The Witness Perkins introduced in evidence his map which showed the encroachments. The Witness Levaris introduced in

evidence his map, which likewise showed the encroachment. The Witness McCloud testified:

"Q. Are you familiar with the subject property? The property of Mr. John Bollinger over which this lawsuit is brought?

A. Yes, sir.

Q. Have you ever made any measurements or anything of that nature to determine how far, if they are, these encroachments are on the right-of-way? The island and the sign that has been referred to here this morning?

A. Yes.

Q. You have made such measurements?

A. Yes.

Q. Do you remember to what extent, if any, these pumps and pump island encroach upon the right-of-way?

A. Well, the pumps, the pump island, I would say is thirty feet from the center line, and the right-of-way at that point, according to the 1927 court order and the plat, is forty feet."

From a careful study of the maps and the testimony we conclude that the encroachments were shown and that appellant's contention to the contrary is without merit.

IV. *No Notice Or Estoppel.* Under this topic heading in his brief, appellant claims: that, even if the 1927 order made the highway ninety feet wide in front of his service station, still he had no notice of such fact; that there was a fence along his present property[6] in 1927; that the fence was only thirty feet north from the center line of the highway; that the Commission made no entry on his property beyond the fence; that he vol-

[6] As heretofore stated, the particular property here involved was owned by appellant's father in 1927. After the death of Mr. Bollinger, Sr., appellant acquired the interest of his co-heirs in 1938 and took down the fence and erected his service station sometime thereafter.

untarily tore down his fence in 1938 when he acquired the property from his co-heirs; that he erected his pumps, etc. more than thirty feet north of the center line of the highway; that the Commission cannot claim beyond thirty feet north of the center line of the highway since there was no "entry" under the 1927 order beyond the 30-foot line. Among other answers to appellant's contention, the Commission claims that when Mr. Bollinger took down the fence and erected his service station and made it available to the public in 1938, such act constituted an entry by the public on the full forty-foot right-of-way north of the center line.

The Chancellor, in his opinion, said:

"As far as actual notice is concerned, Mr. Bollinger was on the committee that laid out this 1927 Highway and went up and down the highway and took right-of-way agreements. One of his witnesses was paid on the basis of an 80-foot right-of-way west of town, based upon the 1927 order. Mr. Bollinger told about how some of these landowners objected when they had trees in the right-of-way; how he took an engineer out to see his own father about leaving a tree in the right-of-way. The plans of the Highway Commission show that the same tree that was left was between the thirty-foot line and the forty-foot line in this Highway right-of-way of 1927. This would indicate that there was actual notice that this tree was in the right-of-way . . . We have several Supreme Court decisions, all holding that when the county condemns land, the county is liable for the damages.

The land mark case is *Arkansas State Highway Commission* v. *Palmer,* 222 Ark. 603, 262 S. W. 2d 772 . . .

It seems to me in a case like this one where the county condemns the land and the property owner is suffering damages and didn't get around to doing anything about it until this late date, that the county would be the party that might be liable for the damages . . . There is no adverse possession here. The Arkansas Statutes of 1947, § 37-109, based on Act 666 of 1923, provide that title to any Highway is not acquired by adverse possession, so you can't say that there is any adverse posses-

sion here, because this law was passed in 1923 and this order wasn't made until 1927. So as I see it, the thing to do here—the practical approach—is to enter this injunction, . . . and to allow Mr. Bollinger to file a claim against the county. If the county does not allow his claim, he can bring it up in the Circuit Court and have a jury trial . . ."

We conclude that the Chancery decree was correct; and it is accordingly affirmed.

HARRIS, C. J., and GEORGE ROSE SMITH and WARD, JJ., dissent.

OLMSTEAD *v.* ROSEDALE BUILDING & SUPPLY, ET AL.

5-1568 313 S. W. 2d 235

Opinion delivered May 19, 1958.

Frank J. Wills, for appellant.

H. B. Stubblefield, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellants are F. H. Olmstead Company, Inc., and Frank H. Olmstead, its president and principal stockholder. Appellees are Rosedale Building & Supply Company, Inc., and C. C. Hudgens, its principal stockholder. On April 1, 1954, appellants bought certain assets of a building supply business from appellees located at 8108 Asher Avenue in Little Rock, Arkansas, executing secured notes for the greater portion of the purchase price. In the sales contract appellees agreed, as a part of the consideration for said sale, not to engage directly or indirectly in any business competition with appellants in the Rosedale Area of Pulaski County, as defined in the contract, for a period of three years.

A suit brought by appellants on August 12, 1955, for alleged breaches of the non-competitive agreement resulted in a decree entered May 2, 1956, enjoining appellees until April 1, 1957, from "directly or indirectly furnishing any building materials for the erection of, or erecting, any structures on any lands" in the restricted area and from engaging in any business competition with that of appellants in the area during said period. The cross-complaint of appellees seeking judgment against appellants for $1,470 in damages was ordered dismissed. We affirmed the decree in *Hudgens* v. *Olmstead Manufacturing Company,* 227 Ark. 475, 300 S. W. 2d 26.

Appellants defaulted on the monthly payments due on the purchase money notes which had been paid down to approximately $8,000 on July 12, 1957, when appellees brought the instant suit to foreclose their liens on the assets of the building supply business securing the payment of said balance. In their answer and counterclaim, appellants claimed actual and punitive damages in excess of the unpaid balance of said purchase money

notes on account of alleged breaches of the non-competitive agreement by appellees, and asked for cancellation of said notes and the mortgages executed to secure them. The reply of appellees contained a general denial and affirmatively pleaded the former suit and decree as *res judicata* and a complete bar to all matters alleged and relief sought against them in the counterclaim. By agreement, appellants paid $8,500 into the registry of the court and the liens held by appellees on the business assets were transferred to said fund and the assets released. This appeal is from a decree dismissing appellants' counterclaim and directing that their indebtedness to appellees in the amount of $8,366.80 be paid from the funds in the registry of the court.

It is first contended that the chancellor erred in holding that the prior suit between the parties precluded appellants from introducing evidence of breaches of the non-competitive agreement by appellees which occurred prior to May 2, 1956, the date of the former decree. This proof was offered in support of appellants' plea that such breaches resulted in a partial failure of consideration for the purchase money notes sued on. In this connection it was shown on the former trial that C. C. Hudgens was the principal stockholder in two building material businesses at the time of the sale of the assets of Rosedale Building & Supply Co., Inc., to appellants; and that the other corporation was then inactive but was reactivated by Hudgens shortly after the sale when he began constructing and selling homes on lots he owned in the restricted area, the materials being furnished by the reactivated corporation. Appellants' offer of proof in the instant suit related to the same alleged breaches of the agreement which were fully explored and enjoined in the prior suit. Appellants insist that since there was no specific prayer for damages in the former suit as to such breaches, they were entitled to litigate that issue here.

This presents a question upon which there is a sharp division of authority, particularly where the second suit

is one at law for damages. A statement by the textwriter in 28 Am. Jur., Injunctions, Sec. 309, indicates that most courts favor the proposition that, where damages are not sought as incidental to an injunction, the decree granting the injunction is not a bar to an action at law for past damages on account of the thing enjoined. However, other courts hold that an injunction decree is a bar to an action at law for past damages regardless of whether the plaintiff in the injunction suit pleaded damages, and regardless of whether there was an attempt to recover damages in that suit. The textwriter's statement as to the majority rule is based upon an annotation in 14 A. L. R. 543. A more recent annotation on the question in 26 A. L. R. 2d 446 indicates that most courts, including our own, hold that a decree deciding an injunction suit is *res judicata* in a subsequent action for damages of all issues determined in the injunction proceeding. Our own cases go further and hold that the decree in the injunction suit is also *res judicata* of all issues in a subsequent action for damages which could have been interposed in the injunction suit.

In *Gosnell Special School Dist.* v. *Baggett,* 172 Ark. 681, 290 S. W. 577, this court reversed and dismissed a circuit court judgment awarding damages to plaintiffs for breach of their contract to teach school and sustained the defense of *res judicata* interposed by the school district by virtue of a former injunction suit involving the same contract. In so doing, the court said it was unimportant that the plaintiffs did not ask the affirmative relief of damages for breach of the contract in the injunction suit and reaffirmed the following statement from *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614: "The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit." The court also approved the following statement in 15 R. C. L. Judgments, Sec. 439: "If it is doubtful whether a second suit is for the same cause of action as the first, it has been said to be a prop-

er test to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form." Many cases from other jurisdictions are cited in support of this general rule in 30A Am. Jur., Judgments, Sec. 365.

In *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610, we affirmed a decree holding a former suit to redeem land and declare a deed a mortgage to be *res judicata* of a subsequent suit by the grantor to recover rents and damages for waste by defendants, although the grantor failed to assert such claim in the original suit. We there said: "The test in determining a plea of *res judicata* is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit. *Gosnell Special School District No.* 6 v. *Baggett,* 172 Ark. 681, 290 S. W. 577; *Cole Furniture Co.* v. *Jackson,* 174 Ark. 527, 295 S. W. 970; *Prewett* v. *Waterworks Imp. Dist. No.* 1, 176 Ark. 1166, 5 S. W. (2d) 735." See also, *Coley* v. *Westbrook,* 208 Ark. 914, 188 S. W. 2d 141; *Crump* v. *Loggains,* 212 Ark. 394, 205 S. W. 2d 846; *Timmons* v. *Brannan,* 225 Ark. 220, 280 S. W. 2d 393.

In the fourth subdivision of Ark. Stats., Sec. 27-1121, it is also now provided that a defendant *must* set out in his answer as many grounds of defense, counterclaim, or set-off as he shall have, and we have held the provision mandatory. *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S. W. 2d 193. The manifest purpose of this and similar statutes is to enable litigants to settle all matters in dispute between them in a single suit. *Troxler* v. *Spencer,* 223 Ark. 919, 270 S. W. 2d 936.

In *Hatch* v. *Scott,* 210 Ark. 665, 197 S. W. 2d 559, relied on by appellants, a judgment for a tenant in an unlawful detainer action involving the issue as to service of a notice to quit, was held not *res judicata* of tenant's

rights under renewal provision of lease presented in a subsequent suit by the landlord to construe the lease, and for its cancellation and a writ of possession, in the absence of a showing that such issues were in fact decided in the first action. We there pointed out that there was nothing in the record of the former proceeding to show what the circuit court's judgment was based on. Nor was there any showing that the former judgment involved a decision of the merits of the case. In the case at bar the matter of the repeated breaches of the noncompetitive agreement prior to May, 1956, constituted the primary and controlling issue in the prior injunction suit and was there very definitely and directly adjudicated on the same proof that was offered here. Any claim that appellants had for damages on account of these repeated breaches of the contract could and should have been interposed in that suit. Under the foregoing rules, we conclude that the chancellor did not err in sustaining appellees' plea of *res judicata* to the counterclaim for any damages by reason of breaches of the contract occurring prior to May 2, 1956.

The question whether appellants introduced sufficient evidence to sustain a judgment against appellees for damages by reason of Hudgens' breach of the contract after May 2, 1956 and prior to April 1, 1957, has given us much concern. It was shown that in several instances after May 2, 1956, Hudgens sold lots in the restricted area to the Commercial Corporation, which took mortgages back from its vendees for part of the sale price and in some instances assigned said mortgages to Hudgens. F. H. Olmstead also testified that he saw Hudgens "very active" in the restricted area after May 2, 1956, but did not know just what he was doing. Hudgens' brother and nephew owned stock in the Commercial Corporation but there was neither allegation nor direct proof that Hudgens conspired with the corporation's stockholders to circumvent and violate the noncompetitive agreement. Commercial Corporation is not a party to the instant suit and there is no showing that Hudgens, or any corporation he was interested in, fur-

nished any of the materials for the houses constructed after May 2, 1956. The former decree did not enjoin Hudgens from selling lots in the restricted area. In these circumstances, we cannot say the chancellor erred in holding the evidence insufficient to assess damages against appellees on account of alleged breaches of the contract occurring after May 2, 1956.

After termination of the non-competitive contract on April 1, 1957, Commercial Corporation opened a building material yard in the restricted area near that of the appellants and Hudgens subsequently became a stockholder in the corporation. Olmstead testified that he observed a dual sign post on the business premises in September, 1957, reading "Commercial Corporation" on one side and "Rosedale Building & Supply Company" on the other. It is argued that appellees should be perpetually enjoined from using the name "Rosedale" in the rather extensive area involved. Since appellants' own business is called "Rosedale Lumber and Paint Co.," it is insisted that appellees' use of the word "Rosedale" is misleading and tends to create confusion and an infringement on appellants' trade name. This was not made an issue in the pleadings nor is there any proof to sustain appellants' contention that use of the word would be misleading or confusing.

Appellants' other contention is that they were entitled to damages of $1,600 for attorney fees and other costs incurred in litigating the first suit. In the first place, there is no provision under our statutes and decisions to allow attorney fees and miscellaneous expenses as elements of damage in an action for breach of contract. *Evans* v. *Ozark Orchard Co.,* 103 Ark. 212, 146 S. W. 511; *Romer* v. *Leyner,* 224 Ark. 884, 277 S. W. 2d 66. Even if such items were recoverable, the right to them could and should have been asserted in the prior suit under the principles already announced.

The decree is affirmed.

WARD *v.* NOLEN.

5-1520 313 S. W. 2d 240

Opinion delivered May 19, 1958.

Spencer & Spencer, for appellant.

Wayne Jewell, for appellee.

GEORGE ROSE SMITH, J. This is a workmen's compensation case, in which the appellant asserts a claim for disability resulting from a ruptured disc in his back. The compensation commission rejected the claim, holding that Ward had not proved his case by a preponderance of the evidence, and that decision was affirmed by the circuit court.

The issue for the commission was largely one of credibility. Ward was employed at the appellee's sawmill for three days and a half, ending May 13, 1955. He testified that on the morning of the last day he injured his back as he was using a cant hook in trying to control a log that he was rolling down the skidway. The employer and several of his employees testified that Ward worked only as a handyman around the mill, culling and loading lumber, that Ward never worked on the skidway, and that he did not at any time use a cant hook. Ward also stated that later in the same morning something snapped in his back as he jumped from a truck to the ground. Nolen, the employer, testified that he was within three feet of Ward at the time and that Ward

simply stepped down from the truck, without jumping. It is conceded that Ward then complained of a "catch" in his back, professed himself unable to work, and obtained his wages for the brief period of his employment.

In denying the claim the commission referred to proof that Ward had been convicted of larceny, had been guilty of stealing chickens, and had testified falsely about a prior claim for a back injury. The commissioners went on to say: "Our decision in the case now before us is based on the fact that we do not believe a preponderance of the evidence establishes that claimant's breakdown was by reason of events in the employment. The claimant has been shown to be an unreliable individual, and his demeanor on the witness stand was such that we deem him to be evasive and unworthy of belief. We think it definitely proved that this claimant did not work on the skidway with a cant hook as he testified to having done when pain first struck him. We are dubious that his first intimation of back difficulty became apparent to him while he was on the job on May 13, 1955."

In the matter of credibility the commission's findings have the binding force of a jury's verdict. When we lay aside Ward's own version of how he received his injuries, all that remains is the fact that he complained of a catch in his back and that he is now disabled by a ruptured disc. This proof does not compel the conclusion that the claimant received an accidental injury in the course of his employment.

Affirmed.

EASTBURN *v.* GALYEN.

5-1570 313 S. W. 2d 794

Opinion delivered May 19, 1958.

[Rehearing denied January 23, 1958.]

[redacted]

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

Nabors Shaw, for appellee.

PAUL WARD, Associate Justice. This same subject matter comes to us on appeal for the second time. The opinion on the first appeal was delivered March 11, 1957, and will be found in 227 Ark. 506, 300 S. W. 2d 10. A brief statement of the facts, pleadings, and result of that case is necessary to an understanding of the issue on this appeal.

On April 20, 1956, appellant, John M. Eastburn, purchased the Seven Valley Cheese Plant, located at Mena, from appellee, L. A. Galyen, for the purchase price of $45,000. A down payment of $10,000 was made by Eastburn, and he was to pay the balance in monthly installments of $500. The payments were not made, and some months later Galyen filed suit in the chancery court for the balance due on Eastburn's note and to foreclose the mortgage on the cheese plant. Eastburn filed an answer in which he sought a recision of the purchase agreement on the ground that he and his wife had been induced to purchase the cheese plant by fraudulent representations of Galyen and his agents. From a decree in favor of Galyen, Eastburn appealed to this Court, where we held, in effect, that Eastburn had, by his acts, waived any misrepresentations that may have been made to him. See the *Eastburn* case, *supra.*

After the above mentioned disposition of the first litigation, on May 23, 1957 Eastburn and his wife filed a complaint in the circuit court against the said L. A. Galyen for special and exemplary damages based on the same, or essentially the same, allegations of fraud and misrepresentations which were relied on as a defense to the original foreclosure suit. To the above complaint Galyen filed an answer, later treated by the trial court as a demurrer, in which he pleaded estoppel based on the former litigation, setting forth, as exhibits, copies of the former decree, the opinion of this Court in the former case, and this Court's mandate therein. The trial court dismissed the complaint, holding that Eastburn's claim was "barred by the doctrine of *res judicata.*"

We think the trial court was correct in dismissing the complaint. When the foreclosure suit was filed against Eastburn, there was available to him as a defense a choice of two remedies. One was to accept title to the cheese plant and sue Galyen for the damage he had been caused by the alleged misrepresentations. The other remedy called for a rejection of title to the property, and a petition for recision of the sale and a refund of the purchase money which had been paid. When Eastburn elected to pursue the latter remedy, he was thereby precluded from later resorting to former remedy. All the essential conditions or elements applicable to the rule relating to election of remedies are present in this particular case: (a) Both remedies were available to appellants, (b) they are inconsistent, (c) they are based on the same state of facts, (d) the same parties were involved in both suits, and (e) appellants were not mistaken as to the existence of any material facts.

In the case of *Bigger* v. *Glass,* 226 Ark. 466, 290 S. W. 2d 641, the Court approved, and commented on, three essential elements: (1) The existence of two or more remedies, (2) the inconsistency between such remedies, and (3) a choice of one of them. There is, we think, no doubt that all of these elements are present in the case under consideration: (1) When Galyen

brought the foreclosure suit, Eastburn could have sought—as he did—a recision of the purchase contract and a return of the money he had already paid to Galyen, or he could have accepted the sale and asked for damages. (2) It was inconsistent for Eastburn to offer to return title to the cheese plant to Galyen, as he did in the first suit, and retain title in himself, as he had to do in the present suit. On this point the opinion in the *Bigger* case, *supra,* contains this statement:

". . . Stripped of all legal niceties, the matter is simply this: when Glass asked specific performance he was offering to surrender the property to Bigger for the full amount of money contracted. When Glass asked damages, he was keeping the property and seeking damages. Certainly keeping the property is inconsistent with surrendering the property . . ."

(3) It is clear under our many decisions that Eastburn made an irrevocable choice of remedies when he filed his answer in the foreclosure suit seeking a recision. Again we quote from the *Bigger* case for language that bears directly on this point:

". . . In many jurisdictions, merely filing a specific performance suit is not considered an irrevocable choice, for that suit may be dismissed without prejudice and then a damage action may be filed. This is no longer an open question in Arkansas, for we have a line of cases all holding that the filing of the suit is the act of irrevocable election . . ."

We can see no rational difference in this connection, between filing an answer and filing a complaint. Eastburn might have brought a suit for a recision before the Galyens brought the foreclosure suit, but the result obviously would have been the same. Also, under this view it is immaterial that Eastburn, under our former decision, did not have a decision on the merits of his allegations, because his election of remedies was made when his answer was filed.

Practically the same rules set forth above were announced in the case of *Belding* v. *Whittington,* 154 Ark.

561, 243 S. W. 808, which opinion is extensively quoted in the *Bigger* case, *supra.* It was there indicated that Belding would not have been bound by his election of a remedy if he could show "that his election was based upon a mistake of material facts." As stated before, Eastburn does not here contend that he was mistaken as to any material facts. The Court also said, in speaking of the doctrine of election of remedies: "Certainly this doctrine has the merit of preventing one who is about to hale another into court from making a capricious choice between inconsistent remedies which he may pursue."

We have read with care the numerous cases and authorities presented in appellants' able brief, but we find nothing to compel a conclusion different from the one we have reached. Appellants stress the holding in *Harris* v. *Whitworth, Admr.,* 213 Ark. 480, 211 S. W. 2d. 101, and the cases cited therein. There the principal issue was *res judicata,* and it is disclosed that, in the two actions involved, each did not depend on the same proof, and different parties were involved in both. Appellants cite Restatement, Judgments § 62, and Restatement Contracts § 383, to the effect that the remedy relied on as a bar must have been available to the elector. However, we see no application of that principle here because the remedy which appellants now seek to invoke was available to them in the foreclosure suit.

By what we have said heretofore we do not mean to imply that appellants might not also be barred from maintaining this present action under the doctrine of *res judicata.* This doctrine appears to be the one relied on by the trial court, but the result was the same as the result reached by us, and its decree should be, and it is hereby, affirmed.

Affirmed.

George Rose Smith, J., not participating.

4900 313 S. W. 2d 388

Opinion delivered May 19, 1958.

[Rehearing denied June 16, 1958.]

[redacted]

Thad D. Williams, for appellant.

Bruce Bennett, Attorney General; by *Thorp Thomas,* Ass't Attorney General, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Luther Bailey, was convicted in the Pulaski Circuit Court, First Division, of the crime of rape, and was sentenced to death. On appeal to this court the judgment was affirmed. *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796. *Certiorari* to the United States Supreme Court was denied. *Bailey* v. *Arkansas,* 355 U. S. 851. Later, appellant filed in the same court where he was convicted a petition for writ of *habeas corpus* alleging that certain of his constitutional rights had been violated. He alleged specifically that he was denied compulsory process to obtain witnesses, in violation of Art. 2, § 10, of the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution of the United States, and fur-

ther that he is a member of the Negro race and that his conviction is void because Negroes have been systematically limited in selection of petit jury panels in the court where he was tried. He prayed that a writ of *habeas corpus* be issued to the end that the conviction be set aside. The trial court granted the petition to the extent of ordering the superintendent of the penitentiary, where petitioner was confined awaiting execution, to produce the petitioner in court. The petitioner then filed an amendment to the petition for writ of *habeas corpus* and stated: ". . . this is a petition under Act 419 of the 1957 Acts of Arkansas, known as the Uniform Post-Conviction Procedure Act . . . That your petitioner has heretofore sought relief from his conviction by appeal to the Arkansas Supreme Court and by application for writ of *certiorari* to the United States Supreme Court. That the conviction under which the plaintiff is held and was sentenced is void and/or voidable in that he was denied the right of having compulsory process for obtaining witnesses in his favor in violation of Article 2, Section 10 of the Constitution of the State of Arkansas, the Fourteenth Amendment to the Constitution of the United States"; and prayed that his conviction be set aside.

The State, by the Attorney General, resisted the petition and affirmatively pleaded that Act 419 of 1957 is unconstitutional; that the Act would nullify Art. 2, § 11, of the Constitution of Arkansas, providing that the writ of *habeas corpus* shall not be suspended. At a hearing on the petition it was shown that prior to the trial the attorney for the defendant had requested the clerk of the court to issue subpoenas for the jury commissioners who had served as such from 1952 to the March term, 1956, inclusive, and that the court had refused to allow the clerk to issue the subpoenas. The trial court denied the petition, and the petitioner has appealed.

Act 419 of 1957 provides: "Section 1. Any person convicted of a felony and incarcerated under sentence of death or imprisonment who claims that the sentence was imposed in violation of the Constitution of the Unit-

ed States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of *habeas corpus,* writ of *coram nobis,* or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction . . ."

It will be noticed that the Act does not apply where the alleged error has been finally litigated or waived in the proceedings resulting in the conviction. Without a doubt the question of whether the trial court erred in refusing to permit the jury commissioners to be subpoenaed was either finally litigated or the point was waived. In the trial of the case on its merits, the attorney for the defendant requested that subpoenas be issued for the jury commissioners who had served over a period of years, and the trial court refused to allow the clerk to issue the subpoenas. If the trial court erred, it was at that point. The defendant was represented by able counsel who had every opportunity to make his record on the point and bring it up on appeal. If he did so, the alleged error was finally litigated. If this was not done, then the alleged error was waived. (As a matter of fact, the question of permitting the jury commissioners to testify was dealt with and disposed of on the first appeal.) If the defendant could at this time take advantage of the alleged error, likewise he could now litigate any other alleged error such as might be alleged to have occurred in the selection of the jury and admission of evidence or in the giving of instructions.

We do not reach the question of the constitutionality of Act 419 of 1957, because constitutional questions are not decided unless the case cannot be disposed of on any

other ground. *Duncan* v. *Kirby,* 228 Ark. 917, 311 S. W. 2d 157, and cases cited therein.

Affirmed.

MORRIS *v.* STATE.

4893 313 S. W. 2d 241

Opinion delivered May 19, 1958.

James P. Baker, Jr., for petitioner.

Bruce Bennett, Attorney General and *Thorp Thomas,* Ass't Attorney General, for respondent.

PER CURIAM. Petitioner, Morris, with a record behind him of many forgery convictions, is now serving a long term in the Arkansas State Penitentiary on pleas of guilty, in the Phillips Circuit Court, to the felony charges of forgery and uttering. Following the filing of his petition for writ of *habeas corpus* in an original action here, this court appointed able counsel to file brief here in petitioner's behalf, and this has been done.

We hold that applicant's petition must be denied. If he is proceeding under Act 419 of 1957 (now Secs. 43-3101—3110, Ark. Stats. 1947) and conceding without deciding the constitutionality of this act, then we can afford him no relief for the reason that he has not com-

plied with the procedural provisions of that act in that he did not first file a verified petition with the clerk of the court in which the convictions took place, and no action on any petition appears to have been taken in this connection by the trial court. *Sec.* 2 of the Act (Ark. Stats. Sec. 43-3102) provides: "The proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place." *Sec.* 6 of the act (Sec. 43-3106 Ark. Stats.) provides: "The petition shall be heard in the court in which the conviction took place and before any judge thereof." *Sec.* 8 of the act (Sec. 43-3108 Ark. Stats.) contains this language: "A final judgment entered under this act (Secs. 43-3101—43-3110) may be reviewed by the Supreme Court of this state on appeal, brought by either the petitioner or the state within six (6) months from the entry of the judgment. (Acts 1957, No. 419, Sec. 8 p. 1165)."

The record further shows that petitioner did not allege in his petition that the Phillips Circuit Court, in which he was convicted and sentences imposed for forgery and uttering, was without jurisdiction to try him on the charges. This court has repeatedly held that "Where a petitioner for *habeas corpus* is in custody under process regular on its face nothing will be inquired into save the jurisdiction of the court whence the process came." *State, ex rel. Att'y General* v. *Auten, Judge,* 211 Ark. 703, 202 S. W. 2d 763. Since petitioner does not allege here that the Phillips Circuit Court was without jurisdiction his petition cannot be considered by this court, his remedy was by appeal to this court, which he failed to prosecute.

Accordingly, the petition for writ of *habeas corpus* is denied.

Opinion delivered May 26, 1958.

[Rehearing denied June 23, 1958.]

Hardin, Barton, Hardin & Garner, for appellant.

Harper, Harper & Young, for appellee.

CARLETON HARRIS, Chief Justice. J. L. Jacobs operated an automobile motor company in Fort Smith under the name of Jacobs Motor Company. On September 24, 1955, Jacobs and wife, Mary Virginia, executed their promissory note to appellee in the sum of $3,000, due 90 days from date, and bearing interest at the rate of 6 per cent per annum until paid, representing borrowed money, which was deposited by Jacobs in

his bank account with appellee for use in his business. To secure the payment of said note, Jacobs and wife executed and delivered to the bank a second mortgage on certain real estate situated in Sebastian County.[1] At the same time they executed a chattel mortgage on various household items.[2] On December 27, 1955, Jacobs made a payment to the bank of $500 on the principal of said note, and paid the interest, leaving a principal balance due of $2,500, and on the same date, Jacobs and wife entered into a written extension agreement, which was attached to the note, extending the maturity date thereof to March 23, 1956. On January 31, 1956, Jacobs executed an additional promissory note to the bank for $6,000 for borrowed money, due on demand, for the purpose of obtaining money to use in his business.[3] On February 6, 1956, apparently using a portion of the money obtained by the execution of the note on January 31st, Jacobs paid to the bank the principal balance of $2,500, and interest due on the note executed September 24, 1955, and extended to March 23, 1956, and accordingly remained indebted to the City National Bank in the principal sum of $6,000. On April 21, 1956, Jacobs paid appellee $1,000 on the principal of said note together with interest, and executed a new note, due in 90 days, in the amount of $5,000, as a renewal thereon. Thereafter, the note was successively renewed without payment (except for interest) until October 18, 1956, when it was last renewed by the execution of a note by Jacobs to the bank in the sum of $5,000, due and payable 90 days from date, and bearing interest at the rate of 6 per cent per annum until paid. The mortgage of September 24, 1955, was not

[1] A first mortgage was held by F. W. Dyke, trustee for the United Savings Association, which was recognized by appellee as being superior and paramount to the bank's mortgage. The property was later conveyed by Jacobs and wife to one H. E. Jacobs, a party appellant in this case, but the effect of such conveyance is not emphasized by any of the litigants herein.

[2] The chattel mortgage was subsequently released by virtue of the payment of an agreed amount of money and is not now considered in this litigation.

[3] Prior to this date, Jacobs had executed other notes to the bank and obtained money therefor in the course of conducting his business, and had repaid such loans.

released when the balance due on the note of same date was paid the bank on February 6, 1956, and under the bank's contention, the mortgage was intended also to secure any future advances made to Jacobs. Suit was instituted against Jacobs and wife on April 15, 1957, for the sum of $5,000 (the amount due under the note of October 18, 1956) and sought to foreclose the mortgage, heretofore referred to, taken on the property in 1955. Jacobs counterclaimed for $6,000, alleging that the bank had illegally taken possession of certain of his motor vehicles, and wrongfully disposed of them at a price greatly under the actual value, and sought damages in the aforesaid amount. To explain the counterclaim, we relate the following facts. Jacobs would take a buying trip, and buy several cars. He would return to the bank, execute a chattel mortgage and note in blank, and discuss with the proper bank official the cars he had bought, giving them the necessary information about the automobiles, motor and serial numbers, etc. The bank would fill in the mortgage, listing the said cars by description, fill in the amount they would loan on the cars, and give this amount to Jacobs. Jacobs would sell to a prospective purchaser, and a conditional sales contract and note would be executed by the purchaser, and given to the bank after endorsement by Jacobs. He would then receive credit for the amount contained in the conditional sales contract, on the note which he had signed under the chattel mortgage, less $25 which went into a special account designated "Reserve Account."

Sometime in January or February of 1956, Jacobs was informed by his doctors that he had cancer, or cirrhosis of the liver, and on February 8th, he left for Mayo Brothers Clinic for examination. The next day, several bank officials went to Jacobs' used car lot, taking with them a letter which had been prepared and typed at the bank. The letter was directed to Edward Reed, president of the City National Bank, and advised the bank that Jacobs desired appellee to take over the cars and dispose of them in order to pay any indebtedness he might owe the bank. Jim Underwood, who had

been left in charge of the lot, signed the letter.[4] The bank thereafter proceeded to dispose of the vehicles which Jacobs had floor planned with them (for $14,-118.72), by selling them to one J. L. Swink for $9,625. Swink shortly resold them for $11,418. The "Red Book," used by car dealers and finance companies, gave the "as is" value of the vehicles as $13,495, with average retail value of $18,210.

On trial, the Chancellor held that the real estate mortgage dated September 24, 1955, did secure the $5,000 note dated October 18, 1956, and rendered judgment against Jacobs in the sum of $5,000, together with interest at the rate of 6 per cent per annum, $200 attorney's fee, found that the claim of H. E. Jacobs was inferior to the lien of appellee's mortgage, foreclosed any right, title, or interest of J. L. Jacobs and Mary Virginia Jacobs in the property, and ordered it sold. The counterclaim filed by Jacobs was dismissed. From such judgment of the court comes this appeal.

For reversal, appellant first asserts that the $5,000 note, dated October 18, 1956, was not secured by the real estate mortgage of September 24, 1955, and the court erred in holding otherwise. Next, it is contended that the bank became a trustee of the vehicles when it took possession of them, and did not comply with the provisions of the instruments, under which, it disposed of the automobiles. It is then urged that the bank, by repossessing some vehicles from the ultimate purchasers, waived the unpaid balance on them. We proceed to a discussion of each point.

In contending that the note in question was secured by the earlier mortgage, appellee relies upon the following provision in the mortgage (a printed provision and appearing in the defeasance clause):

"Now if the said mortgagors shall pay or cause said indebtedness to be paid with interest according to the terms hereof *and all other indebtedness of the mort-*

[4] The letter was prepared after previous conversation between Underwood and one of the bank officials.

gagors to mortgagee;[5] then this instrument to be null and void; otherwise to remain in full force and effect." We deem this insufficient since one of the mortgagors was Mary Virginia Jacobs,[6] who owed no other indebtedness to the bank, and did not subsequently execute any notes. While there is testimony that the bank intended the mortgage to cover future loans, it is noticeable that the mortgage provides that the mortgagors shall keep the property insured in the amount of $3,000. It would seem logical that if the mortgage were intended to cover other indebtedness, the clause would have read "in the amount secured by this mortgage." Be that as it may, we consider the language insufficient to accomplish the result sought by the bank. In the case of *American Bank & Trust Co.* v. *First National Bank of Paris,* 184 Ark. 689, 43 S. W. 2d 248, this Court said:

"One may execute a valid mortgage to secure a debt to be contracted in the future (citing earlier cases) but, in order to do so, there must be an unequivocal agreement in the instrument itself that it is given for debts to be incurred in the future. * * *"

In the same opinion, quoting from *Word* v. *Cole,* 122 Ark. 457, 183 S. W. 757, the Court further said:

" 'The effect of our cases is that a mortgage to secure future advances * * * is valid, but, if such purpose is intended to be accomplished, that fact must clearly appear from the instrument, and such purpose will not be presumed where the instrument does not contain a general description of the indebtedness secured so as to put one who examines it on notice that this was its purpose in order that such person may pursue the inquiry which such knowledge would suggest.' "

Further:

"Where one contracts in good faith with a debtor that the security given should include not only that

[5] Emphasis supplied.

[6] Mr. and Mrs. Jacobs owned the property as tenants by the entirety.

specifically mentioned in the mortgage but other indebtedness, whether existing then or to be incurred in the future, it is not difficult to describe the nature and character thereof, so that both the debtor and third parties may be fully advised as to the extent of the mortgage. Sound policy demands no less. Especially is this true where the terms of the mortgage are sought to be extended by means of the language of the defeasance clause, which is usually at the end of the mortgage and, in the prepared forms commonly in use, is in small type which escapes all but the closest scrutiny."

Numerous other cases denote the same holding. In the instant mortgage, there is nothing said about future advances; the instrument is only a form mortgage, and falls far short of meeting the requirements set forth in *American Bank & Trust Co., supra.*

We do not agree with appellants in their second contention. It is argued that when the bank took possession of the automobiles, it became a trustee of the vehicles, accordingly owed the highest fiduciary duty to Jacobs, and was bound to obtain the highest possible price for them. Appellants contend that the provisions of the chattel mortgages on the vehicles were not complied with, in that before a sale of the property was authorized, same should have been advertized by "ten days notice in some newspaper published in Sebastian County, Arkansas, or by written notices posted at least five places near the property." This admittedly was not done. A number of witnesses testified that the automobiles were sold to Swink at a price considerably less than their value, and in fact, Swink later resold them at a figure approximately $2,000 higher than the amount he had paid for them. There was some evidence that other automobile dealers were notified by the bank of the proposed sale of the cars. We consider, however, all of such evidence to be irrelevant to the question involved, for the reason that the bank was not acting as trustee. The cars were taken over by the bank at the request of Jacobs, through Underwood. Though Jacobs originally desired that the bank send a man over to his

used car lot to handle the cars there, he apparently recognized that appellee likely would not be willing to do so. From the testimony of Underwood:

"Q. Did he give you authority to dispose of the cars and power to turn them over to the bank?

A. He said it would be up to the bank what they wanted to do about it.

Q. Did he tell you to turn them over to the bank if they asked for them?

A. Yeah.

Q. And the bank did ask for them and you turned them over?

A. Yeah."

As to whether a greater price could have been obtained for the vehicles, is mere conjecture. We agree with the trial court that the bank acted in good faith, and there was certainly no reason for appellee to dispose of the cars at a price less than could have been obtained. Jacobs himself ratified and confirmed the transaction, which is shown by defendant's exhibit 19, an analysis sheet listing the various cars, their average retail value, the amount for which each had been sold by Swink, and the total amount of loss resulting from the sales. This was prepared by Jacobs on March 27th, when most of the vehicles had been disposed of. Jacobs had written on the bottom of the sheet: "I owe $5,000 note less res. $1,697.95." Thus, Jacobs recognized his indebtedness under the note in question, and apparently had no thought that the bank had acted improperly, or beyond its authority, in disposing of the automobiles.

Nor can we agree with appellants' third contention. As already stated, we do not characterize the bank's action as "repossessing" the vehicles; rather, with the authority and consent of Jacobs, the bank undertook to help him out of a bad situation and minimize his losses. The reserve was applied against such losses, and this was with the authority of Jacobs, who, on February 23,

1956, wrote the bank to "Please release as much of my reserve as you can to apply on my indebtedness to the City National Bank." Jacobs contends that the judgment should have at least been reduced by $1,908.45, the balance remaining in the reserve account at the time of the trial. Appellee admits that after all contracts are liquidated, Jacobs will be entitled to credit on the bank's judgment for any amount of the reserve remaining.

We conclude that the court's action in dismissing the counterclaim was proper.

For the error in holding that the note of October 18, 1956, was secured by the real estate second mortgage of September 24, 1955, that portion of the decree is reversed, and the cause remanded with directions to enter a decree not inconsistent with this opinion.

McKamie *v.* Kern-Trimble Drilling Co.

1569 313 S. W. 2d 378

Opinion delivered May 26, 1958.

Keith, Clegg & Eckert, J. Fred Jones, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

J. Seaborn Holt, Associate Justice. By proper procedure under our Workmen's Compensation Law (Secs. 81-1301—1341 Ark. Stats. 1947), appellant, McKamie, sought an award of compensation. July 28, 1955, appellant's feet were severely burned when he spilled

caustic acid on his shoes, an injury conceded to be compensable under the above compensation law. The claim was first heard and denied by a single commissioner, later was denied by the full commission, and again on appeal to the circuit court was denied.

On this appeal (by stipulation) "The respondents (appellees) take the position that claimant was temporarily totally disabled for twelve weeks and three days or until October 24, 1955 and that he had a temporary partial disability from October 24, 1955 until May 1, 1956. Respondents take the position that they have paid the claimant for his disability and have no further liability." Further, they take the position that the treatment and hospitalization by Dr. Carruthers was not authorized by appellees or the commission, therefore, appellees are not liable. Appellant, on the other hand, states his position in this language: "The claimant's position is that he has never recovered from his foot injury and as a direct result and consequence of his foot injury he developed a bursa at his knee which was removed by Dr. Carruthers and that the disability as well as the medical expense resulting therefrom is a part of the compensable injury and respondent is liable therefor."

Appellant was first treated by a physician in El Dorado who applied dressings to his burns. From August 4 to October 20, 1955 Dr. Rushton of Magnolia treated appellant, during which time appellant's healing had progressed to the point that enabled him to engage in light work for which he received somewhat less pay than before his injury. Next, appellant was treated by Dr. Shuffield of Little Rock from November 21, 1955 to April 30, 1956, at which time Dr. Shuffield informed appellant that he could return to his regular job on May 1, 1956. The record reflects that from the date of the injury (July 28, 1955) through February 20, 1956, McKamie was allowed and received temporary total disability payments from the appellees and from February to May 1956 he was allowed and received temporary partial compensation. All payments to appellant stopped

on May 1, 1956. On April 30, 1956, when Dr. Shuffield told appellant he could return to his regular job, appellant consulted, for the first time, Dr. Carruthers with respect to a painful swelling on the back of his left knee, which Dr. Carruthers correctly diagnosed as a bursa, and which he removed by surgery on May 8, 1956. Dr. Shuffield examined appellant on April 30, 1956, (the same day on which Dr. Carruthers examined him) and was of the opinion that this bursa was not caused by or the result of the burns suffered by appellant on July 28, 1955. Dr. Carruthers, however, was of the opinion that the bursa was due and caused or superinduced by appellant's burns of July 28, 1955.

As we read this record the primary and decisive question presented is one of fact, and that is whether there was any substantial evidence to support the findings of the commission. Since the enactment of our Workmen's Compensation Law, we have consistently held that we do not try compensation cases here *de novo,* we are, therefore, not concerned with where the weight of the evidence may lie. When we find any substantial evidence to support the findings of the commission, we must affirm. We said in the recent case of *Grimsley, Adm'x* v. *Manufacturers Furniture Co.,* 224 Ark. 769, 276 S. W. 2d 64: "Findings of fact by the Workmen's Compensation Commission are given the same verity as attach to the verdict of a jury and this applies on appeal to the circuit court as well as to the supreme court from the judgment of the circuit court . . . On appeal, the Supreme Court must view testimony in its strongest light in favor of the commission's findings . . . Where the commission acting upon sufficient evidence sustains or rejects an award, such findings will not be disturbed on appeal."

As indicated, the testimony of Dr. Carruthers and that of Dr. Shuffield is in irreconcilable conflict. It was Dr. Carruthers' opinion that the bursa which he removed from appellant's knee was a result of the compensable injury which appellant sustained on July 28, 1955. It appears that Dr. Carruthers first saw and ex-

amined appellant on April 30, 1956. On the other hand, Dr. Shuffield, who for more than five months prior to April 30, 1956 had been treating appellant, also examined and discharged appellant on that same day (April 30, 1956). Dr. Shuffield had been treating appellant, as indicated, for more than five months prior to April 30, 1956. His findings and conclusions were before the commission, without objection, in a letter dated May 29, 1956, in which he said: "It is my opinion that any trouble he had on the posterior aspect of his knee, was not related in any way to the injury to his foot. I feel that the injury to his foot has healed sufficiently that he was able to carry on with his regular work as of May 1, 1956. Although he had some metatarsalgia secondary to his burn, there was no injury to his metatarsal from the burn itself. It is my opinion that this patient will have no permanent partial disability as a result of the burn he sustained."

The commission found that the bursa was not related to appellant's injury. Dr. Rushton, in summarizing his treatment of appellant stated: "He came into this office complaining of his feet; and I examined him and told him that he had fallen arches, and I thought that if he would buy him some arch supports, they would give him some relief. However, his fallen arches had nothing to do with the burns he had sustained on his feet; . . ." Dr. Rushton further stated that appellant would be able to return to work October 24, 1955.

We hold that the above testimony of Dr. Shuffield and Dr. Rushton, if believed by the commission (and it evidently was) was substantial and sufficient to sustain the commission's findings. With reference to the effect of medical testimony which is conflicting, we said in *Grimsley, Adm'x* v. *Manufacturers Furniture Co., supra*, "While, as indicated, medical testimony given by two doctors, Dr. J. L. Smith and Dr. Paul Ewing, tended to contradict that of the three doctors above, we have consistently held that in situations, as this, such conflicting testimony presents a fact question to be determined by the commission and we are without authority to

reverse its conclusions when supported by substantial testimony . . ."

Accordingly, the judgment is affirmed.

REID *v.* KAROLEY.

1557 313 S. W. 2d 381

Opinion delivered May 26, 1958.

Bailey, Warren & Bullion, Walls Trimble, and *U. A. Gentry,* for appellant.

Richard W. Hobbs & B. W. Thomas, for appellee.

ED. F. MCFADDIN, Associate Justice. The Trial Court sustained the plaintiff's (appellee's) motion for judgment on the pleadings; and defendant (appellant) brings this appeal. The ultimate question posed in the case is the effect of the appellant's bankruptcy discharge on the monthly payments claimed by the appel-

lee; but we cannot reach this ultimate question because we conclude that the Trial Court was in error in rendering a judgment for the plaintiff on the pleadings, and thereby refusing to hear the evidence.

In May 1956 Mary E. Karoley filed the present suit[1] against John D. Reid in the Chancery Court, alleging:

"That on or about the 13th day of November, 1951, plaintiff entered into a contract with the defendant, a copy of said contract appearing in the record of the case of *Mary E. Karoley* v. *John D. Reid* in the Pulaski County Chancery Court, Case No. 97073; said copy of contract referred to herein is made a part hereof as fully as though set out word for word herein . . .

"Plaintiff further states that the defendant has refused and failed to make any payments from March, 1955, up to and including May of 1956, and that there is now due and owing upon the said contract to the plaintiff the sum of $3,500.00."

The complaint prayed for judgment in the sum of $3,500.00 with interest and costs. Reid filed an answer, and three amendments to the answer. The effect of the original answer was to admit a contract and the original delinquencies, but to plead Reid's bankruptcy as a release from all liability. In the amendments, Reid (1) denied that Karoley was entitled to any judgment; (2) pleaded Reid's discharge from bankruptcy as a release; and (3) denied that Karoley was still single and unmarried. With the record in this condition, the Trial Court, over Reid's objections, rendered judgment on the pleadings for Karoley for $6,250.00. On this appeal, we discuss three points.

I. *The Rule As To Judgment On The Pleadings.* The rule is well established that judgment on the pleadings can be rendered only when, after giving every reasonable intendment to the pleadings of the respondent,

[1] The briefs herein contain the statement that these same parties have been before this Court in two previous appeals: being *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322; and *Karoley* v. *Reid,* 226 Ark. 959, 295 S. W. 2d 767. But the present litigation is not a reappearance of either of the former cases: this is a new case.

the pleadings still show on their face that the respondent has no defense. *Story* v. *Cheatham,* 217 Ark. 193, 229 S. W. 2d 121. In 41 Am. Jur. 520, in discussing a motion for judgment on the pleadings, the holdings of various jurisdictions are summarized in this language:

"Being in the nature of a demurrer, a motion for judgment on the pleadings raises an issue of law only . . . But it is proper where there is an entire failure to state a cause of action or defense. In a strict motion for judgment on the pleadings, parol evidence is not admissible.

"In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined. The motion, however, is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader . . . If there is joined an issue of fact upon which, if supported by the evidence, a valid judgment may be based, a judgment on the pleadings is improper. The court cannot anticipate what the proof will show."

Measured by the foregoing,[2] it is apparent that the pleadings in the case at bar did not show that Karoley was single or that the amount of Reid's default was $6,250.00. It was admitted in oral argument before this Court that admissions outside of the record were made by the attorneys in the course of the hearing before the Trial Court and that it was these admissions which caused the Chancery Court to set the figure at $6,250.00 and to decide that Karoley was single. But these admissions were not in the pleadings; and we must test the correctness of a judgment on the pleadings by what ap-

[2] To the same effect as the quotation given, see 71 C. J. S. 861 *et seq.* "Pleadings" § 424.

pears in the pleadings and not by factual admissions outside the pleadings.

II. *Incorporation By Reference.* Furthermore, there is another defect in the judgment on the pleadings. The complaint attempted to incorporate by reference a contract, a copy of which is alleged to have been filed in another case in the Pulaski Chancery Court. We have heretofore copied all of the language in the complaint as to the contract. No copy of the contract was attached to the complaint in this case (which was No. 105107 in the Pulaski Chancery Court); and since the judgment was rendered on the pleadings, the only way the Trial Court could have known what the contract was would have been to examine the pleadings in *another case.*

In 71 C. J. S. 28 "Pleadings" Key § 9, cases are cited to sustain the following textual statement:

"The allegations of a pleading in another independent action ordinarily cannot be adopted, even by agreement of the parties, unless they are copied into the pleading."

The language in Karoley's complaint, as to adoption by reference, was sufficient to have allowed the contract to be introduced in evidence;[3] but the case never reached the stage for introducing evidence. Karoley moved for judgment on the pleadings; and in considering the pleadings no contract was shown except by reference to some other case. The reference might just as well have been to a contract filed in another State, or a contract in the attorneys' office, or in some other place. The contract could have been introduced in evidence, but it was not sufficiently shown in the pleadings to support a judgment on the pleadings.

Counsel for appellee tell us that the contract is set out in full in the case of *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322; but that is a separately numbered case. When *Karoley* v. *Reid,* 223 Ark. 737, 269 S. W. 2d 322 was reversed and remanded, it came back before us

[3] But even under our Statute (§ 27-1143), it is necessary to attach a copy of the instrument.

in the case of *Karoley* v. *Reid,* 226 Ark. 959, 295 S. W. 2d 767, and was there affirmed. As aforesaid, the present case is not a continuation of either of those cases, but is a new case; and the adoption by reference was fatally defective in the case at bar insofar as judgment on the pleadings is concerned.

III. *Designation Of Points In Notice Of Appeal.* Appellee says that Reid has waived all of the matters discussed in Topics I and II because in the Trial Court Reid assigned only one error, which was: "Discharge of the defendant, John D. Reid, in the United States District Bankruptcy Court discharges defendant's obligation under the contract in controversy."

This contention of appellees requires a consideration of a portion of Act No. 555 of 1953: the portion of which, germane to the point now under discussion is in Section II, which reads:[4] "No motion for new trial and no assignment of errors shall be necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

It will be observed that "no assignment of errors shall be necessary"; and yet in the Trial Court the appellant assigned as error the point that we have previously copied. The question is, whether such assignment, made in the Trial Court though not required, precludes appellant from listing other assignments in his brief in this Court. The case of *Twin City Lines* v. *Cook,* 226 Ark. 657, 291 S. W. 2d 810, is apropos. There, the appellant filed in the lower Court a motion for new trial in which he failed to mention one of the points that he subsequently argued on appeal in this Court. It was urged that since he had not mentioned the point in the motion for new trial, he therefore was prevented from arguing the point in this Court. We held that since the Act No. 555 of 1953 said, "No motion for new trial and

[4] This is found in § 27-2127.5 of the Cumulative Pocket Supplement of Arkansas Statutes.

no assignment of errors shall be necessary," the filing of the motion for new trial was a mere *surplusage* and could not preclude the appellant from making his assignment of points in his brief in this Court. The same rule is applicable here. The law did not require the appellant to file any assignment of errors in the Trial Court in this case, so the assignment that he filed was a mere surplusage, and he is not precluded from raising here the point previously mentioned regarding the failure of the pleadings to support the motion for judgment on the pleadings.

We must emphasize that when only a *partial record* is brought up, there must be filed in the Trial Court a statement of points. The Statute (as quoted) says: ". . . a concise statement of the points on which he intends to rely for appeal . . ." But when—as here—the entire record is brought up by appellant, then any "concise statement of the points on which he intends to rely for appeal" is surplusage; and the appellant can designate his points in his brief filed in this Court, and is not foreclosed by the surplusage filed in the Trial Court.

The judgment rendered on the pleadings is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion; but this being an equity case, we adjudge all costs of this appeal against the appellant.

5-1572 313 S. W. 2d 384

Opinion delivered May 26, 1958.

[redacted]

Sam Goodkin, for appellant.

Luke Arnett, for appellee.

MINOR W. MILLWEE, Associate Justice. The principal question for decision is whether homestead property is exempt from a judgment for unemployment contributions, interest and penalty assessed pursuant to the provisions of the Arkansas Employment Security Act (Ark. Stats. Secs. 81-1101—81-1108, 81-1111—81-1122).

Appellants, W. B. Rainwater and wife, have owned and occupied their rural homestead in Sebastian County since 1949. In 1951 and 1957 the appellee, Commissioner of Labor, obtained assessments of contributions, penalty and interest against Mr. Rainwater as a delinquent employer under Ark. Stats., Section 81-1117 which provides that said assessments "shall have the force and effect of a judgment of the circuit court." These judgments appear of record in Sebastian County.

The Rainwaters, while still residing on their homestead, conveyed three different parcels thereof to three

other appellants and desire to convey another parcel to another appellant if they can do so free of said judgments. They and the other appellants brought this suit to remove any cloud on their titles by reason of said judgments, to quiet title in the grantees to the parts already conveyed; and for a declaration that said judgments are not liens either on the tracts conveyed or the remainder of the homestead still owned and occupied by the Rainwaters.

Appellee demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action either for a declaratory judgment or for the relief sought. This appeal is from a decree dismissing appellants' complaint after they declined to plead further when the court sustained the demurrer filed by appellee. The court found that appellants had an adequate remedy at law and could not invoke the Declaratory Judgment Act. The court further found: "That the contributions levied under and pursuant to the provisions of the Arkansas Employment Security Act are taxes for which the State of Arkansas has a lien upon all of the property owned by the plaintiff W. B. Rainwater, and under § 3 of Article 9 of the Constitution of Arkansas the homestead of plaintiff W. B. Rainwater is not exempt from the judgment and lien for said taxes."

We find it unnecessary to determine the applicability of the Declaratory Judgment Act (Ark. Stats., Secs. 34-2501, *et seq.*). Aside from that act, the chancery court had jurisdiction of the instant suit under its traditional equitable jurisdiction to remove clouds on title to real estate. Equity jurisdiction to quiet and remove clouds from title to real estate was recognized long before such proceedings were authorized by statute (Ark. Stats. Secs. 34-1001, *et seq.*). See *Patterson* v. *McKay,* 199 Ark. 140, 134 S. W. 2d 543, and cases there cited. If the homestead is exempt from the judgments and liens for the unemployment contributions involved here, then such judgments clearly constitute clouds on the title of appellants, and jurisdiction to remove such clouds is purely of equitable cognizance. *Sanders* v. *Flenniken,* 180

Ark. 303, 21 S. W. 2d 847. The fact that appellants might defend against an attempt by appellee to execute on said judgments in the circuit court does not preclude them from proceeding to remove the clouds from their respective titles. Moreover, the Employment Security Act (Ark. Stats., Sec. 81-1117(e)) expressly authorizes a review of the assessment for contributions in the chancery court.

We proceed to the main issue as to whether the homestead is exempt from the judgment and lien for unemployment contributions under Art. 9 Sec. 3 of the Constitution of Arkansas, which reads: "The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for *taxes,*[1] or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

If the contributions in question are "taxes" within the meaning of this constitutional provision, then they come within the exception exempting said homestead. We are cited to only one decision bearing on this question. In *Lafayette Building Ass'n* v. *Spofford,* 221 La. 549, 59 So. 2d 880, the state obtained judgment against the homestead owner for public welfare taxes and chain store taxes authorized by statute and sought to subject the homestead to the payment of said judgment. The court held that the word "taxes" used in a constitutional provision very similar to Art. 9, Sec. 3, *supra,* referred to property taxes relating directly to the homestead and did not include such excise taxes as were there involved. After pointing out the issue involved and the general object of the exemption proviso, the court said: "In the light of the foregoing, it necessarily follows that in order for the homestead exemption

[1] Italics supplied.

to be set aside and not apply to a certain debt, the provision of the Constitution which disallows the exemption insofar as certain debts are concerned must be strictly construed and it must be clearly shown that the debt comes within the meaning of the aforesaid provision. It is clear that the word 'taxes' as used in the constitutional provision refers to *property taxes* and was intended to relate directly to the homestead property and did not embrace *excise taxes*. As evidenced by the judgments obtained by the State of Louisiana, its claims are for Public Welfare Revenue Taxes and for Chain Store Taxes assessed against a former bankrupt business operated by defendant do not relate to taxes pertaining to nor levied on, nor assessment levied against the homestead in question. We reiterate that the word 'taxes' as set out in the constitutional exception embrace no other type of taxes than that assessed directly against the homestead property.''

The reasoning used and result reached by the Louisiana court appear to be in harmony with our own decisions. This court has traditionally declined to recognize inroads upon the homestead exemption except such as are clearly in accord with the constitutional mandate. We have repeatedly said that the protection of the family from dependence and want is the object of all homestead laws. In *Hollis* v. *State,* 59 Ark. 211, 27 S. W. 73, the court held the homestead exempt from the lien of the State for costs in a criminal prosecution, saying: ''The lien of the State for costs in a criminal prosecution is not a specific lien, nor does it come within the meaning of either of the other exceptions named. Homestead laws are intended for the protection of the families of those who are poor or unfortunate, and, in cases of this kind, there are no reasons why the State should be exempt from their operation.'' This holding is in line with the general rule that it is only in case the homestead statute expressly subjects the homestead to debts due the state or the United States that an exemption therefrom is denied. 40 C. J. S., Homesteads, Sec. 108. Also in *Arnold* v. *Stephens,* 173 Ark. 205, 296 S. W. 24, we held a tax collector's homestead exempt from

the lien of a judgment in favor of his sureties who were compelled to pay money which he had collected and failed to pay to the State.

Employment Security Acts were unknown at the time of the adoption of our constitution. Our act is primarily a public welfare measure, and not a taxing statute. It was not enacted under the general taxing powers requiring uniformity of assessments according to value, but under the general police power as provided in Ark. Stats., Sec. 81-1101. The contributions here involved do not constitute a property tax nor one that is assessed directly against the homestead property such as the "purchase money," "laborers" and other specific liens mentioned in the constitutional provision immediately preceding the word "taxes." Obviously a homestead is not subject to the lien of a judgment for the "purchase money" of a car or a "specific lien" on some other chattel. In our opinion a proper construction of the constitutional provision warrants the conclusion that the word "taxes," as used therein, refers to taxes against the homestead and not to contributions assessed against an employer under the Employment Security Act. The decree is accordingly reversed and the cause remanded with directions to overrule the demurrer and for further proceedings consistent with this opinion.

DeLong *v.* Green.

5-1538 313 S. W. 2d 370

Opinion delivered May 26, 1958.

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

H. B. Means, for appellee.

George Rose Smith, J. On November 15, 1956, Phillip Green, aged nineteen, was killed in a collision between the car he was driving and a car owned by the appellant Garrett and being driven by the appellant DeLong. This action for wrongful death and property damage was originally brought by the decedent's parents, Forace and Elvie Green. Later on Forace Green was appointed administrator of his son's estate and in that capacity intervened as a plaintiff in the action. Upon trial before a jury the plaintiffs recovered a judgment for $23,061.47, of which $20,000.00 was awarded by the jury for the mental anguish suffered by the parents.

The principal argument for reversal concerns certain references to an insurance company that were made during the selection of the jury. Mr. Means, representing the plaintiffs, had stated that he proposed to ask the veniremen if any of them owned stock in the Southern

Farm Bureau Casualty Insurance Company. Mr. McMillan, representing the defendants, informed the court that the company in question was in fact insuring the defendants in the case. He further stated that, "as far as our information is concerned, we have no knowledge of anybody in Hot Spring county, and particularly on this jury, that has any stock in this corporation." He went on to say that there was a conflict in the county between the farmers supporting the Farm Bureau and those supporting the Farmers Union, both of which had insurance companies, that at least two members of the jury were decidedly biased against the Farm Bureau, and that to indicate that the Farm Bureau was a defendant would affect those men. Mr. McMillan requested that the questions be limited to a reference to insurance companies in general, and, if any juror answered in the affirmative, that he then be asked to name the particular company. "In this way," Mr. McMillan pointed out, "Mr. Means can obtain his information without disclosing the name of the insurance company."

Mr. Means insisted, however, that he was entitled to ask the jurors about the particular company. The trial court sustained this contention, and Mr. Means then asked the veniremen four separate questions about their ownership of stock in, or their agency for, the Southern Farm Bureau Casualty Insurance Company. No juror gave an affirmative answer to any of these questions.

On some fifteen occasions we have considered the matter of questioning prospective jurors about their connection with insurance companies. The difficulty, which has made the issue a recurring one, is that of laying down a rule that will operate with fairness to both sides in the litigation. On the one hand, the plaintiff's attorney is undoubtedly entitled to elicit information that may assist him in the exercise of his peremptory challenges. As we said in *Dedmon* v. *Thalheimer,* 226 Ark. 402, 290 S. W. 2d 16: "If counsel, in good faith, thinks that liability insurance is involved, then he may ask questions calculated to bring to light any bias or prejudice a venireman may have for or against insurance com-

panies . . . A lawyer trying a case would be rather careless if he failed to ascertain as well as possible if any one on the venire was biased or prejudiced on a question involved in the litigation, even though such question would be only indirectly involved."

On the other hand, the fact that the defendant is insured has no bearing on the issue of negligence, and since that knowledge, as we have repeatedly held, may prejudice the jury, it is improper for the questions on *voir dire* to be used as a means of unnecessarily calling the jury's attention to the fact of insurance. *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83. Judge Frank Smith, in writing the court's opinion in *Williams* v. *Cantwell,* 114 Ark. 542, 170 S. W. 250, had this to say: ". . . appellee's attorney appears to have known, not only that Mr. Wynne did represent an insurance company, but to have known the particular company which he represented, and his speech before the court, as well as his questions to the jurors, appears to us to have unnecessarily advised the jurors of the fact that appellant was insured against liability and that he would not be required to pay any verdict which they might render against him. Information as to any juror's connection with any insurance company could have been obtained in a less dramatic manner by asking each of the jurors if he represented or was connected with any casualty company insuring employers against liability, or if he was connected with any insurance company, or any other proper question which might have tended to disclose whether any juror had any bias or prejudice likely to influence his verdict one way or the other; and had any juror answered that he was so connected with any such insurance company it would not have been improper to have permitted a more minute inquiry of such juror. But no such necessity appears to have existed in this case, and the purpose and effect of counsel's remarks addressed to the court and his questions to the jurors appear to have been to advise the jury that appellant was insured against liability in the Home Life and Accident Insurance Company and

would not have to pay any judgment for damages which they might render against him."

In the case at bar it cannot be said that counsel's unquestioned right to information about the veniremen necessarily required that the Southern Farm Bureau Casualty Insurance Company be referred to by name. Opposing counsel, whose good faith in the matter is not questioned, had declared that the farmers in the county supported two rival organizations, that at least two members of the panel were decidedly biased against the Farm Bureau, and that to refer to that company would have a prejudicial effect. He went further and pointed out, much as Judge Smith did in the *Williams* case, how the desired information might have been obtained by general questions. Despite this warning plaintiff's counsel insisted upon naming the company and did so in four questions to the jury. It can hardly be supposed that a group of intelligent jurors did not draw the inference that the Southern Farm Bureau Casualty Insurance Company had insured the defendants, since that company was singled out in counsel's repeated inquiries on the subject. Had there been no alternative way of examining the venire no doubt the plaintiffs' right to information would have overridden the defendants' objection; but there was an alternative, which the plaintiffs refused to adopt.

We are aware that in three instances we have affirmed judgments even though a specific insurance company was mentioned during the selection of the jury. *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167; *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. 2d 243; *Lewis* v. *Cox,* 187 Ark. 1163 (mem.), 58 S. W. 2d 215. We emphasize, however, that those precedents do not justify the procedure which was permitted in this instance and that the present judgment would have to be reversed regardless of what rule might be established for the future. In none of the cases just cited was there a suggestion, as there is here, that to name the company would be peculiarly prejudicial; nor was it insisted in the earlier cases that the desired information be elicited by gen-

eral questions. In order to affirm this judgment we should have to go far beyond any prior case, by saying flatly that counsel has an unqualified right to name the particular insurer even though the record shows that the reference will have an especially prejudicial effect upon the jury and even though the needed information can equally well be obtained in a way that involves no such unfair advantage for either side. That view is not supported either by our earlier decisions or by the simplest notions of fair play.

We could, of course, end our discussion at this point, leaving for future determination a host of minute and finely drawn distinctions that would undoubtedly be urged in later cases. The bench and bar, however, are entitled to an expression of our views, especially if that course may reduce an area of uncertainty and thereby avoid needless appellate litigation. We therefore think it best to announce our preference for the procedure that is at once the simplest to follow and the fairest to both sides in the lawsuit: Questions about the veniremen's insurance connections should refer only to insurance companies in general; a particular company should not be named when the information wanted can just as well be obtained by the use of general questions.

In the present case it is also contended that the plaintiffs' references to the Southern Farm Bureau Casualty Insurance Company were offset by the fact that the defendants were allowed to ask the jurors about their possible connection with the Emmco Insurance Company. The latter inquiry was plainly permissible, however, as the Emmco Insurance Company was actually a party to the case, having intervened to assert a subrogation claim for the damage to the Green car.

Several other asserted errors are argued in the briefs, but for the most part they are of a kind not apt to arise upon a retrial and need not be discussed. One matter, however, should be mentioned. Over the defendants' objection the court permitted the jury to return separate verdicts for the mental anguish suffered by the father and that suffered by the mother. The case was tried un-

der Act 115 of 1949, which allows the personal representative to recover for mental anguish sustained by the parents of the decedent and which directs that the recovery be distributed in the proportion provided by law for the distribution of personal property left by persons dying intestate. It is insisted that the court should have required the jury to return a single verdict in favor of the administrator for the total mental anguish undergone by both parents.

Without deciding the merits of this contention we point out that Act 115 was repealed by Act 255 of 1957, which by its language is applicable to all actions for wrongful death, whether arising before or after the effective date of the 1957 statute. Ark. Stats. 1947, §§ 27-906 *et seq.* The new act provides that the apportionment of the damages shall be made by the jury at the request of any beneficiary or party. Ark. Stats. § 27-909. We regard this as essentially a procedural change, since the substantive right to collect damages for wrongful death is continued in force, with a change in the procedural method by which the distribution of these damages is to be determined. The 1957 act will therefore be controlling upon a new trial, under the rule that procedural changes apply to pending cases. *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653.

Reversed.

McFaddin, Millwee, and Robinson, JJ., dissent.

Sam Robinson, Associate Justice, dissenting. The majority holds that before a venireman can be questioned concerning his interest in or connection with a particular liability insurance company, he must first be questioned with reference to whether he has any interest in or connection with *any* liability insurance company. As support for the rule only two cases are cited: *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S. W. 83, and *Williams* v. *Cantrell,* 114 Ark. 542, 170 S. W. 250. The majority quotes Judge Frank Smith extensively from *Williams* v. *Cantrell.*

Cooper v. *Kelly,* 131 Ark. 6, 198 S. W. 94, was decided by practically the same court that decided *Williams* v.

Cantrell. Judge Frank Smith, who wrote the opinion in *Williams* v. *Cantrell,* helped make the opinion in *Cooper* v. *Kelly,* which was written by Judge Wood. In *Cooper* v. *Kelly,* the attorney representing the defendant refused to give the name of the insurance company carrying the indemnity insurance. The Court said: ". . . counsel for the appellee, over the objection of the appellants, asked one juror on his *voir dire* whether or not he represented any accident or casualty insurance company, to which question the juror answered, 'No.' And appellee's counsel asked another juror whether or not he was under any obligation to any accident insurance company or was the agent of any such company. The juror answered, 'No.' And other jurors were asked, 'Do you know of any accident company or any agent of any such company that has any influence or control over you in the city of Hot Springs?' to which they answered, 'No.' And another juror was asked whether he knew that parties in public business were insured against accidents that occurred, and the juror answered, 'Yes.' Then the juror was asked, 'Do you know of any insurance company or casualty company or any agent of such company, in Hot Springs or anywhere else, to whom you are under obligations?' And the juror answered 'No.' Still another juror was asked, 'Do you know any of these accident casualty companies?' and the answer was, 'Know all of them, I suppose.' Question, 'They haven't any hold on you? Answer, 'None that I know of, nobody else.' "

In holding that it was not error for the trial court to permit questioning of the veniremen as above indicated, the Court said: ". . . In both of those cases [referring to *Pekin Stave & Mfg. Co.* v. *Ramey* and *Williams* v. *Cantrell*] it is expressly recognized that it is within the province of an attorney representing a plaintiff to question veniremen concerning their relation to *any casualty company whom the attorney might know or might honestly believe to have insured the defendant against loss for the injury which the plaintiff had sustained at the hands of the defendant.*

"Had nothing more occurred in the above cases, relied upon by the appellants, than the mere asking of the questions therein propounded, doubtless this court *would not have condemned as erroneous and prejudicial the rulings of the trial court in permitting such questions. Doubtless counsel for appellees in the instant case were permitted a broad scope of inquiry concerning the veniremen's connection with any casualty insurance company in Hot Springs or elsewhere by reason of the conduct of the appellant's counsel in refusing to discover whether or not he represented any casualty company, and, if so, in refusing to divulge the name of such company. Had such information been given to appellee's counsel, we may assume that the court would have restricted the inquiry accordingly.*" [Emphasis supplied]

From the above language of the Court in *Cooper* v. *Kelly*, construing *Pekin Stave & Mfg. Co.* v. *Ramey* and *Williams* v. *Cantrell,* it appears that the proper way for an attorney to question a venireman in regard to any interest in or connection he may have with an insurance company that is the real party in interest in the lawsuit then being tried is to question such venireman with reference to his connection or interest in the particular insurance company involved, and not just any insurance company.

Later, when Judge Frank Smith was still on the Court, Judge McHaney wrote *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167, where it is pointed out that in *Cooper* v. *Kelly* that case was distinguished from *Pekin Stave & Mfg. Co.* v. *Ramey* and *Williams* v. *Cantrell.* Judge McHaney said, in *Ellis & Lewis* v. *Warner,* that according to the rule in *Pekin Stave & Mfg. Co.* v. *Ramey* and *Williams* v. *Cantrell,* the attorney for the plaintiff has the right to question a venireman concerning his relation with any casualty company whom he might have reason to believe was interested in the outcome of the litigation.

As I see it, *Pekin Stave & Mfg. Co.* v. *Ramey* and *Williams* v. *Cantrell* do not support a rule to the effect

that counsel seeking to ascertain if a venireman has an interest in or connection with an insurance company which is one of the real parties in interest must first ask the venireman about his connection with *any* insurance company. In fact, according to the construction put on those cases in *Cooper* v. *Kelly* and *Ellis & Lewis* v. *Warner,* the rule appears to be just the opposite, that is, if counsel knows, or has good reason to believe, that a certain insurance company is one of the real parties in interest, and in good faith wants to know if a prospective juror has any connections that would make him an undesirable juror in the opinion of counsel, then the venireman should be asked about that particular insurance company, and not just any insurance company.

The majority states that "Mr. McMillan, representing the defendants, informed the court that the company in question was in fact insuring the defendants in the case. He went on to say that there was a conflict in the county between the farmers supporting the Farm Bureau and those supporting the Farmers Union, both of which had insurance companies, that at least two members of the jury were decidedly biased against the Farm Bureau, and that to indicate that the Farm Bureau was a defendant would affect those men." In these circumstances it was of the utmost importance that counsel for plaintiff learn, if possible, whether any of the veniremen were biased in favor of the Southern Farm Bureau Insurance Company, since that company was the real party in interest on the defense side of the case. Counsel for defendant knew there were two veniremen who were prejudiced against that insurance company. Apparently counsel for plaintiff had no information on the subject, but if there were two veniremen prejudiced against the insurance company, by like token there could be two or more who were biased in favor of the insurance company. A careful trial lawyer representing the plaintiff in all probability would not want a person on the jury where liability insurance was involved if such person had a close relative who worked for any liability insurance company.

In *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. 2d 243, counsel for appellant asked all the members of the panel if they had "any connection or relationship with the Standard Casualty & Surety Company of New York"; and, further, if they "had such relationship with any such company or any surety company that insures persons against liability".

In affirming the trial court in permitting these questions to be asked on *voir dire* examination, this Court said: "The jurors or some of them might have had some relationship or connection with the particular company mentioned or some other surety company so as to make them undesirable jurors, and still not have been connected with any agency or held any stock in the particular company. We have many times held that similar questions may properly be asked the veniremen for the purpose of intelligently exercising the right of challenge. *Smith-Arkansas Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. 2d 1052; *Ellis & Lewis* v. *Warner,* 182 Ark. 613, 32 S. W. 2d 167; *Bourland* v. *Caraway,* 183 Ark. 848, 39 S. W. 2d 316; *Sutton* v. *Webb,* 183 Ark. 865, 39 S. W. 2d 314. No error was committed, therefore, in this regard."

The trial court has wide discretion regarding the scope of the *voir dire* examination and in my opinion there was no abuse of that discretion in the case at bar.

For the reasons set forth herein, I respectfully dissent.

I am authorized to say that Mr. Justice McFaddin joins in this dissent.

STROUD *v.* M. M. BARKSDALE LUMBER CO.

5-1576 313 S. W. 2d 376

Opinion delivered May 26, 1958.

Donald Poe and *Shaver, Tackett & Jones,* for appellant.

Lookadoo, Gooch & Lookadoo, for appellee.

PAUL WARD, Associate Justice. The question for decision is whether the complaint and amended complaint filed in the trial court stated a cause of action.

On June 6, 1957 appellee, M. M. Barksdale Lumber Company, filed a complaint against "Stroud Brothers Lumber Company, Inc." in which it was alleged appellee sold to the said defendant a "lot of lumber for the price of" $1,382.43; that the amount was due, and; that demand for payment had been made and refused. The prayer was for payment in said amount. The complaint was verified. Also attached thereto, marked "Exhibit A," was a verified and detailed statement of the account of the aforementioned sum. This statement was made out to "Stroud Mills." On June 25, 1957 "Stroud Brothers Lumber Company, Inc." answered with a general denial.

On the 12th day of July, 1957 appellee filed a verified "Amended Complaint" in which it was stated:

"Plaintiff hereby amends his complaint by making S. V. Stroud and Roy Stroud, dba Stroud Milling Company with place of business at Mena, Polk County, Arkansas, as defendants; by making Raymond Stroud and Roy Stroud, doing business as Stroud Lumber Company, Inc., defendants; and prays judgment against S. V. Stroud and Roy Stroud and Raymond Stroud, against the Stroud Brothers Lumber Company, Inc., against Stroud Milling Company, against Stroud Lumber Company, Inc., in the amount of Thirteen Hundred Eighty-Two Dollars and Forty-Three Cents."

On the same day summons issued for the newly named defendants.

No answer or other pleading having been filed by the newly named defendants, appellee filed a verified Motion For Default Judgment on December 14, 1957. On December 27, 1957, no pleading still having been filed by any of said defendants, the trial court entered a default judgment in favor of appellee against "S. V. Stroud and Roy Stroud as individuals and dba Stroud Mill Company, and against Raymond Stroud and Roy Stroud as individuals and dba Stroud Lumber Company, Inc."

This appeal is prosecuted by those parties against whom the above judgment was rendered. The only question involved is, as stated by appellants, "whether the complaint and amended complaint state a cause of action upon which to base a default judgment against the defendants brought into litigation by the amended complaint."

It is our conclusion that the complaint and amended complaint, taken together, do state a cause of action against appellants. While the second complaint is denominated an "Amended" complaint, yet we think it should be treated as an "Amendment" to the first complaint. The first portion of the second paragraph begins as follows: "Plaintiff hereby amends his complaint by making S. V. Stroud and Roy Stroud . . . de-

fendants . . ." This portion of the amended pleadings, taken together with the rest of it, indicates clearly, we think, that it was not meant to take the place of the first complaint but to add to it. We have frequently stated, in effect, that a pleading will not be judged by what it is called but by what it contains. It was said in *Randolph* v. *Nichol,* 74 Ark. 93 (at page 101), 84 S. W. 1037: "But under our code of practice all forms of action are abolished, and relief is granted according to the facts alleged and proved, without regard to the form or denomination of the plea." To the same effect, see: *Clements* v. *Hamilton-Brown Shoe Company,* 99 Ark. 335, 138 S. W. 971; *Teal* v. *Thompson,* 180 Ark. 63, 20 S. W. 2d 307, and; *Railway Express Agency, Inc.* v. *H. Rouw Company,* 197 Ark. 1142, 127 S. W. 2d 251.

Also, under our system, we must construe pleadings liberally and give them every reasonable intendment. *Mason* v. *Gates,* 90 Ark. 241, 119 S. W. 70; *James* v. *Lloyd,* 196 Ark. 568, 118 S. W. 2d 284; *Central Supply Company* v. *Wren,* 198 Ark. 1090, 133 S. W. 2d 632, and; *Neal* v. *Parker,* 200 Ark. 10, 139 S. W. 2d 41.

Therefore, when we take both of appellee's pleadings, and considering them in accordance with principles above stated, we think all the appellants were aware of the fact that appellee was attempting to hold them liable for the lumber it had sold. It is of no avail to appellants that the statement was made out to "Stroud Mills" when it now appears that the correct name is "Stroud Mill Co. Inc." This issue was decided against appellants in the *Central Supply Company* case, *supra.* See also § 27-1155 Ark. Stats. and *Beavers* v. *Baucum,* 33 Ark. 722.

Appellants make no contention that proper service was not had on any of them, and since, as we have indicated above, the pleadings stated a cause of action, the judgment of the trial court must be affirmed.

Affirmed.

5-1555 313 S. W. 2d 369

Opinion delivered May 26, 1958.

[redacted]

James M. Gardner, Rhine & Rhine and *John C. Watkins,* for appellant.

Kirsch, Cathey & Brown and *Robert Branch,* for appellee.

SAM ROBINSON, Associate Justice. Appellants, Olga Hooper and L. V. Rhine, are in the abstract business at Paragould. One of their competitors is appellee Frances Walls. This action was filed by appellants to enjoin appellee J. Ed Thompson, County Judge of Greene County, from allowing Mrs. Walls to use space in the County Judge's office in the courthouse to do her abstract work. Mr. Rhine and Miss Hooper have appealed from an order denying the injunction.

Mrs. Walls has been in the abstract business since 1932 and she has owned the business since 1941. During all of this time she has done her abstract work in the courthouse in the same manner in which she is now conducting it. Prior to the election of appellee, J. Ed Thompson as County Judge of Greene County, in 1952, Mrs. Walls did her work in the county clerk's office. The circuit clerk's office would have been more convenient for her, but since appellants and one other abstract concern had space in the circuit clerk's office in which to do their abstract work, there was no room for Mrs. Walls, and she therefore did her work in the coun-

ty clerk's office. After Judge Thompson was elected, he reached the conclusion that due to the crowded condition in the county clerk's office it would be better for Mrs. Walls to do her work in the judge's private office. He suggested to Mrs. Walls that she move her facilities into his office, and she agreed to this arrangement. It appears that this is a very good arrangement for the county. Mrs. Walls had her own private telephone, and the county judge did not have one. Therefore, an extension was installed under an arrangement whereby the county pays one-half of the regular telephone bill and Mrs. Walls pays one-half. She also pays for her listing and for her long distance calls. It is necessary that the county judge be out over the county a considerable portion of the time, and Mrs. Walls takes messages for him and telephone calls; she also does stenographic work for the county judge—all of this at no cost whatever to the county. She is merely allowed to use small space in the county judge's office in connection with her abstract work.

Appellants are given space in the circuit clerk's office to do their abstract work, as required by statute. In fact, appellants sued the county judge in 1951 to compel the county to furnish them space to do their abstract work. As a result of that suit appellants were furnished space in the circuit clerk's office. Ark. Stat. § 71-108 provides:

"Space for work designated in office of clerk or elsewhere in courthouse.—Upon full compliance with all the provisions of this act (§§ 71-101—71-109) by any person, firm or corporation, it shall be the duty of the clerk to designate a reasonable space in his office for such person, firm or corporation to work. Provided, that in any case where space in the circuit clerk's office shall be insufficient to permit the circuit clerk to assign work space to all abstracters entitled thereto, the County Court or County Judge may assign other space in the Courthouse for such purposes, provided such space so assigned does not interfere with the duties of any public official. Nothing herein contained shall be construed to permit

any public records to be taken from the clerk's office when same shall be in use by the clerk, but when not so required, the public records may be used by the abstracter in the area assigned by the County Court or the County Judge."

Here the statute was followed to the letter. Since there is not room in the circuit clerk's office for Mrs. Walls, the county judge assigned her other space in the courthouse in which to work. The fact that Mrs. Walls was permitted to have a telephone in the courthouse in connection with her work as an abstracter was a matter within the discretion of the county judge. According to the undisputed evidence, the other abstracters may also install telephones if they so desire.

Affirmed.

HARDY *v.* HARDY.

5-1415 313 S. W. 2d 387

Opinion delivered May 26, 1958.

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

Frank J. Wills, Quinn Glover, Langston & Walker and *Wayne Foster,* for appellee.

PER CURIAM. Subsequent to the opinion rendered in this case on April 7, 1958, appellant, Meriwether Wright Hardy, filed a petition, setting out that dividends and interest, which had accrued on the various stocks and bonds since the date of the trial court's decree (December 28, 1956), had been paid to appellees. Under the opinion rendered by this Court on April 7, 1958, appel-

lant was given, free from the lien claimed by appellee, Corinne Hardy, one-third of Robert L. Hardy's stocks and bonds. Appellant contends that under the result reached by this Court, she is entitled to judgment for one-third of the dividends and interest which have been paid to appellees since December 28, 1956. In Item 5 of its opinion, this Court continued in effect the trial court's order allowing appellant $262.50 per month for temporary alimony, and provided that such temporary alimony "shall remain in effect until such time as appellant's award of dower, herein set out, shall be satisfied in full."

It is conceded that the award of temporary alimony is greater than the amount of dividends and interest which appellant would have received from the stocks and bonds, if same had been divided in kind at the time of the entering of the decree. In her response to appellant's petition, appellee, Corinne Hardy, states that she "has made arrangements with said bank for the release of that portion of said securities awarded appellant free of appellee's pledge." In view of this statement by appellee, Corinne Hardy, and the facts herein enumerated, we make the following order:

The order allowing appellant $262.50 per month for temporary alimony shall remain in effect until such time as appellant's award of dower in the stocks and bonds shall be satisfied, and the making of such payments shall operate in lieu of judgment for dividends and interest that may have been paid to appellees since December 28, 1956, and in lieu of amounts that may hereafter be paid until there is a division of the stocks and bonds in kind; PROVIDED, that appellant's dower in the stocks and bonds, heretofore awarded shall be satisfied in full within 120 days from the rendition of this order; otherwise, such temporary alimony shall remain in effect and be cumulative to any dividends or interest that may accrue thereafter.

Costs in both courts against appellees.

Justice George Rose Smith not participating.

WILHELM *v.* MCLAUGHLIN.

5-1540 313 S. W. 2d 821

Opinion delivered June 2, 1958.

[Rehearing denied July 1, 1958.]

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

O. E. Williams, for appellee.

CARLETON HARRIS, Chief Justice. The issue in this appeal is whether appellants were acting in a fiduciary relationship to appellee in certain real estate transactions. Appellant, Jeanne Luptak, is a resident of Eureka Springs, Arkansas, where she has operated a motel

for several years. Milton Wilhelm is a real estate broker with an office in Eureka Springs. Appellee, Margaret O. McLaughlin, has been a resident of Eureka Springs since September, 1955. Prior to such date, she lived in a Chicago suburb. Mrs. Luptak and Mrs. McLaughlin are cousins. Mrs. McLaughlin, who was nearing the age of retirement, became interested in Eureka Springs. On an occasion when Mrs. Luptak went to Chicago to bring her husband back to Eureka Springs for a vacation, Mrs. McLaughlin returned with them, and purchased property known as the "Baker property." Wilhelm, a friend of Mrs. Luptak, bought and sold several pieces of property for appellee. On January 31, 1957, Mrs. McLaughlin instituted suit against Wilhelm, alleging that he had represented her in the purchase of certain property, designated as the Vaughn Street or Jeske property, had purchased same with her money (though he received the deed), and had charged her $7,000 while the actual consideration was only $3,300, and asking that he be made to account for the difference. She alleged other property sales and various loans to Wilhelm, stated she was unable to obtain an accounting, and prayed the court to require him to account for all sums due her from the transactions. On March 23rd, she amended her complaint by joining Mrs. Luptak, J. D. Carter, and Manufacturer's Casualty Insurance Company as defendants. As to Mrs. Luptak, it was alleged that the latter purchased a piece of property for Mrs. McLaughlin from Mrs. Hazel Baker for the sum of $4,000, but that Mrs. Luptak had represented to Mrs. McLaughlin that the price was $5,500, and appellee asked that Mrs. Luptak be required to account for the difference. She alleged that Carter was a partner of Wilhelm, and had received $1,000 from the Vaughn Street transaction. The insurance company was surety on the bonds of Wilhelm and Carter for the years 1955 and 1956 in the amount of $2,000 each (under the provisions of Act 395 of 1951), conditioned on compliance with Arkansas Statutes 71-1301 through 71-1311.[1] Appellants

[1] These sections relate to licensing of real estate brokers, causes for revocation of license, etc.

denied the allegations, as did Carter, who also filed a cross complaint against his co-defendant, Wilhelm, alleging that Wilhelm had sold various properties, including those heretofore mentioned, and had not paid him his proper share of the commission as per the agreement under which they operated.[2] The cause proceeded to trial, and at the close of appellee's evidence in chief, appellants and Carter filed their separate demurrers to the evidence. The court sustained the demurrer as to Carter, and overruled the demurrers of appellants. On concluding the trial, the court rendered judgment against Wilhelm for $3,700, against Mrs. Luptak for $1,300,[3] and against Manufacturer's Casualty Insurance Company, as surety on Wilhelm's bond, in the sum of $2,000, when paid, to apply on the judgment against Wilhelm. From such decree, appellants bring this appeal. Appellee cross-appeals, such appeal being based upon the action of the court in denying recovery for sums she contended were due her from Wilhelm, arising from the purchase of property from one J. E. Pitts, and the purchase from one C. B. Stofregen of property located at 42 Prospect, where she now lives. Mrs. McLaughlin contends that she is due $1,175 on the Pitts transaction, and $1,000 on the Prospect Street transaction.

The litigation is purely a fact question, it being admitted by appellants that an agent occupies a fiduciary relationship to his principal, and as such fiduciary, cannot make a profit for himself while serving his principal in a particular transaction without the consent of the principal, and then only after a full and complete disclosure of all material facts. Appellants simply contend that the proof in this case was not sufficient to establish that they were acting under a fiduciary relationship. We see no need to detail the testimony, which was quite lengthy, and which would serve no good purpose since, as previously stated, the law gov-

[2] The cross complaint was later dismissed by Carter, stating that "* * * his said co-defendant has in all things met and satisfied the demands of this defendant as set out in the cross complaint."

[3] Mrs. Luptak was given credit for a $200 broker's fee she had paid.

erning such transactions is not in dispute, and the litigation was determined purely upon the trial court's view as to the preponderance of the evidence.

We will first consider the transaction between Mrs. McLaughlin and Mrs. Luptak. Mrs. McLaughlin, in brief, testified as follows: She is 62 years of age . . . a registered nurse . . . her cousin, Mrs. Luptak, called her around the last of April, 1955, advising there was a good piece of property in Eureka Springs that could be bought . . . stated she would buy it herself, but could not afford to, but would make the down-payment for appellee, and witness could pay her back . . . "I said, 'Well, very well, go ahead'." . . . Mrs. Luptak first stated the property was selling for $4,250, but, while apparently talking to somebody at her end of the line, said she had made a mistake and it was $5,500. Mrs. McLaughlin was reaching retirement age, and had previously told Mrs. Luptak to look around for a place where she could live . . . She came to Eureka Springs on May 6th or 7th, 1955, with Mrs. Luptak and her husband, by automobile, shortly returned to Chicago to get money, and within a few days, returned to Eureka Springs. She saw Mrs. Baker on May 24th for the first time . . . went with Mrs. Luptak and Wilhelm to the home of Mrs. Baker . . . tried to talk to Mrs. Baker, but her cousin and Mr. Wilhelm would change the subject or have something else they wanted to show her. She gave her check in the amount of $5,500 to Mrs. Luptak on that date, and later learned that her cousin had only paid Mrs. Baker $4,000 for the property.

Mrs. Luptak testified that she was searching for a piece of property for her brother . . . Wilhelm mentioned the Baker property to her and she went out and looked at it . . . she told Mrs. Baker she was buying it for her brother . . . her brother was unable to buy it, and so she bought it herself as an investment. . . . she went to Chicago the next day and went out to visit Mrs. McLaughlin, telling her about the property . . . denied that she had called Mrs. Mc-

Laughlin over long distance in April . . . appellee wanted to go back to Eureka Springs with her and take a look at the country . . . they went to see the Baker property, accompanied by Wilhelm, and later Mrs. McLaughlin wanted to purchase it . . . Wilhelm insisted she let Mrs. McLaughlin have the property, and she agreed, selling it to her for $5,500. Mrs. Luptak insists that she had no thought or intention of buying the property for appellee at the time she (Luptak) entered into the purchase agreement with Mrs. Baker in April; that Mrs. McLaughlin inspected the property on three different occasions between May 9th and May 24th and only decided to purchase same on the latter date, giving her a check for $5,500 at that time. This testimony was disputed by Mrs. Baker (now Doherty) who testified that Mrs. Luptak told her she was buying the property for her cousin. She stated that the transaction was completed before she ever met Mrs. McLaughlin, and further verified appellee's testimony to the effect that appellants prevented her from having any conversation with appellee.

The most potent evidence in behalf of appellee, however, is the deed itself. This deed is from Hazel D. Baker to Margaret McLaughlin and Brian A. McLaughlin,[4] dated May 9, 1955, and recorded on May 18, 1955. Mrs. Luptak's explanation is that the deed was originally made to her on May 9th, but that on reconveying it to Mrs. McLaughlin, the name was rubbed out, and Mrs. McLaughlin's inserted in order to save recording fees on two deeds. She makes no explanation for the fact that the deed, as recorded on May 18th, showed the McLaughlins to be the grantees. There are obvious erasures where the name of the grantee is inserted, but Mr. Jay Russell, an attorney of Eureka Springs, gave a much more reasonable explanation. Mrs. Baker had come to his office on another matter, and while she was there, he also prepared this particular deed. From his testimony:

[4] Son of appellee.

"* * * I had understood that the deed was to be made to Jeanne Luptak, and I drew the deed to Jeanne Luptak and handed it over for examination. And Wilhelm said, 'No, I want it made to Margaret McLaughlin and Brian A. McLaughlin.' I then rubbed out Margaret McLaughlin and ——

Q. You mean Jeanne Luptak's name.

A. Jeanne Luptak's name, and put in Margaret McLaughlin and Brian A. McLaughlin, and had Mrs. Baker sign it. I did that on the 9th of May * * *."

As stated by the Chancellor:

"* * * Now the Court is unable to * * * see how Mr. Wilhelm or anybody else would have the prescience to know, on May 9th, only one day after Mrs. McLaughlin got here, that on May 24 she would decide to buy the property and pay for it, and would know to instruct the scrivener to take the Luptak name out and put the McLaughlin name in' * * *." We fully agree. These facts are irreconcilable with Mrs. Luptak's contention that Mrs. McLaughlin was not interested in the property until after arriving in Eureka Springs sometime around May 8th or 9th, and that appellee did not decide to purchase it until May 24th.

We come now to a discussion of the purchase of the Vaughn Street or Jeske property. Mrs. McLaughlin testified that she returned to Chicago and sold her home, as she planned to go back to Eureka Springs and stay, and wanted a place there to live.[5] She accordingly wrote a letter to Wilhelm asking him to find a place for her to purchase as a home. According to her testimony, Wilhelm called her on July 31st and told her there was a place to be sold at auction, and he thought it would be a good place to live. At the time, Wilhelm was holding approximately $8,000[6] belonging to appellee, by virtue of sales of property he had made as her agent. Appellee testified that she asked if she had enough money to

[5] The Baker property was disposed of by Mrs. McLaughlin about two months after the purchase.

[6] The exact amount is in dispute, the testimony ranging from $7,800 to $8,600.

buy it, and he replied: "Well, if it costs more than I've got, I won't buy it." He called her back on August 2nd and reported that he had purchased the place. The record reflects that the property was purchased on August 2nd and deed executed to Wilhelm. Mrs. McLaughlin returned to Eureka Springs on August 14th, and it was not until a few months later that she learned she had been charged $7,000 for the property, while Wilhelm had only paid $3,300 for it.

Wilhelm testified that he and Carter saw the property advertised for sale, took a look at it, and he bid it in for $3,300, with the deed being made to him, though he and Carter were partners in the transaction. He denied any prior conversation with Mrs. McLaughlin . . . stated she had never contacted him about the Vaughn Street property . . . that he had no conversation with her about this property until after she arrived in Eureka Springs. He stated that she wanted to purchase it, and he sold it to her for $7,000 on August 8th . . . that the amount was taken from the money heretofore referred to which he was holding, and which belonged to her. According to Wilhelm, Mrs. McLaughlin signed an "Offer and Acceptance" agreement to purchase the property from him for $7,000, the transaction taking place at the home of Mrs. Luptak on August 8th, and he offered in evidence a copy of such agreement, supposedly signed by appellee. This testimony was corroborated by Mrs. Luptak. Mrs. McLaughlin denied signing such agreement, stated that the signature was a forgery, and testified that she was in Chicago serving on the Cook County Petit Jury on August 8th. She offered in evidence a photostatic certified copy of an "Attendance Master Jury Card." Apparently, under the procedure in Cook County, the juror is required to sign this card each day he or she is present for jury service, and the card shows Mrs. McLaughlin's signature for each day from August 1st through August 12th. The court rejected this evidence, apparently because it was not properly authenticated. Be that as it may, we think there is sufficient evidence to sustain the chancellor's finding that Wilhelm was acting for Mrs. McLaugh-

lin in purchasing the property. As stated by the trial court:

"The evidence is replete that Wilhelm was acting as something more than a mere real estate broker, as to plaintiff; that he actually did have her money, and was actively engaging himself as her agent * * *."

We are of the opinion, however, that the court erred in one respect. Other lots, which had not been purchased by Wilhelm at the sale, and which were not included in the $3,300 sale price, were conveyed to Mrs. McLaughlin, along with the Vaughn Street property, for the $7,000. The testimony reflects that $1,000 was paid to Carter by Wilhelm for these lots, though the fact that this amount was paid, does not necessarily establish the lots to be of that value. We hold that Wilhelm is entitled to a credit on the $3,700 judgment in the amount of the actual value of these lots at the time they were conveyed to Mrs. McLaughlin.

Turning to the cross appeal, we quote from the trial court's opinion:

"As to the other properties, the Court finds that Mrs. McLaughlin has failed to meet the burden of proof imposed upon her; in respect of the Pitts property or the Prospect Street property or the Bohlman property, that in no material degree has the plaintiff shown by a preponderance of the evidence that she was misled or had her eyes closed to anything. And even though it might appear that the price received by the seller of the properties was less than that paid by Mrs. McLaughlin, there is nothing in the testimony to indicate that the difference was other than the normal and legal and proper difference. In any event, there is nothing about those transactions to show that Mrs. McLaughlin was misled or deceived or cozened."

We are unable to say that the court erred in so finding.

As stated in *Kelker* v. *Payton,* 227 Ark. 369, 298 S. W. 2d 704:

"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. * * * 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."

The court further found that the evidence did not reflect with certainty that a balance was owed by Wilhelm to Mrs. McLaughlin, or by Mrs. McLaughlin to Wilhelm,[7] with which conclusion we concur.

Accordingly, the decree should be modified to the extent of giving Wilhelm credit for the value of the lots deeded with the Vaughn street property to Mrs. McLaughlin, and the case is remanded with directions to determine the value of said lots at the time of the conveyance on August 8, 1955, and to enter a decree consistent with this opinion.

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[7] Upon this finding, the court dismissed a cross complaint (counterclaim) filed by Wilhelm, but which does not appear in the transcript. The counterclaim related to various expenditures which Wilhelm contended he had personally made on Mrs. McLaughlin's properties. The court's action in dismissing the counterclaim is not assigned as error, nor argued by appellant in his brief.

5-1582 313 S. W. 2d 553

Opinion delivered June 2, 1958.

J. Harrod Berry, for appellant.

Langston & Walker, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Rose Ellen Bostic, secured a divorce from appellant, John Elmo Bostic, August 13, 1954. She was also awarded the care and custody of their two minor children, John Scott Bostic 9 years of age and Danny Gene Bostic, 6. The decree also contained this recital: "The defendant shall pay through the office of the Master in Chancery the sum of $40.00 on the 15th day of August, 1954, and the sum of $40.00 on the 1st day of September, 1954, and a like amount on the first and fifteenth days of each and every month thereafter until such further order of this court, said sums to be for the support of the children herein and alimony for the plaintiff."

Both parties have remarried since the divorce decree. On March 8, 1957, appellant sought to have the decree modified by reducing the alimony and child support allowance to $40 per month, alleging "changes in circumstances of both parties" such as would warrant modification. Trial resulted in the denial of appellant's petition and the decree directed that "The defendant, John Elmo Bostic, shall henceforth pay to the

plaintiff for the use and benefit of the minor children the sum of $80.00 per month. Said sums shall be for the support of the minor children of these parties." This $80 per month was to be paid $40 on the first and $40 on the fifteenth of each month. It appears that appellant has not failed to make these payments in accordance with the court's order. From that decree is this appeal.

For reversal appellant contends that the trial court erred in refusing to reduce the child support payments because of: "The remarriage of appellee and her improved financial circumstances; and the decreased earnings of appellant, his worsened financial circumstances, and his remarriage."

We find no error in the decree of the trial court. Our rule is well settled that it is both the legal and moral duty of the father to support his minor children in accordance with his means and ability during their minority, and this obligation is required of him even without a court order. See *Kuespert* v. *Roland,* 222 Ark. 153, 257 S. W. 2d 562.

The evidence discloses that appellee lives with her new husband within the city limits of Arkadelphia. They own a small garden plot of 30 feet x 70 feet and 96 acres of pasture land and rent about 400 acres of farm land. They own no passenger car but do own a Chevrolet truck (1949 or '50 model). The record appears to be silent as to the income of appellee or her husband. Generally the remarriage of both husband and wife (as here) to third persons is not within itself regarded as a sufficient change in circumstances as would require a modification of the allowance for child support and maintenance. "The fact that a divorced husband has remarried or was contemplating remarriage is not alone ground for reducing the amount of the allowance, although it is a circumstance that may be considered in weighing the equities of the situation, and the same rule applies to the remarriage of the wife, at least in the absence of an assumption by the second husband of any obligation to support the children of the first

marriage; nor is the remarriage of both husband and wife to third persons, in itself, regarded as such a change of circumstances as requires a modification of the allowance," 27 C. J. S. Divorce, Sec. 322, p. 1245. It appears undisputed that appellant was earning more money after his remarriage, and at the time of the decree in the present case, than he was at the time the divorce decree was granted. For a number of years appellant has been employed by the Rock Island Railroad, and is now so employed. His take home pay is approximately $260 per month. At the time Mrs. Bostic divorced him he was receiving approximately $240 per month, so that at the present time he is earning about $20 more per month, than at the time the divorce decree was granted. He and his present wife operate a rooming house, from which they net about $15 per month, after paying rent of $75 per month. Appellant, in August 1956 following his remarriage, purchased a new 1956 "Ford Fairlane" and obligated himself for installment payments of $72.68 per month on the Ford. Appellant has no children by his present wife. It, thus, appears that appellant's financial condition is better now than it was at the time of the divorce decree. Of significance is the fact that appellant's obligation in the purchase of a new car with payments of $72.68 per month is just $7.32 less than his obligation, under the court's decree, of $80 per month for the support of his children. As indicated, his first obligation was to these children.

Upon consideration of all the evidence presented we hold that the chancellor's findings, that there were no changed conditions such as would warrant a reduction in the child support payments, are in accordance with the preponderance of the testimony. See *Wilson* v. *Wilson,* 186 Ark. 415, 53 S. W. 2d 990. Affirmed.

KANSAS CITY FIRE & MARINE INS. CO. *v.* BAKER.

5-1558 313 S. W. 2d 846

Opinion delivered June 2, 1958.

[Rehearing denied July 1, 1958.]

Kirsch, Cathey & Brown, for appellant.

Rhine & Rhine, for appellee.

ED. F. MCFADDIN, Associate Justice. This is the second appearance of this litigation in this Court. The first appeal was *Baker et al.* v. *Kansas City Fire & Marine Ins. Co.,* 227 Ark. 532, 300 S. W. 2d 264, wherein the facts were recited in considerable detail. Baker, Houston, and the First National Bank of Paragould (all hereinafter called "Baker") had a fire loss of $2,-214.35 and sued the Kansas City Fire & Marine Insurance Company (hereinafter called "Kansas City Company") for the amount of that loss since the Kansas City Company had issued a $4,000 policy to Baker. The Kansas City Company claimed that there was another policy on the same property issued by the Consolidated Underwriters of South Carolina Insurance Company (hereinafter called "Consolidated Underwriters") for the sum of $6,000; that the total insurance was $10,000 and that the Kansas City Company was liable for only

$885.74, which was 40 per cent of the total loss[1] of $2,-214.35.

On the first trial the Circuit Court agreed with the Kansas City Company and rendered judgment in favor of Baker for only $885.74; and Baker appealed. The Consolidated Underwriters were not made parties defendant in the first trial. We said on the first appeal:

"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 never showed that the plaintiffs could have recovered on the $6,000 policy issued by the Consolidated Underwriters. . . . 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 the allegation. . . . 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 remanded for a new trial; and upon remand the Consolidated Underwriters may be brought in and the issues litigated with all parties before the Court."

After the mandate containing our opinion was filed in the Trial Court Baker (the plaintiffs) made no effort to have Consolidated Underwriters made a party defendant. Instead, it was the Kansas City Company that had the Consolidated Underwriters made a third party defendant; and that Company (Consolidated Underwriters) admitted its liability for 60 per cent of the total loss of $2,214.35 and deposited with the Court the sum of $1,341.90 representing 60 per cent of the loss with interest until the date of the deposit, and asked that the Court direct payment to the person or persons entitled thereto.

[1] There is no controversy as to the fact that interest is to be charged. So we omit any further calculation or reference as to interest.

The case was then tried by the Circuit Court on the testimony offered on the first trial, together with the subsequent pleadings, as hereinbefore mentioned; and the Circuit Court, in the trial from whence comes the present appeal, rendered judgment against the Kansas City Company for the full loss of $2,214.35, together with penalty and attorneys' fees, but allowed the Kansas City Company, upon payment of the full judgment, to receive the amount deposited by the Consolidated Underwriters. From that judgment the Kansas City Company brings the present appeal.

We reach the conclusion that the judgment must be reversed. In the first trial the Kansas City Company pleaded the existence of other valid insurance (to-wit, the policy issued by the Consolidated Underwriters) as a defense to any liability by the Kansas City Company for more than 40 per cent of the total loss. The burden of proving this defense of "other insurance" was on the Kansas City Company; and on the first appeal we held that such burden had not been discharged: so we reversed and remanded. Then, on the second trial in the Circuit Court, the Kansas City Company sustained its burden of proving "other insurance" because the Consolidated Underwriters admitted liability and paid into the Court 60 per cent of the total[2] loss. With the 60 per cent paid into Court, then the existence of "other insurance" was established and the Kansas City Company became liable for only[2] the remaining 40 per cent of the loss.

The real battle is over the matter of penalty and attorneys' fees, which the Trial Court awarded Baker against the Kansas City Company. But what we have said, as to the Kansas City Company's liability for only 40 per cent of the loss, points to the disposition that we make of the items of penalty and attorneys' fees. Our applicable statute on these matters is § 66-514 Ark.

[2] That these amounts bear interest is not denied and interest was tendered by the Consolidated Underwriters and offered to be confessed by the Kansas City Company, so we omit any further calculation or reference as to interest.

Stats.; and our cases hold that to be entitled to recover penalty and attorneys' fees the plaintiff must recover from the defendant insurance company the amount for which the plaintiff sued. See *Pacific Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764; *Fidelity Phenix Fire Ins. Co.* v. *Roth,* 164 Ark. 608, 262 S. W. 643; *Lincoln Reserve Life Ins. Co.* v. *Jones,* 178 Ark. 466, 10 S. W. 2d 910; *Mutual Life Ins. Co. of New York* v. *Marsh,* 186 Ark. 861, S. W. 2d 433; *Service Fire Ins. Co.* v. *Horn,* 202 Ark. 300, 150 S. W. 2d 53; *Liverpool & London & Globe Ins. Co.* v. *Jones,* 207 Ark. 237, 180 S. W. 2d 519.

At all times in this case the Baker plaintiffs prayed that they recover from the *Kansas City Company* the sum of "$2,214.35 together with 12 per cent penalty and reasonable attorneys' fees, as required by law . . ." After the remand of the case and after Consolidated Underwriters paid its money into the Court, the plaintiffs were not entitled to recover the full $2,214.35 from the Kansas City Company; and, therefore, the Kansas City Company was not liable for penalty and attorneys' fees.

The judgment is reversed and the cause is remanded with directions to the Trial Court to enter judgment as follows: that the plaintiffs may have and receive the money paid into Court by the Consolidated Underwriters, and then have judgment against the Kansas City Company for the sum of $885.74 plus interest and all costs of the Trial Court, but not for penalty and attorneys' fees. The costs of this appeal are taxed against the appellees.

5-1574 313 S. W. 2d 832

Opinion delivered June 2, 1958.

[redacted]

Roy S. Dunn, Shaw, Jones & Shaw, for appellant.

Chas. I. Evans, for appellee.

MINOR W. MILLWEE, Associate Justice. This suit was brought by appellees, Mort Hardwicke and wife, against appellants, Herman Schwartz and wife, primarily to establish a deed as a lost instrument. In addition, appellees sought an accounting of certain monies allegedly withheld by appellants from a stone cutting business corporation owned by the parties in equal shares, and for an injunction to restrain Mr. Schwartz and his brother from operating a competitive business on adjacent lands. There is a direct appeal from a decree in

which the chancellor found that the appellants had executed and delivered the deed in question to the business corporation; and that it was duly established as a lost instrument. Appellees have cross-appealed from the court's denial of their plea for an accounting by appellants of the affairs of the corporation.

As a basis for the decree, the trial court rendered a comprehensive memorandum opinion which we set forth and adopt as a clear and accurate appraisal and summation of the evidence adduced and the issues presented. The opinion reads:

"At a time when Mort Hardwicke was County Judge of Logan County and engaged in maintaining its roads he chanced to discover a deposit of building stone on or near lands belonging to Mr. and Mrs. Herman Schwartz. That particular kind of building stone was in demand and Herman Schwartz and Mort Hardwicke formed a partnership to quarry and market the stone, Schwartz being the active manager and Judge Hardwicke advising and assisting.

"Their venture was profitable and brought to each a substantial return each year. Books and records were kept by Mr. Schwartz in a manner satisfactory to both parties for the type business they were conducting.

"At some time prior to May 9, 1951, Schwartz and Hardwicke consulted with Hon. L. J. Arnett, an attorney of long and favorable acquaintance to both and from their consultation evolved an agreement that a corporation be formed. The details of the formation of the corporation and even the terms of the agreement to form the corporation are in dispute, but the testimony of Mr. Arnett, who actually did the legal work is both explicit and also logical and when considered together with the 'Articles of Incorporation,' bearing the admitted signatures of Mr. and Mrs. Hardwicke and Mr. and Mrs. Schwartz, it is apparent that 'Logan County Building Stone Co., Inc.,' was validly created and is now and has been continuously in existence and operation since its incorporation in May of 1951. The name 'Cherry Blend Stone'

was registered in the U. S. Patent office by the corporation and business form statements were printed and used with the following heading:

Logan County Building Stone Co., Inc.
producers of
Cherry Blend Stone
(Reg. U. S. Pat. office)
Phones: 101 or 396
Herman Schwartz, Pres., M. B. Hardwicke, Sec.

"Business was carried on in the corporate name. There is such a mass of circumstantial evidence in addition to the direct evidence in the record that the court cannot but find the creation and existence of the corporation in exactly the manner testified to by Mr. Arnett.

"Other than the change from a partnership to a corporation the business of operating the quarry and marketing stone was continued uninterrupted with Herman Schwartz continuing to serve as manager and with Judge Hardwicke assisting until January, 1953, when Judge Hardwicke went out of public office. At that time both men became active in the stone business carried on by the corporation, Mr. Schwartz continuing to sell, collect and look after the business side and Mr. Hardwicke attending more to the quarrying and preparing of stone for sale.

"Mr. Schwartz also engaged in other stone selling ventures. He and his brother opened a quarry in the vicinity of that operated by the corporation. The stone produced was very similar and in his selling sometimes Mr. Schwartz would sell 'split' loads, i. e., part of a load of stone being supplied from the quarry of the corporation and the other part from the quarry owned by Herman Schwartz and his brother.

"The activity of Mr. Schwartz was such that Mr. Hardwicke became dissatisfied and this dissatisfaction was enhanced by a general slackening up in the demand for this particular type building stone and the resulting appreciable decrease in the profits derived from the cor-

poration. Mr. Hardwicke decided he would try to help with the sales and actually did do some selling and collecting. Mistrust was multiplied when it was disclosed that Mr. Schwartz had deposited some corporation money in the Bank of Charleston in his son's name and Mr. Hardwicke had deposited some money in the Bank at Dardanelle.

"With the assistance of Mr. Arnett, Mr. Hardwicke and Mr. Schwartz tried to get the affairs of the corporation back on an amicable basis and a 'get-together' was held on June 18, 1955, and a balance and statement was struck and reduced to writing and endorsed as follows:

'Approved as read witness by Mr. Luke Arnett, Attorney for company at time.'

"In spite of this apparent effort to get things back on a friendly and workable basis, matters went from bad to worse and culminated in the filing of this action on November 1, 1955, the determination of which requires findings of facts and the declaration of law applicable thereto.

FINDINGS OF FACTS

"The Court finds that Logan County Building Stone Company, Inc., is a validly formed Arkansas Corporation and has been such since its incorporation in May of 1951. The stockholders and their shares are as follows:

H. Schwartz 19
M. Hardwicke 19
Pat Hardwicke 1
Theresa Schwartz 1

"Having found that it is a validly formed corporation it must follow that the corporation received something of value for its capital stock. Sec. 8, Art. 12 of the Arkansas Constitution of 1874 among other things provides that '. . . no corporation shall issue stocks or bonds except for money or property actually received or labor done . . .' Mr. Arnett, the attorney handling

the formalities of incorporation was well aware of the provisions of the law and testified positively that it was clearly understood that the 80 acres of land was to constitute the property received and to be valued at $1,000. He also testified positively that the deed was in proper form and was executed and delivered to the corporation by Mr. and Mrs. Schwartz and that in exchange therefor the stock was issued.

"The execution and delivery of the deed is a bitterly controverted matter, but a decision of this case requires a finding of fact on that issue and the court adopts the testimony of Mr. Arnett and finds that Mr. and Mrs. Schwartz executed and delivered the deed to the corporation.

"The Schwartzs offered no other explanation of what any of them paid or gave for their stock. Herman Schwartz has held himself out as the president of the corporation. The Corporation, under his management has done an extensive business, made substantial profits and has registered the 'Cherry Blend' name. Such conduct and circumstances, together with Mr. Arnett's direct testimony that the deed and conveyance of the land constituted the consideration for the issuance of the stock in the corporation leaves no alternative but to find that such deed was executed and delivered and that title to said land should be vested in the Corporation and that Mr. and Mrs. Herman Schwartz should be divested of such title. Nor can the Schwartzs be heard to contend that no consideration has been paid them. The stock in the corporation is valuable. They have received very substantial profits from the corporation based on their stock ownership. In the pipe line settlement in December of 1953, a very substantial sum was paid to the Schwartzs ($3,000) while $1,000 was being paid to the corporation. On the other hand, the Hardwickes cannot be heard to complain about the $3,000 overpayment to the Schwartzs because they knew of the settlement and acquiesced in it by sharing in the corporation profits in 1953 subsequent to the settlement and the years subsequent thereto. In addition, Mr. Hardwicke,

had full knowledge of the pipe line settlement when he and Mr. Schwartz made the settlement of account on June 18, 1955, and no reference or complaint was made concerning it at that time.

"The Court also finds that the corporation agreed to pay to the Schwartzs 25 cents per ton so long as it produces building stone from the tract. The 25 cents per ton provision was not written in the deed and there was never any official action taken by the corporation to be recorded in its minutes, but the proof is beyond cavil that the corporation was to pay the 25 cents per ton and the court finds that such provisions should be made a part of the order vesting title and be binding upon the corporation, its grantees, successors and assigns.

"The Court finds that Herman Schwartz at a time when he was president of the corporation and its active manager also was engaged in competitive stone selling ventures, but finds that there is no evidence in this case to warrant a finding that he was not entitled to be so engaged. At all times when Mr. Hardwicke was in charge of the business, certainly Mr. Schwartz was entitled to be in competitive business.

"However, since the registered name of 'Cherry Blend' is the registered trade name of the rock handled by the corporation, Schwartz should be restrained from marketing competitive stone as 'Cherry Blend' even though his competitive stone may be so similar to that marketed by the corporation as to be indistinguishable from it.

"Undoubtedly Mr. Schwartz has used the name 'Cherry Blend' in the past. But we must not lose sight of the fact that he was and now is the president of the corporation and that he and his wife own half the corporate stock. He was for many years the manager of the corporation's business. Under the evidence in this case the Court is unwilling to assess damages against Mr. Schwartz.

"Since this suit does not seek a dissolution of the corporation, the court makes no finding concerning that

aspect of the case, at the same time recognizing the absurdity that results when half the corporate stock is owned by one faction and an exact equal half is owned by the other — an impasse which could possibly result in inability to elect directors or conduct corporate affairs. Therefore, based on the evidence and happenings since the commencement of this action, the court finds that until some change is made in a legal manner the directors of the corporation have empowered Mort Hardwicke to conduct the corporate business in its accustomed manner and to keep a full, true and complete set of books from which an accurate accounting can be made."

CONCLUSIONS

"The Corporation is a validly existing Arkansas corporation.

"Title to the 80 acres in question shall be vested in the corporation and divested from the Schwartzs.

"The order vesting title shall contain a provision binding on the corporation, its grantees, assigns and successors requiring payment of 25 cents per ton on the rock quarried and marketed, which shall be payable to Herman Schwartz, his grantees, devisees, successors, heirs or assigns.

"Mort Hardwicke is hereby declared to be the presently acting manager of the corporation business of quarrying and marketing building stone and he is required to keep a full, true and complete set of books.

"Herman Schwartz is restrained from using the name 'Cherry Blend' in his competitive rock ventures."

I. *The Direct Appeal.* It is well settled by our own cases, and the authorities generally, that the evidence required to prove and establish a lost deed must be clear, satisfactory and convincing, though it need not be undisputed. *McCulloch* v. *McCulloch,* 213 Ark. 1004, 214 S. W. 2d 209. In *Dillard* v. *Harden,* 197 Ark. 586, 124 S. W. 2d 10, we said it is sufficient if the testimony which the court credits and accepts as true shows clear-

ly, concisely and satisfactorily that the deed sought to be restored had in fact been executed and delivered. We have also said that the burden is upon one who claims under an alleged lost instrument to establish its execution, contents and loss by the same *quantum* of proof. *Slaughter* v. *Cornie Stave Company,* 172 Ark. 952, 291 S. W. 69.

The first and most difficult question is whether the proof tending to establish the execution, delivery, contents and loss of the alleged deed from appellants to the Logan County Building Stone Company, Inc., meets this test. In testing the appellants' earnest and able contention that it does not, due deference must be given to the findings and conclusions of the trial judge who heard and observed the witnesses as they gave their testimony.

As the chancellor indicated, the evidence was sharply conflicting and the testimony of some of the witnesses was indefinite and contradictory on some points. For instance, Judge Hardwicke first testified to the execution of the deed by appellants to the corporation but later stated that he did not actually see them sign the instrument. Also, the minutes of a meeting of stockholders dated May 5, 1951, which might have been the date of the alleged execution of the deed, made no mention of that fact. But the trial court credited and gave great weight to the testimony of Mr. Arnett. So do we. In a hotly contested case like this, it is refreshing to have the testimony of a witness who seems to enjoy the utmost respect and confidence of all parties to the litigation. Mr. Arnett has ably represented the corporation throughout its existence without favor or partiality to either group of stockholders. The appellants do not question his honesty or integrity but do insist that his memory was fallible because it was not in harmony with that of the appellants or Judge Hardwicke on some points and with the minutes which he kept. We find nothing vague, uncertain or indefinite in Mr. Arnett's testimony concerning the execution, delivery, contents or loss of the deed in question. We agree with the trial

court that such testimony was positive, straightforward, explicit, logical and credible. If there were the slightest motive or inclination on his part to tell anything other than the absolute truth, it is not reflected in this record.

On the question of delivery Mr. Arnett testified that after the deed which he prepared was signed by appellants it was delivered to Schwartz by him with directions to take it and have it acknowledged, but not to record it for a while; and that he (Arnett) later found the deed in the files of the corporation but did not notice whether it had been acknowledged. Subsequently the deed was missing from the files. As president of the corporation and then in active charge of its affairs, Mr. Schwartz was the proper party to accept the deed and we think the evidence sufficiently shows a valid delivery.

On the whole case we conclude that the execution, delivery and contents of the deed from the appellants to the corporation were shown by that clear, satisfactory and convincing testimony required to establish it as a lost instrument.

II. *The Cross-Appeal.* Appellees say the trial court erred in holding that Schwartz was not liable to the corporation for $3,000 of the $4,000 easement payment made by the pipe line company. In our opinion a preponderance of the evidence sustains the trial court's finding that appellees had full knowledge of the settlement and fully acquiesced therein by thereafter accepting statements of the accounts and sharing in the corporate profits without complaint concerning the settlement made by Schwartz with the pipe line company. There was evidence that Hardwicke knew about the settlement prior to and during the period that he admits receiving monthly statements of the corporate accounts without protesting the settlement in any way.

Practically the same situation is involved in appellees' further contention that the court erred in refusing to hold appellants liable for damages for selling stone from the Schwartz Brothers quarry as "Cherry Blend Stone." It was shown that Hardwicke not only had

knowledge of these sales of the "split" loads of Cherry Blend Stone but actually assisted in making them and shared in the profits without complaint. Moreover, appellees failed to establish the amount of any damages to which they might otherwise be entitled if they had not fully acquiesced in and agreed to said sales. There is a paucity of proof that appellants actually misappropriated any of the funds belonging to the corporation.

The decree is affirmed on both the direct appeal and the cross-appeal.

BOCKMAN *v.* ARK. STATE MEDICAL BOARD.

5-1573 313 S. W. 2d 826

Opinion delivered June 2, 1958.

[Rehearing denied July 1, 1958.]

John C. Sheffield, Herrn Northcutt and *George K. Cracraft, Jr.,* for appellant.

Bailey, Warren & Bullion, for appellee.

George Rose Smith, J. This is a proceeding instituted before the State Medical Board for the revocation of the appellant's license to practice medicine. The complaint alleges two statutory grounds for revocation: First, that the license was obtained by fraud, and, secondly, that Dr. Bockman has been convicted of crimes involving moral turpitude. Ark. Stats. 1947 (1957 Replacement), § 72-613. The board, after a hearing at which Dr. Bockman appeared by counsel but not in person, found that both charges were sustained by the evidence and entered an order revoking the license. The record was reviewed on certiorari by the Pulaski Circuit Court, which affirmed the board's decision.

The appellant contends that the board's findings of fact are not sustained by any substantial competent evidence. Upon this point it is our rule in proceedings like this one that the board's action will not be set aside on certiorari unless there is an entire absence of substantial evidence to sustain the findings, in which case the

board's action is deemed to be arbitrary. *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041; *Eclectic State Med. Bd.* v. *Beatty,* 203 Ark. 294, 156 S. W. 2d 246.

For a reason to be explained later we discuss only the charge that the license was obtained by fraud. Dr. Bockman received his license from the Arkansas Eclectic Medical Board in 1922, although he does not appear to have practiced medicine in Arkansas until about 1937. In applying for the license Dr. Bockman stated on oath that he had attended lectures at the Kansas City College of Medicine and Surgery for four years, beginning in 1917, and that he had been granted a diploma by that institution on May 5, 1922.

The records of the Kansas City school were not available, but counsel for the board introduced the affidavits of six physicians who attended the college and graduated in the class of May, 1922. All six state that Dr. Bockman did not attend the school. It was also shown by affidavit that Dr. Bockman did not appear in the class graduation picture, nor was his name listed in the announcement of the commencement exercises. Counsel also introduced certified copies of judicial opinions rendered in Connecticut, in a proceeding which resulted in the revocation of Dr. Bockman's license to practice there, in 1928. In detailed findings of fact the trial court found that Dr. Bockman was not a *bona fide* graduate of the Kansas City school, having merely paid $30 for the privilege of taking an examination (which no one failed to pass if a suitable fee was paid) and having on that basis been awarded an "honorary" degree. The trial court's decision was affirmed on appeal. *Aronson* v. *State Dept. of Health,* 108 Conn. 84, 142 Atl. 476.

This proof is sufficient to sustain the finding that the license was obtained by means of false representations. Although the evidence consists of affidavits and certified copies of court decisions, it was nevertheless competent. This is not a criminal prosecution, in which the accused is entitled to be confronted by the witnesses against him. It is an administrative proceeding, civil in nature, as to which the governing statute provides:

"The Board shall not be bound by strict or technical rules of evidence, but shall consider all evidence fully and fairly, provided, however, that all oral testimony considered by the Board must be under oath." Ark. Stats., § 72-614. A provision of this kind is manifestly appropriate when the board members are not trained in the law, for the tribunal could not proceed at all if it were required to observe technical rules of evidence. *Meffert* v. *State Board,* 66 Kan. 710, 72 P. 247, affirmed, 195 U. S. 625. Affidavits are frequently used in quasi-judicial proceedings, as in hearings before the workmen's compensation commission; there is no constitutional objection to this method of proof in a civil proceeding. Here the evidence is wholly uncontradicted, as Dr. Bockman did not choose to testify or to offer proof tending to refute the charges against him. We have no doubt that the evidence adduced was admissible in a hearing of this kind and was ample to sustain the findings.

Next, it is contended that the board is now without power to revoke any license issued before the passage of Act 198 of 1957. Appellant relies on this proviso in the 1957 statute: "Nothing in this Act shall be construed to invalidate or affect any person holding a valid unrevoked or unsuspended license to practice medicine in this state on the effective date of this act." Ark. Stats., § 72-623. The argument is that since the 1957 statute authorizes the revocation of licenses procured by fraud (Ark. Stats., § 72-613), the quoted proviso prevents the cancellation of any license that was issued before the act became effective.

This interpretation of the legislative intent is unsound. The statute that was superseded by the 1957 act also provided for the revocation of licenses obtained by fraud. Pope's Digest, § 10740. Indeed, that provision has been in the statutes for almost fifty years. The 1957 act, among other things, raised the standards for admission to the practice of medicine, by requiring a written examination, fixing the passing grade at an average of 75 per cent, authorizing the board to require all applicants to serve one year of internship, etc. We

think it plain that the proviso relied upon by the appellant was inserted to protect physicians already licensed against the possibility of a revocation on the ground that their qualifications did not meet the more stringent requirements embodied in the 1957 act. If the proviso were given the sweeping effect that the appellant would have us attribute to it, it would follow that no license issued before the effective date of Act 198 of 1957 could ever be revoked for any reason whatever. Of course that was not the legislative intention.

Finally, the appellant interposes a plea of *res judicata.* It is shown that in 1937 a physician, acting as a representative of the medical profession as a whole, filed with the Eclectic Medical Board a complaint asking that Dr. Bockman's license be revoked on the ground that he had been convicted in New York of crimes involving moral turpitude. That board declined to revoke the license, holding that the proof of identity was insufficient and that in any event the offenses did not involve moral turpitude. On certiorari the circuit court refused to disturb the board's findings, and no appeal was taken to this court. That decision is now relied upon as a complete bar to the present proceeding.

We think the plea to be well founded with respect to the second count in the present complaint, which alleges the same New York convictions. When an administrative tribunal acts judicially or quasi-judicially, there are good reasons for holding that its decisions should have the finality that is conferred by the rule of *res judicata.* See an extended note on the subject in 27 Michigan Law Review, p. 677. Especially is this true when, as here, the administrative decision has been upheld upon judicial review.

The prior decision, however, involved only the New York criminal convictions and is not a bar to the charge that Dr. Bockman's license was fraudulently procured. It is shown that the attorney for the complainant in the 1937 proceedings knew that Dr. Bockman was not a *bona fide* graduate of the Kansas City medical school, but that fact was not asserted as a ground for the revoca-

tion of the license and was not considered by the Eclectic Medical Board. Doubtless the charge of fraudulent procurement of the license might have been joined with the charge of prior criminal convictions, but a joinder was not essential. The two instances of misconduct were entirely distinct, separated in time by a number of years, and had no bearing upon each other. Hence there were two causes of action, and a decision upon the first had no effect upon the second. *State Life Ins. Co.* v. *Goodrum,* 189 Ark. 509, 74 S. W. 2d 230. Since it was settled by the *Beatty* case, *supra,* that the practice of medicine under a license fraudulently obtained is a continuing offense, no issue of limitations or laches is now presented.

We conclude that the board was entitled to act upon the first charge in the complaint, but the defense of *res judicata* to the second count should have been sustained. Upon a finding of guilty the board is authorized to revoke the license, or to suspend it, or to place the person charged upon probation. Ark. Stats., § 72-614. The record does not indicate what penalty would have been imposed had the board considered only the charge that the license was procured by fraud. The cause will therefore be remanded, through the circuit court, to the board, to the end that that body may enter an order based only upon its finding that the license was obtained by false representations.

Reversed.

INMAN *v.* KELLEY, COUNTY TREASURER.

5-1565 313 S. W. 2d 796

Opinion delivered June 2, 1958.

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

S. M. Bone, Charles F. Cole, M. F. Highsmith, C. T. Bennett and *Murphy & Arnold,* for appellee.

PAUL WARD, Associate Justice. This appeal calls for the consideration of several Acts of the Legislature fixing the salaries of the several officers (and in most cases their deputies) in Independence County. Appellants contended below, and ably contend here, that these Acts are local and violate Amendment No. 14 to the Constitution of this state. Said amendment was adopted in 1926, and reads as follows: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts." The trial court held that the controversial Acts were not local or special, hence this appeal.

We here set out briefly the background leading up to the litigation, and how the issues arose. In 1936, the voters of Independence County adopted Initiated Act No. 3 fixing the salaries of all the county officers. The salaries fixed by the Initiated Act in 1936 were later thought by some to be inadequate, and so resort was had to legislative enactments. In 1955 Act 426 fixed the Assessor's salary, and in 1957 separate Acts were passed to fix the salaries of all the officers including the salary of the assessor. These Acts will be discussed later.

In August, 1957, D. Inman and other electors and tax-payers of Independence County instituted injunctive proceedings against Beulah Kelley, County Treasurer, to keep her from paying the County Judge's salary as fixed by the Legislature. It was asserted that said salary was fixed by Initiated Act No. 3. In response to the above, appellee (Beulah Kelley, County Treasurer) set out that the salaries of the other county officers were fixed by similar legislative enactments and therefore subject to question, and prayed that their status be declared by a declaratory judgment. This procedure was agreed to by appellants.

This appeal therefore presents for our consideration the validity of the several acts of the Legislature in question. First it must be stated it is conceded that Initiated Act No. 3, referred to above, has been repealed by the Legislature. For convenience the several Acts in question will be considered under three separate groups.

One. Act 232 of 1957 fixed the salary of the Treasurer; Act 350 of 1957 fixed the salary of the Sheriff; Act 358 of 1957 fixed the salary of the County Clerk; and Act 378 of 1957 fixed the salary of the County Judge.

The trial court held all these acts were general and did not offend against Amendment No. 14 to the Constitution, and we are in agreement. An examination of each of these Acts reveals that it deals with all the counties of the state, and fixes the salaries (not in the same amounts) for each county. Precisely the same situation

was under consideration in the case of *Lawhorn* v. *Johnson,* 196 Ark. 991, 120 S. W. 2d 720, where Act 97 of 1929 was held not to violate Amendment No. 14 to the Constitution of Arkansas. Said Act 97 and the Amendatory Act, 133 of 1931, fixed the salary of the County and Probate Judge in each of the 75 counties in the state, in varying amounts. It is true that the court in that case referred to the fact that the Legislature passed Act 216 in 1931 wherein it was stated that the salaries theretofore fixed for the different county officers of the state were based upon a proper classification according to population, wealth, etc., but it is clear from the language of the court it did not consider that fact controlling. In answer to a contention that the counties were not properly classified as to population and assessed valuation, the court pointed out that the Legislature had the right, in passing said Acts 97 and 133, to take into consideration other matters in determining the amount of salary to be paid in the various counties. The court then also said: "The authority for the Legislature to pass such legislation is specifically granted by the Constitution, Sec. 4, Art. 16, which reads: 'The General Assembly shall fix the salaries and fees of all officers of the state, etc.' " We agree with the reasoning in the *Lawhorn* case, *supra.* In fact no other conclusion would appear to be reasonable or even tenable. If the Legislature is charged with the power and duty to fix the salaries of all county officers, and it is, it could only do so, under the view urged by appellants, by making all salaries for a given office the same in every county. Such a result would of course not be practical. As was said in *State, Ex Rel. Attorney General* v. *Lee,* 193 Ark. 270 (at page 273), 99 S. W. 2d 835, "In determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation rather than to its title, form and phraseology . . ." This general rule applies with special significance, it seems to us, in the matter of fixing salaries of county officers in view of the language contained in the Constitution quoted above. In summing up we should emphasize that where the Legislature is dealing with the salaries of county of-

ficers, as here, under the constitutional directive above quoted, it is not necessary to classify the counties as to population or in any other manner but it is necessary that no county be excluded. See *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617. This is not to say, however, that some of the counties may not be excluded if the exclusion is based on a proper classification.

This court has many times held certain local and special Acts of the Legislature in violation of Amendment No. 14, and appellants have cited and emphasized many of them in their able brief, but it would serve no useful purpose to discuss them. It suffices to point out that all such cases are distinguishable on the facts from the *Lawhorn* case, *supra,* and from the case under consideration.

Two. Act 151 of 1957 fixes the salaries of the Tax Collectors in each of the 16 counties in the state where that office is separated from the Sheriff's office. Among those 16 counties is Independence County. It is the contention of appellants that this Act is special or local and therefore violates said Amendment 14 because it does not apply to all counties in the state. This contention is contrary to many decisions of this court to the effect that reasonable classification is permissible. See *Webb* v. *Adams, supra, Cannon* v. *May,* 183 Ark. 107, 35 S. W. 2d 70, and the *Lee* case, *supra.* The general rule is concisely but clearly stated in 50 Am. Jur., page 20-21, under the title STATUTES, General Laws, in these words: "A statute is general where the classification is not arbitrary, but a reasonable, natural and substantial one, resting upon requirements of public policy." We can hardly imagine a classification that complies with the above mentioned requirements better than the one mentioned in said Act 151. We agree with the trial court that this Act is general and does not violate said Amendment No. 14.

Three. We agree with the trial court that Act 379 of 1957, purporting to fix the salary of the Assessor in Independence is special and invalid. It purports to amend one section of Act 426 of 1955 by creating a clas-

sification of counties with a population between 23,400 and 23,600. Not only does it not meet the above mentioned requirements of a valid classification, but it fails to mention all counties in the state. We likewise agree that since said Act 379 is invalid, the Assessor's salary is fixed by said 426 of 1955. The latter Act is valid, we hold, for both of the reasons heretofore mentioned. It not only includes all counties in the state, but it also sets forth classifications based on population which appear to be reasonable and certainly not arbitrary.

Affirmed.

HARDING GLASS COMPANY *v.* ARK. PUBLIC SERVICE COMMISSION.

5-1542 313 S. W. 2d 812

Opinion delivered June 2, 1958.

Charles B. Johnson, Clarksburg, West Va.; *Reuben Goldberg,* Washington, D. C.; *Hardin, Barton, Hardin & Garner*, for appellant.

Claude Carpenter, Jr., for appellee; *Thomas Harper,* for intervener.

SAM ROBINSON, Associate Justice. This is a rate case. On the 5th day of October, 1956, the Fort Smith Gas Corporation (the Gas Company) filed an application for a change of rates for a supply of gas to industrial consumers in the city of Fort Smith, the surrounding area and other communities. The Gas Company sought to increase the price from 16.38 cents per Mcf to 20.62 cents. After extensive hearings the Commission granted the requested new schedule of rates on May 17, 1957. The protestants took an appeal to the Pulaski Circuit Court, where the action of the Commission was affirmed, and the protestants have appealed to this Court. The principal contention of appellants is that the Commission accepted the contract price for gas supplied by the Stephens Production Company (Stephens) to the Gas Company, the Commission refusing at the time of the hearing to investigate the merits of that contract. Appellants maintain that Stephens is an affiliate of the Gas Company and in these circumstances the Commission should not have accepted the contract price as between Stephens and the Gas Company as a *bona fide* operating expense.

In 1945 W. R. Stephens bought the controlling interest in the Gas Company. At that time and up until

1953 the Gas Company bought more than 97 per cent of its gas from the Arkansas-Oklahoma Gas Corporation (Arkansas-Oklahoma). This company owned gas production properties and owned a distribution system whereby it supplied gas to the Gas Company at the city gates of Fort Smith and supplied gas and distributed the same in several small towns in Oklahoma and Arkansas. In 1953, the owners of the Arkansas-Oklahoma decided to liquidate that company and put up for sale all of its properties, including the production properties and the distribution systems. In that connection, in an order made on December 22, 1953, which will be referred to again, the Commission made a finding of fact as follows: "The majority of the common stock of Arkansas-Oklahoma Gas Company has for many years been owned by a group of residents of Fort Smith, Arkansas, and these stockholders have recently expressed a desire to sell the stock and have offered such stock for sale to various interests, including persons not residents of the areas served by the two companies, which caused the owners of the stock of the Fort Smith Gas Corporation and its officers and directors to become concerned as to the continuation of their source of supply of gas from the Arkansas-Oklahoma Gas Company at the termination on December 31, 1965, of the service agreement between the two companies."

For its supply of gas the Gas Company was almost wholly dependent on a contract with Arkansas-Oklahoma which had only twelve years to run. To protect his Fort Smith Gas Company's source of gas supplies, Stephens made a deal whereby the Fort Smith Gas Company bought the distribution system of Arkansas-Oklahoma, and he and his brother, J. T. Stephens, along with the Northwestern Mutual Life Insurance Company, bought the production properties. Stephens assumed heavy obligations by contracting to maintain and develop the properties and explore for gas at his own expense. This is a hazardous business. There are many dry wells; production may be obtained or it may not. The Northwestern Mutual Life Insurance Company put up $4,-

333,000 to pay Arkansas-Oklahoma. Stephens contracted with the Gas Company to supply gas at the wellhead at 12.7819 per Mcf. The Gas Company had been paying Arkansas-Oklahoma 17.38 at the city gate. All of these transactions were aboveboard and the whole plan was laid before the Oklahoma Public Service Commission, the Arkansas Public Service Commission, and the Federal Power Commission. The Arkansas and Oklahoma Commissions approved the sale, and the Federal Power Commission held hearings and granted the application. The contract between the Gas Company and Stephens was made on March 2, 1954, after the Arkansas Commission, in Docket No. U-902, had found in December of 1953 that the price of 12.7819 per Mcf was reasonable. In its findings and order of May 17, 1957, in the case at bar, Docket No. U-1169, approving the new rate schedule, the Commission referred to its order in Docket No. U-902, wherein the contract was approved. The Commission said: "This Commission, after full investigation and hearing, from which it was fully developed, as shown by the contract itself, and the exhibits attached to the Company's response to protestants' motion, found that the dedication of the large gas reserves, made a condition of the contract, was essential to the Fort Smith area. The Commission further found that therefore the contract and the contract rate was fair and reasonable, and that in the public interest it was necessary that the contract and the contract rate be approved and the transfer of properties proposed be authorized. Therefore, the Commission, by its order of December 29, 1953, in our Docket No. U-902, approved the contract and the contract rate of 12.7819 cents per Mcf which the protestants here seek to attack.

"Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, owner of the Production Payment supported by the gas reserves dedicated under the contract in question, obviously relied on our order in this docket and on the order of the Federal Power Commission approving the transaction in Docket No. G-2332-33 as a basis for accepting the production payment

which made the transaction possible. We have no reason now to recede from the position originally taken by us that our approval of this contract and this transaction was then and now is in the public interest. . . ."

The Commission points out that by reason of the Supreme Court decision in the case of *State of Wisconsin* v. *Federal Power Comm'n.,* 205 F. 2d 706 *(Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035) (the *Phillips Petroleum Company* case), it has no jurisdiction over the Stephens Production Company, but that it does have jurisdiction over the rates charged by the Gas Company to its customers. The Commission said: "Moreover, even though we do not consider that we have jurisdiction over the price charged the Company under the contract, we do have jurisdiction over the Company's rates to its customers, and having already found the contract price fair and reasonable, we still would consider it so for the purpose of the application here under consideration." Furthermore, the Commission had knowledge of the fact that subsequent to 1953, when the 12.7819 per Mcf was approved, a wellhead price of 16 cents per Mcf had been allowed for gas produced in the same area. The Commission may take notice of a fact of that kind. *Acme Brick Co.* v. *Arkansas Public Service Comm'n.,* 227 Ark. 436, 299 S. W. 2d 208.

Appellants say: "It is not enough that money ($4,333,000) has in fact been spent; there must be proof that it was wisely, reasonably, and necessarily spent." The spending of this money was approved by the Arkansas Public Service Commission, the Oklahoma Public Service Commission and the Federal Power Commission. It is hard to see how any stronger proof could be produced that the money was wisely, reasonably and necessarily spent.

Appellants further contend: "In view of the ownership and control of Fort Smith and Stephens Production Company, the record in this case in sufficient to support the conclusion that there is in practical effect one organization and that for the purpose of fixing

rates in this case, the amount to be allowed for gas purchased in the cost of service is not the contract price of 12.7819 cents per Mcf, which was not the product of arm's-length bargaining, but only the cost of production of the gas at the wellhead." Even under this theory the Commission must be sustained, because, according to the undisputed testimony in the case, the gas cost Stephens and Northwestern $4,333,000, and when the formula used by Mr. Williams, appellants' expert, is applied to the cost of the gas at the wellhead, $4,333,000 would result in a price for the gas of 13.185 per Mcf.

Appellants say Stephens should have acquired the gas reserves for the Gas Company. According to this theory, some other gas distributing company of which Stephens may be the president could make the same claim. If the Gas Company owned the reserves of gas it would be at the price of $4,333,000, and this amount would be a part of the rate base supporting a price of 13.185 per Mcf. If the $4,333,000 were put in the rate base of the Gas Company and the gas ran out before that much was produced, surely there would be a hue and cry, and rightfully so, about the gas ever having been made a part of the rate base in the first place. The gas purchased by Stephens is under the ground. It cannot be seen, and the amount there is only speculative. Paying $4,333,000 for gas properties that may be depleted before anything like that much is produced is a big gamble, and one that in all probability the Gas Company's customers would not want to take and certainly should not be compelled to take.

There is no serious contention that the rate of 20.62 per Mcf is not fair and reasonable if the price of 12.7819 paid by the Gas Company for gas at the wellhead is fair and reasonable. The order approving the contract, in Docket No. U-902, is made a part of the record, and that order itself shows that the Commission went into the matter thoroughly. Among other things there is this finding: "In order to obtain a dedication of the present gas reserves of the Arkansas-Oklahoma Gas

Company and those gas reserves hereafter developed from its gas properties for the use of the Fort Smith Gas Corporation and the area presently served by it from gas acquired from Arkansas-Oklahoma Gas Company, W. R. Stephens has entered into a contract for the purchase of approximately 82 per cent of the outstanding common stock of the Arkansas-Oklahoma Gas Company, and Arkansas-Oklahoma Gas Company has entered into a contract with Fort Smith Gas Corporation for the sale of its gatherings, transmission and distribution systems. Simultaneously with the transfer of these facilities of the Arkansas-Oklahoma Gas Company to the Fort Smith Gas Corporation, there will be effected a transfer of the gas production properties of Arkansas-Oklahoma Gas Company in liquidation of that company to the Arkansas Valley Mineral Company, Inc., and the Wiltex Corporation, which companies have contracted to furnish gas at the well head to Fort Smith Gas Corporation at the price of 12.7819 cents per m.c.f. . . ." (The Arkansas Valley Mineral Company, Inc., and Wiltex Corporation contracts were assigned to Stephens.)

The gas purchase contract has been filed as a tariff with the Federal Power Commission. True, the Arkansas Commission may not be bound to accept as part of the rate base of the Gas Company the price named in the contract filed with the Federal Power Commission, but here the Commission had already made a finding that the price named in the contract is reasonable. There is no suggestion that there has been any change in conditions since the Commission approved the contract that would justify a lowering of the price at this time. Under the terms of his contract, which is a part of the record, Stephens must explore and drill for gas. This is necessary to maintain the supply, and it is a matter of common knowledge that labor and materials are much higher now than in 1953, when the contract price of 12.7819 was approved. Even though it costs more to produce gas now than it did in 1953, the contract price of 12.7819 is not being changed, and the increase in

rates is due to the Gas Company's increase in the cost of doing business because of factors other than the cost of gas, which price remains as fixed by the 1953 contract. It is hard to understand how the 12.7819 price paid by the Gas Company could be excessive when, according to the undisputed evidence, in an arm's-length deal, Arkansas-Oklahoma received $4,333,000 for its gas production properties. And when the price of gas sold by Stephens to the Gas Company is based on the $4,333,000 cost, the price, figured by a formula about which no one complains, is 13.185, instead of 12.7819, the price the Gas Company is paying.

Appellant cites authority for the proposition that the Arkansas Commission has the power to fix the rates at which the Gas Company must sell its gas, notwithstanding the Arkansas Commission has no authority to fix the price at which Stephens, who is operating in interstate commerce, must sell to the Gas Company. Authority also is cited to the effect that the Commission's order approving the 12.7819 rate is not *res adjudicata.* But even though the Commission does have the authority to fix the Gas Company's rate, regardless of the price it may be paying Stephens for gas, and notwithstanding the order approving the 12.7819 rate is not *res adjudicata,* still the Commission does not have to disregard the contract price just because it has the power or authority to do so. True the Commission could disregard the contract price between Stephens and the Gas Company and refuse to grant an increase in rates. But, in order to do this the Commission would have to ignore completely the contract it has heretofore approved for the sale of gas to the Gas Company. And, moreover, it would have to ignore the fact that $4,333,000 was paid for the gas properties. Assuming that the Commission could disregard its approval of the contract, the Oklahoma Commission's approval of the contract, the Federal Power Commission's approval of the sale of the properties, and all that has been done on the strength of the contract, the fact remains that $4,333,000 was

paid for the gas. When this purchase price is considered, a wellhead price of 13.185 per Mcf is reached. This is more than the Gas Company is now paying.

It has been suggested that perhaps Arkansas-Oklahoma sold the distribution system for less than it was worth and balanced the transaction by selling the gas properties for more than a fair value. This suggestion is wholly unsound. In the first place, the Commission made a determination of the fairness of the price of the distribution system and set out in its order of December 22, 1953 just how the price was determined. The order provides: "The price of the properties to be acquired by the Fort Smith Gas Corporation from the Arkansas-Oklahoma Gas Company will be the depreciated book value of such properties as reflected by the books of the Arkansas-Oklahoma Gas Company at the date of the transfer. This depreciated book value is also the depreciated original cost of such properties as determined by the Federal Power Commission and appears to reflect the fair value of the properties to be transferred." In the next place, the Gas Company and its alleged affiliate, Stephens, could not gain by a maneuver of that kind, because if the distribution system were sold to the Gas Company for less than its worth, this low price would go into the rate base.

As authority for the contention that the Commission should not accept the contract price for gas between affiliates, appellants cite *Western Distributing Co.* v. *Public Service Comm'n.,* 285 U. S. 119, 52 S. Ct. 283, 76 L. Ed. 655; *Dayton Power & Light Co.* v. *Public Utilities Comm'n.,* 292 U. S. 290, 308, 54 S. Ct. 647, 78 L. Ed. 1267; *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 252 F. 2d 619; and Re *Amere Gas Utilities Co.,* 1 P. U. R. 3rd 230. It will be observed, however, that in every one of those cases except the *Amere* case there is nothing in the record to show the cost of the gas to the affiliate on the production end of the contract, whereas in the case at bar the Commission knows what the gas cost the affiliate. The distinction is obvious. In the

Amere case, in an opinion written, not by a court but by a public service commission, it is not at all clear just what the commission found the facts to be, but in any event the facts in the case at bar bear no resemblance to that case.

This Court, along with the great weight of authority, has held many times that the Commission has broad powers and is vested with wide discretion; that if the order of the Commission is supported by substantial evidence, is free from fraud and not arbitrary, it is the duty of the court to let it stand. In *Dept. of Public Utilities* v. *Arkansas-Louisiana Gas Co.,* 200 Ark. 983, 988, 142 S. W. 2d 213, it is said: ". . . if the Department's order is supported by substantial evidence, free from fraud, and not arbitrary it is the duty of the courts to permit it to stand, even though they might disagree with the wisdom of the order. In such a case our judgment will not be substituted for that of the Department."

And in *Arkansas Power & Light Co.* v. *Arkansas Public Service Comm'n.,* 226 Ark. 225, 226, 289 S. W. 2d 668, it is said: "At the outset we point out certain well defined rules governing this court in reviewing the powers and actions of the Arkansas Public Service Commission in a utility rate case such as is presented here. The Commission must and does have broad powers and is a fact finding body. Our Legislature has delegated and entrusted the administration of Act 324 to the Commission, and not to the courts. . . . Apart from the judicial review that may be resorted to under the Act, it is not for us to advise the Commission how to discharge its functions. When an appeal is taken to the circuit court, that court, as well as this court on appeal from the circuit court, shall not extend the review of the Commission's findings and actions 'further than to determine whether the Department (Commission) has regularly pursued its authority, including a determination of whether the order, or decision under review, violated any right of the complainant under the Constitution of the

United States or of the State of Arkansas.' (Sec. 73-233(d) Ark. Stats.) The circuit court, and this court on appeal, reviews the Commission's findings on the record before the commission, and if we find any substantial evidence to support it, it is our duty to permit the Commission's order to stand if it is not arbitrary and is free from fraud. * * *''

In *Petition of Central Vermont Public Service Corp.*, 116 Vt. 206, 71 A. 2d 576, 578, the court said: "An administrative agency performing the delegated legislative function of rate making has a broad discretion. Mr. Justice Cardozo, speaking for the United States Supreme Court, said of it: 'Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed.' "

In the case at bar there is no suggestion of fraud, and it cannot be said that the Commission's action was arbitrary in any respect. The only real issue in this case is whether the price of 12.7819 for gas paid by the Gas Company to Stephens is reasonable, taking into consideration that the gas cost $4,333,000. The Commission had full knowledge of what the gas cost Stephens and approved as reasonable and fair the price of 12.7819 per Mcf based on substantial evidence of the cost of the gas.

Affirmed.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J., dissenting. In this case the Gas Company asks for an increase in its rates. That request carries with it the burden of proving that a higher rate schedule is necessary to afford the company a fair return on its investment. "When a utility seeks an increase of existing rates, the burden is, of course, on the

utility not only to offer all evidence to justify such increase, but also to comply with all reasonable requests of the Commission for full disclosures. The Commission, in such instances, has not only the prerogative but also the duty to make requirements for full disclosure, since the Commission acts under valid Legislative authority to see that the interests of the public are fully protected." *City of Fort Smith* v. *Southwestern Bell Tel. Co.,* 220 Ark. 70, 247 S. W. 2d 474.

The Gas Company, which is wholly owned (except for three qualifying shares) by W. R. Stephens, owns no gas wells and buys more than 97 per cent of its gas from Stephens Production Company, a partnership which is also controlled by W. R. Stephens. These purchases, which in substance are made by Stephens as buyer from Stephens as seller, constitute roughly five eighths of the Gas Company's costs of service and therefore represent what is by far the most important factor in the determination of the company's proper allowance for operating expense.

The purchases in question are made at a price of between twelve and thirteen cents per thousand cubic feet of gas. This price was fixed by a contract which in substance was entered into between Stephens as seller and Stephens as purchaser in 1954. When the Gas Company filed its present application for an increase in rates the protesting consumers, on the basis of facts that I have merely outlined, asked the Public Service Commission to require the utility company to justify the reasonableness of the price it was paying for its gas. That the Commission had the authority to make this inquiry and to allow only a fair price as an operating expense, even though the gas was being sold in interstate commerce, was expressly decided in *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, 52 Sup. Ct. 283, 76 L. Ed. 655.

The consumers' request for a full disclosure of the facts was vigorously opposed by the Gas Company. Its

position was sustained by the Commission, which refused to require the Gas Company to justify the price it was paying for gas, refused to require the Stephens affiliated companies to allow the protestants access to the pertinent books and records, and refused to permit the Gas Company's witnesses to be cross-examined about the reasonableness of the price being paid for gas. In short, the Gas Company was relieved of the burden of proving the most vital element affecting its application for a rate increase, and the consumers were denied the right of cross-examination as an aid to their attempt to sustain a burden of proof that was not really theirs. In my opinion the only issue on this appeal is whether the Commission erred in accepting the Gas Company's contract price and in effectively shutting the door to any inquiry on the subject.

The majority opinion, as I read it, upholds the Commission's ruling on two grounds. First, it is indicated that the present record supports the view that the contract price is in fact a reasonable one. Bearing in mind that this issue or fact has never been explored in an adversary proceeding, I think it a sufficient answer to make these observations:

(*a*) The price was fixed not at arm's length but in a transaction in which the buyer and the seller were essentially the same person. As the buyer Stephens was under a duty to the consuming public to obtain the gas as cheaply as possible. As the seller Stephens was naturally inclined to obtain as high a price as possible. This conflict of interest is the same as that which rigidly precludes a trustee from selling to himself and certainly suggests that this contract price should be open to scrutiny.

(*b*) The uncontradicted evidence shows that the contract price was not determined primarily by the market value of the gas. In a somewhat complex transaction Stephens in effect borrowed, without personal liability, $4,335,000 from the Northwestern Mutual Life Insurance Company in order to finance the purchase of the gas-producing properties. The contract price now in dispute was fixed at a rate sufficient to retire this indebtedness

within a certain number of years, the exact period apparently not being shown by this record. This means that if, for example, the gas reserves have an expected life of fifty years and the term of the loan is only twenty-five years, the consuming public will pay the full purchase price, in the form of excessive gas rates, during the first twenty-five years, and Stephens Production Company will emerge as the owner of the gas, which presumably will then again be sold to the public. The majority's suggestion that the extent of the gas reserves is "only speculative" does not seem wholly convincing. I am not persuaded, especially without proof, that a life insurance company would advance more than four million dollars without being certain that the security actually exists and that its value exceeds the amount of the loan.

(*c*) At every step of this proceeding the Gas Company has strenuously opposed the consumers' efforts to investigate the fairness of the contract price. I am unable to reconcile this attitude on the part of the utility with its simultaneous insistence that the price is really less than the Commission would be required to fix if the facts were fully disclosed.

(*d*) Finally, in my judgment the issue is not whether this incomplete record shows the price to be reasonable but, rather, whether the Gas Company should be required to meet the burden of proof imposed by law. It seems to me idle to speculate upon a question of fact when the proof is admittedly undeveloped.

Secondly, the majority relies upon the fact that the transaction by which Stephens acquired the assets of the Arkansas-Oklahoma Gas Company was approved by the Arkansas Public Service Commission, the Oklahoma Public Service Commission, and the Federal Power Commission. It is of course not contended that those rulings are *res judicata,* for that doctrine does not apply in rate-making matters, which are always open to re-examination.

The trouble with this second ground for affirmance is that the Gas Company has not met the burden of showing

that the earlier proceedings were adversary contests in which the reasonableness of the contract price was at issue. As a public utility the Arkansas-Oklahoma Gas Company was required to obtain the consent of the three commissions before it disposed of its assets and went out of business. That was the issue in those proceedings, which was resolved by a finding that the proposed transfer of ownership was not contrary to the public interest.

There was no reason for the Arkansas Public Service Commission to investigate the contract price, since it was not a rate-making case, and in fact the Commission merely found that the price was "necessary in order to finance the acquisition of the producing properties of the Arkansas-Oklahoma Gas Company," and that it "appears to be reasonable." We were told in the oral argument, without contradiction, that no representative of the consumers was a party to the proceedings, and indeed there was no reason why they should have been represented. As far as the consumers are concerned that proceeding was an uncontested *ex parte* case in which no one involved had the slightest inclination or motive to attack the fairness of the contract price now at issue. In these circumstances the public evidently has had no opportunity to be heard on the question of whether the price is reasonable, and I am firmly of the opinion that that opportunity should have been granted in the present proceeding.

BOARD *v.* VAN HOUTEN.

5-1583 313 S. W. 2d 843

Opinion delivered June 9, 1958.

[redacted]

Ted McCastlain, for appellant.

Frances D. Holtzendorff, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, C. D. Van Houten, instituted this action to obtain possession of a certain 80 acres of land located in Prairie County, Arkansas. The complaint was filed in November, 1955, in the Circuit Court of Prairie County (Northern District), and a default judgment was granted in favor of Van Houten February, 1956, which was later set aside.[1] Appellant herein, Anne Board, intervened during the same month, claiming title to the lands in controversy by virtue of a deed from her mother and father, dated April 17, 1947, and recorded March 19, 1954. Upon her motion, the cause was transferred to the Chancery Court of the Northern District of Prairie County.

The background of this litigation is as follows. The Crittenden County Chancery Court entered a decree on July 25, 1952, awarding judgment against Mrs. Howell in the amount of $3,416, and to secure same, a constructive trust was declared. An alias execution was issued by the clerk of the Crittenden County Chancery Court pursuant to said decree. The judgment creditor caused a certified copy of the decree to be recorded with the clerk and recorder of the Northern District of Prairie County on August 14, 1953. As of that date, the record title to the lands in controversy was in the name of Maurine Howell, who had acquired her title by deed in

[1] See *Howell* v. *Van Houten,* 227 Ark. 84, 296 S. W. 2d 428.

1945. Subsequently, execution was issued in September, 1953, and an order was issued by the Prairie Chancery Court, restraining the sale until after a further hearing in the Crittenden County Chancery Court; following the refusal of the latter court to set aside its decree, the Prairie County sheriff advertised the lands for sale, and said sale was held on June 5, 1954. Appellee was the highest bidder for the lands, and at the end of the statutory period for redemption, received his sheriff's deed (June 5, 1955).[2] Upon trial of the issues, the chancellor dismissed appellant's intervention and cross complaint, awarded appellee possession of the lands in controversy, and quieted and confirmed his title in and to said lands as against the defendant, Maurine Howell, and the intervener, Anne Board. From such decree, comes this appeal.

For reversal, appellant simply asserts that the chancellor had no authority to cancel appellant's deed, dated April 17, 1947, except for fraud in its procurement, and contends that the appellee failed to meet the burden of proof necessary to establish such fraud. Appellee contends that the deed from Maurine Howell to her daughter was a fraudulent conveyance, made in an attempt to defeat the right of judgment creditors, and furthermore contends, that because appellant had personal knowledge of proceedings to sell the land, and the sale itself, and did not assert any right to said lands for long months afterwards, Mrs. Board is barred by laches and estopped from claiming title to said lands. We shall not discuss the latter contention, since we feel the issue is determined by the former.

After a review of the testimony and exhibits, we have come to the conclusion that the proof was ample to support the chancellor's action in cancelling the deed dated April 17, 1947, for we consider the preponderance of the evidence to reflect that the deed was not actually executed at that time.

[2] Appellant also filed a cross complaint against Van Houten, Sheriff E. O. Hamilton, and one Fletcher Livesay, seeking damages allegedly resulting from the wrongful sale of the property. This issue was not developed during the trial.

Appellant testified that she lives at Miami, Florida, with her husband, having lived there since 1956 . . . the property was deeded to her by her father and mother on April 17, 1947 . . . her child had been stricken with polio the summer before, and the purpose of the conveyance was to provide witness and her child with a permanent home . . . she was living on the property at the time of the execution of the deed . . . did not record the deed at the time because she had gotten a divorce in January of 1946 and "I just did not want any legal complications coming up . . . put the deed with some other papers and misplaced it . . . later located it, but saw no need to record it until March, 1954 . . . recorded it at that time because "they were going to sell the property in my mother's name," and witness did not want her own property sold . . . she lived in West Memphis in 1951 and part of 1952 . . . returned to Prairie County in May of 1952, and moved to an adjoining 40 acres, her mother and father living on the 80 acres in question . . . she continued to live on the 40 acres from 1952 to 1956 and her mother and father continued to live on the land here in litigation . . . the reason for such arrangement was that the house on the 40 acres was larger and appellant needed more room . . her mother has paid all taxes on the 80 acres from 1947 through 1956 (except for the year of 1955 when taxes were paid by Van Houten) . . . though her parents have lived upon and farmed the land in question, no rent has been paid by them . . . in 1956, appellant moved to Florida, where she presently resides.

A pertinent exhibit is a deed from Mrs. Howell to her daughter dated August 18, 1953. This deed conveys identically the same property as purportedly was conveyed by the deed of April 17, 1947, and was also recorded on August 18, 1953. When questioned about the need for this deed, if the first had already been executed, Mrs. Board testified that it was executed because the first one had been misplaced. We think it significant that it was recorded on the same date it was executed, though she testified that one reason for not recording

the 1947 deed was that she did not know "it was necessary." Of even more significance is the fact that the 1953 deed was executed and recorded only four days after the certified copy of the judgment of the Crittenden Chancery Court was recorded in Prairie County. Since such deed was executed after the recording of the judgment, it, of course, was of no aid in defeating creditors, as the lien on the real estate had already attached.[3] Such lien could only be defeated if a *bona fide* deed had been executed prior to the recording of the judgment. One of the most incongruous parts of Mrs. Board's testimony dealt with certain language used in both deeds. Appellant testified that the deeds were prepared by her mother. Both convey the property to appellant and contain the typed in language:

"As feme sole, to her sole and separate use, free from debts, contracts, control and marital rights (including courtesy both initiate and consummate) of her present or any future husband she may have, with full power in her to sell, mortgage, convey, encumber, devise or otherwise dispose of same as though she were a feme sole."

This knowledge of the law hardly seems compatible with Mrs. Howell's general background.

The deed, purportedly executed in 1947, was acknowledged by one M. S. Dorsett, justice of the peace, and in going to the home of Mr. Dorsett, the Howells drove several miles further than would have been necessary had they gone to the county seat at Des Arc. Mr. Dorsett testified that the date had already been typed in when presented to him, and that he could not state upon what date the deed was acknowledged. From the testimony:

"Q. You wouldn't know whether it was in 1947 or 1954 when they came before you?

A. Well, I am not swearing to it, not the date, not the exact date on that, no, I am not. * * * It was several years back. I don't keep no records of it."

[3] See Section 29-130, Ark. Stats. 1947 Anno.

Sheriff E. O. Hamilton of Prairie County testified that he conducted the sale on June 4, 1954, and that Mrs. Howell and Mrs. Board were present. He testified they were objecting to the sale, and when asked as to their reason for objecting, answered:

"* * * They stated the land belonged to Mrs. Howell, that she did not want it sold until she could finish her lawsuit, was my understanding.

Q. I will ask you if at any time Mrs. Howell or Mrs. Board, during the execution of sale or before the execution of sale, stated to you that Mrs. Anne Board was the owner of that property or that she was claiming to be the owner?

A. I just don't recall them claiming it was hers."

Appellant admitted that she knew her mother had brought a suit in the Prairie Chancery Court in October, 1953, seeking to restrain the sheriff from proceeding with the sale at that time, and stated: "I was not into it at all, other than it was my property, and she was trying to have this judgment set aside, as far as I knew." She further admitted she was aware that her mother had filed a motion in the Crittenden court to set aside the original judgment, and that that court had entered an adverse ruling. She testified that her reason for not joining in the court actions to prevent the sale was that her child required all of her attention, "and still does." This explanation appears a bit "shallow" since it takes but little time to consult an attorney, and more particularly, since Mrs. Board seems to have had sufficient time to subsequently consult attorneys.

Summarizing the evidence upon which we base this opinion, we find:

1. That although appellant claims the property became hers in April, 1947, she has never paid any taxes, and the taxes through 1956 have been paid by her mother.

2. Her reasons for failure to record the deed are unimpressive. First, she stated she was afraid of legal

complications from her ex-husband (from whom she had been divorced more than a year prior to receiving the deed) concerning the property; subsequently, she misplaced the deed, then, after locating it, failed to record same because she didn't know it was necessary.

3. While stating that the property was given to her as a home for herself and child, she apparently has made no such use of it, since the evidence reflects she has not lived on the place since prior to 1951, though living on an adjoining forty for four years of that time.

4. During the above period, the land involved was farmed by her mother and Mr. Howell, though admittedly no rent was paid to appellant.

5. The deed of August 18, 1953, was executed, *and recorded,* only four days after the certified copy of judgment of the Crittenden Chancery Court was recorded in Prairie County.

6. Appellant admitted she was familiar with her mother's efforts to prevent the sale of the property, but did not join in such efforts.

7. Sheriff Hamilton stated that at the time of the sale in June, 1954, both were present, and claiming the land belonged to Mrs. Howell.

8. The 1947 deed was not recorded until Mrs. Howell's motion to vacate the original judgment had been denied.

We are of the opinion that this evidence was sufficient to establish that the deed dated April 17, 1947, was not actually executed at that time; that it was executed subsequent to the recording of the certified copy of judgment from Crittenden Chancery Court; was executed for the purpose of defrauding creditors, and the Chancellor was justified in cancelling both deeds.

Affirmed.

GARNER *v.* GREENE COUNTY.

5-1581 313 S. W. 2d 785

Opinion delivered June 9, 1958.

[Rehearing denied July 1, 1958.]

[redacted]

Cecil Grooms, for appellant.

Kirsch, Cathey & Brown, for appellee.

J. SEABORN HOLT, Associate Justice. On March 18, 1957, appellees filed their petition in the Greene County Court praying for an order granting a certain county road, and on the same day the county court granted their petition. On April 29, 1957, appellant, Garner, an interested citizen and taxpayer, who was not however a party litigant, filed an affidavit and prayer for an appeal to the circuit court of Greene County, and on April 30, 1957, the circuit clerk ordered the appeal. On August 17, 1957, appellees filed motion to dismiss Garner's appeal and thereafter, on August 28, 1957, the circuit court

granted appellees' motion and dismissed Garner's appeal. On August 31, 1957, Garner, who was not then a party, for the first time filed in the county court his verified petition *to be permitted to intervene and become a party to the action* under which appellees' petition for the road had been granted. He further asked that the March 18, 1957, order granting the road be set aside and on September 4, 1957 the county court denied Garner's petition to intervene. On September 7, 1957, Garner appealed from the county court's order denying his petition to intervene and upon appellees' motion, the circuit court on November 7, 1957, thereafter, dismissed Garner's appeal and from this order of dismissal comes this appeal.

Appellant stoutly insists that the trial court erred in denying him the right to appeal from the order of the county court on March 18, 1957, and we agree. Appellant was an interested citizen and taxpayer of Greene County and his right to appeal here is based on *Article* 7, *Section* 33, of the constitution of this state, which provides: "Appeals from all judgments of county courts or courts of common pleas, when established, may be taken to the circuit court under such restrictions and regulations as may be prescribed by law." And, under the provisions of *Sec.* 27-2001 *Ark. Stats.* 1947, relative to appeals, which provides: "Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court, at any time within six (6) months after the rendition of the same, either by the court rendering the order or judgment or by the clerk of the circuit court of the proper county, with or without supersedeas, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from or the clerk of the circuit court shall forthwith order an appeal to the circuit court at any time within six (6) months after the rendition of the judgment or order appealed from, and not thereafter. The party aggrieved, his agent or attorney, shall swear in said affidavit that

the appeal is taken because the appellant verily believes that he is aggrieved, and is not taken for vexation or delay, but that justice may be done him."

In the present case Garner by his verified petition to intervene and to be made a party to the action on August 31, 1957, as of that date became a party to the record in the county court and had the right to appeal, from any adverse decision, to the circuit court at any time within six months after the decision, (March 18, 1957) in accordance with the provisions of the above statute, and, as indicated, the circuit court erred in denying appellant the right to intervene and to become a party. We said in *McMahan* v. *Ruble,* 135 Ark. 83, 204 S. W. 746, "It is first insisted that the appeal was properly dismissed because appellant was not a party aggrieved within the meaning of the law. But that contention cannot be sustained. Appellant made himself a party to the record in the county court, and he was, therefore, entitled to appeal from an adverse decision . . . As a citizen and taxpayer he had the right to be made a party to the proceeding in the county court." And, in the early case of *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901, we said: ". . . the motion by appellee to be made a party for the purpose of protesting against this illegal proceedings does not manifest the impertinent interference of a stranger without interest, and, when made a party, by order of the court, he may prosecute an appeal from the judgment thereafter rendered." Also, in *Huddleston & Taylor* v. *Coffman,* 90 Ark. 219, 118 S. W. 1010, we said: "The order of the county court, if improperly made, amounted to an illegal exaction, and Coffman, being individually interested in the order, had the right of appeal. This seems to us to be the plain and natural construction of these clauses of the Constitution (Sec. 33, Art. 7 & Sec. 13, Art. 16). To hold otherwise would be to place the interested parties at the mercy of the county court, and might have the effect of imposing a grievous burden upon them without any right whatever of appeal."

We hold that when Garner filed his petition in the county court to intervene and became a party to the liti-

gation, from that time he was a party and stood in the shoes of an aggrieved party to the action, and had the right to appeal from the county court's ruling at any time within six months (from March 18, 1957) which he did. But, says appellees: "The circuit court's order of dismissal dated August 28, 1957, was *res judicata* or law of the case with respect to the circuit court's order of dismissal dated November 7, 1957, and appellant's failure to prosecute an appeal from the first order of dismissal by the circuit court constitutes a complete bar to this appeal."

We do not agree, for the reason that on the date (August 28, 1957) that the order of dismissal was made by the circuit court Garner was not then a party to the action, and that judgment could therefore have no effect on his rights. ". . . the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, *as to the parties and their privies,* in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S. W. 2d 579.

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

Mr. Chief Justice Harris dissents. Mr. Justice McFaddin not participating.

Carleton Harris, Chief Justice (Dissenting). The holding of the majority is apparently based upon the action of appellant in filing his petition in the county court to intervene and become a party to the litigation on August 31, 1957. This action was taken by Garner after the circuit court had dismissed his first appeal, and following the refusal of the county court to permit the intervention, a second appeal was taken to the circuit court. The majority treat the first appeal as absolutely of no effect, exactly the same as though no steps had ever been taken by Garner until he filed his request to intervene on August 31. Since his appeal from the refusal of the county court to permit

the intervention occurred within six months from the time the order establishing the road was granted (March 18, 1957), the majority say the appeal was perfected in time.

Arkansas Statutes (1947) Annotated provide two methods of appeal from county courts. If the establishment of a road under Sec. 76-917 is sought, appeals are granted under the general act, Sec. 27-2001, which grants six months for an appeal from any final order of the judgment of the county court. If the establishment of a county road is otherwise sought, the appeal is governed by Sec. 76-915. This act provides:

"An appeal from the final decision of the county court for a new county road, or for vacating, altering or reviewing any county road, shall be allowed to the circuit court. Provided, that notice of such appeal be given by the appellant or appellants during the same term of the county court at which said decision was made; and the appellant shall, within ten (10) days thereafter, enter into bond, with good and sufficient security, to be approved by the clerk of the county court, for the payment of all costs and expenses arising from such appeal * * *"

The primary basis for this dissent is my complete accord with the trial court's reasons for dismissing the second appeal, *viz,* an intervention could not be filed, nor appeal taken, after the lapse of the County Court term. But I am also of the opinion that the dismissal of the first appeal should have terminated the litigation. If the section, quoted above, governed, the appeal was certainly properly dismissed. If, on the other hand it was contended that the appeal procedures provided by Sec. 27-2001 should apply, then appellant should have prosecuted an appeal from the adverse decision of the circuit court to this court. It would therefore appear to me that when the circuit court dismissed appellant's first appeal, and no further appeal was taken to this Court, the matter became *res judicata.*[1] The first appeal was dismissed by the circuit court on August 29, 1957, in the following language:

[1] Appellant states that the court cannot properly consider this argument because the lower court held contrary to this contention at the time of dismissing the second appeal. There, of course, was no occasion for appellees to cross appeal the *res judicata* finding since they prevailed in the law suit.

"For and in consideration of the petition, the argument of counsel and other matters and things before the Court the Court doth find: That the appeal should be dismissed. It is therefore by the Court considered, ordered and adjudged that the appeal of the appellant, Earl Garner, be and the same is hereby dismissed."

Appellant apparently treated the action of the circuit court as an order to remand, and started all over again. Of course, the circuit court tries appeals from the county court *de novo*.

Appellant, in his brief, cites what he considers to be an analogous situation:

"Let us assume that a litigant in the local municipal court appeals his case to the circuit court and inadvertently fails to file and include in the transcript an affidavit for appeal. Of course, such an action would be subject to dismissal, and if the action is dismissed, and the litigant files the proper affidavit and prosecutes another appeal within the 30 days allowed by law, can it be said that the case has been adjudicated?"

The majority apparently answer this question, "No." My answer is, "Yes." I will agree that if one improperly lodged an appeal (as cited in his example) that he could go back and properly perfect same at any time within the time allowed for appeal, *and before the appellate court acted upon such appeal.* In the example cited by appellant, my conclusion is that upon dismissal of the appeal, the judgment of the lower court would then be enforced. No second appeal would lie in that particular litigation. Let us use another example. Suppose a case is appealed to this Court. Appellant has 90 days within which to lodge his record. However, the case is submitted long before such period of time has expired. Inadvertently, appellant has failed to designate his principal exhibit as a part of the record, though such exhibit is the principal evidence upon which he expects to prevail, and which, though not designated, may actually appear in the transcript. The Court renders a decision for appellee before the expiration of the 90 days from the time the lower court's judgment was

entered. Certainly, appellant cannot go back, designate the exhibit, and bring the matter back to this Court. I will go even further. Jones loses a case in lower court. His counsel immediately advises successful counsel that he is appealing the case to this Court, and the latter, in his thinking, considers the case as being appealed, and accordingly overlooks the fact that he never receives a notice of appeal from the clerk. The facts are stipulated and the transcript prepared within a few days. The briefs are short and the case is submitted. Inadvertently, appellant had failed to file his notice of appeal with the clerk of the lower court, a fact not noticed by appellee until shortly before preparing his brief. Upon filing same, appellee's first request is that the appeal be dismissed because of failure to file notice of appeal. The court would, of course, dismiss the appeal. All of this occurs before the expiration of 30 days from the time the lower court's judgment was entered (not a likely occurrence, but possible). Can appellant then go back, file his notice of appeal and proceed to bring the matter back to this Court? The question has never been answered, and I accordingly leave it unanswered, though it is obvious as to what my personal opinion may be.

Appellant does not even argue that the first circuit court judgment dismissing the appeal was void. If not void . . . it was binding. Accordingly, in my opinion, when the court dismissed such appeal on August 29th, and appellant neither moved the circuit court to set aside its judgment, nor further appealed, the doctrine of *res judicata* applied, and this would be true whether the appeal was properly or improperly lodged.

I therefore respectfully dissent to the opinion of the majority.

BENTON *v.* U. S. MANGANESE CORPORATION.

5-1561 313 S. W. 2d 839

Opinion delivered June 9, 1958.

[Rehearing denied July 1, 1958.]

Hale Brown, Kirkwood, Mo., and *Charles F. Cole,* for appellant.

Murphy & Arnold, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal poses the problem of determining the rights, duties, and liabilities of the owners of the mineral estate as related to the owner of the surface estate. It also requires consideration of the wording in the instrument which separated the full fee estate into the two estates of mineral and surface.

Two tracts of land are involved and each has a separate line of title. In Tract No. 1 (NW¼ SE¼ Sec. 3)

the mineral and surface title were separated by an instrument in *1853* and have never been merged. But no mining has been done on Tract No. 1 and it is not shown that any will be done. Since this is not a suit for declaratory judgment but a suit for injunction, we dismiss Tract No. 1 from this litigation, but without prejudice to any proceeding should mining be attempted on it.

In Tract No. 2 (NE¼ SE¼ Sec. 3 and East Half of Lot 1 of NW¼, Sec. 3) there was a united fee title until October 17, 1927, when George Tenney conveyed the minerals[1] to American Manganese Company, and the deed was duly recorded. The mineral interests of the American Manganese Company passed by mesne conveyances to the appellee, U. S. Manganese Corporation, which acquired title in 1956. Tenney continued to own the surface estate from 1927 to 1948 when he conveyed the surface estate to appellant, Clarence O. Benton,[2] by deed which described the conveyed property as:

"The agriculture or surface right to the East Half of Lot One (E½) of the Northwest Quarter (NW¼) of Section Three, . . . and the Northeast Quarter (NE¼) of the Southeast Quarter (SE¼) of Section Three . . ."

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[1] The following is the language in the conveyance: "Grant, bargain, sell and quit-claim unto the said American Manganese Company and unto its successors and assigns forever, all minerals of any and every kind, mineral rights and mining rights, together with the right to mine, excavate and prospect for minerals and ore, to use and build necessary roads, tram roads, to use water, and with full power of ingress and egress on, over and across said lands for said purposes . . . And grantors herein, their heirs and assigns, hereby agree as part of the consideration of this conveyance to hold Grantee, its successors and assigns harmless from liability on account of accident or death to stock of any kind, which might be injured by falling into pits, excavations, etc., on said lands made by grantees or its assigns in mining and prospecting on said property, and further agree that grantor, or his assigns, shall pay all taxes assessed against said property in which he owns the surface rights, so long as the surface and mineral rights remain unsevered on the tax books, and shall not permit same to become delinquent for nonpayment of taxes . . ."

[2] The appellants are Clarence O. Benton, Mrs. Lanelle Benton, his wife, and Mrs. W. C. Benton, his mother. Agricultural and surface rights to Tract No. 2 are owned by Clarence O. Benton. His mother owns with him the agricultural and surface rights in Tract No. 1. We speak of the appellants as "Benton" since Clarence O. Benton is the active party.

Sometime in 1956 the appellee, U. S. Manganese Corporation, as the owner of the minerals, undertook to remove the manganese deposits from the lands last described. It was thoroughly established that such removal could be done only by open pit mining, or strip mining: that is, the removal of the topsoil to a depth of about 20 or 25 feet by bulldozer or other soil moving machinery, and then the removal of the manganese throughout the entire vein. The result of such operations was to put a tremendous overburden on part of the land and to leave deep holes or trenches in the mined portion of the land. Furthermore, appellee will, later, take the overburden soil to some washing plant to fully retrieve any particles of manganese therein. The practical result of all of these operations is to leave the surface owner with only a "hole in the ground" for his agricultural purposes.

In 1956, when mining commenced on the lands in Tract No. 2, appellee entered into an agreement with Clarence O. Benton whereby he had charge of the bulldozing operations and the removal of the manganese; and for such work, Benton received a stated sum per ton for the manganese ore removed from the lands. The amount that Benton received was deemed sufficient by him to justify the destruction of his surface, so no complaint was registered. Eventually the appellee decided to make other arrangements for its operations, and dispensed with Benton's services. Thereupon, Benton took steps to prevent the appellee and its employees from entering upon the said lands. Then, appellee filed this suit to enjoin Benton from interfering with appellee's entry on the lands for the purpose of mining operations. Benton defended the injunction suit by claiming that the complete destruction of the surface estate by the appellee's operations would constitute an illegal invasion of the agricultural or surface rights. Trial resulted in a decree permanently enjoining Benton *et al.* from interfering with the appellee's mining operations; and this appeal ensued.

We thus have for consideration the relative rights, duties, and liabilities of the owner of the mineral estate

as related to the owner of the surface estate, and the consideration of the wording which divided the full fee estate into the two estates of mineral and surface. It was contemplated by the conveyance of the mineral estate (the words of conveyance being heretofore copied) that the owner of the mineral estate would have "the right to mine, excavate, and prospect for minerals and ore," and that the owner of the surface estate would keep the owner of the mineral estate harmless "from liability on account of accident or death to stock of any kind, which might be injured by falling into pits, excavations, etc., on said lands made by grantees or its assigns in mining and prospecting on said property, . . ." Thus it is clear that the opening of pits was contemplated by the conveyance of the minerals and the owner of the surface estate took with notice of such conveyance.

We entertain no doubt that the owner of the mineral estate has the right to dig pits for the removal of the minerals. But, here, the digging of the pits results in the *complete destruction* of the surface, and the *removal of the surface* to washing plants leaves the surface owner with nothing but a "hole in the ground" for his agricultural pursuits. The question is whether the owner of the mineral estate is liable for damages for such complete destruction of the surface.

The Court was correct in enjoining the owner of the surface estate from interfering with the owner of the mineral estate; but the Court should have retained jurisdiction to assess the damages which the owner of the surface estate should recover for such complete destruction of the surface estate. In *Carson* v. *Mo. Pac. RR. Co.*, 212 Ark. 963, 209 S. W. 2d 97, 1 A. L. R. 2d 784, we were concerned with the mining of bauxite; and Justice Robins, speaking for this Court, said:

"Generally, the operation of mining bauxite is not a subterranean one, but is accomplished by digging of open pits. *Sovereign Camp Woodmen of the World* v. *Arthur*, 144 Ark. 114, 222 S. W. 729. Manifestly, such an operation would destroy the value of the land for farming purposes, or any other purpose. To give the

contract between appellant and the railroad company the construction asked by appellee we must hold that Carson and the railroad company entered into a contract in 1892, by which the railroad company would have had the right (assuming that the bauxite was to be removed by the open pit method), the day after Carson paid for his farm home, to enter upon it and utterly destroy its value without liability upon the part of the railroad company for damages. Such a construction, under the situation of the parties shown here, would be an extremely unreasonable one. A reservation as broad as the grant is ordinarily void. 26 C. J. S. Deeds, p. 447, § 139."

In the case at bar, to deprive the appellants — the owners of the surface estate — of any right for damages for the complete destruction of the surface would be to make the conveyance of the surface as a mere nullity. In *Western Coal & Mining Co.* v. *Young,* 188 Ark. 191, 65 S. W. 2d 1074, the mining had been done by subterranean tunnels and pillars of coal had been left to support the surface. Later the mineral owner removed the pillars of coal and the surface subsided. The surface owner brought suit for damages which were recovered in the lower Court. In affirming the recovery for damages, this Court said:

"Appellant also contends for a reversal of the judgments because, under the lease from Denning, it had the right to mine and remove the coal without reference to damage it might do to the surface of the lands above. It is true the lease placed no restrictions upon it with reference to damaging the surface in mining and moving the coal thereunder, and it is also true, as suggested by learned counsel for appellant, that there is no statute in this State requiring the owner of coal interests in lands to leave pillars to support the surface; but, notwithstanding, we are of the opinion that the only true and sound rule is that 'when the surface of land is owned by one person and the minerals beneath are owned by another, the owner of the minerals cannot remove them without leaving sufficient natural or artificial support to sustain the surface.' Such was the rule announced in

the case of *Western Indiana Coal Co.* v. *Brown,* 36 Ind. App. 44, 74 N. E. 1027, 114 Am. St. Rep. 367. See also *Williams* v. *Hay,* 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; *Noonan* v. *Pardee,* 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; *West Pratt Coal Co.* v. *Dorman,* 161 Ala. 289, 49 So. 849, 23 L. R. A. (N. S.) 805, 135 Am. St. Rep. 127, 18 Ann. Cas. 750, and cases therein cited: *Kistler* v. *Thompson,* 158 Pa. 139, 27 Atl. 874; *Earnest* v. *Corona Coal Company,* 212 Ala. 303, 102 So. 445; 1 R. C. L. 395."

While the Western Mining case was not a case of open pit mining,[3] it was nevertheless a case of damage caused by *destruction* of the surface and points to the reason for our present holding. The Western Mining case prevents us from following the Kentucky cases like *Buchanan* v. *Watson,* 290 S. W. 2d 40, and the Pennsylvania cases like *Commonwealth* v. *Fisher,* 72 Atl. 2d 568. In defending against the injunction, Benton filed a cross-complaint for damage to the land, alleging that the "estate in said lands will be entirely destroyed and of no value." The prayer of the complaint was "for all other relief." We hold that the Trial Court was correct in granting the injunction to prevent Benton from interfering with the appellee in mining the lands; but we hold that the cause should be remanded to the Trial Court in order to assess and award damages to Benton for the complete destruction of the surface shown in this case. It is so ordered.

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[3] Open pit mining is discussed in 36 Am. Jur., "Mines and Minerals" § 174 *et seq.*

ST. PAUL-MERCURY INDEMNITY CO. v. TAYLOR, JUDGE.

5-1614 313 S. W. 2d 799

Opinion delivered June 9, 1958.

Norton & Norton by *Robert R. Wright,* for petitioner.

Knox Kinney, for respondent.

MINOR W. MILLWEE, Associate Justice. Petitioner, St. Paul-Mercury Indemnity Company, seeks a writ prohibiting the judge of the Circuit Court of St. Francis County, Arkansas, from proceeding further in a certain action pending in that court, "due to the attainment and legal retention of jurisdiction by the Chancery Court of St. Francis County, Arkansas, in this case, and due to the irreparable harm which will be caused petitioner by the wrongful continuation and trial of said cause in the Circuit Court of St. Francis County, Arkansas."

According to the petition and the response thereto, St. Francis County owned a truck which was insured by petitioner and damaged in a collision while it was under a loan to and being used by the City of Hughes, Arkansas. Petitioner paid the amount of the damages to St. Francis County resulting from the collision less

$100.00 deductible as provided in the policy of insurance.

On August 28, 1956, counsel for petitioner filed an action in the St. Francis Circuit Court in the name of the county against the City of Hughes for the damages sustained to the truck under its right of subrogation under the policy. On September 26, 1956 County Judge M. D. Clark made a notation of dismissal on the docket sheet which the circuit judge determined had the effect of dismissing the cause without prejudice. There was no appeal from an order to that effect entered on October 5, 1956.

On October 20, 1956 petitioner filed suit in the St. Francis Chancery Court in its own name against the City of Hughes and St. Francis County for the amount of its subrogation only. Subsequently petitioner filed an amendment to its complaint in the name of the county to also recover the $100.00 deductible claim alleged to be still due the county. The county filed a motion to dismiss the amendment on May 30, 1957, alleging a prior release by it to the city of any claim as to the $100.00 deductible portion of the loss. After a hearing on June 20, 1957, the Chancery Court dismissed the action with prejudice as to any damages sustained by the county in excess of the amount of the subrogation paid by petitioner, directed that the county remain a party plaintiff and restrained the county judge from interfering in any manner with the prosecution by petitioner of its cause of action for the amount of its subrogation. A motion of the City of Hughes to transfer the case to law previously filed and submitted on briefs was heard by the chancellor who entered an order on November 7, 1957, transferring the case to the St. Francis Circuit Court. The clerk of this court refused to docket petitioner's appeal from this order on the ground that it was not final and appealable. We sustained the clerk's action by denial of petitioner's motion for a rule on the clerk on April 7, 1958.

Petitioner's motion to transfer the cause back to chancery court was also denied by the St. Francis Circuit on February 7, 1958, the court holding that the county was not a necessary party to petitioner's action against the City of Hughes for the amount of its subrogation which involved only an action for damages properly triable in the circuit court. Petitioner then filed the instant application for a writ of prohibition on March 19, 1958, asserting the circuit court was without jurisdiction because the chancery court had already obtained jurisdiction and that its attempt to evade further exercise of such jurisdiction by transferring the case to law was erroneous, without authority and void.

In support of the petition it is first contended that the transfer of the case by the chancery court to circuit court was erroneous and improper; and that that chancery court, having acquired and exercised jurisdiction of the cause of action for one purpose, should have retained it for all purposes. We find it unnecessary to determine such contentions on this application for a writ of prohibition, though we have already sustained the prior decision of our clerk that a similar order was not final and appealable. Even if the chancellor's action in refusing to exercise and retain jurisdiction were erroneous, we are unwilling to say that petitioner's remedy by appeal is inadequate, or that it has no other protection against the wrong that would be done by a refusal to exercise such jurisdiction.

It is well settled by our cases that prohibition may not be used as a substitute for an adequate remedy by appeal. In this connection we have held that the remedy for refusal to transfer an action to equity is by appeal and not by prohibition under a situation quite similar to that presented here. In *Richards* v. *Maner, Judge,* 219 Ark. 112, 240 S. W. 2d 6, a suit brought at law was first transferred to equity and then retransferred to law when the petitioner applied for a writ of prohibition. In denying the writ we distinguished the factual situation from that in *Burton* v. *Ward,* 218 Ark. 253, 236 S. W. 2d

65, where each trial court refused to try the case, insisting that the other had jurisdiction. In the *Richards* case we said: "Here the trial courts are in agreement. The chancellor has sent the case back to the circuit court, and that court proposes to proceed with the trial. Unlike the situation in the *Burton* case these petitioners are afforded the opportunity of a trial, but they insist that the hearing should be in chancery. It is settled, however, that the remedy for a refusal to transfer an action to equity is by appeal, not by prohibition. *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467. As we said in *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13: 'The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction. To illustrate: The circuit judge certainly had jurisdiction to pass upon the motion to transfer to equity the case pending in its court. If it erroneously transferred the case to equity, prohibition is not the remedy. It can be corrected only on appeal.' We then went on to point out that the party objecting to the transfer should have saved his objection and preserved his point for consideration by this court on appeal from the trial court's final judgment." See also, *Weaver* v. *Leatherman,* 66 Ark. 211, 49 S. W. 977.

So here, the trial courts are in agreement, and the circuit court had jurisdiction to pass on the motion to retransfer to equity. If it acted erroneously the petitioner's remedy is by appeal when the matter proceeds to a final judgment, and prohibition is not the remedy. The case of *Askew* v. *Murdock Acceptance Corporation,* 225 Ark. 68, 279 S. W. 2d 557, relied on by petitioner, involved an appeal and not an application for a writ of prohibition.

What we have said concerning petitioner's first point is applicable to its second contention that circuit court is without jurisdiction to proceed in the case because the chancery court acquired and exercised juris-

diction before it transferred the case to circuit court. As the respondent points out: "A settlement by the insured for the amount of the loss in excess of the insurance only, with a *tort-feasor* who is liable for the loss, since it is a settlement for the part of the cause of action which remains in the insured and which he has a right to settle, does not affect the insurer's right of action against the *tort-feasor.*" 29 Am. Jur., Insurance, Sec. 1345. We do not understand petitioner to contend that the insured county had no right to settle with the alleged *tort-feasor* city for that part of the loss in excess of the insurance. Such settlement in no manner precludes petitioner from pursuing its action for damages against the city to the extent of its subrogation.

Jurisdiction of this action as well as the authority to pass on the motion to retransfer to chancery court was a matter properly within the jurisdiction of the St. Francis Circuit Court. On the record presented, we cannot say that petitioner's remedy by appeal from a final judgment that may be rendered in the circuit court action is inadequate, or that irreparable harm to it will necessarily result from an adjudication of the matter there.

The writ is accordingly denied.

GUSEWELLE *v.* GUSEWELLE.

5-1601 313 S. W. 2d 838

Opinion delivered June 9, 1958.

S. Hubert Mayes, for appellant.

E. M. Arnold, for appellee.

George Rose Smith, J. This appeal is from a decree by which the appellee was granted a reduction in the amount of alimony that he is required to pay the appellant. It is contended by the appellant that the proof fails to show a sufficient change of circumstances to warrant the reduction and, further, that the chancellor erred in refusing to allow the appellant her costs and an attorney's fee.

After having been married for about thirty years the parties were divorced by a decree entered as of October 5, 1953. Gusewelle was then, and still is, the manager of a retail store in Little Rock, earning a salary of $10,000 a year and an annual bonus, based upon the profits of the store, that ordinarily comes to between fifteen and twenty thousand dollars. The original decree awarded to Mrs. Gusewelle the possession of the family home, title to the furniture and household goods, and one third of her husband's other personal property. In addition to fixed alimony of $250 a month Mrs. Gusewelle was awarded a third of her husband's annual bonuses, *before* the deduction of taxes but subject to the contribution that Gusewelle is required to make to his employer's retirement pension plan. The only change effected by the present decree is that Mrs. Gusewelle's share in the bonuses is to be computed *after* the deduction of taxes. This modification amounts to a reduction of about $100 a month.

We are of the opinion that the proof supports the chancellor's decision to modify the original award. It is shown that the appellee's employer, a corporation operating a chain of retail stores, expects its local managers to take an active part in community affairs and to entertain extensively at their own expense. In this connection Gusewelle testified that at the time of divorce he was living in a hotel room, at a rental of $90 a month, but to meet his employer's requirements he deemed it necessary to occupy an apartment costing about $200 a month. There is no reason to doubt the fact that the appellee's income, which depends in part upon the profits of the store that he manages, is at least indirectly affected by the standard of living that he maintains.

Another change of circumstance that we regard as important is the appellee's remarriage. The cases on this point were recently reviewed in *McCutcheon* v. *McCutcheon,* 226 Ark. 276, 289 S. W. 2d 521, where we said that the husband's remarriage is a matter that may be considered in weighing the equities of the situation. The case at bar is an instance in which this factor cannot fairly be disregarded. Gusewelle's net income, after the deduction of taxes and his contribution to the pension plan, averages about $18,000 a year. Under the original decree his first wife received almost $8,000 of that income, upon which her federal and state income taxes were more than $1,000. What was left for the appellant's use was substantially more than her actual needs, as she lives alone, in the former family home, without dependents. It is not indicated that the reduction allowed by the chancellor will work any hardship upon the appellant; at most it will diminish the amount that she is able to put aside as savings. In view of these facts we are not convinced that the chancellor's modification of the original award is without justification. See *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897. By cross appeal the appellee urges us to reduce the allowance even more, but the evidence does not warrant the granting of this request. If the apportionment of the appellee's income can be considered to be inequitable even after the readjustment put into effect by the chancellor,

this condition is due to the original decree rather than to any change that has taken place since then.

With respect to the claim for attorney's fees, the allowance is within the court's discretion, even though the governing statute does not refer specifically to a proceeding in which the husband asks for a reduction in alimony. Cf. *Feazell* v. *Feazell,* 225 Ark. 611, 284 S. W. 2d 117; *Finkbeiner* v. *Finkbeiner,* 226 Ark. 165, 288 S. W. 2d 586. In this case we have concluded that the appellee should contribute $250 toward the payment of the fee for the appellant's attorney and that the appellant should be permitted to recover her costs. With this modification the decree is affirmed.

WRIGHT *v.* VINCENT.

5-1577 313 S. W. 2d 849

Opinion delivered June 9, 1958.

[Rehearing denied July 1, 1958.]

Rhine & Rhine, for appellant.

French & Camp by *Gus R. Camp,* for appellee.

PAUL WARD, Associate Justice. This is an appeal by Ivan C. Wright, appellant, from an adverse judg-

ment in an ejectment action brought against him by Homer Vincent, appellee. The decisive issue relates to the sufficiency of the description of the parcel of land involved.

In March, 1957 appellee filed a complaint in ejectment against appellant in which it was alleged: He is the owner of and entitled to possession of "A part of the NE¼ of NW¼ of Section 26, Township 19 North, Range 7 East, more particularly described as Lot 5 of the NE¼ of the NW¼ of Section 26, Township 19 North, Range 7 East of Laffler's Survey to the town of Rector, Arkansas"; He is the owner of said property by virtue of a chancery court decree, dated December 6, 1956, quieting title in him, a copy of which decree is attached and marked Exhibit "A"; On December 7, 1956 appellant took possession of said property by placing a fence around it, is still in possession, and refuses to surrender possession thereof to appellee. The prayer was for possession, costs, and a Writ of Assistance.

Later in March, 1957 appellant filed his answer to the above complaint, entering a general denial, and also stating: He admits the chancery decree of December 6, 1956 mentioned before which quieted title in appellee by the description set forth in the previous paragraph; He specifically denies that he is in possession of the land described in said chancery decree, and; He admits he did on December 7, 1956, fence and take possession of a certain parcel of land described as follows: "That part of the Northeast Quarter of the Northwest Quarter of Section 26, Township 19 North, Range 7 East, more particularly described as follows: Begin at the Northeast Corner of the Northeast Quarter of the Northwest Quarter of Section 26, Township 19 North, Range 7 East, thence West 837.3 feet to point of beginning proper; thence South 3 degrees 05 feet West 378.2 feet; thence North 45 degrees 31 feet West 326.7 feet to Railroad right of way; thence North 43 degrees 26 feet East 204.6 feet to Section line; thence East 112.6 feet to point of beginning proper, less and except the right of way of State Highway Nos. 1 and 39 crossing said tract." Further an-

swering appellant states he has occupied and claimed the land above described since June 24, 1946 and is still in possession thereof, and that the description under which appellee claims title is void and describes no land that can be identified or located by use of said description. Other pleadings were filed but they are not material to the issue.

A lengthy trial ensued upon the pleadings thus joined, and many exhibits, including an abstract of title, were introduced in evidence. Under the view we take most of the testimony and exhibits are not material, and we shall refer to them only as is deemed necessary.

The trial court, sitting as a jury by agreement, found "that the two above described parcels of land are one and the same and that the plaintiff (appellee here) has deraigned sufficient title to be entitled to possession thereof . . .", and gave appellee judgment against appellant "for possession of the above described premises under either of the two aforesaid descriptions." It is our conclusion that the judgment of the trial court should be affirmed.

Exhibit "A" to appellee's complaint shows, and appellant admits, that on December 6, 1956 the chancery court entered a decree quieting title in appellee to the parcel of land first above described. From that decree we find that Ivan C. Wright (appellant here) was made a party defendant, that he filed an answer and that he was represented by counsel. In the decree it also appears the court found "that neither the plaintiff (appellee here) nor defendant (appellant here) is in physical possession of the above described premises, but that plaintiff is in constructive possession." The chancery court then decreed "that the title to the above described premises is hereby quieted in the plaintiff against all persons whatsoever . . .", and adjudged all costs against Ivan C. Wright. Ivan C. Wright prayed an appeal from the chancery decree to the Supreme Court, but none was ever taken.

The record discloses that on December 7, 1956 (the next day after the above decree was rendered) appellant

took possession of the parcel of land in question by placing a fence around it and placing thereon certain items of personal property.

We think the decree of December 6, 1956 settles the issue in this case in favor of appellee. In *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660, this court said: "It has long been recognized, in cases like this, that the plaintiff must recover on the strength of his own title, whether the case be in ejectment or one to quiet title." This burden, therefore, was on Vincent when he sued Wright to quiet his title to this parcel of land, and the court there held that Vincent sustained that burden. Any defenses available to Wright should have been made at that time, and they are not available to him now.

Appellant strenuously contends that the present cause in ejectment should be reversed because he and appellee are talking about two entirely different parcels of land, and that appellee's description is so indefinite that it locates no certain parcel of land. The testimony of two surveyors was to this effect. We think, however, there are several facts and circumstances which constitute substantial evidence to sustain the finding of the circuit judge (sitting as a jury) that both descriptions describe the same parcel of land.

One. It will be noted that appellee's land, in addition to being a part of NE¼ of NW¼, Sec. 26, Twp. 19 N. R. 7 E, is described as Lot 5 of Laffler's Survey of the Town of Rector, Arkansas. This record contains a Plat of this Addition, shown to be of record in the circuit clerk's office since 1935. Lot 5 appears on that Plat to be plainly indicated. The southwest border is a straight line 270 feet long (the dividing line between Lot 5 and Lot 6), it is bounded on the east by an alley, and on the north and west by a state highway. The highway on the west runs along the east side of the tracks of the St. Louis S. W. Ry. Co. The Plat also shows some dozen blocks, each divided into Lots with all dimensions given. The testimony shows that several families live in this addition. From all this we are led to believe that Lot 5 can be located with reasonable certainty.

Two. It is unrealistic to believe Wright and Vincent are talking about two separate parcels of land. This is demonstrated by the record in various ways. (a) The day after the chancery court quieted appellee's title to Lot 5 appellant put a fence around the exact parcel of land in question. (b) All parties must have known where the land was located because appellee had a fence around it and pastured it for 7 or 8 years prior to 1946. (c) Appellant evidently knew where the land was located because he must have pointed it out to the surveyor he employed to run the metes and bounds description in December, 1956. Otherwise, how could the surveyor have known what land to describe? (d) The record shows that several persons knew where the land was located long before it was described by a surveyor. They testified as to who had and who had not occupied it.

Affirmed.

HARBOUR *v.* HARBOUR.

5-1544 313 S. W. 2d 830

Opinion delivered June 9, 1958.

[Amended on Rehearing July 1, 1958.]

Charles S. Goldberger and *E. W. Brockman, Jr.*, for appellant.

J. S. Brooks and *M. P. Matheney,* for appellee.

SAM ROBINSON, Associate Justice. On October 21, 1955, the parties were divorced. The decree gave the wife possession of the home owned as an estate by the entirety, and the husband was ordered to pay $50.00 per month as alimony and as support for a minor son. The appellant, Thurmon B. Harbour, became delinquent in the monthly payments to the extent of $425.00 as of April 1, 1957. In the meantime, the State in a condemnation proceeding acquired, for the sum of $7,825, the property owned by the parties, the possession of which had been given to Mrs. Harbour in the divorce proceedings. In addition to the property owned by Mr. and Mrs. Harbour, there was an adjoining lot also taken in the condemnation proceedings, which belonged to Mr. Harbour. The price paid for that lot was $1,025. The money was paid into court.

This action was instituted when Mrs. Harbour filed a motion for modification of the decree fixing the alimony and support and to collect the alimony and support payments then in arrears. In a hearing on the motion the court held that she was entitled to $3,912.50 covering her interest in the money then in court and owned as an estate by the entirety; also $233.27 for her dower interest in the adjoining lot; and $709.67 covering accrued and delinquent alimony and maintenance payments for the period ending October 17, 1957. The court also held that Mrs. Harbour was entitled to $2,100 because she had been dispossessed of the home place, which not

only deprived her of a place to live, but also caused her to lose income in the amount of $35.00 per month which she had been receiving as rent for a garage apartment located on the property. It appears that this $2,100 was to be considered as a lump sum payment of an additional monthly award until such time as the minor child should become of age.

On appeal Mr. Harbour contends that the court erred in ordering a lump sum payment of alimony and maintenance to Mrs. Harbour, and that all funds should be held in the registry of the court as an estate by the entirety until the death of one of the parties or until there is an agreement for distribution. Appellant also contends that he should have credit against the alimony in arrears for about $295.00 given to his son; that the alimony and support payments should be reduced; that the order for alimony and support should designate what portion of the monthly payments should be considered as alimony and what part maintenance for the child; and that he is entitled to recover two-thirds of the household furniture.

We think the appellant is right in his contention that he should not be required to pay $2,100 in a lump sum as alimony or maintenance. It is not a debt that has accrued, but something that may or may not accrue in the future. There are several contingencies, the happening of which would bring an end to the monthly payments. No doubt the trial court was completely justified in reaching a conclusion that since the house in which Mrs. Harbour lived was no longer available to her, and since she had lost the income from the garage apartment, the alimony should be increased, and we completely agree with that view. But Harbour cannot be required to pay part of the alimony and support in a lump sum in advance. *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S. W. 2d 550; *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762.

Next, Mr. Harbour contends that the funds in the registry of the court from the sale of the land held by the entirety should remain in court as an estate by the

entirety for the benefit of the survivor of the two or until there is an agreement as to distribution.

The condemnation proceeding had the effect of converting the real estate into personalty by operation of law. *Union & Mercantile Trust Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1. Prior to Act 340 of 1947, it was held that a divorce did not dissolve an estate by the entirety in realty. *Ward* v. *Ward,* 186 Ark. 196, 53 S. W. 2d 8. And in *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, it was held that the Act (340 of 1947), providing for the dissolution of an estate by the entirety, did not affect such estates created before the effective date of the Act. However, such an effect has never been given to an estate by the entirety in personalty. See *O'Quin* v. *O'Quin,* 219 Ark. 247, 241 S. W. 2d 117, where a joint bank account held as an estate by the entirety was divided equally between the parties. It follows that appellant's argument, that the proceeds from the condemnation proceedings remain in court as an estate by the entirety for the benefit of the survivor of the two or until there is an agreement relative to distribution, is without merit.

We do not think that Mr. Harbour is entitled to credit money he gave his son against the alimony and support payments ordered by the court, nor do we think that the alimony and support payments should be discontinued or reduced. On the contrary, now that Mrs. Harbour no longer has possession of the home and does not have the $35.00 per month rent from the garage apartment, and the $2,100 in controversy will be paid to Mr. Harbour, the alimony and support payments should be increased to $100.00 per month, and it is unnecessary to designate the exact amount that is to be considered as alimony and the amount to be regarded as support for the minor child.

Mr. Harbour contends that under the provision of the original decree he is entitled to two-thirds of the household furniture, but subsequent to the decree he entered into an agreement whereby in consideration of the relinquishment by Mrs. Harbour of all claims to an auto-

mobile she was given the use of all the furniture as long as she remains unmarried. She has not remarried. The decree is modified to the extent of allowing the $2,100 now in the registry of the court to be paid to Mr. Harbour and increasing the alimony and support to $100.00 per month, and as modified the decree is affirmed.

PERRY *v.* PERRY.

5-1604 313 S. W. 2d 851

Opinion delivered June 9, 1958.

Holt, Park & Holt, for appellant.

Thad D. Williams, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Tiny Perry, and appellee, Julius Perry, were married June 7, 1925. On September 25, 1951, Tiny filed suit for separate maintenance; Julius filed a cross complaint asking for an absolute divorce. On October 15, 1951, the court granted Tiny's prayer for separate maintenance and gave her custody of the three minor children, who have since that time become of age; gave her possession of the home place, which was an estate by the entirety; and ordered Julius to pay her $25 per week as maintenance and support for the children. On December 17, 1951, Julius was granted an absolute divorce on his cross complaint. The previous order granting separate maintenance to Tiny was not a grant of alimony *pendente lite,*

but was separate maintenance granted in a suit filed for that purpose, and the granting of the separate maintenance in the circumstances was not a bar to the granting of a divorce to Julius. *Hill* v. *Rowles, Chancellor,* 223 Ark. 115, 264 S. W. 2d 638.

The decree granting the absolute divorce did not change or modify the previous order giving to Tiny possession of the property constituting an estate by the entirety. The prior order in that respect remained in full force and effect. Later both Tiny and Julius remarried, but Tiny continued in possession of the property constituting an estate by the entirety. On August 19, 1957, Julius filed a petition asking that he be given possession of the property. The court granted the petition, but the order sets out that Julius is willing that the property be sold and the proceeds divided equally between him and Tiny, and in addition that Julius is willing to pay to Tiny, from his part of the proceeds of the sale, $410 which he has been in arrears a long time in maintenance payments.

On appeal Tiny contends that the decree of December 17, 1951 is *res adjudicata* of the question of possession of the estate by the entirety, and that the court has lost jurisdiction by lapse of time. The possession of the property was given to Tiny by way of maintenance. In the final decree the order giving Tiny possession was in no way disturbed or modified, but the decree specifically provides that the court retains "control of this cause for such further orders and proceedings as may be necessary to ascertain definitely, and enforce, the rights of the parties hereto in the property herein referred to."

As a matter of law the trial court retains control of the cause with jurisdiction to modify an allowance of alimony or maintenance. Ark. Stat. § 34-1213 provides: "The court, upon application of either party, may make such alterations from time to time, as to the allowance of alimony and maintenance, as may be proper, . . ." Decrees for continuing alimony are always subject to the modification of the court upon application of either party. *Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851.

The chancellor had jurisdiction to change the order providing for maintenance, which the court did by holding that since she had married again Tiny is no longer entitled to exclusive possession of the estate by the entirety. As it now stands, Julius and Tiny own the property by the entirety, but neither of them is entitled to exclusive possession. Since the estate was created prior to Act 340 of 1947, the court does not have authority to order that the property be sold. *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124. Of course, the parties may agree to a disposition of the property, and if they cannot agree the courts may take the proper steps to protect the interest of each of them.

Reversed with directions to enter a decree not inconsistent herewith.

Robinson *v.* Merritt, Judge.

5-1579 314 S. W. 2d 214

Opinion delivered June 16, 1958.

Paul K. Roberts, for petitioner.

Clifton Bond, for respondent.

CARLETON HARRIS, Chief Justice. This is a petition praying this Court to issue its Writ of Prohibition, directed to the Probate Court of Bradley County, prohibiting said court from taking further testimony in the cause, hereinafter discussed. Petitioner was the appellant in the case of *Bobbie Jean Robinson* v. *George W. Hammons,* 228 Ark. 329, 307 S. W. 2d 857. George W. Hammons was serving as guardian of the person and estate of Bobbie Jean Robinson. On June 24, 1952, Hammons filed his verified account, in which he charged himself with $1,325 and took credit for various amounts, including $338 paid for the burial of petitioner's grandfather, and a total of $876.08 paid out in cash and checks to petitioner on various occasions. Petitioner, by her next friend, filed exceptions to the account, claiming that a certain receipt for $50 was a forgery, and that the book of receipts presented by the guardian, and purportedly signed by petitioner, was incorrect for various reasons. The trial court disallowed the $50 item, but allowed all the other claimed credits. On appeal, this Court allowed the item of burial expense,[1] but stated "as to the other expenditures, it was error for the trial court to allow the guardian credit on the showing made in this record. * * * Under the above state of the record, we think the trial court erred in allowing all of the credits in controversy. * * * The cause is therefore reversed and remanded with directions to proceed further not inconsistent with the views herein set forth."

On January 27, 1958, the Bradley Probate Court entered its order on the mandate, vacating so much of its decree allowing credits in Hammons' final accounting as has been disallowed by this Court, and directing a further hearing on such items. The petition for Writ of Prohibition followed.

[1] Bobbie Jean, upon becoming of age, ratified this expenditure.

Petitioner contends that the doctrine of *res judicata* applies, pointing out that the questions to be heard are identical with those tried on January 28, 1957, that the parties are identical, the guardian has had his day in court, and this matter has already been finally adjudicated.

Let it first be pointed out that this is not a proper case for Prohibition. As stated in *Corpus Juris Secundum,* Vol. 73, paragraph 8, page 26:

"In general, three things are necessary to justify the issuance of a writ of prohibition; that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power, that the exercise of such power by such court, officer, or person is unauthorized by law, and that it will result in injury for which there is no other adequate remedy.

* * *

The writ ordinarily issues only to prevent great impending present injury or extraordinary hardship, or where the public good demands, or to prevent some great outrage on the settled principles of law and procedure; unless it is shown that injury would result from the act sought to be prohibited, or that damage is likely to follow such act, prohibition will not lie."

Our own cases denote the same view. In *Lowery, Administrator* v. *Steel, Chancellor,* 215 Ark. 240, 219 S. W. 2d 932, this Court said:

" 'The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Order of Railway Conductors of America* v. *Bandy, Judge,* 177 Ark. 694, 8 S. W. 2d 448, and cases cited.' *Merchants & Planters Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. 2d 421, and 'The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is

wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction.' *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13."

See also *McClendon* v. *Wood, Judge,* 125 Ark. 155, 188 S. W. 6. In the instant matter, even if petitioner's assertion that this litigation has already been finally adjudicated, should be correct, the writ sought would not lie. There is no great impending injury, nor extraordinary hardship, and the contention here asserted, could be as well asserted on appeal. In other words, the remedy by appeal is adequate.

The petition is thus disposed of, but to possibly preclude another appeal based on the same contention, we deem it well to state our actual intention at the time of rendering the opinion in *Robinson* v. *Hammons, supra.* Possibly such intent could have been stated with more clarity, but when the language is considered, we think it clear that the cause was remanded for further proof relative to the credits claimed by the guardian. We stated "It was error for the trial court to allow the guardian credit on the showing made in *this record.",* and remanded the cause with directions "to proceed further not inconsistent with the views herein set forth." Of course, if we had simply intended to disallow the items, finally and irrevocably, there would have been no occasion to remand, for there would have been nothing left with which to "proceed further." We would simply have allowed the funeral bill of $338, and disallowed the other items. Petitioner states in her brief, "If this court affirmed the $338 item, then this court disaffirmed all the other expenditures. This court could not affirm one item and remand all the others back for further hearing." We disagree with this conclusion. While it is true that Chancery and Probate cases are generally determined on the basis of the record before us on a first appeal, occasionally some cases are remanded for further proof where it would appear that the ends of justice require such action. Such procedure, though not the usual action, has been followed in numerous cases by this Court. As stated in American Jurisprudence, Vol. 3, page 712, Sec. 1210:

"It may be stated as a general rule that when the record is in such shape that the appellate court cannot in justice determine what final judgment should be rendered, the case will be remanded for such further proceedings as may be necessary in the trial court, or it may be remanded with directions for further proceedings in conformity to the opinion of the reviewing court, or for proceedings not inconsistent therewith."

Also, in *Corpus Juris Secundum,* Vol. 5, page 1447, Sec. 1934, we find:

"The nature and extent of the proceedings which will be ordered upon a reversal and remand is a matter largely within the discretion of the appellate court, which will be exercised according to the exigencies or circumstances of the particular case . * * * Indeed, the directions, instructions, and limitations, imposed or given may be such that the subsequent proceedings in the lower court, whether or not denominated a new trial, fall short of being a full and unrestricted new trial of the original issues."

Still further, in Sec. 1935, page 1448:

"Whether by reason of statutory provision or otherwise, it is generally held that an appellate court, on remanding a cause, may in its discretion either grant a complete new trial or restrict or limit the purpose of the proceedings or the issues to be tried in the lower court, according to which course is demanded by the circumstances or the ends of justice."

The petition is denied.

Justices McFaddin and Robinson concur.

SINDLE *v.* SINDLE.

5-1584 315 S. W. 2d 893

Opinion delivered June 16, 1958.

[Rehearing denied September 29, 1958.]

Paul K. Roberts, for appellant.

W. C. Medley, for appellee.

CARLETON HARRIS, Chief Justice. This is a child custody case. Appellant, Dixie Sindle, and appellee, Charles L. Sindle, were married January 14, 1955. On August 10, 1955, a child, Charles Randle Sindle, was born. Appellee was granted a divorce on October 17, 1955; custody of the child was given to appellant, and appellee was directed to pay the sum of $40 per month for child support. The order further provided appellee should have the right to visit the child "and when it became older, to have it visit him." On July 9, 1957, Mr. Sindle filed a petition for modification of the decree, alleging that he had never been allowed to visit the

child or have the child visit him, asked that he be granted the custody of Charles Randle for not less than one-half the year, and that the child support payment be reduced to $20 per month during the period in which the child remained in the custody of appellant.

At the conclusion of the hearing on such petition, the court granted appellee the custody of Charles Randle during the months of March, July and November, for the years 1958 and 1959, and reduced the support payments from $40 per month to $35 per month for the remaining 9 months of each year. From such action of the court, comes this appeal.

As has been so often stated by this Court, the paramount and controlling consideration in all custody cases is the child's best interest and welfare. *Cushman* v. *Lane,* 224 Ark. 934, 277 S. W. 2d 72. *Holt* v. *Holt,* 228 Ark. 22, 305 S. W. 2d 545. The proof shows that appellee is an itinerant construction worker, presently located in Senatobia, Mississippi, though he claims Hampton, Arkansas, as his legal residence. Subsequent to the divorce, he married again on January 31, 1957. His present wife is 18 years of age. Appellant has not remarried, is unemployed, and lives with her parents.

Appellee contends that appellant has deprived him of his right of visitation with the child. According to the evidence, he has gone to the home where she resides four or five times, the last occasion being about a year before this trial, for the purpose of visiting his son, and appellee refused to let him take the child away from the house, and according to his testimony, took it into another room. The mother contends that she is perfectly willing for Mr. Sindle to see and visit with the child, but that on the occasions of his coming to the home, he has been drinking, and at times has come to the house after the family had retired for the night; that she would not permit visitation under those circumstances. This testimony was corroborated by her father. The proof shows that appellant had gotten behind with his child support payments, and Mrs. Sindle had had him arrested, following which, no further visits

were made. At the present time, he is current in his payments.

It is contended that appellant leaves the child with her parents, and does not stay with it. After a close search of the record, we are unable to find the basis for this contention. The only testimony that even slightly indicates such a fact, was given by appellee.

"Right after the baby was born I could go over. Not long after she went to El Dorado and stayed a good while. Then it started raining, and I couldn't keep up with the payments. She had to leave El Dorado and come back home."

Further:

"You said something about Dixie wanting to take some kind of trip, what do you mean by that?

A. Every time she gets a check she goes somewhere. The last one, she went up to Booneville.

Q. Do you know what she was doing up there?

A. No, I don't, because I wasn't up there with her. I have a bud up there in the hospital. She went in there to see him. That might have been what she went for, I don't know."

Appellant also testified that she went to church one night and left Charles Randle with her parents. These statements by appellee are rather general, and in fact, it is not shown but what she took the child with her. Of course, there could be no objection to her leaving Charles Randle at home to attend a night church service. It might be added that we cannot visualize extensive travel on $40.00 per month. At any rate, since no alimony is being paid, Mrs. Sindle might well be forced to obtain employment, in which event the child would certainly have to stay with her parents. Appellee recognizes that he would not be able to be with the child at all times, and plans for his present wife to look after Charles Randle while he is at work.

The court awarded Mr. Sindle custody of this child during the months of March, July, and November, for

the years 1958 and 1959. The reason for choosing these particular months is not shown in the record. As we stated in *Aaron* v. *Aaron,* 228 Ark. 27, 305 S. W. 2d 550:

"Divided custody of a minor child is not favored unless circumstances clearly warrant such action."

We are unable to see that such action is warranted in this instance. As previously mentioned, appellee is an itinerant construction worker, and the record does not reflect where he will be during the months he was awarded custody of the child, nor what kind of home, or surroundings he will be in. It may well be that he does not know where he will be located during those periods, but we are of the opinion that before the child is placed in his custody, the environment and home surroundings should be ascertained. There is not one line of evidence in the record to indicate the type of neighborhood, or atmosphere, to which appellee and his wife intend to take the boy. We do not know whether they rent a house, live in a trailer, or reside at a hotel. The present wife did not testify, and her attitude toward the child, or ability to care for and look after it, is not shown, except that her husband testified as to her willingness to take Charles Randle. Of course, it is recognized that a child of tender years, under normal circumstances, belongs with its mother, and as stated in *Perkins* v. *Perkins,* 226 Ark. 765, 293 S. W. 2d 889:

"* * * It is a matter of common knowledge that usually there is no love like a mother's love; this is a law of nature that is almost invariable, and unless there are compelling reasons for giving someone other than the mother custody of a small child, it should not be done."

There is no evidence here that comes close to establishing that this mother is not devoted to her child. We are unwilling to approve a transfer of part-time custody of this little fellow, still less than three years of age, from his mother, who has had the custody from the time of his birth, to the father, where he would largely be under the care of an 18 year old stepmother.

This, in our opinion, would not be for the best interest of the child. Certainly appellee is entitled to visit Charles Randle, and arrangements can be made for him to take the little boy away from the house, if visiting conditions are presently unpleasant. Mr. Sindle could take the child to town, or on a picnic, or numerous places where he would have no occasion to be annoyed or disturbed by appellant. It goes without saying that on such occasions, he should be entirely sober.

The court reduced the monthly support payments from $40 to $35 for the nine months period during which it was ordered that the mother have custody of Charles Randle. Again, we find no evidence upon which to justify a reduction. No one testified as to appellee's salary or wages. The only evidence relative to Mr. Sindle's income is as follows:

"You are asking for this decree to be modified to where you will only pay $20 a month while the child is with its mother. On what are you basing that petition?

A. Because I think I could take it and raise it for $20 a month.

Q. You think that is too much?

A. Yes, I do.

Q. Are you working for the same company you were working for at the time the decree was rendered?

A. What do you mean?

Q. This decree was rendered back in October, 1955. Were you working for that same company then?

A. Yes, sir.

Q. Are you making the same money?

A. No, sir.

Q. You are not?

A. No.

Q. How much more now than then?

A. I am not making more."

So it is not shown that his earnings are less, nor his expenses greater, than at the time of the granting of the divorce decree. To justify a reduction in support payments, changed circumstances must be shown. *Clinton* v. *Morrow,* 220 Ark. 377, 247 S. W. 2d 1015. Of course, we know that appellee has remarried, but this is not emphasized in the testimony, nor argued as justifying a reduction in the support payments.

Appellant asks that she be allowed a reasonable attorney's fee, and we think this request should be granted. We approved an attorney's fee for the ex-wife in a child custody proceeding in *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379, and *Aaron* v. *Aaron, supra.* In those instances, the proceedings for modification were instituted by the divorced wives. Here, the proceeding was instituted by the ex-husband, and appellant, apparently without funds of her own, was certainly entitled to defend against the petition. We accordingly allow an attorney's fee of $100.

The decree is reversed and remanded with directions to enter a decree consistent with this opinion, and to enter an order allowing appellant's attorney a fee of $100.

LAMAR BATH HOUSE COMPANY *v.* CITY OF HOT SPRINGS.

5-1536 315 S. W. 2d 884

Opinion delivered June 16, 1958.

[Rehearing denied September 29, 1958.]

House, Holmes, Roddy, Butler & Jewell, for appellant.

A. D. Shelton, City Attorney, and *Wood, Chestnutt* and *Smith,* for appellee.

J. Seaborn Holt, Associate Justice. In 1934 the City of Hot Springs entered into an agreement with the National Park Service, Department of Interior, relative to the construction of a city sewer system and sewage plant in Hot Springs. The parties recognizing that Hot Springs' reservation, including appellant's bath

houses located thereon, contributed largely to the city's sewage, the Park Service agreed to pay 22.5 per cent of the construction cost and an additional 5 per cent in lieu of maintenance and operation charges. Park Service in the aggregate contributed $82,000. Appellants' bath houses furnished no part of the consideration. The agreement contained this recital: "1. That the Government be not charged for any service or use of the system at any time in the future. 2. That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than the United States government sources. Necessary replacements of the entire plant due to natural or human destruction not to be considered a part of paragraph 2." The balance of the cost of construction was paid partly by the U. S. Public Works Administration and partly by a city bond issue of $175,000, financed by a 1.5 mill ad valorem tax on the property within the city. In 1934 the 1.5 mill tax was extended against appellants' property and assessed for taxation. In July 1935 appellants obtained a temporary restraining order against the collection of this tax, setting up the agreement as a defense. Thereafter, in 1945, on the city's motion to dissolve the injunction and for a decree for past due taxes, the court held, in effect, that appellants were U. S. government sources within the meaning of the agreement and enjoined the city from assessing and collecting the 1.5 mill tax against them. There was no appeal from this decree.

The record reflects that by 1952, the city sewage disposal plants were obsolescent, inadequate and heavily overloaded, creating a serious health problem, and the pollution of Lakes Hamilton and Catherine. A thorough engineering study was made resulting in recommendations to the city to enlarge, overhaul and repair the disposal system and to change the method of purifying the city sewage. Following this recommendation and to cover the cost and properly proceeding under the provisions of Act 132 of 1933 (Sec. 19-4101 etc. Ark. Stats. 1947), the city caused bonds to be issued in the amount of $786,000, which were to be financed by a

sewer service charge. It appears that prior to this time the city had never levied any sewer service charge. Sewer service charge rates were set forth in Ordinance 2444 by the city. Following the completion of the work, sewer service charges were made against and sent to appellants and other users of the system. Charges to appellants were calculated upon the total volume of sewage discharged by them from their bath houses into the sewer system, and included both the city water and also the hot mineral water furnished by the National Park Service. Appellants operate commercial bath house companies located on the U. S. reservation and are large consumers of water, and large contributors to the water that goes through the sewage system. There was evidence that in 1952 appellants discharged 57,365,500 gallons of sewage into the system, or about 7.5 percent of the total flow. In 1953 the total number of gallons discharged was 55,705,800, or 7.5 percent of the total flow. Appellants refused to pay to the city any sewer service charges and in 1955 brought the present suit to enjoin collection. In the trial court, and here on appeal, appellants relied on the following points: "1. The agreement is valid, and imposition of sewer charges upon appellants is an unconstitutional impairment of contract. 2. The validity of the agreement is *res judicata.* 3. Appellees are estopped to assert any invalidity in the agreement and from imposing sewer charges upon appellants. 4. The city had no legislative or territorial jurisdiction to impose sewer charges upon appellants, and the trial court had no jurisdiction to render judgment against them. 5. No claim or judgment *in personam* could lawfully be made or rendered against appellants. 6. In no event could any charge be calculated against appellants on volume of hot mineral water from the National Park springs."

Appellees defended primarily on the ground that their agreement or contract relied upon by appellants was *ultra vires* as applied to the sewer service charge, asserted their right to collect these service charges from appellants and in a cross complaint asked for a judgment

for the full amount of the unpaid sewer service charges not only for the city water but also for the hot mineral water furnished by the National Park Service which, as indicated, was also discharged through the sewer system. Upon a hearing the trial court held that the contract or agreement of 1934 was valid as to the 1.5 mill ad valorem tax for the original construction, but *ultra vires* as applied to the present sewer service charges, and that appellants were liable only for the amount of city water discharged into the sewers and not for the hot mineral water. The court also disallowed the city's claim for penalties and attorney's fees. It appears that all bonds for the original construction under the 1.5 mill tax are paid and this tax is no longer levied. The case is before us on appellants' direct appeal and a cross appeal of appellees.

The primary, if not the decisive, question presented is whether the above agreement between the city and the National Park Service is *ultra vires* in the circumstances here. We hold that it was in so far as it would estop or deny the City of Hot Springs the right and power now or at any future time, in the exercise of its police powers to enforce collection of sewer charges against appellants. The city not only has the right in exercising its legislative and governmental functions to protect the health, safety and general welfare of its people, but it is its duty to do so and may not contract away any such right. "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time . . . It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power

of eminent domain which has been delegated to it by the legislature, or of the power of taxation," *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949.

In effect, the same issues as here were presented to the Supreme Court of Ohio in *State ex rel. Gordon* v. *Taylor, et al.,* 149 Ohio St. 427, 79 N. E. 2d 127. In that case Ohio State University refused to pay a bill for sewer service charges presented by the City of Columbus on the ground that it had many years before entered into an agreement with the city under the terms of which it had conveyed to the city an easement across University property for sewer purposes in consideration of "the right and privilege to the Board of Trustees, and to the Ohio State University, to use the city sewers on the campus of said university without cost or expense to said university, or its Board of Trustees." In rejecting the university's defense, that court used this language: "The language of the grant of easement involved herein, if construed as contended by counsel for the respondents, would be so broad and comprehensive as to vest in the university the right to use the city sewer and the benefit of the city's sewerage system without restriction or limitation, and without liability for any future charge or expense of maintenance, renewal or additional facilities required by any change of conditions . . . If the University is completely exempted from any charge therefor and is privileged, without any limitation or restriction, to empty into the city sewers all the sewage from the campus, the boundaries of which are not defined or limited and may be indefinitely extended, such exemption could be held valid only if the city, notwithstanding its duty and obligation to protect the health, safety and welfare of the citizens of Columbus, is authorized to relinquish as to the university property the powers and prerogatives vested in the municipality and to contract away its duty and obligation to require all users of the city sewerage system to pay proportionately the cost and expense of an essential municipal function.

In the construction of a sewerage system, a municipality acts in a governmental capacity, and, hence, in accepting the grant of easement subject to the right of the university to use the sewer would be *ultra vires,* if by such exemption the city bargained away all its duties and obligations with reference to maintenance of such sewer and agreed to forever maintain it for the benefit of the university. It is only in the maintenance of a sewerage system that the city acts in a ministerial or proprietary function. *City of Portsmouth* v. *Mitchell Mfg. Co.,* 113 Ohio St. 250, 148 N. E. 846, 43 A. L. R. 961." *(State* v. *Taylor,* 79 N. E. 2d 127 *supra.)*

"The supervision and regulation of the sewers is a police function of the city. Therefore, in granting permission for the use of the sewers in the first instance and for the continuing use thereof, the city must at all times retain control, and any attempt by way of contract to deprive the city of that control is void. The police power of the city cannot be bargained away by contract, but must at all times be available for use to meet such public needs as may arise. McQuillin, Municipal Corporations, 2d Ed. Rev. Secs. 393, 1564," *Ericksen* v. *City of Sioux Falls,* 70 S. D. 40, 14 N. W. 2d 89. ". . . an indefinite exemption, the purpose or amount of which is not reasonably ascertainable, is not only *ultra vires,* but is also against public policy," *City of Cleveland* v. *Edwards,* 109 Ohio St. 598, 143 N. E. 181, 37 A.L.R. 1352. " . . . in the absence of express grant of power, a municipal corporation has no authority to make contracts for the exemption or commutation of local assessments," McQuillin, 3d Ed. 14, Sec. 38.86. Cases from Delaware, Indiana, Kentucky, Massachusetts, Mississippi, Missouri. New York, Wisconsin and Ohio are cited to support the text.

Appellants have presented for our consideration a large number of cases in their effort to uphold the validity of the above agreement between the city and the National Park Service, however, upon examination of each of these cases there appears to have been statu-

tory or constitutional authority which permitted the municipality to enter into the contract in question. As pointed out above, in the present case we find no authority or express grant of power, statutory or otherwise, giving to the City of Hot Springs the authority to exempt appellants here from the sewer service charge in question. "A common council 'cannot bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.' So, power conferred upon a city to contract respecting a particular matter does not confer power, by implication, so to contract with reference thereto as to embarrass and interfere with its future control over the matter, as the public interests may require. Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void." McQuillin, 3d Ed. Vol. 10, Sec. 29.07.

It appears practically undisputed here that when this bond issue of $786,000 was made that the City of Hot Springs was faced with a serious problem of sewage disposal, affecting the health and well being of its inhabitants, and we see no valid reason, and appellants have pointed to none, why appellants who are citizens and conducting their businesses in that municipality should not pay their just share, through sewer service charges, of this necessary improvement for the public good.

Appellants' contention that "the validity of the agreement is *res judicata*" cannot be sustained. As we have heretofore stated, "the police power of a city must at all times be available for use to meet such public needs as may arise." It does not appear from the record that any such need existed in 1935 when a temporary restraining order was obtained or in 1945 when it was made permanent. Consequently, at those times, there was no occasion for the city to exercise its police powers. On the other hand it appears now that such a need

does exist and consequently there is an occasion for the city to exercise its police powers.

On the contention of appellants that the city is estopped, little need be said in addition to what we have set out above.

Since we are holding that the contract or agreement here in question is *ultra vires,* then the city may not be estopped to deny its invalidity. ". . . contracts which the corporation is not permitted legally to enter into are not subject of ratification, and a city may not be estopped to deny the invalidity of a contract that is *ultra vires* in the sense that it is not within the power of the municipality to make," McQuillin, 3d Ed. Vol. 10, Sec. 29-104, p. 422.

On cross appeal appellees contend that there was error in the trial court's decree in denying them the right to base sewer service charges on the total volume of all water which appellants discharged into the sewers, which included both the city water and the hot mineral water. We agree that this contention should be sustained. It appears that the basis of the sewer service charge is based on the volume of sewage discharged into and through the sewers. The record reflects that the water consumption for the calendar year 1952 was used as a basis for sewer charges for period from October 1953 through September 1954. This water, which was emptied into the sewers, amounted to approximately 4,452,800 gallons of city water and 52,912,700 gallons of hot mineral water. For 1953 the volume of city water was slightly greater and that of the hot mineral water somewhat less. As indicated, sewer service charges are based on the use of the system. Appellants used the water in their businesses in which, obviously, they seek to make a profit, and we can see no just reason why they should not be required to share, along with all other users of sewers, the cost burden of disposing of this water through the sewer system.

We hold that there was no error in denying to appellees the penalties and attorney's fees as provided in

Sec. 19-4113 Ark. Stats. 1947. This statute is penal in its nature and must, therefore, be strictly construed. It provides in part: "If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten per cent, and a reasonable attorney's fee, may be recovered by the sewer Committee. . ." This provision says that penalties "may be recovered" not that they must be. The trial court is thus granted a reasonable discretion in denying or allowing penalties depending on the facts and circumstances. "It is a general rule of statutory construction that penal statutes are to be strictly construed. Statutes imposing penalties are subject to this rule of strict construction. They will not be construed to include anything beyond their letter, even though within their spirit. The rule that penal laws are to be construed strictly is perhaps not much younger than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." 23 Am. Jur., Forfeitures and Penalties, Sec. 37, p. 631. We find no abuse of that discretion here.

Accordingly, the decree is affirmed on direct appeal, on appellees' cross appeal the decree is reversed and remanded with directions to enter a decree consistent with this opinion.

McFaddin, J., dissents.

5-1589 314 S. W. 2d 216

Opinion delivered June 16, 1958.

[redacted]

Johnston & Rowell, for appellant.

Robert A. Zebold and *John Harris Jones,* for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves an oral lease of farm land. According to the evidence adduced by appellee West, he and appellant (Mizell) entered into an oral agreement whereby West (landowner) leased to Mizell for the year 1956, 108 acres of land to be planted to cotton and 70 additional acres for beans. It was agreed that Mizell would furnish all the necessary farm machinery and equipment and as lessee was to receive three-fourths (West one-fourth) of all cotton produced. Under this agreement Mizell farmed the land, properly and successfully, and at the end of the 1956 year West refused appellant's request for renewal of the lease for 1957 and additional years, and placed the land under the soil bank program. Appellant testified on the other hand that the oral agreement between him and West was for the lease of appellee's land for a period not only including 1956, but for several years thereafter. That the reason for a long lease was to enable Mizell (lessee) to pay for the additional farm equipment which would require several crop years. He further testified that it was his understanding that he (Mizell) was to have the land as long as he made

an average crop and wanted it. "A. . . . I hadn't discussed with Mr. West anything during the time he rented to me — he told me he was going to put it in the soil bank and work the rest himself — I was under the impression all the time that I was going to be there this year and continue on as long as I made an average crop on the place. Q. As far as you were concerned it was just going on as long as he owned the land? A. That is what he told me and the boys, as long as we wanted to work it. . . . Q. Did he ever offer to share the soil bank proceeds with you. A. No sir."

Appellant brought the present suit against West alleging: "That by reason of the defendant's breach of the aforesaid rental contract and his unlawful dispossession of the plaintiff from the aforesaid lands this plaintiff has suffered damage by reason of depreciation" of his equipment in the amount of $3,732.72 and "that by reason of loss of profits from farming the 108 acres of land hereinabove mentioned to cotton and the 50 to 70 acres of soybeans, this plaintiff has suffered damage in the sum of $7,250.00 or a total damage in the sum of $10,982.72," and prayed for a judgment in this amount. In an amendment to his complaint plaintiff further alleged: "That the Soil Bank payments under the contract will be in the approximate sum of Seven Thousand Five Hundred Dollars ($7,500.00), and that this plaintiff is entitled to receive three-fourths of said payment or the sum of Five Thousand Six Hundred Twenty Five Dollars ($5,625.00).

Wherefore, in addition to the prayer of the original complaint filed herein, plaintiff prays, in the alternative, that he have judgment against the defendant in the sum of Five Thousand Six Hundred and Twenty Five Dollars ($5,625.00) and for all other relief to which he may be entitled."

West answered with a general denial and in a cross complaint sought to recover from Mizell $450.00 alleged balance due on the 1956 rental, $300.00 for cotton alleged to have been abandoned by Mizell and left

in the field and $84 for tractor fuel used in seed bed preparation and planting, or a total of $834.00.

A jury trial resulted in a verdict for West on Mizell's complaint and a verdict in favor of Mizell on West's cross complaint. This appeal followed.

For reversal appellant relies on one point: "The trial court erred in instructing a verdict for the defendant, upon the claim of the appellant for a *pro rata* share of the soil bank payments, thereby refusing to recognize appellant as a third party beneficiary under the soil bank agreement."

The record reflects that Mizell requested only two instructions, which were given by the court, as follows: "1. If you find from a preponderance of the evidence in this case that the defendant, J. E. West, entered into an agreement with the plaintiff, E. E. Mizell, to rent him the lands involved in this case for the year 1956 and as many years thereafter as E. E. Mizell farmed the lands in a satisfactory manner, and you further find from a preponderance of the evidence that E. E. Mizell moved onto the lands and began the performance of such contract, and purchased equipment because of such a contract and repaired a house on the land to live in so that he could perform the contract, and if you further find that the defendant gave the plaintiff no notice that his work was unsatisfactory, or that he would not be able to farm the lands for the year 1957, then you will find for the plaintiff and fix his damages in an amount equal to the value of the lands to the plaintiff less the agreed rental under the contract. 2. If you find for the plaintiff you may consider, in determining the value of the lands to the plaintiff for the year 1957, the *pro rata* amount of the soil bank payments to which he would be entitled under the soil bank program of the federal government."

As we view the evidence these instructions fully and clearly covered appellant's theory of the case, and the jury found against him on substantial testimony. Obviously, the soil bank issue did not arise in the 1956

crop year, when appellant operated the leased land. It could only arise in subsequent years provided appellant's theory of the case had been sustained by the jury's verdict and, as indicated, it was not.

The record shows that the court gave appellee's requested instruction No. 9 on appellant's claim to a share in the soil bank payments, as follows: "You are instructed to find for the defendant upon the alternative claim of plaintiff for a portion of the soil bank payment," and appellant's objection is in this language: "To which action of the court, in giving to the jury, defendant's written requested instruction No. 9, the plaintiff at the time objected generally, his general objection was by the court overruled, and the plaintiff at the time asked that his exceptions be saved and duly noted of record, which is hereby accordingly done." It is thus apparent that appellant's objection was only general, not specific, and he did not offer any instruction to cover his alleged alternative claim for participation in the soil bank payment. It was his duty to present to the court an instruction on his theory of the case. "A party failing to request a definite instruction is in no position to complain that one was not given," *Wallace* v. *Riales,* 218 Ark. 70, 234 S. W. 2d 199; "Appellant can not complain that the trial court failed to give an instruction that was not asked by appellant," Headnote 6, *Ward Furniture Mfg. Co.* v. *Isbell,* 81 Ark. 549, 99 S. W. 845; "One who appeals cannot complain that the instructions of the lower court were incomplete if he made no effort to have the omissions supplied at the trial," Headnote 4, *White* v. *McCracken,* 60 Ark. 613, 31 S. W. 882.

Accordingly the judgment is affirmed.

SONGER *v.* SONGER.

5-1586 314 S. W. 2d 223

Opinion delivered June 16, 1958.

Terral, Rawlings & Boswell, for appellant.

Howell, Price & Worsham, for appellee.

ED. F. MCFADDIN, Associate Justice. This case involves the custody of two little boys, Larry and Chris Songer. Mr. and Mrs. Songer were married in 1936, and had five children[1] before they were separated on May 4, 1955: Mrs. Songer became enamored of Mr. Halcumb. The five children, and their ages in 1957, are: Caroline Songer McNeill, a woman of full age; Tommy Songer, a boy aged 17; Larry Songer, a boy aged 10; Chris Songer, a boy aged about 5; and Cynthia Gale Songer, a girl of tender years.

[1] Mrs. Songer had a sixth child born after the separation. The custody of that child is not here involved.

On April 10, 1956 Mrs. Songer obtained a divorce; and the decree, insofar as refers to the custody and support of the children, provided:

"The custody of the minor children of the parties hereto is awarded to the plaintiff (Mrs. Songer), with the right of visitation of defendant (Mr. Songer) at reasonable times. Defendant shall pay $125.00 per month for the support and maintenance of Larry Songer, Chris Songer, and Cynthia Gale Songer, which sum shall be automatically reduced to $100.00 per month if and when the plaintiff remarries, and to $75.00 per month when Larry Songer is married, becomes of age, self-supporting, or ceases to live in the home of Jewel Songer, and when Chris Songer reaches such status it shall be reduced to $50 per month for the support of Cynthia Gale Songer."

On May 31, 1957 the foregoing custody order was modified so that Mr. Songer was given the custody of the two boys, Larry and Chris, for all of June, July, and August (except for the period from June 21st to June 29th) and with right of visitation afforded the mother.[2] On June 4, 1957 Mrs. Songer married the previously mentioned Mr. Halcumb, and we will refer to her as Mrs. Songer-Halcumb.

On August 15, 1957 Mr. Songer petitioned the Court for the full custody of the boys, Larry and Chris, with their mother, Mrs. Songer-Halcumb, to have the right of visitation. Trial on the issue of custody of Larry and Chris resulted in a decree refusing Mr. Songer his prayed relief; and from that decree there is this appeal.

At the outset it is admitted by all parties that the burden on Mr. Songer in the Chancery Court was twofold: (a) to show that it was for the best interests of the two boys, Larry and Chris, that the father have their custody; and (b) that a change of circumstances had come about since the entry of the custody order con-

[2] The monthly support payment for the boys was abated during June, July, and August.

tained in the divorce decree of April, 1956. In *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8, Mr. Justice ROBINS stated the law:

"While any order as to custody of a child is subject to future modification by the court making it, the rule, uniformly adhered to by us, is that before such modification may be made it must be shown that after the making of the original order, there has been such a change in the situation as to require, in the interest of the minor, the change to be made, or it must be shown that material facts affecting the welfare of the child were unknown to the court when the first order was made."

To recount all the evidence in this case would present a rather sordid picture and would serve no useful purpose. To discharge the two-fold burden resting on him as aforesaid, Mr. Songer showed, *inter alia*: (a) that Mrs. Songer had married Mr. Halcumb, the man who had disrupted the Songer home; (b) that Mrs. Songer-Halcumb worked, away from home, from 7:15 in the morning until 3:45 in the afternoon and it was necessary to leave the children with someone during all of such absence; (c) and that Mr. Songer had married a fine Christian lady who did not work and who testified that she wanted the two Songer boys in her home and that she would look after them and provide them with every possible care.

Mr. Songer also testified that on May 31, 1957, he saw Mrs. Songer-Halcumb's car, with three of the Songer children in it parked, in front of a beer joint on East Ninth Street in Little Rock; and that Mr. Halcumb and Mrs. Songer-Halcumb came out of the beer joint and got in a fight; that Larry and Chris Songer got out of the car screaming and crying; and that Tommy Songer got out of the car and had an encounter with Mr. Halcumb. Mrs. Songer-Halcumb took the witness stand; and did not deny this testimony. Mr. Halcumb — although present in Court — did not testify, either to deny the brawl incident or to say that he wanted the two children, Larry and Chris, in his home. Furthermore, it was

shown that the two older Songer children (the daughter, Caroline Songer McNeill, and Tommy Songer) have become hostile to their father. We apprehend that if these two little boys, Larry and Chris, remain in the Halcumb home they will be encouraged to develop a like hostility toward their father, who is shown to be devoted to them and to be a regular church attendant. An unfortunate situation envelops the two Songer children, Larry and Chris; but under all the circumstances, we hold that the father, Mr. Songer, is entitled to their care and custody, with the mother to have the rights of visitation.

The lower Court awarded Mrs. Songer-Halcumb $100.00 for attorneys' fee. We also reverse that portion of the decree; but we hold that the costs of both Courts should be equally divided.

The cause is remanded to reinvest the Chancery Court with jurisdiction to enter and enforce a decree in keeping with our holding herein.

ROBINSON, J., dissents.

NEILSON *v.* HASE.

5-1611 314 S. W. 2d 219

Opinion delivered June 16, 1958.

Paul E. Gutensohn, for appellant.

Daily & Woods, for appellee.

MINOR W. MILLWEE, Associate Justice. Appellees, Fred C. Hase and Elsa A. Hase, his wife, were the owners in fee simple of 160 acres of land in Sebastian County, Arkansas, prior to October 12, 1949. On that date they conveyed an undivided one-half interest in the minerals, and said interest subsequently passed through mesne conveyances to the appellants, C. M. Neilson and Woods Oil Corporation. After execution of the 1949 mineral deed, Fred C. Hase and wife continued to be the owners of the surface and an undivided one-half interest in the minerals until January 7, 1952, when they executed a full interest oil and gas lease to appellee, C. J. Haller, who in turn assigned said lease to appellee, Carter Oil Company.

The undivided one-half mineral interest severed by the 1949 deed was separately assessed for the 1952 general taxes which became delinquent. At the annual tax sale on November 9, 1953, appellee, Fred C. Hase, bid in the undivided one-half mineral interest and at the end of the two-year redemption period received a deed to said interest from the county clerk.

Appellants, C. M. Neilson and Woods Oil Corporation brought the instant suit on September 30, 1957, claiming that the purchase by Fred C. Hase at the 1953 tax sale of the forfeited one-half interest in the minerals should be treated as a redemption for the benefit of the appellants as his co-tenants, and not as a purchase; and that said tax deed should be declared void and title to said mineral interest quieted in appellants upon their tender to Hase of the amount of said delinquent taxes, penalty, interest and costs. Appellants also al-

leged a number of irregularities connected with the tax sale and the record of the assessment of the severed mineral interest but these allegations were not sustained by the proof. This appeal is from a decree adverse to appellants in which the chancellor found: "The conveyance in 1949, by defendants Fred C. Hase and Elsa A. Hase, of an undivided one-half interest in the oil, gas and other minerals did not create a tenancy in common between Hase and his grantees, but created two separate, distinct taxable estates to which Ark. Stats. Sec. 84-1304[1] does not apply."

It is undisputed that Fred C. Hase and wife owned the surface and undivided one-half mineral interest and that appellants owned the other one-half mineral interest in the lands as a result of the 1949 and other conveyances executed prior to the 1953 tax proceedings. Appellants contend the chancellor erred (1) in refusing to hold they were tenants in common as to said mineral interest, and (2) that the purchase by Hase of the tax title to the separately assessed one-half undivided mineral interest constituted a mere redemption for the benefit of appellants, his cotenants.

We find it unnecessary to determine whether Hase and the appellants were cotenants. Conceding, without deciding, that they were tenants in common, the purchase of the tax title by Hase did not amount to a mere redemption for the benefit of his cotenants. Appellants rely on the general rule that a cotenant who acquires a tax title to the entire property, either by purchasing at the tax sale himself, or subsequently buying from a purchaser who bought at such sale, cannot assert such title against his co-owners, except as a basis for contribution to repay him for his expenditure. His purchase simply amounts to a payment of the taxes, or a

[1] Sec. 84-1304 reads: " 'The purchaser at the sale of lands or lots, or parts thereof, for the taxes of the interest of any joint tenant, tenants in common or coparcener, or any portion of such interest, shall, on obtaining the deeds from the clerk of the county, hold the same as tenant in common with the other proprietors (or proprietor) of such land, or lot, and be entitled to all the privileges of a tenant in common, until a legal partition of such land, or lot, or part thereof, shall be made.' "

redemption from the sale, and gives him no right except to compel contribution. We have recognized this well-established rule in numerous cases but it is inapplicable here.

An exception to the foregoing general rule arises where the land has been assessed upon the tax books to and in the names of the owners of the undivided interests respectively, and when the owner of each undivided interest could have paid his own tax unaffected by the fact of joint interest, and where the subsequent tax sale and deed are based upon the separate assessment. The annotator states the applicable rule in 54 A. L. R. 906, as follows: "Where taxes are assessed separately against the interest of each cotenant, rather than against the common property as a whole, any cotenant may acquire exclusively for himself, with his own money, title to parts of the property based upon tax sales against the other cotenants, provided, of course, he acts in good faith, and is under no contractual obligation, express or implied, to pay taxes assessed against his cotenants." So, where the undivided interests of tenants in common are separately assessed, and there is no obligation resting on one of the tenants to pay the taxes of the others, he may acquire the interests of his cotenants through a sale thereof for delinquent taxes. 86 C. J. S., Tenancy in Common, Sec. 64 b (1).

Many cases recognizing the exception to the general rule are collected in other annotations on the question in 70 Am. St. Rep. 101; 116 Am. St. Rep. 368; 85 A. L. R. 1538. One of these is *Brittin* v. *Handy,* 20 Ark. 381, 73 Am. Dec. 497, where the court approved the following statement from 1 Lomax Dig. 262: "It is, therefore, considered that joint tenants and coparceners stand in such confidential relations in regard to one another's interest, that one of them is not permitted in equity to acquire an interest in the property hostile to that of the other. And, therefore, a purchase by one joint tenant or coparcener of an incumbrance on the joint estate, or an outstanding title to it, is held at the election of his co-tenants within a reasonable time, to inure to the

equal benefit of all the tenants, upon the condition that they will contribute their respective ratios of the consideration actually given.

"The same equity is considered as subsisting between tenants in common under the same instrument. But it is suggested that tenants in common, probably, are subject to this mutual obligation only where their interest occurs under the same instrument, or act of the parties, or of the law, or where they have entered into some engagement or understanding with one another, for persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests, than would be required between strangers." The *Brittin* case is also cited in support of the following statement of the rule in Thompson on Real Property, Sec. 1862: "If tenants in common occupy and improve the common land in severalty, and each is assessed and pays taxes on a particular portion, one of them can not afterwards, upon a sale of the land for taxes in separate parts, invoke the relation of cotenancy to defeat the tax title acquired by the other." See also, 14 Am. Jur., Cotenancy, Sec. 54. We are convinced the same rule should apply to a purchase by a cotenant of a tax title to undivided mineral interests separately assessed, as in the instant case. The Oklahoma court so held in *Patterson* v. *Wilson,* 203 Okla. 527, 223 P. 2d 770.

We have held that the sale of an undivided mineral interest operates as a severance of said interest from the surface and creates two separate and distinct estates. *Huffman* v. *Henderson Co.,* 184 Ark. 278, 42 S. W. 2d 221. In *Pasteur* v. *Niswanger,* 226 Ark. 486, 290 S. W. 2d 852, we said: "Owners of leasehold working interests are not cotenants of the owners of the fee or surface of the land. Their interests are of a different kind. Their interests are also of a different kind to the interests of the owners of mineral rights where severed from the land."

Regardless of whether Fred C. Hase was a tenant in common with the appellants, or the owner of a completely separate and independent estate, his purchase of the separately assessed mineral interest at the tax sale did not constitute a mere redemption inuring to the benefit of the appellants. When he executed and delivered the deed to the undivided one-half mineral interest and received the consideration therefor, there remained no duty or obligation, legal or moral on his part to pay the taxes on such interest, and it is not shown that he was guilty of any fraud or inequitable conduct in connection with his purchase of the tax title. It follows that Sec. 84-1304, *supra,* does not apply where the tenant in common merely purchases an undivided mineral interest separately assessed and there is no duty resting on him to pay the taxes on such interest. Since the regularity of the 1953 tax sale is not in question, the chancellor acted correctly in dismissing appellants' complaint seeking cancellation of the 1955 tax deed and in quieting the title of the appellees as against the appellants. The decree is accordingly affirmed.

ROGERS *v.* CROWDER.

5-1616 315 S. W. 2d 914

Opinion delivered June 16, 1958

[Rehearing denied September 29, 1958.]

A. A. McCormick, for appellant.

J. Sam Wood, for appellee.

George Rose Smith, J. This controversy over the custody of a nine-year-old boy is between the child's father, the appellant, and the child's maternal grandmother, who was appointed as guardian for the boy after the death of his mother. This appeal is from the chancellor's denial of the father's petition for a change of custody.

The child's parents, Clinton and Wanda Rogers, were married in 1947 and were divorced in 1949. The divorce decree awarded the custody of the couple's six-month-old son to the mother and directed the father (the present appellant) to pay $15 a week for the child's support. Within fifteen days after the entry of the decree Rogers was jailed for failure to make the required weekly payments. Upon his promise to make proper arrangements for the infant's support Rogers was released a month later. He at once left the state, settled down in Oregon, and from that distant point ignored the order of support for about eight years. Rogers says that during those years he sent money from time to time to his former wife, although the decree required that the payments be made into the registry of the court. He did not, however, produce any canceled checks or other evidence that would convincingly corroborate his rather vague assertions that he made contributions toward the child's maintenance. The chancellor was justified in concluding that Rogers pretty well disregarded his responsibility as a father until the present petition was filed in November, 1957.

In the meantime Wanda Rogers, the child's mother, was left with the burden of providing for the infant. Wanda remarried within a few months after her divorce, but she and her second husband, a man named Curry, found it necessary to move into the appellee's home and to depend at least to some extent upon Mrs. Crowder for financial help. There can be no doubt that over a period of years Mrs. Crowder assisted in the care of her grandson and helped to meet the family expenses. In September of 1957 Curry killed his wife, Wanda, and then committed suicide; this tragedy was followed by

the appointment of Mrs. Crowder as the child's guardian, and later on the present petition for a change of custody was filed.

In refusing to change the existing arrangement the chancellor found by his decree: "That the child is nine years old, in good health, attends school regularly, and from his appearance in court on the day of this hearing seems to be well adjusted to being with his grandmother. That he obeyed her, was devoted to her, and appeared to look upon her as his own mother. That the testimony showed that the grandmother had reared the child in her home most of the time since his birth . . . That the defendant father is now married to a 23-year-old woman, has one child by this second marriage, and said wife is now pregnant with child. That this court had no opportunity to see this woman. That said woman did not appear in court, nor did she testify by deposition. That this court has no way of knowing whether she would be a fit mother for the nine-year-old boy or not. That apparently the boy has never seen this woman whom defendant asks that this court deliver the boy to, to rear him from now on. That this court has no assurance that the new wife would rear the child properly, see that he attended school or church, etc. That this court does not even know that the new wife would agree to rear the child at all, if defendant were allowed to take him back to Oregon with him."

As we view this record the appellant's contention narrows down almost entirely to the fact that he is the boy's father and therefore occupies a position that is *prima facie* superior to that of the child's grandmother. Even so, the many other circumstances disclosed by the proof so strongly support the trial judge's conclusion that we do not feel warranted in setting aside his decree. Our reluctance to differ with the chancellor is of course enhanced by the fact that he saw both the contending parties on the witness stand and thus had, in contrast to us, an advantage that is immeasurable in a case of this kind.

A minor contention is that the chancellor erred in overruling the appellant's demurrer to the intervention filed by Wanda Curry's administrator, who sought to recover the support payments that had accrued since the entry of the original divorce decree. This issue, however, has not yet been determined on its merits, and of course an order that merely overrules a demurrer is not a final judgment from which an appeal may be taken. *Ark. State Bd. of Architects* v. *Larsen,* 226 Ark. 536, 291 S. W. 2d 269.

Affirmed.

ANDERSON *v.* MCCLANAHAN.

5-1578 314 S. W. 2d 222

Opinion delivered June 16, 1958.

Reives & Smith, for appellant.

Hale & Fogleman, for appellee.

PAUL WARD, Associate Justice. This appeal comes as an aftermath of a recent decision by this court, involving these same parties, rendered March 11, 1957; *Weeks, et. al.* v. *McClanahan,* 227 Ark. 495, 300 S. W. 2d 6. To understand the issue on this appeal it is necessary to set out briefly pertinent portions of the former decision. The parties involved were: Anderson, landowner; McClanahan, lessee, and; Weeks, a subtenant under McClanahan. The trial court in the first case rendered a decision in favor of McClanahan against Anderson (and also Alton Weeks) for double the rental value of 412 acres of land (at $18 per acre) on the theory

that Anderson (the owner of the land) conspired with Weeks (who had subrented from lessee McClanahan for the year 1951) to keep McClanahan from getting possession of the 412 acres for the year 1952, in violation of Ark. Stats. § 50-509. This court, on appeal, held that the trial court erred in assessing double damages against Anderson instead of single damages, and remanded the cause to the trial court with instructions to correct that error.

Upon remand the trial court followed this court's instructions and rendered judgment against Anderson for single damages in favor of McClanahan.

Anderson, appellant here, argues that the trial court should have reduced the judgment against him by the amount of rent which McClanahan was obligated to pay Anderson for the land. It is not disputed that McClanahan was to pay Anderson $11 per acre for the 412 acres of land for the year 1952.

On this appeal Anderson says: "The sole question is: Did the Circuit Court err in fixing the damages of appellee as to Anderson . . . at one year's rent based on a value of $18 per acre, instead of rendering judgment only for the difference between the rent reserved and the rental value?" It is of course the contention of appellant that the trial court did so err, and it is the contention of appellee that the question raised by appellant was settled by the first decision rendered by this court. We find ourselves in agreement with appellee's position for the reasons set out below.

On March 14, 1957, (6 days after the delivery of our first opinion), Anderson filed a Motion in this court to clarify the opinion and judgment. In that Motion Anderson raised precisely the same question which he raises here. He there stated: "That the term 'single damages' should be defined as meaning those damages determined by application of the usual and ordinary rule of measurement, that is, the difference between the rent reserved and the rental value of the premises." A response was filed by McClanahan resisting Anderson's

motion to so clarify in which it was suggested that the "ordinary rule" relied on by Anderson did not apply when damages are assessed under Ark. Stats. § 50-509, and also that under our original opinion Anderson had already been given credit for the rental value of his land. The motion filed by Anderson was denied by this court.

We do not, at this time, attempt to revaluate the validity of the conflicting contentions presented by both parties presented on the said motion, but we do hold that our former opinion, together with our denial of the motion, constitutes the law of the case, and therefore settles the issue here against the contention of appellant.

Affirmed.

HOBBS WESTERN TIE COMPANY *v.* ORAHOOD.

5-1567 315 S. W. 2d 930

Opinion delivered June 16, 1958.

[Rehearing denied September 29, 1958.]

Gentry & Gentry and *Herrn Northcutt,* for appellant.

Green & Green, West Plains, Mo., and *Oscar E. Ellis,* for appellee.

SAM ROBINSON, Associate Justice. This is a personal injury case. Plaintiff, Othel Orahood, appellee, obtained a judgment in the sum of $4,500 as damages for personal injuries sustained when she was struck by a crosstie which fell on her from a truck that was being unloaded. Appellants contend there was no substantial evidence to sustain the verdict, and that an admission said to have been made by one of the defendants to the plaintiff was inadmissible in evidence.

The defendant Hobbs Western Tie Company is in the railroad crosstie business and has places of business in several localities, one of which is at Mammoth Spring. The Mammoth Spring operation was in charge of Lester Quarles, an employee of Hobbs Western. About 4:00 p. m. on June 16, 1956, Herschel Abney brought a truck load of ties to Hobbs Western's place at Mammoth Spring for the purpose of selling them. Mr. Quarles agreed to buy the ties, and instructed Abney where to place his truck for the purpose of unloading them. The spot where Quarles instructed Abney to place his truck for unloading purposes was partly on the public road and partly on the private property of Hobbs Western. Appellee, Mrs. Orahood, worked for a chicken processing plant and was on her way home, walking on the side of the public road opposite the side where the truck was parked. Just as she was passing the truck, one of the crossties from the truck struck her about the legs, causing serious injury. Appellants contend that the agent of Hobbs Western, Quarles, who was present, had no control over unloading the truck — that he was merely inspecting the ties; but it is admitted that Quarles, as agent for Hobbs Western, instructed Abney to place the truck partly on the public road to unload it.

Negligence is the doing of that which an ordinarily prudent person would not do under the circumstances, or the failure to do that which an ordinarily prudent

person would do under the circumstances. It was a question for the jury to determine whether it was negligence for Quarles to have the truck placed partly on the public road to be unloaded. It is a matter of common knowledge that railroad crossties are very heavy timbers. Whether Quarles should have anticipated that the very thing that did happen might happen was a question for the jury.

There is no showing as to what caused the tie to be propelled from the truck and strike Mrs. Orahood, except the testimony of Jim Romine, who was assisting in unloading the ties, and he testified:

"Q. After the truck was stopped where Mr. Quarles directed you, who actually unloaded the ties?

A. I did.

Q. Did you push the ties off the truck on to the ground?

A. Yes."

To sustain their position, appellants cite *Leonard* v. *Standard Lbr. Co.,* 196 Ark. 800, 120 S. W. 2d 5. There it was held that the owner of a mill was not liable for injuries received by a person when struck by lumber from a truck when the lumber was being unloaded on the mill property and the mill owner had no control over the person unloading the lumber. There is quite a distinction between that case and the case at bar. In the *Leonard* case the lumber was being unloaded on the private property of the mill owner. There was no question of the public road being used as a place to unload the lumber. Appellants also cite *Willoughby* v. *Hot Springs Ice Co.,* 180 Ark. 231, 21 S. W. 2d 168. This case is hardly in point. One customer of an ice company negligently and carelessly ran into and killed another customer of the ice company on the ice company's property. A public street or road was not involved. This Court quoted with approval from the case of *Manning* v. *Sherman,* 110 Me. 332, 86 A. 245, 46 L.R.A.N.S. 126, as follows: ". . . The fact that the negligent act which caused the injury was done on a per-

son's land or property will not render him liable, where he had no control over the persons committing such act, and the act was not committed on his account . . ."

In the case at bar appellants were responsible for the heavy crossties being unloaded from the truck while it was parked partly on the public road. The agent for the appellant Hobbs Western instructed the driver of the truck to stop the truck at that place to unload it, and he knew pedestrians customarily walked along that road. It was a question for the jury to say whether this action of the agent, Quarles, constituted negligence. In the case of *Blakely & Son* v. *Jones,* 186 Ark. 1169, 57 S. W. 2d 1032, we said: "In determining what is or is not negligence in any given case, the test is always what in the light of all the circumstances and in situations similar to that of the person under inquiry, one of ordinary prudence would or would not do, and where men of ordinary intelligence might differ in their honest judgment, the question of negligence is one for the jury." And in 65 C. J. S. 592, it is said: "A person responsible for a place, agency, instrumentality, or operation which is dangerous and likely to cause injury or damage to persons or property rightfully in its proximity is charged with the duty of taking due and suitable precautions to avoid injury or damage to such persons or property. . . . A person responsible for a dangerous place or instrumentality must guard, cover, or protect it for the safety of persons or animals rightfully at or near it, and his failure to do so is negligence. . . ."

When human life is at stake, the rule of due care and diligence requires that, without regard to difficulties or expense, every precaution must be taken reasonably to assure the safety of any persons lawfully coming into immediate proximity of a dangerous agency or device. *Been* v. *Lummus Co.,* 173 P. 2d 34, 76 Cal. App. 2d 288.

Mrs. Orahood testified that subsequent to the time she received the injuries Mr. Quarles, one of the defendants in the case, told her "We are to blame and I hope you get a reasonable settlement." This testimony

was given over the general objection of the defendants, but the court was not asked to instruct the jury that the statement should be considered only as against Quarles, who had made the statement. This was an admission on the part of Quarles and was clearly admissible against him. No doubt if the request had been made the trial court would have told the jury not to consider the statement as against Hobbs Western. "The admissions of a party made directly by him, . . . relative to the subject matter of a suit are received as original evidence against such party, where inconsistent with the claim which he asserts in the action, whether he is the plaintiff or the defendant." 20 Am. Jur. 460.

Affirmed.

HARRIS, C. J., and GEORGE ROSE SMITH, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting. In my opinion, the Court should have directed a verdict for the defendant, Hobbs Western Tie Company. Bouvier's Law Dictionary defines negligence as:

> "The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do.
>
> * * *
>
> Such an omission by a reasonable person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter.
>
> * * *
>
> Negligence, in its civil relation, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another."

I am unable to see that the injury which occurred to Mrs. Orahood was one that Lester Quarles, foreman for

Hobbs Western, could reasonably foresee to be a result of his directing the truck to be parked in a manner in which it partly protruded into the road. Let it be borne in mind that the parking of the truck is not what occasioned the injury. The injury was caused by a tie falling from the vehicle, and the placing of the truck in that location was not the proximate cause of the accident; it might be otherwise if a vehicle, traveling the road, had struck the truck, which protruded into the highway. In other words, at the time of directing the location for the parking of the truck, Quarles reasonably could not foresee that those in charge of the truck would permit a tie to fall off at the same time a pedestrian walked by—and that such pedestrian would be walking close enough to the truck to be struck. The record shows that this manner of unloading had been used for a long period of time, apparently without mishap to anyone.

I cannot agree that Quarles was guilty of negligence. As stated in American Jurisprudence, Vol. 25, Sec. 307:

> "One of the uses, and the temporary obstruction incident thereto, to which streets, roads, and sidewalks are lawfully subject as of necessity is the loading or unloading of goods in the course of the transportation or delivery thereof to or from the abutting premises, including, as incidental thereto, the right to deposit such goods temporarily in the street or road, or on the sidewalk."

In the next place, I consider this case to be controlled by our decision in *Leonard* v. *Standard Lumber Company,* 196 Ark. 800, 120 S. W. 2d 5. In that case, Leonard drove his truck onto the premises of Standard Lumber Company, and stopped at a point designated by Standard's agent, in order to unload the lumber. Another truck, driven by one Johnson, with a load of lumber, entered the driveway, and parked opposite from the first truck, also for the purpose of unloading. When Leonard finished unloading, he went to the rear and pulled the standard from the cup, to place it in a box,

used for that purpose, to prevent losing it when moving while empty. While removing the standard, with his back to the second truck, the lumber fell from the latter, struck appellant, and severely injured him. The lower court gave an instructed verdict for the Standard Lumber Company, and Leonard appealed, contending that a jury question was made by the testimony. This Court said:

> "* * * The undisputed proof shows that appellee's agent *did not exercise any control over the manner of the unloading of the trucks by the truck drivers, but only directed that the lumber be stacked orderly on the platform after it was taken from the truck, and where it should be stacked.*[1] There is no evidence that appellee's agent knew anything about the condition of Johnson's truck and the placing of Johnson's truck in close proximity to that of appellant was as observable to appellant as it was to appellee's agent. Even if appellee's agent had known of the defective condition of Johnson's truck, it could not change the situation for neither Johnson nor appellant were employees of appellee, and no relationship existed that would authorize the application of the doctrine of *respondeat superior.*
>
> * * *
>
> 'When the injury is the result solely of the negligent act of a third person, who does not stand in such a relation to the defendant as to render the doctrine of *respondeat superior* applicable, no liability attaches to defendant.' * * *"

Here, Quarles had nothing to do with the unloading, but only graded the ties after they were removed by the truck driver and his assistant from the vehicle. I find no Arkansas case which holds this to be sufficient control to constitute liability. Let us say that a home owner purchases a load of dirt for the purpose of filling in his yard. The truck arrives, and the home owner points out the spot in the yard, near the street, where he desires the dirt to be placed, and tells the driver to park his truck

[1] Emphasis supplied.

at the edge of the yard, (still in the street) from which point the dirt can be unloaded in the desired location. This is done, and a pedestrian, using the street, walks by. The truck driver, in negligently unloading the dirt, permits part to fall on the pedestrian and injure him. According to my interpretation of the holding of the majority, this act of directing the driver to stop at the place most convenient for unloading the dirt, would render the home owner liable. I would conclude that hereafter, people who desire to fill in their yards, had best permit the heavy, loaded truck to be driven onto the premises. (This probably would require another load of dirt to fill in where the truck had been parked.) For that matter, if the home owner directs the truck driver to park in his yard, and an injury occurs, he may well be liable under the opinion of the majority, for under the principle enumerated therein, in telling the driver where to park, the truck is placed under his control.

Appellant, Hobbs Western, moved for an instructed verdict, and under the above reasoning, I feel it was entitled to same. Certainly it was not bound by the statement made by Mr. Quarles, mentioned in the majority opinion. This statement was made one year after the accident occurred, and after Quarles had ceased working for Hobbs Western. In addition, it was only an opinion, stating no facts upon which it was based, and I consider it inadmissible, as to the company.

For the reasons herein enumerated, I respectfully dissent. Justice George Rose Smith joins in this dissent.

4894 314 S. W. 2d 483

Opinion delivered June 23, 1958.

George E. Pike, Peyton D. Moncrief, Virgil Roach Moncrief and *John W. Moncrief,* for appellant.

Bruce Bennett, Atty. General, and *Clyde Calliotte,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Woodrow McMillan, was charged with murder in the first degree, and upon trial, was convicted of second degree murder and given a sentence of twelve years. The killing occurred shortly after midnight, March 3, 1957, and McMillan pleaded self defense. From such conviction, he brings this appeal.

According to the evidence, Carl McCown and wife operated a cafe located near the court square in DeWitt. McCown and appellant were in the cafe with others around 10 p. m., and McCown suggested that the group go to his home for a dice game. McMillan went along, and in the game lost what money he had, gave McCown a check for $10, and also lost that. After the game closed, the group returned to the cafe, and McCown parked his car at the back of the establishment. Subsequently, he went to his car, and McMillan later went and sat in the car with him. An argument ensued relative to the check which McMillan had given McCown, it being contended by appellant that the former had told him he would return the check. Appellant had in his possession a 22 calibre pistol. The parties subsequently got out of the car, and McCown started toward McMillan, either to strike him, or to get the gun. McCown knocked the first shot upward but McMillan continued to fire until the gun snapped. The magazine held nine

cartridges, and it later developed all were fired except one. McCown ran into the street, and fell dead, being hit by three bullets.

Numerous assignments of error are set forth in the motion for new trial, the first three questioning the sufficiency of the evidence. Proof on the part of the State showed that appellant went to his pickup truck and got the pistol before going to the "crap" game. On returning to the cafe, McMillan talked to different ones there, and then went out to McCown's car. According to the State's evidence, McMillan fired the first shot from the back seat of the automobile, and one Chester Edmondson testified as follows:

"I didn't pay too much attention as to who was in the car until I heard McCown say, put that gun down.

Q. Was there any loud talking?

A. No, they wasn't talking very loud.

Q. Now, when you saw McCown get out of the car was there anything in his hand?

A. No, sir, I didn't see anything.

Q. If he had of had anything in his hand could you have seen it?

A. Yes, sir, if it was very big.

Q. Then you could see his hands?

A. Yes, sir.

Q. Did he have any weapon in his hand?

A. I didn't see one.

Q. Now, after this shooting had taken place and after McCown started staggering away from McMillan, what did Woodie do?

A. He shot three or four more times."

The deceased's wife, Mildred McCown, testified:

"I went on about my work, and I heard something and I thought it was a firecracker at first so I went

to the front door and looked, and when I went to the door, Woodie had done got out of the back seat and the door was open, and Lewis Carl got out on the same side that Woodie got out on, and so Lewis Carl started toward Woodie and Woodie shot, and Lewis Carl hit his hand and knocked his gun up and the shot went up, and Woodie shot several times at Lewis Carl, and Lewis Carl had turned after he shot him with the first shots and he was running down the road, and I went to Woodie and tried to get the gun and Woodie just kept shooting Lewis Carl, and Lewis Carl fell right on his face, and he was dead by the time I got to him."

Charles Tiner, Chief of Police at DeWitt, stated:

"I went back to the police car, and I asked Woodie did he shoot Lewis, and he said yes, and I asked him why and he said he was tired of him running over him, and I asked him did he mean to kill him, and he said yes, he was tired of him running over him."

Further testimony on the part of the State was to the effect that McCown was unarmed. The above enumerated testimony, if believed by the jury, was certainly sufficient to sustain a conviction for second degree murder. As stated in *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26:

"There is ample evidence to support the finding of the jury. Under the settled rules of practice the jury is the judge of the credibility of the witnesses and the weight to be given to their testimony, and it is also a well-settled rule that the evidence admitted at the trial will, on appeal, be viewed in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict of the jury, it will be sustained."

Numerous other cases denote the same holding.

By assignment No. 4, appellant contends that it was error for the court to fail to sustain his objection to a statement made by the prosecuting attorney during the State's closing argument, and that such statement was inflammatory and prejudicial to him. The statement ob-

jected to was ". . . if you turn him loose, then let him go out and kill someone else for a $10 worthless check . . .". Following this remark and an exchange of comment between the prosecutor and appellant's counsel, in which a derogatory remark, unconnected with the evidence, was made by defense counsel concerning the deceased, the court admonished the jury, stating:

"These statements are improper to make before a jury as they are not any part of this law suit and the jury is not to consider them. The Prosecuting Attorney has a right to express his opinion in the argument of this case as does the attorney for the defendant, but the jury is to try this case on the law and the testimony and not on the argument of counsel."

In *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946, this Court said:

"This Court will always reverse where counsel go beyond the record to state facts that are prejudicial to the opposite party unless the trial court, by its ruling, has removed the prejudice * * * but this court does not reverse for the mere expression of opinion of counsel in their argument before juries unless so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect. * * *"

See also *Tillman* v. *State,* 228 Ark. 433, 307 S. W. 2d 886.

Several assignments of error deal with the court's refusal to sustain objections to the testimony of Russell McCollum, Coroner of Arkansas County. McCollum's testimony dealt with statements made to him by appellant a short time after the killing. We do not agree that this was error. As stated in *Dearen* v. *State,* 177 Ark. 448, 9 S. W. 2d 30:

"* * * It is always permissible to prove declarations against a person charged with an offense, if his declarations and admissions tend to show in any way his connection with the crime charged, or tend to prove his guilt. * * *"

A long line of Arkansas cases hold likewise. According to the evidence, the statements made by appellant to McCollum were voluntarily made, and in fact, it is not contended otherwise, except that appellant testified he was nervous and upset at the time the questions were asked. Appellant objected to each question propounded to the coroner and answer given, contending that McCollum was actually conducting an inquest, and had not complied with the statute governing such hearings. It is specifically contended that the statute was not complied with in the following respects: no jury was summonsed as required by Sec. 42-302, Ark. Stats. (1947) Anno., and the testimony was not reduced to writing as required by Sec. 42-307. Let it first be said that the interrogation of appellant by the coroner does not reach the dignity of a formal hearing. According to appellant's own testimony, he was not sworn, and there was no semblance of a "hearing" as the word is commonly used. In other words, no inquest was held. There was no occasion for a hearing, since appellant freely admitted the killing. It is true that certain declarations against interest were made by appellant during the questioning, but, as stated, the evidence reflects these statements were voluntarily made. Appellant also contends that he was not warned that anything he might say could be used against him. While it is preferable that the accused be so advised, the failure to do so does not invalidate a confession. The situation here is analogous to the situation in the early case of *Wilson* v. *United States,* (which was originally tried in the Western District of Arkansas) found in 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090. There, Chief Justice Fuller, speaking for the Court, said:

"In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.

The same rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made, * * *.

* * * where the accused is sworn, any confession he may make is deprived of its voluntary character, though there is a contrariety of opinion on this point. * * * The fact that he is in custody * * * does not necessarily render his statement involuntary, * * *. And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. * * *

In the case at bar, defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. * * *"

There was no error in admitting the testimony of the coroner.

It is next contended the court erred in giving certain instructions and refusing to give others requested by appellant. We have examined all the instructions, offered, refused, and given, and we find no error committed by the court as against the objections made.

Appellant's main argument for reversal is based upon remarks made by the trial court in the presence of the jury concerning certain evidence offered by appellant with reference to an infected or diseased ear, with which he allegedly was afflicted, and it is further contended that the court erred in refusing to permit several witnesses to testify relative to such physical condition. We will first discuss the latter contention. Five witnesses had previously testified regarding the condition of McMillan's ear, and appellant offered in evidence a notice from the Veteran's Hospital to appellant, directing that McMillan report back for further examination. The court correctly excluded this exhibit, as it was not in proper form for introduction, and then announced:

"All right, but let me state further, Mr. Moncrief, that the Court does not think that it is necessary to in-

troduce any further testimony on the ear matter and that the testimony has just been cumulating in this case, so the Court will not allow anymore testimony pertaining to the ear matter.

Mr. Moncrief: Note the defendant's exceptions. If the court please, since the jury are laymen and might not understand the use of the word cumulating, I wish you would explain it to them.

The Court: That means the same kind of testimony just piling up witness after witness about the same thing.

Mr. Moncrief: If I understand the court correctly, the trial court has a right to say you should or should not call but so many witnesses to testify about one certain thing.

The Court: Yes, that is correct. It is just like if you were trying to prove someone's reputation. You might have a thousand witnesses to testify as to their reputation, but who would want to sit here and hear a thousand witnesses testify about the same thing, so the courts hold that a trial court has a right to make a reasonable limit on those kind of witnesses so that is the reason for my actions."

Appellant contends that this was error, but we do not agree. In *Sheppard* v. *State,* 120 Ark. 160, 179 S. W. 168, Justice Kirby, speaking for the court, said:

"It is next contended that the court erred in refusing to allow the ten other witnesses produced to testify in support of the alibi. Their testimony would have been cumulative, and it is not disclosed that any of said witnesses had any special or peculiar knowledge that would have tended more strongly to convince the jury of the truth of their statements of the whereabouts of appellant than that already given by the numerous witnesses who had testified, nor that any of them were of such standing that their statements would have carried more weight than that of the others, and the court did not err in refusing to permit them to testify. It is with-

in the sound, judicial discretion of the trial court to limit the number of witnesses permitted to testify about a particular fact and to decide where and when the introduction of cumulative testimony shall stop and, while in capital cases this discretion should be cautiously exercised, it will not be controlled unless it appears to have been manifestly abused."

We think it was sufficiently established that appellant had been suffering with some sort of ear infection, and additional testimony upon the subject would have been entirely cumulative.

We come now to a discussion of appellant's contention concerning the remarks by the court. The first witness offered by the defendant, John Varnadore, was asked the question:

"Do you remember what his physical condition was with reference to any ailment?

Mr. Lee: I object to this, he is no doctor.

The Court: I don't see that it has anything to do with it.

Mr. Moncrief: It has a great deal to do with it. We have heard as to the relative sizes of these men so we want to show the physical condition of these men, or of Mr. McMillan, that is."

The court permitted the question, and subsequently in the examination, another question was asked relative to the ear.[1] Upon objection by the State, the court invited appellant's counsel to explain his theory.

"Mr. Moncrief: Just this, if a man is assaulted and he is a normal person, that person might be able to withstand an assault or blow, but if he is a person that is not normal and has a dangerous condition about him that is susceptible to a blow that would either kill him or cause him great bodily injury, he would certainly

[1] Varnadore's testimony about the ear was as follows: "The ear drained and it would sometimes drain down on his shirt and he would have to keep putting cotton in his ear, and he would have to do that three or four times a day. * * * Yes, there seemed to be blood and pus."

have a right to defend himself against any assault that he, in good faith, believes would do him great bodily injury, and he, the defendant, would certainly have the right to protect himself under those circumstances, as we expect to prove in this instance. If a man is not able to withstand blows, he would fear blows if he was in such a condition that would cause great injury to him. The defendant's case has to be viewed from the standpoint from what his belief is so long as he acts as a reasonable person would under the same similar conditions.

The Court: I understand what you are trying to prove, but you are going too much in detail about his conditions. We are not trying a personal injury suit. I don't mind you laying the foundation what you are trying to prove, but you are going in too much detail."

McMillan testified he had had trouble with his ear for a year or two before the killing, and that it had constantly bothered him; that he had received treatment for the ear condition from different doctors in DeWitt, and had gone to the Veteran's Hospital in Little Rock, but had not been able to obtain relief. He testified his condition grew worse,[2] and the court remarked:

"Let's not go into much detail about that, Mr. Moncrief. This is not a personal injury suit, and I can't see where it would be competent in a criminal suit, and I don't think, by going into all of the details, that it would shed any light on the case.

Mr. Moncrief: Note the defendant's exceptions.

Q. If your Honor please, I would like to ask this question, whether or not, after an x-ray examination was done, and what were the results to him and whether or not he would withstand a blow if the blow happened to fall on the left side of his head. We want to show that he did undergo this operation and that the bone was affected in the area of the left ear and that it left a condition that he believed he couldn't withstand a blow that

[2] McMillan's foster mother testified there was a discharge from his ear with "an awful odor" which she would help clean out.

might happen to fall on the area of the left side of the head. * * *

The Court: I will let the record show that this ear was in a condition, but I cannot see that it would be competent, you can save your exceptions if you want to. You have shown what you wanted to.

Mr. Moncrief: I cannot state it in detail as to the removal of the bone in the ear and the fact that skin was taken from one part of his body and put on a part of his ear in order to protect the bone.

The Court: You have certainly got it in the record now.

Mr. Moncrief: If the Court please, I would like to go in chambers and make the available proof. We are asking that the available proof be made in the absence of the Jury if it is not allowed to make the available proof before the Jury.

The Court: Overruled, save your exceptions.

Mr. Moncrief: Note the defendant's exceptions. May I ask this, if the Court please, that if he had a fear that a serious blow to his ear or the area of the ear or the head might likely result in a great bodily injury to him or result fatal to him.

The Court: I don't think that would be competent, Mr. Moncrief."

It would appear that counsel's contention was conveyed to the jury, but this, of course, did not constitute evidence. In several instances, questions relating to the ear were properly ruled inadmissible; for instance, Lem Burton was asked the question: "In going fishing and hunting with McMillan, was he more careful than you in dodging limbs and bushes?" Any answer, of course, by the witness, would have been pure opinion. We are of the view however, that competent evidence as to appellant's physical condition was proper and relevant. He was entitled to show his physical, as well as mental, condition at the time of the offense charged. As stated in *Sage* v. *State,* 91 Indiana 141:

"Independently of any question of insanity, the defendant in a criminal cause has the right to have his general physical as well as his mental condition at the time of the commission of the supposed crime explained to the jury, so as to put them in possession of all the facts connected with the transaction, and the better to enable them to judge of its character."

Also, in *Rector* v. *State,* 11 Ala. App. 333, 66 Southern 857:

"If the deceased had in fact recently been ill, it was a circumstance the jury could look to, in connection with all the other evidence in the case, in determining whether or not the deceased assaulted the defendant, and, if so, in determining the character and nature of the assault."

Such a conclusion is logical, for it might well be that one physically incapacitated would hesitate far longer to precipitate an altercation than one who is sound in body; at least, the jury was entitled to take into consideration such fact during their deliberations, as relating to the possible aggressor. Since we consider such evidence competent, it definitely appears that the remarks of the Court amounted to comment upon the weight of the evidence. On two occasions, the Court, though admitting the evidence, stated: "This is not a personal injury suit," and three times made remarks to the effect that the Court did not consider the evidence competent or relevant. It must be remembered that many jurors are serving for their first time, but, for that matter, even though they have served numerous times, the attitude, statements, and opinion of the court probably make a more indelible impression upon the mind of the juror than any other factor during a trial. To the jury, his word is the law. As stated by the late Justice Butler in *Western Coal & Mining Company* v. *Kranc,* 193 Ark. 426, 100 S. W. 2d 676:

"Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of

the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony, or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other.

The remarks indulged in by the trial court in the instant case to our minds had the effect of minimizing the value of the evidence admitted. * * *"

Likewise, as stated by the beloved Judge Battle, in *Sharp* v. *State,* 51 Ark. 147, 10 S. W. 228:

"In the midst of doubt as to what their verdict should be as to appellant, it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions they were required to decide. * * *"

Clearly, the remarks of the court intimated that the evidence was of little, if any, value. While we recognize that no partiality or prejudice was intended by the remarks of the court, such remarks could have been damaging to appellant's plea of self-defense.

Numerous other errors are alleged, but we find no merit in such allegations.

Because of the error herein set out, the judgment is reversed, and the cause remanded.

ARK. STATE HIGHWAY COMM. *v.* MABRY.

5-1655 315 S. W. 2d 900

Opinion delivered June 23, 1958.

[Rehearing denied September 29, 1958.]

Neill Bohlinger, W. R. Thrasher and *Dowell Anders,* for appellant.

Rolland Bradley, Francis Donovan and *Wood & Smith,* for appellee.

J. Seaborn Holt, Associate Justice. Appellee, Mabry, a resident of Faulkner County and a user of the ferry in question, on December 2, 1957, filed his petition alleging "Petitioner lives in a portion of Faulkner County near the Arkansas River and near State Highway 60. The river crossing at this point is by ferry known as Toad Suck Ferry presently being operated by a private contractor charging toll. Petitioner frequently uses such ferry and under exacting circumstances pays toll therefor. Act Number Three, First Extraordinary Session, 1957, Sec. 3 appropriated, payable out of the State Highway Department fund, for ferries in the state highway system '$25,000.00 which shall be paid for the purchase of the ferry on the Arkansas River which connects Highway 60 between Faulkner County and Perry County.' Petitioner alleges that such act is mandatory but that the State Highway Commission has refused to comply with the terms thereof. Compliance

would result in purchase by the state and free operation of the ferry. Wherefore, petitioner prays for a writ of mandamus directed to the State Highway Commission compelling it to issue a voucher to the Auditor of the State upon which a warrant for the purchase of the above mentioned ferry may be completed; and in the alternative for a declaratory judgment defining the obligations of the State Highway Commission with reference to the foregoing act."

Appellant, Highway Commission, demurred to the petition on the grounds that the trial court lacked jurisdiction, that appellee lacked legal capacity to sue, and that his petition did not state a cause of action. From a decree holding that the provision in Act 3 of 1957, which recites that there shall be paid out of the State Highway Department Fund for ferries in the State Highway System "$25,000 which shall be paid for the purchase of the ferry (known as Toad Suck Ferry) on the Arkansas River which connects Highway 60 between Faulkner County and Perry County" was mandatory and directing appellant to procure issuance of the voucher for $25,000 payable to Clay Cross for the purchase of the ferry, comes this appeal.

All evidence presented in the trial court was contained in the following stipulation of the parties: "Section 2-A of Act 451 of 1953, Arkansas General Assembly provided $20,000.00 for the construction, operation and maintenance of a river toll ferry on the Arkansas River to connect State Highway No. 60 between Faulkner County and Perry County, by State Highway Commission Minute Order No. 570, dated January 24, 1954, the State Highway Director was ordered to prepare specifications and request bids for construction, maintenance and operation of toll ferry services at said location . . . Plans and specifications were prepared and by duly advertising, bids on the contract for the ferry operation were asked for . . . The only bidder was Mr. Clay Cross, who was notified of his award of the contract on October 5, 1955. The contract between the Highway Commission and Mr. Clay Cross for

the construction and operation of the ferry was signed and the performance bond executed on October 17, 1955. The Work Order for the construction of the ferry to begin was issued on November 8, 1955. The ferry barge was accepted by the Highway Department and put in operation by Clay Cross in June, 1956. Under Item 12 of the contract the State had agreed to contribute $20,000.00 toward the payment of the floating equipment and under Item 22 the payment was to be made to the contractor based upon certified paid invoices presented by the contractor showing sums actually expended for the floating equipment. (Payment of the $20,000 was made to Cross on receipt of the invoices) . . . The ferry began operation in June 1956, and is presently in operation. The traffic count for 1956 showed a daily average vehicle traffic of 21. . . . The traffic count for 1957 is attached as Exhibit O and shows the average daily traffic of 11 vehicles. . . . Act 3 of the 1957 Extraordinary Session of the Arkansas General Assembly, the Highway Department's biennial appropriation, provided 'for maintenance, construction and repair . . .; and $25,000.00 which shall be paid for the purchase of the ferry on the Arkansas River which connects Highway 60 between Faulkner and Perry Counties . . .' On January 8, 1958, by letter to the State Highway Commission, Mr. Clay Cross offered to sell his interest in the ferry to the State for $25,000.00 and submitted thereon certain items as being in excess of the $20,000.00 expenditure on behalf of the State which was contributed toward the acquisition of physical assets necessary for the operation of the ferry . . . The Commission officially rejected this offer to purchase on January 24, 1954. The Highway Department inventoried and valued the assets of the ferry at $3,035.15, . . ."

Act 3 above was "An Act to make appropriation for the State Highway Department from the State Highway Department fund for the construction, reconstruction, and maintenance of roads and bridges in the State Highway System for the biennial period ending June 30,

1959, and for other purposes. Be it enacted by the General Assembly of the State of Arkansas: Section 1. There is hereby established for the State Highway Department, for the biennial period ending June 30, 1959, the following maximum number of regular employees and the maximum salary of such employees; and no greater salary than established herein, except as modified in Section 2 hereof, shall be paid to any employee from appropriations hereinafter made for said Department. Provided further, that it is the intention of this act to make available the maximum salaries provided herein to secure efficient, skilled employees; and in determining the annual salaries of such employees the administrative head of such Department shall take into consideration ability and length of service, but it is not the intention of this act that the maximum salaries shall be paid unless such qualifications are complied with and then only within the limitations of the appropriations and funds available for such purpose." Then follows the "Maximum number of employees and the maximum annual salary rates," to be paid for the periods 1957-58 and 1958-59. Section 2 provides for payments for overtime work of certain employees. Section 3: "There is hereby appropriated, to be payable out of the State Highway Department Fund, for the operation of the State Highway Department, for construction, reconstruction, maintenance, betterment and replacement of roads, bridges and ferries in the State Highway System for the biennial period ending June 30, 1959, the following:

Item	Fiscal Years 1957-58	1958-59
(1) Regular Salaries	$ 8,662,900	$ 9,727,600
(2) Extra Help	4,700,000	4,800,000

(3) For maintenance, construction, reconstruction, repair, replacement, relocation, betterment, and operation of roads, bridges and ferries in the State Highway System; including the acquisition of necessary rights-of-way; the purchase, repair and operation of equipment; the purchase of materials

and supplies; the payment of departmental current expenses, and the payment of travel expenses, and $25,000.00 which shall be paid for the purchase of the ferry on the Arkansas River which connects Highway No. 60 between Faulkner and Perry Counties, ...$65,280,000 $71,395,000

Total amount appropriated .....$78,642,900 $85,922,600''

Section 4 has to do with the minimum wage scale paid certain employees. Section 5 relates to holidays allowed employees. Section 6. ''Provided that any unexpended appropriation balance remaining on June 30, 1958, in the appropriation authorized in Section 3 hereof for Item (1) Salaries, Item (2) Extra Help, and Item (3) Construction, Maintenance and Operation shall, upon resolution of the State Highway Commission, be brought forward and made available for the purposes provided for in Item (3), in Section 3 hereof, during the fiscal year beginning July 1, 1958 and ending June 30, 1959.'' Section 7 provides that should any provision of the act be found unconstitutional or void it should not affect the remainder, declares the provisions of the act severable and repeals all laws in conflict therewith.

The primary and decisive question presented is whether Act 3 of 1957 above made it mandatory on the Highway Commission to pay for ''Toad Suck Ferry'' $25,000, ——no more and no less——, by using the following language: ''. . . $25,000 which shall be paid for the purchase of the ferry on the Arkansas River which connects Highway No. 60 between Faulkner and Perry Counties.''

After a careful review of the record presented we have concluded that the trial court erred in refusing to sustain appellant's demurrer. In reaching this conclusion we hold that the above provision in Section 3 of Act 3 above, is not mandatory on the highway commission, but is discretionary and it was the intention of the legislature that it be so in the circumstances. Clearly Act 3 above was an appropriation act only, fixing maximum amounts to be expended by the Highway

department for salaries of employees, for payments for highway bridges, ferries, etc., and was not a requirement or mandate to spend specific amounts. In other words, the highway department (or state agency) was not required to spend all the monies appropriated. This act clearly was in compliance with article 5, Sec. 29 of our State Constitution, which requires the maximum amount of any appropriation act to be stated specifically in dollars and cents. As we view this case, the amounts to be spent were discretionary. Our rule is well established that mandamus may be resorted to only when an official or agency refuses to perform a purely ministerial act which a statute imposes upon them. See *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742.

As pointed out Act 3 above was purely an appropriation act. It appears not to be contended by appellee that in spending the maximum allotments for every purpose specifically set forth in the act, — except for the one purpose here involved—, the highway department could not use its discretion. But, says appellee, the appellant had no choice or discretion in the purchase of this ferry but to spend $25,000 of the taxpayers' money for it, regardless of whether it was worth that amount or could be procured for less money. As indicated, it was stipulated that the Highway Department's inventory showed this ferry to be worth only $3,035.15. Had this directive to provide and spend this amount been provided in a separate act, — as was done in Act 451 of 1953, above, providing for the purchase of the barge—, then we would not hesitate to hold with appellee's contention for the reason that the intent and purpose of the legislature would be clear. It becomes necessary, therefore, to construe the meaning of this Act 3 above and in doing so one of our cardinal rules is first to endeavor to ascertain the intent of the legislature from the language used in the statute. See *McDaniel* v. *Ashworth,* 137 Ark. 280, 209 S. W. 646. Further, the rule is well established that where the language is ambiguous, we may not only look to the language but to the subject matter of the act, the object to be accomplished, pur-

pose to be served, the expediency of the act, the remedy provided, the consequences following its enactment and various extrinsic matters which may throw some light on the legislative intent. See *Holt* v. *Howard,* 206 Ark. 337, 175 S. W. 2d 384. "The primary rule in the construction of a statute is to ascertain and give effect to the intention of the lawmakers, and this intention is to be ascertained from a consideration of the entire act. In arriving at the intention of the lawmaking power it is proper to consider the object to be secured, the circumstances attending the adoption of the measure, and its relation to other laws," *Perry County* v. *House,* 196 Ark. 317, 117 S. W. 2d 342. "In construing a statute, the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but, where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. When the words of a statute are not explicit, the intention of the legislature is to be collected from the context, by considering the subject matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be obtained and the remedy in view, by comparing one part with the other, and giving effect to the whole, by looking to the old law upon the subject, if any, and other statutes upon the same or similar subjects, by considering the effects and consequences of a particular construction, and by looking to contemporaneous legislative history and contemporaneous construction of the statute. 25 R. C. L. 1012, 1013," *Cooper* v. *Town of Greenwood,* 195 Ark. 26, 111 S. W. 2d 452. We do not think that here the legislature ever intended that the Highway Department should pay the maximum of $25,000 allotted for the purchase of the ferry, in any event. "When the courts are called on to review and control the official acts of an officer in a co-ordinate branch of the government, they should proceed with extreme caution and circumspection, and the right of the courts to exercise this power should be manifestly clear and free from doubt

and not made to depend upon uncertainties or the doubtful construction of a statute," *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121.

To carry out the legislative intent the word "shall" may in certain circumstances, we think, as here presented, be construed as the equivalent of "may". "Ordinarily the words 'shall' and 'must' are mandatory, and the word 'may' is directory, although they are often used interchangeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words 'shall' and 'must' to be directory, they should be given that meaning," Crawford-Statutory Construction, Sec. 262, p. 519.

Accordingly, the decree is reversed and the cause remanded with directions to sustain appellant's demurrer.

HARRIS C. J., and WARD and ROBINSON, JJ., dissent.

PAUL WARD, Associate Justice, dissenting. The majority opinion contains so many unsupported conclusions and irrelevant quotations that it is difficult to determine the real basis on which it rests.

I do agree however with two statements contained in the opinion. One: The primary and decisive question is whether said Act 3 of 1957 is mandatory. Two: What was the *intention* of the legislature as expressed in the Act? Since the majority appear to take the position that

the answer to the first question depends on the answer to the second question, all of my remarks shall be directed to the latter.

As indicated above the majority must have found it was *not* the *intention* of the legislature that $25,000 should be paid for the ferry. The pertinent part of said Act 3 reads as follows: "and $25,000 which shall be paid for the purchase of the ferry * * *" In view of the fact that the wording of the Act expresses the *intent* in clear language it was necessary, of course, for the majority to assign various reasons and resort to certain rules of statutory construction in order to show the *intent* was something other than that stated in the Act itself. In doing this the majority have overlooked the most fundamental rule of all, to-wit: none of these aids to interpretation shall be employed unless the language of the Act is ambiguous. Nowhere has the majority pointed out in what way the language in said Act 3 is ambiguous. At any rate it will be interesting to examine the various attempts by the majority to explain why the Act does not mean what it says.

(a) Nearly two pages in the majority opinion are used to set out items appropriated in Act 3. Just what bearing all these other items have on the item in question is not shown. None of them have the mandatory language contained in the questioned item.

(b) After setting out the Act the majority say it is "purely an appropriation act." By this it is implied that mandatory language could not be contained in an appropriation act. If this is what is meant then the majority refute their own argument, for they state: "Had this directive to provide and spend this amount been provided in a separate act, as was done in Act 451 of 1953 * * * then we would not hesitate to hold with appellee's contention * * *" Reference to said Act 451 shows it to be an *appropriation act* like Act 3 and also that it is not a *separate* act, but deals with numerous items just like Act 3.

(c) In speaking of Act 3 the majority make this statement: "This act clearly was in compliance with Amendment [Article] 5, Sec. 29 of our State Constitution, which requires the maximum amount of any appropriation act to be stated specifically in dollars and cents". Just what this is supposed to prove entirely escapes me. In the first place $25,000 is a maximum amount. Surely the majority do not mean that the word "maximum" is necessary in an appropriation bill to make it effective.

(d) The majority call attention to the fact that the Highway Department's inventory showed the ferry assets to be only $3,035.15. Again I am unable to see how this throws any light on the *intention* of the legislature. Moreover it is not within the province of this court's powers to question the policy or wisdom of the legislature. Anyway the majority could have pointed out that Cross's itemized statement shows the value of the ferry to be commensurate with the proposed purchase price.

(e) The majority cites several decisions of this court, quoting at length, invoking rules of statutory construction. I thoroughly agree with the rules announced in these decisions. However, as stated at the beginning, they are applicable only when the language to be interpreted is ambiguous. Before the majority invoked these rules as aids to construction they should have pointed out the ambiguities relied upon. Frankly, I can think of none. There is no ambiguity about the amount to be paid, none about the identity of the ferry, and none about the intent to purchase.

I can understand why many people might question the wisdom of the legislature in this instance, but I can't understand how anyone could be in doubt about the intent of the legislature. The essence of my objection to the majority opinion, then, is that it applies well established and salutary rules of statutory construction where there exists no occasion for doing so. This I think, should not be done merely to reach a desired result.

PATTERSON *v.* POLK.

5-1600 317 S. W. 2d 286

Opinion delivered June 23, 1958.

[Rehearing denied October 13, 1958.]

Wright, Harrison, Lindsey & Upton, for appellant.

Wootton, Land & Matthews and *Harry E. Meek,* for appellee.

Ed. F. McFaddin, Associate Justice. This is a suit brought by a Trustee (Herbert S. Bonney, Jr.) asking the Court of Equity for instructions as to how the Trustee should proceed. Such procedure is recognized (see *Ark. Baptist State Convention* v. *Board of Trustees,* 209 Ark. 236, 189 S. W. 2d 913).

Mrs. Elizabeth S. Polk executed her will on June 4, 1954 and died on June 6, 1954, a citizen and resident of Dallas County, Texas. She owned real estate in Hot Springs, Arkansas and the will was also duly filed in Garland County, and her husband, Eugene Polk, was appointed ancillary administrator in Arkansas. It is about the real estate in Hot Springs that we are here concerned. Mrs. Polk was survived by her husband, Eugene Polk; and he is the life tenant of the Arkansas properties here involved and joined with the Trustee, Mr. Bonney, as a party plaintiff in this suit. Mr. Polk, as life tenant, is cooperative with the Trustee.

The portions of Mrs. Polk's will necessary for a determination of this case are as follows:

"XIV. I devise and bequeath to my beloved husband, Eugene Polk, a life estate in and to my property in Hot Springs, Arkansas, known as the Kress Building, with remainder to Ralph Patterson, Jr., and the Patterson twins, Frank and Helen Patterson, children of my niece and nephew, Helen and Ralph Patterson, Sr., as hereinafter provided. I devise and bequeath to my beloved husband, Eugene Polk, a life estate in and to my real property in Hot Springs, Arkansas, known as the Schneck Building, with remainder to my god-children, James Fitzhugh Burton and Isabel Lee Burton, as hereinafter provided. It being my intention, wish and desire that my beloved husband, Eugene Polk, shall enjoy the rents and revenues and income of every kind and character from both the Kress Building and the Schneck Building as long as he shall live.

"XV. a Upon the death of my beloved husband, Eugene Polk, I devise and bequeath to my friend and attorney, Herbert S. Bonney, Jr., in trust and as the Trustee of my god-children, James Fitzhugh Burton and Isabel Lee Burton, my real property and improvements located in Hot Springs, Arkansas, known as the Schneck Building; and I devise and bequeath to my said Trustee in trust and as Trustee for Ralph Patterson, Jr., and Frank Patterson, and Helen (Sissie) Patterson my real property and improvements situated in Hot Springs, Arkansas, known as the Kress Building. It is my desire that my Trustee shall, if possible, place all of the indebtedness against the two above mentioned buildings and land thereunder upon the Kress Building, thereby releasing the Schneck Building from any and all indebtedness.

"b. My said Trustee shall hold the above described property in trust so long as all of the beneficiaries of said trust are minor children, and when each such beneficiary shall attain the age of twenty-one years, my said Trustee shall convey the undivided interest to which such beneficiary is entitled, to each beneficiary. My trustee shall apply all of the rents and revenues over and above taxes and expenses to retire the mortgage

indebtedness on said real property and improvements, but if the Schneck Building shall be clear of debt, such revenues derived from it shall be paid to the beneficiaries for whom said Trustee shall be holding said Schneck Building, share and share alike.

"c. I devise and bequeath all of the residue of my property, real, personal and mixed, after the death of my beloved husband, Eugene Polk, other than the special bequests made in this Will, to my said Trustee, Herbert S. Bonney, Jr., and I instruct my said Trustee to liquidate said residue estate and apply the same against the indebtedness then due against the Kress Building and Schneck Building, and should there be any property or estate left after the payment of said indebtedness on said buildings in full, one-half of the same shall be given, share and share alike, to Ralph Patterson, Jr., Frank Patterson, and Helen (Sissie) Patterson, and the other one-half shall be given, share and share alike, to James Fitzhugh Burton and Isabel Lee Burton, as each of the above mentioned Pattersons and Burtons attain the age of twenty-one (21) years.

"XVIII. . . My said Trustee shall have the power with reference to all properties coming to him in trust, except the Kress Building and the Schneck Building properties above described, to sell, dispose of or otherwise perform any act or execute any instruments with reference thereto and shall have all the powers given Corporate Trustees by the statutes of the State of Texas with reference to the handling of such residue property."

It is essential to an understanding of this case that we give certain other facts developed in the trial:

1. The two properties in Hot Springs are referred to as the "Kress property" because it is leased to S. H. Kress Company, and the "Schneck property" because it is occupied by the Schneck Drug Company. It will be observed from the foregoing copied portions of Mrs. Polk's will that the Kress Building was devised to Mr. Polk for life with the remainder to the Patterson children, but under the trusteeship of Mr. Bonney during

the minority[1] of the Patterson children; and that the Schneck Building was devised to Mr. Polk for life with the remainder to the Burton children, but under the trusteeship of Mr. Bonney during the minority of the Burton children.

2. Mr. Polk is a man now 89 years of age and as life tenant under Mrs. Polk's will is receiving all of the net rents from the two properties.

3. The Patterson children with their birth dates and ages are as follows: (a) Ralph M. Patterson, Jr. was born May 17, 1936 and became twenty-one years of age on May 17, 1957; (b) Helen Patterson, a girl, was born November 25, 1943, and will become twenty-one years of age on her birthday in 1964; (c) Frank Patterson was likewise born on November 25, 1943 and will become twenty-one years of age on his birthday in 1964.

4. The Burton children, with their birth dates and ages, are as follows: (a) James Fitzhugh Burton was born October 5, 1947 and will become twenty-one years of age on his birthday in 1968; (b) Isabel Lee Burton was born on November 6, 1948 and will become twenty-one years of age on her birthday in 1969.

5. It will be observed from Paragraph XV of the will that the age of twenty-one is listed as the determinative age for each beneficiary, so these dates will become important in our decision in this case.

6. The Kress property is now bringing in a monthly rental of $400.00 in addition to taxes and insurance; and the Schneck property is now bringing in $225.00 per month in addition to taxes and insurance. The two properties are now, and were at the time of Mrs. Polk's will and death, under a mortgage to the Equitable Life Assurance Society in the amount of $45,000.00, which bears interest at the rate of 4 per cent per annum. The mortgage became due on October 1, 1957 and is now past due; and refinancing is awaiting the

[1] In various places in this opinion we use the expression "minority", but do so to shorten the language of the will, which says "twenty-one years of age."

outcome of this litigation. The Kress building is leased to S. H. Kress & Company until December 31, 1960. The Schneck building appears to have some sort of option provision that may extend the lease as long as 1965, although that point is not entirely clear in the record.

7. On February 13, 1957, Mr. Herbert S. Bonney, Jr., as Trustee under Mrs. Polk's will, and Mr. Eugene Polk, as ancillary administrator under the will, filed the present proceeding in the Garland Chancery Court, naming as defendants the three Patterson children previously mentioned, the two Burton children previously mentioned, and the guardians of those that are minors. Ralph M. Patterson, Jr. is of full age and is represented by counsel. Mr. Ralph M. Patterson, Sr. is the guardian of Helen Patterson and Frank S. Patterson, minors. Frank M. Burton, Sr. is the guardian of James Fitzhugh Burton and Isabel Lee Burton, who are minors. Mr. Bonney, as Trustee, asked the Garland Chancery Court to give him instructions by answering certain well framed questions, germane portions of which questions relate to: (a) the title and right of the Trustee to the properties; (b) the power or duty of the Trustee to negotiate renewal or extension of the present mortgage of $45,000.00; (c) whether the Schneck Building should be released from the lien of the mortgage if the new mortgage can be obtained entirely with the Kress Building as security; (d) whether the Trustee has power to act even though Ralph M. Patterson, Jr. is over the age of twenty-one; and (e) whether the Trustee can execute a lease of either property for a longer period than the date when beneficiaries reach twenty-one years of age. The attitude of the life tenant, Mr. Eugene Polk, has been most cooperative; and, due to that fact, we treat the case as though only the Trustee's powers were at issue, because Mr. Polk seems thoroughly agreeable to executing any instruments that the Court may direct the Trustee to execute.

8. The Burton children (all minors) answered by their guardian, and claimed that the Schneck Building should be cleared of the $45,000.00 mortgage and that

the provision in Mrs. Polk's will to that effect in Paragraph XV is mandatory on the Trustee.

9. Ralph M. Patterson, Jr., one of the Patterson children, and being himself of full age, claimed that under Mrs. Polk's will his one-third interest in the Kress Building was vested in him on reaching twenty-one years, subject only to the life estate of Mr. Polk, the $45,000.00 mortgage, and the present lease which expires in 1960; that the Trustee had no power to execute any renewal or extension of that lease on the Kress Building covering the interest of Ralph M. Patterson, Jr. without his individual consent; that the provision in Mrs. Polk's will (that the total indebtedness of $45,000.00 be shifted to the Kress building, if possible) was precatory only and not mandatory; that, at all events, the power of the Trustee had ceased insofar as Ralph Patterson, Jr. was concerned when he became twenty-one years of age.

10. The other two Patterson children, Helen Patterson and Frank Patterson, being minors, answered by their guardian, Ralph M. Patterson, Sr., and adopted in the main the position of Ralph Patterson, Jr.

11. At the trial it was shown that the $45,000.00 mortgage could be refinanced with the Equitable Life Assurance Society on a 15-year basis at 5 per cent, with no principal payments for five years and then amortized in equal installments over the other ten years at 4 per cent; and the Equitable Life Assurance Society was willing to release the Schneck Building and take the Kress Building as its sole security, provided some satisfactory assurance could be obtained as to tenancy of the Kress Building. It was further shown that the Kress Company would pay a rental of $700.00 per month for the Kress Building, provided a lease could be obtained for as long as twenty years from the present expiration in 1960.

So much for the background facts. At the trial the evidence and stipulations developed all of the factual statements hereinbefore contained; and the Chancery

decree answered the questions posed by the Trustee. These answers were, in effect: (a) that the Trustee had power to negotiate a renewal or extension of the present $45,000.00 loan and transfer the entire loan to the Kress Building and completely release the Schneck Building from the mortgage; (b) that the Trustee had the power to completely mortgage the Kress Building with the approval of the Court but without any approval or joinder of Ralph M. Patterson, Jr.; (c) that the Trustee had the complete power to execute a 20-year lease on the Kress Building from its present expiration, beginning January 1, 1960, without any consent or joinder of Ralph Patterson, Jr. or any of the guardians; and (d) that the Trustee, prior to the youngest beneficiary becoming twenty-one years of age, had full power to act, since the life tenant joined with him in the matters.

From that decree there is the present appeal, and we condense the various issues, presented in the excellent briefs, into the following topic headings:

I. *The Duration Of The Trust.* The first point that must be decided is the duration of the trust because if Ralph Patterson, Jr. is correct in his contention, then Mr. Bonney, as Trustee, has no power whatever over the one-third remainder interest of Ralph Patterson, Jr. In *Cross* v. *Manning,* 211 Ark. 803, 202 S. W. 2d 584, we stated some of the rules for construing wills; and those rules are applicable here. After a careful study of all the various provisions of Mrs. Polk's will, as previously copied, we reach the conclusion that Mrs. Polk intended to and did accomplish the following: (a) she devised the Kress property to Mr. Polk for life with remainder to the Patterson children, who have a vested remainder subject to the powers of the Trustee, as hereinafter stated; and (b) the same thing applies to the Schneck property and the Burton children. Thus, there were and are two distinct and separate trusts: (1) a trust for the Patterson children on the Kress property; and (2) a trust for the Burton children on the Schneck property. The will distinctly makes the trusts separate.

Mrs. Polk established a trusteeship over the Kress property until the youngest of the Patterson children reaches the age of twenty-one years; and a trusteeship over the Schneck property until the younger of the Burton children reaches the age of twenty-one years. We have previously given these dates; and they show that the trusteeship over the Schneck property extends until November 6, 1969 when Isabel Lee Burton becomes twenty-one years of age; and the trusteeship over the Kress property extends until November 25, 1964, when Helen Patterson and Frank Patterson become twenty-one years of age. The trusts are separate and distinct.

It will be noted that in Paragraph XV of her will Mrs. Polk said, "My said Trustee shall hold the above described property in trust so long as all of the beneficiaries of said trust are minor children . . ." She used the term, "minor children" as meaning under twenty-one years of age, because she instantly added, ". . . and when each such beneficiary shall attain the age of twenty-one (21) years, my said Trustee shall convey the undivided interest to which such beneficiary is entitled to each beneficiary." Mrs. Polk undoubtedly knew that the children would not all be twenty-one on the same day and she wanted the trust to continue on the Kress property until the youngest one of the Patterson children became twenty-one. All that Ralph Patterson, Jr. received when he became twenty-one was his beneficial interest in the property subject to the continuation of the trust during the life of the life tenant and until the youngest Patterson child becomes twenty-one. It is clear that when Mrs. Polk said: ". . . so long as all of the beneficiaries of the trust are minor children," she used the word "all" in the sense of "any" because the trust continues on each property until *all* of the beneficiaries reach twenty-one years of age.

Ralph Patterson, Jr. says that the trusteeship ended on his one-third remainder interest in the Kress property when he became twenty-one years of age. We do not so interpret the will. It was a trusteeship on the *Kress property* during the minority of the three benefi-

ciaries, and was not a mere trusteeship over the *interest* of each of the three children in the Kress property. The Trustee is to handle the entire Kress property and not the separate interest of the still remaining minors. What Ralph Patterson, Jr. was entitled to receive when he became twenty-one years of age was the right to an instrument attesting that he owned a one-third interest in the remainder in the Kress property, subject to the powers of the Trustee under the will of Mrs. Polk; and such power continues until the youngest of the three Patterson children reaches twenty-one years of age.[2] We hold that Mr. Bonney, as Trustee, has all the powers given him by Mrs. Polk's will and that the majority of Ralph Patterson, Jr. has no effect on the powers of the Trustee over the Kress property.

All that has been said regarding the rights of the Patterson children in the Kress property applies with equal force to the rights of the Burton children in the Schneck property. In short, absent any death of the beneficiaries, the trusteeship on the Kress property will cease when the youngest Patterson child reaches the age of twenty-one; and the trusteeship on the Schneck property will cease when the younger of the Burton children reaches the age of twenty-one. Of course, during the life of Mr. Polk the remaindermen have only a vested remainder on which the Trustee may act.

II. *Mandatory* v. *Precatory.* At the time of Mrs. Polk's will both the Kress property and the Schneck property were included in a mortgage to the Equitable Life Assurance Society for $45,000.00; and the same condition exists now. Mrs. Polk's will, as previously copied, says as regards this mortgage indebtedness, It is my desire that my Trustee shall, if possible, place all of the indebtedness against the two above mentioned buildings and land thereunder upon the Kress Building, thereby releasing the Schneck Building from any and all indebtedness. . . but, if the Schneck Building shall be clear of

[2] No one has mentioned in the briefs the possibility of the death of any of the beneficiaries before reaching twenty-one as a termination of the trust; so we entirely ignore such eventuality and continue to refer to reaching the age of twenty-one years as the termination of the trust.

debt, such revenues derived from it shall be paid to the beneficiaries for whom said Trustee shall be holding said Schneck Building, share and share alike."

The Trustee, Mr. Bonney, is Trustee for both sets of remaindermen — the Patterson children and the Burton children — and he wants to be absolutely fair to his *cestui que trusts.* At the same time he wants to be loyal to his trust, so he expresses no opinion as to whether the provision of the will as above referred to is mandatory or precatory. He asked the Chancery Court to make that decision. The Burton children say that the language about freeing the Schneck property is mandatory; and the Patterson children say that the language is precatory.

The distinction between *mandatory* and *precatory* words in wills and trust instruments could make a treatise in itself.[3] In wills and trust instruments, directions are held to be mandatory when such words direct, command, or require something to be done; and directions are held to be *precatory* when such words merely express a hope or wish, and leave it to the trustee or the occurrence of some fortuitous circumstance as to whether the desires will be accomplished. If Mrs. Polk's language about placing the mortgage indebtedness entirely on the Kress Building was merely precatory, then Mr. Bonney, the Trustee, cannot accomplish such purpose. It would unduly prolong this opinion to discuss the value of the properties, the position of the language, the general tone of the words throughout the entire will, or to otherwise elaborate on the reasons for our conclusions; but after a careful study we have concluded that the words in Mrs. Polk's will are mandatory on the Trustee. That is, Mr. Bonney should make every reasonable, honest, and *bona fide* effort to: (a) refinance the $45,-

[3] Some few references are these: *Cross* v. *Manning,* 211 Ark. 803, 202 S. W. 2d 584; *Cockrill* v. *Armstrong,* 31 Ark. 580; *Bloom* v. *Strauss,* 73 Ark. 56, 84 S. W. 511; *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20; *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810; *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349; 57 Am. Jur. 771 "Wills" § 1180; Annotations on "Precatory Trusts" in 49 A.L.R. 10, 70 A.L.R. 326, and 107 A.L.R. 896.

000.00 mortgage at a rate of interest in keeping with present day interest rates; and (b) if possible, obtain a mortgagee who will accept the Kress property as sole security as such interest rate. The mortgage can extend longer than the trusteeship over the Kress property, but the mortgage should contain a clause allowing a full repayment of the indebtedness on any anniversary date after ten years from date of the mortgage. Of course, the proposed note and mortgage must be submitted by the Trustee to the Chancery Court for approval; but when the Trustee and the life tenant join in the note and mortgage and the Court approves it, then the Patterson children cannot complain if only the Kress Building be mortgaged.

III. *Long Term Lease Of The Properties.* The present lease on the Kress property expires December 31, 1960, and the present rental[4] is $400.00 a month after payment of taxes and insurance. S. H. Kress & Company has been the tenant of this building for more than forty years and has proved to be a most satisfactory tenant. The Trustee, Mr. Bonney, reported to the Chancery Court in this proceeding that the Kress Company wanted to make, at its own expense, certain extensive improvements on the property, and would pay a rental of $700.00 per month beginning immediately if a valid lease could be made by the Trustee to run until December 31, 1980 (a period of twenty years from the expiration of the present lease). The Chancery Court considered this to be a good monthly rental and indicated that the Trustee would be authorized to execute the lease.

Viewing the matter as a good business proposition, it appears that the Chancery Court was possibly correct: but viewing the matter as regards the powers and authority of the Trustee, we are forced to conclude that Mrs. Polk's will did not give the Trustee power to execute a lease for such a long period of time after the last of the Patterson children becomes of age. Mrs. Polk's will

[4] This rental would now be $525.00 per month except for the fact that Mrs. Polk in effect received $125.00 per month of the rental in advance several years ago.

did not set up a trust on the Kress property for an indefinite time and empower the Trustee to pay the beneficiaries their moneys at stated intervals; rather, Mrs. Polk's will set up a trust on the Kress property that could not in any event extend longer than the time when the youngest Patterson child became twenty-one years of age. It was a trust during the minority of the Patterson children, and not a trust for some period of time.

The Trustee cannot be authorized by the Chancery Court to lease the property[5] after the youngest Patterson child reaches twenty-one years of age, unless all the Patterson beneficiaries duly consent[6] to such lease. But absent such consent, then no lease can be made past the end of the trust except, of course, to the end of the calendar year. Our holding is possibly unfortunate from a business viewpoint; but we are obliged to restrict the trust powers to what we construe the testator to have stated in the will. In the excellent briefs there is a discussion of a line of cases on extending the power of the trustee to lease property past the life of the trust.[7] We see no need to discuss these cases because we restrict our holding to the trust here involved; and, in the case at bar, we reach the conclusion that Mrs. Polk intended for the trusts to be separate trusts on the properties for the minority of the class of beneficiaries, and for the powers of the Trustee to terminate in each trust when the youngest beneficiary thereof reaches the age of twenty-one years.

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[5] Of course, a trustee could make a lease on a calendar year basis (or a crop year basis in an agricultural situation) in accordance with business customs of the locality; and a lease could extend to the end of the calendar year (or crop year) even if such time extended beyond the life of the trust. For equitable purposes we consider such a lease as being *coterminus* with the trust because at no event could it be longer than one year past the end of the trust. But the situation here is to make a lease for ten or fifteen years after the termination of the trust.

[6] Ralph Patterson, Jr., now being of full age, could now make his own consent to such long term lease; and by proper proceedings the guardian of the two minor beneficiaries could be empowered to make such consent.

[7] Annotations somewhat in point are found in 46 A.L.R. 2d 907 and 43 A.L.R. 2d 1102. See also 54 Am. Jur. 376 and Restatement of Trusts § 189e, page 500.

CONCLUSION

The decree is affirmed in part and reversed in part as herein contained; and the cause is remanded to reinvest the Chancery Court with jurisdiction to enter a decree in keeping with this opinion and for any further proceedings that any of the parties may undertake, consistent with the views herein contained. The costs of all courts will be taxed one-half against each of the respective trust estates.

GEORGE ROSE SMITH, J., not participating.

ROBINSON, J., dissents, being of the opinion that when Ralph Patterson, Jr. became 21 years of age the trust ended as to his interest.

CRUMP & RODGERS CO. *v.* SOUTHERN IMPLEMENT CO., INC.

5-1608 316 S. W. 2d 121

Opinion delivered June 23, 1958.

[Rehearing denied October 6, 1958.]

Daggett & Daggett, for appellant.

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

ED. F. MCFADDIN, Associate Justice. This is a controversy between the mortgagees and a lien claimant under § 51-404 *et seq.* Ark. Stats. The mortgagees are Crump & Rodgers Company and Dabney Crump, the appellants; the lien claimant is Southern Implement Company, Inc., the appellee; and we will refer to the parties by the designations in this Court.

In 1953 O. T. Pickard purchased a John Deere cotton picking machine. Subsequently he mortgaged the machine to the Phillips National Bank, and the mortgage is now held by the appellants. In the cotton picking season of 1956 Pickard had appellee repair his machine on three different occasions. The total bill of the appellee for parts and labor amounted to $2,114.55, which Pickard failed to pay. Appellee filed lien notice on February 9, 1957 under § 51-409 Ark. Stats.; and then filed suit to enforce the lien claim. Judgment by default was rendered against Pickard; but appellants defended by alleging: that appellee was claiming under three separate and distinct repair contracts; and that the lien was in effect for only the last repair job, which amounted to $110.96. They tendered this amount in Court. Trial resulted in a decree for a lien to appellee

for the full amount, and this appeal ensued, presenting the points now to be discussed.

I. *The Rule of Werbe* v. *Holt.* When the appellee, as plaintiff, rested its case, the appellants filed motion for judgment under Act No. 470 of 1949, now found in § 27-1729 Ark. Stats. The Trial Court tested the sufficiency of the plaintiff's case in accordance with our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, and held that the appellee had made a *prima facie* case. The appellants stood on their motion and judgment final was rendered for the plaintiff (appellee). So, under the rule of *Werbe* v. *Holt,* we give the appellee's (plaintiff's) case its strongest probative force; and if there be any substantial evidence to support the decree of the Chancery Court, then we must affirm.

II. *The Lien Account.* The account filed by appellee for $2,114.55 shows that appellee either furnished parts or performed labor on the cotton picking machine on thirty-four different days, beginning on September 8, 1956 and concluding on November 28, 1956. The lien notice under § 51-409 Ark. Stats. was filed on February 9, 1957, which was within the 90-day period from November 28, 1956, but more than 90 days from September 8, 1956. Appellee says that the account was a "running account" and that the 90-day period dates from the last item furnished, citing some of our cases on the mechanics' and materialmen's lien statute (§ 51-601 *et seq.* Ark. Stats.), such as: *Geisreiter* v. *Standard Lbr. Co.,* 187 Ark. 893, 63 S. W. 2d 347; *Whitener* v. *Purifoy,* 177 Ark. 39, 5 S. W. 2d 724; *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; and *Kizer Lbr. Co.* v. *Mosely,* 56 Ark. 544, 20 S. W. 409.

The rule of the cited cases would be applicable if there had been either (a) a definite contract between the parties covering all three of the repair jobs; or (b) the repairs had been under a running or open account for the completion of the work. This is all explained in *Streuli* v. *Wallin etc. Co.,* 227 Ark. 522, 302 S. W. 2d 522, wherein, in speaking of the "running

account", we quoted the language of Mr. Justice BATTLE in *Kizer Lbr. Co.* v. *Mosely, supra*:

"'. . . 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 90 days after the last item was delivered . . .'"

The evidence in the case at bar entirely fails to disclose the existence of either of the above requirements. There was never a definite contract between the parties for repairs over any period of time other than the immediate work order involved; and there was never any "reasonable expectation that further material would be required". As to the definite contract matter, appellee's managing officer, Mr. J. S. Crow, frankly admitted that Pickard and the appellee had no contract or agreement of any kind whereby Pickard expected, or appellee agreed, to do all of the repair work that might be required on the cotton picking machine during the season of 1956, or any other period of time. Mr. Crow testified:

"Q. And if anything happened to it you didn't know whether he would come back to you or not, or would go to another implement company?

A. That would have been his privilege.

Q. That would have been his privilege?

A. Yes."

We come, then, to the matter of "reasonable expectation that further material would be required", which is the only other basis on which the appellants can succeed. There were three work orders for repairs on the cotton picking machine. The first work order (No. 1823) was completed on August 24, 1956, and amounted to a total of $842.64. When this work was complet-

ed Pickard put the machine back into use and there is no evidence indicating that Pickard and appellee had any plans or agreement for any subsequent or further repairs. The second work order (No. 1936) was completed on September 28, 1956 and amounted to a total of $706.35; and when that work order was completed Pickard put the machine back into use and there is no evidence that Pickard or appellee had any plans or agreement for any subsequent or further repairs. Pickard bought some parts for the cotton picking machine which he installed himself; and then on November 28, 1956 there was the third and final repair job (work order No. 2278) for a total of $110.96. Appellee's witness admitted that this third repair order indicated that the last work order on the cotton picking machine was because "it looks like from the parts list it hit something and bent a bar".

It is, therefore, clear that there were three separate and distinct repair jobs, each complete in itself, and that the 90-day period, for filing the lien claim under § 51-409 Ark. Stats., ran from the *completion of each repair job.* In other words, there were three separate repair contracts, and not one contract[1] covering the entire period. The case of *Reed* v. *Horton,* 135 Minn. 17, 159 N. W. 1080, involved a claimed lien on an automobile for a series of repairs, adjustments and parts furnished to the car; and the Minnesota Supreme Court held that each repair job was a separate job, saying: "We think the Trial Court held correctly, that when the repairs for such a vehicle are furnished at different times and constitute separate and distinct transactions, the right to claim a lien expires . . . sixty days[2] after each transaction. It cannot be conceived that the Legislature intended lien claims against motor vehicles to have a

[1] General statements, as to the distinction between a separate contract and a continuing transaction, may be found in 57 C.J.S. 661, "Mechanics' Liens", § 144; 36 Am. Jur. 97, "Mechanics' Liens" § 140; and Blashfield Encyclopedia of Automobile Law and Practice, Permanent Edition, § 5206.

[2] The Minnesota law is sixty days; the Arkansas law is ninety days.

floating existence for long periods of time without constructive notice thereof being given."

The case of *Reconstruction Finance Corp.* v. *Kern-Limerick,* 192 Fed. 2d 978, when thoroughly analyzed, is not contrary to the Minnesota holding, because in the said Kern-Limerick case Judge Gardner, speaking for the U. S. Court of Appeals for the Eighth Circuit, was careful to point out: "In September, 1945 Shores entered into a contract with appellee to maintain and repair the equipment for use on the Sweet Home job, and from the date of this contract until Shores filed his petition in bankruptcy on July 3, 1946, appellee furnished materials and performed labor on the equipment." Judge Gardner pointed out, that there was a contract for the continuing performance of repairs during the entire Sweet Home job; and because of the proof of such contract, the lien claimant had ninety days from the date of the last furnishing in which to file his lien claim.

As we have previously said, in the case at bar there was no contract looking toward repair and maintenance during any period; and so we conclude that each repair job was a separate contract. Under such view — and it is the only one that the evidence supports — the amount covered by the lien notice was $110.96 for the third work order (No. 2278), and the Chancery Court should have so held, because — even under the rule of *Werbe* v. *Holt* — there is no evidence to the contrary. The personal judgment against Pickard is left unaffected by our holding.

III. *The Mortgages Held By The Appellants.* The appellee says: "The Appellants, Crump & Rodgers Company and Dabney Crump, having utterly failed to discharge the burden of proof as to their respective mortgages, have no standing in the court below and in this court on appeal". This point is without merit. The appellee alleged in the complaint that the appellants ". . . claim to have some interest in and to said equipment". Appellants attached to their answer

a copy of the note and mortgage originally executed by Pickard to Phillips National Bank and assigned by the Bank to the appellants. Then Mr. Minton, one of the appellee's officers, made answers on cross-examination as follows:

"Q. Mr. Minton, did you know that this cotton picker was mortgaged at the time that you did this work on it?

A. I understood he owed on the cotton picker; yes.

Q. Did you know it was mortgaged to the Helena National Bank?

A. Phillips National Bank. I understood it was Phillips National Bank.

Q. Well, to Phillips National Bank. And you also knew that Mr. Crump and Rodgers had a mortgage on it?

A. Well, without a doubt. They take that in the furnish . . .

Q. Did you have any definite knowledge that there was a chattel mortgage outstanding to the Phillips National Bank?

A. Pickard has told me that.

Q. Mr. Pickard had told you that?

A. Yes.

Q. Mr. Pickard had told you that at the time the service was rendered and the materials furnished?

A. Yes."

Thus, appellee's own witness admitted that the appellants held a mortgage on the cotton picking machine.

CONCLUSION

The decree is reversed and the cause is remanded, with directions to enter a decree awarding appellee the $110.96 deposited in the Court; but to discharge the cotton picking machine from any lien claimed by appellee. All costs accruing after the date of the aforementioned court deposit are taxed against the appellee.

CHAMP *v.* CHAMP.

5-1617 314 S. W. 2d 503

Opinion delivered June 23, 1958.

Tommy H. Russell and *Ruby E. Hurley,* for appellant.

No brief filed for appellee.

MINOR W. MILLWEE, Associate Justice. This appeal is from a decree sustaining the motion of appellee, Mary Champ, to dismiss a divorce suit filed against her in the Pulaski Chancery Court by appellant, Richard D. Champ, on the ground that he did not qualify as a legal resident of this state for the required time preceding the institution of the suit.

The parties were reared in Ohio where they resided at the time of their marriage in 1948 and they have three children. Appellant has been a member of the U. S. Air Force since 1944 and has been stationed at many bases "all over the world." During the past 2½ years he has been stationed at the Little Rock Air Force Base in this state while appellee and the children remained at their home in Columbus, Ohio.

On January 4, 1957, appellant filed the instant suit against appellee in the Pulaski Chancery Court alleging desertion and general indignities as a ground for divorce. On January 28, 1957, appellee filed a motion to dismiss for want of jurisdiction alleging both parties were residents of Franklin County, Ohio. In an amended and substituted complaint filed on September 30, 1957, appellant alleged three years separation as an additional ground for divorce.

At the hearing on appellee's motion to dismiss for want of jurisdiction it was shown that appellant filed a divorce suit against appellee in the Common Pleas Court of Franklin County, Ohio, early in 1956 alleging he was a resident of that state. He dismissed the petition for divorce when appellee filed a cross-petition upon which there was a hearing resulting in a "Decree of Legal Separation" on April 18, 1956, finding appellant guilty of "gross neglect." Appellee was given permanent custody of the children and awarded $50.00 per month alimony and $150.00 per month for support of the children. The decree also found that both parties were legal residents of Ohio and the dismissal of appellant's own cause of action to be with prejudice.

Appellant testified he had been stationed at numerous bases and was subject to reassignment at any time; that he had an Arkansas license tag on his automobile, an Arkansas poll tax receipt and had voted in the last election; and that he had lived off the base at a motel in North Little Rock for awhile but had moved back to the air base at the time of the trial. He was not asked and did not state his intentions as to making Arkansas his permanent home, but the motel owner where

he stayed about eight months testified that he heard appellant say he was going to make Arkansas his home if he ever left the service.

We have repeatedly held that a soldier acquires no residence in a locality merely because his military duties require that he sojourn there. *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295. In several cases we have approved the following statement from 19 C. J. 418: "The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur." We have also often approved this headnote from *Ex parte White,* 228 Fed. 88: "Assuming that a member of the Army may change his domicile, and establish it at any place he sees fit, if not inconsistent with the military situation, his intention to change must be clear, and must be associated with something fixed and established as indicating such a purpose." *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876; *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502; *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556.

The chancellor's finding that appellant did not qualify as a legal resident of this state in that he had not shown a real and *bona fide* intent to acquire and establish a permanent residence here is not against the preponderance of the evidence. The decree is, therefore, affirmed.

5-1610 314 S. W. 2d 505

Opinion delivered June 23, 1958.

George K. Cracraft, Jr., for appellant.

David Solomon, Jr., for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants, doing business as Lundell Plantation, to collect a "furnish" account from their former tenant, H. E. Swindell, and his wife, the appellees. The husband's responsibility for the debt is conceded; the only question on appeal is whether Mrs. Swindell was a partner with her husband and therefore personally liable for the account. When the suit was filed in 1952 the plaintiffs garnisheed fire insurance proceeds in the amount of $1,963.64, which were admittedly Mrs. Swindell's separate property. Upon trial the chancellor held that Mrs. Swindell was not a partner in her husband's farming operations; the decree accordingly dissolved the writ and awarded damages for its wrongful issuance.

The weight of the evidence supports the chancellor's findings. Early in 1949 the Swindells moved to Snow Lake Place, a farm owned by Lundell Plantation. To obtain financing from the landlord the Swindells executed a note for $6,000, payable in ten months, and a deed of trust securing the note and future advances made during 1949 and 1950. The property conveyed by the deed of trust consisted of eighteen items of farm machinery, all owned by the husband, and the debtors' interest in the crops to be grown on the farm. The Swindells remained on the land for four years, during which the present indebtedness accumulated. It is conceded that the items credited to the account were more than

sufficient to pay the $6,000 note and that no other written evidence of the debt was ever requested or given. If Mrs. Swindell is to be held personally responsible it must be found that the later advances were made to a husband-wife partnership rather than to the husband alone.

The evidence indicating the existence of a partnership is meager. The appellants rely primarily upon the fact that Mrs. Swindell signed the original note, since discharged, and the deed of trust. This alone, however, would certainly not create a partnership, either in fact or by estoppel. It is reasonable to suppose that Mrs. Swindell joined in the execution of the note as an accommodation maker and that her signature to the deed of trust was required as a precaution against the possibility that she might assert a dower interest in the farm machinery. It is also shown that Mrs. Swindell sometimes took the weekly payrolls to the plantation headquarters and obtained cash advances for their payment, picked up the annual statements of the account, and discussed these statements with the bookkeeper. In our view none of Mrs. Swindell's activities go beyond the assistance that a wife might naturally contribute to the conduct of her husband's business.

Other evidence effectively rebuts the notion that a partnership existed. Both the Swindells disclaim that relationship. The farm machinery was owned by the husband alone. It is not indicated that the wife had any voice in the management of the farm. The account was in fact carried upon the appellants' books in the name of the husband only. Mrs. Swindell operated a small store on the place as her own property; her rental payments to the appellants were not carried as a part of the furnish account. The fire insurance policy upon the store's fixtures and merchandise was payable to Mrs. Swindell. On the record as a whole we are convinced that Mrs. Swindell was not a co-owner of her husband's business and was therefore not a partner. Ark. Stats. 1947, § 65-106.

Affirmed.

5-1615 314 S. W. 2d 506

Opinion delivered June 23, 1958.

Lookadoo, Gooch & Lookadoo, for appellant.

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

GEORGE ROSE SMITH, J. This case arises from a traffic collision that occurred in Clark county on November 11, 1957. The proof shows that as the plaintiff-appellant, Callaway, was turning to his left to leave the

highway his car was struck by one that was being driven by Neil Cherry, who was accompanied by his mother, Irene Cherry, and his cousin, Don Rodgers. The jury found that Callaway, Mrs. Cherry, and Rodgers sustained personal injuries.

Callaway asserted in his complaint that the three occupants of the Cherry car were engaged in a joint enterprise, but at the close of the plaintiff's proof the trial court ruled that the evidence tending to show a joint enterprise was not sufficient to present a question for the jury. At the end of the trial the other issues raised by the complaint and the defendants' cross-complaints were submitted to the jury upon special interrogatories. The jury apportioned the total negligence in the ratio of 56 per cent to Neil Cherry and 44 per cent to Callaway, found that neither Mrs. Cherry nor Don Rodgers was guilty of any negligence, and, as between Neil Cherry and Don Rodgers, found willful and wanton misconduct on Cherry's part. The court entered a judgment fixing the liability of the various parties in accordance with the verdict.

The direct appeal involves only that part of the judgment by which Mrs. Cherry recovers damages of $10,000 from Callaway. Although Mrs. Cherry was found not to have been negligent herself, the appellant insists that the court erred in taking from the jury the issue of joint enterprise, whereby Neil Cherry's negligence might have been imputed to his mother. We are of the opinion that this contention must be sustained.

The Cherry car was owned by Mrs. Cherry's husband, who lived with his family in the city of Waldron. The Cherrys' daughter, Sharon, was attending college at Arkadelphia and had been at home for a week-end visit. On the day of the accident the Cherry party had driven Sharon back to the school at Arkadelphia and were returning to Waldron when the collision took place. The sole purpose of the trip was to take Sharon to the college. Neil Cherry, who was driving the car, was a few days past eighteen years old and lived with his parents.

Don Rodgers, who was sitting next to the driver, was only seventeen and had gone along "just for the ride"; Callaway has abandoned his contention that Don shared in the asserted joint enterprise. Mrs. Cherry evidently knows how to drive, but at the time she was riding in the back seat. Called as a witness by the plaintiff, she testified that she would not have hesitated to reprimand her son if he had driven too fast. The clear implication of her testimony is that she expected Neil to obey her.

Upon this proof it was for the jury to say whether Mrs. Cherry's right and power to control the actions of her minor son were sufficient to make her liable for his negligence. The situation is not unlike that considered in *Minor* v. *Mapes,* 102 Ark. 351, 144 S. W. 219, 39 L. R. A. N. S. 214, where we upheld the liability of a husband who was being driven by his wife. After pointing out that a guest is not ordinarily liable for the carelessness of a driver over whom the guest exercises no control, we stated: "This rule cannot, however, be extended so as to afford an avenue for the husband's escape from liability on account of negligent act of his wife or minor child with whom he is driving in an automobile or other vehicle. He is presumed to exercise some control over them under those circumstances, at least to the extent of preventing an act of negligence which is calculated to result in injury to other persons, and it is his positive duty to do so." The case is perhaps not as strong when a mother rides with her minor son, but we are unwilling to say that fairminded men would necessarily conclude that the power of control is absent. Our holding in *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73, is easily distinguishable, for there the son was a man of forty-five and owned the car in which his mother was riding as his guest. We observed that there was "a total want of evidence" to show that the mother had any control over the use of the automobile.

In seeking to uphold the judgment counsel for Mrs. Cherry rely upon the language in many of our decisions, including the *Lockhart* case, to the effect that in a joint

enterprise the participants must have an equal right to direct and govern the movements and conduct of each other. It is therefore contended that a joint enterprise could not have existed between Mrs. Cherry and her son, since Neil had no power to control his mother's conduct. Even so, we regard the distinction as one of nomenclature rather than of substance. It might well have been more accurate for the plaintiff to assert an agency relationship rather than a joint venture; but the vital issue presented by the proof was whether Neil's negligence might be imputed to his mother, and we are not persuaded that the imperfect terminology misled the trial court or opposing counsel.

Neil Cherry took a cross appeal and contends that there is no substantial evidence to support the jury's finding that he was guilty of willful and wanton misconduct and was therefore jointly liable with Callaway for the $2,000 judgment awarded to Don Rodgers. We think that the testimony about Cherry's greatly excessive speed warranted the submission of this issue to the jury. About a quarter of a mile from the scene of the accident young Cherry had passed another car which was traveling at 45 or 50 miles an hour. One of the occupants of this car testified that the Cherry vehicle was traveling very fast; "that car was just rocking when it passed me." Another stated positively that Cherry was traveling at least 90 miles an hour. About the same estimate was given by the plaintiff. We do not intimate that any violation of the 60-mile-an-hour speed limit justifies a finding of willful and wanton misconduct, but "the difference between gross negligence and willful and wanton misconduct is so narrow and indistinct that in many instances the question is one for the jury." *Froman* v. *J. R. Kelley etc. Co.,* 196 Ark. 808, 120 S. W. 2d 164. Without attempting to lay down an inflexible rule on the subject, we hold that the testimony in this case warranted the court's submission of the issue to the jury.

The judgment is affirmed on cross appeal, but on direct appeal the judgment is reversed and the cause remanded for a new trial. Upon remand the controversy

between Callaway and Mrs. Cherry will be subject to a retrial upon all issues, but the disputes among the various other litigants have been settled by the original verdict and judgment. On this procedural point see *Martin* v. *Street Imp. Dist. No.* 349, 180 Ark. 298, 21 S. W. 2d 430; *Oklahoma Gas & Elec. Co.* v. *Hofrichter,* 196 Ark. 1, 116 S. W. 2d 599; *Manzo* v. *Boulet,* 220 Ark. 106, 246 S. W. 2d 126.

HARRIS, C. J., and MCFADDIN, J., dissent to the affirmance on cross appeal.

YORK, ADMX. *v.* HAMPTON.

5-1618 314 S. W. 2d 480

Opinion delivered June 23, 1958.

Paul K. Roberts, for appellant.

B. Ball, for appellee.

PAUL WARD, Associate Justice. This litigation is over the proceeds of a $2,000 insurance policy on the life of Felton Hampton who was killed by his wife. The principal question is whether or not killing was justifiable.

The deceased, an employee of the Bradley Lumber Company, took out the insurance policy in question, payable to his wife who is the appellee here. Thereafter, on June 24, 1956 he was shot by his wife and died a few days later. Ada York, appellant, was appointed administratrix of the estate of the deceased.

On March 22, 1957 appellee filed suit against the insurance company, making appellant a party defendant. The insurer paid the amount of the policy into the registry of the court, and the suit was dismissed as to it. Upon trial the jury returned a verdict in favor of appellee. Appellant now urges a reversal on three grounds.

One. It is contended that there is no substantial evidence to support the jury verdict. There is no objection to any of the court's instructions, so the question presented to the jury on this issue was whether the killing was unlawful or whether it was justifiable. If the killing was unlawful and unjustifiable recovery is prohibited by public policy. See: *Inter-Southern Life Insurance Company* v. *Butts,* 179 Ark. 349, 16 S. W. 2d 184 and *Horn* v. *Cole, Administrator,* 203 Ark. 361, 157 S. W. 2d 787. It follows therefore that the jury found the killing was justifiable, and, we think, there is substantial evidence in the record to support that finding.

Other than appellee there were no eye witnesses to the killing, which took place at night. Some neighbors who heard screaming and who were told by appellee that she had shot her husband went to the home of deceased and found him on the floor with several gun shot wounds in the upper part of his body. They also found a pistol on the floor near the body of deceased. In her own defense appellee stated: "I don't know who fired the shot, but he was fighting me. We were tussling

and he started fighting me. He was quarrelling over my money which I and my little boy made picking tomatoes. That Saturday Felton got a case of beer from somewhere and came home and put some of it in a bag and took it to the ball game. After the ball game he came home and because I would not tell him where my son's and my money was he hit me with a piece of axe handle while I was in bed and I jumped up and we got to scuffling and he cursed me. He went to the dresser and got the pistol out and we scuffled and the gun went off. When he struck me I jumped up from the bed and he told me he was going to kill me, and cursed me and got the gun and I scuffled with him. I am not denying that I fired the shots that killed him. I was scared and hysterical and did not know what had happened until it was over. I would not have hurt him had I not been in fear of my life. He was drunk. He was cursing me." There was other testimony indicating that the deceased had been drinking beer.

Two. We can not agree with appellant that the court erred in allowing appellee to ask appellant whether or not she had testified when appellee was tried for murder. The answer was in the affirmative. No other information was elicited or obtained. While the question and answer might not have been relevant, we are unable to see how any prejudice resulted. In support of her contention appellant cites *Smith* v. *Dean,* 226 Ark. 438, 290 S. W. 2d 439, but we fail to see in it any application here. There it was merely held that a judgment is not admissible to prove the facts upon which it was based. Here no judgment was introduced and there was no attempt to prove any facts.

Three. Over appellant's objections appellee was allowed to introduce the testimony of several witnesses to the effect that deceased had the reputation of being violent and turbulent. We think this testimony was relevant to the issue of whether appellee or the deceased was the aggressor.

The case of *St. Louis I. M. & S. R. Co.* v. *Stroud,* 67 Ark. 112, 56 S. W. 870, cited by appellant does not

support her contention. There it was stated that "No evidence is allowed of particular acts of good or bad conduct, etc." No such evidence was involved here. In the cited case it was stated that ordinarily evidence of general character is not admissible in civil cases, but it also recognized an exception where "the action involves the general character of the party, or goes directly to effect it." We think the case under consideration falls within that exception. The vital question here was whether appellee was justified in killing her husband, and this question was closely connected with who was the aggressor. For that reason we think the questioned testimony was competent.

Affirmed.

YORK, ADMX. *v.* YORK.

5-1619 314 S. W. 2d 482

Opinion delivered June 23, 1958.

Paul K. Roberts, for appellant.

B. Ball, for appellee.

PAUL WARD, Associate Justice. The main issue in this litigation is who is entitled to the proceeds of a life insurance policy.

O. D. York carried a $2,000 insurance policy made payable at his death to his wife who is the appellee herein. On August 20, 1955 appellee inflicted knife wounds on York which resulted in his death a few days later. Ada York was appointed administratrix of York's estate, and as such filed a complaint against the carrier insurance company and appellee for the proceeds of the policy. The complaint alleged that since

appellee maliciously and wilfully inflicted the mortal wounds upon York she is disqualified under the law to receive the proceeds of the insurance policy, and that the insurer is ready and willing to pay the proper amount to the rightful owner. Appellee denied all material allegations and claimed the proceeds of the policy as the named beneficiary. The trial resulted in a verdict in favor of appellee, and from the judgment entered thereon appellant prosecutes this appeal.

The only ground urged for a reversal is that there is no substantial evidence to sustain the jury's verdict. This case is similar in many respects to the case of *Ada York, Administratrix* v. *Dorothy Marie Hampton,* 229 Ark. 301, 314 S. W. 2d 480, decided by us this day to which reference is hereby made. The same principal of law applies to both cases.

There is in the record, we think, substantial evidence to support the verdict. Appellee cut the deceased on the left arm with a knife in front of their own home sometime around 12 o'clock at night. He was promptly sent to the hospital where the doctor attempted to stop the flow of blood from an artery. On August 24, York began to hemorrhage and during an attempt to tie off the artery he died.

On the late afternoon of August 20 it seems appellee and some friends went to a cafe where they got sandwiches. The deceased also came to the cafe but soon returned home. Later when appellee and her friends approached the house the deceased told appellee to come on home. Appellee and one of her friends said she told him she would be there soon, but another witness said appellee replied: "I will be back when I get good and ready." At about this time the deceased started towards appellee with a stick when appellee cut him on the arm with a knife. The sister testified that about two weeks before the affray she heard appellee say: "Don't lose my knife because I am going to mess O. D. up with it", meaning the deceased. Another witness said she was in a store when appellee bought a knife when appellee said she had told appellant she was going

to kill her husband. Appellee denied making these statements, and said she had carried a knife a long time like most colored women. Appellee testified: "At the time I cut him he hit me with a stick. I was going to get some barbecue and he asked me to come home and he insisted and cursed me and grabbed a stick and started toward me. I stood there and the reason I did not get out of the way I knew he would catch me. When he hit me with the stick, I cut him. I felt I was in danger. I don't know what size stick he hit me with. It knocked a hole in my head. I did not intend to kill deceased. I tried to keep him off of me. He had whipped me before and I had plenty of excuses to cut him before." She further stated that she used the knife in self defense. A witness who was present stated that appellee was not looking at the deceased when he hit her, but she might have seen him before he got to her; that the force of the blow did not knock appellee down but that she was bleeding at the head.

The jury had a right to believe or disbelieve all or any part of the testimony of any witness, and we must give the testimony its greatest weight in favor of appellee. Viewed in this light we are unable to say there is no substantial evidence to support the jury's verdict.

Affirmed.

HICKS *v.* LIGHT, JUDGE.

5-1566 314 S. W. 2d 479

Opinion delivered June 23, 1958.

McCourtney, Brinton, Gibbons & Segars, for petitioner.

Killough & Killough, for respondent.

SAM ROBINSON, Associate Justice. L. T. Hicks has filed in this Court a petition for a writ of *certiorari* seeking to review the action of the trial court in setting aside a default judgment. Hicks had caused a writ of garnishment to be issued against B. C. Baker in an attempt to collect a judgment against one N. M. Scoggins. Baker failed to answer within the time named in the writ of garnishment, and the trial court rendered a default judgment against him. Later, during the same term of court, on the motion of Baker, the court set aside the default judgment. It is the action of the trial court in setting aside the default judgment against the garnishee, Baker, that petitioner seeks to review by *certiorari.*

An appeal will not lie from an order setting aside a default judgment rendered during the same term of court in which it is set aside. In *McPherson* v. *Consolidated Casualty Co.,* 105 Ark. 324, 151 S. W. 283, in referring to an appeal from an order setting aside a default judgment, Judge Frank Smith said: "Cases cannot be tried by piecemeal, and one can not delay the final adjudication of a cause by appealing from the separate orders of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative rights and liabilities of the respective parties, an appeal may then be taken, but not before. No such final judgment has been entered here, and the appeal must be dismissed."

A writ of *certiorari* cannot be used as a substitute for appeal to correct the alleged errors of an inferior

court. *Pettigrew* v. *Washington County,* 43 Ark. 33. In *Steadman* v. *State,* 96 Ark. 344, 131 S. W. 679, Judge Wood said: "*Certiorari* will not lie to correct errors or irregularities that could have been corrected on appeal."

In the case at bar if the trial court was in error in setting aside the default judgment against the garnishee, such error could be corrected on an appeal from a final judgment. If we should at this time go into the merits of the court's action in setting aside the default judgment, it might be treated as a precedent for substituting *certiorari* for appeal to correct such alleged errors.

Petition denied.

MO. PAC. RD. CO. *v.* YARBROUGH.

5-1588 315 S. W. 2d 897

Opinion delivered June 23, 1958.

Pat Mehaffy and *B. S. Clark,* for appellant.

Howell, Price & Worsham by *Max Howell,* for appellee.

SAM ROBINSON, Associate Justice. On the 22nd day of August, 1956, about 7:30 a. m., in Benton, at a place known as the Owosso crossing, a Missouri Pacific locomotive pulling a freight train consisting of nine cars collided with a truck being driven by appellee, Maynard C. Yarbrough. Yarbrough filed suit against the railway company and Noble Hatfield, the locomotive engi-
sonal injuries in the sum of $20,000. The railway com-
neer, and obtained a judgment for damages due to per-
pany and Hatfield have appealed.

First, the appellants say there is no substantial evidence to support the verdict. We have reached the conclusion that the evidence was sufficient to take the case to the jury on the question of whether the locomotive engineer negligently failed to blow the whistle or ring the bell for the crossing. Several witnesses who were in a position to have heard the bell or whistle if either had been sounded testified that they heard neither a bell nor a whistle. Although such evidence is negative in character, it is admissible, and in this instance was sufficient to take the case to the jury. *Missouri Pacific R. R.* v. *Rogers,* 206 Ark. 1052, 178 S. W. 2d 667. This cause accrued at a time when Act 191 of 1955 applied. The rule of comparative negligence governs and will be controlling in a new trial. See *St. Louis Southwestern Ry.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282.

One of the allegations of the complaint is that the trainmen failed to keep a proper lookout. This issue was submitted to the jury. Appellants contend that the instruction on keeping a lookout was abstract, contending there is no evidence in the record to the effect that the trainmen failed to keep a proper lookout. In determining the question of whether there is any substantial evidence to support an instruction on the failure to

keep a proper lookout, the evidence must be viewed in the light most favorable to appellee.

There are four railroad tracks that cross Neeley street in Benton. At this point the street is running approximately north and south and the tracks are running east and west. There are two main line tracks and to the south of these tracks is a spur track which services the Owosso Manufacturing Company plant. To the north of the main line tracks is another switch track. The spur track going to the Owosso plant is about 50 or 60 feet south of the main line track, and from that point to the main line track it is upgrade.

On the day in question the train was traveling west at a speed of from 20 to 25 miles an hour and was to stop at the railroad depot, about a quarter of a mile west of the Owosso crossing. The appellee, Yarbrough, was traveling north on Neeley street. He was driving a truck equipped with a transmission having four speeds forward and one reverse. One of the forward speeds is known as "double low". Appellee's truck was empty. He testified that he was going after gas, and when he reached a point where his rear wheels were on the north rail of the spur track south of the main line, he came to a complete stop, looked to his right, then to his left, then to his right again, and seeing no train he put his truck in double low and started to cross the main line track at about 5 miles an hour. He testified that in looking east, to his right, the sun was in his eyes; and he also said that in that direction there was a little railroad tool house that might have interfered with his vision. From the pictures introduced in evidence, it appears that the right front end of his truck collided with the train.

According to the undisputed testimony, when about 100 feet from the crossing the fireman saw appellee's truck going up the incline to the main line track; it occurred to him that the truck driver was not going to stop; he jumped up to make sure that the engineer heard him, and hollered "Big Ho", which is the term used as a warning to apply the emergency brakes, that there is danger; the engineer immediately applied the brakes,

but, although the brakes on the train were working properly, a train of the character involved, going at a speed of from 20 to 25 miles an hour, could not be stopped in less than about 350 feet.

Appellee contends that the testimony of Richard Dick, the fireman on the locomotive, shows that the track is straight for a quarter of a mile east of the Owosso crossing, and that pictures admitted in evidence show the track to be straight for a considerable distance, and hence the fireman should have seen Yarbrough sooner than he testified he did see him, and if he had seen Yarbrough sooner the train could have been stopped before reaching the crossing. We do not find any evidence in the record that is fairly open to that construction. The pictures introduced in evidence clearly show that the crossing itself is actually in a curve, that the track is curving as it comes into the crossing and is curving east of there to such an extent that there is no indication that the fireman could see Yarbrough before he says he did see him. Appellee contends that the following testimony given on cross-examination by the fireman, Dick, indicates that the main line track is straight for a considerable distance east of the crossing:

"Q. And you are telling the jury that you do not know how far east it is where the line makes a turn from south to west?

A. I don't know the exact distance.

Q. Do you have any idea? Can you estimate it for us?

A. I could estimate it, but that would be—

Q. All right, estimate it for us, if you will.

A. My estimation, it would be somewhere close to a quarter of a mile."

When this evidence is considered along with the pictures and the other evidence in the case, it is clear that the fireman meant that the curve started about a quarter of a mile east of the Owosso crossing.

We have carefully examined the record in this case and find no direct or circumstantial evidence from which an inference could be drawn that the trainmen failed to keep a lookout or that such alleged failure in any way contributed to cause the collision. And furthermore, even assuming that the trainmen were not keeping a lookout, according to the undisputed evidence such failure could have in no way contributed to cause the collision. According to appellee Yarbrough's testimony, he brought his truck to a complete stop between the spur track and the main line; he then put the truck in double low and started across the track at about 5 miles an hour. When he did this he could not have been over about 40 feet from the main line. At 5 miles an hour he was traveling about 7 feet per second. The train was traveling between 20 and 25 miles an hour. Assuming that it was going 25 miles an hour it would not have been going over 37 feet a second. At 5 miles an hour it would take the truck about 7 seconds to reach the main line track. In this same length of time the train would travel approximately 250 feet. According to the undisputed testimony the train could not be stopped within that distance, and it would go about 140 feet before the brakes would start slackening the speed of the train to any extent. Therefore, a failure to keep a lookout could not have contributed to cause the collision. It was impossible to stop the train before reaching the crossing after the appellee put his truck in motion and started across the track. Certainly if the trainmen saw the appellee with his truck standing still near the track they would not be required to anticipate that he was going to start the truck up and attempt to cross, when to do so would make a collision almost inevitable. In *Missouri Pacific R. R.* v. *Doyle,* 203 Ark. 1111, 160 S. W. 2d 856, the court quoted from *Blytheville, L. & A. So. Ry.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881, as follows: " 'The operatives of trains have the right to assume that a traveler or a pedestrian approaching a railroad track will act in response to the dictates of ordinary prudence and the instinct of self-preservation, and will,

in fact, stop before placing himself in peril, and the duty of the railroad employees to take precautions begins only when it becomes apparent that the traveler at a crossing will not do so.' "

Appellee further contends that appellants are in no position to complain of the court's action in giving an instruction submitting to the jury the question of whether the trainmen kept a lookout, because the instruction was given at the request of appellants. It appears that appellants, by their instruction No. 3 requested the court to instruct the jury not to consider the allegation of failure to keep a lookout. The court refused to give this instruction. Among appellants' instructions was No. 19, dealing with the lookout question. In reading through the instructions requested by both sides, the trial court decided to give this instruction instead of giving appellee's instruction on that point. The court's action in giving the instruction was over the objection of appellants. It appears that the court had decided on the instructions that would be given when the attorney for appellants dictated his motion for a directed verdict and at the same time objected to the court's action in giving the instruction on the issue of keeping a lookout.

Appellants also maintain that the court erred in not submitting the case to the jury in accordance with the comparative negligence statute (Act 191 of 1955), but from what has been said heretofore this point is not likely to arise at a new trial.

Because of the error in submitting to the jury the issue of whether the trainmen kept a proper lookout, the judgment is reversed and the cause remanded for a new trial.

McFaddin, J., not participating; Millwee, J., dissents.

NOWLIN *v.* MAGNOLIA PETROLEUM COMPANY.

5-1605 314 S. W. 2d 509

Opinion delivered June 23, 1958.

T. O. Abbott and *R. H. Peace,* for appellant.

John M. Lofton, Jr., and *Owens, McHaney, Lofton & McHaney,* for appellee.

SAM ROBINSON, Associate Justice. It appears from the pleadings in this case that a certain piece of property in Hampton is owned by appellee C. N. Primm; that Primm leased the property to appellee Magnolia Petroleum Company, and Magnolia in turn subleased it to appellee J. H. Hannegan. According to the pleadings the lease from Primm to Magnolia provides: "In case of destruction of the premises by fire, explosion, storm, or otherwise, Lessors agree to immediately repair same and replace them in good and proper condition for operation of said service station, and Lessee agrees to repair or replace its said equipment with a view to returning said station to its original condition for the operation of a service station as quickly as possible. During the period of said repairs the rents herein provided for shall cease, but as soon as the repairs are finished and Lessee re-occupies the premises, the

rent shall resume upon the same terms, and such periods of time shall be deducted in calculating the term of this lease.''

The complaint alleges that on October 9, 1955, a building on the property was destroyed by fire and that a sheet of metal from the roof of the burned building was left protruding over the sidewalk; that on November 2nd Margarett Ann Nowlin, a minor, struck her leg against this piece of metal, causing a serious injury. The complaint alleges that the defendants were negligent in not removing the sheet of metal from the walkway and that as a result of such negligence Margarett Ann was injured. At the conclusion of the testimony presented by the plaintiffs, the court instructed a verdict for Magnolia Petroleum Company and Hannegan. The court allowed the case to proceed against Primm, and the jury returned a verdict in his favor. On appeal appellants contend that the trial court erred in directing a verdict in favor of Magnolia and Hannegan.

The record contains no evidence introduced up to the time the court directed a verdict for Magnolia and Hannegan. Later in the trial the defendant C. N. Primm introduced a witness, one Lawrence Primm, and appellants contend that from this witness' testimony it can be determined that Magnolia and Hannegan still had some duty in connection with removing the debris from the property after the fire. But even if Lawrence Primm's testimony could be so construed, it could not benefit appellants, as Primm's testimony had not been introduced in evidence and was not a part of the record at the time the court gave the instructed verdict in favor of Magnolia and Hannegan. When the court gave the instructed verdict, plaintiffs had closed their case, and the court had the benefit of no evidence except that which had been produced by appellants, and so far as the record shows at that point appellants had failed to make out a case against Magnolia and Hannegan.

Affirmed.

HANKINS *v.* DOOLEY.

5-1613 314 S. W. 2d 691

Opinion delivered July 1, 1958.

[redacted]

Mann & McCulloch, for appellant.

E. J. Butler; Davis & Davis, Memphis, Tenn., for appellee.

CARLETON HARRIS, Chief Justice. W. N. Dooley and Ernestine G. Dooley instituted suit against A. F. Hankins, alleging personal injuries and property damage as a result of a collision between an automobile driven by Mr. Dooley and one driven by Mr. Hankins. Mrs. Dooley was a passenger in the front seat with her husband. The complaint alleged that Hankins was guilty of various acts of negligence, which Hankins, in his answer, denied, appellant further alleging contributory negligence on the part of appellees.

The cause proceeded to trial, and at the conclusion of the evidence, was submitted to the jury on the court's instructions and special interrogatories. There were no objections by any party to the instructions, and all instructions requested by the litigants were given. The jury returned its verdict, finding that Ernestine G. Dooley had suffered damages in the amount of $4,800; W. N. Dooley had not suffered any damage; Hankins

was negligent, and appellees were negligent. The jury divided the negligence of the parties as 50 per cent to Hankins and 50 per cent to appellees. Under this verdict, Mrs. Dooley would have been entitled to judgment from Hankins in the amount of $2,400. Appellees filed a motion for judgment *non obstante veredicto,* asking the trial court to render judgment for the full amount of damages suffered by Mrs. Dooley, and also for damages suffered by Mr. Dooley.[1] The motion alleged that there was no evidence to support a finding of negligence on the part of Mrs. Dooley. The court, in compliance with the motion rendered judgment *non obstante veredicto* for Mrs. Dooley in the amount of $4,800, and from such judgment, Hankins brings this appeal,[2] asserting such action on the part of the trial court was erroneous, and that judgment should have been rendered on the verdict of the jury.

Appellant argues that the trial court's action was erroneous for three different reasons, any one of which would require a reversal, if the arguments be sound. Since we are of the opinion that the third contention is controlling, we find it unnecessary to enter into a discussion of the first two contentions. As the third ground for reversal, Hankins states:

"The appellees waived any right to contest the verdict because of failure to object seasonably to the instructions and interrogatories."

The court gave thirteen instructions at the request of appellees, four instructions at the request of appellant, one written instruction upon its own motion, together with oral instructions, and further submitted four special interrogatories relating to the negligence of the parties, and whether damages were suffered by appellees. The interrogatories, together with the answer of the jury, are as follows:

[1] The court overruled the motion as to Mr. Dooley.

[2] The appeal does not question the validity of the finding by the jury of negligence on the part of Hankins, nor does it question the validity of the finding as to the amount of damages.

"Interrogatory No. 1.

Do you find from a preponderance of the evidence in this case that the Defendant, A. F. Hankins, was guilty of negligence and that such negligence, if any contributed to cause, or caused, the injuries complained of by plaintiffs?

Answer . . . Yes . . .

Interrogatory No. 2.

If you have answered Interrogatory No. 1. "Yes", you will answer Interrogatory No. 2.

Do you find from a preponderance of the evidence that the Plaintiffs, W. N. Dooley and Ernestine G. Dooley, suffered damages, and, if so, what do you find the total amount of damages to each of them to be?

Answer . . . Yes . . .
$ (0) . . . (Amount — W. N. Dooley)
$4,800 . . . (Amount — Ernestine G. Dooley)

Interrogatory No. 3.

If you have answered Interrogatories Nos. 1. and 2. "Yes", you will answer Interrogatory No. 3.

Do you find from a preponderance of the evidence that the Plaintiff, W. N. Dooley, was guilty of contributory negligence which contributed to cause the damages complained of?

Answer . . . Yes . . .

Interrogatory No. 4.

If your answer to Interrogatory No. 3. is "Yes", you will answer Interrogatory No. 4.

What percent do you find from a preponderance of the evidence the contributory negligence of Plaintiffs, W. N. Dooley and Ernestine G. Dooley, contributed to cause the damages complained of by the Plaintiffs, using one hundred per cent (100%) to represent the total negligence involved?

Answer: Plaintiffs . . . 50 per cent . . . Defendant . . . 50 per cent . . ."

Appellees point out that the jury did not make a specific finding of negligence on the part of Mrs. Dooley, and contend that the inclusion of Mrs. Dooley's name in Interrogatory No. 4 was an unintentional error by the court. It may well be that this contention is correct; still, the answer to Interrogatory No. 4 includes both appellees, for the question to be answered included both. Appellees stoutly contend that there is not one iota of evidence in the record to support a finding of negligence on the part of Mrs. Dooley. Even though we should agree, the judgment cannot be upheld. If appellees were of this opinion, they should have requested a peremptory instruction to the effect that she was free of negligence. This was not done. To the contrary, appellees themselves offered two instructions dealing with the question of negligence on the part of Mrs. Dooley,[3] and there was no objection to the interrogatories submitted by the court to the jury. When appellees permitted the issue of negligence on the part of Mrs. Dooley to be submitted, it was thereafter too late to make objection. In *Western Union Telegraph Co.* v. *Cowardin,* 113 Ark. 160, 168 S. W. 1133, this Court said:

"The court, at the request of appellant, granted prayers for instructions which told the jury that if the earlier receipt of appellee's request to embalm and hold the body would not have prevented the funeral from taking place when it did, and if the failure to embalm and hold the body was the result of William's misun-

[3] "Plaintiff's Instruction No. 2. It is your duty to try the facts, and the following issues are for your determination: * * * c. The proportion of negligence, if any, expressed in percentage, attributable to the plaintiff, Ernestine G. Dooley, on the one hand, and to the defendant, A. F. Hankins, on the other? Plaintiff's Instruction No. 7. Negligence, if any, on the part of W. N. Dooley as the driver of the vehicle in which the plaintiff Mrs. Ernestine G. Dooley was riding, can not in any degree be imputed to her, unless you find that the said Ernestine G. Dooley failed to exercise reasonable and ordinary care for her own safety, or unless you find that Ernestine G. Dooley and W. N. Dooley, her husband, were engaged at the time in a joint enterprise."

derstanding of appellee's wish, expressed in her telegram, the jury should find for the appellant.

Appellant now contends that the evidence shows conclusively that the failure to embalm the body was not by reason of the late receipt of the message, * * *. The appellant, having requested the lower court to submit this as a jury question, is not in an attitude to complain that the verdict of the jury was erroneous on this issue."

Likewise, as recently as December 23, 1957, in *Pinnacle Old Line Insurance Company* v. *Ellis,* 228 Ark. 458, 307 S. W. 2d 882, we said:

"The insurer, without requesting a directed verdict, obtained an instruction by which this question of fact was submitted to the jury. In these circumstances it cannot now be contended that the verdict on this issue was erroneous."

So, if the instructions were erroneously submitted, the error was invited; if Interrogatory No. 4 was improper, objection should have been made.[4] Appellees cannot now be heard to complain.

The judgment is therefore reversed, and the cause is remanded to the Circuit Court with instructions to render judgment in accordance with the verdict of the jury. While appellant, at all times, has indicated his willingness to pay the $2,400 judgment, the record does not reflect that such amount has ever actually been tendered. Accordingly, appellee, Ernestine G. Dooley, is entitled to the legal rate of interest from the date of the judgment (October 29, 1957) until paid. All costs shall be borne by appellees.

[4] Of course, since the issue of Mrs. Dooley's negligence was submitted to the jury, interrogatories inquiring as to such negligence were entirely in order.

WILLIAMS MFG. CO. *v.* STRASBERG.

5-1624 314 S. W. 2d 500

Opinion delivered July 1, 1958.

A. M. Coates, for appellant.

Daggett & Daggett, for appellee.

CARLETON HARRIS, Chief Justice. Williams Manufacturing Company, appellant herein, is an Ohio corporation engaged in the manufacture and sale of women's shoes. Leonard J. Strasberg is a retail merchant of Marianna, Arkansas. In 1954, Strasberg commenced handling appellant company's shoes, having purchased same through appellant's salesman, one Roy McGinnis. On July 3, 1956, appellant invoiced to appellee at Marianna an order which had been placed with McGinnis in the total amount of $630.85. The merchandise was purchased for fall and winter trade, and was stored to be put on the shelves when fall trade commenced.

On July 12, 1956, Strasberg sent his check to the company for the sum of $278.95, and returned merchandise which had been previously purchased at a cost of $351.90, said check and merchandise to constitute pay-

ment for the July 3rd order. The company accepted the check, but refused to accept the return of the merchandise as part payment.[1] Appellant advised appellee that he could return the July 3rd shipment, but Strasberg refused to do so. Appellant instituted suit for the $351.90, together with interest. Strasberg answered, denying the indebtedness, and affirmatively stated that the purchase of the merchandise (invoiced July 3rd, 1956) was conditioned upon an agreement that Williams would not open or accept new accounts for the retail sale of similar merchandise manufactured by it, that appellant violated this agreement, and did thereby breach its contract. The cause proceeded to trial and the jury returned a verdict for appellee. From the judgment of the court dismissing the complaint, appellant brings this appeal.

Appellee contended that he had an agreement with the company giving him, together with Carothers Shoe Store of Marianna, the exclusive right to handle Williams Company shoes in that city, and appellant violated such agreement by shipping shoes to West's Department Store, a competitor. It was this alleged violation of the agreement that caused appellee, according to his testimony, to send in shoes from previous orders as partial payment of the July 3rd order. Williams contended that it had no such agreement, and that its salesman, Mr. McGinnis, had no authority to enter into same. According to our view, there is no necessity to discuss whether such an agreement existed, or whether McGinnis was authorized to enter into such a contract, since we consider, that under the testimony, appellant was entitled to recover for the July 3rd shipment, irrespective of the alleged breach of contract. Strasberg had been purchasing shoes from appellant company since November, 1954. During that period, he had purchased several shipments and paid for them. Subsequent thereto, on May 4, 1956, he purchased the shoes (which are the source of this litigation), and received

[1] The merchandise consisted of shoes which had remained on appellee's shelves from previous orders, some of which he referred to as "odds and ends." The record does not reflect as to what finally happened to the shoes.

the invoice and shipment on July 3rd. On July 12, Strasberg wrote a letter to the company, sending his check for $278.95, and returning shoes (previously purchased and paid for) amounting to a value of $351.90. He stated in his letter:

"We regret this return, but you have violated your contract with us. * * * Your shoes are moving into Marianna through West's Store, our bitterest competitor. When we agreed to buy your shoes, an understanding was reached whereby our store and Carothers Shoe Store would be the stores to handle Williams Shoes in Marianna (pop. 4,500) exclusively. * * * The only defense I have against a firm that will violate their contract with me is to return the odds and ends of their merchandise. * * *"

It would therefore appear that at the time Strasberg received the July 3rd shipment of shoes, or within a few days thereafter, (at most, within nine days) he had already learned that West's store was selling Williams Brothers shoes. If an agreement had been breached, he was aware of it at that time, but despite such knowledge, retained the shoes, placed them in stock, and sold them in the fall. At the conclusion of appellee's testimony, appellant moved for a directed verdict, first contending that the proof reflected that McGinnis had no authority to bind Williams Manufacturing Company to the agreement claimed by Strasberg, and second,

"The uncontradicted proof on the part of the defendant is that after the controversy arose as to the exclusive right to sell Williams Brothers products in Marianna, he accepted the fall shipment and placed the same on his shelves and proceeded to sell the same. The duty of the defendant was that if he was under the belief that he had an exclusive contract to sell Williams Brothers shoes was to return the merchandise and refuse to accept the same. Having accepted the merchandise he now cannot plead any such agreement with a salesman."

We feel that appellant, on the basis of the quoted portion of the motion, was entitled to the directed verdict, and the court erred in overruling such motion.

If Strasberg felt that appellant had breached its contract, he should have returned the shipment just received. In *International Shoe Company* v. *King,* 186 Ark. 799, 56 S. W. 2d 171, appellant instituted suit against King to recover $1,784.99 for "Red Goose" shoes sold and shipped to King by the company. King defended on the ground that he had an agreement with the company to handle these shoes exclusively, and that International violated the agreement by allowing another firm in Camden to handle the same line of shoes. King shipped the shoes back to appellant, because of the alleged breach. On appeal, we affirmed, but there, King returned *all the shoes* purchased from appellant, *including all that he had of the most recent purchase.* He refused to further handle their merchandise, and immediately placed orders with other shoe companies. Here, Strasberg took all of the shoes remaining in stock from *prior* purchases, and returned them to appellant, together with his check for the difference, as payment for the last shipment. This had the effect of exchanging old goods for new. Included in the shoes returned were white shoes and straw shoes, bought for the purpose of sale in the spring and summer, and the returned shoes were, to a large extent, "odds and ends." To permit appellee to select such stock as he desired to return to appellant, particularly that stock for which the sale season was mostly over, would certainly give him an undue advantage. Appellant was either entitled to remuneration for the fall shoes — or entitled to receive them back. As stated in Williston on Contracts, Vol. 5, page 4118:

"Few questions in the law have given rise to more discussion and difference of opinion than that concerning the right of one who has materially broken his contract without legal excuse to recover for such benefit as he may have conferred on the other party by part performance of an indivisible contract * * *. A satis-

factory solution is not easy, for two fundamental legal policies seem here to come in conflict. On the one hand, it seems a violation of the terms of a contract to allow a plaintiff in default to recover — to allow a party to stop when he pleases and sell his part performance at a value fixed by the jury to the defendant who has agreed only to pay for full performance. On the other hand, to deny recovery often gives the defendant more than fair compensation for the injury he has sustained and imposes a forfeiture on the plaintiff. * * * But the second of these opposing policies has steadily increased in favor in recent years. Except where the obliquity of the defective performance is of a sort that indicates moral obliquity, and where, therefore, the courts feel that the one who is in default may properly be penalized, the tendency is to grant him restitution if a substantial net benefit has accrued to the defendant by partial performance."

Strasberg could have, of course, returned the fall shipment, and then sought damages for breach of contract. As it was, he did not elect to sue for damages, nor was any proof of damage offered during the trial. He elected only to contend that the contract was breached, but if we consider such contention to be entirely established, still, this did not entitle him to keep new merchandise and pay for it with old. It only entitled him to refuse to pay for the merchandise at all, to return it forthwith, and to refrain from handling Williams Brothers shoes in the future. One cannot "have his cake and eat it too." He cannot accept benefits under a contract, and at the same time, avoid his obligations under such agreement. Appellee received a substantial benefit from the shipment of fall shoes, and having accepted that benefit, he cannot refuse to compensate the company because of their alleged breach.

Accordingly, the judgment of the Circuit Court is reversed, and the cause remanded with directions to enter judgment for appellant in the sum of $351.90, together with interest as provided by law.

MILLWEE and WARD, JJ., dissent.

5-1627 315 S. W. 2d 13

Opinion delivered July 1, 1958.

S. L. White, for appellant.

Ancil M. Reed, for appellee.

CARLETON HARRIS, Chief Justice. This is the second appeal of this case.[1] An action was brought by the City of Little Rock to condemn five acres of land, the complaint alleging that Bradley had a deed to the land, and that Keith had a tax title to same. Bradley filed an answer asserting title to the property, but Keith failed to file any pleading whatsoever. At a preliminary hearing, with the parties represented by their attorneys, it was agreed that the land was worth $1,000, and that the city might deposit such amount in the registry of the court, and take possession of the property. The court's order

[1] See *Bradley* v. *Keith,* 227 Ark. 1107, 305 S. W. 2d 134.

recited, "* * * said funds shall remain in the registry of the court until ownership has been finally determined," and directed that the cause be placed on the regular docket for determination. On June 5, 1956, Bradley was present by his attorney, but appellee failed to appear. After hearing evidence, the court found that Keith was entitled to reimbursement for the amount paid for his tax deed together with interest, and that Bradley was entitled to the rest of the aforementioned fund.

On the following day, Keith filed an unverified motion to set aside said judgment, asserting that only a pre-trial conference had been set for June 5th, and that his attorney had been unable to attend by reason of illness. This motion was not presented to the court until after the lapse of the term. At the subsequent term, the court considered the motion, and acting upon the statement of counsel for appellee, made a finding of unavoidable casualty and vacated the judgment. Bradley appealed to this Court, and we reversed the Circuit Court because the motion filed by Keith to set aside the judgment was not verified, nor was any sworn testimony taken at the hearing on said motion. Following the filing of the mandate, Keith again filed a motion to set aside said judgment, and verified same. The court granted the motion, and set aside the judgment of June 5, 1956. From such action, appellant brings this appeal.

The second motion filed by appellee was identical with the first, with the exception that the latter was verified. The meritorious defense alleged was that Keith had a tax deed to the property. Subsequently, Keith amended his pleading to allege the placing of improvements upon the property. Section 29-508, Ark. Stats. (1947) Anno., requires that a complaint to set aside a judgment after the expiration of a term be verified. We reversed the earlier appeal because this statute was not complied with. It was pointed out in our opinion that this requirement may be satisfied by the introduction of sworn testimony at the hearing on such a motion, but though an oral statement was made by counsel, which

might well be considered testimony, the requirement was not met since the statement was not made under oath. The issue before this Court in the first appeal was whether the trial court's action in setting aside its earlier judgment was proper and valid. That court had based its action on a finding that appellee's counsel was prevented, through unavoidable casualty, from attending the hearing at which the judgment was entered. This question, as well as the question of appellee's failure to file an answer within the time allowed by statute, was before this Court, and argued in the briefs. The fact that the case was decided on another point does not mean that Keith is entitled to start over again. Such a holding would not be logical. If Keith can correct his mistake by verifying his pleading and thus come before the Court a second time, then if the present pleading were unverified, and we again reversed for that reason — he could come a third time, and in fact, a fourth — and so on. There would never be an end to the matter. The additional allegation of improvements to the property is of no help because these improvements apparently were made before the filing of the first motion. On page 84, paragraph 65, Vol. 60, of *Corpus Juris Secundum,* we find:

"* * * the denial of a motion is not *res judicata* as to a subsequent motion which is based in part on matters occurring after the making of the prior motion, and which seeks relief which the earlier motion did not seek."

Here, the converse is true. The second motion seeks identically the same relief as the first, and the additional defense alleged is not based on matters occurring after the making of the first motion. We accordingly find that the question of the validity of the Circuit Court's order setting aside the judgment of June 5, 1956, was adjudicated by this Court on July 1, 1957.[2]

Were it otherwise, the result would be the same, for appellee cannot prevail for yet another reason. This suit was filed by the city on March 29, 1956, and no an-

[2] Rehearing was denied on September 30, 1957.

swer was ever filed by Keith. The judgment in favor of Bradley was not entered until sixty-five days after service of summons on both Bradley and Keith, and twenty-six days after the court placed the cause on the regular docket for determination. Counsel for appellee was apparently under the impression that it was not necessary to file an answer in a condemnation suit. As a general rule, this is true. In Vol. 18, American Jurisprudence, Section 325, page 970, we find:

"When condemnation is by judicial proceeding, the usual practice requires no plea or answer on the part of a defendant, and it has been held that it is not error to strike out an answer filed. A reason why there is no strict necessity that the owner should appear and answer is that the land can be condemned only on the payment of just compensation to the owner, and this, of course, must be ascertained and paid whether or not the owner appears and answers.

* * *

On the other hand, it has been held that the duty devolves on a defendant in an eminent domain proceeding not only to prove, but also to plead, how and why he will suffer damages in respect of land which is not taken in the proceeding. Thus, if he claims damages for the cost of building and maintaining fences along a strip of land taken for a public use, such as a highway or railroad, his answer should contain appropriate pleadings supporting the claim."

In this litigation, we do not agree that the filing of a pleading was unnecessary. Sec. 35-906, Ark. Stats. (1947) Anno., provides:

"So soon as the amount of compensation that may be due to the owners of the property taken, or to any of them, shall have been ascertained by the jury, the court shall make such order as to its payment or deposit as shall be deemed right and proper in respect to the time and place of payment and the proportion to which each owner is entitled, and may require adverse claimants of any part of the money or property to in-

terplead, so as to fully settle and determine their rights and interests according to equity and justice."

As previously mentioned, the court, on May 10, 1956, entered an order finding that the city had deposited the sum of $1,000 into the registry of the court, and "* * * that there is a dispute among the defendants as to the ownership of said property. That said funds shall remain in the court until said ownership has been finally determined. * * * It is further ordered that the cause be placed on regular docket for determination of distribution of the funds." So here, it was incumbent, that in order to make claim to the fund deposited, the two claimants of the land assert their claim to ownership (or any other claim, such as improvements), in order that the court might act thereon. It was accordingly necessary that pleadings be filed. Sec. 27-1135, Ark. Stats. (1947) Anno., was amended by Act 49 of 1955[3] to provide as follows:

"The defense to any complaint or cross-complaint must be filed the first day after expiration of the periods of time set forth below, as the case may be:

First. Where the summons has been served twenty (20) days in any county in the State; * * *"

As pointed out by appellant, this provision has been held to be mandatory. *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439. See also *Pyle* v. *Amsler, Judge,* 227 Ark. 785, 301 S. W. 2d 441. In the former case, this Court said:

"* * * We do not mean to foreclose the possibility of relief to a defendant who has been prevented by unavoidable casualty in 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. * * * The 1955 acts do not purport to change the law in this respect. * * *"

Here, no unavoidable casualty or misfortune is suggested as preventing the filing of an answer.

[3] This act was further amended by Act 53 of 1957.

Without entering into a detailed discussion, since this litigation is thus disposed of, it might likewise be added that under the proof, we cannot agree that the failure of counsel to attend the hearing because of illness, constituted unavoidable casualty. The evidence showed that the law firm, with which then counsel was connected, had several members or associates, and it is not shown that it would have been impractical for any of these to attend the hearing.

For the reasons enumerated herein, the judgment is reversed, and the cause remanded with directions to reinstate the judgment of June 5, 1956.

BRAMLETT *v.* WATTS.

5-1590 314 S. W. 2d 490

Opinion delivered July 1, 1958.

John G. Rye, Opie Rogers and *Ray Trammell,* for appellant.

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

J. SEABORN HOLT, Associate Justice. Appellee, Watts, brought suit against appellant, Bramlett, to recover for personal injuries caused by collision of a heavily loaded truck, driven by Bramlett, with an automobile driven by appellee, on Highway 65 a short distance out of Marshall, Arkansas. Appellant answered with a general denial and specifically pleaded that any injuries that appellee received were proximately caused by appellee's own negligence. A jury trial resulted in a verdict for Watts in amount of $12,000 and this appeal followed.

For reversal appellant relies on the following points: "1. Jury's finding as to interrogatory No. 2 and No. 3 to effect plaintiff was absolutely free of any causal negligence was not based upon any substantial evidence and hence is error of law, 2. Failure to credit testimony showing plaintiff's negligence indicates mistake by jury in application of comparative negligence statute and this is reversible error, 3. The judgment is excessive, *etc.*" We do not agree with any of these contentions. Neither party complains about any instructions given. In fact, it appears that all instructions given clearly and fairly submitted the issues, and were agreed to by the parties.

Under our often repeated rule, when an appeal from a judgment on a jury's verdict reaches us, it is our duty to affirm that judgment if we find any substantial evidence to support the jury's verdict. Here we are not concerned with where the preponderance of the testimony rested, but only whether, as indicated, there was any substantial evidence to support the jury's finding and in determining whether the evidence was substantial we must give to the testimony its strongest probative force in favor of the successful party, that it will reasonably bear. "In determining the sufficiency of the evidence to sustain a verdict, the Supreme Court views the evidence in the light most favorable to the appellee, and will not set aside a verdict if supported by substantial evidence," (and cases there cited) *Albert* v. *Morris,* 208 Ark. 808, 187 S. W. 2d 909. Under interrogatories pro-

pounded to the jury by the court, the jury found that appellee Watts was guilty of no negligence, but that Bramlett was guilty of negligence.

The evidence shows that the collision occurred at about 9:45 p. m. while Watts was driving along Highway 65 well within his proper traffic lane, at a speed of about 30 miles per hour, and that appellant drove his truck across the center line over into appellee's lane striking and sideswiping appellee's car. Watts' left hand was outside the window holding the little vent glass at the time. Vent glass was about 4 inches wide. Appellee's witness, Billy Joe Holder, sheriff, who was called to the scene of the collision testified that Watts' car (appellant's abstract) "was in ditch on right hand side, and two lumber trucks were north of that on their side of road, on the shoulder. Looked for physical evidence which might show point of impact. Found glass and some dirt in Ford car's lane which looked like where accident did occur. Would not say how far because did not measure it. Watts' car pretty well broken up — windshield and door glasses broken out, body of the car injured. Car hit just before it got to the windshield, corner of the bed looked like it hit the car. Examined the truck involved. Truck not damaged. Truck loaded with oak lumber." This evidence was substantial and ample to support the verdict. As indicated above, we do not think the verdict excessive.

Watts testified (appellant's abstract) that he lost his forefinger as result of crash; his next finger is bent and cannot be straightened out, while hand was perfect previously; in palm is a heavy seam which is scar; little finger is numb, but some feeling in it has returned. He was under treatment for three months. Complete feeling has not returned to hand. Had pain and suffering for which he took pain pills. Couldn't sleep for two months. Still has some pain in hand after working. Hand stays cold. Was treated by Dr. Evans at Marshall and sent on to Little Rock to Dr. Kenneth Jones. Stayed in hospital for ten days. Made seven or eight trips back to Dr. Jones for dressing. At time of in-

jury was working at Gary, Indiana, taping and finishing sheet rock in connection with inside construction of new homes. Is skilled work consisting of putting mud in the crack where joints come together and then placing tape on there twice. He was earning $4 per hour. Job was waiting on his return. Worked six days a week and made $192 a week before deductions. Company worked for it had lots of houses and work, and that both hands very necessary in doing this work. Used forefinger and thumb of left hand to fold the tape in doing corners. That this is work which requires minute care and attention. Went back to work last of October or first of November; has not drawn same rate of pay because of his left hand. Cannot work as fast and is paid by the hour. Still owes $347.70 to Dr. Jones — hospital bills were covered by his insurance . . . he cannot use tools in left hand. Cannot use trowel but can use machine in work since machine has big end which he can grasp. Cannot work on location where machines are not used.

Dr. Kenneth Jones, orthopedic surgeon, Little Rock, Arkansas, testified that he first examined Watts at the Baptist Hospital July 7, 1956, Watts remained hospitalized until July 18, 1956 and was seen subsequently in the doctor's clinic on 7 occasions, the last October 18, 1956. Dr. Jones testified, relative to the condition of appellee at the time he discharged him, that: "Considering the initial injury I feel that this patient has obtained a very good functional result. However, he does have a loss of the 2nd digit of the involved hand and has considerable limitation of motion in the 3rd digit of that hand. In addition there is a scar in the middle of the palm of the hand and for that reason it may be anticipated that at a later date function of the hand might be improved by turning a pedicle flap into the palm and loosening the adherent flexor digitorium profundis tendon to the middle digit. As it now stands, it is my opinion that the patient has lost approximately 40 per cent of the functional capacity of the hand."

Appellee Watts was a young man 20 years of age, and a skilled workman earning $4 per hour, with steady employment of approximately 9 months a year. As a result of his injuries he is now handicapped with his left hand permanently injured with a loss of 40 per cent of its usefulness, which will materially affect his earnings. He has lost approximately four months employment, has incurred substantial hospital and surgical bills, and still owes a doctor bill of $347.70. He has suffered much pain and continues to suffer. Commenting on the excessiveness of jury verdicts we said in *Phillips Motor Co.* v. *Rouse,* 202 Ark. 641, 151 S. W. 2d 994, "Juries have the same right to pass upon the question of the amount to be awarded as compensation for an injury that they have to pass upon the question of liability for the injury; and we may not set aside a verdict in either case where it is supported by substantial testimony. If, however, there is no substantial testimony to sustain a judgment as to amount, it is our duty to reduce it; and if there is no substantial testimony to sustain a finding as to liability, our duty to dismiss the cause of action is equally certain."

Having concluded that there was substantial evidence to support appellant's liability for appellee's injuries, and that the amount of the verdict was not excessive, we affirm the judgment.

MOORE *v.* STATE.

4891 315 S. W. 2d 907

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

W. Harold Flowers, for appellant.

Bruce Bennett, Atty. General; Thorp Thomas, Asst. Atty. General, for appellee.

Ed. F. McFaddin, Associate Justice. This is a death sentence case. In *Moore* v. *State,* 227 Ark. 544, 299 S. W. 2d 838 the present appellant and three others had been convicted for the murder of M. R. Hamm. We reversed the convictions for the reasons stated in the majority opinion in that case. The facts surrounding

the killing of Mr. Hamm and the appellant's alleged participation are stated in our opinion in the first appeal; so we do not again recite them.

On remand, James Moore (present appellant) obtained a severance, made no claim for change of venue, and upon trial was again convicted and sentenced to death. This appeal ensued; and, being a capital case, we have reviewed every objection in the record. (See § 43-2723 Ark. Stats.) We group the objections and assignments[1] in convenient topic headings:

I. *Appellant's Motion To Quash The Information.* Appellant was tried on an information filed by the Prosecuting Attorney instead of an indictment returned by a Grand Jury; and he says:

"Again is presented to the Court the contention that Amendment No. 21 to the Constitution of the State of Arkansas violates those liberties provided for in the Constitution of the United States of America. The more recent interpretations of the due process clause of the Federal Constitution activates interest in the question of whether or not a State may, if it so desires, provide for prosecution by Information rather than Indictment."

The contention here made has been rejected in many of our cases. In *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, we said:

"Appellant was tried on an information filed by the prosecuting attorney, rather than on an indictment returned by a grand jury; and appellant claims that prosecuting him by information is violative of his rights under both the State and Federal Constitutions. Amendment 21 of the State Constitution reads: 'That all offenses heretofore required to be prosecuted by in-

[1] Some of the matters discussed in this opinion have been considered in several recent opinions of the United States Supreme Court, which we have carefully studied, to-wit: *Payne* v. *Arkansas* (opinion of 5/19/58), 356 U. S. 560, 2 L. Ed. 2d 975, 78 S. Ct. 844; *Thomas* v. *Arizona* (opinion of 5/19/58), 356 U. S. 390, 2 L. Ed. 2d 863, 78 S. Ct. 885; *Hoag* v. *New Jersey* (opinion of 5/19/58), 356 U. S. 464, 2 L. Ed. 2d 913, 78 S. Ct. 829; and *Eubanks* v. *Louisiana* (opinion of 5/26/58), 356 U. S. 584, 2 L. Ed. 2d 991, 78 S. Ct. 970.

dictment may be prosecuted either by indictment by a grand jury or information filed by the prosecuting attorney'. This amendment has been upheld by this court against such attack as is here made, in numerous cases, some of which are: *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131 and *Smith et al.* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24. The United States Supreme Court has repeatedly held that a State can — if it so desires — provide for a prosecution by information instead of by indictment. Some of these cases are: *Hurtado* v. *California,* 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111; *Bolln* v. *Nebraska,* 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287; and *Gaines* v. *Washington,* 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468."

The United States Supreme Court refused *certiorari* in the case of *Washington* v. *State,* 335 U. S. 884, 93 L. Ed. 423, 69 S. Ct. 232. So our holding remains the same as in *Washington* v. *State.*[2]

II. *Motion For Continuance.* The trial of appellant's case was duly set to commence on July 10, 1957; and on the morning of that date the appellant filed a motion for continuance, claiming:

"On a late news telecast over television station KCMC at Texarkana, Arkansas, July 9, 1957, Bill Gill, newscaster, told viewers and listeners living in a wide area covering all of Miller County, Arkansas and much of the four State area which it serves, that Judge Lyle Brown had granted permission for the televising of the trial of the defendant scheduled to begin on July 10, 1957 at 9:00 A. M., in granting permission for the filming and recording from the corridors of the Miller County Courthouse. The defendant, by his attorney, moves for a continuance to ascertain the effect of the sudden and dramatic interest created by such an act, upon the minds of the inhabitants of Miller County, Arkansas, for a possible move to ask the Court for a change of venue."

[2] See also *Smith* v. *State,* 218 Ark. 725, 238 S. W. 2d 649.

Testimony on the motion was duly heard. It disclosed that the defendant's attorney had agreed[3] that a television camera could be placed in a corridor of the Courthouse and that through a window or conduit into the Courtroom certain portions of the trial could be filmed; that the filmed portions would be edited after the trial; and that the pictures could then be televised as silent films. No cameras were stationed in the courtroom and no pictures were taken by anyone in the courtroom.[4] The motion for continuance was not because of the television itself, but because a radio newscast on the night of July 9th had stated what was to be done; and appellant's attorney wanted the trial continued to see whether the radio announcement on the night of July 9th had adversely affected his client.

The Prosecuting Attorney, the Defense Attorney, and the Trial Court arranged some sort of pickup camera outside the courtroom. The motion for continuance is not an effort by the defendant's attorney to recede

[3] The defendant's attorney testified in part on this point: "My name is W. Harold Flowers, an attorney representing James M. Moore, charged with First Degree Murder in the Miller Circuit Court. I have not discussed with Mr. Gill but upon one occasion in or about the chambers of the Presiding Judge the granting of permission to film and televise the proceedings in the trial of James M. Moore. In that discussion which was held during the month of June, on the Friday referred to, we talked for a few minutes and I gave more or less tentative consent to the plan to televise the proceedings; that Mr. Gill told me at that time that we would have the privilege of editing the telecast, and that they only wanted to televise the summation or the arguments to the jury.

[4] Canon No. 35 of the Code of Judicial Ethics, adopted by the American Bar Association and by the Arkansas Bar Association (see 10 Ark. Law Review p. 295), provides: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract, the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted. Providing that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization." We find no change in that Canon. In 11 Ark. Law Review, p. 174 there is a case note about photographing court proceedings, which article contains a review of many of the cases. Also there is a discussion about Canon No. 35 in the American Bar Association Journal for May 1957, Vol. 43, p. 419.

from that agreement: rather it is a motion for continuance to see if the announcement of the facts of the agreement had adversely affected his client.[5] We fail to see how the radio announcement could be a cause for continuance. The statutes (Ark. Stats. § 43-1705 *et seq.*) and construing cases specify the essential content and showing that must be made in a motion for continuance; and no such content or showing was here made.

III. *Motion To Quash The Panel Of Petit Jurors.* This presents the claim of racial exclusion of trial jurors in Miller County, Arkansas. The motion to quash recites, *inter alia*:

"That at all times material herein it has been, was and still is the custom in Miller County, Arkansas, to use white persons exclusively for regular Petit Jury service in any and all cases including the trials of felonies, and in selecting the current jury and the supplement thereto the Jury Commissioners substantially followed the said customs in naming only white persons to the said jury panel. The defendants allege that no Negroes are now serving on the present panel of petit jurors, and that they have been systematically excluded from serving solely because they are Negroes, and that this action constitutes discrimination and a denial to them of equal protection of the laws of the United States of America as guaranteed by Section One of the Fourteenth Amendment to the Constitution of the United States of America.

A lengthy hearing was held on this motion covering seventy pages of the transcript.[6] The evidence reflects that for several years prior to November, 1953 no Negroes had been selected on the trial jury by the Jury Commissioners, with the exception of the June 1951 term, when four Negroes were selected. There are two terms of the Miller Circuit Court each year, being the terms of June and November. The record as to Ne-

[5] See annotation in 39 A.L.R. 2d 1342 on continuance because of hostile sentiment.

[6] There is an annotation in 1 A.L.R. 2d 1291 entitled: "Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case."

groes selected by the Jury Commissioners for trial jury service from November 1953 to date of this trial is as follows:

	Number of Negroes Selected
November, 1953	3
June, 1954	1
November, 1954	2
June, 1955	5
November, 1955	3
June, 1956	9
November, 1956	none
June, 1957	10

The defendant was tried at the June, 1957 term of the Court, at which ten Negroes had been selected for trial jury service. The record does not disclose the number of Negroes in Miller County who are qualified for jury service, and census figures of the total number of Negroes in the County would not indicate how many were qualified for jury service.[7]

The issue here is whether, as regards the calling of Negroes for jury service in Miller County, Arkansas, there has been either a *systematic exclusion* or a *studied evasion*. We went into this issue in considerable detail in *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307; and we there said, as regards the claim of *systematic exclusion* in Jefferson County:

". . . in the case at bar the record reflects that Negroes were selected for jury service at a special term of the Jefferson Circuit Court in March, 1947, and again at the regular term of the court in October, 1947, from which last-mentioned term comes this appeal. Thus, at the two most recent terms, including the one in which appellant's trial occurred, Negroes were selected for jury service. So, any alleged systematic exclusion of previous years certainly had been abandoned at the time

[7] In *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, it was shown that there were 35,980 Negroes in Jefferson County, Arkansas, and that only 3,000 of these were qualified electors, which is one of the requirements for being a qualified juror. So total census figures shed no light on the qualifications for jury service under our statute.

of the trial of this case — and this abandonment was no doubt in keeping with the holding of the U. S. Supreme Court in *Hill* v. *Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159. That case referred to grand juries, but — *a fortiori* — is also germane to petit juries. So, we hold that the evidence here sufficiently repels any inference of present systematic exclusion, since Negroes are now called for jury service."

In the case at bar, Negroes have been called for jury service in Miller County, Arkansas since 1953; so certainly no systematic exclusion has been shown.

As regards appellant's claim of *studied evasion,* we likewise conclude that the proof offered fails to substantiate such claims. In *Washington* v. *State, supra,* we said on the claim of *studied evasions:*

"The fact that the jury commissioners selected Negroes for the panel satisfies the burden placed on the State under the holding in *Patton* v. *Mississippi, supra*: and the burden then devolved on the appellant to show that the jury commissioners practiced 'evasion'. There is no such proof in the record."

Here, the record reflects that the Trial Judge positively instructed the Jury Commissioners to have Negroes on the trial jury list that was to be called to try this case. On June 19, 1957 when there was a preliminary hearing on the motion to quash the jury panel, the record reflects:

". . . said motion is held in abeyance after announcement by the Court of intention to have additional jurors selected. Whereupon the State of Arkansas elects to put James M. Moore to trial first, to which there are no objections, and this cause is continued until July 10th, 1957 to afford the Court opportunity to select additional Jurors."

Then, at the hearing on the motion to quash the panel, the Trial Court stated:

"As a matter of fact, the Court instructed the Clerk in preparing that list, to put all the Negro jurors at

the top of the list in order that there might be full opportunity, if found qualified and if not challenged either by peremptory challenge or cause, for them to serve."

And again the Court stated:

". . . the Court explained to the Commissioners that the absence of Negroes on the panel was significant to the Court, particularly in view of the fact that we were to try the Hamm case, and I instructed them to take special precaution and to make special effort to place a substantial number of Negroes on the additional special list, reminding them that those special jurors, of course, would have to meet the same qualifications as the Court had previously laid down for the selection of jurors."

Thus, the Trial Judge took every precaution to see that there were Negroes on the trial jury list in this case; and the record — instead of showing studied evasion — shows a deliberate attempt by the Trial Court in this case to fully comply with the rulings of the United States Supreme Court, which condemn racial exclusion. We, therefore, find no merit in this claim of studied evasion.

IV. *The Confession.* Appellant says: "The Court erred in admitting the confession of the appellant, and the confessions of three other co-defendants charged with the commission of the crime of which appellant was convicted." Really, there are three points argued under this one topic; and we shall discuss each.

First, we consider the question of whether there was sufficient evidence to submit to the jury the question as to whether the confession was voluntary. The burden is on the State to prove that the confession was voluntary. *Love* v. *State,* 22 Ark. 336; *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123; and *Cush* v. *State,* 180 Ark. 448, 21 S. W. 2d 616. And in determining whether a confession is voluntary the Court should look to the whole situation and surroundings of the accused. *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582; *Brown* v. *State,* 198 Ark. 920, 132 S. W. 2d 15.

When the State sought to introduce the appellant's confession the hearing was recessed to the Judge's chambers for the Trial Judge to see if there was sufficient evidence of voluntariness to submit the issue to the jury. Such is in accordance with our frequently stated procedure. *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26; *Brown* v. *State,* 198 Ark. 920, 132 S. W. 2d 15; *Hendrix* v. *State,* 200 Ark. 103, 167 S. W. 2d 503. The Trial Judge correctly ruled that there was sufficient evidence offered to take the case to the jury on the voluntariness of the confession; and thereupon the hearing was resumed before the jury.

It was shown that the defendant, James Moore, and the three others thought to be implicated in the murder of M. R. Hamm, were taken into custody about 4:30 or 5:00 P. M. the afternoon of May 15th at a store near Texarkana; that the Prosecuting Attorney's office was at Arkadelphia, a distance of about eighty miles from Texarkana; that Moore and the other three accused persons were advised that they would be taken to Arkadelphia to the Prosecuting Attorney and then to the State penitentiary at Cummings Farm; that the only stop made from Texarkana to Arkadelphia was at Hope (thirty-three miles from Texarkana) for the purpose of placing a telephone call to the Prosecuting Attorney's office; that in going from Texarkana to Arkadelphia the four prisoners were on the back seat of the car and three officers were on the front seat of the car; that the prisoners slept a considerable portion of the trip from Texarkana to Arkadelphia; that they reached the Prosecuting Attorney's office in Arkadelphia about 8:00 P. M.; that in the Prosecuting Attorney's office the prisoners were served with food; that the prisoners were questioned separately and sometimes together; that Moore was advised that he did not have to make any statement; that Moore's statement was made freely and voluntarily; that the statement was signed by him; that the other prisoners likewise made and signed their statements; and that all of the prisoners were then taken to the State Penitentiary at Cummings Farm for safekeeping.

The Court Reporter who took down the statements, testified that Moore gave direct answers to the questions asked, and that the statement he signed was in his own words. The defendant testified that he was scared and, therefore, the confession was not voluntary.[3] But he admitted that he was never threatened or struck or beaten; also he admitted that there were no harsh words used by the Prosecuting Attorney. So, under the evidence as stated, and other in the record, we conclude that it was a question of fact for the jury as to whether the confession was voluntary.

The second objection argued under this topic relates to the statements that the other prisoners made regarding Moore's participation in the homicide of Mr. Hamm. There was testimony that all four of the prisoners participated in the robbery and murder of Mr. Hamm. It was shown that the statements made by the other prisoners were made in Moore's presence and not denied by him in any way. In fact, he tacitly admitted the statements to be true. This evidence of the statements by the other prisoners in Moore's presence tending to implicate him in the crime was admissible testimony under our holding in *Martin* v. *State,* 177 Ark. 379, 6 S. W. 2d 293, wherein we said: ". . . it is a general rule that the statements of one accomplice made in the presence and hearing of another, which are not contradicted by him, are admissible in evidence against him as an admission on his part for his failure to contradict them. *Polk* v. *State,* 45 Ark. 165; *Ford* v. *State,* 34 Ark. 654."

In 20 Am. Jur. 428, "Evidence", § 493, the general rule is stated:

"The rule precluding the use of the confessions of co-conspirators and codefendants as evidence against those not making the confessions is limited to confessions made in the absence of such other defendants. A confession of a co-conspirator or codefendant made in the presence of the accused and assented to by him, impliedly or tacitly by his silence or conduct, is admissible

[3] There are annotations in 85 A.L.R. 870 and 170 A.L.R. 567 on the voluntariness of confessions. Many Arkansas cases are there listed.

against him, upon the same principles which permit the introduction of evidence that the defendant stood silent when accused of crime, but it must appear that he did assent to the confession."

We, therefore, conclude that there was no error in the Court's ruling on the point here involved.

The third and final point in regard to the confession of Moore is that his statement was obtained without taking him before a magistrate, as provided in § 43-601 Ark. Stats.[9] It is conceded by the State that after Moore was taken in custody on the afternoon of May 15th he was immediately taken to the Prosecuting Attorney's office in Arkadelphia and the signed confession obtained from him, and that it was not until May 21st that Moore was returned from the penitentiary and appeared in Court in Texarkana. Because of the above mentioned statute and the stated facts, appellant insists that the confession was not admissible.

In the case of *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77, we held that the statute (§ 43-601 Ark. Stats.) was directory only and not mandatory. We there quoted from Wharton on Criminal Evidence, 11th Ed. Vol. 2, p. 1023, § 610: "The mere fact that a confession is made while the maker is in the custody of a police officer, or even while confined under arrest, is not sufficient of itself to affect its admissibility, providing that it is otherwise voluntarily made. This rule pertains equally whether the arrest is legal or illegal."

[9] This Section reads: "Where an arrest is made without a warrant, whether by a peace officer or private person, the defendant shall be forthwith carried before the most convenient magistrate of the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate, and, if the offense for which the arrest was made is charged to have been committed in a different county from that in which the arrest was made, and the magistrate believes, from the statements made to him on oath, that there are sufficient grounds for an examination, he shall by his written order, commit the defendant to a peace officer, to be conveyed by him before a magistrate of the county in which the offense is charged to have been committed; or, if the offense is a misdemeanor only, the defendant may give bail before the magistrate for appearing before a court or magistrate having jurisdiction to try the offense, on a day to be fixed by the magistrate and named in the bail-bond."

Then, in the Browning case, the holding of this Court was summarized in the following language:

"The fact that the confession was obtained while the accused was being held without a warrant, and before he had been carried before a committing magistrate, does not of itself make the confession inadmissible, but is a circumstance, along with all the other facts and circumstances under which the confession was made, to be taken into consideration by the jury in determining its voluntariness."

We, therefore, find that there is no merit in this third point urged by appellant in regard to the confession.[10]

V. *Other Objections Or Assignments.* It would unduly prolong this opinion to discuss *in extenso* every objection or assignment in the record; but we have given careful consideration[11] to each, and find none to possess merit. The declarations and admissions made by Moore show his connection with the crime charged. *Wooten* v. *State,* 220 Ark. 750, 249 S. W. 2d 964. The fact that the deceased's billfold was found at the place where Moore had the officers stop to look for it tends to connect Moore with the crime and to substantiate the confession. *Shufflin* v. *State,* 122 Ark. 606, 184 S. W. 454. The evidence was amply sufficient to support the verdict; and there was no error in any of the challenged instructions.

Affirmed.

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[10] See annotation in 19 A.L.R. 2d 1331; and annotation in 93 L. Ed. U. S. 115.

[11] Included in the record are the summation arguments of counsel to the jury; and we have also read these arguments.

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Opinion delivered July 1, 1958

[redacted]

McMath, Leatherman & Woods and *Mathis & Keys,* for appellant.

Pat Mehaffy and *B. S. Clark,* for appellee.

ED. F. MCFADDIN, Associate Justice. At the completion of all the evidence the Trial Court instructed the jury to return a verdict for the defendant; and the correctness of that ruling is the only issue on this appeal. Our rule for testing such a ruling is well established: giving the evidence of the plaintiff its strongest probative force, was a question made for the jury regarding the alleged negligence of the defendant? (*Hawkins* v. *Mo. Pac. Rd. Co.,* 217 Ark. 42, 228 S. W. 2d 642.) With this rule in mind we state the facts in the light most favorable to the plaintiff.

Mrs. Irene Harper, as administratrix, brought this action against the defendants, Missouri Pacific Railroad Company and G. C. Brown, engineer, seeking to recover damages for the death of her husband and intestate, Mr. Olan Harper. It was established that Mr. Harper, aged 41, left his home near Benton about 3:00 P. M.

Saturday afternoon, September 15, 1956, planning to go to a neighbor's home to place a call about a fishing trip; that Mr. Harper never returned home alive; that at 3:35 A. M. Sunday morning, September 16, 1956 Missouri Pacific northbound train No. 26, proceeding from Benton to Little Rock, struck Mr. Harper and killed him as he was trying to cross the railroad track on the road from Benton to Bauxite. No one witnessed the striking except the engineer and fireman of the Train No. 26. The fireman, Mr. Garland Fisher, testified as to the striking (as abstracted by appellant — plaintiff below):

"As train 26 approached the Benton-Bauxite Crossing I was keeping a lookout ahead. As we approached the crossing, we came around there somewhere around 3 or 4 cars, or maybe it is a little farther, that you can see this before crossing with your straight beam headlight and your oscillating headlight, then when you get two or three cars, straight beam headlights, you can see the whole crossing, and the whole crossing at that time was clear, nothing on it, no cars, no nothing. You could see the whole crossing and this man came out of the shadows or dark and was running on his feet right down the middle of the highway a short distance from the south main track; then we got within a car and a half of the crossing and I picked him up with the oscillating headlight and got the view of the man running; then when we got within a car and a half of the crossing, I shouted to the engineer. 'The man is not going to stop' and he went to tooting the whistle and raised his hand up to apply the brakes and by that time we had done hit the man. At the time I first saw the man he was running. When I first picked up the man we were somewhere around a car and a half or two cars or three from the crossing. A car is 80 feet. (I picked him up first with the oscillating headlight, but we got up two cars there and the straight beam headlight puts it all on the whole crossing, and it also put it on there before we hit the man but was almost on the crossing.) When I first picked him up with the oscillating headlight he was not over 30 feet from the crossing — that is just

an estimate. He was running just as hard as he could run. In my mind I felt that the man knew we were coming and that he would stop, he had plenty of time to stop, either turned up north or south of the track and avoid running out in front of us. When it became apparent he wasn't going to stop I hollowed at the engineer that the man was not going to stop, and he was blowing the road crossing whistle and he went to tooting it just like when anything is on the track, and when he toots just as fast as he could, put his hand on the — and no more than the snap of your fingers, he had already hit the man. He reached for his brake at the same time. From the time I first saw him until it became apparent he wasn't going to stop it was just the snap of your finger. He almost made it across the crossing. I would say he lacked maybe a step or something like that making it across. He was hit on the engineer's side. The train is about 3 or 4 cars from the crossing when you can see the whole crossing. That is just an estimate. I looked at the crossing when it first came in view. No one was on or near the crossing at that time. When he came in view of my oscillating lights I saw him. I did not observe any cars passing over the crossing. The weather was clear. The accident occurred at 3:35. I saw the blinker lights at the crossing working as we approached the crossing. I heard the bell ringing on the crossing lights as we went by the crossing. The engineer was sounding his whistle; . . ."

The engineer, Mr. Brown (joined as a defendant in the case), testified as to the striking (as abstracted by appellant):

"No. 26 was a passenger train. It had ten cars. It was the train involved in an accident at the Benton-Bauxite crossing in which Mr. Alan Harper was killed. The train was traveling between 65 and 70 miles an hour at the time it reached Bauxite crossing. As we approached the crossing I was keeping a lookout ahead. I was blowing my whistle and about three car lengths before I got to the crossing or maybe three and a half,

my fireman said, 'We are going to hit a man' and I was blowing my whistle for the crossing but when he told me I went to blowing short blasts, just a warning, just when I got it on I seen the man run, running across the track ahead of me, possibly around 20 feet but by the time I got my brake on I had done hit him. When the fireman told me I was about to hit a man I started blowing short blasts of my whistle and put my brake on but by the time I got my hand to the brake the train struck the deceased. As I approached the Bauxite Crossing I did not observe anything on the crossing. From Texarkana to Little Rock my scheduled running time is two hours and 45 minutes. I might have been 10 or 12 minutes late when I reached the Bauxite crossing, . . ."

The evidence also showed without contradiction: that after the railroad track leaves Benton going toward Little Rock it is a straight track for about 2,600 feet, then the track takes a one decree curve to the left and the curve extends about 3,300 feet; that near the center of this curve (about 1,650 feet from where the curve began) the road from Benton to Bauxite crosses the railroad track; that it is approximately 4,300 feet from the said railroad crossing back to the Benton railroad depot; that at the said railroad crossing there were two red blinker lights on each side of the crossing and also a warning bell; and that the warning bell and all the lights were working at the time Mr. Harper attempted to run across the railroad track in front of the train No. 26. Furthermore, there was a street light in the locality.

The appellant does not claim that there was any failure by the defendants to comply with the warning board statute (§ 73-717 Ark. Stats.), or the lookout statute (§ 73-1002 Ark. Stats.), or the whistle and bell statute (§73-716 Ark. Stats.), or the headlight statute (73-704 Ark. Stats.), or any other applicable statute: rather, appellant says that this is a common law negligence action and that the applicable rule is contained in the following words found in the case of *Zaloudek* v.

Mo. Pac., 193 Ark. 344, 99 S. W. 2d 567: ". . . the true test of liability was whether the death . . . was the result of the failure of the appellee, in the exercise of ordinary care, to operate its train so as to avoid striking and killing . . . (deceased), under all the circumstances and conditions existing at the time about or near the . . . crossing". On the basis of the foregoing statement, appellant urges that a jury question was made on either of two points, which we now discuss:

I. *Appellant says: "Whether excessive speed under the circumstances constituted negligence was for the jury."* Appellant relies most strongly on the case of *Davis* v. *Scott,* 151 Ark. 34, 235 S. W. 407, wherein this sentence appears: "Unusual speed of a train does not, under all circumstances, constitute negligence, and often the Court may declare, as a matter of law, that the maintenance of a high rate of speed under given circumstances does not constitute negligence, but under other circumstances it may become a question of fact for the determination of the jury". The appellant says that the facts in the case at bar make a question for the determination of the jury. But we cannot see how the speed of the train made a fact question for the jury in the case at bar. The Train No. 26 was a northbound passenger train; it was ten to twelve minutes late at the last time station a few miles before striking Mr. Harper. The train was only maintaining its scheduled speed. It was travelling from 65 to 70 miles per hour.

It was shown without contradiction that when the train operators discovered that Mr. Harper was going to try to run across the track in front of the train the engineer immediately gave the whistle for danger and undertook to apply the brakes, but it was shown that the train would travel a considerable distance before there would be any retardation of the speed. Under all the facts here, speed of the train was not what caused Mr. Harper's death: rather it was his effort to run across in front of the train. If the train had been going much slower, still it would have travelled a considera-

ble distance before retardation of the speed would have taken effect,[1] so the claim of excessive speed did not make a jury question in this case.

II. *The appellant says: "Whether failure to station a flagman at this crossing, in view of the special dangers arising at this particular time, constituted negligence was for the jury".* It is shown that the crossing here involved was within the city limits of the City of Benton, which has a population in excess of 10,000, and that the road that crossed the railroad track was one of the main traveled roads from Benton to Bauxite. Appellant relies most strongly on certain language contained in *Fleming* v. *Mo. & Ark. RR. Co.,* 198 Ark. 290, 128 S. W. 2d 986:

"It is the settled rule that whether failure of a railroad company to station a flagman at a crossing constitutes an omission of such care as an ordinarily prudent person would use under the same or similar circumstances, is a question of fact where there are obstructions which materially hinder the view of approaching trains, provided the crossing is used frequently by the public, and numerous trains are run. Inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time. It is said that the obligation exists, at an abnormally dangerous crossing, to provide watchmen, gongs, lights, or similar warning devices not only for the purpose of giving notice of approaching trains, but such care is to be equally observed where the circumstances make their use by the railroad reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions to the view interfering with the visibility of the responsible train operatives, or those approaching the track."

[1] We have several cases in which directed verdicts for the defendant have been given, even against the plaintiff's claim of excessive speed. Some of these are: *Tinsley* v. *Mo. Pac.,* 189 Ark. 530, 73 S. W. 2d 473; *Garner* v. *Mo. Pac.,* 210 Ark. 214, 195 S. W. 2d 39; and *Walker* v. *Mo. Pac.,* 211 Ark. 635, 201 S. W. 2d 768.

The evidence in the case at bar fails to show that there was any other person anywhere near the Bauxite crossing at 3:30 A. M. on the Sunday morning when Mr. Harper was struck by the train: the evidence also fails to show that there were any obstructions which could have in any way prevented Mr. Harper from seeing the blinker lights at the crossing; and the evidence fails to show that there was any noise that would have prevented Mr. Harper from hearing the warning bells sounding at the crossing. In the absence of such proof, we see no factual issue to submit to the jury on this point. Of course, there are cases presenting factual situations that would make a jury question as to negligence in failing to have a flagman or guard at crossings; but no such factual situation was shown in the case at bar.

CONCLUSION

We find no facts shown which were sufficient to take the case to the jury under Act No. 191 of 1955 (the governing Act in this case), or any other Act in regard to excessive speed or failure to have a flagman on duty at the time and place here involved.

Affirmed.

LEE *v.* STATE.

4895 315 S. W. 2d 916

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

Edward H. Herrod, for appellant.

Bruce Bennett, Atty. General; Thorp Thomas, Asst. Atty. General, for appellee.

MINOR W. MILLWEE, Associate Justice. On May 9, 1957 the appellant, Leo Lee, was charged with murder in the first degree in the killing of another Negro, William Harrison Smith Jr., on December 26, 1956. The in-

formation was amended on July 23, 1957, by additionally charging appellant with the commission of the homicide while in the attempt to perpetrate the crime of rape upon the person of Grace Helen Hays. The jury returned a verdict of guilty of first degree murder without recommending a life sentence and the trial court thereupon assessed the death penalty.

In his motion for new trial, the appellant first questions the sufficiency of the evidence to support the verdict. He earnestly contends there is a lack of sufficient evidence to show either that he assaulted and killed Smith with malice aforethought, premeditation and deliberation or that he did so in the attempt to perpetrate a rape upon the Hays girl.

The evidence adduced by the State tended to establish the following facts. Grace Helen Hays, 19 years of age, resides with her parents at 1406 Ringo Street in Little Rock, Arkansas. In December, 1956 she was at home for the Christmas vacation while in her third year in college in Michigan. On the night of December 26, 1956, she had a date with William Harrison Smith Jr. with whom she had been keeping company for three or four years. They attended a movie with Grace's two younger sisters and a brother. After leaving the theater in Smith's two-door Chevrolet automobile, they took the children home and proceeded to drive around for a while and parked about the middle of the 2200 block on 24th Street between Howard and Park Streets.

Grace Helen Hays testified that she was learning to drive and that she and Smith exchanged positions in the front seat shortly after they parked. After they had been sitting there about five minutes and Smith had kissed her once, a large rock crashed through the right door glass of the car and she heard a voice shout: "I am tired of this fucking here." She saw the form of a man standing on the curb with his head above the car. As the car door opened Smith turned to his right and said: "Mister, please don't hurt my girl," and then said to Grace Helen, "Don't get shook, I am shot." Smith then got out of the car. The man she later identified

as the appellant then walked in front of and to the left side of the car and said to Grace Helen: "Come on out — I have been laying for you." He seized her by the shoulder and forced her from the car. She fell to the ground and rolled under the car. He then said: "Come on out, I am going to kill you anyway," and she replied: "Mister, I will do anything." As he forced her into an alley with a pistol against her back, he asked her about her husband, her parents and where she lived. He then forced her to lie on the ground where he kissed her, placed his fingers in her privates after making her remove her undergarments. He then forced her to engage in an unnatural sexual act at gun point. After also placing his penis in her privates he released her with the warning that she not "holler or call the police." She drove the car directly to her home, reaching there about 9:45 p. m. and the police were notified and given a description of the appellant whom she had not known previously.

After young Smith left the car he staggered to the home of Nace Bradford, a short distance from the car and slumped on his front porch. Bradford called an ambulance and Smith was taken to a hospital where he died shortly thereafter as a result of a wound caused by a bullet which entered his left side and came to rest in his right hip bone.

On May 4, 1957, appellant was taken into custody by Little Rock police in connection with another shooting at Gillham Park. Two Little Rock detectives, D. M. Cox and O. A. Allen, testified that on May 7, 1957, appellant freely and voluntarily admitted he shot someone at the scene of the killing when he came upon a couple in a car on the night of December 26, 1956; that he read the next morning that it was Smith; that he did not want to visit the scene of the shooting again; and that a day never passed that he didn't think about the killing. He made the same statement the next day to the prosecuting attorney and other officers. Grace Helen was called home from college and was positive in her identification of the appellant as her assailant on the

night in question and picked him out of a police line-up. She and others testified there was a street light and other lights shining in the vicinity of the killing on the night of December 26, 1956. She also stated the night was clear and that the lights in the vicinity enabled her to get a good look at the appellant while they were in the alley and that she particularly noticed his mustache and the outline of his hair.

Appellant had lived within a block of the scene of the killing for about 18 months prior to August, 1955, and had known Nace Bradford for many years. When officers visited the scene on the night of the killing, they found shattered glass where the car had been parked and a purse belonging to the prosecuting witness where she had told them she dropped it. In the excitement she was unable to distinguish between the crash of the window of the car door and the noise of a gun and did not know that a shot had been fired until the deceased told her he was shot.

Appellant testified he made the confession as the result of a beating administered to him by Officer Allen in a lonely graveyard west of Little Rock where he said the officer took him while they were on their way to State Police Headquarters on May 7th. This was denied by Allen and there were other facts and circumstances in contradiction of appellant's version of the route taken and injuries he claimed to have sutained as a result of a beating by the officer. Appellant and his wife also testified that he did not leave home on the night of the killing.

We must, of course, consider the testimony in the light most favorable to the State in determining its sufficiency to sustain the verdict. When this is done we hold the evidence sufficient to sustain the charge that there was either a willful, malicious, deliberate and premeditated killing of Smith by the appellant or that the latter killed Smith in the attempt to perpetrate a rape upon the person of Grace Helen Hays. It follows that the trial court committed no error in refusing appellant's request for a directed verdict of not guilty.

Appellant next assigns error in allowing the prosecuting attorney to amend the information to charge that the offense was committed by appellant while in the attempt to perpetrate the crime of rape as provided by statute (Ark. Stats., Sec. 41-2205.) Amendments like this which change neither the nature nor the degree of the crime charged are permissible under Ark. Stats., Sec. 43-1024. See *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304.

In response to appellant's motion for a bill of particulars, the State detailed the time and place of the alleged commission of the offense. The response further stated that the State would also rely on the additional allegation that the offense was committed by appellant while in the attempt to perpetrate the crime of rape as set out in the amended information. Appellant's complaint of the insufficiency of the bill of particulars is without merit. The information, unaided by the bill of particulars, fully complied with Ark. Stats., Sec. 43-804. This statute provides that the bill of particulars shall state the act relied upon by the State in sufficient details as formerly required by an indictment, that is, with sufficient certainty to apprise the defendant of the specific crime with which he is charged in order to enable him to prepare his defense. The information here met all requirements of the statute and the bill of particulars gave still further details and information as to the charge. *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527; *Ragsdale* v. *State,* 222 Ark. 499, 262 S. W. 2d 91.

Error is next assigned in admitting a photograph of the body of the deceased. In doing so, the trial court admonished the jury that the picture was admitted solely for the purpose of showing the nature, extent and location of the bullet wound and not to inflame their minds in any matter. The admission and relevancy of photographs is a matter resting largely in the discretion of the trial judge, and we find no abuse of that discretion in this case. As we said in *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17: "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."

Appellant next contends the court erred in allowing his confession to be introduced into evidence. It is argued that it was not made freely and voluntarily in that it was made while appellant was in custody and before he was taken before a magistrate. The trial court followed the approved practice of first hearing the testimony in the absence of the jury as to the circumstances under which the confession was given and then submitted the question as to whether it was freely and voluntarily made to the jury on the conflicting evidence, admonishing them to disregard the confession unless it was voluntarily made. We have held in *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77, and several subsequent cases, that the failure to have a warrant of arrest and to take the accused before a committing magistrate does not prevent a confession made to officers from being admissible if the jury found the confession to have been voluntarily made. See *Palmer* v. *State,* 213 Ark. 956, 214 S. W. 2d 372, *certiorari* denied in 336 U. S. 921, 69 S. Ct. 639, 93 L. Ed. 1083. There is no evidence of a continuous inquisition persisted in to the extent of exhausting the appellant physically or mentally and thereby overcoming his will, and his testimony that he was beaten into the confession is sharply denied by the officers and other facts and circumstances.

Appellant also insists the court erred in admitting evidence that a .38 caliber revolver was taken from his home by an officer without a search warrant. While we have held evidence obtained without a search warrant to be competent and admissible, it is undisputed

that the officer entered the home of appellant and took the gun with appellant's express permission.

Complaint is also made of the court's action in permitting counsel for the State to ask appellant's wife the name of his first wife on cross examination. First, the witness stated she did not know the name of her husband's former spouse and the appellant testified, without objection, as to the name. The scope of the cross examination of a witness is largely within the discretion of the trial court and no abuse of that discretion occurred here.

Nor do we think the trial court committed reversible error in refusing appellant's motion to allow the jury to go to the scene of the alleged beating of appellant by Officer Allen. Appellant testified he and the officer were at the scene only a short time and that he was handcuffed to a hickory tree and fell to the slate ground at the base of the tree where the officer beat and kicked him. As previously stated, this was stoutly disputed and there is little in the testimony indicating that a visit to the scene would have had any probative value. At any rate the question of the propriety of a view of a place where any material fact is alleged to have occurred is again a matter within the discretion of the trial court under Ark. Stats., Sec. 43-2119. No abuse of that discretion is apparent in the instant case.

We have carefully examined the other assignments of error which relate primarily to the admission of certain rebuttal testimony and general objections to certain instructions given. We find no error in these assignments. The trial court's rulings on the admission of evidence generally were very favorable to the appellant and the instructions given have been repeatedly approved by this court. On the whole case we find no prejudicial error, and the judgment is affirmed.

MONSANTO CHEMICAL CO. *v.* COMMR. OF LABOR.

5-1575 314 S. W. 2d 493

Opinion delivered July 1, 1958.

Davis & Ragsdale, for appellant.

McMath, Leatherman & Woods, for appellee.

GEORGE ROSE SMITH, J. The question in this case is whether 232 employees of the appellant were entitled to receive unemployment compensation during the latter part of a strike, after the appellant, by using supervisory employees, had resumed production at its plant. The Board of Review, whose decision was affirmed by the circuit court, held that the applicants were eligible for benefits. By this appeal Monsanto asks us to re-

verse that decision and to direct that the payment of these benefits not be charged to its account. See *Call* v. *Luten,* 219 Ark. 640, 244 S. W. 2d 130.

Several weeks after the expiration of the contract between Monsanto and the union representing its employees, negotiations for a new contract failed, and the union called an economic strike, effective March 2, 1956. Picket lines were established, and the plant was idle until April 27. The appellees do not seek unemployment compensation for the period while the plant was not in operation. On April 27 Monsanto, by utilizing the services of 91 supervisory employees, was able to resume at least partial production. Beds were moved into the plant, which was operated twenty-four hours a day. On and after May 19 applications for benefits were filed by 232 of the 339 striking employees. The claims involve a three-week period ending June 8, when the labor dispute was settled and the workers returned to their jobs.

The first question is one of law and centers upon the interpretation of this language in the statute: "An individual shall not be eligible for benefits for any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed [with two provisos that are unimportant here]." Ark. Stats. 1947, § 81-1105 (f).

The issue turns upon what is meant by the phrase, "a stoppage of work." These words appear in the unemployment acts of many other states and have been frequently construed. It could be argued that the language refers to a cessation of work on the part of the employee, in which case the phrase would be synonymous with unemployment. That construction was in fact adopted in Oklahoma, but there the rule was later changed by an amendment to the statute.

Elsewhere it has been pointed out that the Oklahoma view makes the reference to a stoppage of work

meaningless, for the statutory sentence has already mentioned unemployment and presupposes the existence of that condition. See Williams, "The Labor Dispute Disqualification," 8 Vanderbilt L. Rev. 338; *Sakrison* v. *Pierce,* 66 Ariz. 162, 185 P. 2d 528. Consequently the view is now generally accepted that the stoppage of work means a cessation of business activity at the employer's establishment rather than unemployment on the part of the applicant for benefits. The authorities were reviewed in *Abbott Pub. Co.* v. *Annunzio,* 414 Ill. 559, 112 N. E. 2d 101, where the court observed that the majority interpretation is followed in nineteen states, while the minority rule has been applied administratively in Colorado and judicially in Oklahoma.

We have no hesitancy in assigning to our statute the meaning that has been almost unanimously given to its language in other jurisdictions. Not only does the majority rule adhere to the basic principle that every word in a statute must be given effect if possible; it also recognizes and carries out the legislative policy of avoiding favoritism toward either side in a labor dispute. As the court stated in *Saunders* v. *Maryland Unemployment Comp. Bd.,* 188 Md. 677, 53 A. 2d 579: "The purpose of the statute was to alleviate the consequences of involuntary unemployment. It was not intended to penalize or subsidize either employees or employers, lawfully engaged in a labor dispute. It was not intended to compel striking workmen to remain without its benefits longer than their own action made necessary. Nor was it intended to compel employers to finance their employees in a strike against them. It was not concerned at all with labor disputes, except in so far as it became necessary to consider them in deciding when unemployment was voluntary and when it was involuntary. And it stated how they should be considered with reference to unemployment in plain, simple and easily understood words."

The next question is whether the stoppage of work at the Monsanto plant had ended when the present claims were filed, on and after May 19. This is an issue

of fact, upon which we must affirm the Board of Review's findings if supported by substantial evidence. *Terry Dairy Products Co.* v. *Cash,* 224 Ark. 576, 275 S. W. 2d 12. We are unable to say that the record is devoid of such evidence.

There is really not a great deal of conflict in the proof concerning this issue. February was the last month of normal operations before the strike. In that month, according to the report filed by Monsanto with the Oil and Gas Commission, the company produced 1,150,320 barrels of its various petroleum products. The appellant's witness Carney testified that in February "we had some stills shut down, which is normal."

In May, while the supervisory employees were operating the plant day and night, the reported production was 1,082,769 barrels, and in June (the strike ended June 8) Monsanto reported an output of 1,237,592 barrels. It is shown without dispute that during the three-week period now in question the company did not operate one of its catalytic cracking stills and did not operate its alkylation plant. We infer that this prevented the company from processing some of its products to the point of complete readiness for the market, but much of the testimony is so technical that we cannot say with assurance how serious these matters really were. As Monsanto's counsel candidly remarked to one of the witnesses: "You talk so much chemistry I'm afraid that none of us can completely understand it."

The appellant insists that the stoppage of work must be held to have continued until the plant's production was again entirely normal in every respect. If this view were accepted Monsanto would be right in contending that the Board's findings are not sustained by the evidence. We are of the opinion, however, that the stoppage ends when the employer regains production to a point at which his business operations are substantially normal. As Professor Williams observes in the article cited above, it is illogical to say that the stoppage does not occur in the first place until production has fallen off by at least 20 or 30 per cent and yet to hold that

the stoppage continues until the plant again reaches 100 per cent of its productive capacity. Williams concludes that "The administrators and the court will be looking for a 'substantial curtailment' of production and a return to substantially 'normal production.' More definiteness can hardly be expected in anything so obviously purely a question of degree." See also *Ablondi* v. *Board of Review,* 8 N. J. Super. 71, 73 A. 2d 262, and Note, 12 Ark. L. Rev. 123. It is of course apparent that if a resumption of completely normal operations were required, the employer could continue the stoppage indefinitely by leaving a small department of his plant idle.

Here the proof shows that, in terms of barrels, Monsanto's output in May and June was roughly the equivalent of normal production. That some of the stills were not operating does not show conclusively that the stoppage continued to exist, in view of the admission that it was normal for some stills to be shut down. On the record as a whole we do not feel justified in holding that the Board's findings are unsupported by any substantial evidence.

Finally, Monsanto contends that the striking employees were not available for other work. The proof is that the 339 employees maintained a picket line consisting of 21 men at a time; this duty appears to have been rotated. The appellant, citing *Producers Produce Co.* v. *Industrial Comm.,* 365 Mo. 996, 291 S. W. 2d 166, contends in substance that as a matter of law a workman cannot at the same time be available for other work and be engaged in a strike which has as its ultimate purpose a resumption of the worker's former employment. That is indeed the view expressed by the Missouri court. The contrary position was taken in *Milne Chair Co.* v. *Hake,* 190 Tenn. 395, 230 S. W. 2d 393, and, at least inferentially, in several of the cases holding that striking employees are entitled to benefits when there is no longer a stoppage of work at the employer's place of business.

It seems to us that the issue is essentially one of fact. Here only 232 of the 339 employees applied for unemployment compensation. The proof shows that most of the others found work elsewhere, which must have been temporary, as the record indicates that all the employees returned to work at Monsanto after the dispute was settled. The present applicants registered for work at the local office of the employment service and are not shown to have been disqualified by that office on the basis of unavailability. This showing made a *prima facie* case and shifted to Monsanto the burden of going forward with the evidence. *Little Rock Furn. Mfg. Co.* v. *Commr. of Labor,* 227 Ark. 288, 298 S. W. 2d 56. Monsanto made no effort to develop proof with respect to any particular applicant; it relies instead upon the appellees' admission that the various striking employees were available for picket duty.

We do not think that the Board was required to find that the applicants would have refused offers of work in order to be on hand for occasional tours of duty on the picket line. There is no evidence to support that conclusion, which does not impress us as a reasonable one. The Board may well have inferred that some of the 107 employees who did not apply for benefits had participated for a time in the picketing before accepting new jobs. The Board may also have believed that these applicants registered at the employment office in the hope of finding work for the support of themselves and their families. It cannot be said that the undisputed evidence shows that the appellees were not available for other employment.

Affirmed.

McFaddin, J., not participating.

FINLEY *v.* GLOVER.

5-1597 315 S. W. 2d 928

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

J. B. Reed, for appellant.

Joe P. Melton and *Chas. A. Walls, Jr.,* for appellee.

GEORGE ROSE SMITH, J. During the year 1956 the appellee Glover raised rice upon his own land and upon fifty-two acres rented from the appellant Finley. This action was brought by Glover to recover for damage inflicted upon the crop by the appellant's cattle, it being shown that the animals were negligently allowed to enter the fields and graze on the rice. There was a verdict for the plaintiff in the sum of $3,400.

Three points are relied upon for reversal. First, it is contended that the court erred in striking a cross-complaint that Finley had filed on the day before the trial. The case had been pending for several months and had been set for trial twenty-five days in advance. The cross-

complaint averred several new matters, not related to the plaintiff's cause of action, and would doubtless have resulted in a continuance. In these circumstances we find no abuse of the trial court's discretion. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63.

Secondly, Finley complains of a reference to bad checks that was made by the plaintiff's attorney in his statement to the jury. Not only did the court at once admonish the jury not to consider counsel's statement until it was proved, but also Finley admitted on cross-examination that he had paid for feed with a bad check. There was no error.

Thirdly, the appellant makes a dual attack upon the instructions about the measure of damages. In substance the court fixed the measure of damages as the fair market value of the rice at the time of its damage. Finley objected generally and also specifically on the ground that the jury should have been told to consider the expense of planting, cultivating, and harvesting the crop. The cost of planting entered into the value of the growing crop and could not fairly have been deducted. Had the instruction referred to what the value of the crop would have been if it had matured without damage, then it would have been necessary for the jury to be instructed to deduct those production expenses that were eliminated by the partial destruction of the crop. *St. Louis S. W. Ry. Co.* v. *Morris,* 76 Ark. 542, 89 S. W. 846. But here the charge referred only to the fair value of the rice at the time of the damage, which is also a correct way of stating the measure of permissible recovery. *Miller* v. *Wheat,* 208 Ark. 636, 187 S. W. 2d 176.

Alternatively, it is insisted that if the instructions were correct then there was no proof of the value of the crop at the time it was damaged. There was, however, evidence of what the value would have been at maturity, and we have held that such testimony supports the verdict even without direct proof of the gathering and marketing expenses. *Rogers* v. *Stillman,* 223 Ark. 779, 268 S. W. 2d 614. Since the jury awarded less than two

thirds of the estimated maturity value of the lost rice, it is evident that the production costs were taken into consideration.

Affirmed.

BOARD OF TRUSTEES, UNIV. OF ARK. *v.* PULASKI COUNTY.

5-1643 315 S. W. 2d 879

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

Bruce Bennett, Atty. General; *Roy Finch, Jr., Chief Asst. Atty. Gen'l.;* and *Ray Trammell* of counsel, for appellant.

William M. Lee, Henry B. Means, Reed Thompson, J. Frank Holt, John T. Jernigan, Joseph C. Kemp and *Gardner A. A. Deane, Jr.,* for appellee.

George Rose Smith, J. By this suit the appellees, six counties and two cities, seek a declaratory judgment holding that the Medical Quota Act (Act 568 of 1957) is unconstitutional. The defendants compose the Board of Trustees of the University of Arkansas and govern the University Medical Center at Little Rock. The chancellor declared the act to be invalid and enjoined the defendants from attempting to enforce it.

By its preamble the act declares that the Medical Center is a state institution, supported by state-wide taxation, and that the use of its facilities by certain counties and municipalities has been disproportionate to comparative population. To correct this situation the act assigns quotas to each county and to each city of more than 10,000 people. Residents of the various counties and cities who are unable to pay for medical care may be treated at the state's expense within the limits of the assigned quotas, but each county or city must pay the actual cost of charitable treatment rendered to its residents in excess of its quotas. If any city or county fails to pay within thirty days after it is billed, the sum due may be deducted from state funds that the city or county would otherwise receive.

For the most part the appellees' attacks upon the validity of the act require little discussion. The coun-

ties' contention that the statute infringes upon the county court's constitutional power to control county finances has been rejected in a number of cases, the most recent being *Campbell* v. *Ark. State Hospital,* 228 Ark. 205, 306 S. W. 2d 313, which is not dissimilar on this point to the case at bar. An allied contention, that the financial burden upon these appellees will be so great as in effect to destroy their local governments, is sufficiently answered by that provision of the act which empowers each county judge and the chief administrative officer of each city to certify the eligibility of each resident applicant for free medical care. If the charges now assertedly due from these appellees appear to be unduly great, it is because they have failed to exercise their option to control admissions to the Medical Center.

A number of contentions are based on the fact that the quotas assigned to the various counties and cities are based solely on comparative population. Before these points can be discussed it is necessary to describe the quota system in some detail.

The act provides two different quotas for each of the seventy-five counties (and for the city of Marked Tree, as we shall explain later on) and for each of the twelve cities having more than 10,000 residents. The first quota represents the number of patient-days in the hospital that are allotted annually to each county and city. Arkansas county, for example, is allowed 1,728 patient-days a year at state expense, Ashley county 1,872, and so on down the list. The various separate quotas total 140,604 patient-days a year. In like manner the act assigns to each county and city an annual quota for emergency and clinic visits to the Medical Center. These various separate quotas total 100,000 visits a year.

The act itself does not state just how these numerical quotas were determined, except that it does declare parenthetically that they are apportioned pro rata according to population. The system is explained in detail, however, in the answer filed by the appellants. It

is there asserted that the Medical Center hospital has 450 beds, which can be utilized at 85 per cent of their full capacity for 365 days a year. This leads to a total of 139,613 patient-days a year (85 per cent of 450 x 365). This total was allocated among the counties and cities in proportion to their population as shown by the 1950 federal census. (That the actual total in the act comes to 140,604 instead of 139,613 is due in a negligible degree to the rounding off of fractions and, principally, to an obvious mathematical error by which Woodruff county was assigned 1,000 more patient-days than its relative population calls for. We assume that a mere mathematical error of this kind can be judicially corrected. See *Murphy* v. *Cook,* 202 Ark. 1069, 155 S. W. 2d 330.) When a county contained a city having more than 10,000 people the city's population was subtracted from that of the county in fixing their separate quotas. In the same way the Medical Center's annual capacity to take care of 100,000 emergency and clinic visits was apportioned on the basis of the 1950 census.

In addition to pleading the method of allocation in their answer the appellants offered testimony to show that the quotas were in fact determined in the manner just stated. This proof is a part of the record, though the chancellor ruled it incompetent. Perhaps the testimony would not be admissible to show what was in the minds of the legislators when the act was passed, but we see no reason why it would not be competent as tending to support the appellants' asertion that there is a sound factual basis for the quotas allotted to the counties and cities. We need not explore this issue, however, for we can determine the method of allocation without reference to the pleadings or the proffered proof. We take judicial notice of the federal census figures, *Street Imp. Dists. Nos. 481 and 485* v. *Hadfield,* 184 Ark. 598, 43 S. W. 2d 62, and it is a simple matter to demonstrate to a mathematical certainty that the various quotas were based upon comparative population as shown by the 1950 federal census.

It is first insisted that a classification based upon relative population alone is so unreasonable and arbitrary as to invalidate the act on the ground that it is local or special legislation. Ark. Const., Amendment 14. On this point the appellees insist that the residents of counties and cities geographically near the Medical Center will inevitably use its facilities more frequently than will citizens living far away. Hence, it is said, the assigned quotas should take into account relative distances as well as relative population.

This argument overlooks the basic purpose of the act, which is to distribute the burden of maintaining the Medical Center equitably among the several counties and cities. A quota system based upon population appears to us to be an altogether fair method of accomplishing the legislative purpose; certainly it is not so unreasonable as to warrant a holding that comparative population has nothing to do with the purpose of the act. See the *Hadfield* case, *supra*. The appellees' position really narrows down to the contention that, merely because they happen to be near the Medical Center, they should not be required to pay their fair share toward maintaining the institution. This position is obviously without merit.

A further contention is that the distinction between cities having more than 10,000 people and those having less than that number is arbitrary. We do not think so. The system involves no duplication or favoritism, for the population of these larger cities was deducted from that of their respective counties. The legislature may well have believed that a small community might be unable to afford to pay its ostensible share upon a quota basis, since serious illnesses befalling a few of its indigent citizens might result in medical bills amounting to thousands of dollars. Hence the risk of such a calamity was spread over the particular county as a whole. On the other hand, the legislature may have believed that the larger cities were sufficiently populous to warrant their being treated on the same basis as a county.

We think it plain that some classification as between large cities and small ones is justifiable, and it is not for us to say that the line as drawn by the legislature is arbitrary.

The act is also objected to on the ground that it is based only on the 1950 census, with no provision for an adjustment of quotas to meet future shifts in population. On this point the appellees cite a number of our cases holding that a classification based upon a particular census makes the act a local one, since no other city or county can ever be admitted to the class.

We do not regard those cases as controlling here. Such acts are local because they amount to a singling out of a particular community for special treatment. As Sutherland points out in § 2109 of his work on Statutory Construction (3d Ed.): "An act limited to a particular census is a form of identification." Our own decisions are to the same effect. As we said in *Ark-Ash Lbr. Co.* v. *Pride & Fairley,* 162 Ark. 235, 258 S. W. 335: "In other words, this statute selected Mississippi County as its only field of operation as unerringly as if it had been made to apply to that county by name."

That is not the situation here at all. The act does not attempt to identify any county or city by the subterfuge of referring to a particular bracket in the census figures. Quite the opposite, the counties and cities are referred to by name, and a quota is assigned to each. If the quotas were in fact fairly assigned on the basis of the 1950 census, it would not *now* be a valid objection that they might become discriminatory when the 1960 census is taken. The principle is well settled that a statute may be valid when enacted but may become invalid by changes in the conditions to which it applies. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed 949; *Atlantic Coast Line R. Co.* v. *Ivey,* 148 Fla. 680, 5 So. 2d 244; *Vigeant* v. *Postal Teleg. Cable Co.,* 260 Mass. 335, 157 N. E. 651; *Pennsylvania R. Co.* v. *Driscoll,* 330 Pa. 97, 198 A. 130. Hence if the Medical Quota

Act could be shown to be free from discrimination on the basis of the latest census, we would not hold it invalid upon the ground that it might later become discriminatory. It might have been better for the appellants to have been invested with power to reapportion the quotas to meet changes in population, as was done in the case of the Tuberculosis Sanatorium, Ark. Stats. 1947, § 7-311; but that precaution was not essential.

The appellees' remaining contention, however, is unanswerable; that is, that the Medical Quota Act discriminates in favor of Poinsett county and Marked Tree. It is of course well settled that an act which does not apply uniformly throughout the state is local if one county is arbitrarily selected for special treatment. "The exclusion of a single county from the operation of the law makes it local, and it cannot be both a general and a local statute." *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617; *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. 2d 55.

In the act before us Marked Tree, a city in Poinsett County, is included in the list of counties and is given annual quotas of 211 patient-days and 151 emergency and clinic visits. The quotas for Poinsett county are 2,870 patient-days and 2,055 visits. If the population of Marked Tree had been subtracted from that of the county, as was done in the case of the larger cities, the act would be mathematically defensible and it might be assumed that the General Assembly had a sound reason for its special treatment of this city of less than 10,000.

That, however, was not done. For convenience we discuss only the quota for annual visits, though the discrimination exists in the patient-days quota as well. According to the census the 1950 population of the state as a whole was 1,909,511. Poinsett County, with a population of 39,311 (including that of Marked Tree), was therefore entitled to 2,058 of the 100,000 apportioned visits. It was in fact given a quota of 2,055. But Marked Tree, with a population of 2,878, which had already been counted in that of the county, was assigned

a quota of 151 visits, which, had there been no duplication, is mathematically correct on the basis of Marked Tree's population. Thus Poinsett county as a whole was allowed 2,206 visits, when its total population entitled it to only 2,058.

It further appears that the other counties and cities have been made to pay for the favoritism extended to Poinsett county and Marked Tree. Arkansas county, with a population of 23,665, was entitled to 1,239 visits on the basis of the state's true population of 1,909,511. But when Marked Tree's population is counted twice, making a fictitious state total of 1,912,389, Arkansas county then receives only 1,237 visits, and that is the figure in the statute. In short, Arkansas county is made to pay for two of the free visits allowed to Marked Tree. Next in alphabetical order, Ashley county, with an enumeration of 25,660, was entitled to a quota of 1,344, but the duplication reduced its quota to the statutory figure of 1,341. And so on down to Yell county, whose true quota of 736 was cut down to 735. Even Poinsett county was affected, its correct quota of 2,058 having been reduced to 2,055.

If we could conscientiously say that the demonstrable discrimination was inadvertent, it might be possible for us to hold, as we have intimated with respect to the mathematical error of 1,000 in Woodruff county's patient-days quota, that practically every one of the 176 numerical quotas in the act should be judicially construed to read other than they do. But we perceive no reason to suppose that the draftsman of the act intended for it to read differently. To include the city of Marked Tree in the list of counties was certainly not an oversight. To allot that city an undeserved quota of 151 and then to calculate every other quota so that Marked Tree's windfall was proportionately distributed among the other cities and the counties was not an oversight. We cannot escape the conclusion that the discrimination was deliberately written into the act, beyond the reach of judicial correction. As much as we

are in sympathy with the purposes of the act, we have no alternative except to hold that it violates the constitution.

Affirmed.

HOLT, MCFADDIN, and MILLWEE, JJ., dissent.

WRIGHT *v.* SULLIVAN.

5-1689 314 S. W. 2d 700

Opinion delivered July 1, 1958.

H. H. MacAdams and *Penix & Penix,* for appellant.

Bruce Ivy, for appellee.

GEORGE ROSE SMITH, J. The issue in this case is whether the appellant Wright is entitled to have his name appear on the ballot in a Democratic primary to be held later this summer. It is conceded that the appellee Sullivan duly qualified as a candidate for nomination to the office of county sheriff. The only other candidate who attempted to qualify was the appellant, but by oversight he failed to file his corrupt practice pledge until May 2, the ticket having closed on April 30. Sullivan then filed this action for a declaratory judgment, naming Wright and the members of the Democratic county committee as defendants. The trial court held

that the pledge had been filed too late and enjoined the committee from placing Wright's name on the ballot.

The statute requires that the corrupt practice pledge be filed ninety days before the election. Ark. Stats. 1947, § 3-1304. The difficulty lies in the fact that two primary elections have been necessary since the adoption of Amendment 29 to the constitution, which requires that party nominees receive a majority vote. Wright's pledge was not filed ninety days before the preferential primary, which will be held on July 29, but it was filed more than ninety days before the general or run-off primary, which will be held on August 12. Wright contends that the latter date should be controlling, since the law provides that when there are, as here, only two candidates for an office the contest is to be determined at the second primary election. Ark. Stats., § 3-212.

We think this question has been determined adversely to the appellant by the explicit language of the statutes. By Act 238 of 1943 the legislature declared that when there are only two candidates for an office "the time for filing pledges and payment of fees shall be reckoned from the date of the preferential primary election." Ark. Stats., § 3-212. In a later section of the same act it is directed that only the general primary shall be held if there are no races involving three or more candidates, "provided, however, the time for filing pledges and payment of fees shall be reckoned from the date on which the preferential primary would have been held had one been necessary." Ark. Stats., § 3-214. Thus the General Assembly has twice declared that the time is to be calculated from the date of the preferential primary even if only two candidates have qualified.

The appellant contends that in the statutes just quoted the reference to "pledges" should be taken to mean party loyalty pledges only, since those happen to be the only pledges that are mentioned elsewhere in the act. Ark. Stats., § 3-213. We think it reasonable to believe that the legislature meant to include both types of pledge in its mandate and thus to avoid the con-

fusion that would inevitably occur if the time for filing the corrupt practice pledge should be dependent, as the appellant insists, upon the number of candidates eventually seeking the office. It is conceded that the date of the preferential primary determines the time for the filing of the party loyalty pledge and for the payment of the ballot fee. We are not convinced that the legislature meant to fix a different date for the filing of the corrupt practice pledge, which is equally a requirement to be met by a candidate for office.

The appellant also asks us to hold that the filing of the pledge two days late amounted to a substantial compliance with the statute. This position might be well taken if no objection has been raised until after the election, for then the requirement could be regarded as directory; but we have often held that the provisions of the election laws are mandatory if enforcement is sought before the election. *Orr* v. *Carpenter,* 222 Ark. 716, 262 S. W. 2d 280; see also *Fletcher* v. *Ray,* 220 Ark. 844, 250 S. W. 2d 734. and *Byrd* v. *Short,* 228 Ark. 368, 307, S. W. 2d 871. The appellant cites a number of cases involving the principle of substantial compliance, but only in the case of *Fisher* v. *Taylor,* 210 Ark. 380, 196 S. W. 2d 217, was the objection made before the election. That case involved a party loyalty pledge executed on behalf of a member of the armed forces, serving on board ship, and we based our decision on the special consideration that the law accords to soldiers and sailors absent from home in defense of their country. It was specifically stated that the rule there applied would not be controlling "under ordinary and normal conditions," which are the conditions presented by the case at bar.

Affirmed.

HARRIS, C. J., concurs.

CARLETON HARRIS, Chief Justice, concurring. I agree that Act 238 of 1943, which directed that "the time for filing pledges and payment of fees shall be reckoned from the date of the preferential primary election", applies to all "pledges" and not just to party loyalty

pledges. I likewise agree that this provision is mandatory, since the word "shall", in my opinion, means "must". However, this Court has not always followed that rule. In the case of *Fisher* v. *Taylor,* 210 Ark. 380, 196 S. W. 2d 217, the Court permitted a pledge to be filed by a person other than the candidate, the candidate having given his power of attorney to his mother to act in that respect. While I agree that the *Fisher* case involved extraordinary circumstances, I also feel that the Court made a mistake in making any exception to the statute. In the first place, both the party loyalty pledge and corrupt practice pledge are personal pledges, and therefore should be made by the candidate himself. In the next place, I can think of no valid reason that would prevent prospective candidates from complying with the provisions of the Act. The pledge does not have to be filed on a particular day; in fact, it can be filed for months preceding the deadline. Accordingly, sickness, or other casualty occurring on a particular day, could not justify one in failing to comply with the Act.

Other cases are cited by appellant as authority for their contention that the statute is not mandatory which, as the majority opinion points out, were cases instituted, and determined by this Court after the election was over. I recognize the rule to be different where objection is raised before the election, in contrast to where litigation is commenced after the election, but I feel that some of the language used in prior decisions has justifiably given rise to the belief that the statute is not mandatory, and I am of the opinion that this Court should take the present opportunity to correct that language. For example, let us look at the case of *Spence* v. *Whitaker,* 178 Ark. 51, 9 S. W. 2d 769. There, the candidate mailed his corrupt practices pledge to the Secretary of the State Democratic Central Committee, instead of to the Secretary of State, as required by law. In holding that this constituted substantial compliance, this Court said:

"If one should deliberately fail or refuse to file the pledge required by the law, it would be the duty of the committee to refuse to put his name on the ticket. But

where, as in this case, the evidence shows that the candidate was guilty of no violation of the Corrupt Practice Act, that he intended in good faith to comply with the provisions of the law, and that no harm resulted, * * *." such error did not deprive him of his right to have his name placed on the ticket. Further quoting from the opinion:

"The intention of the law is to assure fairness and honesty and the nomination of the man favored by a majority of the voters. If the Legislature had intended that a failure to file this pledge should deprive one of the right to have his name on the ticket when there was no question of any wrongful conduct or any attempt to violate or evade the law, it would have provided in plain language that this should operate as a disqualification."

In the case of *Taaffe* v. *Sanderson,* 173 Ark. 971, 294 S. W. 74, a candidate for sheriff filed a statement setting out that he was familiar with the corrupt practice act, but he did not add that he would, in good faith, comply with its terms, as required by the statute. This Court held that this form of pledge constituted substantial compliance.

In the instant case, it would be difficult for me to say that Wright's failure to file the pledge was deliberate—nor does the majority opinion so state. It is not contended that he has violated any election laws, or is contemplating the violation of same. He simply overlooked filing the pledge.

I reiterate my agreement with the result reached by the majority, but I also think that we should take occasion to make it clear that the word "mandatory" has the meaning given to it by the dictionary—"obligatory". I consider that when the provisions of a statute are mandatory, there is a peremptory or absolute command to comply with such statute. In other words, I would recognize no exception, and therefore, would point out that the reasons given by this Court in the *Spence* case, herein quoted, as justifying non-compliance with the Act, would no longer be considered excusable or justifiable grounds for failure to file the pledge.

CLARK *v.* OTTENHEIMER BROTHERS.

5-1623 314 S. W. 2d 497

Opinion delivered July 1, 1958.

M. V. Moody, for appellant.

Riddick Riffel, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case and the principal controversy is over what constitutes an accidental injury within the meaning of the Act. The circuit court affirmed the full commission denying compensation, but we have concluded that the cause must be reversed and remanded.

Set out hereafter are the material facts which are not in dispute unless so indicated. Appellant, Mrs. Ovada Clark, became an employee of the respondent, Ottenheimer Brothers, on August 26, 1953 and continued working until she was forced to quit because of a back injury (ruptured disc) on August 30, 1954. Respondent is engaged in manufacturing wearing apparel, such as dresses. At first appellant was employed as a sewing machine operator, then at making boxes by folding flat cardboard pieces, but on June 14, 1954 she became what was known as a production line service girl. As such her duties were to keep each sewing machine operator on a production line supplied with materials as they

came from the cutting room. It was part of her job in this connection to carry rather large bundles and place or pile them on a cart or platform with rollers. These bundles each contained from 3 to 5 dozen dresses and some of them weighed about 40 pounds each according to the commissioner who first heard the case but, according to other testimony, some weighed as much as 60 pounds each. At times appellant, who was 37 years old and only slightly over five feet tall, lifted the bunles to a height of about 6 feet in order to pile them on the cart, and it was of course a part of her job to remove them for distribution. Appellant noticed her back hurting slightly for about two weeks before it became so severe she had to quit work. She went to several doctors and finally it was determined that she had a ruptured spinal disc which was removed by an operation. The insurance carrier voluntarily paid compensation for 13 weeks and then suspended further payments on the ground that she had not sustained a compensable injury. Appellant was still unable to return to work more than a year after her injury.

It is conceded that appellant is not entitled to compensation unless the record discloses two things: One, that she had an *accident* as that word is defined by our decisions, and; Two, that there was a *causal connection* between the accident and the injury.

One. Accident. If there was an accident all the testimony shows it arose out of and happened during the course of her employment. This case was first heard by one commissioner whose opinion denying compensation was brought to us by *certiorari.* This opinion was adopted by the full commission. We have read the commission's opinion carefully and we are convinced it was meant to deal only with the question of whether or not there was an accident. The commission found there was no accident, and in doing so, we think, it fell into error.

After setting out the contention of the claimant, the opinion states: "Respondents controvert this claim on the grounds that claimant did not sustain an accidental injury, and that any disability she has had since

the last date of her employment is not the result of an accidental injury." Following this, and after summarizing the facts, the opinion, under the heading FINDING, states: "That claimant did not sustain an accidental injury arising out of and during the course of her employment". Nothing was said about causal relationship in the commission's FINDING. This view which we think the commission took of the decisive issue is supported by some of the language it used under the heading of CONCLUSIONS. The pertinent words have been emphasized by us. It said:

"It is the Commissioner's interpretation of the evidence herein that the nature and volume of work performed, as well as the rapidity with which it was accomplished by claimant while being employed as a service girl remained *substantially constant,* so that there was no *increase* in the work load from the time she started on this job until the time she quit.

"The holdings of our State Supreme Court have been such as to include, under certain conditions, an increased work load as constituting an accidental injury within the meaning of the Act; however, in the instant case, the preponderance of the evidence clearly establishes, in the opinion of the Commissioner, that there was no *increased work* load while claimant was employed as a service girl."

Much of the testimony was directed to the issue of whether there was an *increased* work load placed on appellant just previous to her injury, and we readily agree there is substantial evidence to support the commission's finding that there was no such increase. We do think, however, the commission erred in taking the view, as it obviously did, that it was incumbent on appellant to show, as a prerequisite to compensability, an *increased* work load. It is our view that an *accident* may occur when there is no *increase* in work load. It is understandable how the commission might have been led into its mistaken view by the language in some of our former opinions. However, we think the law on this point was clearly and unequivocally settled against

appellee in the case of *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436.

The case above cited is an exhaustive discussion of the very point here under consideration. It comments on Ark. Stats. § 81-1302(d) pertaining to an accidental injury, on the rule in England where compensation acts originated, on various opinions from this court and other jurisdictions, and on the majority and minority rule. A careful reading of the opinion leaves no doubt as to what it holds, the essence of which appears from a few excerpts. "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." The opinion further states: "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, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

Speaking now solely of what may constitute an accident under the holding in the *Bryant Stave* case it is clear that it was not incumbent upon appellant to prove an increased work load. This, however, was the exact burden which the commission and the trial court placed upon the appellant.

It makes no difference, we think, that appellant felt symptoms of her injury two weeks before it became so painful she could work no longer, if in fact the usual work load caused the ruptured disc in her spine. For that matter who knows whether the disc was ruptured on August 30 or two weeks earlier, and it would be folly to speculate.

Two. Causal Connection. Judging from the basis of the commission's finding and from the evidence produced by respondent, it appears to us there was no serious contention that appellant's injury was not the result of the accident, or, in other words, the result of the work she was doing. There was no evidence and no opinion to the effect that appellant's injury was not or could not have been caused by the heavy lifting she did. None of the four doctors who treated her, including the one who operated on her and removed the disc, was ever asked if the injury could have been caused by the work she was doing, and none expressed an opinion about the matter one way or the other. On the other hand the first doctor who treated appellant gave this written statement: "My opinion is the work she was doing at Ottenheimers Bros. was the causative factor to her troubles. As she stated, the work she was doing was carrying heavy bundles of dresses for a service line." The record shows that appellant did not mislead the doctor as to the nature of her work. This medical testimony is not refuted nor does it seem unreasonable, considering her size, her age, the weight of the bundles, and the height to which she lifted them, working 8 hours a day. Also, one other woman received similar injuries while doing work of a similar nature at the same place.

Since the cause appears to have been fully developed, we find from the undisputed evidence that appellant sustained an accidental injury which arose out of and during the course of her employment, and for that reason the cause is reversed. Also, since it appears that appellant had not fully recovered from the injury at the time of the hearing before the full commission, the cause is remanded to the trial court with directions to remand to the commission for further proceedings consistent with this opinion.

UNION LIFE INS. CO. v. RHINEHART.

5-1564 315 S. W. 2d 920

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

[redacted]

E. M. Arnold; M. J. Harrison, of counsel, for appellant.

Pope, Pratt & Shamburger by *Richard L. Pratt,* for appellee.

SAM ROBINSON, Associate Justice. The issue is whether under the terms of a "binding receipt" appellant insurance company is liable on a policy of insurance, the applicant having died before the policy was issued or the premium was returned to the applicant. There is no substantial dispute as to the facts, and from a judgment in favor of the beneficiary named in the application the insurance company has appealed.

On the 12th day of October, 1953, an agent for appellant, Union Life Insurance Company, procured from Edgar Hamilton Thomas an application for a $5,000 policy of life insurance. Thomas paid $119.00 as a year's premium in advance. The agent told him he was insured from that date and issued to Thomas what is called a "Binding Receipt", which provides: "This receipt must not be detached unless first premium is collected in

full at the time of application and shall operate as a BINDING RECEIPT under the conditions set forth below and on the reverse side hereof. Received from . . . representing premium in connection with this application for insurance in Union Life Insurance Company, said application bearing the same date and number as this receipt and which application contains applicant's declaration that he has paid the sum hereby receipted for and that he assents to the terms of this receipt. This receipt is subject to the terms and conditions shown on the reverse side hereof and agreed to by the applicant in the application. NOTICE: This receipt shall not cover insurance protection in excess of $75,000 on any one applicant nor for any premium for the insurance applied for except the first premium thereon which in no event shall be less than the premium for two months or more than one annual premium for such insurance together with the premium for preliminary term insurance if any."

On the reverse side: "FIRST — If a full first premium for the type of policy and amount of insurance applied for has been paid at the time of making this application, and as stated in this application, then the insurance so applied for (subject to all provisions of the policy contract applied for and in use by the company at this date) shall be effective as of the date of this application PROVIDED the applicant is on the date of this application or date of last examination, whichever is later, a risk acceptable to the Company on the plan and for the amount of insurance applied for, *otherwise the payment evidenced hereby shall be returned and this receipt shall be considered null and void.* (Emphasis supplied)

"SECOND — This receipt shall operate as a conditional receipt if the insurance is not effective coincident herewith under the exact conditions heretofore stipulated. If the application is not accepted exactly as made, then no insurance shall be considered in effect under the application. . . ."

In the application Thomas stated that he has or had been told that he had disorder of digestive organs such as appendicitis, stomach trouble, ulcer, etc., and heart disease or high blood pressure; that he had been confined to a hospital; that he had undergone a surgical operation; and that he had been rejected for military service because of hypertension. No medical examination was to be made in connection with the application. The application further provides that "any policy issued shall not take effect unless and until the first premium has been paid and the policy delivered to the applicant during the good health of applicant excepting only such conditions as may be disclosed in this application and during the lifetime of the applicant (*except if there is a receipt on the company's form and bearing the same number as this application given at the time of making this application and showing that the full first premium has been paid in cash, the terms and conditions of said receipt being hereby agreed to and accepted by the applicant*). That the acceptance by the applicant of any policy issued shall constitute ratification by the Applicant of any provision therein regarding war service and aviation and that the Company shall have the right to reject or amend this application and shall not be required to give cause to anyone for such action; that the company shall have sixty days from the date hereof within which to consider and act upon this application and if within such period a policy has not been received by me or if I have not received notice of approval or rejection, then this application shall be deemed to have been declined by the Company." (Emphasis supplied)

Soon after receipt of the application and annual premium, the insurance company notified its soliciting agent, who in turn notified Thomas, that a medical examination would be required. Thomas never submitted to a medical examination, and died on December 3, 1953, and it is agreed by the parties that if Thomas had lived sixty days the premium would have been returned to him.

The binding receipt certainly binds the insurance company to something. The applicant didn't need to be bound by the receipt; he paid the premium in advance. The words "binding receipt" imply that the insurance company is obligated in some manner. When all of the terms and conditions of the binding receipt and the application are considered, there is some ambiguity, which must be construed against the insurance company, as the receipt and application were on the printed forms of the company.

Litigation involving similar binding receipts has been before the courts many times and the decisions are far from harmonious. There is a long annotation on the subject in 2 A. L. R. 2d 943. As an introductory statement the annotator says: "It is the practice of most life insurance companies to state in their applications that the contract of insurance shall not take effect until the application has been approved by the company, the first premium paid by the applicant, and the policy delivered.

"Since, in the absence of a specific agreement, the payment of the first premium and the delivery of the policy are concurrent acts, a period intervenes between the signing of the application by the applicant and the delivery of the policy. During this period no money has been advanced to the insurance company, and no insurance is in effect. This interval, of a few days to several weeks, depending upon the time consumed in investigation and physical examination of the applicant, in passing upon his application at the home office, and in the traveling of the application and policy to and from the home office, is highly undesirable from the point of view of the insurer as well as of the applicant. The disadvantage to the applicant consists in the fact that he is not covered by insurance during this period, while the disadvantage to the insurer consists in the fact that during the period the applicant possesses the power to revoke the offer made in his application. This disadvantage is a very real one as far as the insurer is concerned, since if the applicant decides to exercise his power, either because he chooses not to carry any insurance at all, or because he chooses to purchase it of a rival com-

pany, the company suffers a loss of what it has expended for the investigation and medical examination of the applicant, aside from the loss of business itself.

"To obtain some measure of protection against the applicant's arbitrary withdrawal of his offer during the company's extensive investigation of his insurability, the insurance companies have hit upon the idea of issuing so-called binding receipts to the applicant upon the payment of the first premium. These binding receipts, or conditional binding receipts, as these instruments are sometimes, though less frequently, called, usually contain a provision which, in some instances, is duplicated in the application itself, to the effect that the insurance shall be considered as in force from the date of the receipt, or the date of the medical examination, provided the application is approved and accepted at the home office of the insurer. Sometimes the date of approval or of issuance of the policy is chosen as the date the policy shall become effective, and in some instances no condition is imposed upon the applicant. The exact language of these provisions varies greatly.

"The issuance of these binding receipts effectively does away with the disadvantage threatening the insurer. They protect it in two ways: The applicant to whom a binding receipt is issued feels, as a rule, contractually obligated to perform and, should he withdraw his application, he is unlikely to resort to a law suit to recover the relatively small sum paid. In addition to achieving this primary object, the issuance of a binding receipt has the incidental advantage for the insurer that it serves to give the insurer the use of the premium money at the earliest date possible and that it offers a selling point of which no agent fails to make the utmost in his talks with prospective customers."

The validity of contracts for temporary insurance in the nature of binding receipts is well established. In *Cooksey* v. *Mutual Life Ins. Co.,* 73 Ark. 117, 83 S. W. 317, the court said: "It is not an unfamiliar custom among life insurance companies in the operation of the business, upon the receipt of an application for insur-

ance, to enter into a contract with the applicant in the shape of a so-called 'binding receipt' for temporary insurance pending the consideration of the application, to last until the policy be issued or the application rejected, and such contracts are upheld and enforced when the applicant dies before the issuance of a policy or final rejection of the application. It is held, too, that such contracts may rest on parol." It will be recalled that in the case at bar the insurance went into force as of the date of the application unless the application was rejected and the premium returned to the applicant.

Appellant cites quite a few cases which it is claimed sustain the contention that under the terms of the binding receipt in the case at bar the insurance was not in force at the time of applicant's death, but most of these cases are distinguishable from the case at bar. In *Reynolds* v. *Northwestern Mut. Life Ins. Co.,* 189 Iowa 76, 176 N. W. 207, there is no showing of the failure to return the premium, as in the case at bar. In fact, just the contrary is indicated. *Warren* v. *New York Life Ins. Co.,* 128 F. 2d 671, provides for medical examination, and there was no return of premium clause in the binding receipt in that case. *Gonsoulin* v. *Equitable Life Assur. Soc.,* 152 La. 865, 94 So. 424, provides that the premium shall be returned on demand and surrender of receipt. There is no such provision in the receipt involved in this case. And to the same effect are other cases, such as *State ex rel. Equitable Life* v. *Robertson,* Mo., 191 S. W. 989; *New England Mut. Life Ins. Co.* v. *Hinkle,* 248 F. 2d 879. In *Kronjaeger* v. *Travelers Ins. Co.,* 124 W. Va. 730, 22 S. E. 2d 689, no binding receipt was given. The applicant was given an "informal receipt", but the terms of that receipt are not shown. In *Paulk* v. *State Mutual Life Ins. Co.,* 85 Ga. App. 413, 69 S. E. 2d 777, applicant was required to take a medical examination. In that case it was said: "Since the applicant was required to take the medical examination, after which the company would determine whether or not the applicant was an acceptable risk, no valid contract of insurance arose in the absence of approval by the company." In *Leube* v. *Prudential Ins. Co.,* 147 Ohio St. 450, 72 N. E. 2d 76, 2 A. L. R. 2d 936, the receipt con-

tained no provision for cancellation by return of premium, and in that case the court said: "Where a preliminary or temporary contract provides that it shall be operative from its date or other specified date subject to acceptance of the application or approval of the risk, it is effective from the specified date according to its terms where the company accepts the application or approves the risk; but where the company exercises its rights of disapproval in the *manner specified* the insurance ceases instantly, and no liability arises thereunder." (Emphasis supplied) In the case at bar the company did not exercise its right of disapproval in the manner specified in the receipt, which was by the return of the premium.

Stonsz v. *Equitable Life Assur. Soc.*, 324 Pa. 97, 187 A. 403, 107 A. L. R. 178, is very similar to the case at bar. In speaking of the binding receipt the court said: "The purpose of this clause, 'insurance . . . shall take effect as of the date of this receipt' was to provide an inducement for the payment by appellee of the first premium in advance and to give preliminary protection to the insured until the issuance of the policy. . . . If this clause of the receipt was not intended to provide interim insurance to appellee as a separate and distinct contract from the policy to be issued, what is its effect?" No answer has been suggested in any of the cases except that the binding receipt is a form of temporary insurance, which goes into effect as of the date of the receipt.

In *Albers* v. *Security Mut. Life Ins. Co.*, 41 S. D. 270, 170 N. W. 159, the court said: "If the company did not intend that there should be insurance effective pending the date of the application and the date of the approval of the risk and the issuance of the policy, then the company would be charging and obtaining the full amount of the premium for one year, while the period of actual insurance would be as many days less than one year as there were days intervening between the date of the application and the approval. This would not be dealing honestly with the insured. By the payment of the premium for one year an insured is entitled to insurance for one year." And the court said, in *Starr* v. *Mutual Life Ins.*

Co. of N. Y., 41 Wash. 228, 83 P. 116: "If there was to be no contract of insurance in any event until the application was approved at the home office and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiaries would derive no benefit from the insurance. The chief object of the provision would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk."

Appellant insurance company contends that the application for insurance was rejected and the applicant so notified, and that since the application was not accepted there is no liability on the part of the insurance company. It is admitted, however, that the premium was not refunded to the applicant. The binding receipt specifically sets out the terms and conditions upon which the receipt can be considered void, and that was by a return of the premium. The binding receipt put the insurance into effect as of the date of the receipt (there was to be no medical examination) provided the applicant was a risk acceptable to the company, and if the applicant was not an acceptable risk the premium was to be returned. The premium was not returned. True, the insurance company had sixty days in which to decide whether to issue a policy, but in the meantime the temporary insurance was in force unless the company avoided that risk by returning the premium. This was not done.

Affirmed.

George Rose Smith, J., dissents.

George Rose Smith, J., dissenting. It is certainly a sound rule that an ambiguity in an insurance contract is to be construed against the insurer, but I cannot see what the

rule has to do with this case. The majority say: "When all of the terms and conditions of the binding receipt and the application are considered, there is some ambiguity, which must be construed against the insurance company * * *" Yet nowhere in the majority's fairly long opinion is there a sentence or even a word stating in what respect the receipt and application are ambiguous. The courts have often condemned the practice of creating an ambiguity, where there really is none, in order to resolve it against the insurer; but it is something new for a court merely to announce the rule and on that basis hold the insurer liable, without at least suggesting what language is ambiguous.

The majority also state: "The binding receipt certainly binds the insurance company to something." It certainly does. It binds the company to issue a policy *as of the date of the receipt* if the applicant is a risk acceptable to the company. That obligation is illustrated in two of the three cases relied upon by the majority, the *Albers* case and the *Starr* case. In both those cases the insured was in fact in good health when the binding receipt was issued and was later approved as a risk acceptable to the company. In both cases the applicant died before the policy was delivered. It was correctly held in each case that the company was liable, for that interim protection is exactly what the binding receipt provides. Of course the distinction is that in those cases the applicants were acceptable risks; here Thomas was admittedly not an acceptable risk.

It is convenient at this point to mention the only other decision relied on by the majority, the *Stonsz* case, which the opinion describes as "very similar to the case at bar." Very similar? In that case the insured was not only in good health but the policy was actually issued and delivered to him. The company, however, had dated it as of its issuance rather than as of the issuance of the binding receipt, and the only question was its liability for disability arising in the interim. I find it difficult to discover the similarity.

Laying aside the matters just mentioned, I come to what seems to be the sole reason for imposing liability in

this case: the fact that the insurer had not returned the premium at the time of the applicant's death. That point can be considered in either of two ways, but in neither instance can it be said to have resulted in the creation of a contract of insurance between the parties.

First, was it the insurer's duty to return the premium within less than sixty days after the issuance of the binding receipt? I cannot see that it was. The company had sixty days in which to decide whether Thomas was an acceptable risk. If Thomas had died during the sixty days and also before the company had reached its decision, the insurer would not have been liable if it later determined in good faith that Thomas was not insurable.

The only difference is that here the company reached its decision, in good faith, before the applicant's death. It notified Thomas that the policy could not be issued without a medical examination, but it did not return the premium, *nor did Thomas ask that it be returned.* Under the majority's reasoning the insurance contract must have come into existence at that instant, for neither party ever took any other step toward the making of a contract. In other words at that point, because the premium had not been returned pending the medical examination, Thomas could have brought a suit for specific performance to require that the policy be issued. I need not dwell on the patent fallacies in this reasoning. Of course Thomas could have requested the return of his premium, but he chose not to do so. He knew that the company was unwilling to issue the contract; so how can it be said that there was a meeting of the minds, when neither party to the transaction either thought or had the slightest reason to think that an agreement had been reached?

Second, if we assume for the sake of argument that the company was required to return the premium pending the medical examination, what then? The plain answer lies in the language of the binding receipt: that receipt continued in force rather than becoming "null and void." Thomas's rights, and those of his estate or beneficiary, must then be determined by the provisions of the receipt, which declares in unambiguous language that the insur-

ance shall not be effective unless the applicant is a risk acceptable to the company. It has never been suggested that the company did not act in good faith in determining that Thomas was not an acceptable risk. Thus even if we regard the receipt as having been in force at the time of Thomas's death, it is still not a basis for affirming this judgment.

ARTHUR v. SIMMONS & WILLIAMS CONST. CO.

5-1626 315 S. W. 2d 926

Opinion delivered July 1, 1958.

[Rehearing denied September 29, 1958.]

Paul K. Roberts, for appellant.

John H. Kimberly, for appellee.

SAM ROBINSON, Associate Justice. This is a workmen's compensation case. Chester Arthur, the employee, was working as a laborer for Simmons & Williams Construction Company. On the 25th day of September, 1956, Arthur was pushing a wheelbarrow loaded with sand, when he felt a pain in his leg and his leg became swollen. He was totally disabled for a period of eight weeks, and in addition to the eight weeks period, he claims a 5 per cent partial permanent disability to a portion of his leg. He filed his claim with the Workmen's Compensation Commission. At a hearing before the referee he contended that his disability was due to having rolled the wheelbarrow across an electric line lying on the ground, thereby receiving an electrical shock. His claim for compensation was denied by the referee and at a hearing before the full commission he made

the additional contention that if the condition of his leg was not due to having received an electrical shock it was due to a strain he received while pushing the wheelbarrow. The commission denied compensation on the ground that there is no substantial evidence that claimant's disability was due to an injury received in the course of his employment. The claimant appealed to the circuit court and there the court allowed compensation for total disability for a period of eight weeks but disallowed the claim for 5 per cent partial permanent disability. The claimant has appealed to this court from the order of the circuit court disallowing the claim for 5 per cent partial permanent disability to his leg, and the employer has cross-appealed from the action of the court in allowing compensation for eight weeks total disability.

We have examined the record carefully and it is our conclusion that there is substantial evidence to support the commission's finding that employee's disability was not the result of an accidental injury received in the course of his employment. The evidence is substantial to sustain the finding by the commission that on the day in question the appellee, a man 38 years of age, accustomed to doing hard work, was pushing a wheelbarrow when suddenly he felt a pain in one of his legs; that upon examination it was found that the leg was swollen; he was immediately taken to a doctor, and there was a diagnosis of "hemorrhage into calf of left leg" — "no history of accident obtained." About a month later the employee went to another doctor and there was a diagnosis of "rupture of deep blood vessels of the calf of the leg." The doctor stated: "At the present time there seems to be no vascular impairment in the extremity. I would anticipate with the passing of time that the patient will make a recovery from this injury. I do not anticipate that he will have a significant degree of permanent partial disability. I do not feel that his disability will be in excess of 5 per cent as related to the left leg below the knee." There is no showing that the doctor ever saw the employee again, and on the date of the hearing the employee was working again for a

construction company, earning $1.40 per hour, whereas on the date of the alleged accident he was working for a construction company and earning only $1.00 per hour.

The evidence is substantial to the effect that the employee received no electrical shock whatever, and there is no evidence that he was otherwise acidentally injured. He was merely pushing a wheelbarrow loaded in the usual and customary manner, when suddenly he felt a pain in his leg. It appears that this condition of his leg was caused by a ruptured blood vessel or an "avulsion of muscle fibers in the calf group." There is no evidence whatever that this condition was caused by the work the claimant was doing at the time. There is no evidence as to what causes a rupture of blood vessels in the leg or the avulsion of muscles. We have many times held that if there is any substantial evidence to support the finding of the commission it must be affirmed on appeal.

Affirmed on appeal; reversed on cross-appeal.

JOHNSON *v.* HALL, SECY. OF STATE.

5-1732 316 S. W. 2d 194

Opinion delivered September 29, 1958.

Joe C. Barrett, J. Clib Barton, Pat Mehaffy, Ned A. Stewart, Edward L. Westbrook, Edward L. Wright, for plaintiff.

Bruce Bennett, Attorney General, for defendant; *Pope, Pratt & Shamburger,* by *Walter L. Pope,* of counsel for defendant.

CARLETON HARRIS, Chief Justice. This is an original action questioning the sufficiency of the ballot title of proposed constitutional amendment No. 51, which bears the popular name, "Trainmen Crew Amendment."[1] The ballot title for the proposed amendment, and which is under attack, is as follows: "An Amendment Prohibiting Operation of Trains with Unsafe and Inadequate Crews." Plaintiff contends that the ballot title is defective for the following reasons:

I.

The ballot title of the petition is defective and insufficient in that it does not convey a complete and intelligent idea of the scope and import of the proposed amendment.

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[1] The proposed act provides as follows:

Section 1. The practice of operating high speed diesel trains and locomotives over the railroads in this state with inadequate crews creates undue hazards, jeopardizing and imperiling life and property, and is detrimental to the safety and welfare of the people and contrary to the public policy of this state.

Section 2. Any railroad company, officer of court, or any other person or corporation owning or operating any railroad line or lines in this state, whose line or lines are more than one hundred miles in length, engaged in the hauling of passengers, shall equip any of its said passenger trains consisting of two or more cars or more with a crew consisting of not less than an engineer, a fireman, a conductor, a porter, and a flagman or brakeman.

Section 3. Any railroad company, officer of court, or any other person or corporation owning or operating any railroad line or lines in this state, whose line or lines are more than one hundred miles in length, engaged in the hauling of freight, shall equip any of its said freight trains consisting of twenty or more with a crew consisting of not less than an engineer, a fireman, a conductor, a flagman, and two brakemen.

Section 4. Any railroad company or corporation owning or operating any railroad line or lines in this state, whose line or lines are more than one hundred miles in length, where switching, pushing or transferring of cars are made across public crossings within this state shall operate their switch crews with not less than an engineer, a fireman, a foreman and three helpers, regardless of any modern safety device.

II.

The ballot title is misleading in that it conveys a false idea as to the meaning and effect of the proposed amendment.

III.

The ballot title omits the true nature and effect of the proposed amendment and contains partisan coloring.

The purpose of this amendment is to write into the constitution, provisions substantially similar to Act 116 of the General Assembly of 1907, Act 298 of the General Assembly of 1909, and Act 67 of the General Assembly of 1913.[2] These acts have been generally labeled the "Full Crew Laws."

This Court has had occasion, in several instances, to lay down rules governing the sufficiency of a ballot title. One such case is that of *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356. There, the Court, quoting from a Massachusetts case, said that "* * * the ballot title should be complete enough to convey an intelligible idea, and scope and import, of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring. * * *" Inasmuch as the instant proposed ballot title obviously fails to meet the last requirement (that it must contain no partisan coloring), we deem it unnecessary to enter into a discussion of the sufficiency of the proposed title in other respects.

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[2] There are some differences in the proposed amendment and the provisions of these acts. For instance, Act 298 of 1909, dealing with passenger trains, provides that the act shall apply to all trains with as many as three cars. The proposed amendment, as will be noted in Footnote 1, changes this to trains consisting of two or more cars. Act 116 of 1907, dealing with freight trains, provides for a crew consisting of an engineer, fireman, conductor, and three brakemen. The proposed amendment provides for an engineer, fireman, conductor, a flagman, and two brakemen. Act 116 applies to all railroad companies whose lines are more than fifty miles in length in this state, and where the train shall consist of as many as twenty-five cars. The proposed amendment applies to railroads who operate lines in this state of more than one hundred miles, and where such trains consist of as many as twenty cars.

Let us remember that the voter, getting ready to cast his ballot in the polling booth, will see only the popular name, and the title of the proposed amendment. Neither the body of the amendment, nor any of its provisions, appear on the ballot. The popular name herein used, "Trainmen Crew Amendment," would appear to have no effect upon the voter's thinking, one way or the other, and certainly it conveys no information as to what the proposal contains. Accordingly, the voter who has not previously read the proposed amendment will derive all of his information from the ballot title, "An Amendment Prohibiting Operation of Trains with Unsafe and Inadequate Crews." We think it can safely be said that all citizens are against the operation of trains that do not carry sufficient crews to reasonably assure safety. We cannot conceive that anyone would vote the contrary of this proposition, *viz,* to *permit* the operation of trains with unsafe and inadequate crews. The amendment itself seeks to declare that to operate trains with inadequate crews, (meaning, of course, a crew less than that provided in the act), "is detrimental to the safety and welfare of the people. * * *" But there has been no prior determination that this assertion is always true. Actually, this is a fact question, depending upon the circumstances in each case. Such reasoning is in the nature of "begging the question," which is defined as "founding a conclusion on a basis that needs to be proved as much as the conclusion itself." Here, the voter is urged to support a measure which provides for a particular crew in the operation of trains, because to operate with a smaller crew is, according to the ballot title, "unsafe and inadequate" — but the "unsafe and inadequate" remains to be proved. As was stated in *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470, "In studying his ballot, the voter is not bound by the rule of *caveat emptor.* He is entitled to form his own conclusions, not to have them presented to him ready-made."

As previously stated, other alleged deficiencies in the proposed title need not be discussed, since this title so obviously contains strong partisan coloring, and con-

sequently, fails to meet the test of sufficiency heretofore established by this Court.

Accordingly, plaintiff's petition for injunction is granted.

JOHNSON *v.* HALL, SECY. OF STATE.

5-1733 316 S. W. 2d 197

Opinion delivered September 29, 1958.

Joe C. Barrett, J. Clib Barton, Pat Mehaffy, Ned A. Stewart, Edward L. Westbrooke, Edward L. Wright, for plaintiffs.

Bruce Bennett, Atty. General, for defendant; *Pope, Pratt & Shamburger,* by *Richard L. Pratt,* of counsel for defendant.

J. SEABORN HOLT, Associate Justice. This is an original action brought by plaintiffs (railroads) seeking to enjoin defendant, C. G. Hall, Secretary of State, from certifying proposed Constitutional Amendment No. 52 and its popular name and ballot title to the State Board of Election Commissioners for the purpose of having it on the official ballot at the next general election. Plaintiffs earnestly contend that: "The ballot title of the petition is defective and insufficient in that it does not convey a complete and intelligent idea of the scope and import of the proposed amendment and is mislead-

ing in that it conveys a false idea as to the meaning and effect of the proposed amendment." We have concluded that this contention must be sustained.

The proposed popular name ballot title and amendment in question are as follows: "Proposed Constitutional Amendment No. 52 (By Petition) Safety Crossing Amendment — An amendment to require adequate safety devices at all public railroad crossings. Section 1. The practice of operating trains and locomotives over railroads in this state across highways, public roads, crossings and city streets at high rates of speed without adequate protection to the vehicular and pedestrian traffic at such crossings is detrimental to the safety and welfare of the people and contrary to the public policy of this state. Section 2. Every railroad company in this state whose line or lines are more than one hundred miles in length who operate trains in excess of twenty-five miles per hour over said lines shall install and maintain at each public road crossing or street electrically controlled warning signals which flash red for an approaching train and shall provide and maintain electrically controlled boards or gates on each side of such roads, crossings or streets as a further protection. Section 3. Failure to provide or maintain such warning signals or electrically controlled boards or gates shall create an inference and presumption of civil negligence to any such railroad company in any civil action for damages to persons or property against such company arising out of accidents at such public roads, crossings or streets. Filed: July 3, 1958 C. G. 'Crip' Hall, Secretary of State."

Our governing rules on the sufficiency of ballot titles have many times been announced and reaffirmed by this court. In one of our leading cases — *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364 — we reannounced the test of the sufficiency of a ballot title in this language: ". . . it should be complete enough to carry an intelligent idea of the scope and import of the proposed law, and that it should be free from misleading tendency, whether of amplification or omission or of fallacy, and

must contain no partisan coloring. This test has never been departed from in the subsequent cases, . . ." In the more recent case of *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470, we reaffirmed the above rule and there said: ". . . it is not required that the ballot title contain a synopsis of the amendment or statute. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884. It is sufficient for the title to be complete enough to convey an intelligible idea of the scope and import of the proposed law. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331. We have recognized the impossibility of preparing a ballot title that would suit every one. *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716. Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, of omission, or of fallacy,' and it must not be tinged with partisan coloring." When an elector comes to vote he is entitled to be confronted with a ballot title complete enough to convey to him "an intelligible idea of the scope and import of the proposed law", or amendment. The ballot title must be free, as indicated, from any misleading tendency whether of amplification, omission, or of fallacy, and it must not be tinged with partisan coloring.

The ballot title here — AN AMENDMENT TO REQUIRE ADEQUATE SAFETY DEVICES AT ALL PUBLIC RAILROAD CROSSINGS, — obviously, we think, would convey to the voter, or carry the presumption to him, that at present the railroads were not using adequate safety devices at all public crossings and that our present statutes do not provide adequate protection for the highway traveler. Certainly all good citizens would vote for adequate protection at public crossings. There is nothing in this ballot title that tells the voter that this amendment would require all railroads in Arkansas to install and maintain at each public crossing or street electrically controlled warning signals, and in addition electrically controlled boards or gates on each side of each of the public railroad crossings, without any regard to the distance that said crossing might be from a source of electric power, and that such a re-

quirement would place an additional burden of heavy expense on the railroads of millions of dollars to install and maintain such devices, at an estimated 3,600 public railroad crossings in Arkansas, whether the daily traffic count over such crossings amounted to a dozen vehicles or thousands.

Clearly, we think, this ballot title, under the test above indicated, fails to convey to the voter an intelligible idea of the scope and effect of the proposed amendment. We, therefore, hold that it is defective and insufficient. Accordingly, plaintiffs' petition for injunctive relief is granted.

McFaddin and Millwee, JJ., dissent.

Hope *v.* Hall, Secy. of State.

5-1734 316 S. W. 2d 199

Opinion delivered September 29, 1958.

Pope, Pratt & Shamburger, for plaintiff.

Joe C. Barrett, J. Clib Barton, Pat Mehaffy, Ned A. Stewart, Edward L. Westbrooke, Edward L. Wright, for defendant.

ED. F. MCFADDIN, Associate Justice. This is an original proceeding, brought by a citizen and taxpayer against the Secretary of State, and challenging (a) the popular name, and (b) the ballot title of proposed Initiated Act No. 1,[1] which is to be submitted to the voters at the General Election in November 1958. Our jurisdiction of this proceeding is because of Amendment No. 7 to the Constitution, which reads (§ 16) in part: "The *sufficiency* of all statewide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction of all such clauses." (Emphasis supplied). "Sufficiency" means more than a mere numerical count, because Section 18 of the Amendment says that if a petition be "insufficient", it may be returned "for correction or amendment".

I. *The Popular Name.* The complaint says *inter alia*:

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[1] Here is the popular name, ballot title, and complete text of the proposed Act:

"Proposed Initiated Act No. 1

(Popular Name)

"ACT TO REPEAL THE FULL CREW LAWS.

(Ballot Title)

"A proposed act to repeal acts prescribing minimum numbers of employees to be used in the operation of trains.

(Proposed Act)

"WHEREAS, Arkansas is one of the relatively few states which by law prescribe minimum crews on certain trains operating in the state, thus resulting in higher operating expenses to the railroads in Arkansas than in neighboring states, all to the detriment of shippers and the traveling public; and

"WHEREAS, railroads now have improved roadbeds and grades and have developed and now use equipment that can be operated with safety to the public and the employees with smaller crews than prescribed by law;

"NOW, THEREFORE, BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS:

"Section 1. That Act 116 of the General Assembly of the State of Arkansas, approved March 28, 1907, and Act 298 of the General Assembly of the State of Arkansas, approved May 31, 1909, and Act 67 of the General Assembly of the State of Arkansas, approved February 20, 1913, be and the same are hereby repealed."

"That the popular name proposed by the sponsors which defendant has stated he will place on the November General Election Ballot, to-wit: 'Act to Repeal the Full Crew Laws', is so worded and so designated for the sole purpose of prejudice since the proposed Act would not in any way repeal a 'full crew law'. Not one of the Acts proposed to be repealed is, or ever was, a 'Full Crew Law', nor does any of said acts concern or deal with a 'full crew'."

The proposed Act says it is to repeal three Legislative enactments,[2] being: (a) Act 116 of 1907 (which may be found in §§ 73-720 *et seq.* Ark. Stats. and captioned, "An Act prescribing the minimum number of employees to be used in the operation of freight trains in this State and providing a penalty for the violation of this Act"); (b) Act 298 of 1909 (which may be found in §§ 73-723 *et seq.* Ark. Stats. and captioned, "An Act prescribing the minimum number of employees to be used in the operation of passenger trains in this State and providing penalty for the violation of this Act"); and (c) Act 67 of 1913 (which may be found in §§ 73-726 *et seq.* Ark. Stats. and captioned, "An Act for the better protection and safety of the public"). In several of our cases (*K. C. So. RR.* v. *State,* 116 Ark. 455, 174 S. W. 223; and *St. L. S. F. Ry. Co.* v. *State,* 215 Ark. 714, 223 S. W. 2d 186), we have referred to one or the other of these Acts as, "The Full Crew Law", or the "Full Switching Crew Law". In 44 Am. Jur. 619, "Railroads"

[2] One or the other of these three Acts has been before the Courts in several cases: Act 116 of 1907 was before the Courts in the case of *C.R.I. & P. Ry. Co.* v. *State,* 86 Ark. 412, 111 S. W. 456; and the holding of this Court was affirmed by the Supreme Court of the United States in *C.R.I.&P. Ry. Co.* v. *Arkansas,* 219 U. S. 453, 55 L. Ed. 219, ___S. Ct.____. Act 67 of 1913 was held valid by this Court in *St. L.I.M. & So. Ry.* v. *State,* 114 Ark. 486, 170 S. W. 580; and the holding of this Court was affirmed by the Supreme Court of the United States in *St. L.I.M. & So. Ry.* v. *Arkansas,* 240 U. S. 518, 60 L. Ed. 776, 36 S. Ct. 443. Both the 1907 Act and the 1913 Act were held valid in the case of *Mo. Pac.* v. *Norwood,* 283 U. S. 249, 75 L. Ed. 1010, 51 S. Ct. 458. Other cases involving these Acts are *K.C. So. Ry. Co.* v. *State,* 116 Ark. 455, 174 S. W. 223; *K.C. So.* v. *State,* 194 Ark. 80, 106 S. W. 2d 163; *Mo. Pac. RR. Co.* v. *Moore,* 210 Ark. 643, 197 S. W. 2d 284; *K.C. So. Ry. Co.* v. *State,* 213 Ark. 906, 214 S. W. 2d 79; and *St. L.S.F. Ry. Co.* v. *State,* 215 Ark. 714, 223 S. W. 2d 186.

§ 405, similar statutes are referred to as "full crew acts" in this language:

"Statutes, commonly known as 'full crew acts', requiring crews of a certain number of employees on railroad locomotives or trains, have been generally sustained as a legitimate exercise of the police power."

Anyone familiar with legal parlance could not possibly be misled by the popular name of this proposed Act, which is, "An Act to Repeal the Full Crew Laws". Furthermore, one not familiar with legal parlance, but with ordinary English, could easily find a definition of the words "full crew law" in Webster's Unabridged Dictionary, where the words "full crew law" are defined: "*Railroads.* A law requiring light trains to be manned on the same standard as heavy trains." So, we conclude that the popular name here challenged is not open to any of the objections urged against it by the plaintiff.

III. *The Ballot Title.* The ballot title here challenged reads: "A proposed act to repeal acts prescribing minimum numbers of employees to be used in the operation of trains." The plaintiff states, *inter alia*:

"That the ballot title as proposed by the sponsors and approved by the defendant is misleading, camouflaged by partisan coloring, inadequate to show the full meaning covered by said Act; fails to fairly allege the purpose of the Act, and is written in such a way that the material facts proposed therein are omitted to the extent that the electors will not and cannot determine the issues involved on which they are requested to cast their vote. The ballot title is completely misleading and fails to state the true nature and effect of the Act. The ballot title fails to designate the only vital provisions of the initiated act, to-wit: the acts sought to be repealed which are set forth in Section 1 of the Act . . . The use of the words in the ballot title, 'minimum number of employees', is wholly meaningless."

We have a number of cases which state the rules regarding the validity and sufficiency of the ballot title.

Some of these cases are *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331; *Shepard* v. *McDonald,* 189 Ark. 29, 70 S. W. 2d 566; *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81; *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364; *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716; *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884; and *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470. This general statement, from *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, has been restated in many cases:

"The ballot title should be complete enough to convey an intelligible idea, of the scope and import of the proposed law, and it ought to be free from any misleading tendency, whether of amplification, of omission, or a fallacy, and it must contain no partisan coloring."

Each of the three Legislative enactments here sought to be repealed deals with the minimum number of employees required to be used in the operation of trains, and the purpose of the proposed Initiated Act here challenged is to repeal these Acts. The ballot title certainly and clearly states that purpose. We have studied all of the arguments advanced by the plaintiff and we conclude that the ballot title is valid as against each and all of the attacks here made on it.

Therefore, we deny the petition of the plaintiff.

MOORE *v.* HALL, SECY. OF STATE.

5-1737 316 S. W. 2d 207

Opinion delivered September 29, 1958.

Tom Gentry, for plaintiff.

Bruce Bennett, Atty. General, for defendant; *Mehaffy, Smith & Williams,* by *B. S. Clark,* of counsel for defendant.

MINOR W. MILLWEE, Associate Justice. This is an original proceeding by Ruben Cleveland Moore, a citizen and taxpayer of this State, questioning the sufficiency of the popular name and ballot title of Proposed Constitutional Amendment No. 50 and to enjoin the Secretary of State from placing the proposed amendment on the ballot to be used in the general election on November 4, 1958.

The proposed popular name, ballot title and amendment read as follows:

(Popular Name)

"FREEDOM TO HIRE AMENDMENT"

(Ballot Title)

"AN AMENDMENT PROHIBITING PRACTICES THAT REQUIRE OR INDUCE AN EMPLOYER TO EMPLOY A GREATER NUMBER OF PERSONS THAN THE EMPLOYER DEEMS NECESSARY TO CARRY ON HIS BUSINESS."

(Amendment)

"BE IT ORDAINED BY THE PEOPLE OF THE STATE OF ARKANSAS THAT THE FOLLOWING SHALL BE AN AMENDMENT TO THE CONSTITUTION:

SECTION 1. Practices known as "featherbedding" are contrary to the public policy of this State.

SECTION 2. No employer may be required to employ a greater number of persons than the employer deems necessary to carry on his business. Courts of chancery are empowered to enjoin any person, association or corporation attempting, directly or indirectly, to require, induce, coerce, or compel an employer to employ a greater number of persons than the employer deems necessary to carry on his business.

Petitioner alleges and earnestly contends that the popular name and ballot title of the proposed amendment are insufficient and invalid because they do not convey a fair, full and reasonably intelligent idea of the scope and import of the measure to be voted on, and fail to give the elector information concerning the choice he is called on to make between the retention of the existing law and the substitution of the proposed amendment. It is also argued that they contain partisan coloring and fail to give the elector a fair idea of the far reaching effects of the measure; and that the popular name especially is invalid because it is calculated and intended to give exactly the opposite impression of the contents of the proposed amendment from the true contents thereof and to induce the electorate into believing that the proposed amendment does something that it does not do.

We recently restated the rules to be applied in determining the sufficiency of ballot titles in *Bradley* v. *Hall, Secretary of State,* 220 Ark. 925, 251 S. W. 2d 470: "On the one hand, it is not required that the ballot title contain a synopsis of the amendment or statute. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884. It is sufficient for the title to be complete enough to convey an intelli-

gible idea of the scope and import of the proposed law. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331. We have recognized the impossibility of preparing a ballot title that would suit every one. *Hogan* v. *Hall,* 198 Ark. 681, 130 S. W. 2d 716. Yet, on the other hand, the ballot title must be free from 'any misleading tendency, whether of amplification, or omission, or of fallacy,' and it must not be tinged with partisan coloring. *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81.

"It is evident that before determining the sufficiency of the present ballot title we must first ascertain what changes in the law would be brought about by the adoption of the proposed amendment. For the elector, in voting upon a constitutional amendment, is simply making a choice between retention of the existing law and the substitution of something new. It is the function of the ballot title to provide information concerning the choice that he is called upon to make. Hence the adequacy of the title is directly related to the degree to which it enlightens the voter with reference to the changes that he is given the opportunity of approving."

Petitioner argues that the ballot title is fatally defective in that it would repeal or render unconstitutional the so-called "Full Crew Laws" (Ark. Stats., Secs. 73-720, 723 and 726), and numerous other acts and regulations designed to safeguard the public safety and health, without enlightening the voter with reference to the drastic changes that he is given the opportunity of approving. While there may be considerable merit in this contention, we would not strike the ballot title down on that basis alone. In this connection it should perhaps be noted that Section 1 of the amendment condemns all practices known as "featherbedding." This term embraces numerous types of coercion of an employer by a labor union in which the employer is forced to pay for services not performed. "Featherbed rule" is defined in Webster's New International Dictionary (Second Edition) as follows: "A union rule requiring an employer to pay unneeded workmen, or to pay for unnecessary or duplicating jobs, or setting limits to the amount of

work that workmen may do in a day; for example, a rule requiring a union musician to be paid for standing by idle during the playing of records for broadcasting." Now the term "featherbedding" is not mentioned in the ballot title, which does not inform the voter that all such practices are condemned, but only those requiring more employees than are deemed necessary by the employer, who is made the sole judge of such necessity. While we may not be concerned with the wisdom of a measure that would require one man to do the work of three provided the employer deemed it necessary, this does not relieve the draftsman of the duty to provide an impartial summation of the measure in the ballot title without any misleading amplification, omission or partisan coloring.

When the above mentioned omissions are considered in connection with the proposed popular name, "Freedom to Hire", which is to be construed along with the ballot title in determining its sufficiency, we hold the ballot title defective and that the prayer of the petitioner should be granted. When the popular name is considered in the light of the true purpose of the proposed amendment which is actually to restrict and curtail the number and hiring of employees, we think it has a manifest tendency to mislead the voter and contains partisan coloring. "Freedom" is an enchanting and bewitching word to every citizen of a democracy. There is some merit in the suggestion that the proposed popular name might leave the erroneous impression with the voter that by passage of the amendment some new *freedom to hire* rather than *to refrain from hiring* would be brought about. Similar catch phrases and slogans which tend to mislead and to color the merit of a proposal on one side or the other have been rejected, or held fatally defective, by other courts. See *Say* v. *Baker,* 137 Colo. 155, 322 P. 2d 317; *In re Petition of Idaho State Federation of Labor,* 75 Idaho 367, 272 P. 2d 707.

The petition for an injunction is granted.

HOBAN *v.* HALL, SECY. OF STATE.

5-1736 316 S. W. 2d 185

Opinion delivered September 29, 1958.

Tom Gentry, for plaintiffs.

Bruce Bennett, Atty. General, and *Roy Finch, Jr., Chief Asst. Atty. General,* for defendant.

GEORGE ROSE SMITH, J. By this original action the petitioners seek to enjoin the Secretary of State from certifying as sufficient a ballot title for a proposed constitutional amendment, to be voted upon at the general election in November. In substance the petition asserts that the ballot title is so incomplete and so abbreviated that it fails to convey sufficient information to enable an elector to vote upon the measure with intelligence and understanding.

The proposed amendment carries as its popular name "The States Rights Amendment" and has the following paragraph as its ballot title:

"An Amendment Creating a States Rights Commission and Providing For Its Duties, Qualifications and Operation; Defining an Offense of Barratry and Providing Penalty thereof; Providing for the Suspension of State Funds to School Districts in Certain Cases, the Redistribution of Public School Funds in Certain Districts, the Possible Closing of Schools and Creation of Private Schools in Certain Districts, and the Recall of

School Board Members, all of which to Be Determined by Special Elections of Qualified Voters; Regulating Voter, Candidate and Party Qualifications; Providing for Certain Penalties; Providing for a Severability Clause; and, Providing for a Repealing Clause."

The amendment itself is of such extreme length and touches upon so many different subjects that we shall merely summarize the provisions deemed pertinent to this discussion, with the full text being set out as an appendix to the opinion. Even a casual reading of the measure will disclose that it is the most far-reaching proposal ever offered to the state's electorate.

Returning to the ballot title, one sees at once that its language is cast in generalities. The voter is told that the amendment is to create a States Rights Commission, but he is given no intimation of its powers or duties. He knows that the schools are to be affected "in certain cases" and "in certain districts," but he is given no inkling of what those contingencies actually amount to. He realizes that he is to vote for or against changes in the election laws, but the ballot title supplies no clue as to the nature of those changes.

The single question is whether this ballot title meets the requirements of the constitution. The governing rules are well settled and perfectly familiar. The ballot title need not be a complete abstract of the act. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248. It must, however, provide the elector with information concerning the choice that he is called upon to make. *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470. It was pointed out in our leading case, *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, that "the great body of electors, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. This is the purpose of the title."

Especially pertinent here is the decision in *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81, for it dealt with an error of omission. There the ballot title recited that the proposed measure was an act to pro-

vide for the assistance of the aged and the blind, but it failed to state that this assistance was to be financed by the levy of a sales tax and by the appropriation of a third of the taxes upon horse and dog racing. In holding the title to be misleading and therefore insufficient we said: "The title carries an appeal to all humane instincts. Few would object to some provision being made for the support of the aged and blind; but to levy a general sales tax of two per cent, for that, or any other purpose, is a different question altogether, and would furnish the elector, however generous his impulses might be, serious ground for reflection if that information were imparted to him by the title of the question upon which he exercised his right of suffrage."

Our inquiry, then, is whether this ballot title conceals matters which, if disclosed, would furnish the elector with "serious ground for reflection" before yielding to his impulse to vote in favor of an amendment ostensibly furthering the cause of states' rights. After carefully studying the measure as a whole we are unanimously of the opinion that this ballot title fails to supply the voter with the information that the constitution expects him to have. For brevity we shall discuss only the provisions concerning the proposed commission and the election laws.

With respect to the commission the ballot title merely tells the elector that the measure will create a States Rights Commission and provide for its duties, qualifications, and operation. The cause of states' rights, like that of the aged and the blind, is deservedly a popular one and undeniably appeals to the great body of the electorate. But are there provisions in the amendment which, if made known, would give the voter serious ground for reflection?

We have no doubt that there are. The Commission, created by Article I of the measure, consists of twelve members. Sections 5 and 6 of this article destroy the system of checks and balances that has characterized our government since its birth. Section 5 provides that no court shall be empowered to enjoin the Commission

from performing the duties set out in the amendment. Those duties, however, are not clearly defined. By § 7 the Commission is invested with the duty and the power to "perform any and all things deemed necessary and proper" to protect the sovereignty of the several states and to resist the usurpation of the rights reserved to the states. Within the vague limits of this clause it is difficult to conceive of any power — legislative, executive, or judicial — that the Commission might not lay claim to. The ballot title, it may be observed, does not even mention the powers of the Commission, much less does it give a hint of their unlimited scope.

Having immunized the Commission from the action of the state courts, the amendment next frees it from the control of the state legislature. It has traditionally been the function of the legislative branch to exercise some measure of restraint over the other departments, through its power to enact laws and to control the public purse. But here that restraint is swept away. Since the Commission's powers would be conferred by the constitution, they could not be affected by any laws that might be passed. And by § 6 the General Assembly is deprived of any financial supervision over the Commission. This section makes an annual appropriation of $250,000, which the Commission is at liberty to spend in any way it chooses. It may be noted that the General Assembly, in creating a State Sovereignty Commission that superficially resembles the proposed States Rights Commission without the latter's unbridled powers, deemed an annual appropriation of $30,000 to be sufficient. Acts 83 and 170 of 1957. It will also be observed that the ballot title does not suggest to the voters that a quarter of a million dollars is to be appropriated every year, without any effective safeguard over its expenditure.

It is really not enough to say that the proposed Commission would have equal status with the other branches of the state government; the amendment contemplates that every other department shall be subservient to the Commission. Section 10 of Article I requires all elective and appointive officers and employees of the state and

its subdivisions to cooperate with the Commission and to render such aid and assistance as may be requested by the Commission. By Article V if any person, public official, or employee of the state fails to carry out "the clear mandates" of the amendment he is subject to a fine of not more than $5,000, to imprisonment for not more than a year, and to automatic forfeiture of his office. It is obvious that under the measure before us every public officer and employee in the state, without exception, would live in daily fear of offending the Commission.

Nor is the private citizen to be left untouched by the unlimited powers of the Commission. By §§ 8 and 9 of Article I the Commission is given broad authority to make investigations and to conduct public or secret hearings. It is evident that in the exercise of its inquisitorial power the Commission might interrogate any citizen in the state about his business affairs, his private life, his political beliefs, or any other subject that can be imagined. Although the measure purports to preserve certain fundamental rights of witnesses called before the Commission, these provisions are meaningless in view of the Commission's immunity from the action of the judiciary. The blunt truth is that, however improper the Commission's inquiries might be, the witness's only choice would be to answer the questions or go to jail for contempt.

We have said enough, we think, to demonstrate beyond any question that, with respect to the proposed Commission, the ballot title fails to disclose essential facts that the voter is entitled to know before making up his mind. Much the same situation exists with reference to the changes in the election laws that would be brought about by the measure.

On the latter subject the ballot title simply tells the elector, in six words, that the amendment will regulate voter, candidate, and party qualifications. In fact, however, the proposal embodies such extensive innovations in the election laws that we cannot conscientious-

ly suppose that the average voter would regard them as immaterial.

In addition to lengthening the period of residence required for qualified electors the measure introduces novel conditions to the right to vote. Section 5 of Article IV specifies that an elector must be "of good moral character," that he understand the duties and obligations of citizenship under a republican form of government, and that he be able to read and write. It is evident that vague tests such as these leave much to the discretion of the election officers, who are in a position to disqualify any one they choose. Another change in the election laws is a requirement that an applicant for registration give his or her date of birth and exact age in years, months, and days. We have no doubt that this demand would be so distasteful to a substantial number of men and women that they would forego their right to vote rather than comply with this requirement. Yet the ballot title gives no information about these various amendments to the election law.

The wisdom of the measure does not, of course, concern the courts, for the people undoubtedly have the right to amend the constitution in any way they like. It is our duty, however, in a case of this kind, to approve the ballot title only if it represents an impartial summation of the measure and contains enough information to enable the voters to mark their ballots with a fair understanding of the issues presented. Tested by this standard, the ballot title now before us is clearly insufficient.

The petition for an injunction is accordingly granted.

APPENDIX

(Full Text of the Proposed Amendment)

BE IT ORDAINED BY THE PEOPLE OF THE STATE OF ARKANSAS THAT THE FOLLOWING BE ADOPTED AS AN AMENDMENT TO THE CONSTITUTION:

Article I—States Rights Commission.

Section 1. Communism, being an ideology with its purpose to destroy the freedom and liberty of all people throughout the world, its major weapon being the fomentation of strife and disharmony calculated to turn class against class and race against race, thereby upsetting time honored social patterns which have been attained in this country, not by prejudice but by a background of rich experience, all of which interferes with the exercise of rights reserved to the states; therefore, Communism is hereby declared to be against the public policy of the State of Arkansas.

Section 2. There is hereby created the States Rights Commission, which shall be composed of:

The Governor, the Attorney General, the Lieutenant Governor and Speaker of the House of Representatives, each of whom shall be an ex-officio member.

Three citizens of Arkansas who shall be appointed by the Governor; one of whom shall reside East of White River; one of whom shall reside South of the Arkansas River; and one of whom shall reside West of the White River and North of the Arkansas River;

Two members of the State Senate who shall be appointed by the President of the Senate by and with the approval of at least eighteen (18) members of the Senate;

Three members of the State House of Representatives who shall be appointed by the Speaker of the House of Representatives by and with the consent of at least fifty-one (51) members of the House of Representatives; one of said appointees shall reside South of the Arkansas River; one of them shall reside East of the White River, and one of them shall reside North of the Arkansas River and West of the White River.

The ex-officio members of the Commission and members from the Senate and House of Representatives shall serve during the terms of their respective offices and until their successors are elected and qualified. The

members appointed by the Governor shall serve during the term of the Governor who appointed them and until their successors are appointed and qualified.

Section 3. The Governor shall be Chairman of the Commission, and the President of the Senate Vice-Chairman, with authority to act in the absence of the Chairman. Seven (7) members of the Commission shall constitute a quorum for the transaction of business.

Section 4. The Commission shall meet not less than one day each month and at such other times as the majority of the members shall deem it necessary. Should any member willfully fail and refuse to attend two consecutive meetings without reasonable cause, such member shall be removed from said Commission and from any other office he or she might hold under and by the authority of the State of Arkansas.

Section 5. No court in the State of Arkansas shall be empowered to enjoin the Commission from the performing of its duties as set out in this Amendment.

Section 6. The Commission may employ a secretary and such other legal, professional, expert, secretarial, clerical and other help deemed necessary and proper to carry out the objectives and purposes of this amendment; and it is hereby authorized and empowered to fix the compensation for such employees at any reasonable amount, and pay such other fees as from time to time may be required. Ex-officio members of the commission shall serve without remuneration in addition to that otherwise received by them from the State. Other members of the Commission shall receive $35.00 per day for each day spent on the business of the Commission. All members of the Commission shall be reimbursed for actual living and travel expenses incurred by them. In order to defray the expenses of the Commission, the Treasurer of the State shall, before the end of the first quarter of each fiscal year, set aside and credit to a fund hereby designated "The States Rights Commission Fund" the amount of $250,000, which fund shall be drawn on by the Commission to meet its expenses. The Treasurer shall deduct the amount of this

fund from money received by him, that would otherwise be credited to the General Revenue Fund. Nothing herein shall be construed to prohibit the Commission from receiving and expending additional funds by way of private gifts or appropriations by the General Assembly. Full and complete accounting shall be kept and made by the Commission of all funds received and expended by it. The state auditors shall annually audit the expenditures of all funds received by the Commission from all sources.

Section 7. It shall be the duty of the Commission, and it shall have power in the name of the State of Arkansas or any political sub-division thereof, to perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas and her sister states from encroachment thereon by the Government of the United States, or by any government of any nation, or federation of nations, or any branch or department or agency thereof, and to resist the usurpation of the right and the powers reserved to this State or her sister states by such governments, branches, departments or agencies.

Section 8. The Commission may make investigations and/or hold hearings (whether public or in executive session) in connection with any investigation made by it pursuant to the provisions of this Amendment. Witnesses at Commission hearings shall have the right to be accompanied by counsel of their own choosing, who shall have the right to advise witnesses of their rights, and to make brief objections to the relevancy of questions and to procedure. At least twenty-four (24) hours prior to his testifying, a witness shall be given a copy of that portion of the motion or resolution scheduling the hearing which copy shall state the subject of the hearing; and at the same time he shall be given a statement of the subject matter about which he is to be interrogated. The privileged character of communication between clergyman and parishioner, doctor and patient, lawyer or accountant and client, and husband and wife, shall be scrupulously observed. Every witness who tes-

tifies in a hearing shall have a right to make an oral statement and file a sworn statement which shall be made a part of the transcript of such hearing, but such oral or written statement shall be limited to material relevant to the subject of the hearing.

Section 9. The Commission shall have power to issue subpoenas for witnesses to appear at hearings conducted by the Commission, and to issue subpoenas *duces tecum* directed to witnesses. Subpoenas shall be issued by the Chairman or Vice-Chairman of the Commission only, upon written notice to all members of the Commission, with a statement as to the identity of the witness or material and their relevancy to the investigation or hearing already authorized. Upon request of any member of the Commission, the question of whether a subpoena shall be issued or remain in force if already issued, shall be decided by a majority vote.

In case of contumacy or refusal to obey a subpoena issued by the Commission, any Circuit Court of the State of Arkansas within the jurisdiction of which the investigation or hearing is to be carried on, or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found, or resides, or transacts business, shall, upon application of the Chairman or Vice-Chairman of the Commission, have jurisdiction to issue to such person an order requiring such person to appear before the Commission, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the Court may be punished by said Court as contempt thereof.

The Chairman, Vice-Chairman or Secretary of the Commission is hereby authorized and empowered to administer oaths to witnesses; and any witness appearing and testifying before the Commission who shall willfully and corruptly testify falsely to any material fact shall be guilty of perjury and shall be subject to prosecution and punishment therefor as provided by law; and if such perjury be manifest, or if the witness shall refuse to testify, or to produce any books, records, papers or

documents, he shall be guilty of contempt of the Commission and shall be punished in cases of contempt of the Circuit Court of the State of Arkansas.

Any person sworn and examined as a witness before said Commission without procurement or contrivance on his part shall not be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor shall any statement made, or book, paper or document produced by any such witness be competent evidence in any criminal proceeding against such witness other than for perjury in delivering his evidence. Should any witness refuse to testify to any fact, or refuse to produce any book, document or paper touching which he is to be exexamined, on the ground that he will thereby incriminate himself, or that it will tend to discredit or render infamous, the Commission shall consider such refusal as part of the evidence and shall inform the public of the refusal of such witness to so testify, and the facts and circumstances under which such refusal was made.

Section 10. All elective and appointive officers and employees of the State and the political sub-divisions thereof, including all public schools, and institutions of higher learning, shall co-operate with the Commission and render such aid and assistance as may be requested by them by the Commission.

Section 11. All persons, corporations, societies, organizations and other groups of persons who are found by a majority of the members of the States Rights Commission to be engaged in activities designed to further the cause of Communism shall be declared subversive and shall be required to file with said Commission a complete report of their activities within the State of Arkansas, including a list of names and addresses of their officers and members, a detailed certified financial report showing names and addresses of their contributors and expenditures, and such other information as the General Assembly shall require.

Article II—Barratry

Section 1. Any lawyer who shall represent himself to be an attorney for any person, corporation, society, organization or other group of persons who are engaged in activities which foment racial unrest, without having been personally and specifically solicited and employed by said client or clients such attorney holds himself out to represent, or if such attorney or anyone acting in his behalf solicits said client or clients, said attorney shall be deemed guilty of barratry and in addition to the penalties provided by the General Assembly shall be disbarred and forever prohibited from the practice of law in the State of Arkansas.

Article III—School Requirements

Section 1. No state funds shall be allocated to school districts in which the Negro and Caucasian races are mixed in classrooms, athletic or social activities in any school or schools within said district, except that such mixing of the Negro and Caucasian races shall have been sanctioned by a prior affirmative vote of the majority of the qualified electors in such district.

Section 2. Any school against which a decree, order or proclamation of any court or executive has been rendered, or shall be rendered, causing the mixing of Negro and Caucasian students, and any school or schools from which the students were transferred or were to be transferred in compliance with such decree, order or proclamation, shall be closed forthwith from and after the effective date of this Amendment.

Upon the closing of such school or schools an election shall be held at the earliest possible date in said school district to determine whether or not the qualified electors in said district are for or against mixing of the Negro and Caucasian races in their public schools. Should the majority of the qualified electors in said district favor mixing of the Negro and Caucasian races, the school or schools would be reopened upon an integrated basis. Should less than a majority of the qualified electors in said school district vote to mix the

Negro and Caucasian races, then the affected school or schools, both Negro and Caucasian in said district shall be closed, and the physical plants and equipment of such shall be sold or leased for operation of private schools.

Section 3. The tax monies and state aid over and above that portion of said funds set aside for the retirement of bonded indebtedness of such schools shall be divided *pro rata* among the educable children of school age, regardless of color, who were former students of such affected schools, or who reside in the attendance area of such affected schools. Said money shall be used only for the education of said children, in schools meeting the minimum accreditation standards.

Section 4. Nothing in this amendment shall disturb the status of teacher tenure or teacher retirement benefits.

Section 5. Upon petition of not less than ten per cent (10%) of the qualified electors in any school district in the State of Arkansas, all elected school officials within said school district named in said petition, shall stand for re-election at a special election; the ticket shall be open for other electors to qualify as candidates. Such special election shall be held not later than one month after certification of the recall petition by the county clerk. In no event shall more than one such special election be held in any calendar year.

Section 6. All contracts for school personnel shall be entered into subject to ratification by the school board as it may be constituted following any special election under the provisions hereof.

Article IV—Voting Privileges

Candidate and Party Qualifications

Section 1. The right to vote in Arkansas shall be subject to the provisions of this amendment; provided, however, nothing herein shall be construed as repealing the Poll Tax requirements.

Section 2. Every citizen of this State and of the United States native born or naturalized, not less than twenty-one years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in the State by the people.

Section 3. Each voter shall have been an actual *bona fide* resident of the State of Arkansas for two years, of the County one year, of the municipality in municipal elections four months, and of the precinct in which he offers to vote three months next preceding the election; provided, that removal from one precinct to another in the same county shall not operate to deprive any person of the right to vote in the precinct from which he has removed until three months after such removal; provided, further, that removal from one county to another shall not deprive any person of the right to vote in the county from which he has removed for district officers to be elected in a district which includes the county to which he has removed, or for state officers, whether the county be in the same district or not, until he shall have acquired the right to vote for such officers in the county to which he has removed.

Section 4. Each voter shall be, at the time he offers to vote legally enrolled as a registered voter on his own personal application, in accordance with the provisions of this Constitution, and the laws enacted thereunder.

Section 5. Each voter shall be of good moral character and shall understand the duties and obligations of citizenship under a republican form of government. He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration by making, under oath, administered by the registration officer or his deputy, written application therefor, in the English language, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the

registration officer or his deputy, without assistance, or suggestion from any person or any memorandum whatever, other than the form of the application hereinafter set forth; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon oath of such disability.

The application for registration above provided for shall be a copy of the following form with the proper names, dates and numbers substituted for the blanks appearing therein, to-wit:

"I am a citizen of the United States and of the State of Arkansas. My name is Mr. ..... Mrs. ..... Miss ..... I was born in the state (or country) of ....., County of ..... on the ..... day of ..... in the year ..... I am now ..... years, and ..... months and ..... days of age. I have resided in Arkansas since ....., in the county since ....., and in Precinct No. ....., in Ward No. ..... of this county continuously since ..... I am not disfranchised by any provision of the Constitution of this State. The name of the householder at my present address of ..... is ..... My occupation is ..... My color is ..... My sex is ..... I am not now registered as a voter in any other ward or precinct of this State, except ..... My last registration was in Ward ..... Precinct ....., County ..... I am now affiliated with the ..... Party.

.....
Signature

Sworn to and subscribed before me:

.....
Registration Officer"

Section 6. Each voter must in all cases be able to establish that he is the identical person whom he rep-

resents himself to be when applying for registration, and when presenting himself at the polls for the purpose of voting in any election, or primary election. At any time of voting he must present his registration certificate for identification. In all instances of voting in any election or primary election the election officials must make proper notation on the elector's registration certificate as to time and polling place of his appearance and as to the propriety of his party affiliation.

Section 7. The General Assembly shall enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates. No person shall vote at any primary election, or in any convention, or other political assembly held for the purpose of nominating any candidate for public office, unless he is at the time a registered voter, and a certified member of the political party holding such election, convention, or assembly, and has such other and additional qualifications as may be prescribed by the party of which candidates for public office are to be nominated. All ballots in any election or primary election must designate the race — either Caucasion or Negro — of all candidates appearing thereon. And in all political conventions in this State the apportionment of representation shall be on the basis of population. No person shall be chosen as a delegate by any political party in this State to represent such party in any convention, local, state or national unless such delegate is a duly qualified elector under the provisions of this amendment. No provision of this amendment shall be construed as, nor shall any laws be passed by General Assembly, prohibiting or unreasonably restricting the formation of additional political parties, or binding any political party in this State to any national political party bearing the same name.

Section 8. Any person possessing the qualifications for voting prescribed by this amendment, who may be denied registration, shall have the right to apply for relief to the Circuit Court for the county in which he offers to register. Said court shall then try the cause, giving

it preference over all other cases, before a jury of twelve, nine of whom must concur to render a verdict.

Any duly qualified voter of this State shall have the right to apply to the Circuit Court to have stricken off any names illegally placed or standing on the registration rolls of any county within the jurisdiction of said court; and such application shall be tried by preference before a jury of twelve, nine of whom must concur to render a verdict. Such application hereinabove provided for shall be without cost.

Section 9. The following persons shall not be permitted to register, vote or hold office or appointment of honor, trust, or profit in this State, to-wit: Those who have been convicted of any crime which may be punishable by imprisonment in the penitentiary, and not afterwards pardoned with express restoration of franchise; those actually confined in any public prison or county farm; all interdicted persons, and all persons notoriously insane or idiotic, whether interdicted or not.

Section 10. The General Assembly shall further implement this amendment by appropriate legislation. The qualifications herein provided for are in addition to other qualifications as are now required by law except those laws in conflict herewith.

Article V—Penalties

Section 1. No person, public official or employe of the State of Arkansas or of any political subdivision thereof, shall have immunity from arrest, prosecution and trial for the violation of the provisions of this amendment or penal laws the General Assembly shall provide for the willful failure and refusal to carry out the clear mandates of this amendment, and in addition to the penalties, shall automatically forfeit his or her office.

Section 2. Any person, public official, or employee of the State of Arkansas or of any political subdivision thereof, who shall wilfully fail and refuse to carry out the clear mandates of this amendment shall be deemed guilty of a misdemeanor and shall be punished by a fine

of not more than $5,000.00 or imprisonment for not more than twelve (12) months, or by both such fine and imprisonment.

Article VI—Severability

Section 1. If any section, paragraph, sentence or clause of this amendment shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this amendment, but such other part shall remain in full force and effect.

Article VII—Repealing Provision.

Section 1. All parts of the Constitution of the State of Arkansas in conflict with this amendment be, and the same are, hereby repealed.

STATE EX REL. ARK. PUBLICITY & PARKS COMM. *v.* BUTT, CHANCELLOR.

5-1606 316 S. W. 2d 204

Opinion delivered September 29, 1958.

Bruce Bennett, Atty. General; Russell J. Wools, Asst. Atty. General, for petitioner.

Hugh M. Bland and *Shaw, Jones & Shaw,* for respondent.

PAUL WARD, Associate Justice. Petitioner here seeks to enjoin the Chancery Court of Washington County from proceeding in a cause there pending on the ground that it is an action against a State Commission. Petitioner's contention is that in such action only the Pulaski County Chancery Court has jurisdiction under Ark. Stats. §§ 27-603 and 34-201. The respondent asserts that the Chancery Court of Washington County has jurisdiction under Ark. Stats. § 27-601.

Since one phase of this matter was before us previously (see *State Ex Rel. Ark. Publicity & Parks Comm.* v. *Woodward,* 228 Ark. 856, 310 S. W. 2d 803) we by-pass consideration of the procedural method here pursued.

On February 28, 1957 Neil W. Woodward filed a petition in the Chancery Court of Washington County against the Petitioner wherein he claimed to be the owner of the S½ of SE¼, Sec. 23, Twp. 13 N., Range 31 W. in Washington County, deraigning his title from the Federal Government. Woodward further alleged that said lands were wild and unimproved, and that he and his predecessors had paid all the taxes since 1926, and; That petitioner unlawfully and wrongfully took possession of a part of said land for park purposes under claim of title through a deed from the State based on a void tax sale for the 1930 taxes. The complaint further states that volume 287 in the clerk's office showing the forfeiture of said lands in 1930, at page 501, bears the marginal notation "Cancelled Chancery Court Decree April 20, 1940, D. L. Moore, Clerk". The complaint contains a copy of the Decree in a suit brought by the State to quiet title to the lands in question in Washington County, which shows that on April 20, 1940 the Chancery Court dismissed the State's claim to the land here

claimed by Woodward, and it is stated that no appeal had been taken by the State. Also attached to the complaint is "Exhibit 1" which is captioned "State Land Office, James H. Jones Commissioner, Entry Statement". It is to the effect that the State has no claim to the questioned land, and that it has no record of a conveyance of any part of said land to the Petitioner. The complainant further alleges that the Petitioner is claiming some right, title or interest in said lands by reason of a dedication deed from the Commissioner of State Lands dated January 22, 1935, and recorded in the clerks office of Washington County; and that said deed and the other instruments above mentioned constitute a cloud upon the title to his land.

The prayer was that said clouds be removed from complainant's title and that title to said property be vested in him as against the Petitioner herein, and, further that petitioner be commanded "to remove any improvements placed upon said property . . ."

To the above complaint Petitioner entered a demurrer on the ground that the "court has no jurisdiction of the person of the defendant or the subject matter of this action." The Respondent overruled the demurrer, and Petitioner here asks us to prohibit Respondent from proceeding further in this cause, and asks that the action there pending be ordered transferred to the proper tribunal in Pulaski County.

It is our conclusion that the Respondent was correct in overruling the demurrer. Ark. Stats. § 34-201 reads, in relevant part, as follows: ". . . all actions against such board or commissioner or state officer, for, or on account of any official act done, or omitted to be done, shall be brought and prosecuted in the county where the defendant resides . . ." § 27-601 in relevant part, states that actions for the recovery of real property, or of an estate or interest therein must be brought in the county in which the subject of the action (land) is situated.

The present action was, we think, one affecting title to land, as set out in the last mentioned statute, and was therefore properly brought in Washington County. Since a demurrer admits all allegations in the complaint, the present action amounted to an attempt by Woodward to have certain void deeds and entries removed as clouds upon his title. In other words it was an action to quiet title. We have held many times that such an action is properly brought in the county where the land is situated. See *Fidelity Mortgage Company* v. *Evans,* 168 Ark. 459, 270 S. W. 624. An action to remove a fraudulent deed as a cloud on title to land comes within the same statute. See *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S. W. 762.

The present action was not such an action against the State or Commission as falls within the purview of § 34-201, since it sought to impose no obligation upon the State. In *Federal Compress & Warehouse Co.* v. *Call,* 221 Ark. 537 (at page 541), 254 S. W. 2d 19, this court in dealing with this question stated: "No money judgment is sought against the state — only the enjoining of allegedly void rulings," *etc.,* and held the action not to be against the State. We said in *Hickenbothan* v. *McCain, Comm'r of Labor,* 207 Ark. 485 (at page 490), 181 S. W. 2d 226, "But if the relief prayed is granted no obligation is imposed upon the state. It is, therefore, not a suit against the state." See also *Wilson* v. *Parkinson,* 157 Ark. 69, 247 S. W. 774. In the case under consideration, taking the allegations of the complaint to be true, Woodward sought to impose no obligation upon the State.

The suit brought by Woodward is in effect an action to clear certain clouds from the title to his land in Washington County. From a practical standpoint it appears reasonable, if not compelling, that any court proceedings or decrees affecting his title should appear on the records of that county. No doubt the legislature recognized this fact in enacting § 27-601. This court so found in *Jones, McDowell & Co.* v. *Fletcher,* 42 Ark.

422 at page 439 when it said: "It is very clear that the Legislature intended, in the adoption of section 4532 Gantt's Digest (Ark. Stats. § 27-601) as a part of our *code procedure,* to make all actions, whether at law or in equity, where the judgment or decree is to operate directly upon the estate or title, local, and to restrict the remedy to the proper tribunal of the county where the subject of the action, or some part of it, is situated".

For the reasons heretofore set out the writ is denied.

We have not overlooked that Woodward asked for a mandatory injunction requiring Petitioner to remove any improvements placed upon the land. We think this in no way affects the main issue considered above, because there is no proof that any such improvements have been placed on the land. This feature of the case may or may not arise when and if the cause is tried on its merits.

Denied.

SWINDLE *v.* THORNTON.

5-1592 316 S. W. 2d 202

Opinion delivered September 29, 1958.

Witt & Witt, Nabors Shaw and *Donald Poe,* for appellant.

W. G. Spencer and *Donn G. Allison,* for appellee.

SAM ROBINSON, Associate Justice. The appellants, Sam Swindle and Elizabeth Swindle, brother and sister, committed an assault and battery upon the appellee, M. O. Thornton, by beating him in the face with a rock and cutting him about the face and on the arm with a pocketknife. Thornton filed suit against the Swindles for damages due to the injuries inflicted upon him. The trial resulted in a judgment in favor of Thornton in the sum of $1,500, and the Swindles have appealed.

Mr. Thornton is a resident engineer for the State Highway Department. It was his duty in connection with his work to see that a highway which was being constructed by the McGeorge Construction Company in Montgomery County and which passed in front of the Swindle home was built according to plans and specifications. Incidentally, Mr. Thornton had nothing to do with preparing the plans; it was merely his duty to see that the plans were followed.

The new construction of the highway lowered it to some extent in front of the Swindle home, and Elizabeth Swindle could not see the occupants of automobiles that traveled in front of her house, as she had in the past; she could see only the tops of the automobiles. In lowering the grade of the road it was desirable that roads leading onto the Swindle property be worked and graded for the convenience of those using the property. In this connection Mr. Thornton obtained an easement signed by Sam Swindle authorizing the work to be done on the Swindle property. A portion of the driveway that needed to be worked extended beyond the highway right of way. However, it developed that Sam Swindle did not actually own the property involved. It is owned by his sister, Elizabeth Swindle, and it is contended that Elizabeth Swindle did not authorize Sam Swindle to sign

the easement, although the work to be done in connection with the driveway was for the benefit of the property owner.

Early the next morning after the easement had been signed, Sam Swindle made a trip to see a lawyer, and the conclusion was reached that the easement was not valid. From the evidence it can be determined that the Swindles were extremely angry about the grade of the road having been changed, and it appears that they attributed this change to Mr. Thornton. Elizabeth Swindle made threats that she was going to kill Mr. Thornton. Both of the Swindles were in a very ugly mood when Mr. Thornton, in going about his work, drove up in front of the Swindle house. He stopped his car in the public road and got out. At that time he did not know that the Swindles were angry. He thought that the new situation in connection with the road was entirely satisfactory with everybody. According to the evidence, which the jury had a right to believe, both Elizabeth and Sam Swindle immediately made an attack on Mr. Thornton when he got out of his automobile, Elizabeth Swindle beating him in the face with a rock and Sam Swindle stabbing and slashing him with a knife. The Swindles contended at the trial that without any provocation Mr. Thornton had made an attack upon Sam Swindle while Sam Swindle was standing on private property belonging to his sister. Obviously the jury did not believe this version of the affair.

First, it is argued that instruction No. 4, given at the request of Thornton, is a binding instruction that ignores certain defenses set forth by the Swindles and is therefore fatally defective. The instruction is as follows: "You are instructed that every person is the sole custodian of his person, and no one has the right to touch it unlicensed, and that any unlawful touching of the person of another constitutes an assault and battery. Therefore, if you believe from the preponderance of the evidence in this case that the defendants, Saul Swindle, Sam Swindle and Elizabeth Swindle, or any of them, did make an assault and battery upon the person of

M. O. Thornton by striking, beating, bruising, cutting, or otherwise injuring the person of the said M. O. Thornton with their fists, rocks, a knife, or any other instruments or things, then your verdict should be for the plaintiff as against those persons that you find from a preponderance of the evidence actually made an assault and battery on M. O. Thornton, for such an amount as you find he is entitled to." (There was no judgment against another brother, Saul Swindle.)

By instruction No. 2 the court told the jury that "an assault and battery is the unlawful striking or beating the person of another".

At the request of the Swindles the court told the jury: "The court instructs the jury that every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his or her person — a right to live in society without being unnecessarily or wrongfully put in fear of personal harm. And an assault is an attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented." And, further:

"If a person wilfully trespasses upon the premises of another, and while so trespassing assaults the owner thereof, and the owner, while defending his or her person from such assault, inflicts an injury upon the party thus making such assault, the party thus injured cannot recover damages for the injury so received."

It is appellants' contention that instruction No. 4 given at the request of appellee ignores the defense that Thornton, first, assaulted the Swindles, and, second, that Thornton trespassed upon the Swindles' property. But before Thornton could recover under this instruction the jury had to find that the Swindles made an unlawful attack upon him and that their action in cutting and beating Thornton constituted an assault and battery. The jury was fully informed as to what constituted an assault and battery, and since under instruction No. 4 the jury first had to find that an assault and battery was com-

mitted upon Thornton before he could recover, no element of the defense was left out of the instruction.

Appellants contend that the trial court erred in permitting Thornton to testify that as part of the damages he sustained he had used fifty days of accumulated sick leave valued at $18.50 per day, which was his regular salary. Appellee was entitled to show all the loss he had sustained, and even though he was compensated to some extent through workmen's compensation, this could be of no benefit to the appellants. Ark. Stat. § 81-1340.

Appellants also complain that part of instruction No. 6 given at the request of appellee authorizes the jury to find for the appellee for loss of earnings in the future, if any. It is contended that there is no evidence to sustain an instruction on future earnings. Thornton received severe injuries. In fact, he nearly bled to death. One gash on his arm was 4½ or 5 inches long, and cut the large vein and the full muscle. Appellee testified that he has not been free of a headache since the attack upon him; that he is nervous and can't do a day's work like he could before; that he cannot sleep and has to take treatment for the nervous condition and lack of rest; and Dr. G. T. Stewart testified that Thornton is still under his care. The evidence justifies the instruction.

Affirmed.

BOWLING, JAMES & BELL *v.* STATE.

5-1594 316 S. W. 2d 343

Opinion delivered October 6, 1958.

Bryan J. McCallen and *Claude F. Cooper,* for appellant.

Bruce Bennett, Atty. General and *Bill J. Davis,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. The question in this case is whether, under the facts hereinafter enumerated, the State of Arkansas was entitled to forfeiture on the bond of James A. "Dock" Bowling, said bond having been executed by appellants, Russell James and Earl Bell, along with Bowling.

Appellant Bowling was arrested in the Western District of Clay County on a charge of possessing stolen goods, and was released upon making bail in the sum of $5,000, said bond being executed by appellants James and Bell. Upon his release, Bowling left Clay County, and went to his home in Missouri. The trial was set for January 21, 1957, but was continued and reset for April 22, 1957, due to the illness of one of Bowling's attorneys. Prior to the new date for trial, Bowling was arrested in Missouri on a fugitive warrant from Arkansas (relating to a different charge from the one for which the bond had been executed), and refused to waive extradition. Subsequently, he was charged with Burglary and Larceny in Dunklin County, Missouri, and with Receiving Stolen Property in Pemiscot County, Missouri. On April 22nd, when Bowling's case was set for trial in Clay County, said appellant was in the Dunklin County jail at Kennett, Missouri, having failed to make a $2,000 bond.[1] Forfeiture on the bond in the Clay County case was declared by the court, but the cause was set for hearing on June 10, 1957, for appellants to show cause why said bond should not be forfeited. Following a continuance until July 1st, the court ordered, after a hearing, that the forfeiture should not be set aside, and entered judgment for the State of Arkansas against appellants,

[1] Also, a holdover warrant had been placed with Dunklin County by the sheriff of Pemiscot County relating to the Receiving Stolen Property charge.

both jointly and severally, in the sum of $5,000. From such judgment comes this appeal.

For reversal of the court's judgment, appellants first assert that the bond should not have been forfeited because "it was no fault of the principal in said bond, or his bondsmen, that the principal did not appear for trial on the 22nd day of April, 1958," and secondly, that the bondsmen were excused for the appearance of the principal of this bond by reason of an act of law.

The bondsmen contend that they did everything within their power to have Bowling present in Clay County on the day of the trial. The record reflects that the sheriff of Dunklin County was contacted by James, in an effort to persuade the sheriff to permit Bowling to return to Clay County for trial. Vester Robinson, a resident of Frisbee, Missouri, at the request of James, talked with the sheriff, and the judge of Dunklin County, in an attempt to get Bowling released, but was also unsuccessful. A like request was made of the sheriff and prosecuting attorney of Pemiscot County by Clyde Maloney of Pascola, Missouri, and J. B. Light of Haiti, Missouri. According to appellant James, Bowling was willing to return to Clay County, stand trial, and return to Dunklin County for trial if acquitted in Arkansas; if convicted in Arkansas, Bowling had agreed to voluntarily go back for trial after serving his sentence.

Admittedly, a bail bond was fixed, as prescribed by law, by the Missouri authorities, prior to the forfeiture taken in the Circuit Court of Clay County. Appellants state that this bond was not made because Sheriff Scott of Dunklin County stated that if Bowling made the bond, another charge would be filed against him. According to witness Robinson, "he said he was going to keep him. Said, 'Yes, if you want to make a bond to release him, but there will be others.'" That he "* * * would file on him as fast as he would get loose, be $6,000 in bonds to get him over here."[2]

[2] Sheriff Scott stated he told those who inquired about the bond, that though it were made, he would still have to turn Bowling over to the Pemiscot County sheriff, because of the holdover warrant. Bond in the Pemiscot County case had been set at $4,000.

It is argued that the Missouri officials held Bowling in jail without just cause, and that his rights under the Missouri constitution, relative to bail, were violated. Suffice it to say that we have no jurisdiction of the Missouri counties, nor any control over the action of their authorities; however, we certainly see nothing unreasonable in the sheriff's refusal to permit Bowling to leave without first making proper bond to assure his return to Missouri. No application for a writ of *habeas corpus* was made by appellants' counsel, nor was any bond offered. Likewise, Bowling refused to waive extradition on the second warrant from Arkansas. Appellants' position is unsound principally, however, for the reason that the bondsmen made no attempt to keep the principal within the jurisdiction of the state of Arkansas. Upon the making of the bond, Bowling, without any protest from his bondsmen, as far as the record shows, forthwith went to Missouri. In becoming sureties on the bond, James and Bell, of course, assumed the risk of Bowling's failure to return to Clay County for trial. A bondsman may well consider, when executing bail, many factors that might prevent the return of the principal, *viz.,* the general character and reputation of the defendant, the seriousness of the charge against him, the probabilities or improbabilities of successful prosecution, and the possibility of the principal becoming involved in further trouble, as happened in this instance.

As authority for their contention that the bond should not have been forfeited, appellants cite the case of *Belding* v. *State,* 25 Ark. 315. That case is readily distinguishable from the instant cause. In the *Belding* case, the federal government arrested the principal within the state of Arkansas; furthermore, there was only a provisional civil state government at the time, which was subject to military authority. In the litigation before us, appellant *voluntarily* left this state, thus depriving Arkansas of its jurisdiction over him.

While there are a few cases to the contrary, the general rule is that in order for a surety to be discharged on his bail bond for the reason of an act of law, the act

of law must be operative and obligatory *in the state where the bond is given.* As stated in American Jurisprudence, Volume 6 (Revised), page 133, paragraph 174:

"Generally, sureties on a bail bond or recognizance are excused, and a judgment of forfeiture will be vacated, where fulfillment of the requirements of the bond is prevented by an act of law. An example of an act of law discharging the sureties on a bail bond or recognizance is the abolition of the court in which the accused is obligated to appear. However, an act of law which will relieve the sureties as a matter of right must be an act of law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities."

In the Re-statement of the Law of Security, page 559, paragraph 207, we find:

"Where at the time for the principal's appearance he is in custody in another state, the surety on his bail bond is not discharged unless the principal has been delivered to the other state by action of the first state, or removed there by federal authority."

The following comment is made:

"The surety, having custody of the principal, should prevent his leaving the jurisdiction. If the principal nevertheless leaves, and is arrested in another state, the surety remains liable on his bond. If, however, the principal has been surrendered to another state, either as the result of extradition or by the voluntary action of the officers of the jurisdiction in which the bond has been executed or has been removed by federal authority to another jurisdiction, the surety has a defense because the non-appearance of the defendant is due to the state itself or to another authority which the surety cannot oppose."

The same view was taken by this Court in *Adler* v. *State,* 35 Ark. 517, wherein Chief Justice English, speaking for the Court, said:

"Imprisonment of the principal for crime, therefore, will generally release the bail, the state having taken him out of their possession; and so will the surrendering of him to the authorities of another state as a fugitive from justice. But if they permit him to go into another jurisdiction, and there he is arrested and imprisoned, they will not be released; for they should have kept him within his and their own state."

The Chief Justice then commented on the *Belding* case, (heretofore mentioned as being largely relied upon by appellants), as follows:

"*Belding* v. *The State,* 25 Ark. 315, the only case cited by counsel for appellants to sustain the defense set up in the third paragraph of the answer, is not in point. There the principal in the recognizance was seized by the military authorities of the United States of this department, and imprisoned in Little Rock, and then sent to Vicksburg and imprisoned there, and so prevented, without the fault of the surety, from appearing in the circuit court of Hot Spring county, at the September term, 1867, to answer an indictment, as required by the condition of the recognizance; and this was held to be a valid defense for the surety. There the principal was not prevented from appearing by the act of the obligee in the recognizance (the state), but by a force claiming to act under authority of the federal government, which neither the state nor the surety could control."

It appearing that appellants, under the law, are not entitled to the relief sought, the judgment of the Circuit Court is, in all things, affirmed.

CLOMAN *v.* CLOMAN.

5-1652 316 S. W. 2d 817

Opinion delivered October 6, 1958.

[Rehearing denied November 10, 1958]

T. O. Abbott, for appellant.

T. P. Oliver, J. S. Thomas and *W. A. Speer,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Carrie Cloman, and appellee, Marion Cloman, negroes, were married in November 1922 in El Dorado, Union County, Arkansas. They separated in May 1953 and appellant brought the present suit June 27, 1957, alleging in her complaint that appellee "without just cause and without any explanation to the plaintiff left their home at 130 Rock Island Avenue in El Dorado, Arkansas, where they had been living as husband and wife for years and moved a few blocks away from their said home and began living with a younger woman, namely, Rosie Lee Hardy, with whom the defendant soon thereafter went through a marriage ceremony on June 9, 1953, at Magnolia, Arkansas. This purported marriage

between the defendant and the said Rosie Lee Hardy took place after the defendant had fraudulently, and upon false and fraudulent affidavits and perjured testimony, obtained a decree for divorce (in Columbia County). In order to obtain said fraudulent and void decree for divorce the defendant made affidavit for warning order in which he swore that the plaintiff was a non-resident of the State of Arkansas, when at the time said affidavit was made said defendant well knew that the plaintiff was still residing in their home in El Dorado, Union County, Arkansas, where the plaintiff and the defendant had lived as husband and wife for many years. Said defendant further falsely swore and the witnesses on his behalf falsely swore that this plaintiff was a non-resident of Arkansas, and that the defendant was a resident of Columbia County, Arkansas, when in truth and fact defendant was at the time residing in El Dorado, Arkansas within a few blocks from the home where he had lived with the plaintiff and where the plaintiff was still residing . . . Plaintiff states that she is in very poor health and is unable to work and earn a living and is under care of doctors, and that the defendant is a veteran of World War I and is also a retired railroad worker and has ample means with which to support and maintain this plaintiff as his legal wife. Plaintiff states that defendant has had a stroke, and is in a wheel chair. That plaintiff is willing for defendant to return to their home, where defendant can be cared for during his lifetime." She prayed for suit money, including attorney's fees, and for reasonable maintenance and support.

Appellee answered with a general denial and pleaded laches and estoppel. Trial resulted in a decree dismissing appellant's complaint for want of equity. The decree in part recites: ". . . this court does not have jurisdiction to annul a decree rendered at a former term of court of the Columbia Chancery Court, First Division; that this court further finds that if this court had jurisdiction the plaintiff is estopped and the plaintiff's petition to annul and for maintenance, attorney's fee, and costs should be denied." This appeal followed.

It appears undisputed in this case that at the time appellee secured a decree of divorce from appellant in Columbia County that neither of the parties was a resident of Columbia County or had either of them ever lived or resided in that county. In fact, both had lived all their lives in Union County. We hold, therefore, that the Columbia County divorce decree was absolutely void for lack of jurisdiction of the Columbia Chancery Court. It is well settled that the decree of a court that had no jurisdiction of the subject matter or of the parties has no legal force and effect. It is a nullity. See *Cooper* v. *Cooper,* 225 Ark. 626, 284 S. W. 2d 617. Under the topic *Divorce and Alimony, Ark. Stats.* 1947, *Sec.* 34-1204, Venue-Service of process, provides: "The proceedings shall be in the county where the complainant resides, and the process may be directed in the first instance to any county in the State, where the defendant may then reside." So at the time the present suit was filed the parties here had never been legally divorced and were still husband and wife. Our law is so well established that it is the duty of the husband to furnish maintenance and support for the wife that citation of authorities seems unnecessary. We think that the preponderance of the testimony shows that immediately after appellant learned of the Columbia County divorce decree she immediately employed an attorney and filed the present suit in Union County.

We do not agree that laches is a defense to the present suit. "Generally, laches does not bar such a suit (for support and maintenance) the right of suit being continuous, although condonation may have such effect." *Vol.* 27 *Am. Jur., Sec.* 407, *p.* 15. We find no sufficient evidence to support condonation here. We think the preponderance of the evidence in this record fails to support the alleged separation agreement and we find nothing that would prevent appellant, who had lived with appellee from their marriage in 1922 until he left her in 1953 — without just cause, from claiming her legal rights as his lawful wife.

The evidence shows that appellant was 53 years old, in poor health, without funds and unable to support her-

self. Appellee is a disabled war veteran, and receives monthly a check from the federal government in the amount of $314 in addition to his social security and some other income. Accordingly, the decree is reversed with directions to allow appellant reasonable support and maintenance as appellee's wife, together with all her costs, and a reasonable amount for her attorney's fee.

Chief Justice HARRIS and Justices MCFADDIN and MILLWEE dissent.

LINDSEY *v.* STATE.

4911 316 S. W. 2d 349

Opinion delivered October 6, 1958.

William E. Wiggins and *John B. Hainen,* Texarkana, Texas, for appellant.

Bruce Bennett, Atty. General, and *Bill J. Davis,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. From a conviction for grand larceny (§ 41-3907 Ark. Stats. as amended by Act 243 of 1949) appellant brings this appeal. The motion for new trial contains eight assignments, which we group and discuss in suitable topic headings.

I. *Sufficiency Of The Evidence.* The specific charge was, that appellant and Cordell Powell had stolen a horse, the property of Mr. John Hawkins. Reciting the facts in the light most favorable to the verdict, as is our rule on appeal,[1] there was evidence that Hawkins' employee, Dave Moon, put the horse in question in a pasture in Little River County, Arkansas, on the night of September 8, 1957; that the fair market value of the horse was $100.00; that the horse was not in the pasture the next morning; and that Moon tracked the horse to the Lewis Ferry, which operates over Red River between Little River County, Arkansas, and Bowie County, Texas. The ferry operator, Mr. Polk, testified that appellant and "another man" crossed the ferry the night of September 8th from Little River County, Arkansas to Bowie County, Texas; that appellant was in an automobile and the other man was riding a horse; and that the description of the horse owned by Hawkins matched the description of the horse that appellant and the other man took across the ferry.

It was shown that the horse in question was taken to Bowie County, Texas, and placed in a pasture, and appellant claimed ownership of the horse until it was later identified and recovered by Dave Moon for Hawkins. Appellant claimed that Cordell Powell took the horse and that appellant was only accessory after the fact; but appellant did not deny that he claimed ownership of the horse by some sort of purchase from someone. It was the prerogative of the jury to pass on the fact question; and the evidence is sufficient to support the verdict of guilty as rendered by the jury because there was sufficient evidence to make a fact question as to whether the appellant was an accessory *before* the fact.

[1] Some cases so holding are: *Allgood* v. *State*, 206 Ark. 699, 177 S. W. 2d 928; and *Eddington* v. *State*, 225 Ark. 929, 286 S. W. 2d 473.

II. *Venue.* Appellant claims that no crime was committed in Little River County, Arkansas, because the appellant laid no claim of ownership to the horse until it had been carried to Bowie County, Texas. There is no merit to this argument. The testimony of the ferry operator, that appellant accompanied the "other man" and the horse across the ferry from Little River County, Arkansas to Bowie County, Texas, when coupled with appellant's subsequent claim of ownership of the horse, made a jury question as to appellant's participation in taking the horse from Little River County, Arkansas.

III. *Failure To Give The Written Instructions To The Jury.* At the proper time the Court instructed the jury, and it is conceded by appellant that the instructions were typewritten on four pages of legal size paper. When the jury retired to consider its verdict, appellant's counsel moved the Court to allow the jury to take the written instructions into the jury room. The Court refused this motion since the jury had made no such request.[2] Appellant assigns as error the refusal of the Court to allow the jury to take the typewritten instructions into the jury room. There is no merit to this assignment. We have repeatedly held that it is within the sound discretion of the Trial Court to grant or refuse defendant's request that the jury take the written instructions into the jury room. *Hurley* v. *State,* 29 Ark. 17; *Benton* v. *State,* 30 Ark. 328; *Culbreath* v. *State,* 96 Ark. 177, 131 S. W. 676; and *Rutledge* v. *State,* 222 Ark. 504, 262 S. W. 2d 650. No abuse of discretion is shown in the case at bar.

IV. *Newly Discovered Evidence.* In one assignment in the motion for new trial, appellant claims that he had discovered some new evidence. The assignment reads as follows:

"Newly Discovered Evidence. It having come to the attention of the Attorneys for the Defendant that testimony heretofore non-discovered would be available to the Defendant to the effect that the horse being the sub-

[2] Act No. 128 of 1957 is not applicable here, because the State did not join in the request made by defendant.

ject matter of the alleged larceny did not belong to John Hawkins, Sr. as such witness testified for the prosecution and that consequently the agency of Dave Moon, witness for the prosecution, would also fail, leave of the Court to hereafter attach affidavits of credible witnesses to sustain such position being requested as on the date of the filing of this Motion the Attorneys have not yet procured such affidavits but anticipate such procurement shortly."

All we know about this assignment is what is copied above: the record does not contain any affidavits as mentioned, and no diligence is shown; so this assignment fails for lack of support.

Affirmed.

REAVES and NEAL *v.* STATE.

4916 316 S. W. 2d 824

Opinion delivered October 6, 1958.

[Rehearing denied November 10, 1958]

Maddox, Greer, Maddox & Collier, for appellant Neal; *Sam Anderson* and *Holt, Park & Holt,* for appellant Reaves.

Bruce Bennett, Atty. General and *Bill J. Davis,* Asst. Atty. General, for appellee.

MINOR W. MILLWEE, Associate Justice. The appellants, James George Reaves and Lonnie Neal, were jointly charged, tried and convicted of burglary and grand larceny by breaking into the Ben Powell Chevrolet Company at Trumann, Arkansas, and stealing certain property valued at more than $1,000.00. The amended information also charged prior felony convictions of both appellants. In their verdict the jury left the punishment to the trial court. Reaves was sentenced to ten years for burglary and ten years for grand larceny, the sentences to run consecutively. Neal was given similar sentences of ten years for burglary and five years for grand larceny.

We first consider the sufficiency of the evidence to support the verdict. Sherman Coppell operates and lives in the rear of a restaurant located next to, and in the same building occupied by, the Ben Powell Chevrolet Company at Trumann, Arkansas. Coppell testified that he and his son-in-law, Harry Eubanks, were occupying these living quarters on the night of April 21, 1957. About four o'clock the next morning they heard hammering noises in the office of the automobile company and observed a car backed up to the front of the building. When the telephone operator did not respond to his call in an effort to notify the police, Coppell threw a tub out the rear door of his restaurant toward the place where the office safe of the automobile company was located. He wrote down the Illinois license number of the car as Eubanks read it and saw two or three men leave the auto company store in the Ford automobile after putting some object in it.

The owner of the automobile company was notified and found his safe had been broken into and $980.00 in checks, money orders and cash missing in addition to an adding machine worth $50.00 and a 35-horsepower outboard motor and fuel tank. In response to radio alarms, several officers in three automobiles pursued and overtook the Ford automobile in which the appellants and a codefendant, George F. Garner, were riding. The missing adding machine, outboard motor and fuel tank were in the rear trunk of the car and the checks and money orders were scattered along the route. Three loaded pistols, a glove and a 1957 Alabama automobile license plate were also found in the car. Reaves admitted ownership of the car to arresting officers and had $1,048.96 in his possession and Neal had $48.46 on his person. Both parties had previously been convicted of felonies as charged in the information.

Appellants declined to offer any testimony in contradiction to that adduced by the state. When considered in the light most favorable to the state, this testimony was sufficient to sustain the verdict. Aside from the evidence directly connecting appellants with the bur-

glary and larceny, we have frequently held that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a verdict of either larceny or receiving stolen property. *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029; *Shoop* v. *State,* 209 Ark. 498, 190 S. W. 2d 988.

Appellants next contend that the court erred in the admission of certain testimony regarding the ownership and identification of the adding machine and outboard motor recovered from the car occupied by appellants at the time of their arrest. T. M. Hunn, manager of the Ben Powell Chevrolet Company, testified that he compared the serial number of the adding machine recovered from appellants' car with that taken from a list of company property kept in his office in the usual course of business and that the two numbers were identical. Another witness gave similar testimony with reference to the serial number of the outboard motor. Appellants now argue that this testimony was inadmissible as hearsay evidence under our holding in *Jackson* v. *State,* 226 Ark. 731, 293 S. W. 2d 699. In that case we held that the rule excluding hearsay testimony extends to written as well as oral statements, and that evidence otherwise incompetent as hearsay is not admissible merely because it is written or printed. The only objection made by appellant to the testimony at the trial was that the witness himself did not actually make the list or record and, hence, was not in position to know whether it was correct or not. It should be noted that neither the serial number nor the list of either item was ever offered in evidence. If it had been, the State would perhaps be correct in its contention that it would have been admissible under our statute (Ark. Stats. Sec. 28-928). The statement by the witnesses that they compared the two serial numbers was one of fact and not merely hearsay, although it might have been shown to be based on hearsay by further development of the evidence or cross-examination of the witness. Since this was not done and since the objection now argued was not made at the trial, it may not be raised for the first time on appeal.

It is next contended that it was error to admit testimony regarding the finding of the three pistols and other articles in the car used and occupied by the appellants without a search warrant. We have repeatedly held such evidence by arresting officers admissible in the absence of a search warrant. *Knight* v. *State,* 171 Ark. 882, 286 S. W. 1013; *Garner* v. *State,* 184 Ark. 1093, 44 S. W. 2d 1092. See also, *Banks* v. *State,* 207 Ala. 179, 93 So. 293, Cert. Denied 260 U. S. 736, 67 L. Ed. 488, 43 S. Ct. 96.

Appellants also objected to the introduction of photographs of the automobile company office and safe and the articles found in the automobile. These photographs, which were taken shortly after the burglary, were shown to be true and accurate pictures of the articles and place mentioned by those in a position to know. The admission and relevancy of such matters rests largely in the discretion of the trial court. We cannot say this discretion was abused, and conclude that the photographs enabled the witnesses better to describe, and the jury better to understand, the testimony. See *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17.

Appellant Reaves urges error in the denial of his motion to disqualify the trial judge on account of alleged bias and prejudice against said defendant. The court directed that Reaves, who was on bail, be taken into custody during the trial when it was brought to the court's attention that he had indicated that he might attempt to fix or tamper with the petit jury. Ark. Constitution, Art. VII, Sec. 20, provides: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court." Ark. Stats., Sec. 22-113, fixes the fourth degree of consanguinity or affinity as that "prescribed by law" under this provision of the Constitution. As this court pointed out in *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81: "There is no provision of our constitution or statutes that disqualifies a judge for prejudice.

If having formed an opinion as to the guilt or innocence of a defendant on trial in a criminal case was a disqualification of a judge presiding at the trial, it would often be a difficult matter to find a judge that would not be disqualified."

Whether a defendant remain on bail or be kept in actual custody during his trial for a felony is a matter within the sound discretion of the trial judge under our statutes (Ark. Stats., Secs. 43-710 and 43-2103). We find no abuse of that discretion here, and none of the matters mentioned in the constitutional provision and statute as disqualifying a judge to preside were shown.

Appellant Reaves also argues that the punishment is unreasonable and excessive, but the motion for new trial contains no assignment of error on this ground. Besides, it was within the peculiar province of the trial court to assess the punishment. This was done well within the limits fixed by statute and, under the testimony presented, we do not feel warranted in substituting our judgment for that of the trial court. See *Cox* v. *State,* 164 Ark. 126, 261 S. W. 303; *Garner* v. *State, supra; McHenry* v. *State,* 219 Ark. 401, 242 S. W. 2d 707.

The judgment is affirmed.

ROBINSON, J., concurs.

CROWN COACH COMPANY *v.* ARK. PUBLIC SERVICE COMM.

5-1549 316 S. W. 2d 819

Opinion delivered October 6, 1958.

[Rehearing denied November 10, 1958]

L. M. Crouch, Jr., Harrisonville, Mo., and *Thomas Harper* for Crown Coach Company; *Milton McLees* and *Wright, Harrison, Lindsey & Upton* for Inter City Transit Company; *Mehaffy, Smith & Williams,* by R. Ben Allen; *John G. Rye* and *Scurry, Scurry, Pace & Wood,* Dallas, Texas, for Midwest Buslines, Inc.

George Rose Smith, J. This case is closely related to the proceedings considered in *Mo. Pac. Transp. Co.* v. *Inter City Transit Co.,* 216 Ark. 95, 224 S. W. 2d 372. It will be convenient to review the earlier case briefly before coming to the facts in the present proceeding.

In 1948 Inter City Transit Company, which was then operating a bus service between Little Rock and Morrilton, applied for a certificate of convenience and necessity authorizing it to operate between Little Rock

and Fort Smith over highways 64 and 65 and between Russellville and Fort Smith over highways 7 and 22. That application was resisted by Missouri Pacific Transportation Company, which operated bus lines over both routes covered by Inter City's application, and by Crown Coach Company, whose bus service between Little Rock and Fort Smith used a parallel route along highways 10 and 71.

The proof in the earlier case showed that there was undoubtedly a need for additional intermediate or local bus service between the various cities and towns lying between Little Rock and Fort Smith on highways 22, 64, and 65. It was not shown, however, that there was any public need for additional bus service for through traffic between Fort Smith and Little Rock or North Little Rock or between Alma and Little Rock. It was accordingly held in the earlier case that Inter City's application should be granted subject to certain restrictions, the principal ones being that Inter City would not be allowed to handle through traffic between the terminal points that we have just mentioned.

This arrangement continued in force until the present proceeding was begun in 1956. In September of that year Missouri Pacific (which has since become Midwest Buslines, Inc.) discontinued its bus service between Fort Smith and Russellville along highways 7 and 22, on the south side of the Arkansas River, and reduced from five to two its daily schedules between Fort Smith and Little Rock along highways 64 and 65, on the north side of the river. Inter City at once filed the present application, asking the Public Service Commission to remove the restrictions imposed in the 1948 proceeding and thus to permit Inter City to provide a through bus service between Fort Smith and Little Rock-North Little Rock and between Alma and Little Rock.

After an extended hearing the Commission, by a two-to-one vote of its members, granted Inter City's request that the restrictions be lifted. On appeal the circuit court affirmed the Commission's order with respect

to Inter City's service between Fort Smith and Little Rock by way of Dardanelle, on the south side of the river; but the court held the evidence insufficient to support the application with respect to the other Little Rock-Fort Smith route, by way of Clarksville, on the north side of the river. Crown and Midwest have appealed from that part of the judgment that affirms the order of the Commission, and Inter City has cross appealed from that part of the judgment that reverses the order of the Commission.

In our opinion the case turns solely upon Inter City's failure to sustain the burden of proving that the public convenience and necessity require the removal of the restrictions complained of. There is no doubt—indeed, it is conceded—that the burden of proof rested on Inter City, which was in effect applying for an extension of its certificate. *Boyd* v. *Ark. Motor Freight Lines, Inc.,* 222 Ark. 599, 262 S. W. 2d 282.

In a case of this kind we review the evidence *de novo*. *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604. We find that Inter City, to support its application, introduced the testimony of about seventy-five witnesses. Only a handful of these persons, however, touched upon the point at issue: the need for added through service between the terminals designated in the challenged restrictions. Nearly all of Inter City's witnesses confined their testimony to the need for local service between intermediate points along the Little Rock Fort Smith routes and to the excellence of the local service being rendered by Inter City. This testimony must all be laid aside as irrelevant, for Inter City already had the authority and the duty to provide that local service. That service is not involved in the present application to remove the limitations upon Inter City's carriage of through traffic.

Only six of Inter City's witnesses can be said to have given pertinent testimony. Two Little Rock ladies testified that, after the Commission had removed the restrictions by a temporary order, they had occasion to

travel by bus to Fort Smith and found that, among the services available, one of Inter City's buses was conveniently scheduled to put them in Fort Smith for a meeting at three o'clock in the afternoon. Two Catholic nuns stationed at a school in Fort Smith testified in a general way that their pupils from Little Rock and North Little Rock needed and used through bus service, but they did not know the number of students involved and did not say that the service being provided by other carriers was inadequate. And two witnesses who had sold tickets for Inter City stated that they had received requests for through passage from Fort Smith to Little Rock. We attach no weight to the latter testimony, as it is doubtless true that ticket agents for bus lines and railroad companies often receive inquiries about transportation to cities that are not served by the carrier in question. Such inquiries do not tend to show that the service available elsewhere is inadequate.

This scant testimony does not establish the fact that the convenience of the public, as distinguished from that of a few individuals, requires that this application be granted. *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907. There is a complete absence of proof with respect to several facts that would seem to be of importance in a case of this kind, such as the volume of through traffic from Little Rock to Fort Smith, the adequacy of the seating capacity being provided by other common carriers, the financial interdependence, if any, between Inter City's local service and the proposed through service, etc.

In its brief Inter City relies chiefly, as did the majority of the Commission, on the fact that Missouri Pacific discontinued its service south of the river and curtailed that on the northern route. This bare fact does not satisfy Inter City's burden of proof, nor does it demonstrate that the public convenience and necessity demand that the service be brought to its former level by another carrier. In the absence of evidence it may equally well be supposed that Missouri Pacific's voluntary re-

duction of its schedules indicates that the public demand is insufficient to support the former service as a profitable operation. Too, it appears that the Missouri Pacific certificate, now held by Midwest, is still in effect, so that this carrier is in a position to restore its original schedules between the terminal points in dispute.

Further, the public interest as a whole requires that the peculiar relative positions of Crown and of Inter City be given consideration. Inter City's alternate routes from Little Rock to Fort Smith pass through a comparatively well-populated area; the total population of the communities along each route is shown to exceed 80,000. By contrast, the Crown buses travel along sparsely settled highway 10, where the total comparative population is less than 8,000. These figures indicate that Crown can expect less than a tenth of the intermediate traffic revenues that are available to Inter City. It follows, of course, that the income from through traffic is by comparison essential to the existence of the Crown bus service, while in the case of Inter City that income represents merely an added profit in the operation of buses that are, as far as this record shows, already being supported by intermediate traffic. Crown's service is shown by the proof to be needed, rapid, and efficient. These considerations, taken in conjunction with the dearth of evidence that the public convenience and necessity require the granting of this application, convince us that Inter City failed to sustain the burden of proving its case.

The circuit court's judgment is reversed on direct appeal and affirmed on cross appeal, and the cause is remanded, through that court, to the Commission, with instructions that the application be denied.

Harris, C. J., and Millwee, J., would affirm the judgment of the circuit court. Holt, J., would reinstate the decision of the Commission.

NELSON *v.* RUTLEDGE.

5-1591 316 S. W. 2d 346

Opinion delivered October 6, 1958.

[redacted]

Murphy & Arnold, for appellant.

Judge S. M. Bone, for appellee.

PAUL WARD, Associate Justice. The question for decision is whether appellee made such a payment on a promissory note as to toll the Statute of Limitations. The Chancellor held that no such payment was made, and, for the reasons set out below, we think his holding must be affirmed.

Only two witnesses testified. One was the bookkeeper for appellant (C. T. Roberson) and the other was appellee (Leslie Rutledge). There is very little if any conflict in the testimony, and we deem it necessary to set forth only the material portions thereof together with a brief statement of how the issue arose.

C. T. Robinson (hereafter referred to as appellant) operates two distinct places of business — a hardware store and a motor company. The accounts of both businesses are kept on one set of books.

On April 8, 1950 the motor company sold appellee a saw mill and certain attachments for $2,500. Appellee executed a note (same date) for $1,000 to appellant as the down payment — the note sued on herein. This note was secured by a deed of trust on real estate. A Conditional Sales Contract was executed by appellee and appellant for the balance. In this contract $225 was

added for insurance and interest, payable in 18 equal monthly installments of $95.84 each, or a total of $1,-725.12. (We note here that of the $225 not more than $125 could be charged as interest and avoid usury, leaving at least $100 charged for insurance on the saw mill.) The Conditional Sales Contract required appellee to carry and pay for the said insurance.

Appellant promptly assigned the Conditional Sales Contract to the Murdock Acceptance Corporation. The latter company refused to accept the contract and it was returned to appellant.

This suit was filed by appellant against appellee on the $1,000 note on February 28, 1957. This note would have been barred by the Statute of Limitations, in the absence of a payment by appellee, on April 8, 1956. It is agreed that no such payment was made unless made under the facts and circumstances set forth hereafter. In appellant's brief it is stated: "The only question for decision is whether the May 1, 1952 payment tolled the Statute of Limitations."

The ledger sheet purporting to show all relative transactions was introduced by appellant. It charges appellee with $2,500 and also with items bought by appellee from the hardware store. It credits appellee with several installment payments and with $1,500 on May 1, 1952. It shows no charges for interest or insurance. The said $1,500 payment was not, apparently, a cash payment by appellee, but was the result of a refinancing deal with the Delta Loan Company which is not fully explained by the record.

The record contains an exhibit to the bookkeeper's testimony captioned "Analysis—Leslie Rutledge Note Account." This exhibit, made up by the bookkeeper after suit was filed, purports to charge appellee with the $1,000 note, the $1,500 balance on the sale, and with interest on both items up to May 1, 1952; and, against the above charges, it gives appellee credit (as of May 1, 1952) with $1,500. From these figures it is deduced that on May 1, 1952 appellee owed appellant $1,207.22 on the note sued on, and $1,441.04 on all other items.

Appellant's contention in this case is that the $1,500 received on the refinancing deal paid all of the $1,441.04 item with a surplusage of $58.96, and that the latter amount should apply as a payment on the $1,000 note as of May 1, 1952. If so applied it would, of course, toll the statute. We cannot agree with this contention.

The burden was on appellant to show such a payment as would toll the statute. See: *Kitchens* v. *Machen,* 210 Ark. 1046 (at page 1053) 198 S. W. 2d 833 and the cases cited therein. The testimony, we think, does not sustain this burden.

In the first place, it appears that there would have been no surplusage to apply on the $1,000 note on May 1, 1952 if appellant had charged appellee with the insurance on the saw mill. Appellee was obligated by the Conditional Sales Contract to pay this item the same as he was obligated to pay interest. The mere fact that appellant did not carry the insurance item on the ledger sheet is not significant because interest was not carried either.

In addition to the above we think the testimony fails to show a conscious intent on the part of appellee to make a payment on the $1,000 note. He denied any such intent, but stated that he thought his whole indebtedness to appellant was liquidated by the $1,500 credit on May 1, 1952 and by the repossession of the saw mill by appellant. Moreover it is not clear to us that appellant considered on May 1, 1952 that a payment had been made on the note. The testimony of the bookkeeper, with commendable frankness, indicates that he never arrived at this conclusion until after the suit was filed. It is certain that no such credit on the note is shown on the ledger sheet. The evidence fails to show a voluntary act of payment on the part of appellee.

"To interrupt the running of the statute of limitations, a payment must be voluntary and must be the act of the debtor himself, or in pursuance of his consent or direction." 34 Am. Jur. page 266, § 339. See also in this connection, same authority, §§ 338, 341, and 345.

It is therefore our conclusion that the decree of the trial court must be, and it is hereby, affirmed.

Fox *v.* Fox.

5-1599 316 S. W. 2d 348

Opinion delivered October 6, 1958.

Ed B. Cook, for appellant.

Taylor & Sudbury, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Mrs. Lena Fox, and appellee, Dr. V. R. Fox, were married in April, 1942. Mrs. Fox was 39 years of age and Dr. Fox was 59. In September, 1956, Mrs. Fox filed suit for divorce, alleging adultery and indignities. She also alleged that a clinic operated by her husband was in fact a partnership arrangement and that she was entitled to 50% of the proceeds of the clinic. She also alleged that ap-

pellee had fraudulently transferred some of his property to his children by a former marriage, and asked that the deeds be set aside. In addition, she alleged that a deed to her from Dr. Fox conveyed only a life estate in certain property, with the grantor retaining a life estate, when this deed should have conveyed a fee simple title, and she asked that the deed be reformed.

As heretofore mentioned, the suit was filed in September, 1956. In October, 1956, the defendant answered with a general denial. The case was not tried within a year, and in November, 1957, the defendant filed a cross-complaint asking that he be granted a divorce on the ground of desertion. The chancellor granted a divorce to Dr. Fox and granted Mrs. Fox the rents from 40 acres of land which produced an annual rental of $25 per acre, and granted her additional alimony in the sum of $50 per month.

The record contains no substantial evidence to sustain appellant's allegation of adultery on the part of appellee, and we cannot say the court's finding in favor of appellee on the question of indignities is contrary to a preponderance of the evidence. The evidence of indignities is very meager. There is some evidence that Dr. Fox was rude to Mrs. Fox occasionally in the presence of other people. But this is not evidence of such indignities habitually pursued to the extent of constituting grounds for divorce. Also, Mrs. Fox testified that on one occasion appellee slapped her. There is no evidence corroborating the alleged physical abuse, and it is said to have occurred a long time prior to the filing of the divorce action.

We do not think the evidence supports the theory that appellant was a "partner" in the operation of the clinic. True, the evidence shows that Mrs. Fox worked harder in helping the doctor with his practice than the average wife is called upon to work, but it appears that she was fully capable of doing the work and never objected to it until the filing of the divorce suit.

The evidence does not justify a conclusion that appellee practiced a fraud upon Mrs. Fox in conveying

some of his property to his children. The deeds were executed by both appellant and appellee in August, 1951, and Mrs. Fox made no complaint of the alleged fraud until 1956. She attempts to explain the delay by saying that she did not realize the full import of the deeds until shortly before she filed this action. The evidence is convincing, however, that all concerned must have known that appellee was conveying his property to his children and to his wife because of the condition of his health. He had suffered a stroke, his condition was not good, and in anticipation of death he was dividing his property to avoid litigation by his heirs. He conveyed to his wife practically the same interest in his real property which she would have received by operation of law if he had died at that time, before the execution of any deeds.

Appellant also complains of appellee's failing to complete the taking of depositions within the time fixed by Ark. Stat. § 28-308. It is suggested that the depositions should be quashed. However, it does not appear that there was any willful or negligent failure to take proof within the time fixed by the court or the law. This is a matter within the discretion of the trial court and we cannot say the court abused this discretion.

Finding no error, the decree is affirmed.

MITCHELL *v.* STATE.

4907 317 S. W. 2d 1

Opinion delivered October 13, 1958.

[Rehearing denied November 17, 1958]

Gordon H. Sullivan, for petitioner.

Bruce Bennett, Atty. General; *Thorp Thomas, Asst. Atty. General,* for respondent.

CARLETON HARRIS, Chief Justice. This case involves the provisions of Act 419, of the General Assembly of 1957, known as the Uniform Post-Conviction Procedure Act. Petitioner, Esaw Mitchell, was charged, by Information, on March 20, 1957, with the crime of first degree murder, it being alleged that he, with malice aforethought and after premeditation and deliberation, murdered George Beyerlein, Sr. On October 22, 1957, the cause came on for trial, at which time petitioner's attorneys and the prosecuting attorney entered into an agreement that if Mitchell would plead guilty to the charge, the State would not request the death penalty, and would agree to a sentence of life imprisonment.[1] The plea was entered, and a jury impaneled to hear the evidence. The State then put on sufficient evidence to make a *prima facie* case, consisting of the evidence of officer O. A. Allen, who testified as to the oral confession made to him by

[1] A part of the agreement also was that Mitchell plead guilty to second degree murder for the murder of Beyerlein's wife. The plea was entered, and Mitchell sentenced to twenty-one years on the charge, the sentence to run consecutively.

petitioner, and the introduction of trousers, shoes, and other articles owned by petitioner, containing blood stains. The court then instructed the jury as follows:

"Ladies and gentlemen, you have one function in this case. You heard the State waive the death penalty and agree to accept life imprisonment in this case. In a case of murder in the first degree, nobody but the jury can assess the punishment and of course, any other verdict that you might bring back except life imprisonment I would set aside. You have no choice and your verdict will be: 'We, the jury, find the defendant guilty of murder in the first degree and fix his punishment at life imprisonment in the State Penitentiary.' "

The jury retired, and shortly returned with their verdict, finding petitioner guilty of murder in the first degree. Petitioner was then committed to the state penitentiary.

On December 17, 1957, Mitchell, while in the state penitentiary, filed a petition *pro se* asking for a new trial, and requesting that an attorney be appointed for him. Present counsel was appointed by the court, and filed an amended petition under Act 419 of the 1957 General Assembly of the State of Arkansas, challenging the legality of Mitchell's incarceration. A hearing was held on the petition, at which time petitioner and his sister testified that they did not understand that a plea of guilty to first degree murder was being entered on the day of the trial, and petitioner stated he did not know that a judgment of life imprisonment was rendered, nor did he make any agreement with his attorneys to accept life imprisonment. Petitioner's two attorneys (at the time of the trial) testified that they entered the plea of guilty to first degree murder after thoroughly discussing the matter with both petitioner and his sister. One of the attorneys testified that he told the sister that if Mitchell could get a life sentence, it should be accepted. This attorney testified that he talked with petitioner at the county jail on several occasions, and Mitchell agreed that he would like to get off with a life sentence. "He thought he could stand that, but he couldn't

stand that chair." The attorneys both testified that the matter was explained to both petitioner and his sister, and that they appeared satisfied at the time. At the conclusion of the hearing, the court denied the petition, and this appeal follows.

For reversal, petitioner urges four points.

I.

That the Petitioner was denied due process under the 14th Amendment to the United States Constitution, and Article II, Sections 7 and 8 of the Constitution of Arkansas.

II.

That the Court failed to permit the jury to find the degree of the crime of murder in violation of Arkansas Statutes (1947), Section 43-2152.

III.

That the State failed to make a *prima facie* case of murder in the first degree.

IV.

That the Court directed a verdict of guilty in a felony case where the punishment for said crime was confinement in the State Penitentiary.

For purposes of discussion, these points will be, more or less, grouped together.

Petitioner was charged with Information filed by the prosecuting attorney, and was represented by competent and experienced counsel, retained for his benefit, and of his own choosing. On August 5, 1957, petitioner, through such counsel, filed a motion to quash the information, alleging that the oral confession was obtained after Mitchell had been held in custody for a long period of time, that petitioner had been threatened, physically abused, and subjected to psychological coercion; that he had been denied constitutional and statutory rights

in that the arresting officers failed to take him forthwith before a magistrate, and that he had not been allowed to see or speak to any friend, close relative or attorney while being held in confinement; that the purported confession having been obtained under those circumstances, same was not competent evidence; that since the information had been issued solely upon the basis of this incompetent evidence, such information should be quashed. A hearing was held on this petition on August 12th, at which time Mitchell testified that he had been held in jail ten or eleven days before the statement was made, that he had been beaten and threatened by officers, and coerced into making a statement, though admitting that no one told him what to say, and that the statement was given in his own words. At the conclusion of the hearing, the court rendered its ruling as follows: "The Court thinks it is premature, and I am overruling the motion to quash, holding that the information is good."

On October 22nd, the case came on for trial, and after consultation between the prosecuting attorney and defense counsel, the plea of guilty was entered, and a jury selected and impaneled to hear the evidence. This plea of guilty was entered by petitioner's counsel, according to their testimony, only after the proposed plea had been thoroughly discussed with petitioner on several occasions, and Mitchell and family were in the front of the court room when the plea was entered. To enter a plea of guilty in a first degree murder case is not unusual, and numerous cases in this state have been handled in exactly the same manner. It would appear that up to this point, there was nothing in the proceeding of October 22nd which did not fully conform to the requirements of the federal constitution, the state constitution, and our statutory law. It seems clear that both Mitchell, his family, and counsel, felt that his interest was best being served by entering the plea.

It is argued that the State failed to make a *prima facie* case of murder in the first degree, but we do not

agree. A study of the transcript reveals ample evidence to sustain a first degree murder conviction. No point would be served in detailing such evidence, since we do not consider petitioner's argument in this respect pertinent, in reaching our determination.

Section 43-2152 of Arkansas Statutes (1947) provides as follows:

"The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury and examine testimony, and the degree of crime shall be found by such jury."

Accordingly, we agree that the court was beyond its rights in directing the jury to find the defendant guilty of first degree murder. It was the duty of the jury, rather than the court, to find the degree of the crime. In *Wells* v. *State,* 193 Ark. 1092, 104 S. W. 2d 451, a plea of guilty was entered by the defendant to first degree murder, and the court instructed the jury as follows:

"The defendant in this case has entered his plea of guilty to the charge against him in the indictment; that is, of murder in the first degree. The law provides in such cases that the jury shall be impaneled to assess his punishment.

The question for you to determine in this case is that of the punishment to be imposed. The law provides that the punishment in such cases shall be death or life imprisonment in the penitentiary."

The jury returned the following verdict: "We, the jury, find the defendant guilty and fix his punishment at death." On appeal, this Court held the instruction to be erroneous, and the verdict bad, the latter conclusion reached because the verdict failed to find the degree of the crime. In the case under discussion, the jury found the degree of the crime as first degree murder, but were given no other choice under the court's instruction.

JUSTICE MCHANEY, speaking for the Court in the *Wells* case, said:

"* * * The statute provides that 'the degree of crime shall be found by such jury,' not merely to fix the punishment. * * *"

Though, however, the court committed error, it does not follow that petitioner is entitled to the relief sought. Section One of Act 419 of the General Assembly of 1957, under which petitioner seeks this relief, provides as follows:

"Any person convicted of a felony and incarcerated under sentence of death or imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of *habeas corpus,* writ of *coram nobis,* or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

"*The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction,*[2] but, except as otherwise provided in this Act, it comprehends and takes the place of all other common law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof. A petition for relief under this Act may be filed at any time."

[2] Emphasis supplied.

We call attention to the italicized portion of this Section. It obviously was not the intent of the legislature that the procedure set out in this Act be used in lieu of an appeal from the original conviction; it merely takes the place of other common law and statutory remedies which have long been available for the purpose of challenging the validity of the prisoner's incarceration. Of course, the act of the court in instructing the jury to bring in a particular verdict was not only a violation of the statute, but actually had the same effect as if the court had acted without a jury, and if Mitchell had appealed after the original trial, this Court doubtless would have directed a reversal because of this error — but no appeal was taken. Instead, this collateral attack is made upon the judgment of the court.

If Act 419 had not been passed, petitioner possibly would have filed his petition with this Court, seeking a writ of *habeas corpus.* At least, that would have been the available remedy. It would therefore appear that in effect, Act 419 is here used in lieu of the remedy that formerly existed — the petition for writ of *habeas corpus.* Under the circumstances in this case, we do not see that Act 419 provides any additional grounds for relief that were not available under this previous remedy. We conclude that this matter is determined by *Ex Parte O'Neal,* 191 Ark. 696, 87 S. W. 2d 401. There, O'Neal had entered his plea of guilty to first degree murder, and had been sentenced by the court, sitting as a jury, to life imprisonment. Petition for writ of *habeas corpus* was filed by O'Neal, alleging the invalidity of the judgment, because no jury was called as required by statute, to hear evidence and fix the degree of the crime. This Court, quoting an earlier case, said:

"* * * If the person restrained of his liberty is in custody under process, nothing will be inquired into, by virtue of the writ, beyond the validity of the process upon its face, and the jurisdiction of the court by which it was issued. If he be detained under a conviction and sentenced by a court having jurisdiction of the cause, no

relief can be given by *habeas corpus,* the general rule being that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment. * * *

"When appellant's rights are measured by the rule heretofore stated, he is entitled to no relief in this proceeding. By Section 11 of Article 7 of the Constitution of 1874, circuit courts are created, and by Section 45 of the same article the jurisdiction of all criminal proceedings are vested in them. It is plain therefore from the Constitution and laws of this State, that the circuit courts are given exclusive jurisdiction to try and determine all felony cases, and it necessarily follows from this that the circuit courts have the exclusive jurisdiction to try, hear and determine the guilt or innocence of any one charged with a felony under the laws of this State. If this be true, and it must be so conceded, then the Jackson County Circuit Court had jurisdiction to try, hear and determine petitioner's guilt or innocence in the murder charge pending against him. But petitioner's insistence seems to be that the Jackson County Circuit Court erroneously exercised the jurisdiction conferred in failing to impanel a jury to determine the degree of homicide of which he was guilty. Granting that this is true, it does not follow that the judgment is void upon its face. Erroneous judgments are not necessarily void judgments. If the court in which the erroneous judgment is entered has jurisdiction of the subject-matter and the parties thereto, such judgment is voidable, but not void. The circuit court of Jackson County had jurisdiction of the subject-matter, and of the person of the petitioner, and the judgment entered, though it may be erroneous, is not void, and its validity can only be brought in question by appeal or writ of error. * * *"

To say that petitioner could ignore his right of appeal, and then gain relief under the petition herein filed, would have the practical effect of doing away with the statutes governing appeals. There would be no reason for one to appeal a conviction if he knew that subse-

quently, at any time he might desire, he could gain another hearing on the validity of his conviction by instituting new proceedings, though raising no new issues.

Summarizing, to concisely state our view, Petitioner could have presented each of the four points herein raised by a direct appeal from the circuit court judgment of October 22, 1957. The claim that the confession was forced rather than free and voluntary, the refusal of the court to quash the information, the alleged failure of the State to establish a *prima facie* case of first degree murder, the erroneous instruction of the jury, and the contention that the judgment rendered was void, were all proper matters for an appeal.

It was not the intention of the General Assembly of 1957 in passing Act 419, to authorize the remedy therein set forth as a substitute for, or in lieu of, the time honored procedure of direct appeal.

The judgment of the circuit court denying the petition, is affirmed.

CASTLE *v.* STATE.

4909 316 S. W. 2d 701

Opinion delivered October 13, 1958.

Tom Kidd, George E. Steel and *Wm. M. Stocks*, for appellant.

Bruce Bennett, Atty. General, and *Bill J. Davis, Asst. Atty. General,* for appellee.

J. Seaborn Holt, Associate Justice. On a charge of wife and child abandonment appellant Castle was convicted by a jury and his punishment assessed at three years in the Arkansas State Penitentiary. This appeal followed.

For reversal appellant first earnestly contends that the trial court erred in permitting the state to amend the information after the jury had been selected and sworn. We do not agree. The information as originally drawn charged that Castle "did unlawfully, wilfully and feloniously desert his wife and seven minor children under the age of sixteen years and did fail, refuse and neglect to support said children and did flee the State of Arkansas." As amended it charged that Castle "did unlawfully, wilfully and feloniously desert his wife and seven minor children under the age of sixteen years in destitute circumstances and did flee the State of Arkansas." Our statutes under which the charge was based provide: Arkansas Stats. 1947, Sec. 41-204: "When a man, without cause, abandons or deserts his wife, or legitimate minor child under the age of 16 years — in destitute or necessitous circumstances, or wilfully neglects or refuses to provide for the support and maintenance of the wife or child, he shall be imprisoned in the county jail or on the county farm for not more than six (6) months, or fined not less than fifty ($50) nor more than five hundred ($500) dollars, or both." Sec. 41-205. "If such person after leaving his wife or child

leaves the State of Arkansas, he is guilty of a felony and shall be imprisoned in the penitentiary for a period of time of not less than one (1) year nor more than five (5) years."

As indicated, defendant was convicted on the charge as amended. Our statutes, Ark. Stats. 1947, Sec. 43-1008, further provide that an indictment must be direct and certain as regards: "First, the party charged. Second, the offense charged. Third, the county in which the offense was committed. Fourth, the particular circumstances of the offense charged where they are necessary to constitute a complete offense. (Crim. Code, Sec. 123; C.&M. Dig., Sec. 3012; Pope's Dig. Sec. 3834.)" Also, Sec. 43-1006 provides: "Contents of indictments. —The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties. It shall not be necessary to include statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. Nor shall it be necessary to allege that the act or acts constituting the offense were done wilfully, unlawfully, feloniously, maliciously, deliberately or with premeditation, but the name of the offense charged in the indictment shall carry with it all such allegations. The State, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction." Sec. 43-1024 sets out the method by which an indictment or information may be amended in this language, "The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime charged or the degree of the crime charged." We said in *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, that this section, Sec. 43-1024, (Act 3 of 1936) was enacted . . . "for the very purpose of simplifying procedure in criminal cases, and eliminating some of

the technical defenses by means of which criminals had often in the past escaped punishment for their crimes."

We hold that the amended information did not change the nature of the offense charged, since the willful desertion of appellant's wife and children and that he had fled the State of Arkansas, were still charged in the amended information. The amendment, as indicated, only added "in destitute circumstances" to describe the condition of appellant's family and struck out the charge "and did fail, refuse and neglect to support said children." We think appellant was sufficiently put on notice of the nature of the charge on which he was called on to defend, that is, the crime of wife and child abandonment in destitute circumstances. It is difficult to see how he could have been misled or prejudiced.

Next appellant challenges the sufficiency of the evidence. Again we do not agree. Appellant, the father of seven minor children, while his wife was in the field working to help support the family, without as much as telling his wife of his intentions, and after a month's secret planning, wilfully left his family, and in company with his neighbor's wife, Ercile Mae Thompson, who was herself the mother of three minor children, drove in his car to Floydada, Texas. Appellant and Mrs. Thompson lived together in a tourist court in that Texas town for approximately one month and until they were arrested and returned to Arkansas. Further evidence bearing on appellant's intention to abandon his family was the testimony of Mrs. Thompson and appellant that Mrs. Thompson, after she and appellant had reached Texarkana, Arkansas, on their journey to Texas, got out of the car and walked across the state line. A fair inference it seems to us that the jury might have drawn from this act on her part, was that she was attempting to avoid violation of what is commonly known as the Federal White Slave Traffic Act (Title 18 USCA Sec. 2421). On this issue of sufficiency of the evidence, appellant says: "It is true that the state proved the defendant had left the state, that he has taken another woman with

him, and that his family was in destitute and necessitous circumstances, a fact proved by detailed and numerous testimony . . ." Viewing the evidence in the light most favorable to the state, as we must do, we must affirm the judgment if we find any substantial evidence to support it. We hold that the evidence was substantial and sufficient.

Finally, appellant contends that the trial court erred in permitting the state, over appellant's objections, while cross examining appellant to ask him whether he had paid certain fines in a justice of the peace court in Nashville, Arkansas. On this point the record reflects the following testimony of appellant on cross examination: "And you didn't waste your money? A. No. Q. Did you pay a fine in Nashville for public drunkenness just prior to your leaving here? A. (no answer) Q. You did, didn't you? A. I don't recall it was for public drunkenness. Q. What was it for? A. I don't know. Q. Did you pay a fine to the city? A. Yes. —Did you pay a fine for disturbing the peace? A. No. Q. Are you just as sure of that as you are of everything else you have testified to? A. Yes, sir. Mr. Kidd: If the court please, that's not proper cross-examination. If he's going to ask him along that line, I want him made his own witness. He isn't pursuing proper cross-examination. The Court: I believe you invited it, Mr. Kidd, by asking if he spent his money properly. Now, he's attempting to show that he probably didn't do that. Mr. Kidd. Save our exceptions. Q. (cont'd.) I will ask you if you are sure you didn't pay a fine — A. I never paid a fine for disturbing the peace in my life. Q. Did you pay a fine in Howard County two months before you left for Texas? A. I think I did. Q. What was it for? Do you know? A. No, sir. Q. It was for violation of the criminal law, wasn't it? A. Yes, I suppose it was. Q. Did you on the 24th of April, 1957, pay a fine of $15.00 for public drunkenness, to Howard County? A. What's the date? Q. The 24th of April, 1957. A. I paid one back there somewhere."

We think the above examination of appellant was within the scope of proper cross-examination as affecting defendant's credibility as a witness. It is our well established rule that when the defendant takes the witness stand in his own behalf the same rules apply to him as to any other witness. We said in *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636, "Appellant was asked all sorts of questions about having been a gambler and about other offenses and immoralities. This was merely for the purpose of testing his credibility and was admissible as such. This court so decided in the case of *Hollingsworth* v. *State,* 53 Ark. 387. This was with regard to a witness other than the accused himself, but we have since then frequently held that the same rule applies to a defendant in a criminal prosecution when he takes the witness stand in his own behalf. *Ware* v. *State,* 91 Ark. 555; *Hunt* v. *State,* 114 Ark. 239; *Nelson* v. *State,* 139 Ark. 13." Also see *Hays* v. *State,* 219 Ark. 301, 241 S. W. 2d 266.

Finding no error, the judgment is affirmed.

REBSAMEN MOTORS, INC. *v.* MORRIS.

5-1612 317 S. W. 2d 141

Opinion delivered October 13, 1958.

[Rehearing denied November 17, 1958]

Talley & Owen, by *William L. Blair* and *James R. Howard,* for appellant.

Martin K. Fulk and *Gentry & Gentry,* for appellee.

ED. F. MCFADDIN, Associate Justice. The question in this case is whether usury tainted the sale of the automobile involved.

On July 20, 1951 Tony Morris contracted to purchase a 1949 Ford automobile from Rebsamen Motors, Inc. Here are the figures as reflected in the Conditional Sales Contract:

Total Cash Price	$1,345.00
Total Time Price	1,608.25
Less Trade-in of Old Car	535.00
Unpaid Balance of Time Price	1,073.25

Morris signed a note for $1,073.25, payable in fifteen monthly installments of $71.55 each. He paid some of these monthly installments and then sued to cancel the contract because of usury (§ 68-602 *et seq.* Ark. Stats.).

Morris claimed that the difference between the $1,608.25 (total time price) and $1,345.00 (total cash price) was $263.25; that $101.50 of this was for insurance; and that the balance of $161.75 was for "finance charges", which amount was in excess of 10 per cent per annum, the interest on the amount actually due if calculated on the *total cash price* instead of the *total time price.* In other words, Morris claimed that the "finance charge" was a cloak for usury. The Trial Court agreed with Morris and entered a decree cancelling any balance claimed by Rebsamen. This appeal ensued.

We call particular attention to the fact that this transaction was on *July 20, 1951.* We also mention that the date of finality of our holding in the case of *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S. W. 2d 973, was *June 30, 1952.* If the transaction here involved had been *after* the final date of the Hare case, then the decree herein would be affirmed. In the Hare case we pointed out that the "time price differential" which had allowed finance charges and other charges in excess of 10 per cent had been approved in a long line of cases and we would not upset those holdings retrospectively; and then we said:

"But the time has come when we must re-examine these holdings, so we now give the public a *caveat* that the effect of transactions, such as in the case at bar, may impinge on the constitutional mandate against usury, and transactions entered into after this appeal becomes final, may be subjected to the taint of usury with the aforementioned decisions affording no protection."

In numerous cases since the Hare case we have upheld, as against the claim of usury, contracts like the one here involved *which were entered into before the date the Hare opinion became final.* Some of these cases are: *Crisco* v. *Murdock,* 222 Ark. 127, 258 S. W. 2d 551; *Universal C.I.T. Credit Corp.* v. *Crossley,* 222 Ark. 200, 258 S. W. 2d 562; *Murdock Acceptance Corp.* v. *Clift,* 222 Ark. 313, 259 S. W. 2d 517; and *Universal C.I.T. Credit Corp.* v. *Hall,* 225 Ark. 78, 279 S. W. 2d 281. The case at bar cannot be distinguished from the cases last cited.

Therefore, the decree is reversed and the cause is remanded, with directions to enter a decree for appellant for the unpaid balance of principal and interest due on said contract involved, together with costs.

GENERAL CASUALTY COMPANY OF AMERICA *v.* STATE.

5-1645 316 S. W. 2d 704

Opinion delivered October 13, 1958.

Barrett, Wheatley, Smith & Deacon, for appellant.

Bruce Bennett, Atty. General, and *Bill J. Davis, Asst. Atty. General,* for appellee.

MINOR W. MILLWEE, Associate Justice. Lonnie Neal, James George Reaves and George F. Garner were charged with burglary and grand larceny in Poinsett County in April, 1957 and placed in jail at Harrisburg, Arkansas. At that time John G. Powell of Sikeston, Missouri was an agent of the appellant, General Casualty Company of America, which was subsequently consolidated with the other appellant, General Insurance Company of America, and will be hereafter referred to as "General."

On June 25, 1957 John G. Powell came to Harrisburg and executed bail bonds of $12,500 for each of said

defendants as attorney-in-fact for General as surety on said bonds. Trial of the three defendants was set for September 30, 1957, when Neal and Reaves failed to appear and forfeitures were declared on their bonds and summons was issued and served on General as surety. After a hearing on November 8, 1957, the trial court entered judgment against Neal personally but the matter of the liability of Reaves and General was taken under advisement. On January 28, 1958 judgment was entered for appellee, State of Arkansas, against General as surety on the Neal bond for $12,500, but the forfeiture against Reaves was set aside and General was released and discharged under his bond. Hence this appeal by General in the Neal case and cross-appeal by the State in the Reaves case.

I. *The Direct Appeal.* For reversal of the judgment against it on the Neal bond, General earnestly insists that its agent, John G. Powell, exceeded both the real and apparent scope of his authority in executing the bail bonds in question in Arkansas, and the surety he purportedly represented is not liable thereon. On this point Sheriff C. T. Sullivan testified that when he questioned Powell's authority to execute bonds in Poinsett County, Arkansas in June, 1957, the latter showed him a power of attorney attached to each of the bonds, which reads in part as follows: "KNOW ALL MEN BY THESE PRESENTS: That the GENERAL CASUALTY COMPANY OF AMERICA by ANTONY PANELLA its Vice-President, in pursuance of authority granted by Sections 3 and 4, Article V of the By-Laws of said Company, a copy of which sections is hereto attached, does hereby nominate, constitute and appoint JOHN G. POWELL, Sikeston, Missouri its true and lawful attorney-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed any and all bonds and undertakings, in its business of guaranteeing the fidelity of persons holding places of public or private trust, and in the performances of contracts other than insurance policies, and executing and guaranteeing bonds or other undertakings required or permitted

in all actions or proceedings, or by law required or permitted.

"All such bonds and undertakings as aforesaid to be signed on behalf of the General Casualty Company of America and the corporate seal of the Company affixed thereto by John G. Powell, individually.

"And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its Home Office, Seattle, Washington, in their own proper persons.

"IN WITNESS WHEREOF, the said ANTONY PANELLA has hereunto subscribed his name and affixed the Corporate Seal, of the said General Casualty Company of America this 13 day October 1952.

(Signed) Antony Panella
Vice-President."

Following this on the foregoing document was an acknowledgment of the execution of the instrument by Panella in his capacity as Vice President before a notary public of King County, Washington, together with the two sections of the by-laws of the company authorizing him to appoint and designate individuals "to execute on behalf of the Company fidelity and surety bonds and other documents of a similar character . . ."

General's principal offices are in Seattle, Washington with a division office at St. Louis, Missouri. The manager and a claim adjustor of the St. Louis office gave testimony tending to show that a written "Limit of Authority" was issued to Powell in 1952 which provided that before executing bail bonds an agent should first submit the proposal to the Company for approval; that this procedure was not followed by Powell in executing the bonds in question; and that the witnesses first learned of the execution of the bonds in October, 1957. When contacted by representatives of General at that

time Powell showed them copies of execution reports of the bonds in question which he claimed were duly made and forwarded to the St. Louis office in June, 1957. Powell also turned over to them at that time a note for $28,000.00 and deed of trust which were executed by Neal and Reaves and their wives to General on May 24, 1957. While Powell had statewide authority to represent General in Missouri, he held no Arkansas license as an insurance agent.

The applicable principles of agency were well stated by Chief Justice McCulloch in *Three States Lumber Co.* v. *Moore,* 132 Ark. 371, 201 S. W. 508, as follows: "The law is that an agent acting within the apparent scope of his authority, though in violation of specific instructions, may bind his principal in dealing with one who has no notice of the restrictions upon the agent's authority. *Parsel* v. *Barnes,* 25 Ark. 261; *Jacoway* v. *Insurance Co.,* 49 Ark. 320; *Liddell* v. *Sahline,* 55 Ark. 627; *Forrester-Duncan Land Co.* v. *Evatt,* 90 Ark. 301; *Brown* v. *Brown,* 96 Ark. 456.

"An exception to that rule is that where the agency is special, and not general, that is to say, where his authority is to be confined to a single transaction or to a particular act, there is no presumption as to general authority, and one dealing with him must ascertain the extent of his authority. *Liddell* v. *Sahline, supra; Mutual Life Insurance Co.* v. *Reynolds,* 81 Ark. 202; *Jonesboro, Lake City & Eastern Rd. Co.* v. *McClelland,* 104 Ark. 150. But one dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent clothed with authority coextensive with its apparent scope. *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79."

In support of the contention that the writing of bail bonds in Arkansas was wholly without the apparent scope of Powell's authority, General relies on *New Hampshire Fire Insurance Co.* v. *Walker,* 178 Ark. 319, 11 S. W. 2d 772, and *Central Surety & Insurance Corporation* v. *O. & S. Wholesale Co., Inc.,* 193 Ark. 523, 101

S. W. 2d 167, which hold that the fact that one is an agent of an insurance company for a defined territory gives him no power to bind the company by contracts entered into covering property outside of the territorial limits. The *Walker* case involved the authority of a local agent whose authority was clearly restricted to one city and did not involve the agent's use of a power of attorney furnished by his principal like the one used in the instant case. The second case relied on involved the authority of a local soliciting agent to make a verbal surety contract where the power of attorney under which he acted clearly negatived such authority.

We hold the evidence in the instant case sufficient to sustain the trial court's finding that John G. Powell acted within the apparent scope of his authority as the agent of General in executing the bail bonds. The broad power of attorney issued by General to Powell, and used by him in convincing third parties of his authority to execute the bail bonds in question, contained no territorial limitations on his power to do so. Appellee had no notice of the secret restrictions issued to Powell by General. It had a right to rely on the power of attorney which clearly clothed Powell with apparent authority to execute the bonds.

We do not agree with General's contention that its agent acted without authority, real or apparent, because he was unlicensed and prohibited by our statutes (Ark. Stats., Sec. 66-603 and 66-314) from executing bonds in Arkansas. These statutes prohibit insurance or surety companies from authorizing a non-resident of Arkansas to issue policies on property or persons located in this state. In construing similar statutes we have said they are not intended to, and do not, have any effect upon the agent's power to bind the principal, nor do they change the general laws of agency. See *Continental Casualty Co.* v. *Erion,* 186 Ark. 1122, 57 S. W. 2d 1025 and *Fireman's Fund Ins. Co.* v. *Leftwich,* 192 Ark. 159, 90 S. W. 2d 497.

Since we conclude that a valid surety contract was entered into by the parties, we find no merit in the further argument that enforcement of the instant judgment will deprive General of its property without due process of law in violation of the Fifth and Fourteenth Amendments to the U. S. Constitution.

II. *The Cross-Appeal.* The State insists that the trial court erred in granting the motion to set aside the forfeiture of the bond of James George Reaves. Under Ark. Stats. Secs. 43-724 and 43-729 it is within the court's discretion to discharge the forfeiture if the defendant appears and satisfactorily excuses the failure before final adjournment of the court, or the court may remit any portion of the sum specified in the bond if the defendant is surrendered before judgment is entered. At the hearing on November 8, 1957, Reaves appeared and offered testimony tending to show that he was unavoidably confined to a hospital in Texarkana, Arkansas, after undergoing an operation for appendicitis when the forfeiture was declared on his bond on September 30, 1957. There was no abuse of judicial discretion in discharging the forfeiture under this proof.

The judgment is affirmed.

HOLLAND *v.* INTERSTATE FIRE INS. CO.

5-1580 316 S. W. 2d 707

Opinion delivered October 13, 1958.

Johnston & Rowell and *Brazil & Brazil,* for appellant.

Gordon & Gordon, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellants to recover $1,300 upon two fire insurance policies, by which the appellee insured a dwelling house and household goods. The insurer denied liability on the ground that, in violation of the terms of the policies, the house had been vacant for more than sixty days at the time of the fire. At the close of the proof the trial judge directed a verdict for the defendant.

Since it is conceded that the dwelling had been vacant for some six months when it burned, the trial court's action was correct unless there was substantial evidence from which the jury might have found that the insurer waived this clause in the policies. On this point Lizzie Maxfield, one of the appellants, testified that on each of three occasions, as the company's agent Davidson was collecting a monthly premium, she informed him that the house was unoccupied, and she says that on one occasion Davidson assured her that the insurance was good

despite the vacancy. In view of this proof the issue narrows down to that of Davidson's authority in the matter.

The appellants contend that Davidson was a general agent for the company, while the appellee insists that he was merely a soliciting agent. The familiar distinction between the two types of agency involves a question of substance rather than one of name only. A general agent is ordinarily authorized to accept risks, to agree upon the terms of insurance contracts, to issue and renew policies, and to change or modify the terms of existing contracts. Appleman on Insurance, § 8696. On the other hand a soliciting agent is ordinarily authorized to sell insurance, to receive applications and forward them to the company or its general agent, to deliver the policies when issued, and to collect premiums. *American Ins. Co.* v. *Hampton,* 54 Ark. 75, 14 S. W. 1092; *German-American Ins. Co.* v. *Humphrey,* 62 Ark. 348, 35 S. W. 428, 54 A. S. R. 297; *American Ins. Co.* v. *Hornbarger,* 85 Ark. 337, 108 S. W. 213. He has no authority to agree upon the terms of the policies or to change or waive those terms, nor can his knowledge be imputed to the company he represents. *Sadler* v. *Fireman's Fund Ins. Co.,* 185 Ark. 480, 47 S. W. 2d 1086.

The appellants, as the plaintiffs, had the burden of proving Davidson's real or apparent authority to bind his company to a modification of the written contracts. *American Nat. Ins. Co.* v. *Laird,* 228 Ark. 812, 311 S. W. 2d 313. In our opinion the trial court properly held that the burden of proof had not been sustained.

For the most part the evidence relates to matters which, under our prior decisions, fall within the usual duties of a soliciting agent. It is shown that Davidson was authorized to accept applications for fire insurance, to inspect the property to be insured, to forward the applications to the company's home office for its approval, to deliver the policy if issued by the insurer, and to collect premiums. None of these matters involve a general agent's discretionary power to accept risks and to agree upon the terms of the contract.

The appellants introduced proof of other services performed by Davidson, to be mentioned in a moment, and now stress the fact that his activity did not invariably end with the delivery of the policy. That, however, is not the test; premiums, for example, are often collected by the soliciting agent after the policy has been delivered. The real issue is whether the subsequent services fall within the scope of a general agent's real or apparent authority to bind the principal.

Here the evidence does not indicate that Davidson had been delegated the authority to exercise contractual powers on behalf of the appellee. It is shown that he used a rubber stamp referring to him as an agent of the company; but that statement was true, as he was admittedly the insurer's agent. The situation differs materially from that in *Pacific Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, relied upon by counsel, where the insurer furnished stationery describing Claude D. Head as its general agent and where we said that the uncontroverted facts showed Head to have been a general agent.

Again, it was shown that Davidson delivered the form for the proof of the appellants' loss and, when it had been completed, forwarded it to the company. This evidence falls decidedly short of suggesting that Davidson was authorized to pass upon the claim; to the contrary, it demonstrates that his duty was merely ministerial and that the power to act upon the claim was reserved by his principal.

The appellants also call attention to a clause in the agreement between Davidson and the appellee, by which Davidson agreed to sell insurance, collect premiums, and "aid in the proper adjustment of claims." In substance it is argued that this clause clothed Davidson with the authority of an adjuster and therefore empowered him to waive provisions in the policies. Our decision in *Queen of Ark. Ins. Co.* v. *Forlines,* 94 Ark. 227, 126 S. W. 719, is cited in support of this contention.

There are at least two defects in this chain of reasoning. To begin with, the agency contract in question provides in another clause that Davidson has no authority to make, alter, or discharge any contract, or to waive forfeitures. Since it is not intimated that the appellants had any knowledge of this agency contract until it was introduced in evidence by the appellee, this issue concerns Davidson's actual authority rather than any apparent authority on his part. Davidson's duty to "aid" in the adjustment of claims cannot fairly be supposed to include a power that is elsewhere explicitly denied.

Secondly, unlike the situation in the *Forlines* case, here Davidson did not act as the adjuster in connection with the appellants' claim; that duty was performed by other agents of the insurer. Indeed, it is not shown that Davidson's assistance in the adjustment of claims ever went beyond the ministerial act of delivering checks that had been issued by the insurer for losses approved by it. It must be remembered that Davidson was assertedly told of the vacant house while he was collecting premiums as a soliciting agent, not while he was exercising any limited authority he may have had to aid in the adjustment of claims.

The appellants, in contending that Davidson was authorized to act as a general agent for the appellee, have listed and proved a number of services performed by him, much as it might be shown that a clerk in a retail store performs a variety of duties in the course of his employment. But the question is whether any of Davidson's activities would justify a jury in finding that he was invested with the discretionary powers of a general agent, and that proof is wanting.

Affirmed.

BANK OF PEA RIDGE *v.* CAMPBELL.

5-1620 316 S. W. 2d 713

Opinion delivered October 13, 1958.

[redacted]

Jeff Duty and *Claude Duty,* for appellant.

Vol T. Lindsey, for appellee.

PAUL WARD, Associate Justice. The trial court made two findings from which appellant appeals. *One.* It reformed a certain deed, changing it to describe a homestead of ¼ of an acre. *Two.* It held that the signature on another deed was not a forgery. The facts leading to a presentation of these issues are set out below.

Charles T. Tetrick owned and maintained his home in Pea Ridge, Benton County, for many years before his death on December 1, 1955. Previous to 1949 he was engaged in raising chickens, financed by appellant, the Bank of Pea Ridge. In the year last mentioned the appellant secured a judgment against him for about $20,000. In May, 1950 Tetrick was adjudged a bankrupt, but was denied a discharge because, as the Referee found, of the questionable manner in which he had handled his finances with appellant. The Referee, however, found that Tetrick's homestead could not be subjected to the payment of his debt to the bank. When Tetrick died in 1955 appellant filed its claim against his estate in the amount of $18,609.61, the balance due at that time.

In order to properly understand the issues involved it is necessary to describe the property which Tetrick owned in Pea Ridge on which his home was situated. Parts of it can only be described by tedious metes and bounds measurements, but, for simplification and convenience, we describe it in this manner: Parcel (a) Lot 3 Block 1, which is in the shape of a parallelogram, 125 feet east and west and 144½ feet north and south; Parcel (b) Lot 10, Block 1, which is in the shape of a parallelogram, 40 feet east and west and 80 feet north and south, and which adjoins Lot 3 on the south at the southwest corner thereof, and; Parcel (c) which can only be described accurately by metes and bounds, but is an extension of Lot 3 on the west side for a distance of 87 feet, and also a small triangular parcel on the south side of said extension, and on the west side of Lot 10. This was all the land owned by Tetrick, and consisted of approximately an acre.

On January 1, 1951 Tetrick (his wife having previously died) executed a deed to his daughter, appellee, to Parcel (a), or Lot 3. This deed was recorded 5 days after his death. We shall refer to this deed as deed No. 1. The record also contains a deed, same date, purporting to be signed by Tetrick conveying to appellee *all* of his property, *i.e.* Parcels (a), (b), and (c). This deed, never acknowledged or recorded, will be referred to as deed No. 2.

The land comprising the homestead of Tetrick, which it is conceded here can consist of no more than ¼ of an acre, was determined by the trial court (with the assistance of a survey) to include a strip of land 54.68 feet wide of uniform width lying along the west side of Lot 3, and also a small portion of Lot 3 in the northwest corner thereof, being 25 feet wide and 119½ feet north and south. The court and the surveyor, of course, described the ¼ acre accurately by metes and bounds.

Appellant, on January 25, 1956, filed a suit against appellee to cancel deed No. 1 in order that the property might be applied to the satisfaction of his judgment

heretofore mentioned. Replying to the above appellee contended that it was the intention of her father, by deed No. 1 to convey to her his homestead, and asked to have the said deed so reformed, and also (later) pleaded the execution of deed No. 2. In turn, appellant answered that deed No. 2 was never delivered to appellee, and that the signature on the deed was forged and not the genuine signature of Tetrick, and that there was no consideration for deed No. 1. There were other pleadings and other parties, but none of them have any bearing on the two issues here raised.

One. We think the evidence supports the trial court's decree ordering deed No. 1 reformed to convey to appellee the homestead. In fact there is no testimony to the contrary. The genuineness of deed No. 1 is not questioned, nor does appellant contend that Tetrick's homestead was not exempt from execution for payment of its judgment. On the other hand the evidence and circumstances are convincing that Tetrick did intend to convey his homestead to appellee and that he most likely did not know how to correctly describe the homestead. Appellee testified that when her father gave her deed No. 1, he stated it was intended to convey the homestead. Appellee had lived there and had helped her father in many ways. Much of this was corroborated by her husband. The deed was drawn by Tetrick's attorneys in Harrison using the description given them. However, sometime later the attorneys wrote Tetrick a letter stating the wrong description had been used, inclosing a new metes and bounds description describing parcel (c) above and also the 25 feet by 119½ feet strip heretofore mentioned. The letter, dated April 7, 1951 and addressed to Tetrick, reads as follows: "Herewith enclosed copy of revised description of property claimed as homestead. This description consists of considerably more than one-quarter acre — in fact, about .39 of an acre, but was approved by the Referee." The only reasonable conclusions deducible from the above letter are that Tetrick had instructed his attorneys to prepare a deed conveying his homestead to appellee, that they later

recognized a mistake had been made in the description of the homestead, and that they attempted to correct it.

We do not agree with appellant's contention that there was no consideration for the conveyance, and therefore not subject to reformation. On the contrary the evidence shows that appellee had advanced money to and on behalf of her father on numerous occasions. It may be the appellee did not expect or demand repayment, but that could have been the father's motivation in the execution of the deed. Appellee's testimony is undisputed that she deposited money in the bank to her father's account when he was in financial straits, that she paid $1,000 for her mother's funeral and also paid for the tombstone, and that she advanced approximately $1,500 to help build the very home which her father attempted to deed to her.

It is our conclusion therefore that the evidence clearly supports the trial court's decree in reforming deed No. 1 so as to convey to appellee the homestead by a description which was furnished him by a surveyor, the correctness of which is not challenged.

Two. In view of what we have already said, it would serve no useful purpose to discuss at length the validity of deed No. 2. If it is conceded that deed No. 2 was a fraud, it would not necessitate a reversal. In our opinion, however, the evidence supports the trial court's finding that the deed was genuine. It is true that appellant's expert witness pointed out dissimilarities in the signatures on deed No. 1 (admitted to be genuine) and deed No. 2, but as noted by the trial court, dissimilarities also appeared in other genuine signatures of Tetrick. In addition, the positive and uncontradicted testimony of appellee and her husband was that her father delivered the deed to her at his home. It does not seem reasonable that he would have done so if he had not signed it.

Affirmed.

HEIDELBERG SOUTHERN SALES COMPANY *v.* TUDOR.

5-1636 316 S. W. 2d 716

Opinion delivered October 13, 1958.

Virgil D. Willis and *Marvin A. Hathcoat,* for appellant.

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

SAM ROBINSON, Associate Justice. The issue is whether a contract for the sale of a printing press is usurious. On July 23, 1956, appellant, Heidelberg Southern Sales Company, sold a printing press to appellee, James R. Tudor, under a title retaining contract. The purchaser made a part payment in cash and the balance was to be paid in monthly installments. Tudor refused to make the monthly payments, and Heidelberg filed this suit to replevy the machine. A jury was waived

and the cause submitted to the court. From a finding by the court that the sales contract is usurious, the Heidelberg Company has appealed.

The sales contract shows a selling price of $4,823.84, with $1,062 being paid in cash, leaving a balance of $3,-761.84, to be paid in 36 monthly installments with no interest. But this is not the entire picture. Ordinarily parol evidence is not admissible to vary the terms of a written contract, but there is an exception when such evidence is for the purpose of showing usury. *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516; *Prickett* v. *Williams,* 110 Ark. 632, 161 S. W. 1023; *Crisco* v. *Murdock Acceptance Corp.,* 222 Ark. 127, 258 S. W. 2d 551.

Here the trial court made a finding that the actual sales price was $4,250. From the evidence it does not appear that any other price was ever discussed. In fact, the invoice shows a selling price of $4,250, and a cash payment of $1,062, which would leave a balance owed of $3,188. The invoice also shows a finance charge of $573.84, and the entire balance to be paid in 36 monthly installments of $104.50 each. As pointed out by the trial court, this arrangement amounts to usury. *Crisco* v. *Murdock Acceptance Corp.,* 222 Ark. 127, 258 S. W. 2d 551.

In the case at bar the trial court said: "From the pleadings and the testimony it appears that three written instruments were executed by the plaintiff in connection with this sale: First, the sales order dated July 13 signed by the defendant and by G. Martin as salesman; second, the conditional sales contract dated July 23, 1956; third, the invoice of the shipment. From these instruments and other evidence it appears that the basic cash price of the printing press was $4,250.00; that an old press was traded in and valued at $700.00 and that the defendant at that time paid $100.00 in cash leaving a balance due at the time the sales order was executed of $3,450.00. It is undisputed that the defendant later paid the additional sum of $262.00 in cash leaving a balance cash price of $3,188.00. This is the amount the

purchaser could have paid and discharged his full obligation to the plaintiff. However, as the contract indicates, he elected to pay the balance in 36 monthly payments. It was then that the sum of $573.84 was added to the net cash price as 'finance charges', making the total deferred payment $3,761.84. The question before the Court then is what goes to make up this sum of $573.84 and does it include an excessive amount of interest. The Court finds the interest on the net cash balance $3,188.00 for the three year period at the rate of 10 per cent per annum to be $507.58. Therefore, the amount of the finance charges is $66.26 in excess of the maximum rate of interest allowed.

"Since the contract and the other written instruments in connection therewith were prepared by the plaintiff and on forms furnished by it, the plaintiff had ample opportunity to set out in detail the amounts that constituted these 'finance charges', but it failed to do so. It is the opinion of the Court that the burden of explaining the various amounts that go into this finance charge rests upon the plaintiff, and in the absence of such explanation, the Court must assume that the entire amount is interest. The plaintiff's witness Mr. Huddleston did offer some explanation of this item and of what is included in the monthly payments when he stated that 'each installment covers a monthly payment of the value of the press itself, a part of the financing charge, Heidelberg Southern's monthly cost of overriding insurance carried by Heidelberg Southern until the buyer's obligation is fully discharged and pro-rated share of periodic service visits' . . . However, no definite amounts are given for any of these items, and the Court thinks that they do not meet the burden that rests upon the plaintiff to explain this 'finance charge'."

In *Jones* v. *Jones,* 227 Ark. 836, 301 S. W. 2d 737, we pointed out in a similar situation that the trier of 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".

Appellant next contends that the instrument involved is a Texas contract and that therefore the law of Texas should be applied, and that according to the law of that state the charge of a usurious rate of interest does not forfeit the principal. True, the order for the machinery was accepted in Texas, and it was shipped from that state, but the monthly installments were payable in New York, Chicago or San Francisco; the delivery and acceptance were performed in Arkansas, and the chattel, until paid for in full, was to be located in Arkansas, where fire insurance was to be carried and taxes were to be paid. In these circumstances, the place of performance of the contract was in this state, and the validity of its provisions will be construed according to the law of this state. *Summers, Rec'r.* v. *Carbondale Machinery Co.,* 116 Ark. 246, 173 S. W. 194.

Affirmed.

MANUFACTURERS CASUALTY INSURANCE COMPANY *v.* HUGHES.

5-1587 316 S. W. 2d 827

Opinion delivered October 20, 1958.

W. B. Putman, for appellant.

James R. Hale and *Rex W. Perkins* for appellees; *Howard Cockrill,* of *Cockrill, Limerick & Laser,* for Assn. of Casualty and Surety Companies, *amicus curiae.*

Carleton Harris, Chief Justice. On June 26, 1956, in the city of Fayetteville, Dan A. Spencer, 22 years of age, went to the office of Chester P. Leonard, Allstate Insurance Company agent, for the purpose of obtaining automobile bodily injury and property damage liability insurance on his 1953 Chevrolet automobile. Because of the fact that Spencer did not intend to live at home, Leonard was unable to write the policy in Allstate, and turned down the application. Leonard then told Spencer that insurance was available through the Arkansas Automobile Assigned Risk Plan, which is authorized under Act 347 of 1953, said Act being known as the Motor-Vehicle Safety Responsibility Act. Spencer made application for insurance through the Plan; the application form was filled out by Leonard, signed by Spencer, and the latter executed a draft for $15, required under the terms of the Plan to be sent along with the application. The draft bore the notation: "For down payment on insurance on 1953 Chev." Later in the day, Leonard

purchased a draft with the $15, drawn payable to the Arkansas Automobile Assigned Risk Plan and mailed it, along with Spencer's application, to the Risk Plan Office in St. Louis, Missouri.

The application and draft arrived in the Risk Plan offices the next day, June 27th, and the Plan manager forwarded a notice to Manufacturers Casualty Insurance Company that the risk had been assigned to it, and called attention to the provisions of the Plan requiring the risk to be bound or a policy issued within two working days of the receipt of notice. This notice of designation was received by the company June 29th (a Friday), and on July 2nd, the insurance company notified Spencer that it was binding coverage on that date. Under terms of the Plan, Saturday and Sunday are not working days. The policy was subsequently issued and the company sent a commission to Leonard. In the meantime, unknown to the company, Spencer had, on June 27th, been involved in an accident while driving the Chevrolet, which resulted in the death of Charles Hughes. This, of course, was the same day Spencer's application was received by the Assigned Risk Plan Office and two days before the insurance company received notice that the risk had been assigned to it. Emma M. Hughes, widow of Charles Hughes, and children, instituted suit against Spencer, and the latter made demand upon appellant to defend such suit. The company declined to do so on the ground that it afforded Spencer no coverage at the time of the accident. Mrs. Hughes, et al, recovered judgment against Spencer in the sum of $5,000, and the company refused to pay the judgment. After an execution against Spencer was returned *nulla bona,* Mrs. Hughes and children instituted the instant action against Manufacturers Casualty Company praying judgment for the $5,000, the statutory 12 per cent penalty, and attorney's fees.[1] At the conclusion of appellees' evidence, and at the conclusion of all the testimony, appellant moved for a directed verdict. The

[1] Spencer and Leonard were also named as defendants.

motion was denied in each instance, and appellant's exceptions noted. The jury, in answer to special interrogatories, found that Leonard had represented to Spencer that his insurance became effective upon payment of the $15 to Leonard, and further found that Spencer was justified in relying upon such representation. The court found, as a matter of law, that Leonard was acting as the agent of Manufacturers Casualty Insurance Company, and also found that Spencer was entitled to recover $500 on a cross-complaint filed against the company, representing attorney's fees expended by Spencer in defending the original suit. Verdicts were directed in favor of Spencer and Leonard on the plaintiff's complaint, and judgment was entered against appellant in favor of Emma M. Hughes, et al, for $5,000, plus penalty in the amount of $600 and attorney's fee in the amount of $750, together with costs; judgment was entered in favor of Spencer against the company for $500 and costs. From the judgment of the court, appellant brings this appeal.

Perhaps first, a brief discussion of the purpose of Act 347 of 1953, and the Assigned Risk Plan is in order. The purpose of the Act is expressed in the title: "AN ACT to Eliminate the Reckless and Irresponsible Driver From the Highways and to Provide for the Giving of Security and Proof of Financial Responsibility By Persons Driving or Owning Vehicles of a Type Subject to Registration Under the Laws of This State; and for Other Purposes." In general, the Act makes certain requirements of one who has been involved in an accident, and provides methods for the establishment of future financial responsibility for those who have been convicted of certain offenses under the Motor-Vehicle laws, or who have failed to pay judgments arising from causes of action from automobile accidents. The assigned Risk Plan is authorized by Optional Section 86 of the Act, and reads as follows:

"Assigned Risk Plans. After consultation with the insurance companies authorized to issue automobile li-

ability policies in this State, the Commissioner of Insurance shall approve a reasonable plan or plans, fair to the insurers and equitable to their policyholders, for the apportionment among such companies of applicants for such policies and for motor-vehicle liability policies who are in good faith entitled to, but unable to procure such policies through ordinary methods. When any such plan has been approved, all such insurance companies shall subscribe thereto and participate therein. * * *"

The purpose of this Section is to provide insurance for those persons who cannot obtain liability insurance in the regular manner, though some of these may not have necessarily been involved in accidents, and perhaps have no record as traffic violators. For instance, many companies are reluctant to insure an elderly driver; many refuse to accept the application of a teen-age driver; still others have regulations preventing the acceptance, in the normal course of business, of an application such as we have in the instant case (Allstate Insurance Company would not issue a policy because of the fact that Spencer was not going to remain at home). In each of these instances, the refusal of the company is not based upon any misconduct of the applicant, but only because of the general policy of that company which refuses that type of risk. Pursuant to this Section, the Insurance Commissioner worked out a plan with the insurers authorized to issue automobile liability policies within this State, and all such companies are required to participate in the Plan.[2] The purposes are set forth in Section One of the instrument:

"a. To provide a means by which a risk that is in good faith entitled to automobile bodily injury and property damage liability insurance in the State, but is unable to secure it for itself, may be assigned to an authorized insurance carrier.

[2] The company can only turn down a risk assigned to it for good cause; *i.e.*, investigation reveals the driver to be irresponsible, reckless, etc.

b. To establish a procedure for the equitable distribution of such assigned risks among such insurance carriers."

The Plan provides that an eligible applicant shall make his application and may designate any licensed agent of an authorized insurance carrier to act in his behalf in soliciting coverage. The application is then sent to the Manager of the Plan. Section 42 provides that the Manager shall designate an insurer to whom the risk will be assigned. Section 43 provides that upon receipt of notice of designation, and the premium or deposit from the Manager, the designated insurance company shall, within two working days,

"1. Issue a policy or binder if all information necessary for the carrier to fix the proper rate is contained in the application form, such policy to become effective 12:01 a.m. on the day following the second working day, or

2. Bind the risk if all information necessary for carrier to fix the proper rate is not contained in the application form, such binder to become effective 12:01 a.m. on the day following the second working day, or

3. In the event such carrier does not have on file rates applicable to the risks assigned to it, make the necessary filing and immediately upon its becoming effective issue a policy or binder, such policy or binder to become effective 12:01 a.m. on the day following the second working day following the effective date of the filing.

* * * * *

The day on which the notice of designation and deposit are received from the Manager shall be deemed the first working day, whatever may be the time of such receipt."

The provisions of the Plan here under discussion appear reasonable, and consistent with the Statute. The two working days which are allowed the designated company as a period within which to issue a policy or binder, would certainly appear to be a reasonable period of

time. This being true, it follows as stated in Volume 42, American Jurisprudence, page 432:

"Rules, regulations, and general orders enacted by administrative authorities pursuant to the powers delegated to them have the force and effect of law. * * * Administrative regulations are binding on all persons subject to them without notice, and the courts will take judicial notice of them. * * *"

Appellees questioned the materiality and relevancy of the Plan when it was introduced at the trial of the case, but *since Spencer applied, and was insured, under its provisions, we certainly deem such provisions relevant.*

We have concluded that Spencer, at the time of the accident, was not insured by appellant. This conclusion is reached because Spencer was not covered under the terms of the application executed by him and sent in to St. Louis, and as a matter of law, Leonard was without authority to orally bind the risk. At the top of the applicatin form, which was signed by Spencer, appears the word, in large black type, "Important." Immediately beneath this word, appears the following:

"This application must be filled out in duplicate and accompanied by the investigation fee or deposit premium prescribed in the Assigned Risk Plan. Every item must be completed and answers typewritten or written legibly in ink. If you are eligible for insurance under the Plan, the allowance to the producer of record for services rendered in connection with this application will be paid by the company to which the risk is assigned.

This application does not constitute a binder of insurance. Coverage becomes effective only in accordance with the terms of the Plan.[3]"

The application lists certain questions relative to the occupation of the applicant, the purposes for which the car will be used, and certain information relative to the driving record of applicant. The testimony reflects that these questions were asked Spencer by Leonard,

[3] Emphasis supplied.

and the answers inserted by the latter, following which, the application was handed to Spencer, and signed by him. Spencer stated that he signed the application, but did not read it before signing. His testimony was to the effect that he "understood" he had insurance as of that date, though he admitted that he knew he was not being insured by Allstate, and was not told by Leonard that the latter represented Manufacturers Casualty;[4] he would neither affirm nor deny that Leeonard explained to him that coverage would only become effective in accordance with the terms of the Plan, and that the application was not a binder. Leonard testified that he explained the Plan to Spencer, and told applicant that he had best be careful because "* * * you won't have any insurance for two or three days, until you get a letter back from the company that gets your assignment or gets you a policy back." He further stated that he did not know of Manufacturers Casualty Insurance Company at the time of taking Spencer's application. Under the view we take, the conversation between the parties, and what Leonard may have said, or left unsaid, are immaterial, and the court accordingly erred in submitting the interrogatories to the jury.[5] The application very clearly and emphatically provides that it does not constitute a binder of insurance. In *Universal C.I.T. Credit Corporation* v. *Lackey,* 228 Ark. 101, 305 S. W. 2d 858, we quoted from *Texas Company* v. *Williams,* 178 Ark. 1110, 135 S. W. 2d 309, which Opinion had quoted *Upton* v. *Tribilcock,* 91 U. S. 45, as follows:

" 'It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it,

[4] Spencer testified that the first time he ever heard the name "Manufacturers Casualty Insurance Company" was when he received the bill for the balance of his premium.

[5] The interrogatories were as follows: 1. Was a representation made by Leonard to Spencer that upon acceptance by Leonard of $15.00 check on June 26, 1956, that Spencer was covered by insurance on that date. Answer: Yes or No. 2. Was Spencer justified in relying upon representations of Leonard on 26 June, 1956, if you find such representations were made by Leonard to Spencer, that insurance was effective upon recepit of $15.00 check? Answer: Yes or no.

or did not know what it contained. If this were permitted contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.' ''

While Spencer did not sign a contract, the same rule applies to his failure to read the offer made. There is no evidence in the cause before us that Spencer's signature was obtained through fraud, and though we recognize that possibly many individuals sign instruments without reading them, in such event, the signer does so at his own risk. In the matter before us, by simply reading the opening paragraph, Spencer would have known that he was not then covered.

Aside from this point, there is an even more decisive reason why appellees cannot prevail. For affirmance of the judgment, they rely, as indeed they must, upon the alleged ''oral binder'' by Leonard. They argue that by becoming a member of the Assigned Risk Plan, appellant made Leonard its agent, to take applications for policies, to issue binders, and to enter into the contract for insurance made with Spencer. It is pointed out that the policy itself listed Leonard as ''local agent or broker.'' The company forwarded the policy to Leonard, who in turn, delivered it by mail to Spencer, and the company sent Leonard a check for his commission.

We cannot agree, that by becoming a member of the Plan, appellant designated Leonard as its agent. Appellant, as an insurance company doing business in this state, was required to enter the Plan, but its obligations, duties, and liabilities as such a member, are limited by the provisions of the Plan itself. It is true that the company forwarded the policy to Leonard, and that his name was listed under the space for the name of the local agent or broker (a standard company policy, but stamped ''Assigned Risk'') ; that he in turn delivered the policy to Spencer, and Leonard received a commission from appellant. This procedure is provided for in

the Plan, but Section 41 of that instrument clearly negatives any contention that Leonard was a general agent for appellant. That Section provides:

"A risk which desired insurance and has been unable to obtain it for itself, and thus becomes an applicant under this Plan, shall proceed in accordance with this Article and the applicant may designate any licensed agent of any licensed and authorized casualty insurance carrier to act on *his*[6] behalf in soliciting coverage from insurers as recited by Section 20 and this Article, but in either case the applicant must sign the application form.

The fully completed application, in duplicate, shall then be filed with the Manager of the Plan."

It will thus be seen that any insurance agent who is approached to make the contact for any applicant desiring to obtain insurance under the Assigned Risk Plan, *acts as the agent of the applicant rather than the agent of the insurer.* In the case of *Matsuo Yoshida* v. *Liberty Mutual Insurance Co.,* 240 F. 2d 824, we find:

"Gonzales filed his application for insurance under the California Assigned Risk Plan in early April, 1952. The Assigned Risk Plan is designed to provide automobile liability insurance for those persons who are unable to procure insurance through ordinary channels. All automobile liability insurance carriers engaged in business in California are required to participate in the Plan and each carrier is assigned its *pro rata* share of assigned risks. * * *

He made the application at the offices of Biebrach, Bruch and Moore, Inc., insurance brokers in San Jose, California. This firm represented Gonzales and was not the agent of appellee. Accordingly, any statements that may have been made by employees of the firm cannot effect appellee's substantive legal rights, for they had no authority, actual or apparent, to bind it."

[6] Emphasis supplied.

This is entirely in accord with reason and logic. To hold otherwise would have the effect of making each licensed casualty insurance agent in the state of Arkansas, the potential general agent of every casualty company doing business in the state. How can one be a general agent for, issue a policy, or bind, a company that he has never heard of?

For the reasons herein enumerated, we hold that the court erred in not directing a verdict for appellant at the conclusion of all the evidence, and the judgment of the circuit court is, accordingly, in all respects, reversed, and the cause of action dismissed.

LAYNE *v.* STRODE.

5-1622 317 S. W. 2d 6

Opinion delivered October 20, 1958.

Eugene Coffelt, Claude Duty and *Jeff Duty,* for appellant.

Clifton Wade, Clayton Little, Eli Leflar and *A. L. Smith,* for appellee.

J. Seaborn Holt, Associate Justice. This action involves the *ad valorem* assessment of real property in Benton County for 1957. The Benton County Assessor, after making up his assessment books and an abstract of the assessed property for 1957 (Sec. 84-415 Ark. Stats. 1947) on August 15, 1957, filed same with the county clerk of Benton County (Sec. 84-447 Ark. Stats. 1947). The abstract was based on a 10 per cent assessment of the total value of the real property in that county. This total assessor's value was $8,870,075.00. Following the filing of this abstract the county clerk made out his report in accordance with the assessor's abstract on October 21, 1957, and forwarded same to the State Tax Coordination Division. During all this time the Benton County Board of Equalization was in session, (See Secs. 84-706—718 Ark. Stats. 1947) yet the report to the State Commission showed no changes or adjustments made by the Board of Equalization. It further appears that the Equalization Board had made out cards of each individual taxing unit in the county and had mailed notices to each taxpayer of any change in assessment. No report, however, was made to the county clerk until about 2 p. m. November 18, 1957.

Benton County, proceeding under Act 351 of 1949, had employed the A. B. Capers Company to make an independent appraisal of the real estate in Benton County as an aid to the assessor and the Equalization Board in equalizing assessments. Capers' work of appraisal was completed and accepted by the county as satisfactory. By the third Monday in August the assessor had completed his 1957 assessment on what he believed to be 10 per cent of the fair market value of the real property assessed. Acting on the assessor's recommendations the County Equalization Board fixed the *ad valorem* assessment for 1957 at 14 per cent of the fair market value instead of 10 per cent, and completed its work by October 15, on that basis (except as to protests and appeals of certain property owners.) By resolution, on November 18, 1957, the Equalization Board had reported to the Arkansas Tax Coordination Divi-

sion that all assessments had been reviewed and analyzed on the basis of 14 per cent of the fair market value for the year 1957.

On November 18, 1957, the Benton Quorum Court, in regular session, adopted a resolution, in part as follows: "Be it therefore resolved that the Quorum Court of Benton County, Arkansas, levy the county, municipal and school taxes for the year 1957 upon the assessment of the real and personal property in Benton County, Arkansas, placed thereon by the assessor of Benton County, Arkansas, disregarding the reappraisal of the A. B. Capers Company and the reassessment of the Equalization Board of Benton County, Arkansas." The Quorum Court then proceeded to levy the taxes for the year 1957 upon the basis of the above resolution.

On October 16, 1957, appellant, Russell Layne and 193 others filed a representative tax payers suit in the Chancery Court of Benton County challenging the action of the County Equalization Board in reviewing, adjusting and analyzing *ad valorem* assessments. Defendants in that suit were the County Clerk, County Judge, County Collector, County Equalization Board and others. Trial on the matter was had and concluded on November 15, 1957, when the Chancery Court sustained defendants' demurrer on the evidence offered by the plaintiffs and dismissed plaintiff's complaints with prejudice. In that decree the trial court used this language: ". . . it is the opinion of the court that the plaintiffs have failed to meet the burden of proof . . . have failed to show . . . that the Board of Equalization exceeded its lawful authority; they have failed to show that the Board has done things which it had no right or authority to do under the law." There was no appeal from this decree.

Following that decree, on November 18, 1957, as indicated, the quorum court met and the first item of business considered was the adoption of the above quoted resolution, which, as indicated, resolved that the quorum court should levy county, municipal and school taxes,

upon the assessor's original assessment, disregarding the assessment of the Equalization Board. It appears that the action of the quorum court above was first questioned by a petition in the county court. In accordance with the prayer of the petition the county court on November 21, 1957, entered its order, holding that the resolution of the quorum court was void, for the reason that it had no authority to interfere with the regular assessment procedures as established by law and ordered the county clerk to proceed to extend taxes "using the assessments made by the assessor as adjusted and equalized by the Equalization Board, applying the millage rates levied by the quorum court." This order of the county court, on appeal to the circuit court, which examined the order of the county court, also declared the action of the quorum court void. The findings and order of the Circuit Court contained these recitals: ". . . the actions of the Equalization Board of Benton County, Arkansas and their report, consisting of between 18,000 and 20,000 separate calls on individual pieces of real property located in Benton County, Arkansas, set forth on individual call sheets, has been made in substantial compliance with the laws of the State of Arkansas. 3. The court further finds that the 100 per cent value of the real property in Benton County, Arkansas, as established by the Assessor was $88,700,750.00, and that the 100 per cent value of the real property in Benton County, Arkansas, as established by the Equalization Board was $87,919,918.00, and that the Equalization Board's figures show a total value of property in Benton County, Arkansas of $780,732.00 less than the total value fixed by the Assessor. 4. That the County Assessor used the figure of 10 per cent of the actual value of the real property, which total assessed value amounts to $8,870,075.00, and that the Equalization Board used 14 per cent of the actual value of the real property, which total assessed value amounted to $12,313,714.00. 5. That the action of the Quorum Court on the 18th day of November, 1957, directing that the taxes be collected on

the value established by the Assessor of Benton County, Arkansas, was void, . . ." This appeal followed.

For reversal appellant relies on the following points: "1. The court is in error in holding the action of the quorum court on November 18, 1957 to be void. 2. The court is in error in directing the county clerk to prepare and extend the tax books upon the figures as established by the Equalization Board without regard to the order of the quorum court of November 18, 1957." We do not agree with either of these contentions. They are so interrelated that we consider them together.

It is unquestioned that our legislature has the power as well as the duty to prescribe by law the manner and method in which the value of property should be ascertained for taxing purposes, making the same equal and uniform throughout the state. Section 5, Article 16, Constitution of Arkansas, contains this provision: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, . . ." Act 153 of 1955 makes it mandatory on all state and county officials to make a proper valuation and assessment of all property assessed for tax purposes. Should a county fail to perform this duty, as the act directs, then it shall lose a portion, or all, of the state's turnback as aid to counties, or the taxing units therein. For many years our statutes have provided what is commonly called turnback funds for the use of the counties and subdivisions therein, such funds to be allocated under formulas prescribed. The above Act 153 of 1955, Sec. 12, as amended by Sec. 12 (c) of Act 304 of 1957, directs that each county shall equalize its assessments at 20 per cent of fair market value. However, it is also provided that no funds will be withheld if a county equalized assessments at a rate of 18 per cent of fair market value for

1958. The primary and decisive question is: was the action of the quorum court (above resolution) void? We hold that it was. The powers of the quorum court are limited. It does not have the power to change millages voted by city councils (Ark. Constitution Art. 12, Secs. 3 & 4 and Ark. Stats. 19-4501) and school districts (Amendment 40 Ark. Constitution), but its duty is simply to levy without change such millages as voted. This duty is purely clerical and the county clerk is required to extend taxes on the basis of the millages voted by city councils and school districts without reference to levies made by the quorum court on city and school district millages. In other words, the quorum court was without authority to levy millages on any basis other than the assessment of the assessor, as were equalized and adjusted by the Equalization Board, which completed its work on October 15, 1957. The quorum court does have the power and duty to determine and levy millages for county purposes only (Sec. 17-401—409 Ark. Stats. 1947). The latter section was substantially complied with in this case.

We conclude that the judgment must be affirmed.

HOT SPRING COUNTY, ARK. *v.* CRAWFORD.

5-1628 316 S. W. 2d 834

Opinion delivered October 20, 1958.

W. R. Thrasher and *Bill Demmer,* for appellant.

Joe W. McCoy and *J. C. Cole,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is an eminent domain proceeding; and the jury verdict in favor of the landowner must be reversed because of the admission of improper evidence in the matter of the damages.

The County Court of Hot Spring County made an order for the widening of U. S. Highway No. 67, and thereby took one and one-fifth acres of land of the appellees, Mr. and Mrs. Crawford. The land was on both sides of the highway, which separated the Crawford's home from their place of business, called "Blue Top", a restaurant and truck stop, about three miles north of Malvern. When the County Court disallowed the Crawfords' claim, they appealed to the Circuit Court where the case was tried to a jury, with a verdict and judgment in favor of the Crawfords; and Hot Spring County has appealed.

In the trial in the Circuit Court the Crawfords claimed that the highway had been lowered to such an extent that their patrons could no longer use the "Blue Top" as a truck stop, and that as a consequence the business was ruined, to the Crawford's permanent damage. As one method of establishing the damages for the taking of their land and the damages to the lands remaining, the Crawfords were allowed to show — over objections of appellant — (a) that their net profits[1]

[1] Here is the record when Mr. Crawford was questioned on the point:

"Q. About what was the average gross income that was being produced by that property out there over those three years?

A. I will have to refresh my memory.

Q. Well, get it just as accurately as you can estimate it, you don't have to get it exact. The average gross income, total amount of income?

A. Around $42,000 a year.

Q. And about what was the net profit to you from that income?

MR. DEMMER: Your honor, I am going to object to this. I am going to object on the grounds, that profits on a business operated by a person who owns the land is entirely not proper for the establishment of any type of value of compensation.

MR. COLE: We are merely trying to prove, Your Honor, the productive value of the land as an element in arriving at its value.

MR. DEMMER: Sir, I am saying that profit as far as income is

from the operation of the "Blue Top", restaurant and truck stop, were $4,000.00 per year; and (b) a real estate appraiser testified that in determining damages to the Crawford land he capitalized this $4,000.00 net profit per annum[2] and used the result as a factor in fixing the Crawfords' damages at $48,350.00. The greatest amount that any witness for the County said the Crawfords were entitled to receive was $10,065.00; the jury verdict was for $28,000.00.

The Court allowed the jury to consider net profits from the business operated on the land as a factor in arriving at the land damages the Crawfords claimed; and this was an error fatal to the verdict and judgment. Our Constitution says in Art. 2, § 22, ". . . and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor". We have many cases on damages in eminent domain proceedings. Some of them are: *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792; *Stuttgart & R. B. RR.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511; *Kirk* v. *Pulaski County Road Imp. Dist.,* 172 Ark. 1031, 291 S. W. 793; *Miller Levee Dist.* v. *Wright,* 195 Ark. 295, 111 S. W. 2d 469; *Sewer Imp. Dist.* v. *Jones,* 199 Ark. 534, 134 S. W. 2d 551; and *Pulaski Coun-*

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concerned is not a proper element to consider.

MR. COLE: Not as such, but is so far as it affects market value.

MR. DEMMER: I don't believe it is, the only time it can show income is when it shows the highest and best use for business purposes.

THE COURT: Objection overruled.

Q. What would be the approximate average net income that the property produced?

A. About $4000 a year."

[2] Here is the appraiser's testimony on the point:

"A. Yes, sir, I took a number of things into consideration. I took into consideration the net income that the property produced for Mr. and Mrs. Crawford.

Q. You did consider the net income in arriving at your value?

A. As one approach to my value.

Q. Would you tell me how you did that?

A. I capitalized the net income from the property.

MR. DEMMER: I am going to request that this witness' testimony be stricken from the record and the jury be requested to disregard it, because capitalization of a net income of a situation of this kind is not proper at all in evaluating as far as market value of a piece of property is concerned.

THE COURT: Motion denied."

ty v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706. But we have directly held that the net profit of the business operated on the damaged land is not a proper factor for consideration by the jury in assessing the damages. In *K. C. So. Ry. Co.* v. *Anderson,* 88 Ark. 129, 113 S. W. 1030, in discussing the damages for taking of property, this Court said:

"But this does not reach to damages to the business of the landowner which are incident to the enforced purchase of his property. These are not subjects for assessment in condemnation proceedings, under the weight of authority and the sounder reasoning on the subject."

In *Desha* v. *Independence County Bridge Dist.,* 176 Ark. 253, 3 S. W. 2d 969, land at or near a ferry site was condemned for the location of a bridge. The Trial Court allowed the ferry owner to show the net profits received from operating the ferry. This Court on rehearing said: "A majority of the Court are of the opinion that the evidence as to the amount of revenue or income from the ferry was not competent testimony."

The holding of our Court, as above quoted, is in line with the great weight of authority. In 7 A. L. R. 163 there is an annotation, "Profits derived from business conducted on property taken by eminent domain as evidence of market value"; and the annotator cites cases from fifteen jurisdictions to sustain this statement: "With remarkable unanimity the American jurisdictions hold that evidence of profits derived from a business conducted on property is too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market value of the property in condemnation proceedings."[3] In Nichols on "Eminent Domain", Third Edition § 19.3 (Vol. 5, p. 222), the text writer sums up the holdings in the following language:

[3] There is an annotation in 134 A.L.R. 1125 entitled, "Distinction between income or profits from business on land and income or profits from use of land, as affecting admissibility of evidence in that regard on question of damages in eminent domain", which is worthy of consideration by anyone studying the point herein discussed.

"It is, accordingly, well settled that evidence of profits, of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive. The profits of a business are too uncertain, and depend on too many contingencies to safely be accepted as any evidence of the usable value of the property upon which the business is carried on. Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit another might only do at a loss."

We, therefore, conclude that the Trial Court was in error in allowing net profits from the business operated on the damaged land to be shown to the jury as an element or circumstance to be considered in arriving at a verdict. There are other assignments urged in the briefs, But as those matters may not occur on a new trial, we find it unnecessary to list or discuss them.

For the error indicated, the judgment is reversed and the cause remanded.

DUMAS *v.* MONSANTO CHEMICAL COMPANY.

5-1625 316 S. W. 2d 836

Opinion delivered October 20, 1958.

Tom Gentry and *William M. Dabbs, Jr.,* for appellant.

Davis & Ragsdale, for appellee.

GEORGE ROSE SMITH, J. In 1954 the appellee's predecessor, Lion Oil Company, entered into a labor contract with Local No. 224, International Association of Machinists. That contract provides for the accrual of certain seniority rights on the part of the company's employees. On August 8, 1955, the company shut down some of its maintenance equipment and temporarily laid off thirty-one of its employees. Nine days later the company decided to make a permanent reduction in its working force and, in that connection, discharged the thirty-one men who had been temporarily laid off and forwarded to each of them the termination pay provided for in the labor agreement.

Later on a number of the discharged employees attempted to assert a grievance through the labor union. It was their contention that their seniority rights continued in force for a year after their discharge and that within that year the employer had, in violation of the labor contract, filled certain jobs by retaining or promoting men whose seniority rights were inferior to those held by the discharged employees. The union officers refused to present these grievances, being of the opinion that there had been no breach of contract on the part of the employer. The present suit was then filed by fourteen of the discharged employees. In substance their complaint renews the grievance that was submitted to the union and seeks damages from the employer and injunctive relief against the asserted violation of the collective bargaining agreement. The chancellor dismissed the complaint for want of equity.

A number of contentions are urged in the briefs, but we find it necessary to discuss only the employer's contention that, although these appellants would admittedly have been entitled to priority had the company increased its working force by employing additional workers within a year after the appellants were laid off,

the contract did not contemplate or require that men already working for the company should be discharged in order to make places for these appellants. In our view this contention is well taken and is decisive of the case.

The labor contract classifies the various jobs under two broad categories and establishes a corresponding system of dual seniority. The upper category includes seventeen specified crafts, such as carpentry, painting, welding, blacksmithing, etc. The lower category is called the Yard Pool and includes all workmen who are not assigned to jobs in one of the seventeen skilled crafts. A new employee enters the Yard Pool and, after a training period of forty-five days, begins to accumulate seniority in the bargaining unit as a whole. When he is promoted to work in one of the crafts he continues to accrue seniority in the bargaining unit and also begins to accumulate seniority in the particular craft to which he is assigned. As between the two, craft seniority is declared to be prior to bargaining unit seniority.

Promotions, demotions, and temporary layoffs are determined on the basis of seniority. Vacancies in the various crafts are filled by promoting men from the Yard Pool according to their seniority, and, conversely, if the company reduces the working force in a particular craft, the employee in that craft who is youngest in seniority is the first to be demoted to the Yard Pool. When it becomes necessary for men to be laid off, those in the Yard Pool with the least seniority must be the first to be let go.

The present dispute goes back to the employer's decision to lay off thirty-one men on August 8, 1955. By the terms of the labor agreement the employer was required to select for release the thirty-one men then in the Yard Pool who were lowest in seniority, and it is conceded that this selection was properly made. Although all of these appellants had formerly worked in a craft and in some instances had acquired substantial craft seniority, they were unlucky in that they were

working in the Yard Pool on the particular day when the company found it necessary to reduce its working force. Hence these appellants were laid off, in accordance with the contract, simply because they happened to be in the Yard Pool on August 8, 1955; while other employees junior in service were retained, simply because they happened to be assigned to a craft on that date.

The contract provides that the accrued seniority of an employee who has been laid off through no fault of his own shall continue to exist for one year after the date of his layoff (or for 180 days if he has less than five years of bargaining unit seniority). After these appellants had been let go the company naturally continued to make promotions and demotions to and from the Yard Pool and within the several crafts. It must be strongly emphasized at this point that the company did not employ any new workmen in its maintenance department during the year following the appellants' release; there was merely a shifting about of employees who were on the payroll on August 8, 1955, some of whom, as we have said, had less seniority than the appellants but were fortunate in having been assigned to service in a craft on the day when the employer decided to let thirty-one men go.

The appellants now insist that, since their seniority rights continued for a year after they were laid off, the company could not within that time award a promotion to any other employee whose seniority rights were inferior to those of any one of the appellants. On this premise it is argued that, when the occasion for a promotion arose, the contract required the company to discharge a retained employee and to recall one of the appellants to fill the position.

This contention is answered, in our opinion, by the plain language of the contract: "The employee last employed and not then permanently assigned to a craft shall be the person first laid off in the event there is a reduction in the number of employees. The employee last laid off, through no fault of his own, shall, subject

to the following provisions of this Article, be the person first re-employed in the event additional employees are employed . . . ."

Taken as a whole, the contract leaves no real room for doubt about its meaning. The clause preserving seniority rights for a period of a year fixes a reasonable and practical limitation upon the preferred position accorded to former employees. The only preference actually stated in the contract is that the last employee to be laid off is entitled to be the person first re-employed "in the event additional employees are employed." Here there was no occasion for anyone to be re-employed, for no *additional* employees were added to the working force during the year following the appellants' release on August 8, 1955. The contract admittedly protects an employee of limited seniority who is fortunate enough not to be assigned to the Yard Pool on the day when the employer takes the major step of laying off a number of workmen. We are unwilling to read into the agreement a further provision, which is certainly not expressed, that this same employee of limited service must be discharged to make a place for the former worker whenever the employer takes the minor step of making a promotion within the existing working force.

Affirmed.

CHAMBLISS *v.* BRINTON, SPECIAL ADMINISTRATOR.

5-1634 317 S. W. 2d 143

Opinion delivered October 20, 1958.

[Rehearing denied November 17, 1958]

Barrett, Wheatley, Smith & Deacon, for appellant.

McCourtney, Brinton, Gibbons & Segars, for appellee.

PAUL WARD, Associate Justice. A tractor-trailer truck belonging to Victor Metal Products Corporation and driven by Elbert Chambliss ran into a pick-up truck owned and driven by Harley Shirrell. Five or six hours later Shirrell felt "knocked out all over," two or three hours later he suffered pains and was unable to move his legs, and 14 days later he died. A special administrator of Shirrell's Estate sued, and recovered judgment against Chambliss and the said corporation for several items of damages including $20,000 for pain and suffering.

Appellants, Chambliss and the said corporation, have appealed on two grounds only. *One.* There is no substantial evidence to show a causal relation between the accident and Shirrell's death. *Two.* The award of $20,000 for pain and suffering is excessive.

One. After a careful examination we have concluded there is substantial evidence to support the jury's finding of a causal connection. To substantiate our conclusion it is necessary to set forth at some length the pertinent facts and circumstances as disclosed by the record.

On January 3, 1957, Harley Shirrell of Myrtle, Missouri, 58 years of age and in apparent good health, was

driving his pickup truck south on Highway 67 below Pocahontas, Arkansas, between 5:30 and 6:00 a.m. at a time when it was dark, when his truck was struck from behind on the left rear corner by a tractor-trailer unit owned by Victor Metal Products Corporation and driven by Elbert Chambliss. The immediate result of the impact was; frame was bent, the bumper and back of the cab of the pick-up truck were damaged and the front end of the tractor-trailer truck skidded against the bank of a ditch on the right side of the road. Shirrell told a State Trooper, who arrived at the scene of the accident soon after it happened, that he was not hurt. Shirrell then walked up the road about a mile to make a telephone call. About four hours later (around 10 a.m.) he arrived home and told his wife he didn't think he was hurt, but she said she thought he appeared nervous. Shirrell then went with a neighbor to Alton, Missouri concerning the papers on his truck. He returned from this trip, ate lunch, and at 1 p.m. went to the store across the road which he and his wife operated. At that time he said "there is a funny feeling in my legs," and also said "Oh my back." Thereupon a neighbor, Mr. Hyde arranged to take him to Dr. William Carhart at Alton. Shirrell could not walk to the car but, as Mrs. Shirrell put it, they had to push his feet along or just scoot him along. The Doctor found him incoherent and partially paralyzed from the navel down, and gave him medication including aspirin. Shirrell was returned home and the next morning was put in a car for transportation to a hospital in Jonesboro. However when they arrived at Pocahontas he was unable to proceed on the journey. Dr. Carhart was contacted by phone and he advised they bring him to his office. This was done, and then he was taken back home where he was treated and died on January 17, 1957.

The testimony of Dr. Carhart was, in substance, as follows: On January 3, I saw Mr. Shirrell after he had been in an accident — he was unable to move his legs, complained of severe pains in his legs and told me he had been involved in an accident. His temperature was

98 degrees which is below normal. I X-rayed his skull, chest, abdomen, back and lower extremities. His particular complaint was inability to move and had no feeling from his waist down — his reflexes were normal but he did not react to electric stimuli, he did not notice an electric shock — he didn't feel it at all from his navel down, above the navel he did feel it — no reaction from the navel down, front, back or side. We used a sharp needle to penetrate the skin but there was no reaction to it below the navel but reaction above the navel. A urinalysis showed there was a little blood. Q. "Did you reach any conclusion in your examination of Mr. Shirrell?" A. "Yes, I did. I suspected traumatic psychoneurosis shock." Shirrell was mentally incoherent at moments when I first saw him — he kept speaking of the accident — at times he knew he was in my office and at times I don't think he did know exactly where he was. An examination of his heart and blood pressure showed blood pressure 145/81, pulse good, steady at 62 per minute, respiration good — blood pressure considered normal for a man of his age. My recommendations as to treatment were: Diet, medication, rest, rehabilitation, passive exercise of the body and extremities. The diet was to be liquids or fluids. In the way of medication, I used Thorazine, which is a tranquilizer, and I used aspirin. I recommended taking Mr. Shirrell to a hospital the next morning. The next day they started to take him to Jonesboro but when they got to Pocahontas Mr. Shirrell couldn't proceed any further and they stopped there and called me. I told her to keep him there. Mrs. Shirrell called me again in the evening and I told her to bring him up and he came back to my clinic the next morning. I saw Mr. Shirrell again on the 5th when he was brought in an ambulance to my clinic — I found his condition was progressively worse — he had the same trouble except it was worse and he complained of severe pain in his chest and skull at that time, it was more pronounced. He was incoherent and I called a specialist in Springfield. I repeated my examination of him and I concluded that he

had the same difficulties only he was worse. I advised Mrs. Shirrell that he should be moved to a hospital but she wanted him returned home — in my opinion there was nothing that could have been done at a hospital that couldn't have been done for him at home. I saw him at his home the next day on the 6th but I was in 24 hour contact with the Shirrell family. On the 6th there was no improvement — the same things were wrong with him and he was incoherent — he thought he was a little boy and he kept recalling facts that even the Shirrell family had forgotten. The next time on the 8th I found his condition the same — I didn't make any recommendations except to continue the treatment as prescribed. On the 8th Shirrell was complaining of severe pain in the chest and skull — the next time I saw him was on the 12th and his condition was unchanged, he was definitely incoherent and the case was marked critical and the family was so advised. He was in pain at the time because there was severe moaning and he would hold his head and skull, and the moaning was continuous. Next time was on the 14th and found no change — next time on the 16th and the patient was in a coma. On the 14th he was making sort of a crying noise and moaning, he died on the 17th. Shirrell was unable to control bladder and bowels during his sickness.

On cross-examination the doctor stated: "A person sick independent of wounds would demonstrate pathology if they were diseased. If a person had pneumonia they would demonstrate pathology to the lungs. Shirrell did not have pneumonia — I never changed my diagnosis — it was acute traumatic psychoneurosis shock. In explaining the doctor's statements he said: "Traumatic is caused or relating to an injury. Psychoneurosis is a functional condition, disorder of mental origin without benefit of clinical demonstration of a lesion, fracture or wound. You can't find a full definition of traumatic psychoneurosis shock in the dictionary. Trauma indicates some sort of a blow or an injury. Q. "Didn't this man have a mental condition?" A. "There was a possibility he could have." Q. "Why did you classify it as

psychoneurosis?'' A. ''Because he lost the value of reality.'' He was a psychoneurosis patient — there is such a thing as traumatic psychoneurosis — traumatic psychoneurosis would be an injury to the system, and we couldn't demonstrate any lesion, wound or pathology. *To link traumatic psychoneurosis together the trauma would come from the accident,* possibly unknown to Mr. Shirrell. *The truck hitting him from behind would possibly cause a mild whiplash injury to his system,* which he at the moment ignored. Whiplash injury is a blow and would be most generally without the knowledge of the victim, a blow from the back. *I suspicioned at the time Mr. Shirrell came to see me a whiplash injury but when I couldn't elicit any dislocation from the X-rays, I ruled that out.* Mr. Shirrell walked away from the accident and complained only later; then I was suspicious. There is a *possibility* that paralysis of the legs could have been caused by a mental condition, paralysis of the legs is an organic symptom.

On redirect the doctor stated: ''I considered an injury to the vertebral column but not finding any external proof lacerations or marks we ruled that out. After hearing the testimony of Dr. Bean I have not changed my mind of the diagnosis of the trouble of this man. *For a man of normal health as Mr. Shirrell was, I would attribute his condition to an accident.''*

The Dr. Bean mentioned above was called to testify for appellants. He is an Osteopathic Physician, well qualified. After all the facts and circumstances of this case were fairly placed before him in a lengthy hypothetical question, he was asked if there was any direct causal connection between the traffic accident and Shirrell's condition and death. His answer was: ''My opinion is that it could have no bearing whatsoever since the lapse of time was 6 hours or a little bit better.''

Assuming, though it is not made clear, Dr. Bean meant to say that in his opinion there was no connection between the accident and Shirrell's condition and death, it still leaves open a question for the jury. Dr. Car-

hart attributed Shirrell's condition to the accident, and Dr. Bean did not. The jury had the right not only to believe the one and disbelieve the other but to consider which doctor's testimony more nearly conformed to all the facts and circumstances of the case. Both doctors agree that Shirrell's symptoms and condition indicated some kind of an injury to or malfunction of the spinal cord. The jury could have believed this spinal cord condition was the result of the severe blow or whiplash especially in view of the absence of any other explanation. We recognize that appellee bore the burden of showing a causal connection, as stated in *Jonesboro Coca Cola Bottling Co.* v. *Young,* 198 Ark. 1032, 132 S. W. 2d 382 and other decisions of this court, but this again, involved a question of evidence and the weight to be given it by the jury.

Appellants cite *Missouri Pacific Railroad Co.* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428 for the rule that where the evidence is uncertain, and two or more things might have brought about the injury, there can be no recovery. This is merely another way of saying, as this court has said many times, that a jury's verdict must be based on evidence and not on speculation, and it does not, we think, preclude a recovery here. Here there are, as heretofore pointed out, many facts and circumstances together with the positive statement of Dr. Carhart pointing to the conclusion reached by the jury. On the other hand there is no evidence that any thing else might have caused the injury to Shirrell's spinal cord.

Two. We cannot say there is no substantial evidence to support the jury's verdict for pain and suffering in the amount of $20,000. The testimony relating to this feature of the case has already been set forth and it would serve no useful purpose to repeat it. There is, as we have said on many occasions previously, no definite or satisfactory rule to measure compensation for pain and suffering. Where there is substantial evidence to support the jury's verdict, as we believe there is here, and there is nothing in the case to indicate passion, prej-

udice, or an incorrect application of the law, as in the case here, this court will not disturb the award of the jury. See: *Coca Cola Bottling Co.* v. *Cordell,* 189 Ark. 1132, 76 S. W. 2d 307, *Arkansas Motor Coaches* v. *Williams,* 196 Ark. 48, 116 S. W. 2d 585, and *Rudolph* v. *Mundy,* 226 Ark. 95, 288 S. W. 2d 602.

It follows from what we have said that the judgment of the trial court must be affirmed.

Cross-Appeal. The jury found that 25 per cent of the total negligence was attributable to Shirrell, from which finding appellee has cross-appealed. We are unable to say the jury was wrong as a matter of law. We find in the record substantial evidence to support the jury's verdict. The evidence discloses that it was dark when the pick-up truck was hit from behind by the tractor-trailer truck driven by Chambliss. Chambliss testified that if Shirrell had a tail light on his pick-up it was not burning or he could not see it. He also stated that he told Shirrell this and that Shirrell stated it (the tail light) had been in the habit of going out. None of the testimony is denied or refuted, and is, we think, substantial evidence of negligence.

Affirmed on direct appeal and on cross appeal.

McFaddin, J., not participating.

Lambert *v.* Lambert.

5-1631 316 S. W. 2d 822

Opinion delivered October 20, 1958.

Lester E. Dole, Jr., for appellant.

James M. Rowan, Jr., for appellee.

SAM ROBINSON, Associate Justice. This is a divorce suit. Appellant, Bernadette Lambert, and appellee, Robert W. Lambert, were married in the State of Rhode Island in 1942. The parties have one child, Suzanne, born August 18, 1946. In August, 1954, Mr. Lambert, who worked for the American Paper and Tube Company, was transferred to Port Gibson, Mississippi. Later he was joined in Mississippi by his wife and daughter. On September 12, 1955, Mrs. Lambert and Suzanne left Mississippi and returned to Rhode Island. A few days thereafter, on September 23, 1955, Lambert filed suit for divorce in the chancery court of Claiborne County, Mississippi. He alleged in his complaint that "without just cause or any fault on the part of complainant, the defendant, Bernadette Lambert, departed Port Gibson and returned to her home in Woonsocket, Rhode Island." Mr. Lambert also alleged that Mrs. Lambert had treated him "in an habitual cruel manner", naming the particulars of such alleged treatment. Mrs. Lambert answered, denying the allegations of the complaint, and filed a cross complaint in which she asked for separate maintenance. A trial was had upon the issues joined. Lambert's complaint was dismissed and Mrs. Lambert was granted separate maintenance on her cross complaint.

On September 8, 1957, Lambert filed the present suit for divorce in the chancery court of Ouachita Coun-

ty, Arkansas. As grounds for divorce he alleged desertion and indignities. Mrs. Lambert answered, denying those allegations of the complaint setting out grounds for divorce, and she asserted the affirmative defense of *res judicata.* It was stipulated by the parties in open court that all matters of personal indignities were *res judicata.* The court granted Mr. Lambert a divorce on the ground of desertion, and Mrs. Lambert had appealed.

Appellant raises several points, among which is that the issue of desertion is *res judicata.* We agree with appellant in that respect and reach only that point. Although in the Mississippi case Lambert did not allege desertion as a statutory ground for divorce (the parties had been separated only about ten days when suit was filed), he did allege that Mrs. Lambert had deserted him without just cause. The record of all the evidence in the Mississippi case was introduced in the trial of the present action. It can be seen that one of the most vigorously contested issues in that case was whether Mrs. Lambert left Mississippi and returned to Rhode Island because of ill treatment by Lambert, or whether she deserted him without just cause, and the chancellor's decree was in favor of Mrs. Lambert. A finding in favor of the wife in a separate maintenance action is not necessarily a finding that the husband has no grounds for divorce. *Hill* v. *Rowles, Chancellor,* 223 Ark. 115, 264 S. W. 2d 638. But here the issue of whether Mrs. Lambert deserted her husband without just cause in September, 1955, was stoutly contested in the Mississippi court. In Mississippi a wife will be denied separate maintenance where she has deserted her husband without just cause. *Wilson* v. *Wilson,* 198 Miss. 334, 22 So. 2d 161. Therefore, in granting Mrs. Lambert separate maintenance the Mississippi court must have concluded that she was no deserter. Especially is this true, since the very question of whether she deserted her husband was an issue in the case. Hence the only issue in the case at bar—that is, whether Mrs. Lambert deserted her husband —is *res judicata.*

If Mrs. Lambert did not desert her husband, within the meaning of that term as applied to a divorce action, in September, 1955, she has not deserted him at any time. Because the wife leaves her husband does not necessarily mean that she has deserted him. In *Wickliff* v. *Wickliff,* 191 Ark. 411, 414, 86 S. W. 2d 553, the court said: ". . . where a spouse intentionally brings the cohabitation to an end by misconduct which renders the continuance of the marital relations so unbearable that the other leaves the family home, the former, and not the latter, is the deserter."

Appellee attempts to make a point of the fact that appellant's answer was not filed within the time prescribed by Ark. Stats. § 27-1135. His brief contains no citation to the record wherein the point was raised in the lower court. The designation of contents of record on appeal does not designate any motion or pleading wherein the issue was raised. This is not a matter that can be raised for the first time on appeal.

Since Mr. Lambert's alleged cause of action, desertion, is *res judicata,* that part of the decree granting a divorce must be reversed. It is so ordered.

WEATHERFORD *v.* GEORGE.

5-1639 317 S. W. 2d 147

Opinion delivered October 27, 1958.

[Rehearing denied November 24, 1958]

S. Hubert Mayes, for appellant.

Langston & Walker, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Charlie W. George, is a school bus driver, and his wife, Susie George, a teacher. On the morning of November 15, 1956, around 8:30 a.m., George stopped the bus on Highway 10 to pick up school passengers, including appellee, Susie George. Ross Weatherford was driving his Ford pick-up truck east on Highway 10 toward Little Rock, by his statement, "* * * not over 50 miles an hour." It had been raining, and the highway was slick. According to his testimony,[1] he observed the school bus approaching from the opposite direction at least a quarter of a mile away, and knew that it was a school bus. He stated that when the bus stopped and put out the stop sign, he was about 143 feet away; that he applied his brakes, and the truck began to skid. The skidding truck missed the bus, but struck Mrs. George, who was

[1] From the testimony: "Well, it was kind of dark and it had been raining back up the road a few miles, but it had slacked up and was still dark, you know, at the time of the accident. It wasn't raining at that time and I saw the bus. I saw the bus coming down the road for at least a quarter of a mile and I knew it was a school bus, but I was driving along there and the school bus wasn't stopped, and the first time—when the bus stopped is when I applied my brakes, and that is the first time I saw the stop sign on the bus.

* * * * *

Q. And then when you saw this stop sign on the bus, what did you do?

A. I applied my brakes.

Q. You applied your brakes and when you applied your brakes, what happened?

A. Well, the back end of the truck flew off the highway on the right hand side. It left the blacktop and it headed right toward the school bus. Well, there was only one thing in my mind, to try to stay out of that school bus and that is what I did."

approaching to board the bus. She received serious injuries. Suit was instituted by the Georges against Weatherford and V. L. Beavers, V. Stackhouse, R. V. Williams, and T. A. Hazard, doing business as V. L. Beavers, Engineers, a partnership, it being alleged that Weatherford was an employee of V. L. Beavers, Engineers, and was acting within the scope of such employment at the time of striking Mrs. George. Weatherford filed a general denial, and Beavers, Stackhouse and Williams, asserting that they were the only members of the partnership,[2] set up in their answer and amendment thereto, that Weatherford was not acting within the scope of his employment, denied all material allegations relative to his alleged negligence, and specifically pleaded unavoidable accident as an affirmative defense. The amended answer asserted that George improperly brought the school bus to a stop, improperly displayed the stop signal, and was improperly parked; that this handling of the bus by George caused Weatherford to be confronted with an emergency, and the latter did what appeared to be proper and reasonable at the time, and under the circumstances. The cause proceeded to trial, and at the conclusion of the evidence, the court *inter alia* instructed the jury that Weatherford was, at the time of striking Mrs. George with the truck, "on business for the defendant in the course of his employment." Six special interrogatories were submitted, and the jury returned its verdict, finding that Weatherford was negligent, and that such negligence was the proximate cause of the injuries and damages; finding that neither Susie George nor Charlie George was guilty of any negligence whatsoever, and awarding damages to Mrs. George in the sum of $25,000 and to Mr. George in the amount of $2,868.06. From the judgment entered against appellants,[3] comes this appeal.

For reversal, three points are urged.

[2] The answer alleged that Hazard was not a member, and that the partnership had been erroneously sued. Other motions were made, but are not involved in this appeal.

[3] No judgment was entered against Hazard.

I.

The Court erred in declaring as a matter of law that Ross Weatherford, Jr., was at the time of the accident, the agent, servant and employee of the appellant, V. L. Beavers, Engineers, and was acting in the course of his employment. This error was committed by the giving of Appellees' Instruction No. 5 and refusing to give Appellants' Requested Instructions No. 6 and No. 12.

II.

The Court erred in refusing to give Appellants' Requested Instruction No. 11.

III.

The Court erred in refusing to give Appellants' Requested Instruction No. 13.

We proceed to a discussion of each point in the order listed.

I.

The only evidence included in the transcript consists of the answers given to interrogatories propounded to R. V. Williams and Ross Weatherford, and the oral testimony of Weatherford. Appellees' Instruction No. 5, objected to by appellants, reads as follows:

"You are instructed that the liability of the defendants, V. L. Beavers, V. Stackhouse and R. V. Williams, doing business as V. L. Beavers, Engineers, is based upon the rule that an employer is liable for the actionable negligence, if any, of its employee, Ross Weatherford, causing injuries and damages, if any, to the plaintiff, while such employee is in the course of his employment. In this case, the Court tells you that Ross Weatherford was, at the time he struck Mrs. George with his truck, on business for the defendants in the course of his employment. You are further instructed that if you find from a preponderance of the evidence that the negligence, if any, of their employee, Ross Wea-

therford, was the sole proximate cause of the plaintiff's injuries and damages, if any, then you will answer Interrogatory No. 1 in the affirmative and Interrogatories No. 3 and No. 5 in the negative."

Appellants' Requested Instructions No. 6 and No. 12, refused by the Court, are as follows:

"You are instructed that the plaintiffs seek to recover against the defendant, V. L. Beavers, Engineers, on the allegation that Ross Weatherford was at the time of the accident acting as their agent, servant and employee and within the course of his employment with them. In this connection, you are instructed that the burden of proof is on the plaintiffs to prove these allegations by a preponderance of the evidence."

"You are instructed that the burden of proof is upon the plaintiffs to prove that Ross Weatherford, was at the time of the alleged accident, acting as the agent, servant and employee of the defendant, V. L. Beavers, Engineers, and, further, that he was acting within the scope of his employment."

We are unable to agree with this contention. R. V. Williams, a member of the partnership known as V. L. Beavers, Engineers, in answer to interrogatories, testified that he personally hired Weatherford, and that his employment began at 8:00 a.m. on November 15, 1956. From his testimony:

"4. Did you pay Ross Weatherford for time in your employment for the date of November 15, 1956?

A. Yes.

5. If so, for how many hours of work did you pay Ross Weatherford for work performed on date of November 15, 1956?

A. 8 hours.

6. What work was Ross Weatherford performing for you at approximately 8:30 a.m. on November 15, 1956?

A. He was to meet me at the Highway Department office at 10:00 a.m.

7. Did you pay Ross Weatherford for the use of his truck in your service for the day of November 15, 1956?

A. Yes.

8. Did you hire the truck owned by Ross Weatherford and agree to pay a certain rate per mile to Weatherford for use of the truck?

A. Yes. 8 cents per mile.

9. Did you pay Weatherford for mileage for use of the truck on November 15, 1956, the truck having been used in your service on November 15, 1956?

A. Yes.

10. State whether or nor Weatherford's 1953 Ford pick-up truck was being used in your service and being driven by Weatherford on or about 8:30 a.m. on November 15, 1956?

A. He was going to meet me at the Highway Department at 10:00 a.m.

* * *

15. State whether or not Ross Weatherford was in your employ on November 15, 1956, at approximately 8:30 a.m.

A. His time began at 8:00 a.m., and he was going to meet me at the Highway Department office at Little Rock at 10:00 a.m.

16. State whether or not you, or one of your employees, had instructed Ross Weatherford that his time was to start at 8:00 a.m. on November 15, 1956, and that his mileage for his truck would begin at that time, that Weatherford should drive from Weatherford's home to the State Highway Department in Little Rock, that Weatherford would be paid for mileage on his truck from his home to the highway department?

A. Yes."

Weatherford testified that he left his home in Perryville about ten minutes until eight, dropped his young daughter off at school and then started out for Little Rock. Relative to his employment, he testified, in answer to interrogatories propounded to him:

"1. Were you employed by V. L. Beavers, Engineers, on or about November 15, 1956?

A. Yes.

2. It is true that your employment began with V. L. Beavers, d/b/a V. L. Beavers, Engineers, on November 15, 1956, at 8:00 a.m.?

A. Yes.

3. Is it true that you were using your truck in your work for them?

A. Yes. * * *

7. Is it true that you were on the payroll of V. L. Beavers on the morning of November 15, 1956, at approximately 8:30 a.m. when you had a collision in your truck with Mrs. Susie George on Highway No. 10, approximately eight miles west of the Little Rock city limits?

A. Yes.

8. Were you on duty and working for V. L. Beavers at the time you struck Susie George with your truck at about 8:30 a.m. on November 15, 1956, on Highway No. 10 approximately eight miles west of the Little Rock city limits?

A. Yes. * * *

11. At the time of the accident complained of in the complaint on November 15, 1956, at 8:30 a.m., were you working under instructions given you by R. V. Williams who was doing the work for V. L. Beavers on the highways of Arkansas at the time of the accident complained of in the complaint?

A. Yes."

There is no testimony that conflicts in any manner with the above evidence, and we are accordingly of the opinion that the court acted properly in giving Instruction No. 5 and in refusing to give Appellants' Requested Instructions No. 6 and No. 12. As stated in *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 218, 35 S. W. 2d 1010:

"* * * inference or presumption of fact, * * * may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence * * * is contradictory, the question is one for the jury. Where the facts are undisputed and uncontradicted, it becomes a question for the court."

Again, in *Braman and The Gus Blass Co.* v. *Walthall,* 215 Ark. 582, 225 S. W. 2d 342:

"The evidence on behalf of appellees as to publication of the alleged slander appears to be uncontradicted and we have frequently held that it is not necessary to submit to the jury an issue established by undisputed evidence."

See also *Sutton & Collier* v. *Kesterson,* 199 Ark. 269, 133 S. W. 2d 450.

II.

Appellants requested the following instruction, which the court refused to give.

"You are instructed that if you find from the evidence in this case that Charlie W. George was guilty of negligence and that such negligence, if any, was the sole proximate cause of this accident and resulting injuries, then your verdict will be for the defendants."

Whether the failure to so instruct was erroneous, is immaterial under the circumstances in this case. Appellants' Requested Instruction No. 8 was given, in which the statute relating to the duties and obligations of a school bus driver was quoted, and the jury was told:

"* * * If you find from a preponderance of the evidence in this case that the plaintiff, Charlie W. George violated this Statute, then you are told that such violation, if you find that he did violate the Statute, is *prima facie* evidence of negligence. By *prima facie* evidence of negligence, the Court does not mean that a violation of the Statute, if you find there was a violation, is of itself necessarily sufficient to constitute negligence, but the Court does mean that you should take such violation, if you find there was a violation, into consideration with all the other facts and circumstances of the case in arriving at whether or not the plaintiff, Charlie W. George, was negligent as negligence is defined in these instructions."

The question of negligence on the part of Charlie George was submitted to the jury in Special Interrogatory No. 5, reading as follows:

"Do you find from a preponderance of the evidence that Charlie George was negligent and that such negligence, if any, was a proximate cause of his damages, if any, complained of by him?"

The jury answered this interrogatory "no", and in Interrogatory No. 6:

"Using 100 per cent to represent the total negligence involved, what do you find from a preponderance of the evidence to be the amount of negligence on the part of the following:

Charlie George: 'None' per cent

Ross Weatherford: '100' per cent"

It certainly follows, that if the jury found George guilty of no negligence whatever, they would not have found that negligence on his part was the proximate cause of the mishap. Accordingly, even if the failure to give the instruction was error, the verdict rendered by the jury had the effect of healing or remission.

III.

Appellants requested that the following instruction be submitted to the jury.

"You are instructed that if you find from a preponderance of the evidence that Ross Weatherford was driving down that highway at a rate of speed not exceeding 50 miles an hour, which is a lawful speed, and he was on his proper side of the road, and that when he applied the brakes to his truck, that his truck then skidded out of control as a result of the condition of the highway, over which he had no control and which he could not have foreseen in the exercise of ordinary care, then you are instructed that Ross Weatherford would not be guilty of negligence in this case and your verdict would be for the defendants."

Without entering into a discussion of whether the instruction was proper or improper (though we have reached the latter conclusion), let it suffice to say that the theory of unavoidable accident, as well as emergency, was clearly submitted to the jury by Appellees' Instruction No. 7, and Appellants' Instructions No. 1 and No. 3.[4] These instructions, together with the others submitted by the court, fairly presented appellants' theory of the cause of the accident.

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[4] *Appellees' No. 7.* "You are instructed that the term 'unavoidable accident' means an accident which was not due to the negligence of either the driver or of the pedestrian, but was due to a series of events or circumstances not in the control of either the driver or the pedestrian and consequently not the fault of either the driver or the pedestrian."

Appellants' No. 1. "You are instructed that if you find from the evidence in this case that the accident was brought about as a result of unavoidable accident, then you will answer Interrogatory No. 1 in the negative."

Appellants' No. 3. "You are instructed that when a person is driving a truck and is confronted by an emergency which is brought about without any negligence on his part, then it is the duty of such person to take necessary action to prevent injury to himself or other persons, or damage to property. Although it may appear afterwards that he was mistaken in the action he took and that some other course might or would have been better, if the driver, when confronted with the emergency, was not guilty of negligence in making the decision and taking the course he took, then he would not be liable for a mistake of judgment and would not be liable for any damage to persons or property caused by his actions."

Finding no reversible error, the judgment is affirmed.

WASHINGTON TRANSFER & STORAGE CO. *v.* HARDING.

5-1642 317 S. W. 2d 18

Opinion delivered October 27, 1958.

Wade & McAllister, Rex W. Perkins, Ed E. Ashbaugh, for appellant.

Peter G. Estes, for appellee.

J. SEABORN HOLT, Associate Justice. On September 28, 1956, appellee filed an application with the Arkansas Public Service Commission seeking a permit to operate intra-state as a common carrier of household goods between points and places in Washington County and points and places in the State of Arkansas at large. Appellee alleged in its application that for about three months prior to its application, Washington County was being served by appellants, Washington Transfer and Storage Company and Red Ball Transfer & Storage Company, Inc., two licensed carriers which had merged into one company, thereby leaving only one carrier of household goods in Washington County and the territory affected. Appellee further alleged that the appellants

had merged into an organization and was "under the domination of one family until competition was destroyed contrary to Sec. 14 of the Arkansas Motor Carrier Act, found in Ark. Stats. 1947 annotated, Vol. 6B, Sec. 73-1767 (b), which says: 'The transfer, lease, assignment or hypothecation of the permits and/or certificates and/or licenses shall not be authorized where the commission finds such action will be inconsistent with the public interest, or will have the effect of destroying competition or creating a monopoly.' 2. That Fayetteville, Springdale and Washington County had grown tremendously without additional service. 3. That the present permittees had been rendering slow, unsatisfactory and inadequate service. 4. That the applicant was able and willing to perform the service and abide by the rules of the commission. 5. That there was a need for such additional service which would benefit the general public. All of which would indicate that public convenience and necessity required the additional service and the granting of the permit."

A number of witnesses were presented by appellee before the commission in support of its contentions and appellants offered only four in protest and two of them were from Little Rock. The commission (by a vote of 2 to 1) on November 8, 1956 granted appellee's application for a permit. Its findings and order contained these recitals: ". . . Applicants in this proceeding seek authority to pick up and deliver household goods at any point or place in the State of Arkansas when originating at or destined to points in Washington County. They have been in the Southwest Piano and Van Service since 1950. Applicants have a concrete and tile fireproof building 100 by 50 feet, with 5,000 cubic feet of floor space and are affiliated with Burnham American Van Lines of Columbus, Georgia. The Southwest Piano Company has two trucks with 18 foot van type bodies and a Fruehauf tandem trailer 33 feet in length. In addition, a pickup truck is used for light hauling.

Moving in this territory is unusually heavy, population considered, due partly to the large number of students moving to and from the University of Arkansas area. The City of Fayetteville has had an increase in population of 130 per cent from 1930 to 1950 and the figures projected to 1960 indicates an increase of 211 per cent over 1930. Representatives from the University, real estate and insurance firms, and others testified to the inadequacy of the presently authorized household goods carriers. Frequent and consistent delays have been encountered in getting moves made. Testimony of some witnesses was to the effect that they were delayed several days in getting moved. Financial statement of applicant shows assets of $21,782.63, including cash in bank $967.35, inventory $4,111.50 and accounts receivable $13,855.48. Liabilities amount to $3,-687.25. Furniture vans and equipment are already owned," and further "That present and future public convenience and necessity require the proposed operation; 2. That applicant is fit, willing and able, financially and otherwise, properly to perform the proposed service and to conform to the provisions of the Arkansas Motor Carrier Act, and to the rules and regulations of the Commission promulgated thereunder; and 3. That the application should be granted." The order of the commission was affirmed on appeal to the Pulaski Circuit Court, and from that judgment comes this appeal.

For reversal appellants contend (1) that the applicant (appellee here) must prove conclusively that the existing service in the area affected is inadequate, that public convenience and necessity require such additional service and the ability of applicant financially and otherwise to perform and (2) that the granting of appellee's application would give it an unfair advantage over existing carriers.

1 and 2

This case comes to us for trial *de novo*. Therefore, unless we find the findings and order of the commis-

sion, and that of the circuit court on appeal, to be against the preponderance of the testimony we must affirm. The rules guiding us on appeal in cases such as this have been announced many times by this court. We reannounced these rules in the case of *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604, where we said: "* * * it must be remembered that we are dealing with the finding of a tribunal erected by the legislature for the special purpose of investigating and determining matters of the nature here involved; and the finding of such a tribunal on a fact situation may not be upset by the courts unless the finding is clearly against the weight of the testimony. . . . A point not to be lost sight of here is that *de novo* review by the courts, including this court, must not proceed as though the Public Service Commission did not exist and had never held a hearing. A hearing has been held, and the Commission which held the hearing has had the advantage of seeing and hearing the parties and witnesses face to face, whereas the circuit court and this court review the evidence from the record only. Where a matter is heard and decided by an administrative body such as the Public Service Commission, an order made by it should be upheld by the court on appeal unless it is against the weight of the evidence. . . . We try cases of this kind *de novo,* but it is the duty of the courts to accord due deference to the finding of the Commission, since it is the agency upon which the General Assembly has placed the duty to investigate and determine, in the first instance, the need for any proposed motor carrier service." See also *Ark. Motor Freight Lines, Inc.* v. *Howard,* 224 Ark. 1011, 278 S. W. 2d 118.

It is significant that of the some 48 protestants against the issuance of the permit only four testified opposing it, and two of these (Mr. Moore and Mr. Gathright) admitted they knew little if anything of conditions in Washington County. Mr. Moore testified that he lives in Little Rock and is vice-president of the O.K. Van and Storage Company; that Little Rock is 195 miles

from Fayetteville; that the idle equipment of his company is not available for local moving in Washington County, that his company frequently hauled a load in excess of 4,000 pounds from Little Rock to Fayetteville but it has never made a haul from Fayetteville to points in Northwest Arkansas. Mr. Gathright, who lives in Little Rock and owns and operates the Gathright Van and Storage Company, tended to corroborate Moore's testimony and further testified: "Q. You have a permit and you don't want anybody else to have one? A. I certainly don't."

After a careful review of all the evidence presented, which we do not detail here, we have concluded that the preponderance thereof supports the findings and order of the commission and the judgment of the Pulaski Circuit Court. Accordingly, the judgment is affirmed.

Mr. Justice WARD dissents.

GOINS *v.* SNEED.

5-1596 317 S. W. 2d 269

Opinion delivered October 27, 1958.

[Rehearing denied December 1, 1958]

Brockman & Brockman, for appellant.

Boyce R. Love & Jay W. Dickey, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal presents questions concerning (a) limitations and (b) methods of accounting.

For many years E. E. Goins rented land to John Sneed and advanced him money and supplies for cultivation of the land and harvesting of the crops. In addition to the landlord's lien for the advances, Mr. Goins also had two mortgages as security. One[1] was executed on November 27, 1950, and in addition to securing a specified note, also provided:

"This mortgage shall also be security for any other indebtedness of whatsoever kind that the grantee or holders or owners of this mortgage may hold against grantors by reason of future advances made hereunder, by purchase or otherwise, to the time of the satisfaction of this mortgage."

[1] It described the following property: "The West Half (W½) of the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼) of Section Sixteen (16), Township Eight (8) South, Range Seven (7) West, containing 20 acres, more or less.

"ALSO, 1 Farmall Tractor together with all attachments; 1 Chevrolet Pickup Truck, ½ Ton, 1948 Model, Motor No. AFCA-88424; 1 John Deere Wagon; all Farming Implements; one Grey Mule named Hank; one Dark Bay Horse, named Spotlight; all crops raised or caused to be raised by grantor."

The other mortgage[2] was dated July 6, 1953, and secured a described note and was also for the payment of ". . . goods, merchandise, or supplies, live stock, advances or acceptances furnished, and which may be furnished by second party or parties to first party or parties, the exact amount to be determined by the books of the second party or parties and due and payable on the 1st day of November, 1953." There does not appear to have been any settlement of accounts between John Sneed and E. E. Goins after the 1950 note.

On August 17, 1953 John Sneed, a widower, died intestate, survived by several sons and daughters. Three of the sons (L. G. Sneed, Nelson Sneed, and Garland Sneed) and one daughter (Rebecca Sneed Hamilton), all of full age, agreed to complete the 1953 crop and apply the proceeds on the John Sneed indebtedness to Mr. Goins. This was all done; and according to Mr. Goins' accounts, there was still due him, after all credits, a substantial balance secured by the John Sneed mortgages.[3]

In 1954, some or all of the said four adult Sneed children continued to use the John Sneed farming equipment (mortgaged to Mr. Goins), and rented and cultivated the same lands. Mr. Goins continued to advance money and supplies to the said Sneed children, apparently relying on his landlord's lien and the John Sneed

[2] It described the following personal property:
"One Model G John Deere Farm Tractor Serial No. 35632
One Set 4-row John Deere Cultivators
One Set 3-row Busters
1 cream colored Milk Cow wt. 300 lbs.—6 years old
1 Red Milk Cow wt. 300 lbs.—5 years old
1 Red White Face Bull—5 weeks old
1 Black Bull—2 years old
And all increase from cows
And also all of our crops . . . raised during the year 1953."

[3] Mr. Goins' figures show that at the time of the death of John Sneed the total amount owed by him to Mr. Goins was $6,626.03; that Mr. Goins advanced $1,462.73 to complete the 1953 crop; that the total proceeds from the 1953 crop were $3,408.64; that when the $1,462.73 was first taken out of the proceeds there was left a balance of $1,945.91 to apply on the John Sneed indebtedness; that this reduced the balance of the indebtedness due by John Sneed and secured by the mortgages to $4,680.12; and that the amounts paid by the Sneed children from 1954 and 1955 crops reduced the balance to $2,455.99. The correctness of Mr. Goins' figures was disputed in some instances, but on only a few items.

mortgages. The tacit understanding seems to have been that if the said Sneed children were able to satisfy the mortgage indebtedness of John Sneed to Mr. Goins, then the John Sneed heirs would receive the mortgaged property. There was never any administration on the estate of John Sneed, and no other creditors are mentioned in the record before us.

The 1954 arrangement between the said Sneed children and Mr. Goins was continued by mutual consent for the crop year of 1955. Mr. Goins refused to continue the arrangement for 1956; and on May 28, 1956 filed the present suit against all of the Sneed heirs for judgment for $2,455.99, together with interest from November 22, 1955; and for foreclosure of the two mortgages executed by John Sneed to Mr. Goins. The defendants filed general denial, denied portions of the claimed indebtedness, and also pleaded limitation against each and both of the mortgages executed by John Sneed to Mr. Goins. After an extended trial, the learned Chancellor delivered a written opinion, in which he held:

(1) That all indebtedness incurred by John Sneed to Mr. Goins prior to May 27, 1953 was barred by the 3-year statute of limitation, since this suit was not filed until May 27, 1956; but that all advances made by Mr. Goins to John Sneed after May 27, 1953 up to the time of his death were valid and secured by the mortgages.

(2) That the dealings for 1954 and 1955 between Mr. Goins and the Sneed children were entirely separate from the John Sneed matters and that the Sneed children had overpaid their account by the sum of $2,733.75; but that they had not asked for judgment, so none was rendered.

(3) That during the course of the litigation Mr. Goins had obtained possession of some of the mortgaged chattels by receivership proceedings; and that this cancelled any claim that Mr. Goins had under the John Sneed mortgages.

(4) That Mr. Goins' accounts were in error in a few instances, which we will discuss in Topic III, *infra.*

From that decree both sides have appealed: Mr. Goins claiming he is entitled to judgment for the amount prayed and for the foreclosure of the mortgages; and the Sneed children claiming that they are entitled to judgment against Mr. Goins for overpayment. The questions presented are discussed in a number of points; but we group and dispose of them in the following topic headings:

I. *Limitation against Goins' Right to Foreclose The John Sneed Mortgages.* The Trial Court was of the opinion: (a) that the 3-year statute of limitation (§ 37-206 Ark. Stats. on open accounts) applied to the indebtedness due by John Sneed to Mr. Goins; (b) that the statute continued to run after John Sneed's death, so; (c) that all items furnished more than three years before the filing of the suit (May 27, 1956) were barred by the statute of limitation. Without deciding whether the 3-year statute of limitation or the 5-year statute of limitation would be applicable (because of the provisions in the notes and mortgages sued on), we nevertheless conclude that no statute of limitation had run against Mr. Goins when he instituted his suit to foreclose the mortgages on May 27, 1956.

When John Sneed died on August 17, 1953, none of his indebtedness to Mr. Goins was barred by any statute of limitation: he had executed a mortgage on the 27th of November, 1950 and none of his indebtedness was due until the fall of 1951; and John Sneed had also executed a mortgage on July 6, 1953. In *Bowdre & Co.* v. *Pitts,* 94 Ark. 613, 128 S. W. 57, we held that when a debtor died before the right of action against him was barred by limitation, the "general statute of limitation then ceased to run against the debt and was succeeded by the 2-year statute of non-claims,[4] which did not begin to run before administration on the estate of the decedent. . . The action to foreclose the mortgage was, therefore, not barred and the Chancellor erred in dismissing the complaint . . ." That holding was

[4] The non-claim statute has now been shortened to six months (see § 62-2602 Ark. Stats.).

reiterated in *Montgomery* v. *Gant,* 100 Ark. 629, 140 S. W. 260.[5]

Applying these holdings to the case at bar, it follows that none of the indebtedness of John Sneed to Mr. Goins was barred by the statute of limitation because (a) no limitation had run before John Sneed's death; (b) there was nothing to show any holding adverse to Goins' mortgages; and (c) there was no administration on the estate of John Sneed. So, Mr. Goins was entitled to foreclose his mortgages for whatever amount John Sneed owed him at the time of his death, less whatever amounts the Sneed children had paid on the said indebtedness. Mr. Goins claimed this balance to be $2,455.99. The fact that Mr. Goins had taken possession of some of the mortgaged chattels under a receivership did not operate in any way to prevent him from foreclosing his mortgages. The correct amount for which he was entitled to foreclose will be discussed in Topic *III, infra.*

II. *The Sneed Cross Appeal.* Appellees on their cross appeal say that they are entitled to judgment for $967.95 not allowed by the Trial Court;[6] but we find they are not entitled to any judgment because they took charge of the mortgaged chattels and used them for the purpose of assisting in liquidating the indebtedness of John Sneed to Mr. Goins, and they voluntarily allowed all such proceeds of the crops to be applied on the John Sneed indebtedness. As aforesaid, they were trying to free the land and the chattels of the mortgages when they voluntarily allowed the payments to be so applied. They cannot recover for amounts voluntarily paid. *Northcross* v. *Miller,* 184 Ark. 463, 43 S. W. 2d 734; *Ritchie* v. *Bluff City Lbr. Co.,* 86 Ark. 175, 110 S. W. 591; *Larrimer* v. *Murphy,* 72 Ark. 552, 82 S. W. 168.

III. *The Correct Amount Due Mr. Goins.* Mr. Goins had given the defendants memoranda at various

[5] The case is not reported in full in the Arkansas Reports.

[6] The Chancellor's opinion said, ". . . a surplus credit due L. G. Sneed of $2,733.75"; but, by reason of the appellees' claim of yearly credits, they sought only $967.95 on the cross appeal.

undated and unspecified times as to amounts due, but it seems that each one of these memoranda was for an amount greater than the amount now claimed by Mr. Goins. There is, however, the matter of correct credits to be allowed for an oat crop, and the correct amount to be allowed for some corn. The Chancellor found that Mr. Goins had not allowed the correct amount of credits for these items. We conclude that Mr. Goins had not allowed full credit for some items, so the amount claimed by Mr. Goins on his mortgages is reduced by the sum of $300.00. Mr. Goins was entitled to no personal judgment against any of the defendants.

CONCLUSION

The decree is reversed and the cause is remanded, with directions to enter a decree in favor of Mr. Goins for the sum of $2,155.99, with interest at 10 per cent from November 22, 1955 until paid; for foreclosure of the two mortgages executed to him by John Sneed; and for all costs.

BUTKIEWICZ *v.* WILLIAMS, CHANCELLOR.

5-1648 317 S. W. 2d 15

Opinion delivered October 27, 1958.

G. Thomas Eisele, Owens, McHaney, Lofton & McHaney, for petitioners.

Wm. H. Bowen and *Mehaffy, Smith & Williams,* for respondent.

MINOR W. MILLWEE, Associate Justice. This is an application for a writ of prohibition to restrain the judge of the Second Division of the Pulaski Chancery Court from proceeding further in a suit brought against petitioners by the administratrix of the estate of Reuben W. Bredlow, deceased, and to require said chancellor to transfer the cause to the Pulaski Circuit Court. Petitioners assert that the proceeding pending below is a tort action for the recovery and conversion of personal property, which is not cognizable in equity; that the chancellor had overruled petitioners' request for transfer to circuit court and, unless prohibited, would proceed with the trial of the case over which the court had no jurisdiction of the subject matter; and that the remedy by appeal is inadequate.

According to the pleadings filed below a herd of cattle owned by Reuben W. Bredlow at the time of his death intestate in November, 1956, was in possession of the petitioners, Edward J. Butkiewicz and Annette Butkiewicz, the latter being a daughter of decedent's sister. Pursuant to an order of probate court, Bredlow's widow, as administratrix, first brought an action against petitioners in circuit court for recovery of the cattle together with the increase or the proceeds received by petitioners from the sale or conversion of any of said cattle. After the issues were joined in that action, the administratrix took a non-suit and filed suit in chancery court. The amended complaint in that suit contains the following allegations and prayer for relief.

"2. That at the time of purchase of the said herd of cattle as aforesaid, the cattle were situated on a 160

acre tract of land located at the north end of the Bredlow Farm, which 160 acres had been given in 1953 by the decedent to his mother (Gertrude Bredlow) and sister (Mrs. Lyde Campbell, mother of defendant, Annette Butkiewicz), for and during their lives, with remainder to the bodily heirs of his sister. The decedent's sister died in about April, 1955, so that as of the date of purchase of the cattle as aforesaid, the 160 acre plot belonged to decedent's mother for her life with the remainder interest being vested in the defendant, Annette Butkiewicz and her sister, Phyllis Grant.

"3. That the decedent left the cattle on the said 160 acre plot in the custody of the defendants, that the herd experienced normal growth subsequent to purchase as aforesaid, that defendants, plaintiff is informed and believes, have butchered and/or sold during the intervening years some of the cattle for their own use, that some of the cattle died, that in early January, 1958, the balance remaining of the herd was sold, and that at no time have the defendants made or offered to make an accounting to plaintiff for their actions as custodians of the cattle as aforesaid, but to the contrary, the defendants, in pure violation of their fiduciary relationship and responsibility, have refused and continued to refuse to account to plaintiff for the cattle or the proceeds thereof.

"4. That subsequent to the purchase of the cattle as aforesaid, the decedent furnished money, and/or supplies for the maintenance and upkeep of the cattle, that the defendants, plaintiff is informed, represent that they furnished money, labor and/or supplies for such purposes, that the accounting for such mutual contributions extends over a period of approximately thirty (30) months, that the accounting therefor as well as for the cattle which were sold, butchered for defendants personal use, or which died, together with the increase of the herd, is highly complicated, that defendants have violated their fiduciary relationship as custodians of the cattle, that the knowledge of the facts, events and costs with respect to custodianship of the cattle as aforesaid

is more particular within the knowledge of the defendants, and that plaintiff has no adequate remedy at law and, further, that this action is brought in equity for the purpose of securing an equitable accounting between the parties.

"Wherefore, plaintiff respectfully prays that an account be taken of the amount due the estate of R. W. Bredlow for the herd of cattle purchased by the decedent on or about October 1, 1955 and placed in defendants' custody, for the increase in the herd, for the value of the cattle committed to the defendants own use and/or sold by defendants, for the money, labor and/or supplies furnished by the decedent and by defendants, if any, for the maintenance of the said cattle as aforesaid, for plaintiff's costs and for such other relief as is meet and proper in the circumstances."

After the chancellor entered an order denying a demurrer and motion to transfer to circuit court filed by petitioners, as defendants below, they filed the instant application for writ of prohibition.

Petitioners earnestly contend that the amended complaint filed by the administratrix states an action at law for the conversion and/or recovery of personal property, which is not within the jurisdiction of the chancery court and is triable as a matter of constitutional right before a jury. It is argued that when the amended complaint is considered in the light of all the proceedings below it clearly constitutes an action at law, "and that the equitable jargon contained therein is sham and artifice intended only to deprive petitioners of a trial in the proper forum and by a jury." In determining the validity of this argument, we agree that the difficult question is that of the propriety of the remedy by prohibition in view of the recitals of the amended complaint. We have repeatedly held that the writ of prohibition lies where an inferior court is proceeding in a manner beyond its jurisdiction and the remedy by appeal is inadequate, but it may not be used as a substitute for an adequate remedy by appeal. Except in circumstances

which are not present here, it is also well settled that the remedy for a refusal to transfer an action to or from a court of equity is by appeal and not by prohibition. *Weaver* v. *Leatherman,* 66 Ark. 211, 49 S. W. 977; *Dunbar* v. *Bourland,* 88 Ark. 153, 114 S. W. 467; *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13; *Richards* v. *Maner, Judge,* 219 Ark. 112, 240 S. W. 2d 6; *St. Paul-Mercury Indemnity Company* v. *Taylor,* 229 Ark. 187, 313 S. W. 2d 799.

The following statement by the court in *Bassett* v. *Bourland, supra,* has been approved in several later cases: "The writ is never issued to prohibit an inferior court from erroneously exercising its jurisdiction, but only where the inferior tribunal is wholly without jurisdiction, or is proposing or threatening to act in excess of its jurisdiction. To illustrate: The circuit judge certainly had jurisdiction to pass upon the motion to transfer to equity the case pending in its court. If it erroneously transferred the case to equity, prohibition is not the remedy. It can be corrected only on appeal." Petitioners say this holding constitutes an erroneous and untenable legal theory which we should reexamine in the light of cases like *District No.* 21 *United Mine Workers of America* v. *Bourland,* 169 Ark. 796, 277 S. W. 546, where a writ was granted to prohibit a court of equity from taking jurisdiction of an action in tort for unliquidated damages. In that case the court said: "The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Russell* v. *Jacoway,* 33 Ark. 191; and *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, and cases cited." The court also approved the following rule from Pomeroy's Equity Jurisprudence, 3rd ed., Sec. 178: "Where the primary right of the plaintiff is purely legal, arising either from the non-performance of a contract or from a tort, and the money is sought to be recovered as a debt or as damages,

and the right of action is not dependent upon or connected with any equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like, full and certain remedies are afforded by actions at law, and equity has no jurisdiction; these are cases especially within the sole cognizance of the law."

At this stage of the proceedings we are unwilling to say that the allegations of the amended complaint present a purely legal action for conversion unrelated to such equitable features as trust and accounting and that it states no ground for the intervention of equity. We decline to overrule the doctrine of *Bassett* v. *Bourland, supra.* Under the recitals of the amended complaint the chancery court had jurisdiction to pass on the motion to transfer to circuit court. If it acted erroneously the error may be corrected on appeal, and prohibition is not the remedy.

The writ is denied.

BROYLES *v.* SUMMERS.

5-1641 317 S. W. 2d 14

Opinion delivered October 27, 1958.

John L. Sullivan, for appellant.

Talley & Owen, by *Ancil M. Reed,* for appellee.

George Rose Smith, J. This is the second appeal in this case. In 1954 two of the appellants, Paul E. Broyles and his wife, agreed to sell a house and lot to the appellees, W. J. Summers and his wife. In 1955 the purchasers brought this suit for specific performance of the contract. On March 19, 1956, the chancellor entered a decree for the plaintiffs and directed that the sellers convey the property to the purchasers upon the payment of the balance of the purchase price, which was found to be $2,462.25. Upon an appeal by the sellers that decree was affirmed on November 5, 1956. *Broyles* v. *Summers,* 226 Ark. 878, 294 S. W. 2d 766.

Later on a dispute arose as to whether the purchasers were entitled to a credit upon the purchase price in the amount of the rents collected by the sellers after the date of the original decree. The appellees filed a motion in the trial court, asking that they be given credit for these rents and that the sellers be required to execute a deed upon the payment of the original balance less the amount of the rents. In response to this motion the sellers contended, as they do upon this appeal, that our affirmance of the 1956 decree settled every issue in the case and precluded the purchasers from seeking a credit for rents collected after the entry of that decree.

A hearing was had in the chancery court upon the issues raised by the supplemental pleadings. It was shown by undisputed testimony that, in connection with the first appeal, the parties had agreed, through the attorneys then representing them, that the sellers would not be required to execute a supersedeas bond and that, in lieu of such a bond, the rents received by the sellers after the date of the decree would be applied upon the purchase price if the chancellor's decision should be affirmed. By the decree now under review the chancellor simply enforced the parties' agreement and made a finding, which we think to be supported by the evidence, that the purchasers are entitled to a credit of $660, rep-

resenting rents collected by the sellers between the date of the original decree and the date of the supplemental decree.

The chancellor's decision was correct. It is doubtless true that in many cases, perhaps in most cases, our affirmance of a judgment or decree ends the litigation except for the matter of enforcing the trial court's order. But this is not invariably true. Not infrequently justice requires that further proceedings be had with reference to rights arising after the entry of the trial court's original judgment. For example, in *Montgomery* v. *Black,* 75 Ark. 184, 86 S. W. 1006, we affirmed a chancery decree setting aside an administrator's sale and remanded the cause with directions that the land be judicially sold and the proceeds distributed. Upon remand the trial court required the administrator to account for rents collected by him after the date of the first decree. On a second appeal, *Robinson* v. *Black,* 84 Ark. 92, 104 S. W. 554, we held that, although the cause had been remanded for "the sole purpose" of having the land sold, it was proper for the trial court to ascertain the amount of rents collected by the administrator *after* the date of the original decree. That issue had not arisen when the sale was set aside in the first instance and was not adjudicated by the affirmance of the initial decree.

The appellants' position in the case at bar cannot be upheld. If, in taking the first appeal, they had executed a supersedeas bond for the purpose of maintaining the *status quo* and thereby enabling themselves to continue to collect the rents, the affirmance of the decree would not have been *res judicata* in a proceeding upon the bond for the recovery of rents collected after the date of the superseded decree. *Dover* v. *Henderson,* 197 Ark. 971, 125 S. W. 2d 798. Instead of making the bond, the appellants were permitted to continue to collect the rents on the faith of their agreement that the appellees would receive credit upon the purchase price if the decree were

affirmed. The appellants cannot invoke the doctrine of *res judicata* as a basis for repudiating their promise.

Affirmed.

NABHOLZ CONSTRUCTION CORP. *v.* PATTERSON, CHANCELLOR.

5-1773 317 S. W. 2d 9

Opinion delivered October 27, 1958.

Guy H. Jones, for petitioner.

Martin, Dodds, Kidd, for respondent.

GEORGE ROSE SMITH, J. On July 29, 1958, the petitioner, by its attorney, State Senator Guy H. Jones, filed suit in the Faulkner chancery court to enjoin the members of a labor union from picketing a construction job at Conway. On the same day a temporary injunc-

tion against the picketing was issued by the county judge, both the circuit judge and the chancellor being absent from the county. After the issues were joined the chancellor set the case for a final hearing on September 8.

On August 23 the Governor called the General Assembly into a special session that was to begin on August 26. Senator Jones, as a member of the legislature, then asked for a continuance under the provisions of Ark. Stats. 1947, § 27-1401. The chancellor granted the request only to the extent of resetting the case for trial on October 6. The petitioner later filed this application for a writ of prohibition, contending that the legislature will be in continuous session until January 10, 1959, and that the statute therefore requires that the case be stayed until at least thirty days after that date. The chancellor postponed the trial until the petitioner's application could be passed upon by this court.

The respondent insists that the trial court acted within its jurisdiction in setting the case for trial and that prohibition is accordingly not the petitioner's proper remedy. It has been held, however, that a court acts in excess of its jurisdiction in proceeding to a trial when the statute in question requires that the case be continued. *Barton-Mansfield Co.* v. *Higgason,* 192 Ark. 535, 92 S. W. 2d 841. We do not now re-examine the soundness of the majority's ruling in that case; for the principal question in the case at bar affects the administration of justice and should, in the public interest, be decided on its merits.

The statute provides that when any attorney in a pending case is a member of the legislature all proceedings shall be stayed "for not less than 15 days preceding the convening of the General Assembly and for thirty days after its adjournment, unless otherwise requested by any interested member of said General Assembly." Ark. Stats., § 27-1401. The issue here is whether the adjourning order of the August special session of the

General Assembly entitles the petitioner's attorney to invoke the protection of the statute.

The legislature convened on August 26 and remained in session at the state capitol in Little Rock until August 29. On that day the members adopted a resolution of adjournment and returned to their homes throughout the state. The adjourning resolution, after a preamble declaring the need for a continuation of the session, reads as follows:

"1. That on Friday, August 29, 1958, we do adjourn at 12:00 M. (high noon) until January 10, 1959;

"2. That the items within the purview of the proclamation for the convening of the present session have not been completed; and that there are yet numerous bills in committee and various items that we can consider;

"3. That additional time is needed to study and draft legislation which may vitally affect our school problems;

"4. That we adjourn subject to the call of the President of the Senate and the Speaker of the House; and that we duly forego any compensation for days in which we are not actually in session;

"5. That said adjournment will be at no expense to the State of Arkansas except for days actually served between August 29, 1958, and January 10, 1959;

"6. That on January 10, 1959, we duly adjourn *sine die* at 12:00 M. (high noon)."

The petitioner argues that the effect of this resolution was to create merely a recess until January 10, 1959, when the true adjournment will take place. On this basis it is contended that, since the statute in question refers only to an adjournment, the petitioner is entitled to a continuance until thirty days after January 10, 1959.

We do not find this argument persuasive. An adjournment may be either to a day certain or without day, while a recess is defined as a suspension of business for a comparatively short time. Webster's New International Dictionary (2d Ed.). See also *Tipton* v. *Parker,* 71 Ark. 193, 74 S. W. 298. Here the intermission appears to have been an adjournment to a day certain, and indeed that seems to have been the understanding of the General Assembly itself, for the resolution uses the words "adjourn" and "adjournment," with no mention of a recess.

We do not, however, rest our decision upon the technical distinction between a recess and an adjournment. The consideration of primary importance is whether the legislature, in enacting the statute now invoked by the petitioner, intended for it to be controlling in a situation such as this one, when the General Assembly is not actually in session in Little Rock and when its members are free to attend to private business.

We are convinced that the statute was not meant to apply to this situation. It requires that proceedings be stayed for a period beginning at least fifteen days before the session and ending thirty days after adjournment. The policy underlying the law was aptly stated in the emergency section of Act 4 of 1931, where it was declared that "it is more important that members of the legislature shall attend to their public duties rather than to their private affairs." The essential need for the statute lies in the attorney's duty to be in attendance at the legislative session. See *Cox* v. *State,* 183 Ark. 1077, 40 S. W. 2d 427. The periods of grace before and after the session are manifestly intended to enable a lawyer to make advance arrangements for the temporary suspension of his practice and, after adjournment, to interview witnesses and make other preparations for trial.

None of these considerations are involved in the contention now urged by the petitioner. Senator Jones was

required to be at the capitol for a special session lasting four days, after which he was free to resume his private practice of law. He was duly granted a continuance of more than thirty days after his return to his home at Conway. Neither the letter nor the spirit of the law contemplates a further postponement.

Our ruling in *McConnell* v. *State,* 227 Ark. 988, 302 S. W. 2d 805, goes far toward deciding the present case. There we pointed out that a statute affording reasonable protection to attorneys serving in the legislature is valid. But if the act clearly goes beyond the needs of the situation and in effect transfers the control of judicial dockets from the courts to the attorney members of the legislature, it becomes an unconstitutional invasion of the powers granted to the judiciary.

To construe § 27-1401 as the petitioner would have us do would present a serious question as to its validity. Under this interpretation there would be no limit to the unjust delays that might be demanded. The present General Assembly, the Sixty-First, was convoked in extraordinary session within eleven days after the close of its regular session in March of 1957. Had that special session ended with an adjourning resolution like the one now before us, the petitioner's argument would have led to mandatory continuances extending to almost two years. Public policy strongly demands the prompt trial of criminal and civil cases. On the criminal side, unnecessary postponements destroy much of the deterrent effect that a conviction should have. On the civil side, it is a truism that justice delayed is apt to be justice denied. Indeed, this case illustrates the principle, for if the temporary injunction cannot be reviewed until thirty days after January 10, 1959, and even then not until thirty days after the adjournment of the regular legislative session that will convene on January 13, the construction job may well be finished before the case is heard. The case would then be moot, so that the defendants would be deprived of their day in court.

Although these considerations of public policy must give way to the pressing need for brief continuances in connection with actual sittings of the General Assembly, they cannot be disregarded when the legislators have resumed their private business and can assert no well-grounded plea for a postponement.

It is earnestly urged that, since the adjourning resolution authorizes the President of the Senate and the Speaker of the House to recall the legislators, Senator Jones and others in his situation cannot make preparations for trial, such as the summoning of witnesses, with any assurance that they will not be called away on the eve of trial. This risk, however, is part of the sacrifice involved in this particular type of public service. The Governor has the power under the constitution to convoke the General Assembly at any time. Ark. Const., Art. 6, § 19. The hazard of being recalled by the President of the Senate and the Speaker of the House under the terms of this resolution is precisely similar to the constant hazard of being recalled by the chief executive.

Writ denied.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice (dissenting). In dissenting, I take cognizance of the fact that we are living in tumultuous and abnormal days; otherwise, I should only take the view herein expressed with great reluctance, and for that matter, otherwise, the legislature would not have passed the resolution under discussion. Certainly, it is entirely possible that the General Assembly could be called back at any day, and this call could well come during the preparation for trial, or during the trial itself. The majority says that "This risk, however, is part of the sacrifice involved in this particular type of public service." While the emergency clause to Act 4 of 1931 (Sec. 27-1401) states the purpose of the legislation to be,

> "* * * that members of the legislature shall attend to their public duties rather than to their private affairs * * *."

I am also persuaded that a secondary purpose was to prevent the sacrifice of a legislator's private practice.

Under normal circumstances, the lawyer legislator knows when the General Assembly will meet, and can make his plans accordingly, but under the present existing circumstances, the time of a possible reconvening cannot be ascertained, and under this ruling of the majority, preparation for litigation, dates for trial, etc., cannot be made with certainty.

Irrespective of the fact that the word "adjourn" is used in the resolution, a reading of same clearly shows that the legislature intended to recess rather than to adjourn. Black's Law Dictionary, 4th Edition, page 1434, defines the difference between a recess and an adjournment. A recess is:

> "In legislative practice, the interval, occurring in consequence of an adjournment, between the sessions of the same continuous legislative body; not the interval between the final adjournment of one body and the convening of another at the next regular session."

In other words, it is a temporary dismissal, and not an adjournment *sine die.* We find this view expressed in one of our own cases *Tipton* v. *Parker,* 71 Ark. 193, 74 S. W. 298. There, Justice Wood quotes Judge Cooley, relative to the authority of a legislative committee to sit during a recess of the house which had appointed it. Following which, Judge Wood states:

> "The 'recess' here referred to by Judge Cooley means the intermission between sittings of the same body at its regular or adjourned session, and not to the interval between the final adjournment of one body and the convening of another at the next regu-

lar session. When applied to a legislative body, it means a temporary dismissal, and not an adjournment *sine die.*"

Here, according to the resolution under discussion "* * * the items within the purview of the proclamation for the convening of the present session have not been completed; and that there are yet numerous bills in committee and various items that we can consider; 3. That additional time is needed to study and draft legislation which may vitally affect our school problems; * * *."

Accordingly, in my opinion, the legislature is only in recess, and its lawyer members are entitled to the protection afforded by Section 27-1401. I would therefore grant the petition.

DAILEY *v.* ADAMS.

5-1640 319 S. W. 2d 34

Opinion delivered October 27, 1958.

[Rehearing denied January 19, 1959]

Botts & Botts, for appellant.

George E. Pike, for appellee.

PAUL WARD, Associate Justice. Appellant, Charlie Dailey, filed a claim in the amount of $7,000 against the estate of Maggie M. Goodwin which was disallowed by the Executor and also by the Probate Court. For a reversal, he prosecutes this appeal. The controversy between the parties is based not upon disputed facts but upon the legal significance of those facts.

Maggie M. Goodwin died testate on March 7, 1957. Her will was executed June 2, 1956 and probated March 25, 1957. This will is not involved or significant in this litigation except in a single instance to be noted later. The executor of the will is H. C. Adams.

On September 5, 1957 appellant filed his claim which consisted only of the usual affidavit with two exhibits attached. One exhibit was a check, as follows:

"DeWitt Ark. October 19, 1956 No. .....

FIRST NATIONAL BANK

PAY TO THE
ORDER OF ..... Charlie Dailey $7,000.00

Seven thousand no/100 ..... DOLLARS

FOR from my estate as
mentioned in letter .....Maggie M. Goodwin"

The other exhibit was a written document, to-wit:

"I Maggie M. Goodwin of sound mind do hereby *artharize* Charlie Dailey to rite this check on me for $7,000.00 to bee paid out *of my estate* to Charlie Dailey and he is to care for my *dog* Madam Shan for her lifetime and *beried in a pine box* at the foot of my grave and to place on my cemetary a arch that I have told

Mr. Lawson Fly about the size and shape to be placed in the South West corner of the Merritt Cemetary bearing the name the Merritt Cemetary by Maggie Merritt Goodwin and to remodel my house for his convenience leaving the too original rooms that was moved on the property.

R by Charlie Dailey
for Maggie M. Goodwin
S/s Maggie M. Goodwin"

The check and document were placed in an envelope and delivered to appellant at the time of their execution and were held by him until filed as a claim in the Probate Court.

Appellant's contentions here are based on two grounds. *One.* The trial court erred in holding (a) the check and document were without consideration, (b) claimant had burden of showing consideration, and (c) testimony could not be introduced to show consideration. *Two.* The trial court erred in holding that the check and document did not constitute a gift *inter vivos* or a gift *causa mortis.*

One. At the beginning it is noted that although the document has certain testamentary aspects, appellant makes no claim on that basis. In this appellant is correct because the testimony and the document show it was not properly executed as a will or as a codicil to a will. Nor does appellant base his claim on compensation for services rendered during the deceased's lifetime. If he had done so certain oral testimony would have been admissible.

We gather from statements in appellant's brief that his claim is based upon a written contract. In response to an inquiry by the court it was stated that appellant was not relying on an implied contract, but that he was relying on a "specific contract." At another place we find this statement: "It is insisted by the claimant that the instruments dated October 19, 1956 represented a *written* contract and are obligations against

the estate; said instruments are heretofore set out fully in this brief." (emphasis supplied). Viewed in this light, the Chancellor's finding that no valid contract existed must be sustained, as indicated below.

The document was not signed by appellant. He was not obligated to do anything. There was no consideration shown in the document. It mentioned nothing appellant had done in the past, but only things he was to do in the future. It is not stated nor was it shown that he had performed any part of the socalled contract. Appellant does not rely on any mistake or fraud, in the absence of which parol testimony was inadmissible. In *American Southern Trust Co.* v. *McKee,* 173 Ark. 147, (at page 160), 293 S. W. 50 this court said: ". . . it is universally held that a written contract, free from doubt and ambiguity, cannot be altered or contradicted by parol evidence except for fraud or mistake." The trial court was therefore correct in refusing to allow appellant to show by parol testimony what services he had rendered to Mrs. Goodwin during her lifetime. Moreover, even had such testimony been admissible it would have not necessarily shown consideration for the purported contract under consideration. Item 5 of Mrs. Goodwin's will heretofore mentioned shows that she gave appellant 4 lots in Block 42 in the City of DeWitt. This could have been for services already rendered since all services mentioned in the document were to be performed in the future.

Two. In the alternative to the first contention discussed above, appellant says the trial court erred in not allowing his claim on the basis of a gift. We do not agree.

There was no gift *inter vivos* because there was no irrevocable transfer of the $7,000 to appellant which is necessary under the decisions of this court dating back to *Ammon* v. *Martin,* 59 Ark. 191, 26 S. W. 826 where, in this connection, the court said: "The gift being made by Mrs. Lynch while on her death bed, and but a few hours before her death, the presumption is it was a gift *causa mortis.* But death, supervening in so short a time after the delivery, practically eliminated the ele-

ment of revocability which distinguishes a gift *causa mortis* from one *inter vivos.* Delivery before death is just as essential to a gift *causa mortis* as it is to a gift *inter vivos,* and the same rules as to delivery are applicable to both; but in the former, although absolute in form, the title to the thing given remains in the donor, and the gift is subject to revocation at any time prior to his death. In the latter — *inter vivos* — the gift becomes absolute upon delivery." In the case under consideration there was a delivery of the check to appellant, but appellant had no right to cash it at that time, and there was no circumstance which eliminated "the element of revocability." There was a period of approximately 140 days (from Oct. 19, 1956 to March 7, 1957) in which Mrs. Goodwin could have stopped payment on the check or changed her will or could have revoked the document. We have carefully considered the cases relied on by appellant, but find they can be distinguished on the facts or have no bearing on the issue here considered. There is nothing in *Burks* v. *Burks,* 222 Ark. 97, 257 S. W. 2d 369 contrary to the views above expressed.

Nor do we think appellant's claim can be sustained on the basis of a gift *causa mortis.* The question of irrevocability does not arise in such a gift, but it is essential that the gift be made in contemplation of death. See: *Hatcher* v. *Buford,* 60 Ark. 169 (pp. 173, 4), 29 S. W. 641, and *Ellsworth, Administrator* v. *Cornes,* 204 Ark. 756, 165 S. W. 2d 57. No such required showing is disclosed by the record, but just the contrary. As stated before, approximately 140 days elapsed after the check was written before Mrs. Goodwin died. While it is shown that she was ill a greater portion of this time there was no proof that the check was written in contemplation of death.

Affirmed.

WHEELER *v.* WALLINGSFORD.

5-1654 317 S. W. 2d 153

Opinion delivered October 27, 1958.

[Rehearing denied November 24, 1958]

Shackleford & Shackleford, for appellant.

Brown & Compton, Gilliam & Mayfield and *McKay, Anderson, Crumpler,* for appellee.

SAM ROBINSON, Associate Justice. Appellant, Wheeler, filed suit in the Pulaski Circuit Court on February 2, 1954, against appellee, Wallingsford, a resident of Union County, and others, for a debt accruing February 16, 1949. The summons issued for Wallingsford was directed to the Sheriff of Union County. The trial court overruled a motion to quash service. On a petition to this court for a writ of prohibition, it was held, in the decision handed down on February 7, 1955, that the action was transitory and that the service of summons in Union County was invalid. *Barr* v. *Cockrill,* 224 Ark. 570, 275 S. W. 2d 6.

About six months later, on August 18, 1955, Wheeler took a nonsuit in the Pulaski Circuit Court, and on August 9, 1956, a little less than a year thereafter, he filed a new suit against appellee in Union County. Appellee pleaded the statute of limitations as a defense to that action. It is conceded that the alleged debt on which Wheeler based his cause of action accrued on Feb-

ruary 16, 1949. It was barred by the statute of limitations when the present suit was filed on August 9, 1956, unless the time in which a new suit could be filed was extended by Ark. Stat. § 37-222, which gives the plaintiff a year in which to commence a new action after suffering a nonsuit. In the present action the trial court held that the one year period in which a new suit could be filed began to run on February 7, 1955, when the decision of the Supreme Court became final, wherein it was held that the summons served in Union County was invalid in the action that had been filed in Pulaski County.

Appellant contends that the one year period in which he could file a new suit after a nonsuit had been suffered, should date from August, 1955, when he was actually granted a nonsuit by the Pulaski Circuit Court. The question is: Just when did appellant suffer a nonsuit in the action filed in the Pulaski Circuit Court? We think the one year period began to run when this court held invalid the summons issued by the Pulaski Circuit Court and directed to the Union County Sheriff. When the Supreme Court reached the decision that the summons was invalid, the plaintiff's action in Pulaski County came to an end. There was no possible way the summons issued theretofore could be served that would bring the defendant into court. The summons issued by the Pulaski Circuit Court was directed to the Sheriff of Union County; the action was transitory; there were no codefendants that would hold the case in the Pulaski court. Before the defendant could be brought into court he would have to be served in Pulaski County; the Sheriff of Union County had no authority to serve him in Pulaski County. Of course, a new summons could have been issued directed to the Pulaski County Sheriff, but appellant concedes that if such procedure had been adopted, even if the defendant could have been served in Pulaski County, the action would have been barred by the five year statute of limitations because the summons would have been placed in the hands of the sheriff more than five years after the cause of action accrued,

and the time would not have been extended by a nonsuit. An action is commenced when the complaint is filed and the summons is placed in the hands of the sheriff. *Goodyear Tire & Rubber Co.* v. *Meyer,* 209 Ark. 383, 191 S. W. 2d 826. No other conclusion can be reached than that the plaintiff's case came to a complete and final end in Pulaski County when this court granted prohibition, and it was more than a year later that the suit was filed in Union County. To suffer a nonsuit it is not necessary that a suitor actually ask for and be granted a nonsuit in the trial court. *State Bank* v. *Magness,* 11 Ark. 343; *Jernigan* v. *Pfeifer Brothers,* 177 Ark. 145, 5 S. W. 2d 941.

Young v. *Garrett,* 212 Ark. 693, 208 S. W. 2d 189, was very similar to the case at bar on the point involved here. There, in speaking of the nonsuit statute, Ark. Stat. § 37-222, the court said: "But wording of the Act does not justify belief that it was the legislative purpose to so liberalize this gratuity (permitting a new suit to be filed within a year of suffering a nonsuit) that irrespective of adverse judicial decisions in a given case that the controversy in that jurisdiction had been terminated, a period of one year would yet remain while courts were reaffirming what had already been explicitly held."

As heretofore pointed out, when this court granted prohibition, the action in the Pulaski Circuit Court came to an end. The plaintiff had suffered a nonsuit, and the present action was not filed within one year thereafter. Appellant relies heavily upon the case of *Myers* v. *Union Elec. L. & P. Co.,* 233 Mo. App. 730, 125 S. W. 2d 950. In the peculiar circumstances of that case it was held that a nonsuit did not date from the granting of prohibition, but there the court said: "The test of whether or not a nonsuit has been 'suffered' is whether or not the order or judgment of nonsuit has finally terminated the suit." Here the order granting prohibition terminated the action in the Pulaski Circuit Court just as effectively as it could be done. Therefore, appellant in the case at bar

suffered a nonsuit at that time and it was more than one year before a new suit was commenced. Hence, the new suit could not be saved from a successful plea of the statute of limitations by the one year nonsuit statute.

Affirmed.

SMITH *v.* SMITH.

5-1621 317 S. W. 2d 275

Opinion delivered November 3, 1958.

[Rehearing denied December 1, 1958]

Lee Seamster & Russell Elrod; Barney Hamilton, Kansas, Okla., for appellant.

A. L. Smith, for appellee.

CARLETON HARRIS, Chief Justice. Hugh Smith and Lucy Coleman Smith, his wife, lived at Siloam Springs, Arkansas. They had no children. On April 22, 1947, Mrs. Smith executed a will leaving all property to her husband.[1] On November 3, 1952, Mr. Smith executed a will leaving all property to his wife. On April 19, 1957, while riding together in an automobile, the Smiths had an accident. Hugh Smith was dead when assistance arrived at the scene, and Lucy Coleman Smith was unconscious, and remained so until her death seventeen days later on May 6th. Clint Smith, appellant herein, and brother of the deceased, was named administrator, with the will annexed, of the estate of Hugh Smith. A. L. Smith, appellee herein, was named administrator, with the will annexed, of the estate of Lucy Coleman Smith. Both estates are now pending in the Benton County Probate Court. The administrator of the Hugh Smith estate filed a petition asking for a construction of the two wills. A. L. Smith, administrator of the estate of Lucy Coleman Smith, demurred to the petition, setting out that the

[1] On February 10, 1954, Mrs. Smith signed a typewritten statement in the form of a will, attempting to dispose of certain property which she had received in 1948 from a deceased sister, Mrs. Mary Grant Sills of Denver, Colorado. These addenda attempted to make certain bequests for the benefit of a brother, certain nephews and nieces, and the establishment of a memorial. This statement was signed by Mrs. Smith but not witnessed. We do not consider that this statement has any bearing on the issues in this case.

petition with exhibits[2] thereto, showed on its face that the two wills were not ambiguous, that appellant had no right or interest in the estate of Lucy Coleman Smith that would entitle him to a construction of her will; that the petition showed that the estate of Hugh Smith, under the terms of his will, became the property of Lucy Coleman Smith at his death, and since her decease, had become the property of her heirs, named in the petition; that the petition set forth no facts which would authorize the consolidation of the cases for the purpose of construing the wills of Hugh Smith and Lucy Coleman Smith, and asked that the demurrer be sustained and the petition dismissed. The heirs of Mrs. Smith also filed a demurrer, adopting as their own the demurrer filed by appellee administrator. On hearing, the court sustained the demurrers, and dismissed the petition of appellant for construction of the wills. From such order, comes this appeal.

We deem it first proper to relate the provisions of the two wills. Lucy Coleman Smith's will was properly executed on April 22, 1947, and after formalities, consists of three items. Item one directs the payment of debts at the time of death, and expenses of last illness and funeral. Item two provides: "All the rest and residue of my property, real, personal or mixed, and wheresoever it may be situate, and of whatsoever it may consist, I give, devise and bequeath to my husband, Hugh Smith, absolutely and without any limitation whatever." Item three appoints the husband, Hugh Smith as executor of the will, to serve without bond. Hugh Smith's will was executed on November 3, 1952, and after formalities, consists of two items. Item one directs the payment of debts at the time of death, and expenses of last illness and funeral. Item two reads as follows: "All of the rest and residue of my property, of whatsoever it may consist, and wheresoever it may be situated, I give, devise and bequeath to my wife, Lucy Coleman Smith, absolutely and without any limitations

[2] The will of Hugh Smith, the will of Lucy Coleman Smith, and the typewritten statement signed by the latter.

whatever, and I hereby nominate and appoint said Lucy Coleman Smith to be Executrix of my will, and request that she be permitted to serve as such without giving bond." These instruments would seem to be entirely clear, but appellant bases his argument for reversal upon the allegation that a latent ambiguity was created, and that in such a situation, the court will aid itself by resorting to extrinsic facts and circumstances to determine the actual intent of the testators. The latent ambiguity, says appellant, is created by the following circumstances: first, the wills provide for the survivor to be executor, or executrix, as the case might be, without any alternate or substitute mentioned; second, as a result of the accident, both testators lost their power to will at the same instant; third, the Arkansas Uniform Simultaneous Death Act placed a common disaster clause in both wills, and finally, "facts and circumstances surrounding the accident." These "facts and circumstances" are not set out in any pleading.

The petition for construction contains a quite unusual and unique allegation. We quote:

"That the said Hugh Smith and his wife, Lucy Coleman Smith, were in an automobile accident on the 19th day of April, 1957, said accident being instantly fatal to each of them at the same time, although the doctors maintained a vain hope of survival and made every effort to revive and resuscitate said Lucy Coleman Smith until May 6th, 1957, when it was finally determined by the attending physicians that their hope of resuscitation and possible restoration of human life to the said Lucy Coleman Smith was entirely vain, and

That as a matter of modern medical science, your petitioner alleges and states, and will offer the Court competent proof that the said Hugh Smith, deceased, and said Lucy Coleman Smith, deceased, lost their power to will at the same instant, and that their demise as earthly human beings occurred at the same time in said automobile accident, neither of them ever regaining any consciousness whatsoever."

It is interesting to note that these allegations are entirely contrary to an earlier petition filed on the approved Probate form by appellant, when seeking to admit Hugh Smith's will to Probate. There, it was averred:

"Nominee is brother of decedent. Lucy Coleman Smith is in a critical condition as a patient in the Siloam Springs Memorial Hospital and is unconscious and, therefore, is physically and mentally unable to serve as executrix. Administration is necessary to preserve the estate."

On the same date, a prepared petition was filed by Clint Smith, together with Dr. John L. Stockton, a nephew of Hugh Smith, containing the following allegation:

"That said Hugh Smith died, testate, and left surviving his widow, Lucy Coleman Smith, who sustained severe injuries as result of the same accident and is now a patient in the Siloam Springs Memorial Hospital in Siloam Springs, Arkansas, and is in a critical condition and unconscious, and it is the information and belief of the Petitioners and according to information from the doctors and attendants of Lucy Coleman Smith, that she will be incapacitated for several months; * * * ." These petitions sought to name appellant as executor of Hugh Smith's estate (which order was subsequently entered), and apparently as evidence of Lucy Coleman Smith's inability to act, a letter from C. D. Gunter, M. D., was attached to the petition. The letter is as follows:

"Mrs. Lucy Smith, widow of the late Hugh Smith, was severely injured in the same accident that caused her husband's death. Since the accident on 19th April, she has remained in coma due to brain injury. Her mental status after recovery is impossible to evaluate at the present, but it will probably be several months before she would be considered competent. Her other damage consists of fractures of both femurs, fracture of knee joint and fractures of the left arm in several places. These will require several operations and a year would

be a conservative estimate of the time before she will be able to be about and manage her affairs."

However, we shall not include in this discussion the question of whether appellant is bound by the statements made in the earlier petitions, but we mention them only to show that after Hugh Smith's death, Mrs. Smith continued to live, in the ordinary and accepted meaning of the word, and that appellant recognized that fact.

We proceed to a perusal of appellant's contention that a latent ambiguity was created. An "ambiguity" is defined by Bouvier's Law Dictionary, Vol. 1, 3rd Revision, as "indistinctness, or uncertainty of meaning of an expression used in a written instrument." There are two kinds of ambiguity — patent and latent. According to Bouvier: "Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court which is obliged to place a construction upon it, cannot, placing itself in the situation of the parties, ascertain therefrom the parties' intention." On the other hand, according to Volume 2, Bouvier's Law Dictionary, a latent ambiguity is "one which does not appear on the face of the instrument. A latent ambiguity is where words apply equally to different things or subject matter. * * * " Further discussing the subject, the writer says:

"Where a determinate intention appears to be expressed by the written instrument, extrinsic evidence is admissible to show that the description of an object contained in the instrument is applicable with legal certainty to either of two objects; and, a latent ambiguity having thus been disclosed, evidence of the surrounding circumstances is admissible to show which of the objects was meant by the description. * * * "

Interesting examples are then mentioned. For instance:

"* * * where a testatrix gave a share of her residue to her 'cousin, Harriet Cloak,' and the testatrix had no cousin of that name, but had a married cous-

in, Harriet Crane, whose maiden name was Cloak, and a cousin, T. Cloak, whose wife's name was Harriet; evidence was admitted to show the testatrix's knowledge of *an* intimacy with the members of the Cloak family." Further,

"* * * a good type of the 'American doctrine' was a devise to 'the four boys,' where the testator had seven sons, of whom three were shown to be minors living at home."

Possibly a more simple example of latent ambiguity would occur if a testator should leave a bequest to John Smith, and there were two John Smiths who could be intended as legatee. In such event, evidence would be admissible to show which John Smith the testator intended.

We will discuss each fact that appellant contends, taken together, creates a latent ambiguity, except the "facts and circumstances surrounding the accident." This cannot be discussed nor considered, because the allegation is only general, and no specific facts or circumstances are set out in the petition. First, appellant says the fact that neither testator named an alternate executor showed that each expected the other to live and enjoy the property bequeathed and devised. Frankly, we see no significance to this circumstance. Naturally, when one executes a will, he more or less assumes that the executor named will be able to serve; otherwise, he would name someone else. But, though unable to check the point, we venture to say that a majority of wills do not provide for an alternate executor, while some others name no executor at all. The wills before us seem to have been made in a completely normal manner. A husband, or wife, more often than not, names the other as executor (or executrix), and in a great many instances, leaves all property to the surviving spouse. This, of course, is particularly true where there are no children.

Nor are we impressed by appellant's argument as to the second circumstance relied upon by him. In the brief, appellant states:

"Under the allegations of the petition, both Lucy Coleman Smith and Hugh Smith at the same time lost the power to will, power to administer the estate of the other, and power to enjoy the estate of the other. Since both lost all of these powers at the same time, both lost the power to accept the bounty of the other under the reciprocal wills. Hence, both the will of Lucy Coleman Smith and the will of Hugh Smith lapsed and neither is effective to transmit the estate of either."

It is pointed out that the petition for construction of the wills (heretofore quoted) was disposed of by demurrer, which means that the facts alleged in the petition are admitted to be true;[3] that if such facts are true, a cause of action is stated, and appellant accordingly should be permitted to proceed with his proof. Let it first be observed that in reading appellant's petition, as a whole, the assertion of the death of Lucy Coleman Smith appears to be predicated on the theory that such demise occurred "as a matter of medical science," and of course, appellant could not have meant otherwise, for he had already filed the petitions, heretofore mentioned, in the probate court, together with the physician's letter, stating that Mrs. Smith was a patient in the hospital, and would be incapacitated for several months. Black's Law Dictionary, 4th Edition, page 488, defines death as follows:

"The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc., * * * ."

Admittedly, this condition did not exist, and as a matter of fact, it would be too much of a strain on credulity for us to believe any evidence offered to the effect that

[3] For the purpose only of determining the sufficiency of the pleadings.

Mrs. Smith was dead, scientifically or otherwise, unless the conditions set out in the definition existed. The trial court was entirely justified in sustaining the demurrers. In Vol. 41, American Jurisprudence, Sec. 244, page 463, we find:

"Those allegations of a pleading * * * which are contrary to the facts of which judicial notice is taken are not admitted by a demurrer, but are treated as a nullity. The court cannot thus be prevented from passing upon allegations which in their nature are contrary to common experience and common knowledge as a matter of law, or allegations which the law does not allow to be proved."

For instance, in *Southern Railway Company* v. *Covenia,* 100 Ga. 46, 29 S. E. 219, the court took judicial notice of the fact that an infant twenty months of age, is incapable of rendering valuable services, such as running errands, bringing in wood etc., despite allegations to the contrary. There, a child 18 months and 10 days of age was killed by one of appellant's trains, and suit was instituted, alleging *inter alia* that the child

"* * * was capable of rendering, and did render to the plaintiff valuable services, by going upon errands to neighbors residing near to plaintiff's residence, picking up and bringing in coal and chips to make and keep burning fires in the house, bringing the broom and other articles used in house cleaning to his mother, picking up and carrying out of the house trash and litter which tended to render untidy in appearance plaintiff's home, watching and amusing plaintiff's younger child while his wife was engaged in cooking and attending to her household duties; and that these services were worth to the plaintiff the sum of two dollars per month, * * * ."

The railroad demurred to these allegations, and the trial court overruled such demurrer. In reversing the trial court, the Supreme Court of Georgia, in an opinion written by the Chief Justice, said:

"The question is, therefore, squarely made whether the court, on demurrer, can take judicial cognizance of the fact that a child of this tender age is incapable of rendering such service as would authorize the parent to recover, or whether, in such a case, the court is bound to submit the matter to the jury. In the case of *Minnesota* v. *Barber,* 136 U. S. 321, 10 Sup. Ct. 862, Mr. Justice HARLAN said: 'If a fact alleged to exist, upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice.' In *Ho Ah Kow* v. *Nunan,* 5 Sawy. 560, Fed. case No. 6546, Mr. Justice FIELD said: 'We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men.' In the case of *King* v. *Gallun,* 109 U. S. 99, 3 Sup. Ct. 85, it was held that 'the court will take judicial notice of matters of common knowledge, and of things in common use. Courts will take judicial notice of facts generally known as of uniform occurrence, * * * .'

* * *

In our opinion, there can be no issue of fact as to the ability of a child two years old to perform valuable services. Even if the parent should testify that a child of that age could render services of the value of two dollars per month, it would be so inconsistent with every person's knowledge of the incapacity of children of that age to render service that such testimony would be unworthy of credit.

* * *

But it is contended that by the demurrer in the court below it was admitted that the child was capable of rendering service, and that therefore the court was right in overruling the demurrer. * * * In passing upon a demurrer to a declaration, the court considers all the allegations therein. The demurrer admits all the facts well pleaded. If all the facts, taken together show that the plaintiff is not entitled to recover, the court should sustain the demurrer, * * * . If the major prem-

ise in the declaration shows no cause of action, the minor premise will not aid in sustaining it. * * * ''[4]

Likewise, we take judicial notice that one breathing, though unconscious, is not dead.

Appellant contends that the provisions of the simultaneous death act, found in Section 61-124, Volume 5, Arkansas Statutes, Annotated, apply. This section reads as follows:

''Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.''

Appellant argues that this is a ''common disaster'' statute, and that under such an interpretation, Smith and his wife died at the same time, because they died as a result of a common disaster. Three cases are cited, but none of these deal with an interpretation of the Uniform Simultaneous Death Act. The main case relied upon by appellant is *Hackensack Trust Co.* v. *Hackensack Hospital Ass'n.* 120 N. J. Eq. 14, 183A. 723. The facts were as follows: Mrs. Flora Curry Adams and daughter were in an automobile accident in which they were fatally injured. They were taken to a hospital, where Mrs. Adams died in about one hour and the daughter about thirteen hours later. Mrs. Adams had made a will which left all of her property to her daughter, except

''* * * but should my said daughter predecease or not survive me, or should she and I perish in a common disaster, she leaving no issue her surviving, I give, devise and bequeath all of my residuary estate as follows: * * * .''

Here, contingent beneficiaries were named. The Court said:

[4] The court then mentions several imaginary situations that would not be admitted by demurrer; for instance, if the child had been 6 months of age; allegations charging a five year old boy with rape, etc.

"The contentions in the instant suit are based upon construction of the language of the will, which in the one case would interpret the will as though it read 'perish as a result of a common disaster,' while the adverse group of interests would limit the expression so as to make it read substantially 'perish exactly or almost exactly at the time and place of the accident.'

The contentions of the executor of the daughter's estate and those claiming under the daughter's will are that the word 'in' is to be strictly construed as to time and place, and that since neither the mother nor the daughter died immediately or at the scene of the accident, and that since the daughter survived the mother by more than twelve hours, that their deaths were not 'in' a common disaster.

On the other hand, those claiming under the alternative provisions of the residuary clause contend that the expression 'in a common disaster,' as used in ordinary language, is broad enough to include deaths resulting from an accident although not simultaneous. They further contend that from the provisions of the will it was not the intent of testatrix that the daughter should take the residuary estate unless she could have the beneficial enjoyment of it, and that it was also the intent of the testatrix that the residuary estate should be disposed of according to her own wishes unless the daughter should survive her so as to substantially benefit. * * * ." Referring to the will:

"It sets up three contingencies under any one of which the daughter was not to take. It says, '* * * should my said daughter predecease,' second, 'or not survive me.' This second phrase cannot mean anything else except the simultaneous deaths of both of them. The three contingencies would accordingly seem to provide for a possible third other than the prior or simultaneous death of the daughter, namely, in a common disaster with the mother. This would therefore include survival by the daughter of the mother provided they both met their deaths because of a common accident,

since prior or simultaneous deaths had already been provided for."

It will be noted that there is no reference in Hugh Smith's will to death from common disaster; for that matter, there is nothing in the Statute which refers to death by common disaster, though, of course, the situation of simultaneous death would, in a great majority of instances, arise from such an event. But it is possible for people to die simultaneously from natural causes under circumstances that would prevent a determination of who died first. See *In re Dunham's Will,* N. Y. S. 2d 571. At any rate, according to Webster's dictionary, simultaneous means, "the same time," and the Statute refers only to such deaths. Volume 9-C, Uniform Laws, Annotated, reflects that this section is an exact copy of Section 1 of the Uniform Simultaneous Death Act, which has been adopted in at least thirty-seven of our states. A study of the cases quoted reflects that the provisions of the statute never apply unless there is no sufficient evidence to determine which party died first. In the case, *Sauers, Administratrix* v. *Stolz,* 121 Colo. 456, 218 P. 2d 741, a husband and wife were in an automobile accident, and the evidence showed that the husband outlived the wife for a few moments. The trial court found that the husband and wife died simultaneously, and the Colorado Supreme Court, in reversing the lower court, said:

"The court,[5] in making the above findings, apparently relied upon chapter 197, S. L. '43, known as the uniform simultaneous death act, which provides in part as follows: 'Section 1. Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this act.' Where two or more persons perish in a common disaster, such as here, and there is no proof as to which died first, the statute fur-

[5] Referring to the trial court.

nishes a guide, in the absence of evidence, by which descent of property may be judicially determined, and creates a presumption that death of the parties was simultaneous. *The statute is inapplicable if there is evidence as to which one of the parties survived the other*[6] or if there are particular circumstances from which the fact of survivorship may be inferred. The presumption of simultaneous death of the parties was not intended to take the place of competent, positive and direct evidence, and the fact of survivorship requires no higher degree of proof than any other fact in the case."

See also *In re DiBella's Estate,* 100 N. Y. S. 2d 763, where the court, in construing Section 1, stated:

"Of course, in sustaining her burden of proof, it is entirely unnecessary for the petitioner to show by a fair preponderance of the evidence that the husband survived the wife by any matter of hours. If the proof is sufficient, one second would be enough."

To summarize and conclude, this litigation is determined by two facts. First, Hugh Smith and Lucy Coleman Smith did not die simultaneously, and second, there is no ambiguity.

It is well settled law in this state, so well settled as to require no citation of authority, that where there is no ambiguity, or no conflict or repugnance between provisions of a will, judicial interpretation or construction is not required.

Accordingly, the order sustaining the demurrers, and dismissing the petition for the construction of the wills is affirmed.

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[6] Emphasis supplied.

GEORGE, GUARDIAN *v.* ALEXANDER, ADMR.

5-1646 317 S. W. 2d 124

Opinion delivered November 3, 1958.

Wayne Foster, for appellant.

Wilton E. Steed, Chas. S. Goldberger, Jay W. Dickey, for appellee.

J. SEABORN HOLT, Associate Justice. Mrs. Elnora Brown died intestate, without descendants, on April 2, 1956. Her husband, Edwin Brown, and three other parties, claiming to be her heirs at law, survived her. Certain realty owned by the decedent was sold for a cash consideration of $2,900 and is now held by the duly appointed administrator, Kenneth Alexander, appellee. Mrs. Brown's husband was declared incompetent and appellant, Corinne George, was appointed his guardian on April 9, 1956. The facts in this case appear not to be in dispute. Mrs. Elnora Brown had acquired the property in question as a devisee under the will of her (full) sister, Lucinda Adams, on March 22, 1955. The sole question for our determination is whether the estate of Mrs. Brown, deceased, in her real property here involved, was an ancestral estate, or a new acquisition.

Under the provisions of Sec. 61-228 Ark. Stats. 1947, Curtesy—Descent and Distribution—the surviving husband is entitled to one-third of the wife's realty for life if the estate is ancestral. If the estate is a new acquisition, then the husband would be entitled to one-half of

her realty in fee. A trial resulted in a judgment finding and declaring the estate of Elnora Brown to be an ancestral estate and we hold that the court was correct in so finding.

The distinction generally held between an ancestral estate and a new acquisition, is that a new acquisition is one that the intestate acquired by his exertions and industry or by will or deed from a stranger to the blood. See *Kelly's Heirs et al.* v. *McGuire and wife et al.,* 15 Ark. 555. Here the property came to the wife solely by the will of her sister. The blood relationship of the decedent, Mrs. Brown, and her sister brought this estate into being. ". . . ancestral estates come from no other consideration but that of blood; all others are new acquisitions," *Dowell* v. *Dowell,* 207 Ark. 578, 182 S. W. 2d 344. This court in *Carter* v. *Carter,* 129 Ark. 7, 195 S. W. 10, used this language: "Under our statute of descents as interpreted by this court it is held that ancestral estates embrace not only descended estates, but also all other, which may have come to the intestate by gift, or devise, from either parent, or from any relation of the blood of either parent, and that, as to all such, it is the manifest intention of the legislature, upon the death of the intestate, without issue, to preserve them in the line of the blood from whence they came to the same extent that descended estates were so preserved at common law."

We conclude, therefore, that this property became vested in the decedent because of the blood relationship to her sister, Lucinda Adams, who willed it to her, and is, therefore, ancestral property. Affirmed.

TRAVELERS INS. CO. *v.* CARGILE MOTOR CO.

5-1630 317 S. W. 2d 126

Opinion delivered November 3, 1958.

Van Johnson and *Atchley & Russell,* by *Howard Waldrop,* Texarkana, Tex., for appellant.

Arnold & Arnold, John O. Moore, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal challenges a judgment which appellee, Cargile Motor Company (hereinafter called "Cargile"), recovered against Travelers Insurance Company (hereinafter called "Travelers") on an insurance policy issued by Travelers in which Cargile was named as the lien holder.

In February 1957 Cargile sold a new automobile to Dr. Frankenstein, and the unpaid balance was in excess of $2,400.00. Travelers issued a comprehensive insurance policy to Dr. Frankenstein which, *inter alia,* protected him and Cargile against theft or larceny. In the endorsement on the policy Cargile was named as lien holder, and the germane portion of the endorsement reads:

"Loss or damage, if any, under the policy shall be payable as interest may appear to Cargile Motor Company, lien holder, and this insurance as to the interest of the . . . Conditional Vendor or Mortgagee (herein called the Lienholder) shall not be invalidated by any act or neglect of the . . . Owner of the within described automobile nor by any change in the title or ownership of the property; . . . "

Dr. Frankenstein, aged 80, was an optometrist in Texarkana, Texas, and a young lady working for him, named Pat Blood, was approximately 20 years of age. Dr. Frankenstein allowed her to have possession of the car and to drive it, as part of her duties were to keep the books and collect accounts. In April, 1957 there was a "falling out" between Dr. Frankenstein and Pat Blood. He demanded and received the return from her of his fur stole and a diamond ring. He also demanded the automobile; and she refused because she claimed that he had given the car to her. However, she did give him one set of car keys but kept another set and continued to drive the car. Some time thereafter she left Texarkana with the car and Dr. Frankenstein advised the police that she had gone off with the car after he had demanded its return. It was about May 1st when Pat Blood left Texarkana with the car. She has never returned. Cargile and Dr. Frankenstein filed claim against Travelers for recovery on the policy, claiming that Pat Blood had stolen the car. Travelers denied liability; and trial to a jury resulted in special verdicts (as hereinafter discussed) on which the Court rendered judgment for Cargile against Travelers for $2,501.48, with interest, as the balance due Cargile on its lien claim. Travelers has appealed, presenting among other things, the matters herein discussed:

I. *Refusal to Make Pat Blood A Party Defendant.* Relying on § 27-814 Ark. Stats., Travelers moved the Trial Court to make Pat Blood a party defendant, but the motion was refused; and Travelers claims the following cases as requiring such joinder: *Smith* v. *Moore,* 49 Ark. 100, 4 S. W. 282; *Choctaw O. & G. RR.* v. *Mc-*

Connell, 74 Ark. 54, 84 S. W. 1043; and *Westmoreland* v. *Plant,* 89 Ark. 147, 116 S. W. 188. In *Smith* v. *Moore* (*supra*), the effort was to recover a mortgaged chattel and an adverse claimant was held to be a necessary party. In *C. O. & G. RR.* v. *McConnell* (*supra*), it was shown that other persons were claiming the fund in controversy and we held that such other claimants should be made parties. The case of *Westmoreland* v. *Plant* (*supra*) was an ejectment action and claimants claimed only a half interest in the land. We held that the persons claiming the other interest should be made parties.

In the case at bar, Cargile was not seeking to recover the automobile but was seeking to recover from Travelers on an insurance policy on the claim that Pat Blood had stolen the car. The cited cases do not justify a holding that the alleged thief is a necessary party defendant in a suit on an insurance policy. The Trial Court refused Travelers motion, stating, *inter alia,* ". . . that the primary subject matter of this lawsuit is the determination of alleged liability of the defendant under an insurance policy; that Pat Blood is not in any manner a party to, or interested in, said contract of insurance." The Trial Court was correct, because it was not claimed that Pat Blood had any interest whatsoever in the insurance policy sued on.

II. *No Theft Of The Car.* Travelers maintained below, and stoutly insists here, that there was no theft of the car within the coverage of the policy. The parties stipulated in open Court that the policy was written under the laws of Texas and that the effect of whatever "taking" there had been by Pat Blood was to be determined under the laws of Texas; so we examine the statutes and cases of that State. Section 1429 of the Texas Penal Code[1] involves conversion by a bailee and says:

"Any person having possession of personal property of another by virtue of a contract of hiring or

[1] All citations to the Texas Penal Code are to the sections as numbered in Vernon's Penal Code of the State of Texas, Annotated, published in 1953.

borrowing, or other bailment, who shall without the consent of the owner, fraudulently convert such property to his own use with intent to deprive the owner of the value of the same, shall be guilty of theft, and shall be punished as for theft of like property."

Article 1534 of Vernon's Penal Code on Embezzlement says, "If any . . . employee of any private person, . . . or any . . . bailee of . . . property, shall embezzle, fraudulently misapply or convert to his own use, without the consent of his . . . employer, any . . . property of such . . . employer which may have come into his possession or be under his care by virtue of such . . . employment, he shall be punished in the same manner as if he had committed a theft of such . . . property." A fraudulent conversion of property bailed constitutes theft under § 1429 of the Penal Code. See *Malz* v. *State,* 36 Tex. Cr. R. 447, 37 S. W. 748; and *Creale* v. *State,* 71 Tex. Cr. R. 9, 158 S. W. 268. The opinion of Justice MEADE F. GRIFFIN of the Supreme Court of Texas in *Hall* v. *Great Nat. Lloyd's,* 154 Tex. 200, 275 S. W. 2d 88, is apropos.

From the Texas statutes and cases we reach the conclusion that if Pat Blood fraudulently converted the car to her own use there was a theft within the meaning of the policy; and it became a question of fact as to whether Pat Blood had fraudulently converted the car to her own use.

III. *Sufficiency Of The Evidence.* Travelers earnestly insists that there was no evidence to show that Pat Blood had fraudulently converted the car to her own use; and points out that Dr. Frankenstein never sued out a warrant of arrest for Pat Blood when she refused to return the car to him or when she left with the car. It is the strong contention of Travelers that Dr. Frankenstein gave the car to Pat Blood.

These matters were questions of fact for the jury. Dr. Frankenstein testified that he did not give her the car; that she did give him one set of keys to the car but continued to drive the car; that he advised the police

that she had gone off with the car after he had demanded its return; and that he notified Travelers and Cargile that she had gone off with the car. Dr. Frankenstein testified that he made a statement to the theft bureau and called the Texas police; and "I reported it to the police but they said they didn't want to fool with me . . . " It was shown that a letter written by Cargile to Pat Blood in care of her parents in Troy, New York, was never returned as undelivered. Dr. Frankenstein firmly insisted that he never gave her the car and that she ran away with it.

This testimony, and other in the record, made a question of fact for the jury as to whether Pat Blood was guilty of the theft of the car. If she was, then Cargile is entitled to recover under the wording of the endorsement on the policy because if Pat Blood stole the car, then any failure of Dr. Frankenstein — whether to sue out a warrant of arrest or take other steps — did not prejudice the rights of Cargile. By answering the interrogatories as it did, the jury clearly showed that it believed that Pat Blood had stolen the car.

IV. *Special Issues.* At the close of the case and after giving instructions (which we do not find to be in error) the Court submitted the case to the jury on special interrogatories:[2]

"1. Do you find from a preponderance of the evidence that theft or larceny of the automobile, as those terms have been defined to you, has been committed? You will answer yes or no . . .

"3. What do you find from a preponderance of the evidence to be the fair market value of the automobile on or about May 1, 1957?"

The jury answered Interrogatory No. 1 in the affirmative (thereby finding that there had been a theft of the car); and answered Interrogatory No. 3 by fix-

[2] There was an Interrogatory No. 2 which related to whether Dr. Frankenstein had cooperated with the Travelers Insurance Company. The answer to this interrogatory related only to matters between Travelers and Dr. Frankenstein; and this is not before us on this appeal.

ing the value of the car at $2,501.48; and the Court rendered judgment for Cargile against Travelers for said amount with interest and costs. Travelers makes two claims against these special issues. The first is, that if Dr. Frankenstein could not recover, then neither could Cargile recover. But this contention is disposed of by the wording of the endorsement on the policy which we have heretofore copied and which says that the rights of Cargile ". . . shall not be invalidated by any act or neglect of the owner." The other objection to the special interrogatories is the refusal of the Court to give Travelers' requested interrogatory, which reads as follows:

"Do you find from a preponderance of the evidence that Pat Blood had the automobile, the subject of this litigation, in her possession on or about May 1, 1957, under the honest belief that Dr. E. W. Frankenstein had given her the said automobile as a gift? Answer yes or no."

This interrogatory should not have been given. Under the law it is not a question of whether Pat Blood believed that Dr. Frankenstein had given her the car; it was a question whether in fact Dr. Frankenstein had given Pat Blood the car. The Court instructed the jury on all of the essentials of a gift and the issue was sharply drawn, as shown in Topic III *supra,* on the question of the gift. The verdict of the jury settled that question.

Finding no error, the judgment is affirmed.

5-1635 317 S. W. 2d 121

Opinion delivered November 3, 1958.

W. B. Howard, Claude Cooper, John H. Bradley, Kennett, Mo., for appellant.

Howard A. Mayes, for appellee.

GEORGE ROSE SMITH, J. This action for slander was brought by the appellee, Virginia Dove, who asserts that the appellant, George Edward Thiel, falsely accused her of adultery. The jury awarded the plaintiff $14.00

as compensatory damages and $1,400.00 as punitive damages. The appellant questions the sufficiency of the evidence and the correctness of the court's instructions to the jury.

Thiel, who was the municipal judge at Paragould, was standing on the sidewalk across the street from the Reynolds Apartments at about 9:30 on the evening of July 24, 1957. He says that in one of the apartments he saw a city policeman, Jimmy Rogers, clad only in an undershirt, and a nude woman whom he did not recognize and, in fact, has never attempted to identify. The two disappeared from view, but Thiel observed enough of their conduct to indicate that an act of sexual intercourse took place.

On the same evening, according to the evidence, Thiel met two policemen and told them what he had seen. He also went to the home of an alderman and, in describing the incident, identified the window of the apartment as having been the first one to the left of the stairway in the building. The next day the mayor heard about the matter and discussed it with Thiel.

No formal charge appears to have been made against Rogers, the officer involved, but the city's Police Committee met on July 26 and investigated the matter to some extent. Five days later the city council held a public hearing, which was well attended, to determine if Rogers should be suspended or discharged. Thiel appeared at both these meetings, by request but without subpoena, and again described what he had seen in the apartment to the left of the stairway.

The apartment in question was occupied by the plaintiff, Mrs. Dove, and her husband. Their testimony, which is amply corroborated, is that on the evening of July 24 two other tenants in the building, Miss Potter and Miss Berry, dropped in to watch television. Nothing of an unusual or indecent nature took place. Rogers testified that he had never been in the Reynolds Apartments at night and had never been in the plaintiff's apartment at all. The jury evidently accepted the testi-

mony offered by the plaintiff and concluded that the defendant's narrative was false.

The appellant first contends that his words did not amount to a defamation of Mrs. Dove, since he did not name her as the woman he saw and did not even know that she lived in the particular apartment. This argument is not sound. It is enough that the slanderous words be reasonably understood to refer to an ascertained or ascertainable person, who, of course, must be the plaintiff. Nowell, Slander and Libel (4th Ed.), § 214. Inasmuch as Thiel identified the man as Jimmy Rogers and fixed the place as the apartment occupied only by Mrs. Dove and her husband, the statements strongly imply, and would reasonably be taken to mean, that Mrs. Dove was in fact the unidentified woman supposedly seen by the appellant.

Upon the theory that Thiel's statements before the Police Committee and at the city council's public hearing were absolutely privileged, counsel for the defense asked the trial court to instruct the jury that there could be no liability for those statements. That request was properly refused. The committee and the council were discharging a public duty in inquiring into Rogers' fitness to act as a policeman, and in the public interest it was desirable that they have as much information as possible about the incident. Consequently it is true that statements taken at the hearings were privileged, but the privilege was conditional rather than absolute. Rest., Torts, § 598.

The rule governing the limited immunity that attends a conditional privilege has been stated as follows: "One who publishes false and defamatory matter of another upon a conditionally privileged occasion is liable to the other if he abuses the occasion." Rest., Torts, § 599; *Bohlinger* v. *Germania Life Ins. Co.*, 100 Ark. 477, 140 S. W. 257, 36 LRANS 449, Ann. Cas. 1913C, 613. It is an abuse of the occasion for one to make a defamatory statement that he knows to be untrue. Rest., § 600. Here, as we have seen, the jury

were warranted in finding that the statements at the hearings were made with knowledge of their falsity.

A conditionally privileged occasion is also abused if the speaker is motivated by malice rather than by the public interest that calls the privilege into being. Rest., § 603; *Miller* v. *Nuckolls,* 77 Ark. 64, 91 S. W. 759, 113 A. S. R. 122, 4 LRANS 149. We think the proof made the existence of malice a question for the jury. "Malice may be shown by the defamatory words themselves and the manner of their publication, and need not be proved by extrinsic evidence. The absence of legal excuse for publishing the slander is evidence of malice." *Gaines* v. *Belding,* 56 Ark. 100, 19 S. W. 236. It may be conceded that if Thiel did not know who lived in the apartment next to the stairway his statements were not consciously motivated by ill will toward Mrs. Dove in particular. But the proof supports a finding that Thiel acted at his peril in designating the apartment and displayed such a conscious indifference to results that his conduct could be regarded as willfully wrong. *Greer* v. *White,* 90 Ark. 117, 118 S. W. 258. What we have already said on the issue of malice makes it unnecessary to discuss the contention that the evidence of malice is insufficient to support an award of punitive damages.

Finally, it is insisted that the court erred in giving an instruction which reads in part: "You are instructed that malice may be inferred from the falsity and the absence of probable cause or other relevant circumstances, or it may be deduced from the libel or slander itself of which it forms a part." It is argued that under our previous decisions this instruction constituted a comment upon the weight of the evidence.

This contention must be sustained. The manner in which the trial court may call certain facts to the jury's attention has been pretty clearly outlined by a number of decisions, many of which deal with the fact of possession of recently stolen property as constituting sufficient proof of guilt. On the one hand, it is permissible for the court to instruct the jury that a certain fact,

such as the possession of recently stolen goods, goes to the jury for its consideration in connection with the other evidence as tending to show the guilt of the accused. See *Blankenship* v. *State,* 55 Ark. 244, 18 S. W. 54; *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029; *Barron* v. *State,* 155 Ark. 80, 244 S. W. 331.

On the other hand, it is clearly improper for the court to tell the jury that a specific fact in evidence is sufficient to support an inference of guilt, negligence, or the like. *Blankenship* v. *State, supra; Smith* v. *Jackson,* 133 Ark. 334, 202 S. W. 227; *Coca-Cola Bottling Co. of Southeast Arkansas* v. *Bell,* 194 Ark. 671, 109 S. W. 2d 115. It is for the jury to say whether the particular inference *should* be drawn from all the proof in the case, and consequently the court comments on the weight of the evidence when it declares that a certain inference *may* be drawn from a specific fact.

In the case at bar the court instructed the jury, at least in general language if not by reference to a specific fact, that malice may be inferred from the falsity of the statements and the absence of probable cause. In applying this charge to the proof before them the jury would necessarily understand that a finding of falsity and of the want of probable cause was, in the court's judgment, a permissible basis for inferring the existence of malice. Hence, even though the charge was couched in general language it conveyed the same message that would have been carried by a specific narration of the facts.

The case of *L. B. Price Merc. Co.* v. *Cuilla,* 100 Ark. 316, 141 S. W. 194, is directly in point. That was a suit for malicious prosecution, and the court instructed the jury that malice might be inferred from the want of probable cause. In holding the charge erroneous we said: "This amounted to an instruction on the weight of the evidence, for it was equivalent to saying to the jury that a finding of want of probable cause was sufficient to justify a finding of malice. Now, a trial jury in a case of this sort may or may not, according to the circumstances of the case, draw an inference of malice

from a want of probable cause. It is a mere inference of fact and not presumption of law; and as the jury are not bound to draw such an inference as a matter of law, it amounts to an instruction on the weight of the evidence to tell them what facts are of sufficient weight to warrant the inference." To the same effect is *Kable* v. *Carey,* 135 Ark. 137, 204 S. W. 748, 12 A. L. R. 1227.

Reversed.

COLLIE *v.* TUCKER.

5-1650 317 S. W. 2d 137

Opinion delivered November 3, 1958.

Lawson E. Glover, for appellant.

William C. Gilliam, for appellee.

George Rose Smith, J. Robert Lee Collie died testate on July 22, 1952, and his widow, Sarah F. Collie, died intestate on December 19, 1957. This case requires a construction of the husband's will in order to determine the ultimate disposition of certain real and personal property that Mrs. Collie received from her husband's estate and still held at the time of her own death. The appellants, who are the husband's collateral heirs, contend that Mrs. Collie was given only a life estate with a power of disposition and that at her death the devolution of the property now in dispute was controlled by her husband's will. The appellees, Mrs. Collie's collateral heirs, contend that she was given an estate in fee simple, so that the property should pass to them under the laws of descent and distribution. The trial court, construing Collie's will in connection with petitions filed by the appellants, held that Mrs. Collie had owned the property in fee.

The case turns upon the construction of these two paragraphs in the will of Robert Lee Collie:

"Third. After the payment of my debts, if any, and my funeral expenses I hereby give, devise and bequeath to my said wife, Sarah F. Collie, all of my property, real, personal and mixed of whatsoever kind of which I may die seized and possessed, including our home place in Malvern, Ark., bank stock, notes and mortgages and all other property of any and all kinds, although not herein specifically mentioned. In as much as I have no children and my said wife has aided me to accumulate what we have I feel that it is only just and right, that should she outlive me, all I have should be absolutely hers, and that is my will.

"Fourth. It is my will in case my wife should not use and dispose of all my property during her lifetime,

that whatever she may leave undisposed of, shall be equally divided between her heirs and my heirs."

The probate court rightly concluded that this case is controlled by our decision, upon very similar facts, in *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 LRANS 1028. There the testator devised his residuary estate to his widow "in fee simple forever," and, in the next sentence of his will, attempted to provide for the distribution of any of the property that the widow had not disposed of during her lifetime or by her will. It was held that the limitation over was void, being inconsistent with the fee simple devise to the widow. In discussing a number of authorities we pointed out the governing distinction: If the will, construed in its entirety, shows that the testator intended for the first taker to have an estate in fee simple, then any subsequent language attempting to direct the disposition of property remaining undisposed of at the death of the first taker is void. If, however, the will shows that the testator intended for the first taker to have only a life estate with a power of disposition, then the testator may direct the disposition of property remaining undisposed of at the death of the life tenant.

In the present case Collie left all his property to his wife and added the unmistakable direction that it should be "absolutely hers." In view of this clear expression of Collie's intention that his widow would own the property outright instead of merely for life, the attempted limitation over must be declared void. We are not willing to set aside the rule of property that was announced in the *Bernstein* case and that has been adhered to ever since.

The four cases principally relied upon by the appellants are not out of harmony with the *Bernstein* decision. In two of them, *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. 2d 287, and *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807, the original devise was modified by a codicil to the will, and we stressed the fact that the mere making of a codicil gives rise to

the inference of a change in the testator's intention. In the other two, *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417, and *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129, the testamentary language was insufficient to create a fee simple estate in the first taker; so the subsequent limitation over was not inconsistent with the first gift.

It is also contended by the appellants that the issue in this case was conclusively adjudicated during the administration of Robert Lee Collie's estate. Sarah F. Collie was the executrix of her husband's will, and in filing her final account she inserted a statement that "I am the sole legatee of said will and am entitled to all of the assets of said estate for and during my lifetime." The probate court order approving the account recites that Mrs. Collie is entitled to all the property in her husband's estate, to use and dispose of as she chooses, and that the remainder not disposed of at her death shall descend according to the terms of Collie's will "to their lawful heirs."

It is evident that Mrs. Collie misunderstood the legal effect of her husband's will, and that misconception was embodied in the order approving her final account. Since this order was also an order of final distribution, containing all the recitals enumerated in subsection (b) of Ark. Stats. 1947, § 62-2902, the appellants insist that subsection (d) of the statute requires that the order be given conclusive effect.

We do not agree with this view. The court was not called upon to determine the validity of the fourth paragraph in Collie's will, for a decision of that issue was not essential to a distribution of the estate. Ark. Stats., § 60-416. Subsection (a) of § 62-2902, governing the distribution order, contemplates that the distributees of the estate be given such notice of the hearing as the court may direct, to the end that questions pertaining to the distribution may be conclusively settled in an adversary proceeding. In the case of Collie's estate the only issue that could be determined when the final ac-

count was filed in 1953 was that of making a proper physical distribution of the assets of the estate. Even if the fourth paragraph of Collie's will had been valid, it could not be known in 1953 what property would be undisposed of at the date of Mrs. Collie's death or what persons would then prove to be the heirs of Mr. and Mrs. Collie. The statute certainly does not authorize the court to make a conclusive determination at a time when the essential facts cannot be known and when even the identity of the distributees cannot be ascertained. We think Mrs. Collie correctly interpreted the statute when she stated in her final account that she was the sole beneficiary of the estate, there being no other distributees under the terms of the will. As far as the issues presented by the 1953 distribution order were concerned, that statement was accurate.

It is plain that Mrs. Collie's heirs, the present appellees, are not bound by the distribution order under the doctrine of *res judicata,* for they were not parties to that proceeding. Nor are they concluded by the principle of virtual representation, as it cannot be said that Mrs. Collie fairly represented the same interest as theirs in that uncontested proceeding. Since the probate court order recited that Mrs. Collie was entitled to use and dispose of the property as she chose, she herself was not adversely affected by the unnecessary recital of how the unused remainder would descend at her death. Her misconstruction of the will was in fact antagonistic to the interest of the appellees. It would be manifestly unjust, as we observed in *Mixon* v. *Barton Lbr. & Brick Co.,* 226 Ark. 809, 295 S. W. 2d 325, to apply the doctrine of virtual representation as a basis for holding that these appellees have had their day in court.

Affirmed.

WARD, J., dissents.

PAUL WARD, Associate Justice, (dissenting). I have read many decisions of our court dealing with testamentary language similar to that contained in the *third* and *fourth* paragraphs in the will under consideration and I

am driven to the conclusion that the law is now in a state of uncertainty. The majority opinion certainly does nothing to clarify that uncertainty. In my opinion it is desirable to put an end to this confusion. I submit this can be done simply and only by adhering strictly to a rule of law relative to the construction of wills that has been clearly and repeatedly announced by this court. That simple rule, briefly, stated is that the courts should determine the intent of the testator from the four corners of the will. See: *Jackson* v. *Robinson,* 195 Ark. 431, 112 S. W. 2d 417; *Piles* v. *Cline,* 197 Ark. 857, 125 S. W. 2d 129; *Ellsworth* v. *Arkansas Nat'l Bk., Trustee,* 194 Ark. 1032, 109 S. W. 2d 1258; *Dyer* v. *Lane,* 202 Ark. 571, 151 S. W. 2d 678; *Dickens* v. *Tisdale,* 204 Ark. 838, 164 S. W. 2d 990; *McLane* v. *Chancey, Adm.,* 211 Ark. 280, 200 S. W. 2d 782, and; *Thompson* v. *Ark. Nat'l Bank,* 220 Ark. 802, 249 S. W. 2d 958.

Applying the above rule only one conclusion can be reached in this case, and that is that Robert Lee Collie meant for his heirs and his wife's heirs to have any property not disposed of by his wife at her death. The same rule would likewise determine the effect to be given to similar wills in the future.

Any attempt to make a distinction, under the above rule between the case under consideration and the *Piles* case, *supra,* as the majority has done, is tenuous and strained and lends itself to uncertainty and confusion. In the first case the devise of a fee was in one paragraph and the qualification was in another, while in the second case the devise of a fee is in one sentence and the qualification is in another sentence. This difference, I submit is one of rhetoric and literary composition which with many of us is not an exact science. The difference is not one of substance which should control the disposition of property.

In advocating the simple rule of *intent* I am not unmindful that it has some limitations. For instance we have said the *intent* must be determined from the words of the will and not from what the testator might have had

in mind. Also, as was said in the *Jackson* case, the *intent* must not be contrary to some rule of law (not to some rule of construction). These limitations, however, have no bearing on the case under consideration.

BLACK *v.* BOLLINGER.

5-1678 317 S. W. 2d 130

Opinion delivered November 3, 1958.

Reid & Burge and *Bernal Seamster,* for appellant.

Frank C. Douglas, for appellee.

PAUL WARD, Associate Justice. Appellees raised and sold cotton in 1956 to Manila Gin Company, but were unable to cash the gin's checks given them for the purchase price. They instituted this action against the Gin Company (*i. e.* the two partners owning and operating the Gin), The Corning Bank at which the Gin Company did business, and L. G. Black who was connected with the Bank and also was a creditor of the Gin Com-

pany. There were other defendants originally but they are not material to this opinion.

Since one of appellant's contentions is that the trial court rendered its decision on a question not raised in the pleadings, the material portions of the complaint will be abstracted at length following a statement of the factual background leading up to this litigation. Because of the disposition hereafter made of this case many details will be omitted.

Background. Prior to 1952 the Manila Gin Company was owned and operated as a partnership by L. G. Black (appellant) and K. S. Jackson. In May of that year Black sold his interest to Jackson, resulting in Black holding Jackson's notes in the amount of $12,642.50, payable in three installments on December 31, 1953, 1954 and 1955 and secured by a second mortgage on the gin property. Nothing had been paid on these notes when this litigation began on November 21, 1956. Before the ginning season started in 1956 Jackson sold an interest in the Gin to U. S. Griffith. Jackson and Griffith, who were in need of financial aid, were doing business with the First National Bank of Blytheville. Later, on about September 14, 1956, at Black's suggestion, Jackson and Griffith started doing business with The Corning Bank. It seems that it was the policy of the gin company to purchase the cotton which farmers brought to it for ginning. Briefly, the arrangement with The Corning Bank was this: The bank furnished the gin company cash to purchase the cotton; when the gin company made a purchase it would issue its check for the purchase price on the bank, and would then redeem the check with cash; then the gin company would place the cotton in a government warehouse and receive negotiable warehouse receipts, and when the gin company exhausted its cash on hand it would take the redeemed checks to the bank and receive cash to the amount of $100 for each bale of cotton purchased. Apparently the gin company would retain the warehouse receipts or sell them and (presumably) turn the money into the bank. It is apparent that the bank would be required to carry an overdraft

for the gin company since it paid more for the cotton than $100 per bale. On October 6, 1956 Black endorsed Jackson and Griffith's note to the bank for $6,800 whereupon the bank agreed to advance $125 per bale. It seems that the bank's security for the ever increasing overdraft was the warehouse receipts.

Appellees, J. N. Bollinger, W. O. Roach, and Frank Nowlin were farmers in the Manila vicinity and had been customers of the gin company for several years. In the fall of 1956 they sold cotton to the gin company under the arrangement above mentioned, but the gin company was unable to redeem their checks. When these checks were presented to the bank on or about October 16, 1956 payment was refused and they have never been paid. At that time the bank refused to advance any more money to the gin company which (according to the bank statement) owed the bank $19,961.70. On November 3, 1956 the gin company increased its debt or overdraft to the amount of $20,057.70. On December 1, 1956 the bank sold, with the consent of the gin company, warehouse receipts which had been turned over to it and received therefor the sum of $27,390.42. This amount, however was not sufficient to cover the overdraft of $20,057.70 plus the said $6,800 and plus other advances made by Black to help keep the gin in operation. There was of course no money available to take up the checks held by Bollinger, Roach and Nowlin, hence this litigation.

Pleadings. The complaint, in all material parts, states in substance:

". . . these plaintiffs have reason to believe that a great number of warehouse receipts for cotton belonging to these plaintiffs, and other customers of said Manila Gin Company, have been placed with The Corning Bank; that such a plan and scheme was for the purpose of fraudulently securing money which the said K. S. Jackson and his partner did not intend to use in paying for the cotton they claimed to have bought, but in order to pay the defendant L. G. Black (Laney Black) . . . ; that it was all done with the fraudulent intent

to hinder, cheat and delay these plaintiffs; that such fraudulent scheme was known to the said defendants who benefited or were to benefit from such fraudulent purchase of said cotton."

The amended complaint states:

"The defendants K. S. Jackson, Sam Griffith, L. G. Black and The Corning Bank entered into a scheme and plan whereby said K. S. Jackson and Sam Griffith would buy cotton from the customers of the Manila Gin Company, (owned by said K. S. Jackson and Sam Griffith, and under deed of trust to L. G. Black) and would surrender the warehouse receipts for such cotton to The Corning Bank, get a portion of the price of such cotton paid over to said K. S. Jackson and Sam Griffith, and when the cotton was sold would then pay the balance due on such cotton to L. G. Black, knowing all the time that said K. S. Jackson and Sam Griffith did not have sufficient money to fully pay for the cotton they bought, and knowing that some of said cotton was subject to landlord's lien for rent and some was under mortgage to the Planters Production Credit Association."

"That under this plan and fraudulent scheme, the said bank was not an innocent purchaser of said warehouse receipts and cotton and knowing that said K. S. Jackson and Sam Griffith had not paid the producers and owners of such cotton and did not intend to pay for such cotton . . . That the transaction was not in the usual and ordinary course of a banking institution, was not *bona fide* and without fraud in its inception and accomplishment."

"These plaintiffs further allege that in making this fraudulent scheme to get money to pay L. G. Black, and for K. S. Jackson and Sam Griffith to use, the bank was fully aware that the cotton covered by the warehouse receipts were not paid for, and that the checks issued by Manila Gin Company on The Corning Bank would not be paid."

The prayer was for a marshalling of assets, for subrogation, for judgment against Jackson, Griffith, and Black, and for "full and complete relief."

After a lengthy hearing the trial court, among other things found: The Manila Gin Company is indebted to each of the plaintiffs (appellees) in the amount sued for; The Corning Bank dealt at arms length with the parties at all times, and; Black did not enter into an intentional and deliberate conspiracy with Jackson and Griffith to defraud the plaintiffs. The court then said that "The real problem . . . is whether defendant L. G. Black assumed and exercised such control over the finances of the Manila Gin Company during 1956 that he became liable *as a partner* to these plaintiffs." (emphasis supplied.) Following this the court entered a decree against Jackson, Griffith, and Black in favor of Bollinger for $2,681.86, in favor of Roach for $1,073.44, and in favor of Nowlin for $872.66. Also a decree was rendered against all the above in favor of Borowsky Brothers for $97.77. Black is the only one who has appealed.

It is strongly insisted by appellant Black, and we agree, that the court erred in rendering a decree against him on a ground or theory not contained in the pleadings. Those portions of the complaint copied above show plainly, we think, that appellees sought recovery against Black on the sole ground that he had entered into a fraudulent plan or scheme with Jackson, Griffith, and The Corning Bank to use some of the proceeds from the operation of the gin to repay old debts to himself and consequently thereby make it impossible for the plaintiffs to collect their claims. There were no allegations in the complaint to put Black on notice that he was being sued as a partner. Nor was any testimony introduced which would have given him such notice. Without detailing the testimony it suffices to say that such testimony was consistent with the alleged ground of a conspiracy or fraudulent scheme and consequently no notice of a partnership. Therefore the action of the trial court cannot be justified by the well established

rule that the court may treat the pleadings to conform to the testimony. The rule applicable here is clearly stated in 30 C. J. S., Equity, § 403, pp. 820-821:

"After a hearing and submission of the cause, the court is reluctant to permit an amendment, and an amendment will not then be permitted, the effect of which would be materially to change the issues or introduce new issues, unless, at least, an opportunity is given to introduce further proofs."

The above rule has been approved repeatedly by this court. In *Butler* v. *Butler,* 176 Ark. 126 (at page 128), 2 S. W. 2d 63 we said:

"If appellants had desired to raise the issue of the extent of the homestead on account of its value, they should have done so in their complaint, in apt time, so that it could have been met by pleading on behalf of appellees, and by proof. The court did not therefore err in excluding this evidence and in refusing to permit appellants to amend."

In the case under consideration the plaintiffs did not offer to amend the complaint. On the other hand, the court not only rendered its decision on an issue not raised by the pleadings but also refused to allow appellant to introduce further proof on that issue. In *Price* v. *Price,* 215 Ark. 425 (at page 428), 220 S. W. 2d 1021, the court, referring to Kirby's Digest § 6145 which corresponds to Ark. Stats. § 27-1160, approved this statement: "Under statutes like this it has been uniformly held that no amendment can be allowed after the commencement of a trial which introduces into the case a new cause of action." For the error indicated the decree of the trial court must be reversed.

Appellant insists that the cause should not only be reversed but that it should also be dismissed. In support of this appellant says there is no evidence to support the finding of liability on the basis of a partnership, and after a careful examination of the record on this point we are forced to agree. For the reason indi-

cated below we have concluded, however, that the cause should not be dismissed. Since reaching this conclusion it would serve no useful purpose to detail the testimony. Suffice to say there is no testimony that Black was a partner in that he took any part in actually running the gin, or that he in any way led anyone to believe he was doing so. There is no testimony that he induced appellees or anyone else to patronize the gin or induced them to withhold their checks. All Black did, according to the record, amounted to helping Jackson and Griffith finance their gin operation through The Corning Bank, and there is no showing that he received any gin proceeds to apply on any old debts.

We have concluded that, in the interest of justice to appellees, the cause should be remanded for a more detailed accounting of the proceeds of the operation of the gin, if appellees should so desire. We do this because all parties and the trial court seem to think there should have been sufficient funds from the gin operation to pay all claims, because no attempt was made to account for all the proceeds, and because there is nothing to indicate clearly how the credits given to Jackson and Griffith are tied in with the bank overdraft.

This court has heretofore remanded causes in chancery where it appeared that further development was necessary. See: *Langhorst* v. *Rogers,* 88 Ark. 318, 114 S. W. 915, and *Massey* v. *Tyra,* 217 Ark. 970, 234 S. W. 2d 759.

Therefore the cause is reversed for the reason above indicated, and it is remanded for further development along the lines indicated if appellees so desire.

McFaddin, J., dissents as to reversal and concurs as to the remand.

Millwee, J., Smith, J., and Robinson, J., dissent as to remand.

Ed. F. McFaddin, Associate Justice (Dissenting in Part and Concurring in Part). My views in this case are as follows:

(1) I think the prayer of the plaintiffs' complaint was sufficient to support the Court's decree finding Black liable, entirely aside from any proof of conspiracy. Here is that portion of the prayer:

> "Plaintiffs pray for judgment to which each may be entitled when the case is heard and as shown by the facts; * * *
>
> "Plaintiffs further pray for the marshalling of assets, for subrogation where any of their cotton or cottonseed have been delivered to any of the defendants, or where warehouse receipts have been pledged or delivered to any of said defendants, * * * and for complete and equitable relief to which the court may find each plaintiff is entitled, and for all costs herein expended."

(2) I think Black was liable to plaintiffs even in the absence of any evidence of conspiracy. Mr. Black admits that while 164 bales of the cotton were still unsold, the plaintiffs came to him and asked if there would be any equity in the 164 bales sufficient to pay their checks. The plaintiffs say (and the Trial Court evidently believed them) that Black told them that when the cotton was sold he would let them know. Bollinger gave Black his telephone number.

Black and his son took the compress receipts on this lot of 164 bales of cotton, had it resampled, sold the cotton without consulting the gin, the bank, the plaintiffs, or anyone else. When the money came back to the bank the total was $27,390.42. The bank paid itself (which it had a right to do) the amount of its claim in excess of $20,000.00. Then occurred the situation which I think makes Black liable. Without notifying the plaintiffs he directed the bank to take from the remaining proceeds of the sale of the cotton enough to pay the $6,800.00 note and interest which he had endorsed for the gin company. He thereby preferred himself as a creditor over these plaintiffs. Mr. Black's handling of the situation did not stop at that point: there was left a balance of $370.39,

and Mr. Black had that amount credited to the Clay County Cotton Company, which was one of his own organizations. There is no showing—nor is there any claim — that the gin company owed the Clay County Cotton Company anything.

Under these facts and others in the record, I think Mr. Black became liable to the plaintiffs as an intermeddler in the affairs of the gin company and that equity should grant the plaintiffs relief against Mr. Black for his intermeddling. In 33 C. J. 269, an intermeddler is defined as, "a person who officiously intrudes into a business to which he has no right; one who enters himself into a situation on his own initiative". In 54 Am. Jur. 188, in discussing intermeddling with property as making the intermeddler a constructive trustee, the rule is stated, "A constructive trust may arise where one wrongfully intermeddles with or assumes the management and control of property of another". To sustain the text there are, among others, the cases of *Garney* v. *Jarvis,* 46 N. Y. 310, 7 Am. Rep. 335; *Bailey* v. *Bailey,* 67 Vt. 494, 32 A. 470, 48 A.S.R. 826; and *Morris* v. *Joseph,* 1 W. Va. 256, 91 Am. Dec. 386. These cases do not present factual situations like the one at bar, but they recognize the broad equitable principle that an intermeddler makes himself liable. There is an annotation in 38 L. Ed. 55 on the liability of a person as a trustee *ex maleficio* from his act of intermeddling. Even though Black was not a partner in the gin company, he certainly intermeddled with its affairs and sold cotton and got a part of the proceeds, in violation of his promise to the plaintiffs that he would notify them when the cotton was sold. Under these facts, I think it is within the broad power of equity to hold Mr. Black liable as a trustee *ex maleficio* for intermeddling. So I would affirm, the Chancery decree against Mr. Black.

(3) But the other members of the Court vote to reverse the case; and so, in order to allow the plaintiffs an opportunity to try to salvage something against Mr.

Black, I agree that the cause should be remanded for further development.

SAM ROBINSON, Associate Justice, (Dissenting). The appellees tried their case on the theory of fraudulent collusion between the bank, Jackson, Griffith and Black, all of whom were named as defendants, to cheat and defraud the appellees. The alleged fraud was not proved. Of course, Jackson and Griffith were liable on the worthless checks given to appellees, and default judgments were rendered against them. But there was no finding of fraud on the part of Black or the bank, and the decree was in favor of the bank. Black was held to be liable solely on the theory that he was a partner with Jackson and Griffith. The majority opinion points out that there is no testimony that Black was a partner with Jackson and Griffith, and no evidence to the effect that he caused anyone to believe he was such a partner. It is further shown that he did not induce anyone to patronize the gin or induce anyone to withhold their checks. And the opinion states: "All Black did, according to the record, amounted to helping Jackson and Griffith finance their gin operation through the Corning Bank, and there is no showing that he received any gin proceeds to apply on any old debts."

There was no finding of fraud. In fact, the bank, one of the alleged conspirators, has been dismissed from the case, and there is no evidence of Black's being a partner with Griffith and Jackson. Hence, I fail to see how Black could be liable. It is therefore my opinion that the action should be dismissed, and I respectfully dissent from the action of this Court in remanding the case for new trial.

I am authorized to say that Mr. Justice GEORGE ROSE SMITH joins in this dissent.

FARMERS UNION MUTUAL INS. COMPANY *v.* WATT, ET UX.

5-1691 317 S. W. 2d 285

Opinion delivered November 3, 1958.

[Rehearing denied December 1, 1958]

Chas. A. Wade, for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. Appellees, Cordell L. Watt and his wife, brought suit against appellant, Farmers Union Mutual Insurance Company, on a fire insurance policy covering their dwelling and smokehouse which were completely destroyed by fire, and covering their cellar which was damaged by fire. The complaint contained all the necessary allegations to establish liability. Appellant's answer consisted of a denial of each and every material allegation in the complaint.

The cause was tried before a jury, resulting in a verdict and judgment in favor of appellees as prayed. The record contains approximately 20 pages of testimony on behalf of the Watts, 10 pages on behalf of the insurance company, and 6 pages of instructions by the court.

On appeal appellant has not abstracted any of the evidence or any of the instructions. Thus it is seen that appellant has failed to abstract the record as required by Rule 9 (d) of this court.

For the above indicated failure to abstract the record this court must, under the holding in *Porter* v. *Time Stores, Inc.,* 227 Ark. 286, 298 S. W. 2d 51 and other cases cited therein, affirm the judgment of the trial court, and it is so ordered.

Affirmed.

REESE *v.* COX.

5-1703 317 S. W. 2d 135

Opinion delivered November 3, 1958.

Sam Sexton, Jr. and *Ralph W. Robinson,* for appellant.

Batchelor & Batchelor, for appellee.

SAM ROBINSON, Associate Justice. In 1914 appellee, J. B. Cox, and his sister, Josephine, purchased 40 acres of land which was conveyed to them jointly. Title to an undivided one-sixth interest in 20 acres of this land is involved in this appeal. At this point it may be helpful to identify the parties to this action and their relatives who appear in the record. Josephine Cox, Marie Cox, Eugene Cox and the appellee, J. B. Cox, were brothers and sisters. Josephine died in 1934, leaving one child, Savannah, who is the appellant. Arizona Cox is the wife of J. B. Cox. Savannah Reese, the appellant, daughter of Josephine Cox, is in possession of and is the undisputed owner of the west 20 acres of the original 40 acres purchased by her mother, Josephine, and her uncle, J. B. Cox. She claims, however, that she also owns a one-sixth interest in the east 20 acres. This appeal is from a decree holding that J. B. Cox is the owner of the entire east 20 acres.

While J. B. Cox was in the Army during the first World War, in the fall of 1918 or spring of 1919, Josephine had a fence constructed from north to south, dividing the 40 acres in half. It appears that from then on, Josephine was in possession of and claimed title to the west 20 acres of the 40, and J. B. was in possession of and claimed title to the east 20; Josephine built a house on the west 20, and her daughter, Savannah, the appellant in this case, has lived on the west 20 for more than 30 years. It appears from a preponderance of the evidence that in 1934, in anticipation of not living much longer, Josephine, wanting to save the west 20 acres for the benefit of her daughter, Savannah, but being apprehensive of Savannah's dissipating the property at that time, conveyed her interest in the 40 acres to her spinster sister, Marie, with the understanding that Marie would save the property for the use and benefit of Savannah. Marie died in 1949 without having actually conveyed the property to Savannah.

Although it appears that the 40 acres had not been divided between J. B. and Josephine by mutual conveyances, it does appear that they both considered that J. B. owned the east 20 and Josephine owned the west 20. The east 20 joined J. B.'s home place. He had possession of the east 20, farmed a part of it, pastured part of it, put a stock pond on it, planted fruit trees, made a garden, and treated it as his own, and it was fenced to itself. Likewise, the west 20 was fenced, and Josephine built a house thereon and occupied it. It is not likely that she would have built a house on land that she did not consider her own. Marie died in 1949, without having actually conveyed the property to Savannah, but it was realized by Savannah that she had an interest in the property, and she lived on it without paying rent to anyone. She wanted to build a new house on the west 20 acres, but it appeared that the property had descended from Marie to J. B., Eugene and Savannah, and at Savannah's request J. B. and his wife, Arizona, and Eugene all executed a deed to Savannah to the west 20 acres of the 40. Savannah claims that the consideration

for this conveyance was her action in getting a job for Arizona, but her testimony in that respect is not convincing. On direct examination she testified:

"Q. Do you claim the west 20 acres as your property?

A. Well, I do.

Q. How do you claim that?

A. Well, they gave me — after my auntie died, they gave me a deed to it, but I knew all the time that I had an interest in her part of it after she passed away."

It appears that all the interested parties considered all along that the west 20 acres belonged to Savannah; that her mother, Josephine, had left it with Marie in trust for Savannah. Therefore, without hesitation J. B., his wife, Arizona, and Eugene gave Savannah a deed to the west 20 acres without any consideration whatever.

But Savannah says that as an heir of Marie she owns a one-third interest in an undivided one-half of the 20 acres that had been in the possession of J. B. for about 40 years. J. B. contends that Josephine gave him a deed to the east 20 acres in 1919 and that the deed was lost without having been placed of record. The evidence of a lost deed is very weak and we do not believe that J. B. could prevail on that theory. But we do think that the evidence is overwhelming to the effect that since 1919 he has been in possession of and has claimed to be the owner of the east 20 acres of the 40 acres, and that Savannah has known all along that J. B. claimed to own the east 20 and that her mother, Josephine, claimed to own the west 20.

During the years from 1934 to 1948, inclusive, J. B. paid the taxes on the entire 40 acres, and Savannah reimbursed him for one-half thereof. In 1949 Savannah paid the taxes and J. B. reimbursed her. Subsequent to 1949, which was the year J. B., Eugene and Arizona executed to Savannah a deed to the west 20

acres, Savannah has paid the taxes on the west 20 acres and J. B. has paid on the east 20 acres. Appellant attaches much significance to the fact that at one point in his testimony J. B. stated that prior to 1956 he made no claim that Savannah owned no interest in the east 20 acres. We do not think the witness' testimony is fairly open to the construction placed on it by appellant. It is perfectly clear from his testimony as a whole that J. B. has claimed title to the east 20 acres since 1919. We do not think there is a shadow of a doubt that his reason for not demanding a deed from Savannah to the east 20 acres at the time he executed a deed to her to the west 20 acres was that he thought he owned the east 20 acres and no deed from her was required, but a deed to Savannah was necessary to give her record title to the west 20 acres because of the deed from Josephine to Marie. Moreover, it is highly significant that at the time, in 1949, when Savannah requested a deed to the west 20 acres, she made no claim to any interest in the east 20 acres. Nor does Eugene, as an heir of Marie, the same as Savannah, make any claim to ownership of any interest in the east 20 acres, but says that the entire 20 acres belongs to J. B.

Appellant points out, and we agree, that "where the adverse claimant has entered as a tenant in common, it is necessary for such claimant to give notice, either actual or by unmistakable acts, to his cotenants that he is holding adversely, or the statute will not run against such cotenants." See *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S. W. 2d 321. In the case at bar the evidence is completely convincing that Savannah knew for more than seven years before this action was commenced that her uncle, J. B. Cox, was claiming to be absolute owner of the east 20 acres. In *Jones* v. *Morgan,* 196 Ark. 1153, 1158, 121 S. W. 2d 96, we said: "It is true there is no testimony that Morgan ever said to his sister or brothers, or to those claiming through them, 'I am claiming this land as my own; I deny your interest in it; take notice of my attitude!' Nothing of this kind occurred; and yet, for more than thirty years, his conduct, his situa-

tion, and his actions in dealings affecting the property, were tantamount to a declaration of hostility to the claims of all persons . . . (including those) descending from the Morgans."

Affirmed.

LITTLE *v.* HOLT.

5-1637 318 S. W. 2d 157

Opinion delivered November 10, 1958.

[Rehearing denied December 22, 1958]

Rex W. Perkins & David J. Burleson, for appellant.

Hubert L. Burch & John Wm. Murphy, W. B. Putman, for appellee.

CARLETON HARRIS, Chief Justice. This appeal presents the question of sufficiency of the evidence to warrant cancellation of a deed for failure of consideration, the consideration therefor being an agreement by appellees Holt to support and care for appellant Little for

the remainder of his life. On January 15, 1952, T. E. Little, then 68 years of age, the owner in fee simple of a 107 acre farm in Washington County, executed and delivered to James and Arlene Holt, husband and wife, a warranty deed conveying said property to the Holts in consideration of their oral agreement to support and care for him for the balance of his life. Mrs. Holt is Mr. Little's great-niece. Appellant lived with appellees on the said farm[1] from shortly after that date until March 11, 1957, at which time he commenced living at the Haws boarding home, near Fayetteville, where he has remained since that time.

On April 1, 1957, Mr. Little filed a complaint in the Washington Chancery Court, setting out the conveyance and agreement with the Holts, alleging that appellees had breached the agreement to support and care for him, and praying that the conveyance be cancelled and held for naught, and that the title to said property be decreed to be in him.

In the meantime, on March 12, 1957, the Holts had conveyed the property (87 acres, including improvements) to J. M. Summers and wife,[2] which deed[3] was allegedly also executed by T. E. Little.[4]

The Holts answered with a general denial, further pleading laches and estoppel, and the Summers answered that they had received a deed from the Holts and Little; that they were *bona fide* purchasers for value without notice, and that Little was estopped to question the authenticity of either the deed executed and delivered by him to the Holts, or the one executed by him and the Holts to them. They further filed a cross-complaint against the Holts, stating that they had paid

[1] He lived with the Holts from eight months to a year in their home at Lincoln before deeding his own property to them.

[2] 20 acres had several years earlier been conveyed to W. C. Little.

[3] This conveyance was not filed for record until about an hour and a half after appellant's suit was filed, but that fact is not material to determination of this cause.

[4] On April 4, Little amended his complaint, setting out that he did not sign the deed to the Summers, that if his signature appeared, it had been obtained by trickery and fraud, and asked that the deed to Summers also be cancelled, set aside, and held for naught.

the latter $6,500 for the property, and asking alternative relief against them in said amount, should the conveyance be set aside, and praying a lien on the property. On trial of the issues, the court found for appellees Holt as against Little, and further dismissed the cross-complaint filed by the Summers against the Holts. From such decree dismissing his complaint, appellant brings this appeal.

Before entering into a discussion of appellant's contention of a breach of contract by the Holts, we will consider the validity of the deed received by the Summers. This deed was admittedly signed by the Holts and allegedly signed by Little. Mr. Holt testified that he took the deed to Little at the Haws home, and the old man signed it. Goldie Jones, an employee of the University, was to take the acknowledgment, but was unable to go at that particular time. Approximately a week later she went to the home, along with Holt, his brother, and Mr. Summers and his son, to see Mr. Little for the purpose of taking the acknowledgment. From her testimony:

"At first he was confused, he didn't know whether he had signed it or not, and the more he talked, he decided he didn't sign it; however, I got his signature for my own personal benefit.[5]

* * *

Well, I asked him if he would acknowledge his signature, and he looked at it awhile; well, he didn't know whether it was or not, and then, he was a little confused and talked around there, and then he decided he didn't. There was a lot of conversation."

She further stated that Mr. Little told Mr. Summers that he had no objection to Holt selling the farm. From the testimony and a comparison of Mr. Little's signature (taken from exhibits), with the signature on the Summers' deed, the court found that Mr. Little had executed the instrument. We are unable to say that this conclusion was incorrect. From cross-examination of

[5] On an old envelope.

the Holts, appellant's counsel indicated that they attached some importance to the fact that Mr. Little's signature was even obtained, *i. e.,* if he had no interest in the property or if the contract had been observed by the Holts, why obtain a useless signature? We attach no significance to this fact. Under the agreement by which the Holts received the deed from Little, it would seem a proper precautionary step to take; however, the evidence reveals that this was done because of the requirement of an attorney examining the abstract, and acting on behalf of the purchasers. We consider that the Summers were innocent or *bona fide* purchasers for value.

We now turn to appellant's contention that the court erred in holding that the evidence, offered in behalf of his allegations, was insufficient to establish a breach of the agreement by the Holts. In addition to the parties, eleven witnesses testified for appellant, and eight for appellees, though the testimony of one of appellant's witnesses was probably more favorable to appellees than to appellant. Several of these witnesses were distantly related to appellant and Mrs. Holt. Appellant's nearest relatives were nephews, but in the early part of 1951, Little, who had lived alone for several years, commenced living with the Holts. He lived in their home for eight months to a year before entering into the agreement, which is the subject of this lawsuit. Following the agreement, and execution of the deed, the parties moved to the Little home. There, extensive repairs, according to Mrs. Holt's testimony, in the amount of approximately $3,000, were made on the premises by the Holts. In the fall of 1955, Mr. Little moved to a granary back of the house to live. Appellant says that these appellees forced him to move to this building, while the testimony on their part is that he asked to move out to himself, because the operation of a TV set, and the children's noise disturbed him. A bed, stove, and chairs were placed in the granary, and repairs were made on the building for the purpose of making it more livable. The evidence disclosed, however, that wide cracks were left in some places, and the building was cold in the

wintertime. In addition to being moved from the house, the evidence of mistreatment upon which appellant relies for a concellation of the contract, is briefly as follows. Mr. Little testified that the children mistreated him and would hit him; that Mr. Holt knocked him down on one occasion; that the family would not permit him to eat his meals with them; that they would lock him out of the house when away; that they gave him no money, and did not look after him. Several witnesses, including one of the nephews, testified that they went to the granary to visit appellant in approximately January, 1956, and found the place dirty, cold, and but little food on the premises. Little himself was dirty and clothes filthy; there was human excrement in the bed, on his person, and around the doorway. It appears from the evidence that the testimony of the several witnesses relative to these conditions, referred to this particular period, except the evidence of Mrs. Winifred Smith, a welfare worker, who found somewhat similar conditions on a visit about a year later. Henry Brewster, the nephew, testified that he visited his uncle from one to three times a year; that since Little started living with the Holts, he had visited him about eight times, and had found him in the granary twice — in January, and October of 1956. Following the first time he found appellant in the granary, complaint was made to the Holts, and the old man was taken back into the house. Subsequently, according to appellees' testimony, again at Mr. Little's request, the latter went back to the granary, and stayed there until March, 1957, when he went to the Haws Nursing Home. Appellant's witnesses testified that Little lost a great deal of weight, and became quite feeble after taking up his abode with the Holts. We are a little prone to wonder, as did the Chancellor, why some of those who testified about the conditions in the granary, took no steps to aid appellant,[6] not even to building a fire. Brewster

[6] From the Chancellor's oral Opinion: "But the thought that occurs to me is that if a person, a kinsman is found in such a terrible shape, a fellow ought to be able to overcome his inhibitions long enough to at least build a fire for him. Now, that is not to say that Mr. Beaty didn't tell the truth when he testified as to what he found down there. But it just raises that question as to whether the actual suggested deplorable

made an affidavit relating the provisions of the contract, which was recorded at the court house, but this, of course, was for the primary purpose of placing prospective purchasers of the property on notice, rather than bringing to Mr. Little any physical benefit. One could gain the impression that this nephew was possibly more interested in what happened to the property than what happened to his uncle. After one of the friends wrote a letter to the welfare department at Little's request, Mrs. Smith, heretofore referred to, paid a visit. Appellant was declared eligible for welfare payments in May, 1956, and drew checks from that time.[7] Little requested Mrs. Smith, in February, 1957, to help him get into the boarding home (apparently already aware of the existence of this home), and subsequently, was moved there. Mrs. Smith testified she advised him that his welfare check would be increased sufficiently to take care of the additional expense. The testimony reflects that after moving to the Haws boarding home, Mr. Little had a more robust appearance, ate well, kept his room tidy, was able to control his bowels, and went to the bathroom on necessary occasions.

On the other hand, the Holts testified that they took care of him in accordance with the living standard of the other members of the family; that he came to live with them while they still resided in Lincoln, and was taken into the home because none of the other rela-

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and terrible condition was quite as bad as Mr. Beaty let on that it was. The Court cannot understand why any person, white or black, finding any other person in a condition like that wouldn't have done something about it, right then and there. And when asked why he didn't try to do something himself to give the old gentleman some relief, Mr. Beaty said that he just couldn't stand the smell, so he just left * * * Now, the same thing is true of Mr. Williams. He seemed to be rather worked up about the fact that the old man didn't have money to pay for his haircuts and shaves, and appeared to be hungry, and dirty and ragged and messed up. But as far as actually doing anything to alleviate the situation, there is nothing Mr. Williams appears to have done. Perhaps he shouldn't have done anything; perhaps there was nothing he could have done. But this sense of outrage which appears on the witness stand seems just a little bit off color when it is squared up with what it seems like a fellow would have done under the circumstances then and there."

[7] He first received $28 per month, then $31, and finally $60, after moving to the Haws home.

tives would have him; that his habits, and failure to control his bowels, contributed to this reluctance by closer relatives. Mrs. Holt testified that she generally cleaned his room and washed his clothes twice a week, and never less than three times every two weeks. She stated that, while living in the house, because of the fact that appellant would dip his hands into the food bowls on the table, he was placed at another table to eat by himself, but received the same food as other members of the family, and in whatever amounts he desired. After obtaining a job, in January, 1957, Mrs. Holt testified that she would prepare his meals before she left. She denied that Mr. Little had been locked out of the house, stating that only the front door was locked. Physical mistreatment of Mr. Little was denied, though she did say that on occasion, the young children would "pick at him," for which she would whip them.[8] Mr. Holt testified that he gave the old man $2 to $5 per week for tobacco and spending money, denied that he had ever physically abused appellant, stated that he was perfectly willing for Little to return and live with them, and that the agreement with the old man would be observed. The evidence reflects that the Holts called a physician to attend appellant on two occasions, it once being necessary to go after the doctor, as the telephone was out of order. Several witnesses living in the vicinity testified that Little had never complained to them about any mistreatment, and there was evidence to substantiate the Holts' contention that Mr. Little went to the granary of his own accord. In short, the testimony in this case was in irreconcilable conflict.

We note that while appellant's witnesses testified as to the weakened condition of Mr. Little, even their testimony reveals that he was able to visit his friends, some 2½ or 3 miles away, once or twice per week. Mr. Little walked this distance, and on several occasions, bought a large sack of groceries in the Summers community, and carried it back home. We also observe the testimony relative to the changes in appellant's attitude

[8] The Holts had five children, ranging in age from 7 to 13.

and habits after moving to the Haws home. It is unusual for one to suddenly acquire the habit of tidiness, and to industriously clean his room, where he had not done so before. Likewise unusual is the fact that though unable to control his bowels for several years, this affliction ceased soon after appellant moved to different surroundings. One might well be led to believe, that because he was dissatisfied with the arrangements made, Mr. Little really did not make too much effort to look after himself until leaving the premises. While we consider that the conditions testified about in January, 1956, existed, and were extremely bad, still it must be remembered that Little had already lived with the Holts for close to five years, and there is no evidence, other than appellant's testimony, which indicates any sort of mistreatment during that period. We do not consider the Holts responsible for the application for welfare assistance, since he first applied in 1948, several years before he started living with them; nor does the testimony reflect that the Holts ever received any part of his welfare check. We feel that important evidence as to whether appellees had observed their part of the contract, is shown by the introduction of Little's application to the welfare department for assistance on May 1, 1956. Appellant was interviewed by Mrs. Smith, and she talked with him and filled out his application. Upon completion, she read the application to him, and he signed it. Paragraph B states: "The source of my (our) support during the past year has been: By Mr. and Mrs. Holt for more than five years."

The testimony of the various witnesses, contradictory as it is, unquestionably makes this a difficult case to determine. Of course, under such circumstances, the finding of the Chancellor becomes even more persuasive. The trial court apparently listened intently to the testimony of the witnesses, and at the conclusion of the trial, rendered a lengthy oral opinion from the bench. A portion of that opinion indicates that the Chancellor was not too impressed by some of the testimony presented on behalf of appellant. It is true, that when simply read-

ing the evidence from the transcript as to conditions in the granary, one's feelings are momentarily outraged, but when observing a witness from the stand, noting his apparent interest or lack of same in the case, the manner in which he answers questions, such as extreme eagerness or hesitancy, etc., a court can receive an entirely different impression. This, of course, is the reason for the rule, that while we try Chancery cases *de novo,* the findings of the Chancellor will not be disturbed on appeal unless they are clearly against the preponderance of the evidence. After carefully studying the testimony and exhibits in this case, we are unable to say that the findings of the trial court are against the weight of the evidence.

Let it be remembered that the contract provides that the Holts shall take care of Mr. Little for the balance of his life. It is still their obligation, and if Mr. Little returns to their home, it is incumbent that they do so. The termination of this litigation in a manner adverse to appellant's contentions, does not affect any future cause of action based upon a subsequent breach of the agreement. A refusal, or a failure, to properly provide for the old man could well subject the Holts to a suit for damages, based on a breach of contract. It may well be that if appellant has received careless attention in the past, this litigation may serve the useful purpose of providing more careful attention to his needs in the future.

Since this litigation involves title to real estate, the cause is remanded solely for the purpose of entry of a decree, declaring the Summers *bona fide* purchasers and quieting title in them as against the parties herein. In all other respects, the decree is affirmed.

HOLT, MCFADDIN and WARD, JJ., dissent.

ED F. MCFADDIN, Associate Justice, (Dissenting in part). Insofar as the Summers are concerned, I agree to the affirmance, because Little signed the deed to them. But as between Little and the Holts, I maintain that the decree should be reversed and the cause remanded with

directions to render a judgment in favor of Little and against the Holts for the value of the 107 acre tract as of January 12, 1952, when Little conveyed the same to the Holts.

In 1952 Little owned a farm of 107 acres, was self-sustaining, and not entitled to State Welfare assistance. He conveyed the farm to the Holts in consideration of their promise to take care of him the rest of his life. Now they have denuded him of his property and he is in a nursing home and dependent on State Welfare assistance for his existence. The majority opinion says that Little can go back to live with the Holts if he desires. Back to the corn crib? That is where he was.[1] No. He will stay in the nursing home; the State of Arkansas will pay the bills; and the Holts are the winners.

I maintain that Little should have judgment NOW against the Holts. He could then assign the judgment to the State and something might be salvaged.

Mr. Justice Holt and Mr. Justice Ward join in this dissent.

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[1] The chancellor in discussing the conditions in the corn crib said: "So, I think we can take it as settled, as far as the testimony is concerned, that the situation described by Mr. Beaty and Mr. Brewster was just about what actually existed there; and it was a pitiable state for any person to be in."

BLAUSER *v.* BLAUSER.

5-1656 317 S. W. 2d 267

Opinion delivered November 10, 1958.

Terral, Rawlings & Boswell, for appellant.

No brief filed for appellee.

J. Seaborn Holt, Associate Justice. Appellee, J. C. Blauser, sued appellant, Montene Blauser, for divorce on October 24, 1955. They were married in October 1953. Montene answered denying appellee's right to a divorce, and asked for support, separate maintenance and costs. A hearing resulted in an award to Montene of $25 per month, beginning on April 15, 1956, and each month thereafter, for her support and maintenance, during the pendency of the above divorce action, plus $50 fee for her attorney.

On March 25, 1957, appellant was given a judgment in the amount of $275 against appellee for arrearage in support payments and an attorney's fee of $75 and on appellee's motion his complaint for divorce was dismissed. Thereafter, on April 2, 1957, Mrs. Blauser filed suit for divorce and asked that she be awarded her property rights in 12 head of cattle owned by her husband on which she alleged "that there is a mortgage on said cattle in favor of First State Bank of Conway in the sum of $700 with an unpaid balance of approximately $500 and that defendant is earning approximately $300 per month." Summons was duly served on appellee April 8, 1957. On April 10, 1957 execution was issued on the March 25 judgment against the above cattle and the above bank was made a party to the process. The sheriff's return showed a chattel mortgage dated April 4, 1957, properly filed on April 6, 1957, and made to H. M. Castleberry in the amount of $1,220 on the above cattle.

On November 6, 1957, trial was had on appellant's divorce action above, which resulted in a decree awarding her a divorce, and a one-third interest in appellee's cattle, subject, however, to the two mortgages held by the bank and H. M. Castleberry. This appeal followed.

For reversal appellant relies on the following point: "The lower court erred in failing to set aside the mortgage from appellee to H. M. Castleberry in the sum of $1,220 filed for record April 6, 1957 after appellant filed suit for divorce and property rights on April 2, 1957."

We hold that the trial court was correct in refusing to set aside the mortgage from appellee to H. M. Castleberry, on the cattle in question, for the reason that H. M. Castleberry was not made a party to appellant's suit. On this issue the court found: ". . . the court holds . . . that the mortgagee, H. M. Castleberry, who holds a mortgage on the cattle described in the mortgage . . . , not being made a party to this action, . . . the plaintiff, although decreed to own a one-third interest in the property of the defendant, is not entitled by reason of H. M. Castleberry not being made a party here in order that his rights under the mortgage might be adjudicated, . . . to proceed against the cattle described in said mortgage for the reason that Castleberry is not a party to this suit."

The governing rule in the situation here presented, is stated in *Peebles Garage* v. *Downey,* 195 Ark. 31, 111 S. W. 2d 454. In that case there was involved an automobile sales contract and a purchase money note and mortgage which had been hypothecated with a bank and the bank's interest was attacked, without having made the bank a party to the suit. We there said: "It appears to be undisputed that the note and mortgage given by appellee to appellant were hypothecated with the Portland bank. The Portland Bank is not a party to this litigation and its interest could not be affected by the decree of the court which attempted to cancel the said note and mortgage. So far as this record discloses, the Portland bank is an innocent holder, for value and in due course of business, but whether so or not, that part of the decree cancelling same in the hands of the bank cannot be sustained." See also *Avera* v. *Rice,* 64 Ark. 330, 42 S. W. 409. Castleberry has not had his day in court, to which he was entitled.

Accordingly the judgment is affirmed.

ROSE LAWN CEMETERY ASSOC., INC. *v.* SCOTT.

5-1647 317 S. W. 2d 265

Opinion delivered November 10, 1958.

Hardin, Barton, Hardin & Garner, for appellant.

Warner, Warner & Ragon, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves a strip of land 25 feet wide across the south side of the East Half of the Northeast Quarter of a certain section. The appellees (plaintiffs below) are: (a) the three children of Dr. Cons. P. Wilson (being Lucy Lewis Scott, Jane Wilson Smith, and Cons. P. Wilson III), who claim all his interest in the land; and (b) two sisters of Dr. Cons. P. Wilson, Jr. (being Mrs. Jim C. Wilson Ward and Mrs. Susie C. Wilson Ozment). The appellees, as plaintiffs below, claimed: (a) that they were the owners and entitled to the possession of the land in controversy; and (b) that the defendant had taken possession of the land, erected barricades, and refused to surrender possession. The prayer of the complaint was for a mandatory injunction requiring defendant to remove the barricades and surrender possession.

The defendant — Rose Lawn Cemetery Association, Inc. — denied the plaintiffs' claim of ownership and claimed title in itself to the land in controversy. Trial in the Chancery Court resulted in a decree for the plaintiffs, and the defendant prosecutes this appeal.

I. *Deraignment Of Title.*[1] The plaintiffs had the burden of proving that they were the owners of the land in controversy. The common source of title to the entire eighty acre tract (E½ NE¼) was Mrs. Mary J. Collins, who devised the eighty acres and other property, one-half to her son, Elias D. Collins, and the other one-half to the four children of her deceased daughter, these children being the grantees in the deed next to be mentioned. Here are the subsequent conveyances after the devise by Mrs. Mary J. Collins:

(1) In 1912 Elias D. Collins conveyed all his interest in the entire eighty acre tract to his co-tenants, being (a) Dr. Cons. P. Wilson, Jr.; (b) Nellie C. Wilson; (c) Jim C. Wilson; and (d) Susie C. Wilson.[2]

(2) In 1916 Dr. Cons. P. Wilson, Jr. conveyed his one-fourth interest in the eighty acre tract to his three co-tenants, being his sisters, Nellie C. Wilson, Jim C. Wilson Ward, and Susie C. Wilson Ozment. In this deed from Dr. Cons. P. Wilson to his sisters, following the description of the eighty acres, there was this language: "EXCEPT a strip of land 25 feet wide off of the south end of said tract, which is reserved as a roadway for use of the parties hereto." The above quoted language is the beginning point of this suit. We will discuss it in Topic III, *infra.*

(3) In 1919 Nellie C. Wilson, Jim C. Wilson Ward, and Susie C. Wilson Ozment (grantees in conveyance No. 2 above) conveyed by general warranty deed to their father, Cons. P. Wilson (Sr.) the entire eighty

[1] In addition to the deraignment of title the abstract shows mortgages executed by some of the title holders at various times, but these have no effect on the deraignment of title, and are without significance to the decision herein.

[2] In some places the name is spelled Susie and in others, Susan; but there is no question about the identity.

acre tract (E½ NE¼) without any exception clause as was contained in the conveyance No. 2, *supra*. The effect of this deed is discussed in Topic II, *infra*.

(4) In 1922, for $1.00, Dr. Cons. P. Wilson, Jr., Susie C. Wilson Ozment, and Jim C. Wilson Ward made a deed to Nellie C. Wilson, conveying the East Half Northeast Quarter, "EXCEPT a strip of land 25 feet wide off of the south end of said tract which is reserved as a roadway for use of the parties hereto." We mention this conveyance only to show that it was three years subsequent to the time when Cons. P. Wilson, Sr. had already received a general warranty deed from his three daughters, with no such exception clause as to the 25 foot strip. The 1922 deed between the children of Cons. P. Wilson could not have affected the title that Cons. P. Wilson had already received, since there is no sufficient showing that Cons. P. Wilson, Sr. acquiesced in this 1922 deed.

(5) In 1930 Cons. P. Wilson, Sr. (grantee in conveyance No. 3, *supra*), joined with his daughter, Nellie C. Wilson (being one of the grantors in conveyance No. 3 and being the grantee in conveyance No. 4), conveyed to The United Cemeteries of Arkansas, Inc. by general warranty deed the entire East Half Northeast Quarter without any exception clause as to the 25 foot strip.

(6) In 1952 The United Cemeteries of Arkansas, Inc. and its stockholders conveyed to Fentress & Crane the East Half Northeast Quarter, "EXCEPT a strip of land 25 feet wide off the south end reserved for roadway."

(7) In 1952 Fentress & Crane conveyed to appellant, Rose Lawn Cemetery Association, Inc. the East Half Northeast Quarter, "EXCEPT a strip of land 25 feet wide off the south end reserved for roadway."

(8) In 1957 the stockholders of the United Cemeteries of Arkansas, Inc. (the corporation being dissolved) conveyed to Rose Lawn Cemetery Association, Inc. the entire eighty acres (E½ NE¼) for the purpose of con-

veying whatever had been reserved by the corporation in its deed to Fentress & Crane in conveyance No. 6, *supra.*

II. *The Title Claims Of Mrs. Ward And Mrs. Ozment.* From conveyance No. 3 in the deraignment of title, it is apparent that all of the three sisters of Dr. Cons. P. Wilson (Nellie C. Wilson, Jim C. Wilson Ward, and Susie C. Wilson Ozment, grantees in conveyance No. 2, *supra*) conveyed all of their interest in the entire eighty acres (E½ NE¼) to their father, Cons. P. Wilson (Sr.) in 1919, because that deed had no language of exception. We regard the said conveyance No. 3 as completely disposing of all title claims of the appellees, Mrs. Jim C. Wilson Ward and Mrs. Susie C. Wilson Ozment, because their 1919 deed to their father contained covenants of general warranty which would pass any rights they might then have or might thereafter have acquired in any part of the entire East Half Northeast Quarter. Section 50-404 Ark. Stats.; *Grayson-McLeod Lbr. Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350; *Hayes* v. *Gordon,* 217 Ark. 18, 228 S. W. 2d 464.

III. *The Title Claims Of The Children Of Dr. Cons. P. Wilson, Jr.* Dr. Cons. P. Wilson, Jr. died in 1932; and whatever interest he had in the eighty acres, *i. e.,* in the exception for the roadway as contained in conveyance No. 2 above, is owned by three of his children, who are some of the appellees herein. Any title claim of the said appellees as children of Dr. Cons. P. Wilson, Jr., must depend on the language their father used in the deed as shown in conveyance No. 2, *supra.* This language was: "EXCEPT a strip of land 25 feet wide off of the south end of said tract which is reserved as a roadway for use of the parties hereto."

The question is whether this quoted language created an easement appurtenant (so as to run with the land), or an easement in gross (so as to be personal to Dr. Cons. P. Wilson and the grantees in conveyance No. 2), and to end with the life of the parties — *i. e.* the grantor and the grantees in the said conveyance No. 2.

The distinction between the two kinds of easements (appurtenant and in gross) has been a frequent source of litigation. See Am. Jur. Vol. 17A, p. 624 *et seq.*, "Easements" § 9 *et seq.*; and see also annotation in 130 A. L. R. 1253 entitled, "Assignability and divisibility of easement in gross or license in respect of land or water." We reach the conclusion that the quoted language created a right personal to the parties to the deed. See *Field* v. *Morris,* 88 Ark. 148, 114 S. W. 206; and *Ft. Smith Gas Co.* v. *Gean,* 186 Ark. 573, 55 S. W. 2d 63. So nothing passed to Dr. Cons. P. Wilson's heirs in the East Half Northeast Quarter. The fact that those heirs thought they acquired something cannot be used to prove their title. The deraignment in Topic I *supra* establishes that they received no title since their father's easement was personal and ended at his death.

The question in this litigation is whether appellees proved their title. There is absent here any substantial claim of adverse possession by appellees or appellant; the only issue is the ownership as between the parties; and the appellees fail to prove their title. Any question of the rights of the general public to a roadway by dedication in any of the conveyances, or in any other way, is outside the purview of this litigation.

The decree is reversed and the cause is remanded, with directions to dismiss the complaint.

BURNSIDE *v.* FUTCH.

5-1632 317 S. W. 2d 717

Opinion delivered November 10, 1958.

THE FARMERVILLE BANK v. FUTCH.

5-1638

Opinion delivered November 10, 1958.

[Amended on Rehearing December 8, 1958]

Spencer & Spencer, for appellant.

Brown & Compton, for appellee.

Brown & Compton, for appellant.

Spencer & Spencer, for appellee.

GEORGE ROSE SMITH, J. These two appeals involve different phases of the same litigation and have been

consolidated in this court. In the more important of the two appeals, Case No. 5-1632, the basic issue is that of priority as between a judgment lien held by the appellants Burnside and a mortgage lien asserted by the appellee Farmerville Bank. The chancellor held that the bank's mortgage is valid and that it constitutes a first lien against the property that both creditors are pursuing. We have concluded that the chancellor's decision was erroneous, because the bank's mortgage was discharged by payment on January 14, 1957.

The property in question, a drive-in theater near El Dorado, was formerly owned by Carson J. Futch, a now insolvent debtor who incurred both the obligations sued upon in this case. The bank's claim preceded that of the Burnsides in point of time. Futch borrowed at least $23,000 from the bank, evidenced by what is referred to in the record as a hand note, and executed two separate mortgages to secure the debt. One of the mortgages was given in 1952 to secure what is called a real estate note, in the amount of $15,000, and covered a farm owned by Futch in Louisiana, where the bank is domiciled. The other mortgage was executed in 1953, to secure another $15,000 real estate note, and conveys the tract of land now in controversy, upon which a theater was constructed. Under the bank's practice the hand note represented Futch's actual indebtedness; the two real estate notes and mortgages were attached to the hand note as collateral security.

In 1954 Carson J. Futch entered into a contract by which he agreed to sell the theater property to E. J. Burnside, Jr., for $75,000. Burnside and his father, as partners, made payments totaling $13,000 upon the purchase price. On October 31, 1956, the Burnsides filed suit to rescind the contract and to recover their payments, it being alleged that certain outstanding mineral interests rendered Futch's title unmerchantable. By a decree rendered on February 28, 1957, the chancellor granted the Burnsides' request for rescission and awarded them a judgment against Carson J. Futch for the

$13,000 that had been paid. The decree declared that the Burnsides' judgment lien should be effective as of the filing of the notice of *lis pendens* on October 31, 1956. The bank was not originally a party to the suit for rescission, but it intervened on March 26, 1957, to assert its mortgage lien.

It seems clear that Futch, while the Burnsides' suit was pending, decided to denude himself of his lands in Arkansas and Louisiana. On January 14, 1957, he conveyed the Louisiana land to his brother, Robert T. Futch. On the same day Robert T. Futch went to the bank and borrowed $16,000, which was advanced to him in cash. With that money and about $8,000 of his own Robert paid in full Carson's indebtedness to the bank, which then totaled about $23,900. The bank marked Carson's hand note as paid and concedes that this transaction extinguished Carson's personal liability to the bank. The bank did not, however, mark as paid Carson's real estate note for $15,000, secured by the Arkansas mortgage, which had been attached to Carson's hand note as collateral security. Instead, the bank attached that real estate note and mortgage to Robert's $16,000 hand note, as collateral security. Robert's note was also secured by a new mortgage that he executed upon part of the Louisiana land he had received from Carson. On the following day, January 15, Carson conveyed the Arkansas land to Robert for a consideration of $10 and the assumption of the mortgage debt (which had actually been paid by Robert the day before).

On March 15, 1957, the bank filed a foreclosure suit upon Carson's $15,000 real estate note and mortgage. This suit was consolidated with the Burnsides' suit for rescission, in which the court had already rendered a decree and ordered a sale of the property. The chancellor's opinion upon final hearing in the consolidated case erroneously states that Robert had already assumed the Arkansas mortgage debt when he paid Carson's hand note on January 14. Upon this mistaken premise the chancellor concluded that there had been no break in the

continuity of the mortgage lien, Robert's personal liability having been merely substituted for Carson's. The decree accordingly upheld the bank's lien and awarded it priority.

The bank seems to have acted in reliance upon the law of Louisiana, but of course the validity of a lien on Arkansas land is to be determined by Arkansas law. *Midland Valley R. Co.* v. *Moran etc. Co.,* 80 Ark. 399, 97 S. W. 679, 10 Ann. Cas. 372. The chancellor, treating Robert as a purchaser, applied a rule analogous to that stated in *Walker* v. *Mathis,* 128 Ark. 317, 194 S. W. 702, where we held that payment of a mortgage by a subsequent purchaser will be regarded as an assignment when that course is necessary to protect the purchaser's right to subrogation. Here Robert T. Futch has not asked for subrogation and is hardly in a position to do so, as his promise to pay the mortgage debt was apparently the only consideration he gave for the property.

It seems clear enough that Robert's payment of Carson's indebtedness on January 14 extinguished the lien of the mortgage on the theater property. As Hughes points out in his treatise on Arkansas Mortgages, § 272: "Payment of the debt instantly and of itself discharges the mortgage." It goes without saying that there can be no lien when there is no debt, for a lien is purely a security device. At the close of business on January 14 it could not seriously have been contended that the bank had a lien on Carson's Arkansas land. The debt had been paid in full by Robert, who did not own the land and had not assumed the mortgage. Robert, it is true, owed the bank $16,000, but that obligation was secured by a different mortgage upon land in Louisiana. The discharged lien of the Arkansas mortgage could not be revived by the bank's attempt to reissue the paid note as collateral security for a debt owed by Robert, who had no interest in the Arkansas land and thus had no power to encumber the title. Hughes, *supra; Bailey* v. *Rockafellow,* 57 Ark. 216, 21 S. W. 227. It is immaterial that Robert later tried to

assume the discharged indebtedness, for the break in the continuity of the bank's lien is fatal to its claim to priority. The decree awarding a prior lien to the bank must therefore be reversed.

In Case No. 5-1638 the bank appeals from the order confirming the sale of the property. The court had directed that the real and personal property be sold separately. At the sale the bank bought the real property for $9,000 and bought certain items of personal property for $3,613.75. The Burnsides bought other items of personal property for $749.50.

The bank now contends that even though its mortgage contained only a metes-and-bounds description of the land, with no reference whatever to personal property or appurtenances, all the fixtures and equipment of the drive-in theater became real property within the mortgage description and were therefore part of the real property that the bank bid in at the judicial sale. To support this theory the bank president and Carson J. Futch testified that the money was lent to enable Futch to construct the theater and that both parties intended for the mortgage to cover all the personal property that was later used in the operation of the theater.

Even if it be assumed that the unexpressed intention of the parties to the mortgage could, as between themselves, extend the mortgage to cover property not described in the instrument, that question is not before us, for we are holding in the companion appeal that the mortgage is not a lien on the property. Instead, the issue is whether the real estate purchased by the bank at the judicial sale includes certain property that the court below found to be personalty. Some of the disputed items, such as a cot, an office desk, chairs, a lamp, etc., were not affixed to the realty at all. Other items, such as a motion picture projector, sound equipment, etc., could be removed without damage to the land. We are of the opinion that the chancellor was correct in

holding these articles to be personal property. *Anderson* v. *Southern Realty Co.*, 176 Ark. 752, 4 S. W. 2d 27.

The decree in Case No. 5-1638 is therefore affirmed.

ROBERTSON *v.* ROBERTSON.

5-1659 317 S. W. 2d 272

Opinion delivered November 10, 1958.

Eugene M. Munger, St. Louis, Mo.; *Langston & Walker, Wayne Foster,* for appellant.

George M. Booth & John L. Bledsoe, for appellee.

George Rose Smith, J. This is the second appeal in a suit by the appellants, M. O. Robertson and his daughter Mary Etta, against the appellee, Opal Robertson, who is the divorced wife of M. O. Robertson and the mother of Mary Etta. In the original complaint Mary Etta sought an accounting for rents collected by her mother upon forty acres that the mother and daughter own as tenants in common, and M. O. Robertson sought to set aside his conveyance to Opal of an undivided half interest in the land. The chancellor in effect sustained a demurrer to the original complaint and dismissed the suit. On the first appeal, 227 Ark. 978, 302 S. W. 2d 810, we held that Mary Etta's complaint for an accounting stated a cause of action and that M. O. Robertson should have been given time to amend his part of the complaint. The cause was remanded with directions that the suit for an accounting be reinstated and that M. O. Robertson be given time to amend.

Upon remand the plaintiffs filed an amended complaint alleging, in addition to their original causes of action, that Opal Robertson held her undivided half interest in the forty acres upon a constructive trust for Mary Etta. After a trial on the merits the chancellor required Opal to account to her daughter for one half of the rents, but he refused to impress a trust on the land or to set aside Robertson's conveyance to his former wife. This appeal is from the latter rulings.

The appellee insists that upon remand the trial court should not have permitted the plaintiffs to assert a new cause of action by amendment, since this was outside the scope of our directions on the first appeal. The rule is, however, that the pleadings may be amended after an appeal that merely reverses a ruling on demurrer, there

having been no hearing on the merits. *American Inv. Co.* v. *Sager,* 175 Ark. 67, 299 S. W. 374.

The asserted constructive trust is said to have arisen when Robertson conveyed the land to his wife and daughter on September 5, 1947. A divorce suit was then pending between Robertson and his wife, and the deed was executed pursuant to an agreement settling the couple's property rights. Although the deed was absolute in form, the appellants offered proof to show that the purpose of the conveyance was to provide a means of support for Mary Etta, whose custody was being awarded to Opal, that Opal was named as a grantee only to enable her to manage the property for the minor child, and that Opal orally agreed that the land would belong to Mary Etta when she reached her majority. Mary Etta became of full age shortly before the case was heard below.

The appellants' proof is insufficient to establish a constructive trust. A grantee's oral promise to hold the land for a third person is unenforceable under the statute of frauds, but a constructive trust will be imposed if it is shown by clear and convincing evidence that the grantee's promise was intentionally fraudulent or that the grantor and grantee were in a confidential relation. *Walker* v. *Biddle,* 225 Ark. 654, 284 S. W. 2d 840; Rest., Trusts, § 45. In this instance neither condition is shown by the required standard of proof.

To bring about a constructive trust the oral promise must be falsely given, with no intention of performance, so that it amounts to a misrepresentation of fact. Rest., Trusts, § 44, Comment *b; Armstrong* v. *Armstrong,* 181 Ark. 597, 27 S. W. 2d 88. Here there is nothing to indicate this state of mind on the part of Mrs. Robertson except the bare fact that more than ten years later she refused to carry out the asserted agreement. All the rest of the evidence tends to rebut the suggestion that the promise was consciously false. Both the appellants testify that Mrs. Robertson conceded until about the time this suit was filed that the land belonged

to Mary Etta. In 1948, in connection with a second divorce suit after the couple had remarried, Mrs. Robertson signed a separation agreement which recited that the land had been deeded to her and the child for the support and maintenance of the child. These matters certainly indicate that the promise, if it was made, was given in good faith. We are by no means convinced that this mother deliberately set out to defraud her eight-year-old daughter, whose custody she sought and won in the divorce suit that was pending at the time.

The proof also negatives the existence of a confidential relation between Robertson and his wife when the deed was executed. The two were already estranged and had signed a separation agreement bringing their marital duties to an end. The husband alone was represented by an attorney, who prepared the deed and supervised its execution. If the instrument did not express the true intention of the parties, the omission must be attributed to Robertson's reliance upon the advice of counsel rather than to a reliance upon the confidence that a husband reposes in his wife when the two are living together in harmony.

Robertson's alternative request for a cancellation of the deed is based upon the fact that the Robertsons were married, in 1935, about three weeks before Mrs. Robertson obtained a divorce from her first husband. Robertson says that he did not learn until 1954 that his first marriage to the appellee was void. On this basis he contends that the appellee was not legally entitled to a property settlement in 1947 and that the conveyance should therefore be canceled.

There are two answers to this reasoning. First, Robertson has insisted all along that his only purpose in executing the deed was to provide for the support of his daughter, and there is no reason to think that he would have been less generous to his child had he known that the marriage was invalid. Secondly, although the first marriage was void, the Robertsons married and divorced each other a total of four times. The last three

marriages were legal, and at least one of the later divorces was obtained by Mrs. Robertson. There is no proof that this undivided half interest in forty acres of land is more than she was entitled to receive upon the dissolution of the valid marriages.

Affirmed.

GARRETT *v.* BUTLER.

5-1651 317 S. W. 2d 283

Opinion delivered November 10, 1958.

Wiley A. Branton, for appellant.

Sam M. Levine, for appellee.

PAUL WARD, Associate Justice. This appeal deals with the restoration of a lost will, and with legal rules

and presumptions as related to facts which, for the most part, are undisputed.

Rev. John H. Garrett died on September 26, 1956, leaving no spouse or issue but a number of collateral heirs. When no will was found immediately his brother, George Garrett, was appointed administrator of the estate which consisted primarily of a house and lot valued at $2,500.

On April 19, 1957 Thomas A. Butler (a nephew of the deceased's late wife), appellee, petitioned the Probate Court for the restoration of a lost will which purportedly devised a large portion of the estate to him. All heirs of the deceased were given notice of the petition. George Garrett, the administrator, and Theodore Jones (to whom some of the estate property had been sold) filed a general denial. Upon a full hearing the trial court found the issues in favor of Butler, and this appeal follows.

The only point relied on for a reversal is thus stated by appellants: "The court erred in finding that the proffered will should be restored as a lost will and admitted to probate." The above point suggests two questions to which we shall direct our discussion. *One,* was the execution of a lost will proven and, *Two,* if so, was the will revoked?

One. There is little doubt that Rev. John H. Garrett did execute a will leaving to appellee the property in controversy. In fact this is not seriously questioned by appellants. The proof shows that such a will was written by the deceased's attorney and that it was properly executed and witnessed. A carbon copy of the original will, introduced into the record, shows it was executed in January 1950.

Two. Whether or not the original will was revoked presents a more difficult question, although the testimony relating thereto is not in conflict.

Appellee, in substance, testified: I am 43 years old and have lived in Chicago for the past 10 years, but

prior to that time I lived in Pine Bluff, Arkansas, with Rev. Garrett, — from 1925 to 1941; I considered him my father, he put me through school, supported me, and treated me as a son; Rev. Garrett sent me a will in January 1950, and also wrote me a letter dated January 12, 1950 in which he said to keep the will; I read the will and it seemed to be identical with the copy which has been introduced; On January 24, 1956 Rev. Garrett wrote me to send him the will because he wanted to put it on record and I sent it to him sometime in February or March; After that (in August) I visited deceased — he was almost deathly sick when I arrived, but I noticed no difference in the way he treated me; He gave no indication he had made any changes in his will, and; In about two weeks he died and I returned to Chicago. Before leaving, and after Garrett's death I looked for the will and couldn't find it but I did find the envelope in which I returned the will in a drawer in his room. George Garrett and others were present when I was looking for the will. Clarence Burton, a witness for appellee, testified: Rev. Garrett talked with me as though Butler was his son; He confided in me about his affairs; I was with Rev. Garrett every night for about two weeks before he died; He discussed with me the disposition of his property about a month before he died; He had given me a $1,000 insurance policy, and he told me to present it at his death and that Tom Butler would be the administrator, and; He also said Butler would know what to do with the rest of his property. Frank Anderson, who lived in Pine Bluff 14 years and who lived in the house with Rev. Garrett 6 years, said he signed for the letter (containing the will) which appellee sent from Chicago; that he saw deceased looking at the envelope several times; that he saw George Garrett and his aunt looking through deceased's papers after he died; that there were a number of people prowling through his effects; that George was in his house about 2 weeks before Rev. Garrett died, and a lot of people had access to where the deceased kept his papers; that he saw the envelope while Butler was there about two

weeks before Rev. Garrett died. The testimony of the wife of Frank Anderson was to the same effect.

No testimony was offered on behalf of the appellants.

It is appellants' firm contention that the will of Rev. Garrett was revoked and that the trial court erred in not so holding. This contention is bottomed on Ark. Stats. § 60-304. This section, in all parts material here, reads as follows:

"No will . . . shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the life time of the testator."

It is then pointed out by appellants that there is no direct and positive evidence showing the will was in existence at the time of Rev. Garrett's death, or that it was fraudulently destroyed before his death. In the absence of such evidence and since it is admitted that the will could not be found, say appellants, the law presumes Rev. Garrett revoked his will. To show there is such a presumption appellants quote from 57 Am. Jur., Wills, § 549. We agree with appellants, and also note that the same presumption was recognized in *Rose* v. *Hunnicutt,* 166 Ark. 134 (at page 137) 265 S. W. 651 where we said: "It will be presumed that a testator destroyed a will executed by him in his lifetime, with the intent of revoking same, if he retained custody thereof, or had access thereto, and if it could not be found after his death." It must be admitted that the facts in the case under consideration fall within the provision set out in the above quotation. However, immediately following the above the court said this: "This presumption may be overcome by proof." This court also said in *Porter* v. *Sheffield, Administrator,* 212 Ark. 1015, 208 S. W. 2d 999 and in *Bradway* v. *Thompson,* 139 Ark. 542, 214 S. W. 27, that such a presumption of revocation could be overcome with proof. In the *Bradway* case, which dealt with a factual situation similar to that here involved, the

court considered the same statute as is now § 60-304 above quoted from, and sustained the trial court's holding that the presumption of revocation had been overcome.

After careful consideration of the weight to be given to the facts and circumstances in this case as set forth above, we cannot say the trial court's finding is against the weight of the evidence. The proof is clear that Rev. Garrett made the will in question, and that he had good reasons for making appellee his chief beneficiary; that nothing occurred to change or alter those reasons; that he indicated to disinterested witness shortly before his death he expected appellee to have some control over his affairs after his death and; that there is a total absence of any testimony he tried or wanted to make any change in or revoke his will. There are also in the record other circumstances which the trial court had a right to consider. During Rev. Garrett's last illness many people had the opportunity to handle and destroy or misplace the will. One of these was the appellant, George Garrett, who was an interested party and who failed to testify.

The vital question with which we are concerned of course is whether or not the will was revoked. We are confronted with no proof but with a presumption only that it was revoked. We think the testimony and attending circumstances are sufficient to overcome that presumption. As was said in the *Bradway* case, *supra,* in speaking of the problem facing the trial judge in this kind of a case: "It was not indispensable that he should determine what became of the will. It was enough that he should find that it was not revoked or cancelled by the testator."

We do not agree with appellants that the burden was on appellee to overcome the presumption of revocation by clear, satisfactory and convincing evidence. The rule which appellants would apply has apparently been adopted in some other jurisdictions, but we have held

that, in such cases, only a preponderance of the evidence is required. See *Bradway* and *Reynolds, supra.*

Affirmed.

[redacted]

STOVER *v.* HOLMAN.

5-1670 317 S. W. 2d 722

Opinion delivered November 10, 1958.

[redacted]

Carlos B. Hill, for appellant.

J. E. Simpson, for appellee.

SAM ROBINSON, Associate Justice. In the year 1922 J. A. Holman died intestate, leaving a widow and seven children, and a homestead consisting of 120 acres. On the 23rd day of July, 1945, appellant, J. S. Stover, entered into a written contract with the widow whereby he agreed to purchase, and Mrs. Holman agreed to sell, the 120 acres. Mrs. Holman agreed to perfect the title and to give Stover possession of the property while necessary procedure was being taken to enable her to give him a warranty deed to the property. The purchase price was $700, of which $10 was paid in cash. On the 12th day of December, 1945, Mrs. Holman and four of

her children executed to Stover and his wife a warranty deed to the land. However, two of Mrs. Holman's children who had become of age did not sign the deed; also not parties to the deed were two minor children of a deceased child. Later, by proper procedure, the interest of the minors was conveyed to Stover. Stover's deeds were placed of record and he took possession of the property.

During the trial of this case Mrs. Holman testified that although the deed had been executed by her and four of her children, it was not actually delivered to Stover, and she does not know how he acquired it.

A short time after Mrs. Holman and four of the children executed a deed to Stover, they executed and delivered a warranty deed to Carl Holman, another son of Mrs. Holman. Carl had not conveyed to Stover; neither had Thelma Frazier, a daughter of Mrs. Holman, conveyed to Stover, but she executed and delivered to her brother, Carl Holman, a deed to her interest in the property. Assuming that the deed from Mrs. Holman and four of her children to Stover was not delivered, then the deeds to Carl Holman by Mrs. Holman and all of his brothers and sisters then living conveyed to him title to their interest in the property. There is no question about the validity of the conveyance to Stover by the two minors of their interest in the property.

On May 1, 1947, appellee here, Carl Holman, filed suit against appellant, Stover, and his wife, alleging, among other things, that he, Holman, owned a 6/7ths interest in the property. Stover answered and denied the allegation. Later, on the 8th day of December, 1947, the suit was dismissed for failure to prosecute. On the 15th day of December, 1956, the present suit was filed by Stover to clear the title. He claims the property by deed and by adverse possession. The trial court held that Stover owns a 5/7ths interest and Carl Holman owns 2/7ths interest. It will be recalled that Carl and his sister, Thelma Frazier, had never signed a deed to Stover, but that Thelma Frazier did convey to Carl Holman.

Stover has appealed, contending that he owns all of the property by deed and by adverse possession. Regardless of the validity of the deed to Stover by Mrs. Holman and four of the children, the fact remains that Mrs. Holman and five of the children (there is no contention that Stover does not own the 1/7th interest acquired from the two minor children of a deceased child) conveyed their interest in the property to appellee, Carl Holman, and even though it can be said that at one time Holman and Stover were cotenants, Stover has acquired by adverse possession all the interest Carl Holman ever owned. The deeds to Holman by his mother and sisters and brothers were executed and delivered in 1945. Incidentally, the conveyance of a homestead by the widow amounts to an abandonment which affords grounds of reentry by the holders of the title in remainder. *Murphy* v. *Graves,* 170 Ark. 180, 279 S. W. 359; *Bowen* v. *Black,* 170 Ark. 237, 279 S. W. 782; *Clark* v. *Friend,* 174 Ark. 26, 295 S. W. 392.

Subsequently Carl Holman filed a partition suit in which he made Stover a party and claimed to own an interest in the property. Stover answered and denied that Holman owned any interest. Later, on December 8, 1947, the suit was dismissed for failure to prosecute. Certainly at that early date Holman knew that Stover was denying Holman's claim of ownership, and moreover, the record shows conclusively, beyond a shadow of a doubt, that Holman has been well aware of the fact that Stover has had possession of the property and was claiming ownership of all of it. In addition to other evidence in the case to the effect that Holman knew of Stover's claim of ownership, Holman testified:

"Q. . . . You have never collected any rent?

A. No, never collected nothing.

Q. You haven't paid any taxes on it?

A. No, he (meaning Stover) said it was his.

. . .

Q. Carl, when did you first learn that Mr. Stover was in charge out there, of that place?

A. Well, he took charge, I reckon, just as they made him out a deed.

Q. When did you learn about it?

A. Well, I can't tell you exactly when it was, anyway it was when we started the suit up here against him, 1945, I guess it was.

. . .

Q. When he took possession?

A. Well, I knowed it when I went down there — where he run me off.

Q. In other words, he told you to get off?

A. He told me to get off.

Q. Told you that he owned the place?

A. That (it) was his and he was claiming it.

Q. You know he has been there ever since?

A. I ain't been back.

Q. As far as you know he has?

A. Yes.

Q. Now you filed suit here in '47?

A. Yes, sir."

Although appellant, Stover, at one time was a cotenant with appellee, Carl Holman, Stover has acquired good title to the property under the law of adverse possession. In the recent case of *Reese* v. *Cox,* 229 Ark. 623, 317 S. W. 2d 135, we said: "Where the adverse claimant has entered as a tenant in common, it is necessary for such claimant to give notice, either actual or by unmistakable acts, to his cotenants that he is holding adversely, or the statute will not run against such cotenants." Citing *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S. W. 2d 321. See also: *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96. The record in the case at bar shows conclusively that Stover gave Carl Holman notice that he

was holding adversely to any claim of ownership on the part of Holman.

Reversed.

SULLIVAN *v.* FANESTIEL.

5-1660 317 S. W. 2d 713

Opinion delivered November 17, 1958.

Joe E. Purcell, for appellant.

Bailey, Warren & Bullion, for appellees.

CARLETON HARRIS, Chief Justice. On October 12, 1956, around 6:40 p.m., an automobile collision occurred at the intersection of Main and Fourth Streets in the town of Bryant, Saline County, Arkansas, between automobiles operated by Leon Sullivan, who was traveling north on Main Street, and A. A. Fanestiel, who had been traveling south on Main Street, and at the time of the collision, was making a left turn into Fourth Street. Traveling in the Fanestiel automobile were five other passengers, Lena Fanestiel, wife of Mr. Fanestiel, Zora Reed and husband, and D. J. Wagner and wife. Mrs. Fanestiel and Mrs. Reed received personal injuries. On January 16, 1957, Sullivan instituted suit in the circuit court against Fanestiel seeking $1,400 for damages to

his automobile, and $1,000 for personal injuries. Fanestiel answered with a general denial, and also filed cross complaint seeking $300 for damages to his automobile, and $3,500 for personal injuries. Mrs. Fanestiel, Mrs. Reed and Mr. Wagner filed suit in the circuit court against Sullivan, asking damages for personal injuries allegedly sustained by them in the collision. By agreement of counsel, representing all parties concerned, an order was entered consolidating the cases for trial.[1] On October 23, 1957, the cause proceeded to trial and the jury returned a verdict finding Sullivan 60% negligent and Fanestiel 40% negligent; finding Sullivan's total damages as $1,528, Fanestiel's total damages in the amount of $412, Zora Reed's total damages as $1,552.38 and Lena Fanestiel's total damages as $655.33. After making the necessary mathematical calculations pursuant to the comparative negligence statute (Act 191 of the General Assembly of 1955), and the necessary offsets, judgment was entered for Sullivan against Fanestiel in the sum of $364. Mrs. Reed was given judgment against Sullivan in the amount of $1,552.38, and Mrs. Fanestiel was given judgment against Sullivan in the amount of $655.33. From the judgment, appellant brings this appeal.

For reversal, Sullivan first contends that the trial court erred in refusing to instruct the jury relative to unavoidable accident, and second, that Interrogatory No. 6 (which prorated the negligence as 60% to Sullivan and 40% to Fanestiel) was concurred in by only eight jurors, and the verdict of the jury was accordingly void.

After an examination of the evidence, we have reached the conclusion that there was no error in the court's refusal to submit the instruction on unavoidable accident. Appellant's contention seems to be largely based on the fact that Fourth Street, east of the intersection, was narrow, with a narrow culvert and ditches along each side, precluding an angle turn. It is argued that had it not been for the narrowness of the street and

[1] Wagner took a nonsuit, and his suit was dismissed by the court without prejudice.

culvert upon which Fanestiel was attempting to enter, he could have completed the turn and been out of the intersection before appellant's automobile reached him. Of course, Mr. Fanestiel was in a position to observe the street when he got ready to make the turn, and further, Mr. Sullivan testified that Fanestiel cut in front of him when he (Sullivan) was not more than five feet from the intersection. Fanestiel testified that Sullivan "whipped around" another car, which had stopped and was waiting for him (Fanestiel) to make his turn, and struck him. "Of course, his car was coming so fast, it hit me. It hit me before I got clear across." As stated in *Uncapher* v. *Baltimore & O. R.R. Co.*, 127 Ohio St. 351, 188 N. E. 553:

"An unavoidable accident is such an occurrence or happening as, under all the attendant circumstances and conditions, could not have been foreseen or anticipated in the exercise of ordinary care as the proximate cause of injury by any of the parties concerned.

Can there be an unavoidable accident when one of the parties is negligent? Most certainly not."

This collision was certainly caused by somebody's negligence, and the jury found that both were negligent.

The case was submitted to the jury on six interrogatories. Four of these were signed only by J. C. Newcomb, foreman, as the answer given by the jury was unanimous. One was signed by eleven jurors, including the foreman, and No. 6 appears as follows:

"If your answers to Interrogatories No. 1 and No. 3 are 'Yes', then answer this question: Using 100% to represent the total negligence involved in the collision, what percentage of negligence do you find attributable to each of the following parties?

Leon Sullivan: 60%

A. A. Fanestiel: 40%

(S) J. C. Newcomb
Foreman

"Herbert James

Sam Curtis

Ernest J. Carlisle

Eddie Hunnicutt

Roy Martin

Earl Crosswhite

Henry J. Cohrt

H. Montgomery"

Appellant contends that this interrogatory was only signed by eight members of the jury, such contention being based on the assumption that Newcomb signed merely as foreman. Appellant argues that, to concur in the answer to the interrogatory, Newcomb would have had to sign again. We do not agree. Article II, Section 7 of the Constitution of Arkansas, as amended by Amendment No. 16, states:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in all jury trials in civil cases, where as many as nine of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than twelve jurors all the jurors consenting to such verdict shall sign the same."

This interrogatory was signed by nine jurors. The word, "Foreman", appearing under the signature of Newcomb, is, in our view, mere surplusage.

Finding no reversible error, the judgment is affirmed.

BASTON *v.* DAVIS.

5-1666 318 S. W. 2d 837

Opinion delivered November 17, 1958.

[Rehearing denied January 12, 1959]

[redacted]

Bernard Whetstone and *Joe B. Hurley,* for appellant.

J. Hugh Wharton, for appellee.

J. SEABORN HOLT, Associate Justice. There is involved here an alleged breach of a lease of real property for a filling station and parking lot in El Dorado, Arkansas. On April 11, 1953, the Rileys, owners of the property, entered into a written lease agreement with appellees here, the Davises (hereinafter referred to as Davis). This lease was to run for a term of ten years at a monthly rental of $300, with an option of renewal for another ten year period. The lease further provided: "Sec. 5. Lessees shall have the right to sublet any part or all of the premises, and shall have the right to assign this lease. . . . Sec. 7. This agreement shall extend to and be binding upon the heirs, administrators, executors and assigns of all the parties." On May 21, 1955, Davis sold a bulk sales (oil and gas) business to appellant, Baston, and on that same date Baston took possession, including possession of the lease property here, under an assignment by Davis of the above lease of the Rileys to Davis, and Davis quit paying the rental.

This assignment was as follows: "For value received we hereby sell, transfer and assign the within lease and all rights and privileges thereunto belonging, to Lloyd C. Baston, dba Baston Oil Company, El Dorado, Arkansas, this May 21, 1955.

Eldon A. Davis
Toyee G. Davis
dba Davis Oil Company

Witness: Douglas A. Ward"

It was stipulated that Davis paid the rental until June 1, 1955, and Baston paid it from June 1, 1955 until December 20, 1956, when he abandoned the property after having paid for the time he had occupied it.

By another agreement made on May 29, 1957, between the Rileys and Davis, Davis admitted liability to the Rileys, the original lessors, and permitted the Rileys to re-lease the property in an effort to minimize the damages. The Rileys did re-lease one part of the property to a grocery company for $150 per month, and another part to Mr. Sanders for $100 per month, for terms of 4½ years under each lease, with each lease expiring at the same time. These leases were to extend to within 21 months of the expiration date of the original ten year Riley-Davis lease.

The present suit was filed by the Rileys against Davis only. This complaint alleged, in effect, the execution of the original lease between the Rileys and Davis, its assignment by Davis to Baston, that Baston defaulted after paying the rental for 18 months, alleged execution of the two above leases to minimize damages, and (appellant's abstract) "that on May 21, 1955, Davis sold and assigned said lease and all rights and privileges thereto to one Lloyd C. Baston, d/b/a Baston Oil Company, and that Baston entered upon and took possession of said property and began paying the rental to the plaintiffs and accepting the benefits and privileges of said lease and became in privity of estate with plaintiffs under said lease; that the lease provided the right to assign or sublet all or any part thereof; that in ac-

cepting said assignment and the benefits and privileges, Baston assumed all the responsibilities to the plaintiffs; that shortly after the execution of the lease between Riley and Davis, Eldon A. Davis sold and assigned to Toyee G. Davis all his right, title and interest in Davis Brothers Oil Company, including the said lease, and said Toyee G. Davis assumed all liability of said company; Baston is a necessary party to this suit in order that a complete determination of the issues herein may be had; prays that Baston be made a party.'' Davis answered with a general denial of all matters not admitted and further alleged ''that the deficit during the period of these two leases above would be $2,800 and that after the expiration of these two leases that there would be 21½ months remaining to the end of the original lease to the defendants, during which liability would accrue in the sum of $6,450; Rileys prayed to have judgment in the amount of $10,550,'' and in a cross-complaint prayed that should, he, Davis, be found liable for any amount that he recover from Baston an identical amount. Baston answered with a general denial of any liability and specifically pleaded the statute of frauds as a defense.

The cause was brought to trial, and at the close of all of the evidence the court directed a verdict in favor of the Rileys against Davis for $5,175 and a judgment for Davis against Baston for this same amount. The judgment contains this recital: ''After the plaintiffs and the defendants had concluded their evidence, the third party defendant, Lloyd C. Baston, moves the court to direct the jury to return a verdict in his favor, but same is, by the court, overruled. Thereafter the third party defendant presented his evidence and at the conclusion of all the evidence, the plaintiffs move the court to dismiss their cause of action against defendant Eldon A. Davis, which is granted and defendant Eldon A. Davis moves to dismiss his cause of action in the cross-complaint against the third party defendant, Lloyd Baston, which is granted.

Whereupon the plaintiffs move the court to direct the jury to return a verdict in their favor against the

defendant, Toyee G. Davis, in the amount of $5,175 and the court being sufficiently advised in the premises grants said motion, and thereupon the defendant, Toyee G. Davis, moves the court to direct the jury to return a verdict in his favor against the third party defendant, Lloyd C. Baston, in the amount of $5,175, and the court being sufficiently advised in the premises grants said motion and at the direction of the court the jury returns from the box . . ." the above verdicts.

Baston alone has appealed, and for reversal says: "Court erred in refusing to direct verdict for Baston at the conclusion of Davis' testimony; court erred in directing verdict for the plaintiff (Davis) against Baston."

There appears to be little if any dispute as to material facts. We have concluded in the circumstances that the court was correct in holding that Baston was bound for the remaining unexpired term of the original lease of the Rileys to Davis from the time he took possession of the property under the written assignment of said lease from Davis to him. The evidence shows that he received, accepted, and kept in his possession this assignment lease and operated under it for 18 months, although it is conceded he did not sign this assigned lease. Davis testified: "I sold out — I sold the Davis Oil Company to Lloyd Baston, and I assigned him these leases, not only this lease here of Dr. Riley's but a lease on the bulk plant and a service station on the Smackover Highway, and two other service stations. . . . Mr. Baston mailed me this lease here and said I had failed to sign the assignment to him, Mr. Baston; and I sent it back to him, and he has had the lease all this time, and I haven't even had a copy of it."

The rule appears to be that where a person accepts an assignment of a lease he enters into a privity of estate with the original lessor, and becomes personally liable for the rents, (32 Am. Jur. 320, Sec. 374) and that liability continues despite the fact that the assignee abandons the premises, as Baston did here. Baston's

acceptance of the written assignment and performance under it, we hold, was sufficient to make him liable for the rents without regard to the statute of frauds, and that his abandonment of the property did not relieve him from a liability for the remainder of the term. The annotator in 70 A. L. R., page 1103, under the title, — Rent — Liability of Assignee of Lease, — uses this language: "The abandonment of a leasehold by the assignee of the lessee, without any reassignment and without the consent of the lessor, does not relieve the assignee from liability to the lessor for rent accruing for the remainder of the term." In support of this rule a large number of cases are cited from many jurisdictions, among them that of *Chicago Attachment Co.* v. *Davis Sewing Machine Co.,* 25 N. E. 669, from the Supreme Court of Illinois. There that court held: "Headnote 1. The assignment of a lease whose unexpired term is longer than a year is within the purview of Rev. St. Ill. c. 59, Sec. 2, which provides that no action shall be brought 'upon any contract for the sale of lands, tenements or hereditaments or any interest in them for a longer term than one year, unless such contract or some note or memorandum thereof be in writing.' 2. The fact that the assignee, by parol, of a lease takes possession of the demised property, pays rent for a time and is recognized by the lessor as his tenant, constitutes such an execution of the contract of assignment as takes it out of the statute of frauds. 3. The assignee of a lease who has abandoned possession without divesting himself of his title is liable for rent thereafter accruing under the lease. . . ." In the body of the opinion the court said: "The lessee is liable to the lessor both by virtue of privity of estate and privity of contract. We understand that the liability of the assignee to the lessor or reversioner is by reason of the privity of estate, which, by the assignment, has been transferred from the lessee to the assignee. The fact of actual possession is frequently of vital importance, as affording a link which, in connection with the further fact such possession is derived from the lessee, will

raise the presumption that there is privity of estate between the party in possession and the lessor, or even estop such party from denying such privity, but, after all, it is the privity of estate which imposes the liability. . . . So long as it continued to be owner of the lease estate, and retained the legal title thereto, and was entitled to immediate and actual possession, such legal title drew to it the constructive possession, and it was still assignee of the term, and responsible as such."

We have concluded, however, that the court erred in refusing under appellant's objection to submit to the jury the fact question as to the reasonableness of the rental value of the property in question during the remaining years of the lease term and what amount of damages Davis would be entitled to recover under proper instructions. It was the duty of Davis to use all reasonable efforts to minimize the damages he sustained. The evidence failed to show what Davis did with the property from December 20 to the following May, when the property was re-let for $50 per month less than the $300 per month lease contract rental. We approved the following instruction, in a situation such as here, in *LaVasque* v. *Beeson,* 164 Ark. 95, 261 S. W. 49, "The court further instructs the jury that it was the duty of the plaintiffs, when they learned that the contract had been breached, to use all reasonable efforts to minimize the damage which they may have sustained, and, if they failed to do so, the jury should take that into consideration in assessing the amount of damages sustained by the plaintiffs on account of said breach of contract." For the error indicated the judgment is reversed and the cause remanded.

E. P. BETTENDORF & COMPANY *v.* KELLY.

5-1657 317 S. W. 2d 708

Opinion delivered November 17, 1958.

Leffel Gentry, for appellant.

Shaver, Tackett & Jones, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case. Melvin Kelly suffered a heart attack and died while working for the appellant, E. P. Bettendorf & Company on April 25, 1956. The Workmen's Compensation Commission made an award to the appellees, who are the widow and children of Melvin Kelly; the Circuit Court affirmed the Commission's award; and appellant prosecutes this appeal, urging only one point for reversal, to-wit: "The decedent, Melvin Kelly, did not sustain an accidental injury arising out of his employment". This assignment requires a brief review of the evidence and a discussion of the applicable rule of law.

Mr. Kelly, aged 43, was engaged in driving nails into pallets (boards) when he collapsed. Dr. Shelton (the local physician of the appellant) testified that Mr. Kelly had been suffering for some time with chronic ne-

phritis (kidney ailment), and also with hypertension (high blood pressure); and that physical exertion by a person suffering from hypertension increases the heart's burden and hastens a heart attack. The death certificate signed by Dr. Shelton stated that Mr. Kelly died from a coronary infarction. When Mr. Kelly collapsed at his work, Dr. Shelton was called immediately, had the patient taken to the hospital, had oxygen administered; but all to no avail. It was Dr. Shelton's opinion that Mr. Kelly died enroute to the hospital.

On this testimony, and other of a similar nature, the commission made an award of compensation for Mr. Kelly's death. The Referee used this language in his opinion, which was affirmed by the full Commission:

"A study of the evidence in this case taken together with the medical testimony shows, in the opinion of the Referee, that the claimant had a pre-existing condition which taken together with the work load that the claimant was undertaking on the date of his collapse and death resulted in his collapse on the job in the course of his employment. The Referee is further of the opinion that the evidence shows that the claimant's work was a causal connection in the claimant's death. The evidence shows that the claimant was a hard worker and that he had worked on numerous occasions doing over-time work and this taken together with the amount of work that the claimant had done in the past and his collapse on the job while attempting to do the work before him on that date, made his collapse and death accidental injury arising out of and in the course of his employment.

In bringing the case to this Court, appellant's counsel contends that anyone could have known that a person suffering from high blood pressure would have a heart attack if such person engaged in over-exertion; and so (reasons appellant's attorney) Mr. Kelly's death was not accidental but consequential due to his disease

and his over-exertion.[1] In an effort to avoid the effect of our holding in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436, appellant uses this language:

"The testimony of the very witness called by the claimants in this case to establish that Kelly died as the result of a heart attack, a contributing cause of which was the work which he was performing, also indisputably establishes that the heart attack was not unforeseen or unexpected, but, on the contrary, in light of the fact that he was suffering from hypertension and nephritis, that the occurrence of a heart attack was not only expectable and foreseeable, but was entirely probable."

We cannot follow appellant in the conclusion urged. Every time a mortal is born everyone knows that some time the mortal will die, so the death of a mortal is never unforeseen or unexpected in the light of human existence. But just when the death will occur and under what circumstances, is certainly unforeseeable and unpredictable. So it was with the heart attack of Mr. Kelly in the case at bar: no one could tell when it would occur. He was engaged in a line of work, he was exerting himself by the driving of nails into the pallets, he collapsed: his death was, therefore, accidental and within the scope of his employment.

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[1] The same argument was made before the Commission, and in its opinion the Commission used this language; "We think the argument advanced by counsel for respondents is worthy of note and comment. As set out hereinabove, counsel for respondents argues that the death of deceased, under circumstances then extant, was not unexpected. This argument rests on the undisputed factual situation in this case that no fortuitous event brought about the death of decedent, nor was decedent, at the time of his death, exposed to any conditions of employment not usual or customary. Then counsel for respondents contends that the death of deceased, coming when it did and as it did, could not be considered to be an unexpected death when it is taken into account that ailments from which deceased suffered coupled with usual exertion, would reasonably result in death. Thus, according to counsel, instant case does not become a compensable one within the rule expressed in *Bryant Stave & Heading Company* v. *White,* . . . In that case the court said, among other things, '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 unanimous opinion of this Court in the case of *Bryant Stave & Heading Co.* v. *White, supra,* is directly in point:

"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. . .

"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, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

Our case of *Bryant Stave & Heading Co.* v. *White, supra,* is in accord with the great weight of authority. In Vol. 19 NAACA Law Journal, p. 34, there is a lengthy review of our case, concluding with the statement that the holding in the Bryant Stave case is in accordance with the majority rule. There is this significant concluding sentence to the NAACA article, written in May, 1957: "May the few States that still adhere to the minority rule have the courage to reverse themselves and restore justice to injured workers — and we predict that at least one of the minority States, Michigan, will soon join the majority. . ." This language was a real prophecy because in *Sheppard* v. *Michigan National Bank,* 348 Mich. 577, 83 N. W. 2d 614, the Supreme Court of Michigan on June 10, 1957 reached the same conclusion that we had reached in *Bryant Stave & Heading Co.* v. *White,* and cited our case and agreed with our hold-

ing.[2] We continue to adhere to the holding in *Bryant Stave & Heading Co.* v. *White, supra.* The Commission was correct in making the award; and the Circuit Court was correct in affirming the Commission.

Affirmed.

[2] In 20 NAACA Law Journal p. 32 there is a review of the Michigan case.

TOLBERT *v.* SAMUELS.

5-1668 317 S. W. 2d 715

Opinion delivered November 17, 1958.

Douglas Bradley, for appellant.

Frierson, Walker & Snellgrove, for appellee.

George Rose Smith, J. On August 19, 1957, the appellee obtained a temporary restraining order which enjoined the appellants, labor representatives, from picketing a construction job in Jonesboro. On final hearing the chancellor dissolved the temporary injunction but held that there was no competent evidence to support an award of damages for its wrongful issuance. The appellants contend that the court should have awarded them substantial compensatory and punitive damages.

The record is large, but only a few salient facts need be stated. McDaniel Brothers Construction Company, a partnership which was also engaged in the plumbing business under the trade name of Central Plumbing Company, was originally the general contractor and the plumbing contractor for the construction job at Jonesboro. In July of 1957 McDaniel Brothers brought suit against these appellants, to enjoin the picketing that was then in progress. The application for a temporary injunction was heard on July 18 by Chancellor Lee Ward, who refused to interfere with the picketing except to a very limited extent.

After having failed in their effort to halt the picketing, the McDaniel brothers ostensibly sold their plumbing department to the appellee Eleanor Samuels, who was an employee in that department. On August 19 Mrs. Samuels filed her present complaint, which alleges the same matters that were asserted in the earlier case but does not disclose that the plaintiff acquired the plumbing subcontract from McDaniel Brothers. On the same day, without notice to the defendants, the verified complaint was presented to Chancellor W. Leon Smith, who issued a temporary restraining order. When the matter was later heard on its merits Judge Smith ruled that the injunction had been wrongfully obtained, as the plaintiff was in privity with the McDaniels and was

bound by their litigation. This appeal is from the court's refusal to allow damages.

We find no merit in the appellee's cross-appeal, by which it is contended that the injunction was not obtained wrongfully. On the direct appeal we must reluctantly agree with the chancellor's conclusion that the appellants offered no competent evidence to sustain an award of damages against the appellee and her bondsmen. One witness testified that the bargaining position of the labor unions was practically destroyed by their inability to picket, but there is no evidence at all by which we could attempt to determine the pecuniary loss that resulted from this injury. That damage of this kind may be hard to prove in dollars and cents does not justify our reaching into the air for a figure that would represent only an unsupported guess on our part. The burden was on the appellants to prove the amount of their damages. *Alf Bennett Lbr. Co.* v. *Walnut Lake Cypress Co.,* 105 Ark. 421, 151 S. W. 275.

In seeking to prove certain expenses that the unions are said to have incurred as a result of the injunction, the appellants offered only a memorandum of figures prepared by the witness Mowrey. The chancellor correctly held this memorandum to be inadmissible, for it was a synopsis of information gathered by Mowrey from various records and canceled checks of the unions. The records themselves were the best evidence and should have been produced. Wigmore on Evidence (3d Ed.), §§ 1179 and 1532. The appellants also sought reimbursement for their attorney's fees in connection with the dissolution of the injunction, but under our decisions this expense is not recoverable. *McDaniel* v. *Crabtree,* 21 Ark. 431; *Citizens' Pipe Line Co.* v. *Twin City Pipe Line Co.,* 183 Ark. 1006, 39 S. W. 2d 1017. Nor can punitive damages be recovered in the absence of an award of actual damages. *Kroger Gro. & Baking Co.* v. *Reeves,* 210 Ark. 178, 194 S. W. 2d 876.

Doubtless the appellants were entitled to nominal damages; but the chancellor awarded them their costs,

and in an equity case, where the costs have been properly assessed in the trial court, nominal damages are not allowed on appeal for the sole purpose of charging the appellee with the costs in this court. *Campbell* v. *Southwestern Tel. & Tel. Co.*, 108 Ark. 569, 158 S. W. 1085; *Reader Railroad* v. *Green*, 228 Ark. 4, 305 S. W. 2d 327.

Affirmed.

LOUALLEN *v.* MILLER.

5-1669 317 S. W. 2d 710

Opinion delivered November 17, 1958.

Ben M. McCray, for appellant.

Glenn G. Zimmerman and *William G. Fleming*, for appellee.

Terrall, Rawlings & Boswell, amicus curiae.

PAUL WARD, Associate Justice. This appeal deals with the annexation of a small parcel of land to the town of Bryant. The petition for annexation, signed by a majority of the property owners affected, was approved by the circuit court over the objections of appellant and his wife who are affected property owners.

Appellants' grounds for urging a reversal will be classified and discussed under three separate headings. *One.* The lands sought to be annexed are not contiguous. *Two.* The lands proposed for annexation are not suitable for that purpose under the rules announced in *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891. *Three.* There is no substantial evidence to support the judgment of annexation by the circuit court.

One. There is, we think not only substantial but clear and convincing evidence to support the trial court's finding that the land proposed for annexation is contiguous to the town of Bryant. It is admitted by appellants that the land touches the corporate limits of Bryant along a north and south line for 150 feet. The parcel of land proposed for annexation (hereafter referred to as "the land") is very small and is in an irregular shape. The plot shows the said 150 feet wide (from north to south) strip extends west from the west corporate limits for a distance of 634 feet, and that adjoining said strip at the southwest corner is another irregular parcel of land which extends west 250 feet and south 450 feet. It is also shown that there is a blacktopped road (running west from and being a continuation of Fourth Street) across "the lands". There appears no reason why it is not practicable for the present town and "the land" to some day become a unity. In the *Vestal* case, *supra,* it was said: "In all cases, however, where actual unity is practicable legal unity should be ordered as promising the greatest aggregate of Municipal benefits". In the cited case it was held that Little Rock and Argenta (now North Little Rock) were contiguous although they are divided by the Arkansas

River which (then) could only be crossed *via* two bridges and small boats. See also: *Garner* v. *Benson,* 224 Ark. 215, 272 S. W. 2d 442. The case of *Wild et al.* v. *People ex rel. Stephens,* 227 Ill. 556, (Ill.) 81 N. E. 707, cited by appellants as holding to the contrary is not in point because it is based on a statute which we do not have in this state.

Two. In the *Vestal* case, *supra,* the court, after mentioning the two grounds relied on for a reversal, made this statement: "Before considering them (the two points) directly, we will state what we conclude from the many authorities to be the correct rule to guide in determining an application for annexation". The court then set forth (at pages 323 and 324 Arkansas Reports) five examples or conditions affecting annexation. It is important to note that these five examples or conditions are not conjunctive but disjunctive. In appellants' designation of points and in the argument they have apparently relied on each example or condition as a separate ground for reversal. It seems clear to us however that it is not encumbent upon appellees to meet the burden imposed by all five of the conditions or examples. In other words, "the land" may be considered as suitable for annexation if appellees' application and proof comply with either one of them. We think this requirement has been met.

Although "the land" has not been divided into lots and blocks, it appears they are susceptible of such divisions; they furnish a suitable abode for the four families now living there and could be used by others; the town has recently approved a sizeable bond issue (two in fact) for improvement of the water system, and this service is needed and can be used by those living in the proposed annexation; a serviceable road or street has already been constructed as before mentioned, and; it appears that the lots, as stated in the *Vestal* case, *supra,* ". . . are valuable by reason of their adaptability for prospective town uses". The land is not used for agriculture or horticulture and it is not shown to be valuable for that purpose only.

There is much testimony showing that there are a great many vacant lots in the town of Bryant, and great stress is placed on this fact by appellants. Although the existence of these vacant lots is a circumstance which might have been weighed by the trial judge, it has never been considered controlling by this court. In the case of *Fowler* v. *Ratterree,* 110 Ark. 8, 160 S. W. 893, annexation was approved although, as the court said, there was "much vacant and unimproved lands already within the limits".

We are aware that from the very nature of this kind of a case there will often be occasion for a diversity of opinions and that, for that reason, much must be left to the good judgment of the trial court. The statutes under which this proceeding was instituted (Ark. Stats. § 19-301 *et seq.*) appear to be designed to that end. Section 19-302, among other things, says the court shall grant annexation if it is satisfied the prayer of the petitioner is right and proper. Sanction was given to this view in the recent case of *Cantrell et al.* v. *Vaughn,* 228 Ark. 202, 306 S. W. 2d 863, decided by us November 4, 1957, Vol. 102 L. R. 760.

Three. In view of what we have already said it is obvious that there is substantial evidence to support the judgment of the trial court. It is well established by the decisions of this court that the findings of the trial court in annexation cases must be given the same weight as are given to the verdict of a jury, and that such findings must be sustained if supported by substantial evidence. See: *City of Newport* v. *Owens,* 213 Ark. 513, 211 S. W. 2d 433; *Walker* v. *City of Pine Bluff,* 214 Ark. 127, 217 S. W. 2d 510; *Burton* v. *City of Fort Smith,* 214 Ark. 516, 216 S. W. 2d 884; *Marsh* v. *City of El Dorado,* 217 Ark. 838, 233 S. W. 2d 536, and; *Garner* v. *Benson,* 224 Ark. 215, 272 S. W. 2d 442.

Affirmed.

5-1674 317 S. W. 2d 721

Opinion delivered November 17, 1958.

B. Ball and *Spencer & Spencer,* for appellant.

C. C. Hollensworth, for appellee.

SAM ROBINSON, Associate Justice. In 1947, Nettie Hatridge Parker executed her will. In 1953 she married the appellee herein, Doyle E. Parker. She died March 26, 1957, and appellant, Barney Anderson, is the sole beneficiary under her will. He has appealed to this Court from an order of the probate court allowing Parker curtesy in the estate of the deceased.

Ark. Stat. § 61-229 provides that curtesy shall be assigned the same as dower. Section 62-704 provides that if dower be not assigned to the widow within one year after the death of her husband, or within three months after demand made therefor, she may file in the court of probate a petition for allotment of dower.

On June 18, 1957, Parker made demand upon Anderson for the allotment of curtesy. The demand was addressed to Anderson as executor. On September 5, 1957, a petition for assignment of curtesy was filed in probate court by Parker. On September 24th Anderson filed a motion to quash service, alleging that the notice was addressed to his attorneys, and he appeared specifically and only on the motion. On October 14th Anderson filed a motion to dismiss the petition for curtesy because the petition was filed September 5th, which was

less than three months after demand for curtesy had been made on June 18th. On October 22nd Anderson demurred to the petition for curtesy, alleging that the demand was on the executor, and, further, that the petition did not allege that the Parkers had a child born alive to them.

On November 4th there was a hearing on the petition to dismiss and there was a finding by the court that the petition was refiled September 25th, which was more than three months subsequent to the notice given on June 18th. Also on November 4th the court made a finding that although the notice was directed to Anderson as executor, it was served on him personally and it is not necessary in order for curtesy to attach that a child be born to the marriage. The court overruled the demurrer. On November 4th Anderson filed a response to the petition for assignment of curtesy, without saving the point on the question of proper service. But even if Anderson had preserved his objection to the court's refusal to quash service, he could not prevail on that point, because of the court's finding that Anderson was actually served individually.

Appellant's second contention, that a child must be born alive to the husband and wife before curtesy will attach, is without merit. Our statute establishing the right of curtesy, Ark. Stat. § 61-228, is a part of Act 313 of 1939. Section 5 (Ark. Stat. § 61-232) of the Act provides: "The purpose of this measure is to give a surviving husband the same interest in the deceased wife's estate as a widow now has in the estate of her husband, so far as Section 7 of Article 9 of the Constitution permits." Certainly it is not necessary that a child be born alive to a husband and wife before the widow is entitled to dower.

Affirmed.

4903 317 S. W. 2d 823

Opinion delivered November 24, 1958.

Skillman & Fitzhugh, for appellant.

Bruce Bennett, Atty. Gen. and *Thorp Thomas,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Thomas Walker, was charged by Information with the crime of First Degree Murder. The case went to trial and the jury returned a verdict of guilty, fixing Walker's punishment at death in the electric chair. The cause is here on appeal. Appellant contends that the evidence was insufficient to sustain the conviction, and that a verdict of acquittal should have been directed by the court.

On March 9, 1957, around 9:30 p. m., a Saturday night, J. W. Orman, while on duty at the Cates Esso Station in West Memphis, was killed by a shotgun blast, fired by a Negro man, during an attempted holdup. Mr. and Mrs. Marvin Smith witnessed the slaying. Mr. Smith was inside the station, using the telephone, and his wife was sitting in the car in front of the station. Both heard the intruder say, "Stick them up," and Mr. Smith testified that the murderer had a double barrelled shotgun. The man was wearing an old felt hat, pulled down over his face. They stated that the murderer was a Negro, but were unable to identify appellant as the per-

petrator of the crime. Following the report of the killing to officials, Arkansas State Trooper Bobby Sanders, with two other officers, went to the station, obtained a description of the suspect, and then drove south on Hulbert Road. After obtaining information from a young colored boy named Peals, who had observed a man running across a field, next hiding in a ditch when a car passed, and then running straight down the highway toward Hulbert, the officers drove on to Hulbert, and State Trooper Weaver walked down the railroad tracks toward Memphis. The officers heard a car start on a dead-end road at the edge of Hulbert, and watched it proceed to the Hulbert Road and turn south. Sanders testified that, judging from the sound of the starter, they considered the car to be an old model Buick or Pontiac, with a defective muffler, and observed that the left tail light was dimmer than the right. The next day, upon locating the car driven by appellant, it was found that such car was an old model Buick, with a defective muffler, and that the left tail light was dimmer than the right. Leroy Brown, a farm employee, employed by L. L. Riggan, testified that as he was leaving the Riggan barn, located at the intersection of Fletcher Lake Road and Dixon-Yates Road, around 12:30 or 1:00 a. m., on Sunday morning following the shooting, a man carrying a gas siphoning hose and a shotgun, caught up with him. They engaged in small talk, and parted at the intersection of Rock Road and Fletcher Lake Road. Brown testified that appellant "looks pretty well" like the man he saw on the road, but would not positively identify him. John Tolbert Clemons, also an employee of Riggan, testified that about sunup, he got up to hook up a pair of mules, and observed an "old model, sort of blue looking, might have been green, I took it to be blue, old model car setting side the road." From the testimony: "Q. Was anybody by the car? A. Looked like a gentleman off from the car, sorta stooped over, off from the car. Q. Which way was the car headed? A. The way the road run, south like. Q. Away from you? A. Yes, sir. Away from me. Q. How did you say the gentleman was? A. Looked like he was sorta bent

over, away from the car, sorta stooped over." He testified that later, a colored man, driving the blue car, passed the barn and stopped at the home of William Bradford, another employee of Riggan. According to his testimony, the driver of the car walked back up toward the barn, and talked with Richie Taylor, another employee, about finding work. Clemons identified Walker as the stranger seeking work. Bradford testified that appellant stopped at his house and asked if he (Bradford) could let him have any gas or money. Walker then inquired about getting work, and was told that he would have to see "my boss man." He further testified that Walker parked his car where it could not be seen by people coming down the Hulbert Road. L. L. Riggan testified that Walker asked him for work. When told that none was available, appellant went across the field to the home of James Williams, likewise a tenant on the Riggan farm. Riggan, who had heard about the killing earlier that morning, drove to West Memphis, and notified officers of Walker's presence on his farm. In the meantime, according to witness Williams, Walker came to his home and asked Williams to fix him something to eat. Before the latter could finish preparing the meal, the officers arrived and took Walker into custody.

In another phase of the investigation, Lieutenant Charles Duncan of the West Memphis Police department, testified that he searched the immediate vicinity around the station for clues, and found footprints[1] leading into a field just west of the West Memphis road and the service station. The footprints led to an open field that borders Hulbert Road and went as far as Bowen Airfield (where Peals saw the man running). The tracks were followed to the Hulbert Road. About five hundred yards from the point where the tracks started, Duncan found an empty 12-gauge shotgun shell. This

[1] Only one set of prints was found. According to the testimony, the field was wet and soggy.

testimony was corroborated by Captain Romines of the West Memphis Police Department.[2]

After taking Walker into custody at the home of Williams, appellant was transported to the City Hall in West Memphis by two of the officers, while the others stayed and searched for the shotgun. It was finally located, buried at the side of the road, lying in one of the gulleys, being covered lightly with dirt, and a burned piece of fence post, and near the place where Tolbert had noticed the parked blue car, and the man bending over. A search of the automobile revealed a piece of hose and a gas can in the back of the car. A shotgun shell was taken from appellant's possession[3] at the City Hall. As reflected by the evidence, Captain Romines and Lieutenant Duncan talked to appellant at the West Memphis City Hall around 10 o'clock on the morning of the arrest. His oral statement to them was to the following effect. After stating that his name was Thomas Morris, he changed it to Walker, and stated that he lived in Blytheville . . . had been in West Memphis a couple of days, after getting lost . . . he got lost between Osceola and Blytheville, taking a wrong turn . . . that the automobile he was driving, and the shotgun,[4] belonged to Lilly Daniels,[5] with whom he was living in Blytheville . . . he identified the shotgun as the one he brought from Blytheville . . . around 9 o'clock Saturday night, he was on a street where there were a lot of Negroes, and negro "honky tonks" . . . he overheard one say there had been a killing . . . that somebody had been shot with a shotgun . . .

[2] The officers made casts of the prints, which were approximately the same size and general appearance of Walker's shoes; however, according to Captain Romines: "We didn't think the casts were good enough, due to the condition of the ground, to definitely or positively identify the tracks as having been made by any particular shoe." Captain Romines also testified that some of the prints by the road were measured, and that the first print, from the heel to the next heel, was 6½ feet, and the next 5½ feet, indicating that whoever made the prints was traveling fast.

[3] This shotgun shell, like the expended one, was a blue, Peters 12-gauge shell.

[4] A double barrelled shotgun with wire wrapped around the handle.

[5] The car was turned over to Lilly Daniels four days later when it was ascertained that it belonged to her.

he got scared, because he had the shotgun in the car, left, and drove away (to the area which constituted a part of the Riggan plantation) . . . that during the night he stayed around the car, walking up and down the turn row to keep warm . . . the next morning, he buried the double barrelled shotgun beside the road in the ditch, because he didn't want to get caught with it . . . that after burying the shotgun, he went to a colored boy's house on the plantation, parked his car, went down and asked a white man for a job . . . that he then went to another colored boy's house to try and get breakfast (the home of Williams, where he was arrested).

The shotgun, expended shell, and loaded shell, all properly identified by the officers, were sent by Captain Romines to the Federal Bureau of Investigation at Washington, with a request for a laboratory examination to determine if the expended shell had been fired from that particular shotgun, and if there was any relation between the expended shell and the loaded shell. Marion E. Williams,[6] ballistics expert, and an employee of the Bureau for 19 years, conducted the examination of the gun and shells, and testified as follows: As to die markings, of the loaded shell and the expended shell, Williams testified that they were stamped from the same machine, though that did not necessarily mean that they came from the same box. According to his testimony, many thousands of shells are stamped with the same

[6] Qualifications are as follows: "I have a Bachelor of Science degree, which I received prior to going to work for the Federal Bureau of Investigation. Since my employment there, I have studied under instructors who have made their life work firearms and ammunitions, too, that type. And, in different firearms and ammunitions plants, studying the method of manufacture and studying ammunitions, things of that type. I read various books and periodicals on the subject of guns, examinations. Made many examinations on my own in the Federal Bureau of Investigation laboratory. And have made examinations in several hundred cases and presented the evidence in courts in several jurisdictions throughout the United States. * * * Q. Would you tell the jury what your teaching experience is? A. Well, since being assigned to the Federal Bureau of Investigation laboratory, I have participated in numerous schools, both in Washington and throughout the United States, designed to train police officers and other men in this profession in the handling of evidence, particularly as it relates to firearms, ammunition, things of that type."

marking, "Since there are 25 in a box, this same marking might appear in any number boxes of shells. * * * Q. Could have come from the same box, but that is not necessarily true? A. Could have, yes." Williams testified that two test rounds of ammunition were fired through each barrel of the shotgun sent to him, and he then went into minute and interesting detail as to the manner in which it is determined whether a particular shell was fired from a particular gun. This explanation was implemented by enlarged photographs, showing the markings on the head of the shell, caused by the breech face of the gun.[7] He testified that the expended shell sent to him (which had been found in the field) was fired in the right barrel of the shotgun, and stated that this conclusion was reached from many points of comparison. Although vigorously cross examined, Williams was quite emphatic and positive in this statement. His testimony was impressive and authoritatively related, and was, we think, potent testimony.

Appellant points out that the evidence is circumstantial. Yet, circumstantial evidence has long been recognized by the law as sufficient to sustain a conviction. *Osburne* v. *State,* 181 Ark. 661, 27 S. W. 2d 783, *Jeffer-*

[7] "This photograph is a photograph made through a comparison microscope. It is, I will explain that, a comparison microscope is actually an arrangement whereby two microscopes are put side by side, or two microscopes. Then we place on the left hand stage, ordinarily place the evidence shell, which in this case is Plaintiff Exhibit No. 9. On the righthand stage, place the specimen which was fired in the laboratory, they are situated side by side on the stages of the microscope. By optical means the images of the two primers are brought together in one single eyepiece in the instrument. As you look through the eyepiece, you see a portion of Plaintiff Exhibit No. 9, which is the evidence shell, and a portion of the test shell, through the microscope. It is possible by a mechanical arrangement of the microscope to move the shell to the right, left, up, down. It is possible, under the microscope, when arranged in the comparison microscope, you see through the microscope as a split field. This line in the center is caused by the split in the field. As you look at the photograph for this set-up, the left side of this photograph or the left as you see it, is a portion of the head of the shot shell in the area adjacent to the firing pin impression on the primer, enlarged 50 or 60 times. That area, portion on the right, my right, your left, is a portion of the head of the shot shell which was fired in the laboratory in the right barrel of the shotgun. These markings that seem to pass across the line from the head of one shell to the other are points used for the purpose of identification. Those markings are caused by the breech face of the gun."

son v. *State,* 196 Ark. 897, 120 S. W. 2d 327, *Smith* v. *State,* 227 Ark. 332, 299 S. W. 2d 52. While parts of the testimony failed to link appellant with the crime, because of the inability of witnesses to make identification (testimony of the Smiths and Peal), and some other testimony, standing alone, was of but little value, it was certainly established that appellant was near the area in which the murder was committed . . . he was without money and apparently in need of funds (testimony of William Bradford), which could have been his motive for attempting robbery . . . Orman's slayer used a double barrelled shotgun . . . Walker had such a weapon in his possession at the time . . . he went out into the country and spent the night walking back and forth on a turn row, which was unusual, since he had been in town for two days . . . he went to the trouble of burying the shotgun . . . a siphoning hose was found in the car he was using (which ties in with the testimony of Leroy Brown), . . . the shotgun shell in his pocket was of the same brand, gauge, and color as the expended shell — and the expended shell, found not too far from the scene of the shooting, had been fired from the gun in Walker's possession. In the *Osburne* case, *supra,* Justice SMITH, speaking for the Court, said:

"But it may be doubted whether the State relied upon circumstantial evidence alone in the instant case. It is true that no witness who testified in the case saw the killing, but numerous statements of appellant herself relating thereto were offered in evidence, and the inferences deducible therefrom were of an incriminating character. The inference is fair and reasonable from appellant's own admissions that she must have known how her husband met his death, and her improbable and untrue statements in regard thereto support the conclusion that she was a party to his murder."

No evidence was here offered on behalf of appellant, and the testimony of the officers as to the oral statements made by Walker to them, stands uncontradicted and unexplained. This testimony constitutes persuasive

evidence in support of the conviction. Even if we consider appellant as an ignorant neer-do-well, obsessed by fear, still his actions are totally inconsistent with innocence; his story too unlikely for credence.

The court did not err in refusing to direct a verdict of acquittal, and the evidence, under numerous holdings of this Court, was sufficient to sustain the verdict rendered. We have examined the record, and find no reversible error.

Affirmed.

WILLIAM J. SMITH, J., not participating.

THOMAS *v.* BARNETT.

5-1682 318 S. W. 2d 154

Opinion delivered November 24, 1958.

[Rehearing denied December 22, 1958]

Ike Murry, for appellant.

W. J. Hulsey, McAlester, Okla., for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Carl Thomas, and appellee, Viola Barnett, are the parents of Sharon Sue Thomas, a little five year old girl.

They were divorced in Oklahoma and the District Court of Pittsburg County Oklahoma gave the father (appellant) exclusive care and custody of Sharon Sue. On an appeal by the mother to the Supreme Court of Oklahoma (*Alford* v. *Thomas,* 316 P. 2d 185), the child's custody was, on October 1, 1957, given to her "until after a conclusive showing and judicial determination have been made as to her unfitness and that by reason thereof the best interest of the child required that she be placed in the custody of someone else." Thereafter, on November 12, 1957, upon another hearing before the Pittsburg County District Court, appellant (father) again asked for the child's exclusive custody and his prayer was granted. The judgment contained these recitals. "Wherefore, witnesses are sworn and examined in open court, they being Captain Bob Oliver, Lt. Elmer Durant and Jess Henson of McAlester Police Department; Jack E. Dale, Court Clerk of Pittsburg County, Oklahoma; Mrs. Vada Lawson; Hon. Jay P. Farnsworth, Municipal Judge of McAlester, Oklahoma; Frances M. Powell, Director of Public Welfare in Pittsburg County, Oklahoma; Mrs. Oleta Mitchell, M. K. Barnett and the plaintiff. And the cause having been concluded and the court being sufficiently advised, finds that the defendant is the mother of three children, to-wit, Warren Johnston, age 12 years, Linda Kay Barnett, age 10 years and Sharon Sue Thomas, age 4 years, each being by a separate father; that said defendant has been, during the period of time starting August 25, 1945, and ending April 11, 1957, involved in nine divorce actions filed in this court; that defendant, for a period of time starting at the latest in the year 1950, has been an unfit person to have the care, rearing and custody of minor children; that she has received fraudulent funds from the Department of Public Welfare in the amount of $2,248.00 which she has not repaid; that defendant has abandoned her children to the care and custody of others; she stands at this time convicted of contempt of this court for disobeying the order of the resident judge, W. A. Lackey; that she bears a bad reputation for

morality and she is personally addicted to bad language, to lewd association with various men; that she is a person of violence and one who uses vile and opprobrious language in public. The court finds that said defendant, between February 8, 1955, and March 31, 1957, has been convicted of three separate criminal offenses in municipal court in the City of McAlester, Oklahoma; that she now has custody of the minor child, Sharon Sue Thomas.

"The court further finds that under date of October 18, 1957, the two older children of defendant were adjudged dependent and neglected children based upon jury verdict now final in the County Court of Pittsburg County, Oklahoma, and that under the order of said County Court, defendant has been deprived of the care and custody of her two older children, Warren Johnston and Linda Kay Barnett. The court finds, upon evidence submitted herein, and upon evidence submitted on March 26, 1957, that defendant is an unfit person to have the custody or right of visitation of said minor child, Sharon Sue Thomas, and that it is not for the best interest of said child to be in the custody of defendant; that by reason of the emotional instability and bad habits and temperament of the defendant, it is for the best interest of the child, Sharon Sue Thomas, that said child be placed in the custody of someone else. The court finds that since the birth of Sharon Sue Thomas, her father has conducted himself properly, that he has acted as both father and mother to said child; that he has cared for said child on practically all occasions except when said child was in the custody of the Oklahoma Baptist Orphanage at Oklahoma City, Oklahoma, for a period of nine months under court decree, and when said child was in divided custody by order of this court, all until on or about the 9th day of January, 1957. The court finds that on January 9th, 1957, at the suggestion of various public officials, judicial officers, welfare agencies and church groups, plaintiff agreed to the placement of his minor child in the home of a respectable and childless couple in Oklahoma City, where

she remained until the decree of the Supreme Court aforesaid, during which time said child was well cared for; the court further finds that said child at this time is not well cared for and that her health and welfare is in jeopardy by virtue of the type and character of her custodian and her relatives; that were it not for the fact that plaintiff has no home nor female relatives to care for said child, he would be a fit and proper custodian for said child. Until such time as the proper court determines the person or institution to have custody of said child, plaintiff should have her custody." Following the above judgment appellee refused to obey it and removed the child to Little Rock, Arkansas.

The present action was brought on January 13, 1958, in Pulaski Chancery Court by the father (appellant) to enforce the above Oklahoma judgment of the Pittsburg County District Court. On February 21, 1958, following a trial, the Pulaski Chancery Court entered a decree holding: . . . "that the conditions and circumstances upon which the judgment of the District Court of Pittsburg County Oklahoma was based have changed and the defendant is entitled to the custody of her child and it will be to the best interest of said child that she be placed in custody and control of defendant." This appeal followed.

For reversal appellant contends: "1. Appellee failed to show a change of conditions since the Oklahoma judgment or any material facts existing at the time of the judgment which were unknown to the Court. 2. The Oklahoma judgment is entitled to be enforced under the full faith and credit clause of the United States Constitution."

We agree with both of appellant's contentions. We said in the very recent case of *Coder* v. *Coder,* 226 Ark. 478, 290 S. W. 2d 628, "We have repeatedly held that a decree of another state fixing the custody of a child is final on conditions then existing, and should not be changed thereafter by a decree of a court of this state unless on conditions altered since the decree of the other

state, or on material facts existing at the time of the decree of the other state but unknown to that court, and then only for the welfare of the child, (citing many cases) . . . All of these cases, and many others, also hold that the welfare of the child must be considered."

Since coming to Little Rock appellee has been working. She leaves Sharon Sue with her father and mother. She testified: (appellant's abstract) "We have a four room apartment with two bedrooms. We have one bed in each bedroom. The little boy sleeps on the divan in the front room and Sharon sleeps with me. My mother and father sleep in the other bedroom. My brother and his wife are there temporarily and they sleep in the front room. My brother is a cab driver and he had to move in with us when he lost his job. There is plenty of room in the apartment . . . " The testimony showed that appellee, her father, mother, brother and sister-in-law all drank intoxicating liquor in the apartment. "The court: All of you drink in that family, you and your wife and your son and his wife? A. (appellee's father) Not excessive." For most of the time since coming to Arkansas eight people have lived in the crowded apartment. Appellee is not now and it appears has never united with any church and does not attend church. She has never taken, or sent, Sharon Sue to church or Sunday school. It appears certain from the evidence that Sharon Sue has had no religious training. Appellee testified: "Q. Did she (Sharon) attend Sunday School one single time? A. We have not yet, but I don't know where to go." We do not attempt to detail all the testimony, it suffices to say that after a review of the entire record we have concluded that the preponderance thereof shows no such change in conditions as would warrant awarding the custody of this little girl to its mother.

The decree is reversed and the cause remanded with directions to award Sharon Sue's care and custody to her father (appellant) in accordance with the judg-

ment of the Pittsburg County District Court of Oklahoma, to which judgment we must, and do, give full faith and credit.

WILLIAM J. SMITH, J., not participating.

WHITAKER & CO. *v.* SEWER IMPROVEMENT DIST. NO. 1 OF DARDANELLE, ARK.

5-1644 318 S. W. 2d 831

Opinion delivered November 24, 1958.

[Rehearing denied January 12, 1959]

Spitzberg, Bonner, Mitchell & Hays and *S. L. White,* for appellant.

Williams & Gardner, for appellee.

Goodier & Parsley, amici curiae.

Ed. F. McFaddin, Associate Justice. This appeal involves matters of Sewer Improvement District No. 1 of the City of Dardanelle, Arkansas (hereinafter called "District"), occurring at various times from 1936 up to the present. A chronological statement, though lengthy, may serve to an understanding of the points presented on this appeal.

1. The District was organized in 1917 under the Municipal Improvement District Statutes then in effect (see §§ 20-101 *et seq.* for the present statutes). In 1918 the District sold $32,500 of its 6% bonds, secured by mortgage of the assessed benefits. The bonds were payable serially and annually from 1918 to 1939. Whitaker & Company (who, along with Roy A. Dickie, will hereinafter be referred to as "Appellants") became the owner of some, if not all, of the bonds issued by the District. The maturing bonds and interest appear to have been regularly paid until 1928, when the District defaulted.

2. In November 1936 Whitaker and Company, on behalf of the bondholders, filed complaint against the

District in Case No. 2856 in the United States District Court for the Eastern District of Arkansas (which case and Court are hereafter referred to as "Federal case" and "Federal Court"). The complaint was to obtain judgment for debt, to foreclose the mortgage, and for other relief. In October 1937 the Federal Court entered a decree awarding judgment to the plaintiffs and appointing a Receiver for the District to foreclose in the State Court the District's lien on delinquent assessments. A portion of the judgment became owned by R. A. Dickie. The Federal Court appointed D. A. Love as Receiver of the District. Other Receivers were substituted by Federal Court order over the years, but we use the term "Receiver" to designate the person acting under the Federal Court orders.

3. In 1939 a suit was filed by the Receiver in the Yell Chancery Court to foreclose the District's lien for delinquent assessments against each parcel of land in the District. This was Case No. 1522 in the said Chancery Court, and will be hereinafter referred to as the "State case" and the "State Court." That case was styled on the docket of the State Court as, "*D. A. Love, Receiver, Sewer Improvement District No.* 1 *of Dardanelle, Arkansas, Plaintiff,* v. *Delinquent Lands, Defendants.*" Foreclosure decree was entered in the State case in 1941 and sale ordered. We will subsequently refer to this as "the 1941 foreclosure." At the sale by the Commissioner of the Court, all parcels not sold to other parties were sold to the District. The report of sale of the Commissioner in Chancery was approved by the State Court, and the Commissioner in Chancery was directed to issue deeds to purchasers after the time for redemption had expired. The Commissioner in Chancery died, and there is no record of any deeds being issued. The original file of proceedings in the State Court has been lost; but it is apparent from the docket entries, record entries of proceedings, and by other evidence, that most of the parcels of land in the 1941 foreclosure suit were sold to the District. No disposition of

any of the parcels seems to have been made until the decree here challenged.

4. For many years after 1941 the matters of the District lay dormant or semi-dormant in both State and Federal Courts, although some interlocutory orders were made in the State Court, as well as in the Federal Court. At various times Receivers were substituted by the Federal Court in the place of D. A. Love; and other interlocutory orders were made; but the recital of any of these is not essential to the issues here. The effect of Act No. 79 of the 1933 Arkansas General Assembly was not called to the attention of the Federal Court for many years. Then in 1956 in the Federal case, the Court appointed the Commissioners of the District, "to proceed in good faith and with all reasonable speed to liquidate the assets of the District.[1] . . ."

5. In 1956 Whitaker and Company and R. A. Dickie intervened in the Case in the State Court and alleged: (a) that the judgments rendered by the Federal Court in the Federal case in their favor remained unpaid, and with interest, amounted to approximately $42,000; (b) that the unpaid and unforeclosed benefits did not equal said judgment; (c) that the District has property which it acquired in the 1941 foreclosure in the State case; (d) that said property should be sold and proceeds applied on the $42,000 claim; and (e) for all other relief. This intervention stirred the District and the Commissioners to action. The Commissioners (Webb, Snyder, and Keenan, as named in the Federal Court order, *supra*) filed their pleading in the State case, pointing out: that many property holders had been willing to pay delinquencies as soon as the legality of the 1941 foreclosure suit in the State Court

[1] This order of the Federal Court recites in part: "It is further ordered by the Court that the Commissioners of said District, namely, Harold Snyder, Lewis A. Webb and Dan Keenan, proceed in good faith and with all reasonable speed to liquidate the assets of said District and wind up the affairs of said District to the end that the judgments in this cause may be satisfied, or so much thereof as possible; . . ."

could be determined; and that the question was whether in the light of said Act No. 79 of 1933 a Federal Receiver could foreclose in the State Court in the place of the Commissioners of the District. The Commissioners expressed a desire and willingness to proceed as soon as, and in the manner, directed by the Court. Other pleadings were filed by various intervenors and *amici curiae.*

6. There was a trial in the State Court on the various issues; and documents were introduced showing various orders and proceedings in both State and Federal cases during the many years intervening from 1936 to the present. The recitation of all of this would serve no useful purpose. On March 17, 1958 the learned Chancellor rendered the decree here challenged on appeal. In that decree the Chancellor of the State Court said:

"A matter of prime concern at this time is the determination of the validity or invalidity of the foreclosure obtained in the name of the Receiver. The issue is presented to the court upon the petition of the Representatives of the judgment holders in Federal Court who contend the title to the foreclosed lands is already in the District and this court should direct a commissioner to prepare proper deeds to the district and then subject the lands of the district to the satisfaction of their judgment.

"The Commissioners of the District ask that the entire foreclosure proceeding be declared a nullity and that this court set forth instructions how to marshal the assets of the District.

"It is apparent that some past commissioners of the District have by word and action led the owners of delinquent property to believe that the foreclosure proceeding was void and should be disregarded, and it is more than just a possibility that such action together with the disregard of the provisions of Act 79 of 1933 caused the chancery court of Yell County to hold the execution of deeds in abeyance."

And again the Chancellor said:

"The decree of the Yell Chancery Court has been on record since 1941. The subject matter was within the jurisdiction of the court. The owners of the delinquent land knew that the taxes had not been paid. No attack was filed in either court asking the removal of the Receiver. The Receiver collected some delinquencies and executed proper receipts and releases. To hold the Receivership void would be to penalize those taxpayers who were trying to pay what they knew they owed. Certainly their payments to the Receiver were valid extinguishment of the taxes levied against them. Every act of the Receiver was pursuant to his authority emanating from the United States District Court; and in this foreclosure action had the added authority of being within the jurisdiction of the Yell Chancery Court.

"This Court, therefore, holds that the Receivership was a valid receivership and the judgment of the Yell Chancery Court a valid judgment. Without relying in any manner upon any argument based upon whether or not the Yell Chancery Court judgment can be properly attacked at this late day in this matter this court finds that the foreclosure was and is a valid foreclosure.

"At the same time this court finds that the commissioners of the District should be substituted as parties plaintiff and stand in the place of the Receiver in this action (Chancery No. 1522); that the commissioners shall compute the delinquencies against the lands involved in this action with interest at the rate of 4% per annum[2] and cause notice of such delinquent amounts and the delinquent property to be published in the Dardanelle paper for 3 consecutive weekly issues notifying all interested parties and persons that owners of the delinquent lands can and may redeem the same by paying the delinquency with accumulated interest within 90 days from the date of the first publication of such notice.

[2] This 4% interest rate will be discussed in Topic II *infra*.

"The Commissioners of the District are hereby directed to proceed to collect the assets of the District including the delinquencies hereinabove referred to and in an orderly manner proceed to administer the affairs of the district to the end that whatever amounts are available to pay to creditors will be speedily made available for that purpose."

7. Under the said Decree there were other provisions wherein the Commissioners were directed to proceed in a manner which intervenors disliked; and from that decree the intervenors (Whitaker and Company and R. A. Dickie) bring this appeal, making three assignments, as follows:

"1. The Court erred in not ordering the issuance of deeds to the District of lands sold it at the foreclosure sale not redeemed within five years.

"2. The Court erred in fixing the rate of interest at 4% instead of 6% per annum on the delinquent assessments as provided in the judgment Jan. 10th, 1941.

"3. The Court having upheld the validity of the foreclosure sale, erred in failing to direct the Commissioners to use sound judgment in disposing of properties for liquidation of debt."

The District as appellee says in its brief in this Court:

"The sole question bothering Commissioners is whether or not the Foreclosure Decree of the Chancery Court of Yell County, entered on the 10th day of January, 1941, is of such validity that title to real property passed under and in accordance with it will divest the former owner of all right and claim which he may have had and invest the new owner with a good and indefeasible, fee simple title.

"This question turns on whether or not the foreclosure suit brought solely in the name of D. A. Love, Receiver, for the Sewer Improvement District has any

validity in light of Section 20-1120, Arkansas Statutes of 1947 (Act 79 of the General Assembly for the State of Arkansas for the year 1933) and the decisions of this Court interpreting that Act."

In the *amici curiae* brief filed on behalf of the City of Dardanelle, there is the argument that the 1941 foreclosure decree is completely void.

Having stated the chronology and the points on appeal, we proceed now to our decision.

I. *The Effect The Chancery Court Gave To The* 1941 *Foreclosure Decree Of The State Court.* A court of equity is a court of conscience: a forum wherein justice[3] is done, sometimes stripped of technicalities and red tape. A court of equity should be as alert to afford redress as the ingenuity of man is to cause situations to develop which call for redress. In one case we said:

"A court of conscience must keep the granted relief abreast of the current forms of iniquity. We should never naively refuse relief . . . simply because there is no similar instance of such . . . in any of the books." (*Renn* v. *Renn,* 207 Ark. 147, 179 S. W. 2d 657.)

In the case at bar the court of equity wisely considered the relative positions of the various parties and rendered a decree that does substantial justice to all.

The appellants contended in the lower Court: (a) that the 1941 foreclosure decree was valid; (b) that the District owned the land that was sold to it in the said foreclosure sale; and (c) that the Commissioners should immediately sell the land and pay the appellants' claim. The appellants also alleged in their intervention, ". . . that the assessments remaining un-

[3] In 19 Am. Jur. 41 (Equity § 4) this statement appears: "But the primary character of equity as the complement merely of legal jurisdiction, in that it seeks to reach and do complete justice, where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of cases, are incompetent so to do, persisted and still persists."

paid in said Sewer Improvement District, all of which are delinquent, if collected, would not pay even one-third of the judgments; and that the only manner in which Roy A. Dickie will ever receive the amount to which he is entitled is by the plaintiffs, that is, the District, obtaining title to the various tracts of land which have been sold to the District and not redeemed within the time provided by law."

We find no substantial evidence in the record to support the copied allegations. Evidently the appellants meant, by the copied allegations, to state that with the District owning the foreclosed property and with no assessments thereafter collected on said property, then the assessments remaining unpaid on the other property would not pay the appellants' judgments. But under the order of the Chancery Court here appealed, the Commissioners must collect *all delinquent assessments on each parcel* of property sought to be redeemed, together with interest from the date each assessment was due until it is paid. That is to say, the Commissioners calculate not only the assessments that were involved in the 1941 foreclosure, but all subsequent assessments. The adding of these subsequent assessments, together with interest, will materially change the situation from that alleged by the intervenors, as above copied. If any parcel sold to the Receiver (District) in the 1941 foreclosure sale is not so redeemed within the limited time stated in the decree here challenged, then the Commissioners will forthwith be entitled to a deed to such property; and thereupon the Commissioners will have the right of sale. So we fail to see how the appellants can be seriously hurt under the decree that the Chancellor rendered herein.

On the other hand, appellees stated in their pleadings that some of the property holders had been advised that the 1941 foreclosure decree of the State Court was void because the Arkansas statute forbade the appointment of an outside third person as a Receiver. The ap-

pellees ask for instructions.[4] Conceding only for the sake of argument that the 1941 foreclosure proceeding in the State Court could be held to be a nullity, then the unpaid and delinquent assessments involved in that proceeding are still due, and all subsequent delinquent and unpaid assessments are still due; and all of these should be foreclosed. Against these assessments there could be no successful plea of limitation because the statute provides (§ 20-414 Ark. Stats.): "Said local assessment shall be a charge and a lien against all the real property in said District, . . . and shall continue until such local assessment, with any penalty and costs that may accrue thereon, shall be paid;[5] . . . " We held in *Martin* v. *Board of Commissioners,* 190 Ark. 747, 81 S. W. 2d 414, and in *Lueken* v. *Burch,* 214 Ark. 921, 219 S. W. 2d 235, that the statute of limitations does not run against the right of an improvement district (such as the one here involved) to foreclose its lien.[6] If the entire 1941 suit had never been filed, a foreclosure could now be maintained for *all* delinquent assessments, penalty, and costs against each parcel of property. At some time the property owner of each tract must pay the amounts due or lose the property; so the setting aside of the 1941 foreclosure proceeding in the State Court would not defeat payment.

The appellants, as judgment creditors, are entitled to payment — not property. The plan evolved by the learned Chancellor will produce money because of the necessity of redemption. If the property owners do not pay, then they will lose their property. In *Greer* v. *Blocker,* 218 Ark. 259, 236 S. W. 2d 68, a drainage dis-

[4] Of course, the *amici curiae* claim that the whole 1941 proceeding is void; but, even so, it would not relieve the property from the unpaid benefits as hereinafter discussed.

[5] Act 85 of 1925 prescribing a period of limitations for filing foreclosure suits for delinquent assessments applies only to Counties having a population of 75,000 or more; and we judicially know that Yell County does not have such population, so Act 85 of 1925 has no application.

[6] The language in § 190 of Act 195 of 1949 (as found in § 20-422 Ark. Stats.), in using the words, "within six months", is directory merely. The statute that is amended (§ 7313 Pope's Dig.) had used the word, "forthwith"; so the 1949 Act in using the words, "within six months", was directory and did not provide a period of limitation.

trict had for many years held title to several thousand acres of land acquired by it at a foreclosure sale for delinquent assessments. We said in that case: "Also the Chancery Court should direct the Receiver to ascertain and report the wise way to dispose of the lands on hand, so that the most money may be realized therefrom; in short, the Chancery Court should direct the Receiver to undertake the liquidation of the debts of the District . . . " In the case at bar, the Chancellor has evolved a plan which is designed to accomplish for Sewer Improvement District No. 1 of Dardanelle exactly what should be done: the obtaining of all delinquent assessments and interest thereon or title to the property that remains delinquent. So, with the exception of the interest rate — to be discussed in Topic II *infra* — we think the Chancellor's decision was just and equitable in all respects.

II. *The Interest Rate.* The Chancery Court provided interest at 4% per annum to be paid on each delinquent assessment[7] when any property holder sought to redeem. Since the judgment of the appellants bore 6% interest and the bonds were 6% bonds, we conclude that the interest rate, to be charged by the Commissioners on each delinquent parcel sought to be redeemed, should be 6% per annum, so that the appellants cannot lose because of interest rate.

Who can complain at 6% per annum interest? (1) Certainly not the property holders (see *City of Eureka Springs* v. *Banks,* 206 Ark. 289, 174 S. W. 2d 947). If the property owners pay 6% per annum interest they are still receiving a most equitable consideration. (2) Certainly not the appellants. They purchased bonds that bore 6% interest and looked to the assessed benefits. If the Chancery Court requires the interest rate for the redemption to be 6% per annum on each delinquent assess-

[7] Since the benefits were payable 4% each year until paid sufficiently to retire the bonded indebtedness, the Chancellor may have used the 4% interest rate, although his reason for using 4% interest instead of 6% is not stated.

ment from the time of delinquency until paid, then the amount received from the interest will be at the same rate as the interest on the bond issue and the judgment they hold.

We modify the decree to make the interest rate on redemption to be 6% per annum instead of 4% per annum. In all other respects the decree is affirmed at cost of appellants. The cause is remanded to reinvest the Chancery Court with jurisdiction for further proceedings.

WILLIAM J. SMITH, J., not participating.

LANGSTON *v.* HORTON.

5-1719 317 S. W. 2d 821

Opinion delivered November 24, 1958.

W. E. Billingsley & Oscar E. Ellis, for appellant.

Claude A. Caldwell, for appellee.

George Rose Smith, J. This is a child custody case involving the parties' two daughters, of the ages of ten and seven years. Temporary custody of the children was awarded to the appellant, their father, when he obtained the divorce in May of 1955. This arrangement continued in effect until the present application for a change of custody was heard in May of 1958. The chancellor found that conditions had changed and awarded custody to the appellee, the children's mother. The appellant was given reasonable rights of visitation and was directed to contribute to the little girls' support as long as their mother keeps them within the court's jurisdiction.

The decree is the only part of the original divorce proceeding that appears in the present record. It recited that the defendant had entered her appearance but had made no defense. The court found that the defendant, while still married to the plaintiff, had gone through a marriage ceremony with Melvin C. Smith and had lived with him for three or four weeks. Upon this finding the court granted the plaintiff, who is now the appellant, a divorce on the ground of adultery. In the present proceeding the appellee testified that she had been told that the divorce was final and was under that impression when she married Smith. She says that she did not live with Smith after learning that their marriage was illegal. This testimony is not contradicted in the record now before us.

The appellee was not in a position to take care of the children when the divorce was granted in 1955. She left Arkansas and went with her brother to the state of Washington. The appellant attempted to show that there she lived with a man not her husband, but this proof is so inconclusive as to be hardly worthy of notice.

The appellee and her present husband, M. J. Horton, were married in March of 1956. They say that they worked in Alaska for a year to earn money with which to provide a home for the appellee's children, if their custody could be regained. Upon returning from Alaska to Washington the couple made a small down payment upon a home, and Horton obtained employment as a mechanic. The Hortons then came to Arkansas so that the appellee could file her present petition. Horton supports his wife's application, explaining that she is no longer able to have children and that they are anxious to have the little girls in their home.

While Mrs. Horton was away the children were cared for by the appellant. He lives with his uncle, a man of seventy-six, who stays with the children while Langston is at work. The chancellor commended Langston for having discharged his obligation to the best of his ability, but it was the chancellor's opinion that the children should be placed in their mother's care rather than remaining in a home where there is no woman to look after their needs.

We are unable to say that the trial court reached the wrong decision. The appellant undoubtedly is a person of good character, devoted to his daughters, but the same things are true of the appellee, with the exception of such inferences as may be drawn from her void marriage to Smith. The trial judge was familiar with the case from its inception, as we are not, and had the further advantage of seeing the parties and hearing the testimony as it was given. He recalled that he had not been exactly satisfied with the original order of temporary custody, but it seemed to be the only arrangement that could be made at that time. Conditions have now changed, since the appellee is able to provide a good home for the children. *Carlton* v. *Carlton,* 223 Ark. 870, 269 S. W. 2d 313. It seems evident that the custody would have been awarded to the appellee by the original decree if the present circumstances had existed at that time. We are not convinced that the order appealed from is contrary to the children's best interests.

In the matter of visitation, however, the decree falls short of effecting complete justice. Apparently the Hortons intend to take the children to Washington, and it is not likely that the appellant, a man of limited means, will be able to exercise there the rights of reasonable visitation that the decree provides. It should, we think, be stated explicitly that the appellant may have his daughters visit him in Arkansas for two or three weeks each summer if he will arrange for their transportation to this state, with the Hortons to bear the expense of the return trip. The appellee shall be required to give a bond to secure her duty to comply with the court's orders in this respect. There appears to be little ill feeling between the parties, and we assume that they will be able to agree upon the exact terms of the modified decree. If not, the chancellor will enter an order consistent with this opinion.

With this modification the decree is affirmed and the cause remanded.

WILLIAM J. SMITH, J., not participating.

RICUMSTRICT *v.* GRIFFIN.

5-1686 317 S. W. 2d 819

Opinion delivered November 24, 1958

George E. Pike, for appellant.

Coleman, Gantt & Ramsay & E. Harley Cox, Jr., for appellee.

George Rose Smith, J. This is a suit by the appellee to obtain cancellation of a deed by which he conveyed four town lots in DeWitt to his stepdaughter, the appellant. The complaint alleged that the defendant had induced the plaintiff to sign the deed by fraudulently representing it to be a mortgage. The chancellor rejected the charge of fraud but found that one of the lots, Lot 7, had been included in the conveyance by mutual mistake. The decree reformed the deed by deleting Lot 7 and also impressed a lien on that lot for a debt of $149.95 that the appellee owes the appellant. Both parties have appealed.

The four lots were originally purchased in 1947 and 1948 by Griffin and his wife, who had the deeds made to themselves and to the appellant. The Griffins had built a small house on Lot 7 and had just begun the construction of a house on the other lots when Griffin's wife died in about 1950. The appellant wanted to complete the second dwelling as a home for herself, but she was told by an attorney that she would have to have a deed to the lots to be entitled to finish the house.

The parties, who are still on friendly terms, are pretty well in agreement about the way in which the deed now in dispute came to be executed. Griffin was an illiterate laborer, somewhat addicted to drink, and after his wife's death both he and his stepdaughter feared that he might lose his home on Lot 7 through improvidence or might someday remarry and lose it to his second wife.

The appellant consulted an attorney, who prepared the deed with a view to carrying out the parties' wishes.

By the instrument Griffin conveyed the four lots to his stepdaughter; but he reserved a homestead right in Lot 7, with a proviso that this right would cease if he should abandon his residence on the lot for a year or if he should remarry and be divorced. The deed was signed and acknowledged by Griffin, who has abandoned his original assertion that he thought he was signing a mortgage. After the deed was executed, in 1951, the appellant finished the house on the other lot and was living there when the case was tried. There seems to be no real dissension between Griffin and his stepdaughter; we infer from the record that Griffin's second wife may have persuaded him to bring this suit.

We think the weight of the evidence to be against the chancellor's finding that Lot 7 was included in the conveyance by mutual mistake. At the trial both parties were easily led by questions on direct and cross examination and contradicted themselves from time to time. For example, Griffin, in response to a leading question, said that he had not intended to convey the property; but when he was asked later on if he knew that he was signing a deed to the property he answered: "Well, to be honest, I sure did know it." The appellant testified that her attorney fully explained the effect of the deed before Griffin signed it, and Griffin refused to deny that such an explanation was made. The deed was in fact aptly worded to give effect to the admitted intentions of both the grantor and the grantee. We are convinced that it was a valid conveyance, voluntarily executed by the appellee without fraud or mistake on the part of anyone concerned.

Counsel for the appellee, citing such authorities as the Restatement of Trusts, § 44, and *Walker* v. *Biddle*, 225 Ark. 654, 284 S. W. 2d 840, insist that a constructive trust should be declared in Griffin's favor, because the parties were in a confidential relation. This, however, is not a case in which an absolute deed was made in reliance upon the grantee's oral promise to hold the land for the grantor. Here the agreement of the parties was written into the deed itself, and it has not been

shown by clear and convincing evidence that the appellant orally assured her stepfather of any interest in the land other than the homestead right that was actually reserved.

By cross appeal the appellee contends that the court erred in fixing a lien upon Lot 7 to secure the appellant's judgment for $149.95. This sum is the unpaid balance of an unsecured loan that the appellant made to the appellee, to enable him to pay delinquent federal income taxes. It does not clearly appear that the Government had a lien to which the appellant might be subrogated, and there is no other basis for impressing a specific lien on Lot 7. The appellant's proof entitles her to a money judgment only.

Reversed and remanded for the entry of a decree consistent with this opinion.

WILLIAM J. SMITH, J., not participating.

FREEZE *v.* HINKLE.

5-1673 317 S. W. 2d 817

Opinion delivered November 24, 1958.

N. J. Henley, for appellant.

Ben B. Williamson, for appellee.

PAUL WARD, Associate Justice. A jury failed to award treble damages against appellee under Ark. Stats. §§ 50-105 and 50-107 for cutting and removing timber (alleged to be wilfully done) from land belonging to appellant. It is the contention of appellant here that the cause should be reversed because the trial court gave two instructions which were erroneous.

There is hardly any dispute over the essential facts. Appellant, T. E. Freeze, and appellee, Alva Hinkle, each own considerable acreages of timber land which have a common boundary line of approximately one-half mile. This mutual line had not been surveyed when the timber was cut, and its exact location was apparently not known to either and certainly not known to Hinkle. On two different occasions the employees of Hinkle entered upon Freeze's land, at places pointed out by Hinkle, and cut and removed timber. The actual value of this timber, according to the allegations in Freeze's complaint, was $146.20. It was further alleged by Freeze that said timber was cut and removed by Hinkle "wilfully and without right or authority," and judgment was prayed for treble the actual value of said timber.

The jury returned a verdict in favor of Freeze for the sum of $94.00 and judgment was entered for that amount. The only grounds designated by appellant for a reversal are that the trial court erred in giving ap-

pellee's requested instructions No. 3 and No. 4. We will consider these grounds separately and in the order mentioned.

Instruction No. 3. By this instruction the trial court in effect told the jury it would be authorized to return a verdict for the actual value only if it found Hinkle "honestly believed, or had probable cause to believe that the timber was on his own land, and said cutting was not done knowingly and intentionally." It is not contended by appellant that the instruction is inherently wrong, but he bases his objection solely on the ground that there is no testimony to support it. If appellant is right it was error for the court to give the instruction. After a careful survey of the record we have arrived at the conclusion that it does contain substantial evidence to support the instruction. Appellee testified in part as follows: Q. "At the time you cut this timber, this oak and cedar, did you honestly believe it was on your land?" A. "Yes, I did." Q. "Why did you believe it was your land?" A. "The line didn't go anywhere near where I thought. I was mistaken about where the corner was at." It is noted that sometime after the timber was cut the true line was surveyed and definitely determined. It shows that the timber was in fact on Freeze's land. It further appears from the record that appellee readily admitted cutting the timber, that he offered to pay appellant its value after the survey, and that the matter might have been settled at that time if an agreement as to the amount had been reached. It is admitted that there was nothing to indicate the true line when the timber was cut. Section 50-107 mentioned at the outset states in substance that only single damages shall be recovered in an action of this kind if it appears that the trespasser (appellee here) "had probable cause to believe that the land on which the trespass is alleged to have been committed . . . was his own."

Considering all these facts and circumstances, together with Hinkle's positive statements, we cannot say, as a matter of law, that he did not have probable cause

to believe the land was his. In other words, we think there is substantial evidence to justify the trial court in submitting the question to the jury.

Appellant says the testimony shows positively that Hinkle could not have had probable cause to believe the land was his. This is based on Hinkle's admission that he did not know the exact location of the line when he cut the timber. We cannot agree that appellant's deduction necessarily follows. We think Hinkle could have honestly believed he was on his own land even though he did not know exactly where the true line ran. In fact it seems that the question of good faith or "probable cause to believe" could only arise where the trespasser did not know the location of the true line.

Instruction No. 4. This instruction is essentially the same as No. 3 discussed previously, except as hereafter indicated. It told the jury in effect that before appellant could recover it must find that the timber "was wilfully and intentionally cut and removed . . . *and that it was not a mistake on the part of the defendant*" (our emphasis). The principal objection is to that portion of the instruction which is emphasized. Appellant has not pointed out, and we fail to see, how the jury was misled by the questioned portion of this instruction. We think the jury understood that cutting timber by mistake by appellee meant the same thing as cutting with probable cause to believe he was cutting his own land.

In addition to the above appellant argues to the effect that the trial court should have instructed a verdict in his favor for treble damages because of Ark. Stats. § 54-201, but we find no merit in this argument. The above section provides in substance that anyone cutting timber on land must first have it surveyed, and the succeeding section provides a penalty for its violation. These sections do not deal with the wilful cutting of timber or the amount of damages. It is true that Hinkle's failure to have a survey made before cutting

the timber could be considered by the jury as going to the wilfullness of his act, and the jury was so told in appellant's instruction No. 2. This was all appellant was entitled to. This same question was settled against appellant's contention in the case of *Case* v. *Hunt,* 217 Ark. 929, 234 S. W. 2d 197, at page 931 of the Arkansas Reports.

Affirmed.

WILLIAM J. SMITH, J., not participating.

ACLIN *v.* CAPLENER.

5-1667 318 S. W. 2d 141

Opinion delivered December 1, 1958.

L. E. Lightle & Cecil A. Tedder, Jr., for appellant.

Yingling & Yingling, for appellee.

CARLETON HARRIS, Chief Justice. Appellees, prior to early spring of 1955, operated as a partnership in Searcy, Arkansas, being engaged in the processing, sale, and distribution of dressed chickens, particularly broilers. Much of their trucking equipment had been pur-

chased from appellants, d/b/a The Searcy Truck & Tractor Company, who held the Oldsmobile automobile and International truck agency. In February, 1955, it became evident that appellees' business would have to be reorganized, or they would be faced with insolvency. At that time, they owed appellants, hereinafter called Aclin, $5,854.09. Appellees employed a Little Rock attorney, and he, together with Capleners' auditor, J. B. McIlroy, undertook to develop a reorganization plan. It was decided that if approval of customers and creditors could be obtained, the business would be incorporated and stock sold. A meeting was called of the chicken growers, largest creditors of the Capleners, and a specific proposition submitted to them, which included the payment in cash of one-third of the indebtedness due them. Other creditors, unsecured, were contacted, with the request that they transfer their accounts from the partnership to the corporation (proposed to be organized); in other words, instead of looking to the partnership for payment of their debt, they were asked to agree to look to the corporation. The incentive to the creditors to consent to this arrangement was created by the fact that the partnership was unable to continue further, and would be unable to pay any indebtedness, while it was hoped that the proposed corporation, with the additional capital anticipated, could, within a short period of time, pay the debts which had been incurred by the partnership. According to the undisputed evidence, all other creditors agreed[1] to the plan, and thenceforth looked to the corporation, rather than to the partnership, for payment of the indebtedness due them. Previously, certain equipment notes had been given appellants by appellees, and these had been endorsed by appellants with recourse, to the Searcy Bank. An effort was made by Capleners to borrow additional money for the reorganization from the Searcy Bank, which was refused, but the Security Bank agreed to advance money to the corporation if it was given a first mortgage on all equipment and other specific assets of the corporation.

[1] Whether Aclin agreed, is the question in this litigation.

Articles of incorporation were filed on March 4th, and the equipment notes were paid off one week later,[2] along with some other indebtedness due the Searcy Bank. The sum due and paid on the equipment notes was $11,042.10. The corporation operated unsuccessfully for a few months, and the Security Bank foreclosed on all corporate assets pledged to it. Aclin instituted this suit against the Capleners for the $5,854.09, and they answered, pleading accord and satisfaction. This plea was based upon the fact that the equipment notes had been paid.[3] A jury was waived by the parties, and the court, after hearing the evidence, held that appellants were estopped to recover upon the account sued on. From such judgment, comes this appeal.

Let it first be said that we agree with appellants that appellees cannot prevail upon the theory of accord and satisfaction, and in fact, this defense is not argued in appellees' brief.

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[2] From the testimony of McIlroy: "Q. Actually though, the funds came from the Security Bank, didn't it, to pay it? A. No, not necessarily, because it was kept there, and I believe now, I will have to look at the record again, but I believe that there would have been sufficient dollars there to have made that much of a payment without any note having been issued by the bank. Now, in fact, I believe that if you will check the records that the deposit of the money from the note wasn't made into the account of the corporation until after the payment of the —in fact, a day or so after, after the payment was made to the Searcy Bank."

[3] From appellees' "Response to Motion to Make More Definite": "That prior to March 4, 1955, defendants operated as a partnership under the firm name and style of Caplener & Sons. On March 5, 1955, because of financial difficulties and their inability to pay their bills, they entered into an oral agreement and arrangement with all of their unsecured creditors, including plaintiffs, to reorganize and incorporate said business, said corporation to assume payment of all unsecured debts then owned by said partnership, which proposal was orally accepted and agreed to by said unsecured creditors, including plaintiffs, the agreement by plaintiffs, however, being conditioned that said corporation pay at once certain notes, four in number, given by defendants to plaintiffs and by plaintiffs endorsed with recourse to The Searcy Bank; and the balance due upon said notes in the sum of $11,042.10, was paid by said corporation on March 11, 1955, to The Searcy Bank in accordance with said agreement.

"That plaintiffs, having entered into said oral agreement, any balance due them on the account sued on herein, is due and payable by Boyce Caplener & Sons, Incorporated, and not by the defendants herein."

Appellants contend that the equipment notes were paid by appellees without their knowledge,[4] and that they would have vigorously opposed such payment, since, in their opinion, the equipment was worth more than the balance due on said notes; that they would have been glad to take the equipment back for the indebtedness. We do not consider the payment of these notes by the corporation, either with, or without, prior knowledge of appellants, to be determinative of this litigation. We rather conclude, as evidently did the trial court, that the issue is whether appellants, by word or deed, consented to the transfer of the indebtedness from the partnership to the corporation. Therefore, there are only two questions to be decided. First, was there substantial evidence to support the judgment rendered by the circuit court, and second, is the defense of estoppel available to appellees when they had not pleaded same? To the first question, we answer "yes." Caplener testified that he personally contacted James Aclin; that the entire plan of reorganization was explained to Aclin; the latter was advised that to perfect the plan, all creditors would have to "go along"; that future business with the Aclin partnership would be conducted on a cash basis, and "I told James that I thought by reorganizing the corporation and getting in more money to operate on, that he would receive his amount owing him a lot quicker and could realize all of it. I was sincere in telling him that. * * *" He further testified that Aclin " * * * was very cooperative and in agreement." J. B. McIlroy testified by deposition that he had known the parties about three years, and had been employed by both appellants and appellees to handle their accounting work. He further stated that he furnished the necessary statements and data required for the reorganization, and likewise participated in such reorganization, to the extent of contacting several of the creditors and both banks in regard thereto. As to Aclin, the witness' testimony was as follows:

[4] Kenneth Caplener testified that he told James Aclin that the notes would be paid in the manner they were paid, and that Aclin raised no objection.

"Q. * * * Did you in company with anyone else submit this proposition to the plaintiff in this lawsuit or any one other person?

A. Yes, sir, as was required by that initial stockholders meeting. In fact, I believe on the same day, Attorney Guy Reeves and I went to the office of James Aclin at the Searcy Truck & Tractor Company and both of us together outlined the entire program to him and requested of him at that time that he allow that indebtedness to be transferred to the corporation and we also requested that he take common stock for a cash consideration in the corporation.[5] We were told at that time — —

Q. By him?

A. By Mr. Aclin, James Aclin, that he felt that there would be no difficulty in transferring the debt from the partnership to the corporation, however, in regards to the stock that he would not commit himself and desired to talk to his father in regards to both items. * * *"

According to McIlroy, Aclin was contacted on several other occasions with regards to the matter and

"* * * eventually he told us that they had decided not to take stock as we had requested, that they, at that time, were not in a position to purchase the stock."

Further,

"Q. Well, then, as I understand your testimony, Mr. Aclin's statement was, in effect, that they would go along with you on everything except the purchase of stock?

A. That was my general opinion of the conversation."

McIlroy testified that the corporation assumed payment of the debt, the balance being transferred, and placed upon the records of the corporation. He likewise testi-

[5] There was no requirement under the plan of reorganization that creditors take stock; such purchase would be purely voluntary.

fied that Aclin had been told any future business would be handled on a cash basis, and stated that this was done. According to his evidence, the new corporation would not have been formed, except that all creditors accepted the proposition submitted to them. This testimony of these witnesses was denied by Aclin, who only admitted that he knew the Capleners' business was being reorganized. He stated that he made no agreements whatsoever to transfer the debt. Other evidence was offered in support of appellants' position, such as the fact that the books of the Searcy Truck & Tractor Company were never changed to show a transfer of the indebtedness. It is noticeable, however, that no suit was instituted by Aclin until after the corporation had become insolvent, which lends some weight to appellees' contention that appellants were looking to the corporation for payment. Be that as it may, we are of the opinion that the evidence adduced by appellees constituted substantial evidence. According to the appellees' evidence, the reorganization and incorporation was carried out in reliance upon the agreement with creditors. This, of course, meant that Capleners were put to the expense and trouble of employing counsel, and an accountant, and were required to expend time and effort in raising capital for the new venture, and other matters incident to perfecting the corporation. We are of the opinion that the doctrine of estoppel properly applies, even if the view be taken that the agreement was without consideration. In *Peoples National Bank of Little Rock* v. *Linebarger Construction Company,* 219 Ark. 11, 240 S. W. 2d 12, it was said:

"There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact, it was relied upon, * * *."

Estoppel *in pais* is as readily and fully recognized in courts of law as in courts of equity. *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553.

It only remains to determine whether there was necessity that such defense be pleaded. While it is true that, as a general rule, estoppel must be pleaded as a defense to a claim, there is a well defined exception. As stated in *Williams* v. *Davis,* 211 Ark. 725, 202 S. W. 2d 205:

"Appellant argues here, however, that appellees could not avail themselves of the defense of estoppel for the reason that it was not specially pleaded. It is true that, as a general rule, estoppel must be pleaded to be available as a defense to a claim; however, there is a well defined exception that arises, as in the present case, when 'the estoppel or waiver is admitted in evidence or becomes an issue without objection at the time that it was not pleaded, this objection that it was not pleaded is waived and the estoppel is as conclusive as if pleaded specially, whether it is an estoppel *in pais,* a waiver, *etc.*' 19 Am. Jur., page 850, section 197.

In this case there were no objections to the evidence bearing on the question of estoppel, on the ground that it had not been pleaded, and therefore it was within the sound discretion of the trial court to treat the pleadings as amended to conform to such proof."

To the same effect is the holding in *Brotherhood of Railroad Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. 2d 433, and *Keylon* v. *Arnold,* 213 Ark. 130, 209 S. W. 2d 459.

Finding no reversible error, the judgment is affirmed.

Justice William J. Smith not participating.

5-1661 318 S. W. 2d 148

Opinion delivered December 1, 1958.

D. L. Grace, for appellant.

Harper, Harper, Young & Durden, for appellee.

J. SEABORN HOLT, Associate Justice. Properly proceeding under the provisions of our Workmen's Compensation Statutes (Secs. 81-1301—1349, Ark. Stats. 1947), appellant, Carty, was awarded compensation, resulting from an injury, for permanent partial disability to the extent of 30 per cent of his body as a whole. His claim was first heard before a referee of the commission, who, on January 2, 1957, awarded Carty compensation on the basis of permanent partial disability to the extent of 25 per cent of his body as a whole. On appeal the full commission increased the amount of such disability allowed by the referee to 30 per cent. The Sebastian Circuit Court affirmed the action of the full commission and this appeal followed.

For reversal appellant says: "First: Appellant was injured while in the employment of the appellee on the 14th day of September, 1954 — a primary injury, traumatic in nature. (1). The award and opinion of the commission and order of the circuit judge were insufficient, and did not fairly recompense appellant for injury sustained as to healing period, (2). Did not fairly

recompense appellant as to total permanent disability, and/or the per cent thereof. Second: Appellant sustained a secondary injury, permanent in nature, which resulted from the use of iodized oil in the form of myelogram administered by the doctors in their efforts to diagnose and operate his injuries, for which he never was treated. That said injuries sustained by the use of iodized oil were never diagnosed and never rated as to disability by the Arkansas Workmen's Compensation Commission nor the circuit court."

"Since the enactment of our Workmen's Compensation Law, we have consistently held that we do not try compensation cases here *de novo,* we are, therefore, not concerned with where the weight of the evidence may lie. When we find any substantial evidence to support the findings of the commission, we must affirm. We said in the recent case of *Grimsley, adm'x.* v. *Manufacturers Furniture Co.,* 224 Ark. 769, 276 S. W. 2d 64: 'Findings of fact by the Workmen's Compensation Commission are given the same verity as attach to the verdict of a jury and this applies on appeal to the circuit court as well as to the supreme court from the judgment of the circuit court . . . On appeal, the supreme court must view testimony in its strongest light in favor of the commission's findings . . . Where the commission acting upon sufficient evidence sustains or rejects an award, such findings will not be disturbed on appeal,' " *McKamie* v. *Kern Trimble Drilling Co.,* 229 Ark. 86, 313 S. W. 2d 378.

After a careful review of the testimony presented, we think a fair summation thereof was made by the commission and that its conclusions were based on substantial evidence. The commission's findings and conclusions contained these recitals: "On September 14, 1954, claimant sustained an accidental injury to his low back, and in an opinion filed January 2, 1957, by a referee, it was found that claimant's temporary total disability and/or healing terminated July 17, 1956; that the claimant has a permanent partial disability of 25 per cent to the body as a whole; that the payment of

temporary total disability and permanent partial disability of 25 per cent to the body as a whole has not been controverted by respondents. The referee made an award in keeping with his findings and in addition thereto allowed claimant's attorney an attorney's fee of $200 to be deducted from the award.

"Upon review additional evidence was presented, it consisting of the following: testimony of Dr. Hoyt Kirkpatrick, Jr., Holt-Krock Clinic, Fort Smith, Arkansas, who specializes in orthopedics; testimony of Dr. Frank Padberg, Little Rock, who specializes in neurosurgery and who examined and operated on claimant for a herniated disc and who re-examined claimant on May 3, 1957, at the suggestion of this commission; additional testimony of claimant and his wife; reports of Dr. Frank Padberg dated May 4 and 27, 1957; report of Dr. John D. Christian, orthopedist of Little Rock, dated May 11, 1957; x-ray report of Dr. George Regnier dated May 22, 1957.

"We find from a study of the evidence of record presented before the referee that the 'Statement of the Case', as set forth . . . is a fair statement of such evidence; therefore, in the interest of avoiding repetition, we herewith adopt said statement as our own.

"Briefly stated, the additional evidence presented before the full commission is substantially to the following effect: Dr. Padberg re-examined claimant on May 3, 1957, at the suggestion of this commission, and after that examination it is his opinion claimant's permanent partial disability is 25 per cent to the body as a whole, and he finds no evidence of any disability resulting from the myelographic examinations given the claimant. Claimant continues to assert that he is unable to do any work and is 100 per cent disabled, but he also continues to refuse any additional operative procedure. Dr. John D. Christian of the orthopedic firm of Drs. Thompson, Christian and Steele, examined claimant on May 3, 1957, and he concludes his report of May 11, 1957, with the statement that he would estimate claim-

ant's permanent partial disability in the neighborhood of 30 per cent to the body as a whole, and he does not feel that any further treatment is indicated, and it is his further opinion that claimant's healing period ended prior to that time. Dr. George Regnier, radiologist of Little Rock, states in his report of May 22, 1957, that he reviewed films of claimant's spine made May 13, 1957, July 11, 1955, and December 6, 1954, and there is no evidence of a destructive process in any of the films, nor is there evidence of acute injury and no appreciable change in disc interspace which can be seen in these films, and the sacroilee and hip joints are normal radiographically.

"Upon consideration of all of the evidence presented herein, the commission, in partially affirming and partially amending the opinion of the referee, makes the following — Findings — 1. That on September 24, 1954, claimant sustained an accidental injury to his low back that arose out of and during the course of his employment; 2. That on July 17, 1956, claimant's period of maximum recovery or healing period from the aforesaid injury terminated, leaving him with a 30 per cent permanent partial disability to the body as a whole; 3. That 65 per cent of claimant's average weekly wage exceeded $25; 4. That the payment of compensation for temporary total disability and for permanent partial disability as found above has not been controverted by respondents. — Conclusions — Concisely stated, the questions for decision herein are the duration and extent of disability. When did claimant achieve maximum recovery from his admitted compensable accidental injury to his back? There is some conflict in the evidence as to exactly when claimant reached such a physical state. We believe that there is competent evidence to establish that claimant's maximum recovery, particularly in view of claimant's refusal to submit to any further operative procedures, terminated on or before July 17, 1956. We, therefore, affirm the referee's finding that claimant's healing period terminated on the foregoing date.

"What is the extent of claimant's permanent partial disability resulting from instant injury? As opposed to claimant's assertion that he is unable to do any work, we have the medical opinions of three medical specialists that claimant is able to do certain types of work, and that in their opinions claimant's permanent partial disability to the body as a whole is from 25 to 30 per cent. One orthopedist and a neurosurgeon expressed the opinion that claimant's permanent disability is 25 per cent, while one orthopedist states claimant's disability is about 30 per cent of the body as a whole. There is also other medical opinion on the part of two general practitioners that claimant's disability is greater than that found by the medical specialists. When consideration is given, however, to the qualifications of the doctors and their opportunities to know claimant's condition, we believe that the opinions of the specialists should be given more weight than that accorded the general practitioners in this case. At the time the referee made his findings of a 25 per cent permanent partial disability to the body as a whole, he did not have the benefit of the findings of Dr. John D. Christian as set forth in Dr. Christian's report of May 11, 1957, which is now before the full commission.

"By the terms of this opinion, we, therefore, amend the referee's finding as to permanent partial disability, and herein find same to be 30 per cent to the body as a whole . . .

"Award—It appears that respondents have paid claimant for his periods of temporary total disability and/or temporary partial disability from the date of the injury at least down through July 17, 1956, and there is no dispute about payment of compensation for that period of time; therefore, beginning July 18, 1956, and continuing for a period of 135 weeks, respondents will pay to claimant compensation at the weekly rate of $25 for a 30 per cent permanent partial disability to the body as a whole. Respondents will take credit for any com-

pensation paid to claimant since July 17, 1956, to apply on his award for permanent partial disability."

Accordingly the judgment is affirmed.

FIREMEN'S RELIEF AND PENSION FUND FOR THE CITY OF PINE BLUFF, ARK. *v.* HUGHES.

5-1664 318 S. W. 2d 145

Opinion delivered December 1, 1958.

Wilton E. Steed, for appellant.

Joe Holmes, for appellee.

ED. F. MCFADDIN, Associate Justice. The question here presented is the correctness of the decision of the Circuit Court which adjudged that Appellee Hughes was entitled to a fireman's pension because of physical disability. The appellant here is the Firemen's Relief and Pension Fund for the City of Pine Bluff (hereinafter referred to as "Pension Board"); and the appellee is David C. Hughes, who claims that he was injured at a time and in a manner that entitles him to a pension.

Both sides agree that the applicable law is found in §§ 19-2201 *et seq.* Ark. Stats., including the 1955 amendments.[1] Pertinent statutory provisions will be mentioned later.

The present litigation began on August 29, 1957, when Hughes' attorney filed an oral claim with the Pension Board, which claim was denied.[2] On September 6, 1957 Hughes filed Case No. 14521 in the Jefferson Circuit Court and his pleading was entitled, "Appeal". In that pleading, Hughes alleged that he received an injury while a regular member of the Pine Bluff Fire Department and that the injury was not received while in or as a result of other gainful employment. He alleged the refusal of the Pension Board to award him a pension and prayed for a Circuit Court judgment awarding him a pension from July 1, 1956, which was apparently some time near the date of his injury. The Pension Board filed answer: (1) denying the allegations made by Hughes; (2) alleging that Hughes was discharged for cause on July 1, 1956; and (3) claiming that Hughes had failed to comply with the law in attempting to obtain a pension.

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[1] The amendments made by the 1957 Legislature are found in the Pocket Parts of Arkansas Statutes Annotated, but the 1957 amendments are not applicable to this case insofar as concerns the substantial claim of the appellee, since his alleged injury occurred in 1956.

[2] All the minutes of the Pension Board of August 29, 1957, insofar as relate to this case, are as follows: "The Board of Trustees of the Firemen's Relief and Pension Fund met in regular monthly session at 8 o'clock AM this date in the office of the Mayor. Mayor Lites presided and the following members of the Board were present: Chief Alford, Firemen Jones, Murdock, Phillips and McCallister. There was none absent.

"Minutes of the meeting of July 31, 1957, were read and approved . . .

"Attorney Joe Holmes was present and requested the Board to grant an application for pension made by his client, David C. Hughes.

"Mayor Lites read a court order signed by Circuit Judge Henry Smith decreeing that the appeal by Mr. Hughes to the court be dismissed with prejudice. After some discussion with reference to state laws that applied to the case, Mr. Jones moved that the application of Mr. Hughes to the Board for a pension be denied. His motion was seconded and, upon roll-call vote, carried unanimously.

"Mayor Lites instructed the Secretary to furnish copies of these minutes to Mr. Holmes, to Fire Chief Alford and to the Civil Service Board.

"There being no further business, the meeting adjourned."

The cause was heard in the Circuit Court *ore tenus*: part of the hearing was on the 22nd day of November, 1957 and the concluding portion of the hearing was on the 30th day of January, 1958. On the last mentioned date the Circuit Court entered judgment for Hughes for a pension to begin on July 1, 1956. From that judgment there is this appeal in which the appellant presents two points, to-wit:

"1. A Fireman is not entitled to a pension where he fails to file a certificate of disability with the pension board.

"2. Appellee is not entitled to a pension from the Firemen's Relief and Pension Fund for the City of Pine Bluff, Arkansas, where his injury is caused by his own misconduct."

I. *Appellant's First Point.* Section 19-2205 Ark. Stats., insofar as concerns disabled firemen, says:

"Whenever a person serving as a fireman in such city or town shall become physically or mentally disabled, except while actually performing work in gainful employment outside of the Fire Department in said city or town, said Board may, upon his written request, . . . retire such person from active service, and, if so retired, shall order and direct that he be paid from said fund a monthly pension . . ."

Section 19-2206 Ark. Stats. says:

"No person shall be retired, as provided in the next preceding section, or receive any pension from said fund, unless there shall be filed with the said board certificates of his disability, which certificates shall be subscribed and sworn to by said person and by the city or town physician, if there be one, and the firemen's relief and pension fund physician, and such board may require other evidence of disability before ordering such retirement and payment as aforesaid."

Hughes never filed any written request with the Pension Board and never filed any certificate of disability with the Pension Board, as a basis for his request of August 29, 1957. When the case reached the Circuit Court the Pension Board claimed as a defense that Hughes had failed to comply with the Arkansas Statutes. On the trial, Hughes admitted that he had never appeared before the Pension Board; and no certificate of any kind was introduced in the trial.[3] So the record here conclusively establishes that Hughes did not file a certificate as required by § 19-2206; and that the Pension Board has not waived such failure because it has all the time urged that Hughes had not complied with the law.

The Statute provides in § 19-2210 that appeals from the Board to the Circuit Court shall be, ". . . in the method now provided for appealing from decisions of the Justices of the Peace in civil cases". The trial in the Circuit Court is *de novo*; but in the *de novo* trial in the Circuit Court there was no evidence that Hughes had complied with § 19-2206 Ark. Stats. The question, then, is how fatal is his said failure. The situation here is very much like the situation involving § 51-1101 Ark. Stats. That section provides that before any mortgagee shall proceed to foreclose a mortgage or to replevy under such mortgage any personal property, such mortgagee shall make and deliver to the mortgagor a verified statement of account showing each item, debit and credit, and the balance due. We have held that, unless waived, compliance with § 51-1101 is a prerequisite to the beginning of proceedings. (*Lawhon* v. *Crow, infra.*) Likewise, it is clear that, unless waived, compliance with § 19-2206 is prerequisite to the allowance of a disability claim.

[3] In the appellee's brief in this Court it is stated that a certificate of disability was filed with the Pension Board of February 12, 1958; and what purports to be such certificate appears in the appellee's abstract; but the judgment herein was on January 30, 1958 and subsequent attempted curative filings cannot improve a defective record.

The case of *Lawhon* v. *Crow,* 92 Ark. 313, 122 S. W. 999, points the way to our conclusions here. In that case the mortgagee brought suit in the Justice of the Peace Court to replevy personal property described in the mortgage. The mortgagor pleaded in the Justice of the Peace Court that the mortgagee had failed to fully comply with the section that is now § 51-1101 Ark. Stats. The case reached the Circuit Court and the mortgagor renewed his plea. The Circuit Court sustained the defense and the mortgagee appealed. This Court cited the earlier cases of *Atkinson* v. *Burt,* 65 Ark. 316, 53 S. W. 404, and *Perry County Bank* v. *Rankin,* 73 Ark. 589, 84 S. W. 725, and reached the conclusion that: ". . . the mortgagee does not forfeit his debt by failing to comply with the statute. . . He may still have his remedy of foreclosure by complying with the statute . . ."[4] So, here, the failure of Hughes to comply with the statute (§ 19-2206 Ark. Stats.) is fatal to his present suit; and the Circuit Court should have dismissed the case, but without prejudice to Hughes' right to thereafter comply with the statute and have further proceedings. Such is the conclusion we reach in this case.

II. *Appellant's Second Point.* The appellant claims that the appellee is not entitled to a pension because his injury was caused by his own misconduct, and pleads § 19-2210 Ark. Stats. as a defense to any pension claim of appellee. Even though this present case is to be dismissed by the Circuit Court, we think it only proper for future guidance to point out that we are not passing on this second point. Thus, the Pension Board is still at liberty to make its claim, relying on the provisions of § 19-2210 Ark. Stats.

The judgment in the present case is reversed and the cause is remanded, with directions to the Circuit Court to dismiss the present case but without prejudice

[4] Some of the subsequent cases citing *Lawhon* v. *Crow (supra)* are: *Ford Hardwood Lumber Co.* v. *Bryant,* 178 Ark. 807, 13 S. W. 2d 1; *McCoy & Son* v. *Atkins,* 167 Ark. 250, 267 S. W. 779; and *Haffke* v. *Hempstead County Bank,* 165 Ark 158, 263 S. W. 395.

to Hughes to have further proceedings after he complies with the applicable law.

CONWAY *v.* HUDSPETH.

5-1698 318 S. W. 2d 137

Opinion delivered December 1, 1958.

Gordon & Gordon, for appellant.

Walker & Villines and *N. J. Henley,* for appellee.

George Rose Smith, J. This is a three-sided lawsuit arising from a traffic collision involving a car owned by the appellees Hudspeth, a truck owned by the appellee Steen, and a car owned by the appellant Conway and being driven by his employee, the appellant Bert Smith, Jr. By the pleadings each set of parties charged the other two with negligence and sought damages from the other two. The jury attributed the collision solely to the negligence of Conway's employee, Smith, and judgments were accordingly entered in favor of the Hudspeths and in favor of Steen and his daughter, who was riding with him at the time. The appellants question the sufficiency of the proof, the court's rulings upon the admissibility of evidence, and one of the instructions to the jury.

The accident happened on the afternoon of January 28, 1957, at a point on Highway 65 near the western edge of the city of Marshall. Steen was traveling west in his truck and had slowed down with the intention of turning to his left across the highway to enter a service station. The Conway car was following Steen and the Hudspeth car was approaching from the opposite direction. The pivotal question of fact at the trial was the order in which Steen's truck collided successively with the two cars. That is, did the Conway car strike the truck from behind and knock it into the path of the Hudspeth car, or did Steen himself drive slightly across the center line into the lefthand traffic lane, where his truck was hit by the Hudspeth car and thrown back into the path of the Conway vehicle? The jury evidently adopted the view first mentioned.

In questioning the sufficiency of the evidence the appellants insist that Steen's testimony cannot be reconciled with the physical facts. Steen testified that he had

not begun his turn when he was struck from behind, and from this statement the appellants argue that a blow from the rear would have thrust the truck straight ahead instead of leftward. This reasoning is sufficiently answered by the fact that the Conway car's damage was to the left front end and the truck's damage to the right rear end. The jury doubtless concluded that the truck received a glancing blow which caused it to swerve to the left.

Conway asked for a directed verdict, contending that his adversaries had not proved that Conway's employee, Smith, was acting within the scope of his employment when the collision occurred. We think the court was right in holding that the proof made this an issue for the jury's determination.

Smith, a boy of seventeen, was employed from time to time to wash cars and do odd jobs at Conway's used car lot. On the afternoon of the accident a man named Karns had become ill at Conway's place of business. Conway and Smith drove Karns to a hospital, where he obtained medicine. After leaving the hospital Conway alighted from the car and instructed Smith to take Karns home "and come right back." Smith says that he drove Karns to his home, and then "I started out to see about my granddad," who lived perhaps a half mile west out Highway 65. Smith states that he was on his way to his grandfather's house when the accident happened.

We are unable to say that the undisputed proof required the jury to find that Smith had left the course of his employment. In the first place, the geographical setting is not clearly disclosed by the proof. Conway's used car lot, to which Smith was to return, is in the downtown business district of Marshall, and the collision took place within the city limits, near the western edge of town. We are not told, however, where the Karns house is, except that it is in the north part of town, north of Highway 65. If the house were due north of the point of the accident Smith's deviation from the

most direct return route might have been so slight as to support a finding that there had been no departure from the master's business. *Cahill* v. *Bradford,* 172 Ark. 69, 287 S. W. 595.

In the second place, Conway testified that he had another place of business on beyond the point of the accident and that he himself made numerous trips there every day. Since both Conway and Smith were interested parties, the jury was not required to accept Conway's uncorroborated statement that he instructed Smith to come right back or to accept Smith's unsupported testimony that he had started to see about his grandfather. *Bullock* v. *Miner,* 225 Ark. 897, 286 S. W. 2d 328. Inasmuch as the route that Smith was traveling led both to the object of his personal mission and to his employer's second place of business, it was for the jury to say which destination Smith had in mind when he began the trip.

Several contentions relate to the admissibility of evidence. Thomas Martin, who was the driver of the Hudspeths' car, testified on direct examination that after the accident he asked Steen whether he had driven across the center line or had been knocked across, and Steen said he believed he was knocked across. No objection was made at the time, but at the close of Martin's cross examination counsel for Conway and Smith asked that the testimony be excluded. The court instructed the jury that Martin's statement of what Steen had said should not be considered as evidence against Conway and Smith, but it might be considered for any other purpose.

We perceive no error in the court's ruling. Since the objection was not interposed in time to prevent the jury from hearing the statement, the court's later admonition to the jury was as favorable a ruling as the appellants could then expect and in effect sustained their objection. Their present argument is that the statement should have been excluded altogether; but the statement was competent against Steen as an admission, for there is no requirement that the admissions of

a party to the suit must also be declarations against his interest in order to be admissible. Wigmore on Evidence (3d Ed.), § 1048. What we have said also disposes of a similar objection that was made during the testimony of Gerald Bert Hudspeth.

The appellants called as a witness a trained state police officer, who had investigated the accident before the vehicles were moved, and attempted to elicit his opinion as to the order in which the collisions occurred. When the court sustained an objection to this testimony, counsel stated that the officer would have testified that in his opinion the Hudspeth car struck the Steen truck and knocked it backwards against the Conway car.

We do not agree with the appellants' contention that the proffered testimony was admissible as the opinion of an expert. It has been said that the courts look with disfavor upon attempts to reconstruct traffic accidents by means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration. *Moniz* v. *Bettencourt,* 24 Cal. App. 2d 718, 76 P. 2d 535. In the case at hand the officer was not asked to describe every physical fact that he had seen and then to explain his deductions, in the manner that ballistic experts often explain their conclusion that a certain weapon fired a certain bullet. Here the officer was asked his opinion on the basis of the position of the vehicles, the damage to them, "and other physical evidence found at the scene." In the absence of anything to indicate that it was beyond the jurors' ability to understand the facts and draw their own conclusions, there was no need to resort to expert opinion. *Mo. Pac. R. Co.* v. *Barry,* 172 Ark. 729, 290 S. W. 942.

The appellants sought to show that Steen, after the Hudspeths had filed suit, said to Conway: "I don't want to get in a lawsuit over this; he said my pickup is a total wreck, and I am willing to sell the salvage and pay it on it, if we can get it stopped." The trial court correctly ruled the statement to be inadmissible, for it in-

dicates only a willingness to compromise and does not amount to an unqualified confession of fault. *Folsom* v. *Watson,* 217 Ark. 158, 228 S. W. 2d 1006.

J. L. Hensley, a witness for the appellants, testified that he was following the Conway car and saw the collision. On cross examination he denied having told Steen that he had not seen the collision. On rebuttal Steen was permitted to testify that he had talked with Hensley and that Hensley had said that he did not see the accident happen.

It is now insisted that no proper foundation for Steen's rebuttal was laid, in that Hensley was not informed of the exact time and place of his asserted statement to Steen. In fairness to the trial court this contention cannot be sustained. The only objection to Steen's rebuttal was this: "If the court please, the statement to him by J. Lee Hensley is not admissible." The court ruled that the evidence was competent for the sole purpose of going to Hensley's credibility, and the objection was pursued no further. We think the court reasonably understood the objection as being based upon the hearsay rule, and upon that understanding the ruling was correct. If counsel thought that no proper foundation had been laid, the point should have been brought specifically to the court's attention. Had that course been followed the omission now complained of might readily have been supplied in the trial court. See *Degen* v. *Acme Brick Co.,* 228 Ark. 1054, 312 S. W. 2d 194.

Finally, it is contended that the court should not have given an instruction on the issue of Smith's possible negligence in following too closely behind the Steen truck. It is true that no eyewitness testified that Smith was too close, as neither Martin nor Steen saw the Conway car before the accident. But Smith testified that he applied his brakes as soon as he saw the truck coming back toward him, and the proof is that his skid marks were only twelve feet in length. From this evidence the jury may have concluded that Smith was not keep-

ing a reasonable distance behind the vehicle ahead of him.

Affirmed.

WILLIAM J. SMITH, J., not participating.

BELLOTT *v.* WEATHERLY.

5-1728 318 S. W. 2d 152

Opinion delivered December 1, 1958.

John F. Gibson, for appellant.

W. P. Switzer, for appellee.

PAUL WARD, Associate Justice. On August 20 and 29, 1957, pursuant to Ark. Stats. § 20-701 *et seq.,* certain property owners in the vicinity of Crossett filed petitions in the County Court of Ashley County to form two improvement districts. One was Fire Protection District No. 1 and the other was Natural Gas Improvement District No. 2.

On September 9, 1957, after proper notice, the County Court ordered the creation and establishment of

the two districts mentioned above. The order states the following findings of fact: ". . . the proposed district includes lands lying adjacent to the City of Crossett, Arkansas, which has a population of more than 5,000 inhabitants . . ."; ". . . all of said lands are situated wholly outside the corporate limits of said city . . .", and; ". . . said petition is signed by a majority in value and area of the owners of real property within the hereinafter described territory and said proposed district." The court also appointed appellees as commissioners.

On December 6, 1957 an appeal was taken to the Circuit Court, and a hearing was set for December 16, 1957. On the latter date an intervention was filed by two property owners who were given until January 13, 1958 to file pleadings and ask for legal relief.

On the date last mentioned a hearing was held at which time testimony was introduced by both sides. At the conclusion of this hearing the Circuit Court entered judgment affirming the order of the County Court creating the two districts.

For a reversal appellants rely on three grounds, to-wit: The court erred (a) in placing the burden of proof on appellants, (b) in accepting the testimony of the Tax Assessor, and (c) in considering the 1956 assessments.

Under the view which we have taken it will not be necessary to discuss all of the above points. The County Court, as has heretofore been noted, found that all statutory prerequisites had been complied with. On appeal it was the duty of the Circuit Court to approve the order of the County Court unless it was shown by the testimony that the County Court order was in error. The burden was on appellants to make this showing. This was not done.

The case of *Henry* v. *Board of Improvement of Paving District No.* 3, 170 Ark. 673, 280 S. W. 987 is, we think, conclusive of the above rule. In that case the City Council held that the signers of a petition for the

creation of an improvement district constituted a majority in value of the property owners therein. An appeal was taken as provided by the statute, to the Chancery Court. On appeal to this court we held that ". . . in the very nature of things, the finding of the council must be treated as *prima facie* correct, and the burden rests upon the attacking party to show to the contrary." The language in the appeal statute in the cited case and in the appeal statute here (§ 20-702) is the same. Precisely the same question was likewise decided in *Dunbar* v. *Street Improvement District No. 1 of Dardanelle,* 172 Ark. 656, 290 S. W. 372, citing the *Henry* case with approval.

It would serve no useful purpose to set out the testimony introduced in the Circuit Court. Suffice to say we have read it carefully and find nothing to contradict the findings of the County Court. In fact appellants make no contention to the contrary.

We might add that the County Court and the Circuit Court were correct in using the 1956 assessment as a basis. The 1957 assessment list was not completed on September 9, 1957 when the order of the County Court was entered. See *Arkansas Tax Commission* v. *Ashby,* 217 Ark. 759, 233 S. W. 2d 361.

Affirmed.

NAT'L PROPERTY OWNERS ASSOC. *v.* HOGUE.

5-1692 318 S. W. 2d 151

Opinion delivered December 1, 1958.

Willis V. Lewis, for appellant.

Robert L. Rogers, II, for appellee.

SAM ROBINSON, Associate Justice. This is a suit to quiet title to Lot 7, Block 4, Sunset Heights Addition to the City of Little Rock. The issue is whether appellants have acquired title by adverse possession.

Appellant Roy Morrison testified that in 1946 he cleared the underbrush on the lot and posted a sign there as follows: "Private Property — Roy Morrison, Owner — Keep Off". He says that he kept the sign up and kept the lot free of brush until 1955. He is corroborated by his wife. Morrison organized a corporation known as National Property Owners Association. In 1955 this corporation obtained from the State a tax deed to the lot, the property having been declared forfeited for the nonpayment of the 1951 taxes. It is conceded that the tax forfeiture is void because of an overcharge. It does not appear that appellants ever paid any taxes on the property. Morrison claims title by seven years' adverse possession (Ark. Stat. § 37-101) and by two years' adverse possession (Ark. Stat. § 34-1419).

The trial court held that he had not acquired title on either theory. We agree. Morrison does not claim to have had possession of the property in any manner except by clearing the brush and putting up the sign. The property was not enclosed and there is no showing that the sign conveyed any information as to the area of land which Morrison claimed. No one gave testimony regarding the sign except Morrison and his wife. There is no showing of the size of the sign or how well it could be seen or where it was located on the property. Prior to obtaining the tax deed, Morrison did not have color of title, and without color of title it was necessary that he have actual possession in order to claim the benefits of the seven years adverse possession statute (Ark. Stat. § 37-101). *Montgomery* v. *Wallace,* 216 Ark. 525, 226 S. W. 2d 551. Likewise, it was necessary that he have actual possession to claim the benefits of the

two years adverse possession statute (Ark. Stat. § 34-1419). *McMillen* v. *East Ark. Investment Co.,* 196 Ark. 367, 117 S. W. 2d 724. The evidence is not sufficient to show that he had such actual possession at any time. In *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681, the evidence was much stronger to show adverse possession than is the evidence in the case at bar. In that case Judge Hart said: "The defendant claims to have gone into possession of the lots in 1907 and to have held adverse possession ever since. He describes his adverse possession, however, and it is not of such a substantial character as to give him title to the lots. At one time he had the underbrush cleared and some of the larger trees cut down. One year he planted and cultivated a few garden seed. He did nothing from that time until the suit was brought, except that, in 1917, a part of the lots were inclosed and rented. It is true that, in the beginning, he put up a sign on the lots forbidding trespassers from coming there. This of itself would not be sufficient to show adverse possession of the lots against the true owner."

Affirmed.

BLAIR *v.* YANCY.

5-1694 318 S. W. 2d 589

Opinion delivered December 8, 1958.

H. B. Stubblefield, for appellant.

Gentry & Gentry, for appellee.

J. Seaborn Holt, Associate Justice. On March 28, 1958, appellant, Blair, purchased a piece of property at 1514 Maryland (West 9th Street) in Little Rock, for the purpose of establishing thereon an embalming business. This property was zoned for business and commercial purposes and following the issuance of a permit to him, by the city, to engage in the embalming business on the property, Blair began the construction of a building 14 feet wide, 22 feet long and about 9 feet high. After he had expended about $1,000 on the property a number of citizens residing in the area filed a petition seeking to enjoin appellant from establishing an embalming business on the property on the ground that it would be a nuisance. The trial court granted appellees the injunctive relief prayed and this appeal followed.

For reversal appellant earnestly contends that the business involved is located in a neighborhood which is predominately commercial now, and is growing as a business area—crowding out residences, and that such business would not be a nuisance, and that the chancellor erred in holding otherwise. After a careful review of the testimony, which is conflicting, we have concluded that the preponderance thereof supports appellant's contention.

Equity will not prohibit the erection of a building on the ground that it would become a nuisance unless, as we said in *Kimmons* v. *Benson,* 220 Ark. 299, 247 S. W. 2d 468, ". . . the preponderance of the testimony shows that the activity is certain to be a nuisance. *Murphy* v. *Cupp,* 182 Ark. 334, 31 S. W. 2d 396; *Buckner* v. *Tillman,* 195 Ark. 149, 110 S. W. 2d 1060." Our governing rule in cases such as the one presented here is stated in *Fentress* v. *Sicard,* 181 Ark. 173, 25 S. W. 2d 18, wherein this court reversed the Sebastian Chancery Court

which had entered a decree enjoining the location and operation of a funeral home on a certain side in the City of Fort Smith and directed that the injunctive relief sought be denied. We there said: "The proof shows that there will be little, if any, noise from the ambulances and other vehicles used. No noise from funeral services will be heard without the building, and there will be no escape of odors or gases from the building, except through the roof to the open air. The district has long been a residential district, and fully developed, no new residences having been erected there for a long time. The testimony shows it is in a state of transition from an exclusively residential district to a business district, many places of business—drug stores, filling stations, pressing parlors and grocery stores—having already been established . . . The chancellor's decree was based largely upon the common knowledge that the people residing in the vicinity would be affected in their feelings by the establishment of the mortuary, which would bring discomfort to all because of the constant reminder of death and that on that account largely the establishment and operation of the institution upon the proposed site would interfere with the proper enjoyment of the homes of the residents in the vicinity already long established there. There is no zoning ordinance in the City of Fort Smith, but the city commission granted a permit for the construction of the mortuary upon the site selected . . . The authorities are well nigh uniform in holding that a mortuary or undertaking establishment of the kind complained of here is not a nuisance *per se*. It may become a nuisance, however, by reason of its location in a residential district or from the manner in which it is operated. In 46 C. J., p. 726, it is said: 'An undertaking establishment or funeral parlor is not a nuisance *per se,* but by reason of surrounding circumstances it may become a nuisance. It may constitute a nuisance by reason of its location, as, for instance, under particular circumstances, when it is located in a residential district, notwithstanding, it has been held, it does not directly affect the health or grossly offend the phys-

ical senses; but it is more frequently held that the mere location in a residential section is not sufficient to make such an establishment a nuisance.' If the district of the location was an exclusively residential one, its intrusion therein would ordinarily constitute a nuisance, and could be prevented by injunction. Change is the order of time however, that progress and development may not be hindered or obstructed, and the transition from a residential district into a business district is recognized and has been effected.''

Blair testified, in effect, that his operations on the property would be the same as he was operating at 5th and Cross Streets in Little Rock; that Little Rock is a hospital center and numerous deaths here are taken care of by funeral directors out over the state who want the deceased removed from the hospital and embalmed so they can remove the body to their own establishment; that he owns and will use a Nash Rambler station wagon with no glass panels in the sides and that there is nothing about it suggesting death. He further testified that this building, where the embalming will actually take place, will have two windows on the west side, both above the height of the average person's head, and while they permit light they will be blacked out so no one can see through them; that there would be a solid wooden door 3 feet in width in each end of the building which would be kept closed except the south door would be opened to receive or remove a body; that on the south side a fence about 6 feet in height would prevent anyone witnessing the loading or unloading of a body at the building. He further testified there was nothing offensive or objectionable in connection with his embalming business; that he averaged about three bodies a week; and there would be no ambulances with sirens going to or coming out of his place of business.

Mr. Spencer Plowman testified that he was with the real estate firm of Weaver and Company in Little Rock and had been in the real estate business for about 28 years; that the proposed building for the embalming business would be situated adjoining a brick garage

building having a cyclone fence with barbed wire top along the east side of the proposed building; across the street to the south is a building that is occupied by Finkbeiner Packing Company. In the next block west on the south side of Maryland is the Drummond Funeral Parlor; on the southeast corner of Maryland and High is a row of stores, including a liquor store; there is a little variety store on the northeast corner and on the southwest corner of the block adjoining this property to the east there is a filling station. He further testified, that in his opinion, this particular area is undergoing the transition from residential to commercial which is very often accompanied by difficult situations. The property is becoming commercial, and in his opinion is losing whatever residential character it had. Property in such a locality lessens in value for residential purposes and has a tendency to increase for commercial or business purposes.

Mr. Howard Thom testified that he had been in the real estate business in this city for about 25 years; that the property involved at 1514 Maryland is next to Finkbeiner's garage; that the driveway to this embalming building 14x22 feet is on the east side of the house at 1514 Maryland next to the garage and parking lot used by Finkbeiner's trucks, and that in his opinion that the completion of that building on Mr. Blair's property and the operation of an embalming business there would not affect the value of adjacent or nearby property one way or the other either from a residential standpoint or business.

A number of other witnesses appeared and their testimony tended to corroborate the above testimony. While appellees, as we have indicated, produced a number of witnesses which tended to contradict appellant's evidence, however, on the whole record we are convinced that the preponderance thereof shows that this property is in a section of the City of Little Rock that is predominately commercial and growing as such.

The decree is reversed with the directions to deny injunctive relief prayed for by appellees.

THE J. R. WATKINS COMPANY v. MARTIN.

5-1685 318 S. W. 2d 591

Opinion delivered December 8, 1958.

A. J. Russell and *M. D. Anglin,* for appellant.

John H. Shouse, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from the efforts of the appellant to recover on a surety agreement. The appellant—The J. R. Watkins Company (hereinafter called "Watkins")—is a corporation engaged in selling merchandise in wholesale quantities to individuals who resell to the retail trade.

On June 17, 1954 Watkins entered into a written contract with William Albert Martin (hereinafter called "Martin"), agreeing to sell to him merchandise in wholesale quantities, under the provisions of their contract.[1] To guarantee Martin's payments to Watkins under the contract, Tom Martin, along with the appellees, Bailey Hall, V. E. Smith, Roy Bell, and Clyde Deakins, signed a surety agreement with Watkins, which agreement was attached to the Martin contract, and read in part:

"In consideration of the execution of the foregoing agreement by The J. R. Watkins Company, which we . . . hereby agree and assent to, and its promise to sell, and the sale and delivery by it, to the Purchaser, as vendee, of goods and other articles, as therein provided, we, the undersigned sureties, . . . jointly, severally and unconditionally promise, agree and guarantee to pay for said goods and other articles, and the prepaid transportation charges thereon, at the time and place, and in the manner in said agreement provided . . ."

Pursuant to the contract, Martin received merchandise from Watkins at various times and in various amounts. He did not pay for the merchandise; and he seems to have departed from the locality and was never served with summons in this case. His unpaid balance was $1,458.92 on April 18, 1955, when Watkins notified each of the appellees:

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[1] Some of the contractual provisions were:

1. The contract continued until April 1, 1955 if Martin fulfilled all terms, but ". . . either of the parties hereto may terminate this agreement at any time, if desired, by giving the other party notice thereof in writing by mail."

2. "The purchaser further agrees to pay the Company its current wholesale prices for the goods and other articles sold to him, as herein provided . . ."

3. "The purchaser may, within thirty days after the expiration or termination of this agreement, return, by prepaid freight, to the Company, at Winona, Minnesota, Memphis, Tennessee, Newark, New Jersey, or Oakland, California, in as good condition as when delivered to him at point of shipment, any goods purchased by him from the Company, which he may then have on hand; and the Company agrees to repurchase such goods, in the units and combinations purchased, if in such condition when received by it, and pay or credit the Purchaser therefor at the invoiced prices or at the Company's prevailing wholesale prices whichever shall be lower . . ."

"In Re: Your surety for Mr. William Albert Martin. This is to notify you formally that the contract of the above for whom you are surety has been terminated, and in accordance with the provisions of the contract any balance owing is immediately due and payable. We wish to advise you that under the terms of the contract, unsold goods are returnable for credit, charges prepaid—credit will be allowed on condition of goods as received by us. If there is any information you desire or cooperation, please let us hear from you promptly."

Appellees neither made payment nor returned merchandise; and on May 31, 1956 Watkins filed the present action, alleging the facts as above stated, all of which were established at the trial. In addition to a general denial, the appellees claimed that Martin had on hand merchandise which should have been returned to Watkins and which would have extinguished the account.

At the trial, the appellees admitted signing the contract, did not deny the correctness of the account, and admitted receiving the letters from Watkins dated April 18, 1958; but the appellees contented themselves with testifying: (a) that they went to Martin's house and saw through the window several truck loads of merchandise, although no one ever made any further examination as to the contents or condition of the merchandise; (b) that they wrote Watkins offering to return the merchandise and pay freight, but never received any reply to the letter; and (c) because they did not receive a reply to the letter, no merchandise was ever returned. These matters were claimed to be substantial compliance with the provisions of the contract as to the return of the merchandise. At the conclusion of the evidence, Watkins moved for an instructed verdict for the plaintiff, which was refused. The jury rendered a verdict for the defendant and this appeal ensued.

I. *Instructed Verdict.* We hold that the Trial Court should have directed a verdict for Watkins. The fact that the appellees received no detailed instructions from Watkins as to the method of returning the mer-

chandise was no defense, because the contract gave the appellees the right to return the merchandise if they exercised the right within the time and in the manner stated in the contract, all of which they entirely failed to do. The appellees did not show: (1) that they tendered a return of the merchandise within the time fixed by the contract; (2) that the merchandise in Martin's house was of the qualifications that could be returned; or (3) that the merchandise in Martin's house had any determined value. According to the uncontradicted evidence, the defendants owed Watkins $1,458.92, together with interest, and the Trial Court should have directed a verdict for Watkins for said amount, since the appellees did not show that they had complied with the contract in regard to the return of merchandise.

II. *Procedural Matter On Appeal.* In this Court the appellees have filed a motion to dismiss the appeal: claiming that the appellant has failed to comply with a portion of Sec. 9 of Act 555 of 1953 (as now found in Sec. 27-2127.3 Cumulative Supplement to Ark. Stats.) The portion of the section relied on by the appellees reads:

"If there be designated for inclusion any evidence or proceedings at the trial or hearing which was stenographically reported, the appellant shall file, at the time of filing his designation or within a time to be fixed by the Court, a copy of the reporter's transcript of the evidence or proceedings included in his designation. The said transcript shall be filed with the designation unless the appellant shows to the satisfaction of the Court the impossibility or impracticability of furnishing the transcript at the time of the filing of the designation of the record."

The appellees urge that when the appellant furnished the designation of the record and the points to be relied on, the appellant failed—at that time—to furnish the stenographer's transcribed notes of the testimony taken *ore tenus*. The record reflects that the judgment was entered on April 5, 1958; that the notice

of appeal and the designation of points were filed on April 9, 1958; that the transcribed testimony was certified by the Court Reporter on April 16, 1958; and that it was filed on April 23, 1958.

When the judgment was filed on April 5, 1958 the appellant had thirty days within which to file the notice of appeal; and was required to file the designation of points promptly thereafter. (See Sec. 2 of Act 555, as found in § 27-2106.1 Cumulative Supplement to Ark. Stats.) The notice and designation were filed in apt time. The statute says: ". . . failure of the appellant . . . to take any of the further steps to secure the review shall not affect the validity of the appeal, . . . but shall be ground only for such action as the appellate court deems appropriate, which may include the dismissal of the appeal . . ." Section 20 of said Act 555 (as now found in § 27-2127.1 Cumulative Supplement to Ark. Stats.) says that the record on appeal shall be filed with the appellate court and the appeal docketed within 90 days from the date of the notice of the filing of the appeal unless an extension be granted, as provided by law. The record was filed in this Court within the 90-day period.

When we take into consideration the fact which we know—that it is only in the rarest of instances that a court reporter gets the testimony transcribed within four days after the trial—we think it would be putting the letter above the spirit to say that the transcribed testimony *must* be filed in all cases at the time the notice of appeal and the designation of the record are given. We, therefore, indulge a presumption that the Trial Court granted additional time for the filing of the transcribed testimony; and this presumption exists because appellees did not claim and establish either: (1) that they asked the lower Court to shorten the time for filing the transcribed testimony; or (2) that the appellees have been hurt by failure of earlier filing of the transcribed testimony. We exercise the discretion accorded us by Sec. 2 of the Act 555 and deny the motion to dismiss the appeal.

The judgment is reversed and the cause is remanded, with directions to enter a judgment for The J. R. Watkins Company for $1,458.92, together with interest from April 18, 1955 until paid, and together with all costs.

Justice WILLIAM J. SMITH not participating.

NORTHWEST MOTORS, INC. *v.* CREEKMORE, JUDGE.

5-1711 318 S. W. 2d 614

Opinion delivered December 8, 1958.

Shaw, Jones & Shaw, for appellant.

R. S. Dunn, Hardin, Barton, Hardin & Garner, for appellee.

GEORGE ROSE SMITH, J. This application for a writ of prohibition involves a jurisdictional conflict between the Logan circuit court and the Sebastian circuit court, in cases arising from the same automobile accident. We are asked to prohibit the Logan circuit court from proceeding with two particular phases of the case pending in that court.

The petitioners, Northwest Motors, Inc., and its employee, Clyde Hammock, are domiciled in Sebastian county. On April 21, 1958, Hammock, in the course of his employment, went to Logan county to demonstrate and attempt to sell a car to Jack Goodson, a resident of Logan county. During a test ride, with Goodson driving, the car collided with a truck owned and being driven by Hoyt Ray Walker, a resident of Logan county. Goodson was killed, and there were personal injuries to the others and damage to the vehicles.

Northwest and its employee, Hammock, whom we shall refer to collectively as Northwest, filed separate suits in Sebastian county against Walker alone and obtained service of process. A day or two later Goodson's administrator brought suit in Logan county against Walker and Northwest, alleging, among other things, that Walker was negligent in driving his truck on the wrong side of the road and that Northwest was negligent in permitting Goodson to drive a car with which he was unfamiliar and in distracting Goodson's attention just before the collision. In the Logan county case Walker filed a cross-complaint, and an amendment thereto, by which he sought to recover his own damages from Goodson and Northwest. The Logan circuit court denied Northwest's motion to dismiss this cross-complaint insofar as it pertained to Northwest, and this application for prohibition was then filed. During our summer recess a temporary writ was granted by Justice WARD, and on this phase of the case the question is whether the writ should be made permanent.

On this issue our prior decisions are conclusive. It was incumbent upon Walker to assert in the Sebastian county cases any cross-complaint he might have against Northwest. Ark. Stats. 1947, § 27-1121; *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S. W. 2d 193. Northwest's suits against Walker in Sebastian county fixed the venue of the controversy between Northwest and Walker and precluded Walker from bringing an independent suit against Northwest in Logan county. *Kornegay* v. *Auten,*

203 Ark. 687, 158 S. W. 2d 473; *Carnes* v. *Strait,* 223 Ark. 962, 270 S. W. 2d 920. If Walker could not maintain an independent action against Northwest in Logan county, we think it unavoidably follows that he could not achieve the same result by filing a cross-complaint (for damages rather than for contribution) against Northwest in the suit that Goodson's administrator had brought in that county. On this part of the case the temporary writ is made permanent.

In the Logan county case Walker, as we have said, also cross-complained against the plaintiff, Goodson's administrator. The administrator then filed a third party complaint against Northwest, under the Uniform Contribution Among Tortfeasors Act, asking for contribution from Northwest in the event that the administrator should be held liable to Walker on the latter's cross-complaint. The court overruled Northwest's motion to dismiss the administrator's third party complaint, and Northwest amended the petition for prohibition to ask that the respondent be prohibited from proceeding further upon the administrator's third party complaint.

On this second point we confine our decision to the narrow point of law argued by the petitioners in their brief; that is, that the Uniform Act does not permit a plaintiff to file a third party complaint against a defendant who is already in the case. This argument is based on § 7 (1) of the Act, Ark. Stats., § 34-1007 (1), which provides that a third party complaint may be served "upon a person not a party to the action." But the petitioners overlook subsection (3) of § 7, which permits a party to state "as a cross-claim against a co-party" any claim of contribution that he may have. See the Commissioners' Note to subsection (3), 9 U. L. A. 248. It might have been more accurate for Goodson's administrator to entitle his pleading against Northwest a cross-claim rather than a third party complaint, but the difference is merely one of form and can have no effect upon the administrator's statutory right to seek con-

tribution from Northwest. On this phase of the case the writ is denied.

HOGAN *v.* HILL.

5-1665 318 S. W. 2d 580

Opinion delivered December 8, 1958.

Mann & McCulloch, for appellant.

Fletcher Long for Third party appellant.

McMath, Leatherman & Woods and *Willis V. Lewis,* for appellees.

PAUL WARD, Associate Justice. This is a personal injury suit, involving three parties, growing out of an automobile collision.

Appellee, Harold L. Hill, who was injured, was in an automobile driven by John W. Short in a westerly direction on a 5% down grade. This car collided with a pick-up truck owned by Louie Moffatt and driven in the opposite direction, by Louis Melton. The collision occurred just east of Forrest City on Highway No. 70 which, at that portion of the road, was being repaired by Ben M. Hogan & Company under contract with the Arkansas Highway Commission.

The complaint and amended complaint filed by Hill stated (as to all material portions) in substance: The defendants (hereafter called the Hogan Co.) are partners d/b/a Ben M. Hogan & Company. The Hogan Co. entered into a contract with the said Highway Commission to build and construct approximately 11.7 miles (including the portion where the accident occurred) of grading, minor drainage structures, gravel base, gravel or crushed stone shoulders, widening and resurfacing with asphaltic concrete hot mix, etc., having a crown of 32.4 feet and typical surface 24 feet in width, known as job No. 11563. The Hogan Co., for the protection of the traveling public, agreed to the following provisions in said contract:

"608.14 Public Safety. The Contractor shall schedule his operations in widening existing pavement under traffic so that in no case shall trenches be open on both

sides of the existing pavement at one time; the base course for widening on the side first opened shall be completed to the specified grade and shoulder material pulled back against the outside edge off the base course and that side opened to traffic before the trench on the opposite side is opened.

"Appropriate signs, lights and barricades shall be furnished and installed by the contractor to protect public traffic where trenches for widening are open alongside existing pavement."

It was further alleged that the Hogan Co., under the said contract, was obligated to the public and the plaintiff to perform said work in accordance with 608.14 copied above. The complaint after setting out in detail how the accident happened and how the cars collided, states that the accident was caused by the failure of the Hogan Co. to comply with the safety provisions of the contract, enumerating five such instances. In the amendment to the complaint it was also alleged that it was the common law duty of the Hogan Co. to use ordinary care to protect plaintiff from injury while using the reconstructed portion of the highway, as well as the duty to comply with safety provisions of the contract. The nature and extent of the injuries were set out, and the prayer was for judgment in the amount of $75,680.

The answer by the Hogan Co. was a general denial and contributory negligence on the part of Hill, and further, that Hill was on a joint enterprise with John W. Short who was the driver of the car and who was himself negligent. It was further alleged by the Hogan Co. that the accident was caused by the negligence of Louis Melton the driver of a pick-up truck owned by Louie Moffatt, which truck collided with the car driven by Short. The acts of negligence on the part of Melton were set out. The prayer was that Hill's complaint be dismissed.

In addition to the above answer, the Hogan Co. filed what was termed a "Third Party Complaint" in which it was in substance stated: If it be found that the Hogan

Co. and Melton were both negligent then the former was entitled to contribution against the latter. The prayer was that Hill's complaint be dismissed or, in the alternative, that contribution be awarded.

In answer to the third party complaint, Melton and Moffatt entered a denial, and cross-complained against the Hogan Co. On interrogatories the jury found, after a trial, that: (a) The Hogan Co. was guilty of negligence (b) Hill suffered damages in the amount of $25,000; (c) Short was not guilty of contributory negligence; Hill was not guilty of contributory negligence; (d) Melton and Moffatt were guilty of negligence; (e) The Hogan Co.'s negligence contributed to the cause of damages 80% and Melton and Moffatt's negligence 20% and; The Hogan Co.'s negligence did not contribute to Melton and Moffatt's damages. Judgments of the trial court were entered in accordance with the jury findings. The Hogan Co. and also Melton and Moffatt prosecute this appeal.

The Hogan Co. relies on three grounds for a reversal. *One.* Plaintiff introduced no substantial evidence of negligence. *Two.* It was error for the court to admit Part 6 of the contract in evidence. *Three.* It was error to give Hill's instruction No. 7. In addition to the above it is insisted that the verdict is excessive.

One. Substantial evidence. At approximately 6:15 P. M. on March 15, 1957 John W. Short, accompanied by Hill and one other passenger, was descending a hill on U. S. Highway No. 70, just east of Forrest City headed west for his home in Little Rock. At the same time Louis Melton was ascending the hill from the opposite direction in a pick-up truck owned by Louie Moffatt. As Melton approached the Short car and in an effort to pass it the right rear wheel of the pick-up truck ran off the edge of the pavement on its right side or the south side of the highway, and the truck swerved across the center line of the pavement into the path of the Short car. This forced the Short car onto the north shoulder of the highway where it turned over, killing Short and injuring Hill. At the time of the accident

that portion of Highway 70 was being reconstructed by the Hogan Co. as a part of State Highway Job No. 11563. The work included repairing shoulders, and widening and resurfacing with hot asphalt mix. The highway, before repairs, was paved with concrete 20 feet wide. At the time of the collision the north shoulder had been excavated and refilled with a sandy material some two or three months previously. There was testimony that it had rained considerably in the mean time and that the shoulder had become somewhat rough and soft, that it was as much as 3 inches lower than the pavement, and that it had not been worked since first installed. There was testimony on the part of the Hogan Co. that adequate warning signs were installed on both sides of the road, but there was testimony by appellee's witnesses from which the jury could have found otherwise.

The shoulder on the south side of the road at the scene of the collision had been excavated to a depth of about 18 inches below the pavement. This excavation had just been completed a few hours before the accident and, of course, had not been filled. It is admitted that the portion of the highway in question bears heavy traffic—approximately 4,000 vehicles each day. There was a great deal more testimony, much of it conflicting, by a large number of witnesses but we feel it would serve no useful purpose to set it out, for we think it is clear from the above that there was substantial evidence to support the jury's finding of negligence on the part of the Hogan Co.

Two. Part 6 of the Contract. The Hogan Co. contends it was reversible error for the court to allow the introduction in evidence of Part 6 of the contract between it and the Highway Commission. For several reasons we think no such error appears in the record.

It will be noted that Hill's complaint states a cause of action in tort based not only on the usual common law of negligence but based also on the Hogan Co.'s failure to comply with the regulations in the contract relative

to public safety. This, we think he had a right to do. See: *Prosser* on *The Law of Torts,* 1955 Second Edition § 81 at page 478 and page 482; Annotated Cases 1913 (c) 217; *Pugh* v. *Texarkana Light & Traction Co.,* 86 Ark. 36, 109 S. W. 1019; *Hill* v. *Whitney,* 213 Ark. 368, 210 S. W. 2d 800, and; *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059.

When Hill offered in evidence, as Exhibit 5, the contract between the Hogan Co. and the Highway Commission, this proceeding occurred:

The Court: "Is it necessary to put it all in there?"

Atty. for Hill: "We think the whole contract is pertinent."

The Court: "Without objection let it be introduced."

Atty. for the Hogan Co.: "We object to certain portions of it, that is set out in plaintiff's complaint."

The Court: "That is the part you are objecting to?"

Atty. for the Hogan Co.: "We object to all of what is known as 'Part 6' in there."

The Court: "Is that the part that is set out in plaintiff's complaint?"

Atty. for Hill: "Yes, sir."

The Court: "The objection is overruled and the plaintiff will be permitted to introduce the contract."

We have already said that Hill had the right to base a tort action on the failure of the Hogan Co. to comply with the safety provisions in the contract. This being true it must necessarily follow that the jury must know the contents of the contract and also know the safety provisions. It is conceivable of course that in many cases, or even in this case, some parts of the contract would not be relevant. In such event, when the entire contract is offered in evidence by the plaintiff as here, the burden would be on the defendant to make it clear to the court

just what part of the contract is objectionable and the specific reasons therefor. In this instance Hogan did point out as objectionable that part of the contract "that is set out in plaintiff's complaint." The part referred to is shown as "608.14" and is set out in full, *supra,* in this opinion. Provision 608.14, it must be understood, is only a small portion of Part 6 which consists of 21 pages and Part 6 is only a portion of the entire contract which comprises more than a hundred pages. We think the court was correct in allowing this portion of the contract to be introduced. Hogan's main objection is that § 608.14 would be relevant only if and when he was in the process of actually putting down black-top or concrete on the shoulders. We cannot agree with this interpretation upon a careful examination of the language in § 608.14 and upon considering it in context with the rest of the contract. The substance of the section is that "in no case shall trenches be opened on both sides of the existing pavement at one time," and that one side must be open for traffic before the other side is excavated. The jury could have found this was not done here. It seems to us that it makes no difference, from a safety standpoint, whether the topping is actually being applied or whether the shoulders are merely being prepared for that purpose. The "base course," as shown by other parts of the contract, refers to the use of certain materials in building up the shoulders preparatory to a completed job.

Three. Finally it is ably contended that it was reversible error for the court to instruct the jury to find for Hill if the Hogan Co. failed to use ordinary care to comply with the contract provisions relating to the safety of the traveling public. This contention is based on Hill's instruction No. 7, which reads as follows:

"You are instructed that in this case the defendant Ben Hogan entered into a contract with the State of Arkansas to widen and re-surface a portion of Highway No. 70 east and west of Forrest City, and under said contract defendant Hogan undertook to perform certain

duties with respect to the safety of the traveling public, using said highway while the work was in progress. The law imposes upon defendant Ben Hogan the duty of using ordinary care to comply with the provisions of the contract inserted for the safety and protection of the traveling public. In determining whether defendant Hogan was negligent, as alleged in complaint of plaintiffs Nina Fay Short and Harold Hill, you may take into consideration the provisions of the contract between Hogan and the State of Arkansas, inserted for the protection of the traveling public and whether the defendant Hogan used ordinary care to comply with said provisions. If you find from a preponderance of the evidence that defendant Hogan failed to use ordinary care to comply with the provisions of said contract relating to the safety of the traveling public and said failure to use ordinary care contributed to proximately cause the death of J. W. Short and the injuries to Harold Hill, your verdict should be for the plaintiffs; unless you find for the defendants under other instructions given you."

To the above instruction appellant objected generally and also specifically on the grounds that it was confusing to the jury and that it permitted the jury to consider whether or not the Hogan Co. complied with subsection 608.14 which is a portion of Part 6 discussed above, and which has already been set out as a part of the complaint.

It has not been pointed out to us, nor do we see, how the instruction confused the jury.

The objection with reference to § 608.14 has already been disposed under part "Two" above. Since, as before stated, this section was properly introduced in evidence the jury naturally had a right to consider it.

Amount of Judgment. This kind of a question always gives the court great concern because there is no definite satisfactory rule for guidance. Ordinarily the amount of damages fixed by a jury will not be disturbed unless based on erroneous instructions or unless it is shown to be the result of prejudice or passion, or un-

less it shocks the sense of justice, or unless it is not supported by substantial evidence. It is the latter alternative which is stressed by appellant in asking us to reduce the amount of the judgment in this instance. In brief it is pointed out that Hill suffered three facial cuts, spent one night in the hospital, and incurred only $353.00 in medical expenses; that he was unable to work for only about four months; that he earned approximately $5,000 a year, and; that he is now employed at the same salary.

However the record reveals other facts which the jury had a right to consider. Hill, who was 36 years old, had been employed by the Western Electric Company for 16 years and for the past two years had earned around $7,000 each year. His duties required him to lift objects weighing from 50 to 100 pounds, but the temporary work which he is now doing requires no such physical exertion. It is not known that he will be retained, especially at the same salary, unless he is able to do heavy work. Doctor Gilbert O. Dean stated Hill suffered three severe lacerations of the face, an injury to his left eye, and trauma around the head, that he suffered severe pains through his chest and back, and had a piece out of the bridge of his nose. X-rays were taken shortly after the accident, which, according to Dr. Dean, revealed a compression type fracture of the 6th vertebra of the dorsal region of the back. He stated: "It is what is known as a compressed fracture. Here the disk sits here and it has 50% compression at the front of it, of the vertebra, it occurred when he was thrown forward, it squashed the front part together." Dr. Dean further stated that there was curvature of the spine still present, and that the condition was permanent. There also appeared a whiplash injury in his neck according to the doctor who also referred to the spinal injury as a broken back. Hill stated he suffered severe pains as a result of the various injuries, that he could sleep only on his back with his knee over a big roll of blankets and a board under his kidneys, or, if he slept on his side, he had to keep his knees drawn up in a coil. He also stated that he was still in pain and never free of it, and that he

couldn't hope to hold his present job unless his condition improved. This view was supported by Hill's supervisor.

With the above picture before us we cannot say there is no substantial evidence to support the jury's verdict. We have examined the various cases cited by appellant where judgments were reduced by this court but do not consider them as controlling in this instance.

In view of what has been said it follows that the judgment in favor of Hill must be, and it is hereby affirmed.

On Cross-Appeal. Melton and Moffatt, the third party defendants, in seeking a reversal present an able argument on a very interesting question. They point out, and we must agree, that their interest was in conflict with the interest of the Hogan Co. On this basis they contend they were entitled to three peremptory challenges in the selection of the jury in addition to the three such challenges the court allowed the Hogan Co. We can readily understand the justice and fairness of this view, but we think it is one that addresses itself to the legislature and not this court. Ark. Stats. § 39-229 which deals with peremptory challenges says "Each party shall have three (3) peremptory challenges." Section 39-231, in part, provides: "Where there are several persons on the same side, the challenge of one shall be the challenge of all under this subdivision." As was stated in the case of *Crandall* v. *Puget Sound Traction, Light & Power Co.,* 77 Wash. 37, 137 P. 319, in dealing with this same question, "the right of peremptory challenge is wholly a creature of statute, and not of common law." Looking solely to our statutes, referred to above, the answer still is not clear. The first section refers to each *party* without defining party. Likewise there is an element of uncertainty in the use of the words "on the same side" as used in the latter section. We have concluded, however, that the decisions of this court and other courts have resolved this uncertainty against the contention of Melton and Moffatt here. See: *Waters-Pierce Oil*

Company v. *Burrows,* 77 Ark. 74, 96 S. W. 336; *Fidelity-Phenix Fire Ins. Co.* v. *Friedman,* 117 Ark. 71, 174 S. W. 215; *Fort Smith Light & Tr. Co.* v. *Bailey,* 153 Ark. 574, 241 S. W. 42, and; *Crandall* v. *Puget Sound Light and Power Co., supra.*

In the *Burrow* case in dealing with the question and the same statutes as here, we said: "All the defendants are not entitled in the aggregate to more than three peremptory challenges. The statutes do not provide that they shall, *in any case,* be entitled to more." (our emphasis.) In the *Friedman* case where this question is discussed at some length it was held that after cases are consolidated only three challenges are allowed each side under our statute. It was further pointed out that if several defendants on one side of a law suit were allowed three challenges each then the plaintiff on the other side would be entitled to three challenges for each defendant.

The cause is therefore affirmed both on direct appeal and on cross-appeal.

Affirmed.

HOLT and ROBINSON, JJ., dissent.

Justice WILLIAM J. SMITH not participating.

ARKANSAS STATE HIGHWAY COMMISSION *v.* ADDY.

5-1677 318 S. W. 2d 595

Opinion delivered December 8, 1958.

W. R. Thrasher, Dowell Anders, Wendell Hall, Jr., W. B. Brady, for appellant.

C. M. Carden, for appellee.

SAM ROBINSON, Associate Justice. This is a proceeding for the condemnation of land for state highway purposes. A little over four and one-half acres was taken. There was a jury verdict for $20,000, and the Highway Commission has appealed.

In 1955 appellees bought a tract consisting of nine and one-half acres on the southwest corner of the intersection of Highway 67-70 and the Saline County road known as "Alcoa Plant Road." Appellees constructed on the property what is known as a speed bowl for the racing of stock cars and operated such track during the years 1956 and 1957. On appeal appellant contends that the trial court erred in admitting evidence of the profits derived from the operation of the speed bowl to prove the value of the land taken, and the damages to the remainder. Appellee Charles E. Addy was allowed to testify, over the objection of the appellant, that he made a net profit of $4,927.69 in 1956 from the operation of the track, and that in 1957 he made a net profit of $6-775.01. Other witnesses who testified as experts on the value of the property and the damages, stated that they considered the profit derived from the operation of the track in reaching the appraised value given in their testimony.

This case is controlled by the recent case of *Hot Spring County, Arkansas* v. *Crawford,* 229 Ark. 518, 316 S. W. 2d 834. There it was held that net profits from a business operated on the land cannot be considered as a factor in assessing damages for the taking or damaging of land. Many authorities are cited in the *Hot Spring* case, including *Desha* v. *Independence County Bridge Dist.,* 176 Ark. 253, 3 S. W. 2d 969. There it was held that the trial court erred in permitting evidence to be introduced showing the profits from the operation of a ferry. Appellees cite *Arkansas State Highway Comm.* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 792, as sustaining their contention that the evidence of profits is admissible; but that case involved farm land and profits from the farming operation. This is an exception to the gen-

eral rule. See 7 A. L. R. 163, Ann.; 1 Orgel on Valuation under Eminent Domain, § 167; 16 A. L. R. 2d 1113, Ann., 5 Nichols on Eminent Domain, p. 225.

For error in admitting evidence of profits from the business operated on the land, the judgment is reversed and the cause remanded for new trial.

COOPER *v.* COOPER.

5-1704 318 S. W. 2d 587

Opinion delivered December 8, 1958.

C. A. Caldwell, W. E. Billingsley, for appellant.

W. G. Wiley, Murphy & Arnold, for appellee.

WILLIAM J. SMITH, Associate Justice. On February 27, 1957, Mary Ida Cooper, appellant, filed a petition in the Circuit Court of Izard County for a Writ of *Habeas Corpus* against Carl G. Cooper and his parents, Leslie and Juanita Cooper, appellees, seeking possession of her minor son, Stephen Carl Cooper. In this proceeding she relied solely upon a California interlocutory decree awarding her a divorce from Carl G. Cooper and the

custody of their minor son, Stephen. She contends that under the Federal Constitution, Article IV, Section 1, and the Federal Statute, 28 U. S. C., Section 1738, the California decree should be given full faith and credit by the Courts of Arkansas.

This is an appeal from an order dismissing the appellant's petition after a hearing of the evidence.

The appellant and Carl G. Cooper were married in 1955. Their son, Stephen, was born in 1956. While these two young people were residing in Sacramento County, California, marital trouble developed between them and on the night of October 30, 1957, the husband took Stephen from the couple's home. On the next day he left California (with Stephen) by automobile and drove to his parents' home in Izard County, Arkansas, where he arrived on November 2, 1957.

Stephen was living with his father and grandparents when his mother filed this action in the lower court.

On November 1, 1957, Mary Ida Cooper filed suit for divorce and custody of Stephen in Sacramento County, California. Service was had on her husband in Izard County, Arkansas, on November 18, 1957. Carl G. Cooper did not appear (by answer or otherwise) in that suit and on December 19, 1957, the Superior Court of Sacramento County, California, granted an interlocutory decree of divorce to Mary Ida Cooper wherein she was awarded the custody of Stephen. This is the decree upon which the appellant relies in this action.

Did the Circuit Court err in dismissing the appellant's petition? We think not.

The evidence is undisputed that Carl G. Cooper and Stephen were not in the State of California when Mary Ida Cooper filed her suit for divorce. They were not in California when summons was issued, when service was had, nor when the interlocutory decree was granted.

A father's right to custody of his child is a personal right, *May* v. *Anderson,* 345 U. S. 528, 97 L. Ed. 1221,

73 S. Ct. 840, and since the California Court did not have personal jurisdiction over Carl G. Cooper, it could not adjudicate his right to possession of Stephen.

In *Frey & Horgan Corporation* v. *Superior Court,* 5 Cal. 2d 401, 55 P. 2d 203, the Supreme Court of California said: "The general rule has long been established that a court may not acquire jurisdiction *in personam* over the defendant in an action, by service of notice or other process outside the territory or state in which the forum exists. It was so decided in the case of *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565, and there are innumerable decisions in accordance with that authority."

In the *May* case, *supra,* the Supreme Court of the United States, citing cases, quoted the following: "It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extra-territorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

See also *Halvey* v. *Halvey,* 330 U. S. 610, 91 L. Ed. 1133, 67 S. Ct. 903 and *Kovacs* v. *Brewer,* 356 U. S. 604, 2 L. Ed. 2d 1008, 78 S. Ct. 963, in which the Supreme Court of the United States discusses the effect of the "full faith and credit" clause in child custody cases.

The order of the circuit court is affirmed.

It should be pointed out that this decision does not prejudice this mother's right to file a *habeas corpus* action in the Chancery Court of Izard County to obtain custody of her child upon a proper showing that it is to his best interest and welfare that she have such custody. *Waller* v. *Waller,* 220 Ark. 19, 245 S. W. 2d 814.

Justice Sam Robinson dissents.

5-1717 318 S. W. 2d 596

Opinion delivered December 15, 1958.

Shaw, Jones & Shaw, Crouch, Jones & Blair, for appellant.

James R. Hale, Pearson & Pearson, for appellee.

CARLETON HARRIS, Chief Justice. On November 20, 1957, Pauline O. Holt instituted suit in the Washington Circuit Court against appellant, Dr. Stanley Applegate. The complaint alleged that about March 10, 1956, Mrs. Holt became ill and sought the advice and services of Dr. Applegate; that she was informed by appellant that it was necessary that she undergo immediate surgery for removal of a tumor from her left ovary; that without her consent, the doctor removed her uterus, and performed upon her a total hysterectomy; that Applegate negligently cut, or otherwise destroyed, the normal function of her left ureter, creating a condition that prevented urine from escaping from plaintiff's left kidney, but causing said urine to collect therein and causing the

kidney to become enlarged and infected; that she underwent excruciating pain and suffering from March 20, 1956, until May 2, 1956, on which date it became necessary that the kidney be removed.[1] Further:

"VI

That as the proximate result of the negligent acts or omissions by the defendant Stanley Applegate, it was necessary that the plaintiff be confined in a hospital and under the care of physicians and surgeons for a total of one hundred and fifty days, during which period of time the plaintiff suffered severe and intense pain, suffering, and mental anguish, and for which hospital and medical care, and the drugs and medicines necessitated thereby, the plaintiff was required to, and did, expend large sums of money.

* * *

"VIII

* * * the plaintiff states that it became and was necessary that her left kidney be removed as aforesaid, in order to prevent the flow and passage of her urine from said kidney into her vagina as hereinabove set out, and the leakage therefrom, and that on or about the 2nd day of May, 1956, said kidney was removed by further surgical operation, and the loss of said kidney caused the plaintiff great injury and damage, all of which injury and damage was the proximate result of the negligent acts and/or omissions on the part of the defendant as set out herein.

"IX

That said acts and omissions, acting singly and together, caused and brought about and were the proximate cause of all of the aforesaid injuries and damages suffered by the plaintiff, all of which total the sum of one hundred thousand dollars ($100,000)."

[1] This second operation was performed by Dr. Frank Riggall, appellee herein.

The complaint prayed judgment against appellant in that amount.

Applegate answered, with a pleading termed, "Answer and Third Party Complaint," denying the material allegations, and stating:

"* * * that if in fact the plaintiff sustained any damages as alleged in the complaint that the same are not the result of any negligence on the part of this defendant."

He then alleged that Dr. Frank Riggall, a physician and surgeon at Prairie Grove,

"* * * carelessly and negligently represented to the plaintiff that her condition following surgery was such that it was necessary that her left kidney be removed, and acting upon said negligent representation, did, on or about May 2, 1956, remove the left kidney of the plaintiff; that the said action on the part of the cross-defendant was wholly unwarranted and that any damage, if any, suffered by the plaintiff was the proximate result thereof. That the negligence of the cross-defendant consisted of carelessly and negligently diagnosing the condition of the plaintiff as requiring the removal of the left kidney; and in carelessly and negligently advising the plaintiff to submit to said operation; and in carelessly and negligently performing the said operation without cause therefor; that the damage alleged in the complaint was the direct and proximate result of the negligence of the cross-defendant, for which this defendant and cross-complainant is not responsible. * * *"

Subsequently, Dr. Riggall demurred to the third party complaint, which demurrer was sustained by the court. From the action of the court in sustaining the demurrer and dismissing the third party complaint, comes this appeal.

Let it first be said that it is not necessary that the parties act in concert in order to be liable as joint tortfeasors, and appellee concedes this to be the general

rule. See *Giem* v. *Williams,* 215 Ark. 705, 222 S. W. 2d 800. The sole question to be determined is simply whether Dr. Riggall is a proper party defendant in this action. Appellee argues that the two doctors cannot be held to be joint tortfeasors, because any alleged injuries received from either by plaintiff, were separate and distinct injuries; that under the law, tortfeasors, acting independently, are jointly liable to a plaintiff, and liable to each other in contribution, *only* when the independent acts of each, cause or contribute to the *same* injury obtained by a plaintiff. We consider the latter assertion to be a correct statement of the law, but even so, we do not agree that Applegate is precluded from filing his third party complaint. While it is true that a part of plaintiff's complaint deals with alleged injuries occurring before Dr. Riggall entered the picture, nonetheless, it is apparent from reading the portions of the complaint heretofore quoted, that a substantial part of the damage complained of was allegedly caused by the loss of the kidney. In other words, the suit is based upon *all* the injuries received by plaintiff, and suffering occasioned thereby. Dr. Applegate is being sued *because of the removal of the kidney,* and pain resulting, as well as for suffering occasioned by the earlier operation performed by him; and according to his third party complaint, *the removal of the kidney was unnecessary.* While Dr. Applegate denied any liability whatsoever, his alternative prayer was:

"* * * that if the plaintiff should recover on her complaint against this defendant, that this defendant and cross-complainant have judgment over against the third party defendant, and for all other proper relief."

Arkansas Statutes, Section 34-1007, provides:

"Before answering, a defendant seeking contribution in a tort action may move *ex parte* or, after answering, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action *who is or may be*

liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him.[2] * * *"

By Arkansas Statutes, Section 34-1001, the term joint tortfeasors is defined to mean, "two or more persons jointly or severally liable in tort for the same injury to person or property." Therefore, it would appear that the pivotal phrase in Arkansas Statutes, Section 34-1007 (italicized above), means: ". . . who is or may be liable jointly or severally to him or to the plaintiff for all or part of the plaintiff's claim against him." Of course, if plaintiff has no cause of action against Riggall, the latter could not be liable as a joint tortfeasor, but clearly, if appellant's third party complaint be taken as true (as admitted by the demurrer)[3], it would appear that a cause of action was stated against Dr. Riggall as a third party defendant.

The judgment of the court sustaining the demurrer and dismissing the third party complaint is reversed, and the cause is remanded with directions to overrule the demurrer and to reinstate the third party complaint.

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[2] Emphasis supplied.

[3] For the purpose only of determining the sufficiency of the pleadings.

ADAMS *v.* STATE.

4908 318 S. W. 2d 599

Opinion delivered December 15, 1958.

J. D. Thweat, Virgil Moncrief & John W. Moncrief, for appellant.

Bruce Bennett, Atty. General and *Bill J. Davis,* Asst. Atty. General, for appellee.

J. Seaborn Holt, Associate Justice. On a charge of the crime of rape (Sec. 41-3401 Ark. Stats. 1947) appellant, Adams, was convicted of assault with intent to commit rape (Sec. 41-607 Ark. Stats. 1947) and his punishment fixed at a term of three years (the minimum) in the state penitentiary. From the judgment is this appeal.

The prosecuting witness had a "blind" date with Adams on the night of July 21, 1957, and accompanied him in a car to a drive-in movie. During the show Adams made such improper advances towards her that she got out of the car. After the movie was over appellant borrowed a car and started to take her home, however, before arriving there Adams turned off on a side road, began trying to assault her and when she jumped out of the car appellant ran after her, caught her, threw her on the ground and forcibly and against her will had sexual intercourse with her.

Appellant concedes that the evidence was sufficient to support the verdict of the jury but earnestly contends that reversible error was committed by remarks of the prosecuting attorney in his opening and closing arguments to the jury. In this connection the record reflects: "Opening Argument—By Mr. Lee: Now gen-

tlemen of the jury I don't charge people with anything or for any crime unless I know what I am doing. Mr. Moncrief: If the court please we object to the statement that Mr. Lee just made, that he doesn't charge people with anything or any crime unless he knows what he is doing and that is the exact statement that he made and we are objecting to it, and we would like the court to tell the jury to disregard it. The court: Gentlemen of the jury Mr. Lee wasn't a witness to this case and he has only acted by his official duties that is required by him and you are to consider the case on the law and the evidence that is introduced and not on the argument of counsels. Mr. Moncrief: Note the defendant's exceptions. Closing Argument—By Mr. Lee: Now, gentlemen if you turn this man loose go home and tell your daughters that you made it really hard for them today because you turned a man loose that can run over them and take anything from them he wants to and then come up here and tell cock and bull story and get away with it. Mr. Moncrief: If the court please we object to the statements that Mr. Lee just made. Mr. Lee is trying to compare the juror's daughters with some girl that goes out on blind dates and I am sure that none of the jurors try to get blind dates for their daughters or even allow their daughters to go out on blind dates and we are objecting to the statements that Mr. Lee just made, that if they turn this boy loose that he can run over their daughters and take anything away from them he wants to and then come up here and tell some cock and bull story and get away with it. The court: As I have told the jury before that you are not to consider the case on the arguments of counsels but on the law and the evidence introduced. Mr. Moncrief: Note the defendant's exceptions."

We have concluded that appellant was correct in his above contention and that the judgment must be reversed for the above error. The duty and responsibility of a prosecuting attorney is a high and important one, and has been announced by this court many times. It is as much his duty to protect the innocent as to convict

the guilty. In *Holder* v. *State*, 58 Ark. 473, 25 S. W. 279, we said: "A prosecuting attorney is a public officer 'acting in a *quasi* judicial capacity.' It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose." See also *Kansas City, Ft. Smith & Memphis RR Co.* v. *Sokal,* 61 Ark. 130, 32 S. W. 497.

In reversing the judgment for prejudicial remarks of the prosecuting attorney, similar in effect to those in the present case, in the case of *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70, we used this language: "Lastly, appellant contends that his rights were prejudiced by the following statements of the prosecuting attorney made in closing the argument, to-wit: 'I know he is guilty, I am willing to meet my God in the next hour knowing that Hughes is guilty, because I am thoroughly convinced. I have examined the testimony and know so much about it, and know things that never get to anybody else.' When this statement was made, the counsel for appellant objected, and the court stated that the argument of the prosecuting attorney was improper and the jury should not consider it. The statement was an attempt on the part of the prosecuting attorney to testify. He, in effect, said that he was in possession of facts which could not be revealed to the jury, but which riveted conviction upon appellant. Coming from a sworn

official, the remark was calculated to make a deep impression upon the minds of the jurymen. It cannot, perhaps, be classed with remarks the effect of which cannot be removed even by a solemn admonition of the court, but it was certainly a flagrant violation of the right of appellant to a fair and impartial trial vouchsafed to him by the Constitution and laws of the State of Arkansas. Considering the highly prejudicial character of the remark, its effect could not be removed by a mild admonition of the court."

As indicated, we hold that the above remarks of state's counsel were highly improper and prejudicial to appellant's rights. His remarks referring to the daughters of the jurors were improper and inflammatory and tended to arouse passion and prejudice. "The appeal to the jury to put themselves in plaintiff's place was improper. One doing that would be no fairer judge of the case than would plaintiff herself. *Dallas Ry. & Terminal Co.* v. *Smith,* 42 S. W. 2d 794. The fact must be very plain to justify a lawyer in declaring his opponent's case to be trumped up," *F. W. Woolworth Co.* v. *Wilson,* 74 Fed. 439, 98 A. L. R. 681. Here the mild rebuke of the court was not sufficient to remove from the minds of the jury the damage done.

Since the judgment must be reversed and remanded for a possible new trial for the above error, we do not discuss the other assignments of alleged errors, other than to point out that we think the prosecuting attorney was allowed too much latitude on his cross-examination of appellant, Adams, and that the trial court abused its discretion in permitting it. While our rule is that a defendant when he submits himself, as here, to cross-examination is in the same position as any other witness, and in testing his credibility may be asked about previous convictions of offenses and about his personal habits and associates, we think improper and prejudicial questions were permitted. Over appellant's objections and exceptions the prosecuting attorney was permitted to ask appellant: "Q. Did you ever assault an-

other female? A. No, sir. Q. Did you ever assault a Mr. Emmett Honn's daughter? A. No, sir . . . Q. Did you assault a woman down at Radel? A. Where? Q. Radel? A. Never been down there. Q. You have never been down there or in that county? A. Not that I know of." We think these questions were highly prejudicial and improper in the circumstances. The record before us fails to show, in the slightest degree, that appellant had ever assaulted any other woman. Without any basis of fact whatever, the state's counsel was permitted to question appellant about imaginary assaults of two other women, which obviously, we think, would tend to inflame the minds of the jury against appellant.

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

Mr. Justice McFaddin dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I find no reversible error in this case, and, therefore, I vote to affirm.

I. The majority opinion says that the Prosecuting Attorney in his opening argument made some improper remarks. Even so, the Trial Court told the jury: "Gentlemen of the jury, Mr. Lee wasn't a witness to this case and he has only acted by his official duties that is required of him and you are to consider the case on the law and the evidence that is introduced and not on the argument of counsel." The majority opinion says that in the closing argument the Prosecuting Attorney made some improper argument. Even so, the Trial Court told the jury: "As I have told the jury before that you are not to consider the case on the arguments of counsel but on the law and the evidence introduced."

Ordinarily we hold that such admonitions by the Trial Court will erase any errors: and I think the admonitions did in this case. All the defendant did was to save his exceptions: he did not ask for a mistrial; so I think he is hardly in a position to ask for a new trial now. I cannot believe that the jury became inflamed over the

remarks of the Prosecuting Attorney to such an extent as to disregard the Court's admonitions, because the accused was not convicted of rape, but only of assault with intent to rape; and the majority opinion states that the appellant concedes that the evidence was sufficient to support the verdict.

II. Finally, the majority opinion says that the Court allowed the Prosecuting Attorney to go too far in the interrogation of the accused on cross examination. The Prosecuting Attorney did not go as far in the case at bar as the Prosecuting Attorney did in the cross examination of the accused in the case of *Seward* v. *State,* 228 Ark. 712, 310 S. W. 2d 239. In that case the Prosecuting Attorney interrogated the defendant concerning the death of his second wife and the homicide of Will Walker; and we held that no error was committed by the Trial Court in allowing the Prosecuting Attorney to ask such questions. Likewise, I see no error here.

I vote to affirm the judgment of the Trial Court.

ARKANSAS STATE HIGHWAY COMMISSION *v.* RICHARDS.

1699 318 S. W. 2d 605

Opinion delivered December 15, 1958.

W. R. Thrasher, Dowell Anders, O. Wendell Hall, Jr., Ed Boyett, for appellant.

Ben M. McCray, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant, Arkansas State Highway Commission, proceeding under its powers of eminent domain, condemned a right-of-way through a 65-acre airport owned by appellee, Mike Richards.[1] The jury awarded Richards $50,000 as damages; and on appeal appellant argues only two points, being: (1) "The verdict is excessive in that there is no substantial evidence to support the verdict"; and (2) "The Court erred in not granting plaintiff's motion for a directed verdict of $23,250 at the close of the testimony." We consider these two points together.

The Court submitted the case to the jury on instructions about which there is no complaint; telling the jury: that the landowner's just compensation is the difference between the fair market value of the lands before and after the taking, or damage; that the landowner is entitled to recover not only for the lands taken, but also for the damages, if any, to the remaining lands not taken; and that such fair market value should be based upon the highest and most valuable purpose to which the lands could reasonably be devoted at that time or in the reasonable future.

The evidence for the landowner established that he owned a tract of 65 acres located near the City of Benton, Arkansas; that he had purchased the lands and improved them for an airport; that the lands were being used as an airport at the time of the condemnation proceedings; and that such use was the most valuable purpose for which the lands could be devoted. In order to establish this last point (as the most valuable use for which the lands could be devoted), Richards showed that he had invested in the lands, hangars, runways, and other improvements to the airport, a total in excess of $110,000; that the rental value of the airport

[1] Mrs. Richards was a party to the case because of dower; but we refer to the Richards as "appellee".

made a fair return on the investment. Richards showed that the State Highway Commission had condemned a strip of land for a highway right-of-way through the approximate center of the airport; that the right-of-way through Richards' airport varied from 300 to 320 feet in width, and from 1333 to 1976 feet in length; and that the strip so condemned completely destroyed the use of the land as an airport and rendered it valuable only for agricultural purposes. The strip condemned contained 12.35 acres and the lands remaining totalled 52.65 acres in two tracts, entirely separated from each other by the highway right-of-way. Thus, the use of the lands as an airport was completely destroyed; and witnesses for Richards testified that the two tracts remaining were valuable only for agricultural or grazing purposes, and had a value, as such, of about $100.00 per acre, or a total of $5,265.00.

The appraiser for the Highway Department testified that the total value of appellant's 65-acre tract was only $48,750 before the taking, and that after the taking the lands remaining[2] were worth $25,500. Thus, the appraiser for the Highway Department fixed $23,250 as the maximum amount that Richards should recover. Appellant says that what Richards spent in improving the airport is not the test of value; and appellant is correct in such statement; but the cases recognize that when there is no readily ascertainable market value for the property in the particular use to which it is devoted (as an airport in the case at bar) then the cost of the property is admissible—not as a substitute for market value, but—as an aid to the jury to assist it in determining the market value. The rationale of the holdings is summarized in Nichols on "Eminent Domain," 3rd Edition,[3] Volume 4, § 12.313, in this language:

"Cost as criterion. As has been stated previously where the character of the property is such as not to

[2] This witness stated that the 52.65 acres remaining after the taking were worth $750.00 per acre; whereas, witnesses for Richards placed such value at only $100.00 per acre. This difference between the witnesses as to value of the 52.65 acres remaining would be $34,222.00.

[3] For additional discussion, see also the same work, Volume 5, § 20.1.

be susceptible to the application of the market value doctrine, resort has been had, among other things, to the original cost of the property, or to the current cost of reproduction less depreciation. Market value, it has been held, is not equivalent to the amount expended for the property by the owner.

"The proper measure is the market value of the land with the buildings upon it, and the owner therefore receives nothing for the buildings unless they increase the market value of the land. Accordingly, evidence of the structural value of the buildings is not admissible as an independent test of value. When, however, it is shown that the character of the buildings is well adapted to the location, and structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property. As in other cases of determining market value, not only the character and condition of the building, but also the uses to which it might be put, are matters for consideration.

"As a general rule the market value of the property is the measure of damages, and, ordinarily, the cost of construction is not material, and especially the cost of some particular improvement, which, however convenient to the owner, may not correspondingly increase the market value. When there is nothing to show that the cost of a particular improvement would aid in determining the market value of the whole estate, or that the value of the whole estate would depend closely on the cost in detail of improvements made upon it from time to time, evidence of such cost should be excluded. When, however, it appears by independent evidence or by reasonable inference that a building or other improvement erected upon the land tended to adapt the property to the use to which it could most advantageously be put, and there is nothing to show that the sum paid for its construction was not paid in good faith and under normal conditions, it cannot be said as a matter of law that the cost would not assist the jury in arriving at

the market value of the whole estate, and in such a case evidence of the cost is admissible.

"The admissibility of such evidence has in some cases been left to judicial discretion."

Giving the evidence its strongest probative force to sustain the verdict, as is our rule on appeal,[4] we reach the conclusion that the amount awarded is not excessive.

The judgment is affirmed.

WILLIAM J. SMITH, J., not participating.

HOLT and ROBINSON, JJ., dissent.

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[4] See *Albert* v. *Morris*, 208 Ark. 808, 187 S. W. 2d 909, and cases there cited.

MARTIN *v.* TERRELL.

5-1702 318 S. W. 2d 607

Opinion delivered December 15, 1958.

James C. Cole, for appellant.

Joe W. McCoy, for appellee.

George Rose Smith, J. This is a suit by the appellees for a mandatory injunction to require the appellants to remove two fences that they have erected across what is asserted to be a public road. The chancellor granted the relief prayed. Substantially the only contention made on appeal is that the maintenance of a gate across the road for many years compels the conclusion that the public's use of the way has been merely permissive.

The several parties all own farm land on what is known as Morrison Island or Watermelon Island. This so-called island consists of twelve or thirteen hundred acres lying between the Ouachita River and an old river bed that is now a slough. For a good many years the various landowners have, by common consent, maintained a single fence around the entire island.

The great weight of the evidence shows that the road in question has existed for seventy-five years or more. It provides access to the island from a nearby county highway. The road enters the island through a gate in the perimeter fence, crosses the land owned by the appellant Martin, and runs thence to lands owned by the four appellees and others. Throughout its life the road has been used by the landowners of the island and by the general public; at times it has been worked upon by the county. If it were not for the gate at the entrance to the island there would be no good reason to doubt the public's prescriptive right to use the road.

This dispute arose when Martin, and the other defendants at his direction, placed two fences across the road at points on Martin's land. In insisting that the long-continued existence of the gate entitles him to close the road Martin relies upon our settled rule that the public loses its prescriptive right in a road when it acquiesces for more than seven years in a landowner's maintenance of a gate across the road. *Porter* v. *Huff*, 162 Ark. 52, 257 S. W. 393. The reason for the rule, as we observed in the *Porter* case, is that the gate gives

notice to the public that they pass through the land by permission of the owner and not as a matter of right.

To apply the rule to the particular facts of this case would extend it beyond the reasoning on which it is based. To begin with, the gate was not situated on the land that Martin owns; so the gate could hardly be regarded as notice to the public that their passage across that particular land was by permission of its owner. Upon somewhat similar facts we held, on rehearing, in *Stoker* v. *Gross,* 216 Ark. 939, 228 S. W. 2d 638, that a landowner is not entitled to close a road across his land merely because another landowner has maintained a gate at a different point on the road. See also *Holmes* v. *Pierce County,* 121 Wash. 56, 208 P. 7.

The proof does not support Martin's effort to distinguish the *Stoker* case on the ground that here Martin's predecessor in title, Henry B. Means, Sr., mistakenly believed that the gate was on the land that Means owned. Means acquired the land in 1915 and owned it until his death in 1950. The gate was near the Means barn and was sometimes referred to as the Means gate, but it was actually on adjoining land owned by the appellee Sibley. Coley Buck, who supervised the Means farm for thirty-four years, testified positively that Means never laid claim to the land where the gate is. G. R. Sibley and Charles Crow gave similar testimony. Henry B. Means, Jr., evidently believed that the gate was on the Means land, as he once kept the gate locked for two or three days, but he frankly admitted that his assumption was based on hearsay. On the whole record we are not convinced that the elder Means relied upon the gate as a protection against the creation of an easement.

In the second place, the gate was not maintained even by its owner as a means of asserting his dominion over the road. There is abundant evidence that the perimeter fence, including the gate, was kept in repair by the community as a whole, to protect the island lands against the intrusion of cattle during the crop seasons.

Everyone concerned helped in the maintenance of the fence, the gate, the bridge across the slough, and even the road itself. We are by no means persuaded that the various landowners, in assuming their fair share of the responsibility for the fence, the gate, the bridge, and the road, had the slightest notion or intention of demonstrating by their maintenance of the gate that their use of the road was merely permissive. It is much easier to believe that they used as a matter of right the facilities that they themselves had created.

Affirmed.

HOT SPRING COUNTY *v.* BOWMAN.

5-1740 318 S. W. 2d 603

Opinion delivered December 15, 1958.

W. R. Thrasher, Dowell Anders and *W. B. Brady,* for appellant.

Wendell O. Epperson and *Joe W. McCoy,* for appellee.

George Rose Smith, J. This is a claim against the county for damages of $40,000 assertedly suffered by the appellees as a result of a lowering of the grade of Highway 67 in front of their service station. The county court disallowed the claim, finding it excessive. Upon appeal to the circuit court the appellees were awarded a verdict and judgment for $10,000. The county contends that the State alone is liable to the claimants and, alternatively, that incompetent evidence was introduced at the trial.

In 1954 and 1955 the State Highway Commission approved a plan for the renovation of Highway 67 in Hot Spring county. Pursuant to Ark. Stats. 1947, § 76-510, the Commission applied to the county court for assistance in the project. The court granted the petition and entered an order requiring any aggrieved landowner to present his claim within one year. It is conceded that by this order the county made itself liable for the value of the land that was actually taken as a right-of-way for the improvement. *Ark. State Highway Com'n* v. *Palmer,* 222 Ark. 603, 261 S. W. 2d 772.

It happened, however, that none of the appellees' property, which abutted the highway for a distance of 120 feet, was actually taken. Along their frontage the pre-existing right-of-way was used, but the roadbed was lowered about three feet, causing the damage now complained of.

The county points out that the Highway Commission controls the grade of state highways and could have lowered the roadbed in front of the appellees' land without applying to the county court for assistance. Counsel also seek to deduce from some of our prior decisions a rigid rule by which liability for a change in the grade of a street or highway would be limited to

the public agency having the authority to make the change. Among the cases cited are *Eickhoff* v. *Street Imp. Dist. No.* 11, 120 Ark. 212, 179 S. W. 367; *Red* v. *Little Rock Ry. & Elec. Co.,* 121 Ark. 71, 180 S. W. 220; and *Road Imp. Dist. No.* 6 v. *Hall,* 140 Ark. 241, 215 S. W. 262. It is accordingly urged that the appellees have no claim against the county and that their only remedy was against the State, either by a suit for an injunction or by an application to the Claims Commission.

We are unable to agree with this reasoning. None of the cases relied upon lays down the inflexible principle that the appellant would have us adopt; each case merely holds that a particular public agency was not liable under certain statutes not pertinent to the present controversy. Here the county's liability derives from Ark. Stats., § 76-510, which authorizes the Highway Commission to call upon the county court to *change* or widen any state highway, in the manner provided by § 76-917. The latter section empowers county courts to make such *changes* in old roads as may be deemed proper. It is plain enough that the county may assume the responsibility for a change in the existing highway, whether or not the acquisition of additional right-of-way is involved.

Here the county court's order gave no hint to the affected landowners that the county meant to restrict its liability to the value of land actually taken. The order recites the fact that the road is to be rehabilitated as set out by the Highway Commission's plan and specification, that the improvements asked for in the Commission's petition are accepted, and that any landowner who is affected by the order is to present his claim to the county court. Although the record is not wholly clear on the point, it appears that the Commission's plans and specifications contemplated the change in grade along the appellees' land. To say the least, it may fairly be assumed that the Highway Commission did not embark upon an extensive renovation of Highway 67 without knowing what the finished grade would

be. A landowner who is damaged by a change in the grade of the highway is protected by the constitution to the same extent as one whose land is actually taken. *Clark County* v. *Mitchell,* 223 Ark. 404, 266 S. W. 2d 831. If the county intended to assume the latter liability only, that intention should have been clearly disclosed by the order, so that the public would not be misled.

On the second point, however, the judgment must be reversed. An expert witness for the claimants was permitted to arrive at the value of the land, before the change in grade, by capitalizing the income derived from the service station on the property. This was error. *Hot Spring County* v. *Crawford,* 229 Ark. 518, 316 S. W. 2d 834. The record does not support the argument that this income consisted only of rent received by the appellees from lessees of the property; Bowman testified that he operated the station himself for a substantial part of the period that was considered in the capitalization of income.

Reversed and remanded for a new trial.

BANKO *v.* GARVIN.

5-1742 318 S. W. 2d 611

Opinion delivered December 15, 1958.

Wright, Harrison, Lindsey & Upton, for appellant.

Charles A. Brown and *Neill Bohlinger,* for appellee.

PAUL WARD, Associate Justice. The question here deals with the application of an automobile guest statute.

Appellee was injured while in an automobile belonging to and controlled at the time by appellant in a parking building in Little Rock.

The pertinent facts, in the main undisputed, leading up to this litigation are: Appellant, Dorris Banko, a nurse in the Navy, driving in her own car from California to her new station in Massachusetts, stopped at Little Rock, her former home, on October 31, 1957 to visit friends: She and her mother who was making the trip with her went to the home of appellee, Bula Garvin, and spent the night: The next morning the three persons mentioned drove down town in appellant's car preparatory to meeting another friend, Mrs. Thelma Ellis: It seems that appellant understood they would visit a few minutes with Mrs. Ellis during her noon recess hour at some place Mrs. Ellis would designate for temporary parking: However, as appellant was driving south on Louisiana Street and was approaching the intersection with 4th Street, Mrs. Ellis motioned to her to drive into the Newrock Parking Center which was just to appellant's right. Appellant accordingly drove into the parking center and stopped the car when Mrs. Ellis opened the right rear door and greeted her and her mother: At about this time appellant, at the direction of a parking attendant, after he had given her a claim check, started to move her car out of the entrance lane and over to the right side of the ground floor of the

parking area: As appellant attempted this maneuver she lost control of her car which began to gather speed, headed down a ramp at the rear of the building and collided with a concrete wall. Appellee was in the front seat of the car with appellant. As a result of the accident appellee was injured, and brought suit against appellant for damages, recovering a judgment in the amount of $5,000 in the trial court, from which comes this appeal.

From the briefs we understand it is agreed by both appellant and appellee that the evidence shows appellant was guilty of ordinary negligence but that she was not guilty of "willful misconduct" or that she "willfully and wantonly operated" the automobile in causing the collision which resulted in the injury; and also that appellee was a "guest" in appellant's car.

In view of the above the following situations are presented: (a) If Ark. Stats. 75-915 is in full force and effect, as contended by appellant, then the judgment of the trial court should be reversed, because there was no willful and wanton negligence shown and because it was not necessary, under that statute, for appellant to be driving on the *highway* at the time of the accident. (b) If on the other hand said § 75-915 has been repealed, as contended by appellee, the judgment should be affirmed, because appellant was shown to be negligent and because appellant is not protected by the other so called guest statutes which apply only when the automobile is being operated on the highway.

Briefly stated another way: Appellant says she is not liable because she is protected by the guest statute, § 75-915, which requires that she be shown guilty of willful and wanton negligence. Appellee says the guest statutes are not involved at all, and that appellant is accountable for ordinary negligence.

The trial court, by its instructions, adopted appellee's view over the objections of appellant.

To better understand the arguments pro and con on the above stated issue it is deemed necessary to set out the essential parts of the three "guest statutes" concerned, with the dates of their enactments.

Act 61 *of* 1935. (Referred to hereafter as Act A) Section 1. "No person transported as a guest in any automotive vehicle upon the public highways of this State shall have a cause of action against the owner or operator of such vehicle for damages on account of any injury, death or loss occasioned by the operation of such automotive vehicle unless such vehicle was willfully and wantonly operated in disregard of the rights of others." (§ 75-913 Original Volume Ark. Stats.)

Act 179 *of* 1935 (Referred to hereafter as Act B) Section 1. "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 vehicles, unless such injury shall have been caused by the willful misconduct of such owner or operator." (§ 75-915 Ark. Stats.)

Act 175 *of* 1955. (Referred to hereafter as Act C) Section 1. "That no person transported as a guest in any automotive vehicle upon the public highways or in Aircraft being flown in the air, or while upon the grounds, shall have a cause of action against the owner or operator of such vehicle or Aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or Aircraft unless such vehicle or Aircraft was willfully and wantonly operated in disregard to the rights of others." (§ 75-913 in New Volume of Ark. Stats.)

We can find no sound or reasonable ground for appellee's contention that Act B has been repealed. Act A

was approved February 20, 1935, while Act B was approved March 21, 1935. Both statutes deal with guests while riding in automobiles, the former on the public highways and the latter not so limited. While it is true that the legislature might have combined both features in the same Act we know of no rule compelling it to do so. There is no contention, nor can we see how it could be reasonably contended, that Act A repealed Act B. Consequently, if Act B has been repealed it must have been done by Act C. But an examination of Act C reveals that it only amended Act A, as is clearly shown by the enacting clause and the Act itself. If the legislature had intended to repeal Act B it would have been easy and natural to say so. Also, there appears a good reason why the legislature did not want to repeal Act B since it contained a provision (not copied above) dealing with guests who were related (to the driver) by blood or marriage (recently declared unconstitutional by this court in *Emberson* v. *Buffington*, 228 Ark. 120, 306 S. W. 2d 326). Because of this and other distinct differences between Act B and Act C we see no ground or reason for the application of the doctrine of repeal by implication which has been urged by appellee.

Nor can we agree with appellee's able argument to the effect that all three of the above mentioned statutes deal with the same subject matter ("same class of persons or things") and should be considered together. The result of appellee's argument would be that the last Act (Act C) replaces Act B. Supporting this argument appellee quotes the "General Rules" found in Vol. 82, C. J. S. at page 801, under § 366 entitled "Statutes Relating to Same Subject Matter in General." The gist of the rule is that such statutes should be harmonized if possible. In the same section mentioned above it is stated that ". . . although an act may incidently refer to the same subject as another act it is not in *pari materia* if its scope and aim are distinct and unconnected." It is obvious, we think, that the scope and aim of Act B are distinct and different from that of Act C.

While both deal with the same general subject of "guest" the scope is not confined to the public highways in the former as it is in the latter; the former deals with the degree of relationship while the latter doesn't, and; the latter deals with aircraft while the former doesn't.

To put these Acts in their right perspective we think it is important to bear in mind that they were originally designed to deal with liability to a guest (in an automobile) who might be negligently injured, and not to regulate traffic on the highways. This being true, it is altogether reasonable that the legislature chose, perhaps wisely, to give protection to drivers both on and off the public highways. Certainly it was foreseeable that guests might be injured in either event.

We find no merit in appellee's contention that the journey had come to an end and consequently no guest statute is involved. All the testimony shows that the journey had not ended but that appellee would have continued to ride with appellant after the short visit with Mrs. Ellis.

The judgment of the trial court is reversed and the cause of action is dismissed.

GORDY *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

5-1712 318 S. W. 2d 609

Opinion delivered December 15, 1958.

Wood & Smith, for appellant.

Bernal Seamster, for appellee.

SAM ROBINSON, Associate Justice. The amount of an attorney's fee is involved here. Appellant, Victor G. Gordy, retained H. B. Stubblefield, an attorney, to attempt the collection of disability benefits on six policies of insurance. Gordon contends that Stubblefield was to receive as his fee one-third of the accrued benefits, and Stubblefield contends that he was to receive one-third of the full amount collected on the policies, including the amount to be paid in the future, less the amount payable in the event of death. From a judgment in favor of Stubblefield, Gordy has appealed.

Three policies were issued to Gordy by The Equitable Life Assurance Society of the United States. Two of these policies are involved in this appeal; these policies provide for waiver of premium and for disability benefits of $100 per year each. Suits were filed on the Equitable policies, but the insurance company made a settlement before the trial for the full amount the policyholder claimed was due, and judgment was entered for the accrued benefits less that part barred by the statute of limitations. The trial court assessed a 12% penalty and an attorney's fee of $750. The insurance company appealed to this court, contending the attorney's fee was excessive, and Gordy, represented by Stubblefield, cross-appealed, contending it was not enough. The judgment was affirmed. *Equitable Life Assur. Society of U. S.* v. *Gordy,* 228 Ark. 643, 309 S. W. 2d 330.

The present action pertains to future benefits payable under two of the policies. The judgment in the circuit court established the validity of Gordy's claim for disability benefits. When payment of benefits accruing subsequent to the judgment became due, the insurance company filed an interpleader in chancery court and deposited in court the amount due under the policies. The interpleader alleged there was a controversy between Gordy and his attorney, Stubblefield, regarding the amount due each. Stubblefield contends that he should have as his fee one-third of all sums collected and to be collected, including future benefits, but exclusive of death benefits, and that Gordy was to get two-thirds of everything, including the attorney's fee and penalty. Gordy contends that the attorney's fee was to be one-third of the accrued benefits and one-third of the attorney's fee and penalty. The chancellor held that Stubblefield is entitled to one-third of the future benefits, as well as one-third of the accrued benefits, and Gordy has appealed.

Stubblefield maintains that if his agreement with Gordy is not a binding contract, he is entitled to one-third on a *quantum meruit* basis. So far as the terms of the agreement are concerned, the parties were before the chancellor, and that court was in much better position than this court to judge their credibility; and we cannot say a finding that the agreement was for an attorney's fee of one-third of future benefits, as well as those which had accrued, is against the preponderance of the evidence. Moreover, if the agreement is disregarded and the attorney's fee is assessed on a *quantum meruit* basis, one-third of everything recovered, including future benefits but excepting death benefits, is not too high, considering all the circumstances. In fact, it appears that the odds were greatly against Stubblefield's being able to bring the matter to a successful conclusion. The courts have approved many contracts for attorneys' fees calling for 50% of the amount recovered where the prospects of making recovery were much

greater than were Gordy's for collecting disability benefits under the terms of the policies. In order to collect on the policies, it was necessary to show that Gordy's disability began before he reached age 60. He had reached that age in 1952, and his alleged disability began in 1949. He did not employ Stubblefield, however, until 1955. Undoubtedly the statute of limitations had run on part of the claim; the whole thing had become somewhat stale, and many lawyers would not have accepted employment on a contingent basis. Stubblefield was faced with the prospect of long, drawn out, strongly contested and expensive litigation, with a good chance of finally receiving no fee at all.

The record shows that Stubblefield advanced a large part of the necessary expenses of the litigation, and there is no showing he would have recovered this money if he had lost the case. Apparently he did a tremendous amount of work on the case. It was shown that his files pertaining to the matter were voluminous. Some of the litigation was in federal court, and after winning his case there before a jury, Stubblefield had to go to the circuit court of appeals; and, as heretofore mentioned, he had to handle one angle of the case in this court. All of this work could have been anticipated from the beginning. In addition, it appears that there must have been grave doubt about being able to prove Gordy's alleged disability. In short, it appears to have been a pretty weak case. And, in agreeing to handle it on a contingent basis, Stubblefield was taking a long gamble on collecting a fee.

Appellant cites *Johnson* v. *Rolf*, 208 Ark. 554, 187 S. W. 2d 877, and other cases, to the effect that equity regards the relation of attorney and client in much the same light as that of guardian and ward, and will relieve a client from hard bargains from an undue advantage secured over him by his attorney. But the rule announced in those cases has no application to the facts in the case at bar. Here it does not appear that Gordy

was overreached in any particular. On the contrary, it appears that he was very fortunate in being able to engage, on a contingent basis, the services of a very able lawyer who, through energy, perseverance and tenaciousness, brought his client's litigation to a successful conclusion. The future disability benefits Gordy will receive are just as much the result of the lawyer's work as the accrued benefits.

Affirmed.

LEACH *v.* STATE.

4927 318 S. W. 2d 617

Opinion delivered December 15, 1958.

Eugene Coffelt, for appellant.

Bruce Bennett, Atty. General and *Russell J. Wools*, Asst. Atty. General, for appellee.

WILLIAM J. SMITH, Associate Justice. While the appellant, Bill Leach, was driving his automobile west on U. S. Highway 71 between Bentonville and Rogers on March 12, 1958, two members of the Arkansas State Police who were driving behind him saw him weaving from one side of the road to the other. They overtook Leach and succeeded in stopping him. The appellant was arrested and charged with operating an automobile upon a public highway while he was under the influence of intoxicating liquor, second offense. The jury found him guilty and fixed his punishment at a fine of $250 and ten days in jail. Pursuant to the jury verdict, the Circuit Court sentenced the appellant and suspended his driver's license for a period of one year.

For reversal, the appellant contends that the trial court erred in refusing to quash the jury panel and in refusing to grant a continuance; that the jury verdict was based upon prejudice; and, that certain remarks by the Prosecuting Attorney in his closing argument were prejudicial.

At the trial the testimony of the arresting officers and others was to the effect that the appellant was unsteady on his feet; that his speech was not clear; that his face was flushed; and, that he had the smell of intoxicating liquor on his breath. For purposes of this opinion we do not consider it necessary to further summarize the evidence.

With reference to his first assignment of error, the appellant refers to a colloquy between the Court, and the appellant and his counsel at the time the case was set for trial. In our opinion, the appellant has failed to state any statutory ground for challenging the jury panel. Section 43-1911 Ark. Stats. 1947. Also, he is in no position to complain about the jury panel since he failed to exercise his peremptory challenges. *Hooper* v. *State,* 187 Ark. 88, 58 S. W. 2d 434.

The appellant's second contention likewise has no merit. He moved orally for a continuance on the ground that a witness he desired to use was absent, and he did

not file an affidavit setting forth information specifically required by the applicable statute. Section 27-1403 Ark. Stats. 1947. Further, a motion for continuance is a matter within the sound discretion of the trial court and we find nothing in the record to indicate an abuse of discretion in this case. *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24.

Apparently the appellant's contention that the jury's verdict was based on prejudice is predicated upon what he describes as conflicting and ridiculous evidence adduced by the State. It is settled that the jury weighs the evidence and in this case it did so on instructions from the Court to which the appellant did not object. The testimony to which we have referred, we think, constituted substantial evidence to support the verdict of the jury. *Slavens* v. *State,* 226 Ark. 62, 287 S. W. 2d 892.

In making his closing argument, the Deputy Prosecuting Attorney said: "In my opinion, he was driving while under the influence of intoxicating liquor, like Joe Means said—strong like he had been by the cider mill." Joe Means, Sheriff of Benton County, had testified that when arrested, the appellant was unsteady on his feet; that his speech was very bad; and, that he had the smell of alcoholic beverage on his breath. In our opinion, this statement by the Deputy Prosecuting Attorney while arguing the case to the jury was nothing more than a permissible comment on the evidence in the case. *Willis* v. *State,* 220 Ark. 965, 251 S. W. 2d 816.

The judgment of the circuit court is affirmed.

CLINTON *v.* GENERAL MOTORS CORPORATION.

5-1585 318 S. W. 2d 577

Opinion delivered December 15, 1958.

Wright, Harrison, Lindsey & Upton, for appellant.

Rose, Meek, House, Barron & Nash, Edwin E. Dunaway, Henry M. Hogan and *Daniel Boone,* Detroit, Michigan, for appellees.

H. Maurice Mitchell, Beresford L. Church, Jr., Spitzberg, Bonner & Mitchell, for appellee; *Wood & Smith, amicus curiae* brief for Ford Motor Co. *Richard B. Darrah,* Dearborn, Michigan, *Owens, McHaney, Lofton & McHaney, amicus curiae* brief for Chrysler Corp., and *Leland J. Markley, Kelley, Drye, Newhall, Herbert F. Moshier,* Detroit, Michigan.

LEON B. CATLETT, Special Associate Justice. Act 530, which became effective on July 1, 1957, created the Arkansas Motor Vehicle Commission, composed of a Chairman and six members, and provided for the regulation by such Commission of the sale and distribution of new motor vehicles in Arkansas. On June 27, 1957, six automobile dealers, including franchised new car dealers and non-franchised new car dealers, filed suit in the Pulaski Chancery Court seeking a declaratory judgment that Act 530 was unconstitutional in multiple respects under the State and Federal Constitutions and for an injunction against its enforcement. On August 27, 1957, General Motors Corporation, a nonresident automobile manufacturer, filed suit in the same Court praying the same relief as asked in the case of the

six automobile dealers for substantially the same reasons. The two cases were consolidated for trial, and on January 14, 1958, the Court below held the Act "unconstitutional in its entirety because it contravenes the Constitution of Arkansas and the Constitution of the United States in several respects, particularly: 1. The Act contains arbitrary classifications among persons following the same calling and trade. 2. The Act is not a valid exercise of the police power. 3. The Act fails to provide for an impartial tribunal. 4. The standards set out in the Act are not sufficiently definite. 5. The Act constitutes a prohibited delegation of legislative powers. 6. The Act imposes unreasonable burdens and restrictions on interstate commerce."

Excellent briefs have been submitted by the parties and by Ford Motor Company and Chrysler Motor Corporation as *amici curiae.*

The legislation and ensuing litigation are a sequel to a similar Act, No. 182 of 1955, reviewed and declared unconstitutional in *Rebsamen Motor Company* v. *Phillips,* 226 Ark. 146, 289 S. W. (2d) 170. In the *Rebsamen* case the Court found that Act 182 contravened Section 18, Article 2 of the Arkansas Constitution by arbitrarily classifying dealers in new and unused cars as subject to the required license, while exempting dealers engaged in the sale of new and used cars. The question presented is whether Act 530 of 1957 is sufficiently different from Act 182 of 1955 to eliminate unconstitutional features.

Section 2(a) of Act 530 of 1957 defines a "New Motor Vehicle" as "any motor vehicle transferred for the first time from a manufacturer, distributor or wholesaler, factory branch or distributor's branch, and which motor vehicle has theretofore not been used." The remainder of Section 2 is devoted to defining, among other terms, "Motor Vehicle Dealer," "Commission," "Manufacturer," "Distributor," "Wholesaler," "Factory Branch" and "Distributor Branch." Section 3 creates the Arkansas Motor Vehicle Commission and empow-

ers it to "make and enforce all reasonable rules and regulations" necessary to accomplish the purposes of the Act. Section 4(a) specifies that on or after July 1, 1957, engaging in business as a motor vehicle dealer, or manufacturer, distributor or wholesaler of motor vehicles without first obtaining the license required by the Act, constitutes a misdemeanor with each day of violation a separate offense, and Section 4(b) requires an applicant to execute a form prescribed by the Commission containing information relating to the applicant's financial standing, business integrity, whether applicant has an established place of business and is primarily engaged in the pursuit of the business for which a license is sought, and whether the applicant is able to conduct properly such business and such other pertinent information consistent with the safeguarding of the general economy, public interest and public welfare. Section 4(c) sets forth a schedule of license fees and Section 4(d) provides that a change of location must be sanctioned by a new license. Section 5 enumerates the grounds for denying, revoking, suspending or delaying the issuance of a license, and specifies that such action may be taken by the Commission if a "Motor Vehicle Dealer" (a) has required a purchaser of a new motor vehicle, as a condition of delivery thereof, to also purchase special features, appliances, accessories or equipment not desired by the purchaser; (b) has represented and sold as a new and unused motor vehicle any motor vehicle which has been used and operated for demonstration purposes, or which is otherwise a used motor vehicle; or (c) resorts to or uses any false or misleading advertising in connection with his business as a "Motor Vehicle Dealer."

Customarily, manufacturers of automobiles sell new motor vehicles, through their distribution systems, only to dealers with whom they have a franchise or contract.

A careful and painstaking comparison of the provisions of Act 530 of 1957 with those of Act 182 of 1955 fails to disclose any real difference in the basic requirements imposed by Act 530 in connection with "any mo-

tor vehicle transferred for the first time from a manufacturer, distributor or wholesaler, factory branch or distributor branch, and which motor vehicle has theretofore not been used," and the requirements imposed by Act 182 in connection with "the sale of new and unused motor vehicles" by a dealer holding a *bona fide* contract with or franchise from a manufacturer of such vehicles. Nor has any difference been discerned between the sale of a "motor vehicle transferred for the first time" and the sale of "a new and unused motor vehicle." Both Acts regulate and require the payment of license fees by identical classes, while the competitors of such classes engaged in the same business are not regulated or required to pay such fees. There is no reasonable basis for placing the franchised dealers under regulation and requiring them to pay license fees, while not making the same requirements of the nonfranchised or independent dealers.

In the case of *Rebsamen Motor Company* v. *Phillips, supra,* this Court pointed out that while the manufacture and sale of motor vehicles constitutes an area by no means exempt from regulation under the police power of the State, such regulation may not extend to a point where competition is circumscribed in an unreasonable manner. Act 530 and Act 182 reach an identical result in this respect.

In reaching this decision we do not desire to create an impression that the wisdom of legislation has or will become a factor in judicial appraisal where attack is made on constitutional bases. However, as we have often held, the police power may not be applied to a class without equal application to all members of such class.

While additional grounds of unconstitutionality are urged, some of which are meritorious, in view of our conclusion, a discussion of these points is unnecessary. Act 530 of 1957 is unconstitutional in its entirety.

Affirmed.

The Chief Justice and Mr. Justice WARD dissent.

GEORGE ROSE SMITH and WILLIAM J. SMITH, JJ., not participating.

PAUL WARD, Associate Justice (dissenting). For the reasons hereafter set out, I am unable to agree with the majority opinion.

I cannot help feeling that those making the majority opinion have missed entirely the purpose and the essential provision of Act 530 of the 1957 General Assembly. The sole and only purpose of the Act was not to *punish* but to *help* the franchise dealers of Arkansas. This is specifically stated in Section 1 of the Act. This plain fact seems to have entirely escaped the majority, because they say: "There is no reasonable basis for placing the franchised dealers under regulation and requiring them to pay a *license fee*" (my emphasis). It is, of course, the view of the complaining dealers [and General Motors Corporation] that the Act is a burden on them, but that certainly does not express the attitude of a vast majority of the franchise dealers of Arkansas. Confirmation of this conviction is the fact that they are so persistent in their efforts to obtain this kind of legislation. Section 1 of the Act explains clearly why auto manufacturers are opposing this legislation. It removes the economic pressure they now are able to exert upon their dealers.

Having understood the purpose of the act, it is now pertinent to examine the question of "classification". The essence of the majority opinion is that there is "an arbitrary classification among persons following the *same trade* or *calling*". (my emphasis). So it will be interesting to have a look at just what are these classifications, and just how arbitrary they are.

One group consists of authorized dealers who sell new cars. This group [as stated in said § 1] are subjected to superior economic pressure and thereby forced into agreements, acts, and practices which produce harmful effects on the general economy. Those in this group can resist this pressure only at the risk of losing their

business to others who are willing to submit and thus start the round robbin of economic pressure all over again.

In the other group are used car dealers, and they are not affected by the Act in any way. Those in this group do not have to buy more cars than they want and therefore are not under the pressure imposed on the first group.

To say, as the majority does in effect, that this difference between the two groups is imaginary and that a classification based thereon is arbitrary is simply being unrealistic. Neither is it realistic to say both groups are engaged in the *same kind of business*. Of course both groups deal basically with automobiles, but they do so under entirely different circumstances and conditions. The legislature has always recognized classification distinctions, and with this courts approval. For example, the county officers in one county deal with the same matters as officers in other counties, but they are nevertheless classified as to salaries solely on the basis of different conditions. All cities deal with local government but they are also classified and given different powers and duties depending on different conditions. In the case of *Ring* v. *Mayor and Council of Borough of North Arlington,* 136 N. J. L. 494, 56A. 2d 744, in dealing with this precise question, the court said: "In the exercise of the power to license for regulation and revenue, distinctions may be made not only between businesses of different character, but also between businesses of the *same general class* where there are *substantial differences* in the subject matter and *trade methods and practices* related to the object of legislation" (my emphasis). It was also said in the *Ring* case: "A distinction in legislation 'is not arbitrary, if any state of facts reasonably can be conceived that would sustain it' ".

Neither do I agree that this case is controlled by the *Rebsamen* case, cited in the majority opinion. The gravamen of the *Rebsamen* opinion is found on page 152 of the Ark. Reports. It holds that there is no distinction between selling *"new and unused cars"* and selling "new and used cars". A careful examination of Act 530 reveals

that no such classification is made. Of course I took the view in the *Rebsamen* case, as shown by my dissenting opinion, that the classification there was not arbitrary, and I certainly do not want to extend further the restrictive scope of that opinion. In the *Rebsamen* case both groups dealt with *new* cars while here only one group does. That one distinguishing feature alone, added to the numerous other distinguishing features enumerated heretofore, constitutes the basis for a reasonable classification, and that is all this court has ever required. For confirming decisions see: *Williams* v. *State,* 85 Ark. 464, 108 S. W. 838; *Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594; *Bollinger* v. *Watson,* 187 Ark. 1044, 63 S. W. 2d 642; *Hogue* v. *The Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49, and; *Thompson, Com. of Revenues* v. *Continental Southern Lines, Inc.,* 222 Ark. 108, 257 S. W. 2d 375.

[redacted]

MORGAN *v.* DANIELS.

5-1714 318 S. W. 2d 823

Opinion delivered December 22, 1958.

[redacted]

M. V. Moody & Joe Brooks, for appellant.

Cockrill, Laser & McGehee & Jacob Sharp, Jr., for appellee.

CARLETON HARRIS, Chief Justice. Appellant instituted a suit for damages alleging that he was seriously injured by the action and negligence of appellee in striking him at the intersection of 10th and Broadway in Little Rock. Appellee answered, denying the allegations, alleging that any damages were caused solely and proximately by appellant's own negligence. Unavoidable accident was further pleaded. Previous to the *voir dire* examination, appellant's attorney requested in Chambers that he be permitted to ask the following questions of the jury panel during such examination.

"One. Have you ever been in the employ of a liability insurance company? Two. Do you own any stock in a liability insurance company at the present time? Three. Are you insured with a mutual benefit liability company where your premiums are determined upon the size of judgments given in personal injury actions for the previous year?"

The court ruled that counsel could ask the first two questions, but sustained an objection to the third. After returning to the courtroom, the court made a statement to the panel, explaining the general nature of the case, and interrogated the prospective jurors relative to their knowledge of the cause, representation by any of the attorneys, any relationship to any of the attorneys, and whether there was any reason why any juror could not try the case impartially if selected. The following colloquy then took place:

"Mr. Moody: (Counsel walks to pleading bar and turns and directs his question to counsel for the defendant sitting close by). 'What is the name of that insurance carrier that has the coverage on your client's automobile?' Mr. Sharp: 'Your Honor, I want to be heard on that.'

Thereupon, Counsel for both parties approached the bench and an off-record discussion was had between the Court and counsel for the respective parties.

The Court: 'Ladies and gentlemen, are any of you connected with or do you own any stock in the Preferred Risk Insurance Company, an Arkansas corporation, or do any of you have any close relatives that are employed by or owns stock in that company?'

Thereupon, Mr. Sharp, counsel for the defendant, returned to his seat at the counsel table and Mr. Moody, counsel for the plaintiff, approached the pleading bar and questioned the jury, as follows: * * *''

Here, appellant's counsel interrogated the panel relative to any employment by that company at any time in the past, any representation or business dealings with appellee's attorneys, and whether any of the prospective jurors had ever been either plaintiffs or defendants in a personal injury suit. Upon submission of the case, the jury returned a verdict for appellee. For reversal, appellant relies upon two points.

I.

The Court erred in refusing permission to plaintiff's attorney to interrogate prospective jurors on the *voir dire* respecting their interest in or connection with liability insurance companies.

II.

The Court erred in refusing permission to plaintiff's attorney to interrogate prospective jurors on *voir dire* as to their ownership of stock or employment with any liability insurance companies, and as to mutual benefit insurance determined by judgment given in personal injury actions for the previous year.

These will be considered together in our discussion.

The exact questions, heretofore mentioned, were approved in *Dedmon* v. *Thalheimer*,[1] 226 Ark. 402, 290

[1] The three questions were included as one.

S. W. 2d 16. In that case, the trial court refused to allow any of the questions to be asked; here, the court ruled that the first two might be propounded, but not the third. Appellant complains that he was effectively deprived of even asking the first two questions, because the court took over the interrogation, and did not ask the questions in the manner in which they had been requested. We have searched the record and find nothing therein which indicates that the court, in any manner, prohibited counsel from asking the first two questions. Counsel had been informed in Chambers that the two questions could be asked, and the record discloses no further remarks by the trial judge to the jury panel, or to the attorneys, other than those heretofore mentioned. We accordingly are unable to agree that the court's action in asking the questions relative to ownership of stock, or close relatives in the Preferred Risk Insurance Company, amounted to "taking over" the interrogation, or precluded appellant's counsel from requesting the information in questions one and two. In fact, as previously shown, other questions were asked, and counsel's examination of the jury appears to have been entirely unhampered (except as to the third question). While we said in the *Dedmon* case, *supra,* that the question excluded was proper, we do not see that, under the circumstances, appellant was prejudiced by the refusal of the court to permit the question. The court questioned the panel specifically in regard to the Preferred Risk Insurance Company. These questions certainly would convey the impression that if an insurance company were interested, *it was this company.* Mutual companies return dividends to their policy holders in the form of a credit to be applied upon premiums that become due. This credit is, of course, affected by the size of judgments given against the company in the previous twelve month's period. There being no answer to the court's questions relative to the Preferred Risk Insurance Company, it is apparent that no prospective juror held a policy with that company. Since any holder of a mutual policy on the panel would have recognized

that his or her company was not involved, they would likewise have known that their dividend credit would not be affected by the outcome of the litigation.

Actually, the court's interrogation resulted in the jury obtaining information relative to insurance which they should not have properly received, and which, under usual circumstances, could have been expected to inure to the benefit of appellant. In fact, under our holding in *Delong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370, such a statement by the court, if properly objected to by appellee, would have necessitated a reversal, had appellant obtained a judgment. At any rate, it would appear, that when the court asked these questions, counsel was apparently satisfied as far as any examination relating to insurance was concerned, for he did not even proceed to ask the two questions for which permission had already been obtained. We are persuaded that appellant's contentions are not well taken, and that no reversible error was committed by the court.

The judgment is affirmed.

SHIPP *v.* TANNER.

5-1701 318 S. W. 2d 821

Opinion delivered December 22, 1958.

Shaver, Tackett & Jones, for appellant.

Thomas S. Arnold & Arnold & Arnold, for appellee.

J. Seaborn Holt, Associate Justice. Proceeding under our Workmen's Compensation Law, (Secs. 81-1301—1349 Ark. Stats. 1947) appellant, Shipp, sought an award of compensation for an alleged injury while in the employ of H. G. Tanner, now deceased, and while in the course of such employment. On a hearing before a referee of the commission, his claim was disallowed. It was again denied on appeal to the full commission and this action of the full commission was affirmed on appeal to the circuit court. This appeal followed.

For reversal appellant contends that: "1. The trial court erred in refusing to rule that appellant received an accidental injury in the course of his employment. 2. The trial court erred in ruling that appellant failed to give sufficient notice of his injury."

Since we have concluded, after a careful review of all the testimony, that the commission, and the circuit court on appeal, correctly found that there was no substantial evidence that Shipp (the claimant) had received any accidental injury arising out of, and in the course of his employment, it becomes unnecessary to consider appellant's second contention above. "Since the enactment of our Workmen's Compensation Law, we have consistently held that we do not try compensation cases here *de novo,* we are, therefore, not concerned with where the weight of the evidence may lie. When we find any substantial evidence to support the findings of the commission, we must affirm. We said in the recent case of *Grimsley, Adm'x.* v. *Manufacturers Furn. Co.,* 224 Ark. 769, 276 S. W. 2d 64: 'Findings of fact by the Workmen's Compensation Commission are given the same verity as attach to the verdict of a jury and this applies on appeal to the circuit court as well as to the supreme court from the judgment of the circuit court . . . On appeal, the supreme court must view testimony in its strongest light in favor of the commission's findings . . . Where the commission acting upon

sufficient evidence sustains or rejects an award, such findings will not be disturbed on appeal,' " *McKamie* v. *Kern Trimble Drilling Co.*, 229 Ark. 86, 313 S. W. 2d 378. ". . . there is no *prima facie* presumption that the claim comes within the provisions of the law" (Workmen's Compensation Act), *Duke* v. *Pekin Wood Products Co.*, 223 Ark. 182, 264 S. W. 2d 834.

Shipp claims that he experienced a pain in his chest, a heart attack, on February 3, 1956, while he was delivering gasoline to Easley Service Station, the pain became worse, and he went to the office of Dr. Kittrell, who sent him to Dr. Baskett for an electrocardiogram. He was sent home for rest. He states his contention in this language: "It is our contention that Mr. Shipp was suffering from a heart or other condition more than a year prior to February 3, 1956, and that because of the undue strain and hardship due to his fellow employees being off from work placing the burden on him which he hadn't been used to carrying, because of his nervous condition, his mental condition and physical exertion, that it brought about this eventual heart attack on February 3, 1956, it being our contention that he was suffering from an ailment prior to that time, and that heavy work contributed to the eventual heart attack."

We think the testimony clearly supports the following findings of the commission: "The facts in this case disclose that claimant had previously suffered at least one incident which led him to suspect that he suffered a coronary involvement. We find the evidence supports the conclusion that claimant's breakdown stems from natural progression of disease as opposed to the result of strain or debilitating working conditions. The facts also disclose that claimant suffered at least one coronary episode subsequent to date of alleged injury, and this while he was at rest. The most that can be said relative to events of February 3, 1956, the date claimant alleges the suffering of accidental injury, is that claimant was beset by chest pains and as a result thereof quit work that morning and sought medical ad-

vice. The history on onset of these pains, even in the light of subsequent coronary developments, was not such as to cause testifying physicians to associate claimant's work with his disability on other than a speculative possibility. We do not deem such to be evidence of a character which will sustain a finding that a casual relation actually exists between claimant's breakdown and his work."

Dr. Goesl, a practicing physician who specialized in diseases of the heart (appellee's witness) testified: "I have heard the testimony with respect to the particular situation of Mr. Shipp. I believe that his employment had nothing to do with the development of the infarct, and I believe his condition would have developed in spite of the particular employment." Two other doctors testified (witnesses for claimant Shipp) and both were not in material disagreement with Dr. Goesl. For example, Dr. Baskett testified:

"Q. Can you say with medical certainty what caused Mr. Shipp's condition? A. No." Dr. Kittrell, who treated Shipp, also testified to the same effect, and further that most attacks of this nature occurred after a big meal or what would be called rest, which would indicate that probably exertion played no part in the development of these conditions. He also testified: "Q. In your opinion, would that heavy exertion contribute to the condition which he was suffering and aggravate it? A. I wish I could answer it but I don't think I could answer it honestly. I don't think anybody would know."

It appears that Shipp did suffer some heart damage about March 9, 1956 and again in July 1956, however, he was not working for Tanner at either time and was in fact resting on both occasions. Prior to his July attack he had begun working for another employer. As indicated, we hold there was substantial evidence to support the judgment and accordingly it is affirmed.

Mr. Justice McFaddin concurs.

BATES *v.* CITY OF LITTLE ROCK.

4912 319 S. W. 2d 37

WILLIAMS *v.* CITY OF NORTH LITTLE ROCK.

4913

Opinion delivered December 22, 1958.

[Rehearing denied January 19, 1959]

George Howard, Jr. of Pine Bluff, Ark. and *Robert L. Carter,* New York, N. Y., for appellant.

Gardner A. A. Deane, Jr. & Joseph C. Kemp, for appellee.

George Howard, Jr. of Pine Bluff, Ark. and *Robert L. Carter,* New York, N. Y., for appellant.

Reed Thompson, for appellee.

Ed. F. McFaddin, Associate Justice. The issue on these appeals is the constitutionality of the so-called "Bennett Ordinance", which was enacted by the City of Little Rock, and also by the City of North Little Rock. Appellant Bates was fined $25.00 for violation of the Little Rock ordinance; and appellant Williams was fined $25.00 for violation of the North Little Rock ordinance. There were separate appeals; but the cases are disposed of in this single opinion since constitutionality is the point at issue in each case, and the claims and defenses of each appellant are the same.

On October 14, 1957, the City of Little Rock[1] adopted its Ordinance No. 10638 (here under attack), reading in its entirety as follows:

"An Ordinance Requiring Certain Organizations Functioning or Operating Within the City of Little Rock, Arkansas to List Certain Information with the City Clerk: And For Other Purposes.

"Whereas, it has been found and determined that certain organizations within the City of Little Rock, Arkansas, have been claiming immunity from the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal, or non-profit, and

"Whereas, many such organizations claiming the occupation license exemption are mere subterfuges for

[1] About the same time the City of North Little Rock adopted its Ordinance No. 2683; and the Little Rock ordinance and the North Little Rock ordinance are in all substantial respects entirely similar.

businesses being operated for profit which are subject to the occupation license ordinance;

"Now, Therefore, Be It Ordained by the City Council of the City of Little Rock, Arkansas:

"Section 1. The word 'organization' as used herein means any group of individuals, whether incorporated or unincorporated.

"Section 2. Any organization operating or functioning within the City of Little Rock, including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the Mayor, Alderman, Member of the Board of Directors, City Clerk, City Collector, or City Attorney, shall list with the City Clerk the following information within 15 days after such request is submitted:

A. The official name of the organization.

B. The office, place of business, headquarters or usual meeting place of such organization.

C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

D. The purpose or purposes of such organization.

E. A financial statement of such organization, including dues, fees, assessments and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

"Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City with ref-

erence to occupation licenses and the collection thereof.

"Section 4. All information obtained pursuant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

"Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or sub-sections hereof are declared to be severable.

"Section 6. Any person or organization who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50.00 nor more than $250.00, and each day of violation shall constitute a separate offense. The City Council in the enforcement of this ordinance shall have the power to seek injunctive relief.

"Section 7. It has been found and determined by the City Council that certain organizations operating within the City of Little Rock have failed to comply with the terms of Ordinance No. 7444, as amended, governing the payment of occupation licenses, and as a result thereof, needed revenue is being lost, and the enactment of this ordinance will provide for more efficient administration of such ordinance. Therefore, an emergency is declared to exist, and this ordinance being necessary for the preservation of the public peace, health, and safety, shall take effect and be in force from and after its passage and approval."

Daisy Bates, a resident of Little Rock, is the State President of the National Association for the Advancement of Colored People (hereinafter referred to by the letters "NAACP"); and Birdie Williams, a resident of North Little Rock, is President of the North Little Rock Branch of the NAACP. Daisy Bates was notified to

comply with the Little Rock ordinance, and Birdie Williams was notified to comply with the North Little Rock ordinance. Each furnished all the information required by the ordinance except that part of Section E, which requires that there be furnished: "A financial statement of such organization, including dues, fees, assessments, and/or contributions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization". In refusing to furnish the information required by Section E, Daisy Bates (by her attorney) advised the City of Little Rock:

"E. The financial statement is as follows:

January 1, 1957 to December 1, 1957	
Total receipts from memberships and contributors	$1,791.55
Total expenditures	1,491.46
Balance on Hand	$ 300.09

"F. I am attaching my affidavit as president indicating that we are a Branch of the National Association for the Advancement of Colored People, a New York Corporation.

"We cannot give you any information with respect to the names and addresses of our members and contributors or any information which may lead to the ascertainment of such information. We base this refusal on the anti-NAACP climate in this State. It is our good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm. Moreover, even aside from that possibility, we have been advised by our counsel, and we do so believe that the City has no right under the Constitution and laws of the United States, and under the Constitution and laws of the State of Arkansas to demand the names and addresses of our members and contributors.

We assert on behalf of the organization and its members the right to contribute to the NAACP and to seek under its aegis to accomplish the aims and purposes herein described free from any restraints or interference from City or State officials. In addition we assert the right of our members and contributors to participate in the activities of NAACP anonymously, a right which has been recognized as the basic right of every American citizen since the founding of this country.

"I am enclosing herein a copy of the Constitution of the National Association for the Advancement of Colored People, and the Constitution and By-Laws for Branches of the National Association for the Advancement of Colored People."

A similar refusal for similar reasons was made by Birdie Williams, concerning the North Little Rock request. For refusal to furnish the requested information each appellant was fined $25.00 by the Circuit Court; and each in prosecuting her appeal to this Court raises this Federal issue: the ordinance involved—insofar as it requires the names and addresses of the members of and contributors to, the local branch of the NAACP, is an invasion of the rights guaranteed by the amendments to the Constitution of the United States.[2] All the other points urged blend into the one just stated.

[2] To support the contentions for immunity from furnishing the requested information appellants stated in the lower Court and reiterate here: ". . . that Ordinance 10,638 is an unjustified interference with defendant's rights of freedom of speech and assembly as secured and protected by the Constitution of the State of Arkansas and by the Constitution of the United States of America—namely, the First Amendment as assimilated in the Fourteenth Amendment of the Federal Constitution. It is the contention of the defendant that the City has not shown that there is a compelling reason or a justifiable cause for demanding the contributors' list to the defendant in this case. The defendant would like to cite two United States Supreme Court cases wherein the Supreme Court held that the request of membership lists and contributors' lists was a direct violation of this fundamental constitutional right—namely, freedom of speech. The case is *Wieman vs. Updegraff*, 344 U. S. 183, and there the court said that the right to assemble freely, to join an organization and to participate in its activities is one of the protected rights guaranteed under the Constitution. In *Watkins vs. U. S.*, the Chief Justice of the United States wrote: 'There is no general authority to expose the private rights of an individual without justification'. In

The appellants have cited and discussed, *inter alia*: *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571; *Sweezy* v. *New Hampshire,* 354 U. S. 234, 1 L. Ed. 2d 1311, 77 S. Ct. 1203; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444, *Bridges* v. *Calif.,* 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190; *Pennekamp* v. *Florida,* 328 U. S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029, *National Broadcasting Co.* v. *U. S.,* 319 U. S. 190, 87 L. Ed. 1344, 63 S. Ct. 997, *Burstyn* v. *Wilson,* 343 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *DeJonge* v. *Oregon,* 299 U. S. 353, 81 L. Ed. 278, 57 S. Ct. 255; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624; *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736; *NAACP* v. *Patty,* 159 F. Supp. 503 (E. D. Va. 1958); and *American Communications Assn.* v. *Douds,* 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674. Also in the oral argument before this Court appellants laid great stress on the case of *NAACP* v. *Alabama,* 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163, which was decided after the filing of appellant's brief in this Court. It was claimed that *NAACP* v. *Alabama* was conclusive against the validity of the ordinances here challenged.

It would unduly extend this opinion to review each of the above cases or those cited by appellees. For purposes of this opinion we by-pass the point urged by the Cities — that anonymity is a personal defense and can be claimed only by the organization itself and not by one for it — and we proceed to state our conclusions on the claims that the appellants have made:

I. The primary purpose of each of the ordinances here involved is to obtain revenue for the Cities, and

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Sweeney vs. New Hampshire, the Court said: 'We do not now conceive of any circumstance wherein a State interest would justify an infringement upon these fields—freedom of speech and freedom of assembly'. It is our contention that the City of Little Rock has not shown that there is a compelling reason or a justifiable cause for requiring the defendant to produce the names of its members and the names of its contributors."

the obtaining of the membership list and the listing of contributors is merely to aid in determining the matter of tax status. The NAACP is not being required to furnish any information other than that which is required of all other organizations seeking immunity from the payment of an occupation tax. The record here shows that the information required by the ordinances involved was required of all organizations claiming tax exemption; and the information was furnished by all of the requested organizations except the NAACP.

In Arkansas, municipalities are creatures of the State and have the powers which the State gives them. (*Eagle* v. *Beard,* 33 Ark. 497; *City of Hot Springs* v. *Gray,* 215 Ark. 243, 219 S. W. 2d 930.) By Act No. 294 of 1937 (now found in § 19-4601 *et seq.* Ark. Stats.) the Arkansas Legislature authorized municipalities to enact ordinances levying an occupation tax. This was a revenue measure. In *Talley* v. *Blytheville,* 204 Ark. 745, 164 S. W. 2d 900, we held that this act of 1937 was authority for cities to enact occupation tax ordinances as revenue producing measures. Our subsequent cases have followed that holding. In 1947 the City of Little Rock passed its ordinance No. 7444, captioned, "An Ordinance Establishing an Annual Privilege License Tax for Various Businesses, Occupations, and Professions within the City of Little Rock Providing for the Amount Thereof . . . " This ordinance has been amended numerous times by changing the amount to be charged various businesses and professions and adding other businesses and professions as subjects of taxation.

On November 22, 1948 the City of Little Rock passed its Ordinance No. 7809, entitled, "An Ordinance Relieving Charitable Institutions from the payment of Privilege Taxes to the City of Little Rock, Amending Ordinance No. 7444, and For Other Purposes".[3] Thus, by the

[3] The entire text of this Ordinance is as follows:
"WHEREAS, There are certain charitable institutions in the City of Little Rock which engage in the business of manufacturing, and selling, or other lines of endeavor in order to raise funds for charitable purposes

Ordinance No. 7809, certain charitable or non-profit organizations became exempt from the privilege tax, even though such organization engaged in some kind of business. Such was the status of the law when, on October 14, 1957, the City of Little Rock enacted its ordinance No. 10638 first copied herein. The City had reason to believe that some of the organizations, who were claiming immunity under Ordinance No. 7809, were not really charitable or non-profit organizations. The City wanted to ascertain what was being done by these organizations claiming exemptions; and so the City passed its ordinance requiring such organization claiming immunity from occupation tax to furnish the City certain information.[4]

The NAACP is not being required to furnish any information other than is furnished by all other organizations claiming immunity from taxation. Furnishing of membership lists of non-profit organizations in Arkansas, as a basis of being determined a non-profit organi-

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such as the assistance of the needy, and the care and education of the crippled and the blind, and

"WHEREAS, These institutions are performing in an unselfish manner a service to the community and are rendering untold aid and comfort to persons who are physically handicapped, and

"WHEREAS, It is believed to be in the best interest of the City and the people of the City of Little Rock to foster and promote such activity on the part of these institutions,

"NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLE ROCK, ARKANSAS:

"SECTION 1. Each charitable, eleemosynary, non-profit organization whose purpose is to assist the needy and bring care, training and comfort to the physically handicapped, is hereby exempt from the payment of a privilege tax for the privilege of carrying on such business or occupation within the City of Little Rock.

"SECTION 2. Ordinance No. 7444 is hereby amended to conform to the provisions of this ordinance.

"SECTION 3. All ordinances and parts of ordinances in conflict herewith are hereby repealed."

[4] Section 7 of Art. 5 of the Constitution and By-Laws for Branches of the NAACP says that the local branches shall remit, ". . . the net proceeds of each entertainment or fund raising effort by a Branch shall be divided equally between the Branch and the National Office . . ." When we consider that shows and amusement places and other forms of entertainment are taxable under the occupation tax ordinance, certainly the City would have some right to ascertain who was belonging to the NAACP and who was making contributions to it, because it was claiming an immunity and yet sending part of its money for some other use outside of the State.

zation, has been the rule in Arkansas since 1875. Act No. 51 of 1875 (as now found in § 64-1301 Ark. Stats.) provides for the incorporation of a non-profit organization, and Section 2 of that Act (as now found in § 64-1302 Ark. Stats.) says:

"Any association of persons desirous of becoming incorporated, under the provisions of this act, shall file with the Clerk of the Circuit Court and Recorder for the proper county a copy of their constitution or articles of association, *and a list of all the members,* together with a petition to said court for a certificate of incorporation under the provisions of this act (Emphasis supplied.) So it is nothing new to require a non-profit organization to furnish a list of all of the members.[5] The same rule that applies to such organizations seeking corporate status is sought here to be applied to such organizations that seek privilege tax exemptions. The record shows that the rule is being uniformly applied to all organizations.

Requiring the furnishing of information to the taxing power is not an unconstitutional invasion of the freedoms guaranteed. A taxpayer is required to file an income tax return giving the names of the sources of revenue (as, for instance, the name of the corporation and the amount of the dividend received from it); yet all this has been held to be within the power of the Sovereign. See *Hubbard* v. *Mellon,* 5 Fed. 2d 764. Furthermore, the United States Supreme Court, in *U. S.* v. *Harriss,* 347 U. S. 612, 98 L. Ed. 989, 74 S. Ct. 808, upheld a law which required the furnishing of the *names of contributors* and *amounts* paid by each to any person engaged in seeking to obtain legislation. So the rationale of the holdings seems to be: when the required information is a mere incident to a permissible legal result, then the information should be furnished. That is the situation in the case at bar; and we find nothing in *Speiser* v. *Randall,* 357 U. S. 513, 2 L. Ed. 2d 1460, 78 S. Ct.

[5] In 8 Ark. Law Review 110 there is an interesting case note entitled: "Illegal activities by non-profit corporations".

1332, or in *First Unitarian Church of Los Angeles* v. *Los Angeles County,* 357 U. S. 545, 2 L. Ed. 2d 1484, 78 S. Ct. 1350, which affects the conclusion here reached

II. The claim, that it may hurt the prospects of the NAACP to furnish to the City its membership list and the names of the contributors, does not make the ordinance unconstitutional. The Constitutional Amendments do not guarantee anonymity at all events. If NAACP wants tax immunity, it should comply with the ordinance. It cannot have immunity from taxation without complying with the ordinance. This is but an application of the old statement that one cannot both eat his cake and keep it. The case of *NAACP* v. *Alabama,* 357 U. S. 449, 2 L. Ed. 2d 1488, affords the appellant no protection in this case. In the Alabama case the prime purpose of the procedure instituted by the Attorney General of Alabama was to obtain information whereby Alabama could force the NAACP out of the State. So the Supreme Court of the United States held that NAACP was not required to disclose against itself. In the case at bar, the purpose of the ordinance is to determine the tax status of one seeking to claim immunity from occupation tax. The ultimate aim in *NAACP* v. *Alabama* was to stop the activities of NAACP; but in the case at bar, the disclosure of NAACP's list of members and contributors is a mere incident to see if legal taxation is being evaded. The ordinance here under attack does not single out NAACP and require information of it only: rather, the ordinance requires information of all organizations seeking exemption from privilege tax. Other organizations have complied: why should this one have immunity as though it were a favored child?

The United States Supreme Court has quite recently recognized that a law applicable to all persons is valid, even when attacked by those who disliked the law involved. In the case of *Shuttlesworth* v. *Birmingham Board of Education,* 162 Fed. Supp. 372, four Negro children sought to test the constitutionality of the Alabama

School Placement Law and to enjoin the City Board of Education from enforcing the law. The three-Judge Court, in an opinion by Circuit Judge Rives, held that the Alabama School Placement Law furnished legal machinery for an orderly administration of the public schools by admission of qualified pupils upon a basis of individual merit, without regard to their race or color, and that the law was not unconstitutional on its face. The case was appealed to the Supreme Court of the United States and that tribunal affirmed the three-Judge Court in a per curiam order of November 24, 1958, saying: "The motion to affirm is granted and the judgment is affirmed upon the limited grounds on which the District Court rested its decision". When we study the decision of the District Court, we see that the Alabama School Placement Law was upheld because there was no showing that it was not being uniformly administered. The same thing is true in each of the ordinances here under attack: there is nothing in the record before us to show that these ordinances were enacted for any purpose other than those stated in the ordinances; and there is no showing that the ordinances are being enforced other than uniformly.

We find no error, and the judgment in each case is affirmed.

HOLT and GEORGE ROSE SMITH, JJ., dissent.

POTTS *v.* HAY.

5-1551 318 S. W. 2d 826

Opinion delivered December 22, 1958.

[redacted]

Joseph C. Kemp & Gardner A. A. Deane, Jr., for appellant.

McMath, Leatherman & Woods, for appellee.

George Rose Smith, J. This is a representative suit brought by the three appellees, as officers of the Little Rock policemen's union, to enjoin the city officials from enforcing Act 30 of 1957, it being asserted that the act is contrary to Amendment 34 to the Arkansas Constitution. William W. Leigh, as a citizen and taxpayer, filed an intervention and offered proof in defense of the statute. The chancellor held the act to be unconstitutional and issued a permanent injunction against its enforcement.

The evidence need not be recited in detail. The city and the intervenor adduced proof to show that the declared policies of the labor union contemplate that its members will support authorized strikes, refuse to cross picket lines, and in other respects adhere to a course of action contrary to the attitude of impartiality that the city expects on the part of its policemen. There was also testimony that 35 of the 162 members of the police force belong to the union and that the department as a whole suffered a loss of public esteem as a result of the union's having made a $500 contribution in support of a busmen's strike against their employer.

Amendment 34 reads in part: "No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union, nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union." Section 1 of Act

30 declares that union membership by police officers is inconsistent with the discipline which their employment requires. Section 2 of the act provides that no person who is a member of a policemen's union shall be eligible to serve on any municipal police force and that union members currently serving shall be dismissed unless they sever their relationship with the union within thirty days.

If the constitutional amendment applies to public employees it cannot be doubted that the act is unconstitutional. The amendment requires that no person be denied employment because of membership in a labor union. The act requires that persons be denied employment as policemen because of membership in a labor union. The conflict is irreconcilable; the act must fall unless it can be said that public employment is not within the purview of the amendment.

In insisting that an implied exception should be read into the amendment the appellants rely upon a rule of statutory construction, that in certain kinds of statutes general words do not include the state or its subdivisions unless that intention is stated expressly or by necessary implication. *Cole* v. *White County,* 32 Ark. 45; *Linwood & Auburn Levee Dist.* v. *State,* 121 Ark. 489, 181 S. W. 892. Although the rule is followed primarily in the interpretation of statutes, we recognized its applicability to a constitutional question in *State* v. *Williford,* 36 Ark. 155, 38 Am. Rep. 34. There the two appellees asserted the constitutional exemption of personal property to defeat a writ of execution upon a judgment in favor of the state. We concluded that no harm could come to the state if the debtors were permitted to claim their exemptions and accordingly held that the exemption clause in the constitution included the state by implication.

We perceive no compelling reason to believe that the people intended to exclude public employment from the positive, unequivocal command of Amendment 34: "No person shall be denied employment because of mem-

bership in . . . a labor union." The suggestion made by the appellants, that the public interest will suffer if policemen are allowed to exert "union pressure" upon the city, fails to take into account the relatively slight extent to which Amendment 34 restricts the power of the legislature.

The pertinent clause of the amendment deals only with the denial of employment on the basis of union membership. Nothing is said one way or the other on the subject of union pressure. Left untouched, for example, is the matter of striking against the government. As the Connecticut court pointed out, after a thorough review of the cases, every judicial decision on the subject holds that there is no right to strike against the government. *Norwalk Teachers' Assn.* v. *Board of Education,* 138 Conn. 269, 83 Atl. 2d 482, 31 A. L. R. 2d 1133. Yet in the same case the court was able to say, with complete consistency: "In the absence of prohibitory statute or regulation, no good reason appears why public employees should not organize as a labor union." In like manner a Texas statute has been upheld which provides, on the one hand, that no person shall be denied public employment by reason of membership in a labor union, and, on the other, that collective bargaining contracts with public employees are void and that any public employee who participates in a strike forfeits his employment. *Beverly* v. *City of Dallas, Tex.,* Civ. App., 292 S. W. 2d 172.

We are not convinced that the bare fact of union membership on the part of police officers presents such a threat to the public welfare that an implied exception must be written into the unqualified language of Amendment 34. Quite the contrary, when the full implications of the appellants' argument are carefully examined, it seems clear that the suggested exception was *not* intended. One result of the amendment, perhaps the principal one, was to outlaw the closed shop. *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45. If the state and its subdivisions were meant to be exempted from the mandate of the amendment, there would be nothing in the con-

stitution to prevent the legislature from permitting policemen to maintain a closed shop, even though that type of organization is forbidden in private employment. Inconsistencies such as this can be avoided only by giving the amendment the effect that its plain words demand.

Affirmed.

McFaddin, J., concurs.

Ed F. McFaddin, Associate Justice (concurring). Less than 60 days ago, I was designated to write the majority oninion in this case. I prepared such an opinion; but the majority did not approve my draft. So I now use as a concurring opinion the draft that I prepared. It uses the plural as "we hold" instead of the singular as "I submit", but it must be understood that it was prepared for a majority opinion. Here it is:

We have, here, a case in which a Labor Union is relying on the Right-to-Work Constitutional Amendment. The question presented is whether Act No. 30 of the 1957 Arkansas Legislature is void as being in violation of Arkansas Constitutional Amendment No. 34. The Act No. 30 of 1957 (hereinafter called "the Act") is captioned:[1] "AN ACT to Prohibit Persons Employed on

[1] The full text of the Act is: "Section 1. PURPOSE. The purpose of this Act is to protect the public peace and welfare by encouraging the undivided loyalty of municipal police officers to the public service which it is their duty to serve, by prohibiting such police officers from holding membership in or becoming affiliated with any policemen's labor union which might, on any occasion for any purpose, attempt to control or influence the relations of municipal police officers toward the municipality which they have undertaken to serve. It is hereby found and determined by the General Assembly that such membership or association by police officers is inconsistent with the discipline which such employment requires, and therefore is subversive to the police service and detrimental to the general peace and welfare.

"SECTION 2. Hereafter, no person who is a member of or affiliated with any policemen's union shall be eligible to serve on the police force of any municipality of this State. Any person who is serving on the police force of any municipality of this State and who is a member of or affiliated with any policemen's labor union shall be dismissed unless such person shall, within thirty (30) days after the passage of this Act, sever all relationship with such policemen's labor union.

"SECTION 3. Any person who is responsible for the payment of salaries or other compensation to municipal police officers in this State

Municipal Police Forces of the Various Municipalities of this State from Holding Membership in or Being Affiliated with any Policemen's Union; to State the Policy of this State in Regard to the Membership or Affiliation of Municipal Law Enforcement Officers in Policemen's Unions; and for Other Purposes." Section 1 of Amendment No. 34 (hereinafter called the "Constitutional Amendment") reads in part:

> "No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union * * *"

The appellees (plaintiffs below) are individuals and members of Local Union No. 1377 of County and Municipal Employees and are members of the Little Rock Police Department. They brought this action for and on behalf of themselves and as a class suit for the benefit of the other members of the local Union who are employees of the City of Little Rock Police Department. The appellants (defendants below) are the Chief of Police of Little Rock, the City Officials, and Members of the Civil Service Commission of Little Rock. The appellees sued to enjoin appellants from enforcing the Act No. 30, claiming that the appellants will dismiss appellees from employment as policemen of Little Rock because of Union membership. The prayer was that the Act No. 30 be declared void—as being in conflict with the Constitutional Amendment—and that appellants be enjoined from discharging appellees because of Union membership.

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and who shall make payment to a person who under the terms of this Act is not eligible to serve on the municipal police force, shall be guilty of misfeasance in office and shall be punishable by a fine not to exceed $1,000.00 and shall be removed from his office or position in the municipal government.

"SECTION 4. All laws and parts of laws in conflict with this Act are hereby repealed."

W. W. Leigh intervened for himself and as a representative of taxpayers and employers. Evidence was heard. It was shown that the Policemen's Union was affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), some of whose aims and objectives are: (1) to refuse to cross or interfere with a picket line established by an affiliated union; (2) to assist in promoting the effectiveness of any strike called by an affiliated union; and (3) in cases of strikes, to aggressively resist resumption of work or production by an employer through the use of non-union labor. It was furthermore testified that in a recent strike in Little Rock involving the transportation system and in which strike there was some violence, the Policemen's Union had contributed to the fund of the strikers; and that many people in Little Rock were of the opinion that the Policemen's Union did not maintain neutrality in the said strike. It was also shown that the official manual for the Little Rock policemen required of each member, *inter alia:*

> "In accepting the position of a police officer, you become an executive officer of the criminal laws of the State and the ordinances of the City, and a conservator of the public peace; your acts are at all times subject to the observation and criticism of the public; and on the standpoint where you commence and the course which you pursue depends not only the welfare of the community, but the credit of the department, as well as your own success as an officer and a man. You must never forget that your character is your capital. Deal honorably with all persons, and hold your words sacred, no matter when, where, or to whom given."

It was shown that unless the injunction issued, the City would have no alternative except to dismiss any policeman who belonged to the Union. The Chancery Court held that the Act No. 30 violated the Constitutional Amendment, and enjoined the enforcement of the Act. This appeal ensued. Splendid briefs have been filed by

the parties and the intervener, and a wealth of cases have been cited. For the appellants and the intervener it is most earnestly claimed that the State as a Sovereign is not within the inhibition of Amendment No. 34, and that the municipality is a subsidiary of the State and therefore entitled to the same immunity. On this and other points appellants and intervener cite, *inter alia: Thornbrough, Comm.* v. *Williams, Chancellor,* 225 Ark. 709, 284 S. W. 2d 641; *Baratti* v. *Koser Gin Co.,* 206 Ark. 613, 177 S. W. 2d 750; *Railway Mail Assn.* v. *Murphy,* 180 Misc. 868, 44 NYS 2d 601, 607; *United Federal Workers of America (CIO)* v. *Mitchell, District of Columbia,* 56 Fed. Supp. 621; *Christal* v. *Police Comm. of City and County of San Francisco,* 33 Cal. App. 2d 564, 92 Pac. 2d 416; *Perez* v. *Board of Police Comm. of L.A.,* 78 Cal. App. 2d 638, 178 P. 2d 537; Annotation in 31 ALR 2d 1145, 1154; *McNatt* v. *Lawther,* (Tex. Civ. App.) 223 S. W. 503; *San Antonio Fire Fighters Local Union No. 84* v. *Bell,* (Tex. Civ. App.) 223 S. W. 506; *CIO* v. *City of Dallas,* (Tex. Civ. App.) 198 S. W. 2d 143; *U. S.* v. *United Mine Workers,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677; *Cole* v. *White County,* 32 Ark. 45; *Lunsford* v. *City of Bryan (Tex.),* 297 S. W. 2d 115; and *King* v. *Priest* (1947), 357 Mo. 68, 206 S. W. 2d 547 (appeal dismissed 333 U. S. 852).

To attempt to review and distinguish all of the cases in the briefs would be a work of supererogation. We merely state our conclusions. In *State ex rel. Attorney General* v. *Irby,* 190 Ark. 786, 81 S. W. 2d 419, in considering constitutional language, Chief Justice Johnson, speaking for the Court, said:

> "As a preliminary to a consideration of these questions, it may be said that we are irrevocably committed to the rule that the Constitution of this State should be construed as a frame of laws and not as an ordinary statute *(Pulaski County* v. *Irvin,* 4 Ark. 473; *State* v. *Scott,* 9 Ark. 270), and that where the language employed in the Constitution is plain and unambiguous the courts cannot and should not seek other aids of interpretation *(Clayton* v. *Berry),*

27 Ark. 227; *State* v. *Ashley,* 1 Ark. 513; *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586); and that every word used should be expounded in its plain, obvious and common acceptation *(State* v. *Martin,* 60 Ark. 343, 30 S. W. 421; *Ex parte Reynolds,* 52 Ark. 330, 12 S. W. 570) * * *"

The foregoing language points to the result in the case at bar. The Constitutional Amendment says: "No person shall be denied employment because of membership in or affiliation with . . . a labor union . . ." Each of the appellees in this case is a *person;* and each of the appellees is about to be denied *employment* because of *affiliation with a labor union.* The words of the Constitutional Amendment are too clear to require the application of any rules of statutory construction such as the one urged here by the intervener, to-wit: that the Sovereign is not restricted by general statutes.[2] It is not a question of restricting the Sovereign by general statute: it is a question of the people having restricted the Sovereign by the clearest possible words in the Constitutional Amendment. When we view the language in the fundamental document (Constitutional Amendment No. 34) by which the people have given the State Government its powers, we see the broad and clear expressions used. It would be a most dangerous doctrine to say that the State (Sovereign) was not bound by the limitations imposed by the People and that, as here, the individual citizen is not entitled, as against the State, to the rights which the Constitution gives him. To hold that the State is not bound by Amendment No. 34 would lead inevitably to the next step—that the State was not bound by Art. 2, Sec. 22 of the Bill of Rights, which says

[2] The rule is stated in 82 C.J.S. 554 "Statutes", Sec. 317, in this general language: "Neither the government, whether federal or state, nor its agencies, are considered to be within the purview of a statute unless an intention to include them is clearly manifested; * * *" As pointed out in our present opinion, this is a rule of *statutory* construction. There are cases which hold that the general rules of statutory construction apply with equal force in matters of constitutional construction (*Shepherd* v. *Little Rock,* 183 Ark. 244, 35 S. W. 2d 361); but none of these rules of construction ever comes into use except when the words of the document are not clear. No rule of construction should ever be used to defeat the clearly expressed language of the document.

that private property shall not be taken, appropriated, or damaged for public use without just compensation. When the State rises above the people and seeks immunity against rights guaranteed the people, then our motto—"The People Rule"—will have come to an end, and the super-state will have arrived. The right to work in gainful employment is as necessary for human existence as the right to own property—else why did the great Declaration say, "life, liberty, and the pursuit of happiness"? So we hold that the State—its subdivision, the municipality in the case at bar—is bound by the language of the Constitutional Amendment No. 34 just as any other employer; and this holding on Amendment No. 34 distinguishes the case at bar from cases cited by the appellants and intervener, such as *McNatt* v. *Lawther* (Tex. Civ. App.), 223 S. W. 503, and *Perez* v. *Board of Police Com'rs,* 78 Cal. App. 2d 638, 178 Pac. 2d 537.

It has been said that such an application of Amendment No. 34 as here made renders it impossible for the State to exercise its police power for the general welfare. We, therefore, think it proper to point out that, even though under Amendment No. 34 the municipality cannot refuse to employ a policeman merely because he belongs to a Union, still the State has the right to enact a statute that would require every policeman, as a condition prerequisite to employment, to agree to forego the right to strike or to support a strike.[3] Law enforcement must go on in times of strikes; and to require public employees engaged in law enforcement to agree to forego the right to strike or support a strike as a prerequisite to employment is a matter which Amendment No. 34 does not prohibit.

[3] The Railway Labor Act (U.S.C.A. Title 45 Sec. 151 *et seq.*) has a provision which allows injunction against strikes, and that provision has been upheld: certainly police protection is as important as is transportation. Also, the Hatch Act (U.S.C.A. Title 5 Sec. 118-i) prohibits federal employees from political activities and it has been held valid: certainly abstaining from strikes by those employed in law enforcement is no more a burden than is abstention from political activities. (See also U.S.C.A. Title 5 Sec. 118-j for statute preventing strikes by government employees).

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC. v. STATE OF ARK.

5-1593 319 S. W. 2d 33

Opinion delivered December 22, 1958.

[Rehearing denied January 19, 1959]

George Howard, Jr. of Pine Bluff, Ark. and *Robert L. Carter,* New York, N. Y., for appellant.

Bruce Bennett, Atty. General & Roy Finch, Jr., Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. This is an action by the State, on the relation of the Attorney General, to collect corporate franchise taxes, in the amount of $50 a year, for the past seven years. The merits of the case were not reached in the court below, as the appellant refused to comply with an interlocutory order requiring the production of certain records and permitted judgment to be entered by default as a means of obtaining a review of the production order.

Four days after the complaint was filed the plaintiff attempted to secure information about the appel-

lant's activities in Arkansas by propounding interrogatories to the president of the Arkansas State Conference of NAACP Branches. The president refused to disclose a substantial part of the information requested, on the ground that it was privileged under the constitutional guaranties of free speech and assembly. The plaintiff then asked for an order directing the defendant to produce for inspection (1) records listing the names and addresses of the officers, agents, servants, employees, and representatives in Arkansas of the defendant and of its Arkansas Conference, (2) records listing similar information with respect to the defendant's local branches in Arkansas, (3) records, files, papers, correspondence, deposit slips, canceled checks, reports, and publications of the defendant and its Arkansas Conference, and (4) records listing the persons in Arkansas donating to the defendant and its Arkansas Conference during the past seven years, and the amount received from each.

This motion was resisted on the same ground of privilege. The defendant offered proof to show that if the identity of its officers and members were disclosed they might be subjected to harassment in the form of violence, bombing, the burning of crosses, anonymous telephone calls, and threatening letters. The court found that the requested information was not privileged and granted the plaintiff's motion for production, except that item (4) was modified to require only a statement of the total donations and contributions from Arkansas for the past seven years. As we have indicated, the defendant refused to comply with the order and permitted the entry of a default judgment. The court found that the refusal was not willful and denied the plaintiff's motion that the defendant be punished for contempt.

We need consider only the two points argued by the appellant in its brief, for it abandons other errors by failing to argue them. *Connell* v. *Robinson,* 217 Ark. 1, 228 S. W. 2d 475. It is first contended that the appellant's membership lists are privileged under the guar-

anties of freedom of speech and of assembly. *NAACP* v. *Alabama,* 357 U. S. 449. 2 L. Ed. 2d 1488, 78 S. Ct. 1163. In this particular case this contention is sufficiently answered by the fact that we do not construe the court's order as requiring the production of these lists. That information would doubtless have been available to the plaintiff had the court granted item (4) in the motion for production, for the names of persons donating or contributing to the appellant would have included the names of persons paying dues. But the court refused to order the disclosure of this information, which of course means that it was also excluded from the general language in the rest of the order. The State did not cross appeal from the court's refusal to order that the membership lists be produced.

Secondly, it is said that the plaintiff should have been required to show good cause for the production of the records. Ark. Stats. 1947, § 28-356. The record reflects, however, that the parties stipulated and orally agreed that the only issue on appeal would be whether the records are privileged. On the basis of this agreement the chancellor refused to impound the records pending appeal. Hence the appellant is not in a position to question the order on the ground now asserted.

Affirmed.

WHEAT *v.* WHEAT.

5-1658 318 S. W. 2d 793

Opinion delivered December 22, 1958.

J. H. Spears, for appellant.

Rieves & Smith & Henry S. Wilson, for appellee.

GEORGE ROSE SMITH, J. The only question here is the validity of Act 36 of 1957, which added the following provision to the statute governing the matter of residence in divorce cases: "The word 'residence' as used in Section 34-1208 is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the State and this is declared to be the legislative intent and public policy of the State of Arkansas." Ark. Stats. 1947, § 34-1208.1. The effect of the 1957 statute is to substitute residence, in the sense of physical presence, for domicile as a jurisdictional requirement in divorce cases. The chancellor held the act unconstitutional and, finding that the plaintiff-appellant is not domiciled in Arkansas, dismissed his suit for divorce.

The parties were married in 1948 and were living in Maryland when they separated in 1952. The record does not show where the marriage ceremony was performed, but it was evidently in some state other than Arkansas. It is not contended that either of the parties had ever lived in Arkansas before the appellant came here in May of 1957. At that time he was transferred by his employer, a private corporation, to a station in Millington, Tennessee, which is some twenty miles northeast of West Memphis, Arkansas. Wheat rented an apartment in West Memphis and traveled back and forth each day to his work at Millington. After having thus resided in Arkansas for about three months Wheat filed this suit for a divorce, on the ground of three years separation. Mrs. Wheat, who is a resident of California, was served by warning order. She filed a cross-complaint asking for separate maintenance, but she denied the court's jurisdiction to grant a divorce. Although Wheat testified that he intends to make Arkansas his home, the weight of the evidence supports the chancellor's finding that Wheat has not established his domicile in this state. Hence the case turns upon the validity of Act 36, by which the jurisdictional requirement of domicile was abolished.

The legal history that lay behind Act 36 is well known. The Civil Code of 1869 required the plaintiff in a divorce case to prove residence in the state for one year next before the commencement of the action. C. & M. Dig., § 3505. In 1931 the legislature amended the statute to require only that the plaintiff prove residence for three months next before the judgment and for two months next before the commencement of the action. Ark. Stats., § 34-1208. In 1932 we held that the amended statute meant residence only, not domicile. *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281. This interpretation was followed until 1947, when we overruled the *Squire* case and held that the statutory reference to residence meant domicile. *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, noted in 2 Ark. L. Rev. 111. The *Cassen* case did not reach the constitutional

question now presented, as the decision involved only an issue of statutory construction. It cannot be doubted that by Act 36 the legislature intended to restore the rule of the *Squire* case, for the emergency clause in the act refers specifically to that decision and to the *Cassen* case.

Although the wisdom of Act 36 is of no concern to the courts, since the law of divorce is purely statutory, *Squire* v. *Squire, supra, Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, 152 A. L. R. 327, we may nevertheless observe that the act may well have been designed to prevent perjury. We know, of course, that the residential requirements for divorce vary greatly among the forty-nine states. In a decided majority of the states the plaintiff must have lived in the state for at least a year before filing suit. Louisiana and New York have no minimum period of residence, but their laws do not permit the courts to entertain cases where the state had no substantial connection with the marriage.

Arkansas is one of the five states in which the necessary period of residence is relatively short. In Idaho and Nevada the period is six weeks, in Wyoming sixty days, in Arkansas three months before judgment, and in Utah three months before the commencement of suit. At the time Act 36 was adopted all five of these states demanded proof of domicile as a condition to the granting of a divorce.

It is a matter of common knowledge that every year thousands of unhappily married persons, unable to obtain divorces at home, visit one or another of these five states in search of marital freedom. It is equally well known that the need for proof of domicile leads to perjury in a vast number of instances. The situation in Nevada, for example, has been described in these words: "It has been estimated that 8,616 divorces were granted in Nevada in 1942 and 11,399 in 1943, the great majority of which must have been obtained by non-residents who went to Nevada solely for divorce purposes, remaining there only the required six weeks. All the while they

contemplated returning to their home states immediately after their divorces were secured, yet they all swore falsely that they intended to make Nevada their permanent home, having been warned by local counsel that, unless they did so, they would be out of court. On advice of counsel they also took steps which would be accepted by the Nevada courts as corroborating their sworn statement but were actually nothing more than sham and camouflage. Upon such evidence the courts find that they acquired a Nevada domicil." Lorenzen, Extraterritorial Divorce—*Williams* v. *North Carolina II,* 54 Yale Law Journal 799, 801. We should be less than candid if we did not concede that similar instances of perjury have taken place in Arkansas. Act 36 goes far toward freeing litigants from the temptation to swear falsely on the issue of domicile.

To hold the act invalid we must be able to assert that it conflicts with some particular clause in the state or federal constitution. Only two clauses seem sufficiently pertinent to warrant discussion.

First is the full faith and credit clause of the federal constitution. This clause is now construed to mean that a divorce decree is not entitled to recognition in other states unless one of the parties was domiciled in the state where the decree was rendered, *Williams* v. *North Carolina,* 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 A. L. R. 1273, with an exception which precludes either party from attacking the decree if the question of domicile was actually put in issue. *Sherrer* v. *Sherrer,* 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A. L. R. 2d 1355.

The full faith and credit clause deals only with the extent to which the decree is entitled to recognition elsewhere. It does not purport to say that the decree is not valid in the state where rendered; still less does it intimate that the courts cannot be authorized to act at all in the absence of proof of domicile.

We do not question the desirability of having Arkansas divorce decrees receive recognition in other

states. That wish was the basic reason for the *Cassen* decision. But it must be remembered that a decree is not entitled to respect elsewhere merely because the statute exacts a showing of domicile as a condition to the maintenance of the suit, and this is true even though the court makes a finding that domicile does exist. The decree is still not conclusive of the issue, which may be re-examined in other jurisdictions. *Williams* v. *North Carolina,* 325 U. S. 226, 89 L. Ed. 1577, 65 S. Ct. 1092. Although Nevada ostensibly requires proof of domicile, we have refused to recognize a Nevada decree when the court's finding of domicile was clearly unsupported. *Cooper* v. *Cooper,* 225 Ark. 626, 284 S. W. 2d 617. With or without Act 36 the acceptance of any particular Arkansas decree by a court in another state will ultimately depend upon whether that court believes that an Arkansas domicile really existed. Even if the act deprives the decree of *prima facie* extraterritorial validity when the Arkansas court fails to make a finding of domicile, it was for the legislature to say whether this disadvantage is outweighed by the beneficial consequences of the statute.

The other constitutional provision to be considered is the due process clause. On this point the arguments on each side are examined in detail in the majority and minority opinions in *Alton* v. *Alton,* 3d Cir., 207 Fed. 2d 667, appeal dismissed as moot, 347 U. S. 610, 98 L. Ed. 987, 74 S. Ct. 736. See also *Granville-Smith* v. *Granville-Smith,* 349 U. S. 1, 99 L. Ed. 773, 75 S. Ct. 553. In the *Alton* case the Court of Appeals declared invalid a Virgin Islands statute which provided that six weeks residence should be *prima facie* evidence of domicile and, further, that if the defendant entered his appearance the court would have jurisdiction without reference to domicile. The facts were that Mrs. Alton brought suit for divorce after having resided in the Islands for the necessary six weeks. Her husband entered his appearance but made no defense. The trial court refused to grant a divorce without proof of domicile. The Court of Appeals, by a vote of four to three,

sustained the trial court, holding that the statute denied due process of law.

We have studied the majority opinion in the *Alton* case with much care but do not find it convincing. The Fourteenth Amendment declares that no state shall deprive any person of life, liberty, or property without due process of law. The question at once arises: What person was denied due process in the *Alton* case? The majority's answer is hardly satisfying: "The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere." It will be seen that although Alton alone could have complained of a denial of due process and did not choose to do so, the court nevertheless found that his constitutional rights were somehow being violated.

In the case at bar Mrs. Wheat, unlike Alton, elects to contest the action for divorce and to attack the validity of Act 36. We may lay aside at the outset any question about procedural due process. It is not suggested that Mrs. Wheat is being denied notice or an opportunity to be heard. To the contrary, she invokes the court's jurisdiction by her request for separate maintenance. We also assume that there is no doubt about the power of the Arkansas courts to determine Mrs. Wheat's marital rights in any Arkansas property her husband may own.

The difficult question is raised by the theory, which was the basis for the *Alton* decision, that the marriage relationship is a *res* that remains always at the parties' common domicile, or at their separate domiciles, and is therefore beyond the reach of courts in other jurisdictions. See Rest., Conflict of Laws, § 110; Leflar, Arkansas Law of Conflict of Laws, § 133; and compare Corwin, Out-Haddocking Haddock, 93 Pa. L. Rev. 341. It will hardly do to side-step this issue by merely ob-

serving that the marital status in the domiciliary jurisdiction will not be affected if our decree is not entitled to full faith and credit there.

With respect to the due process clause, as distinguished from the full faith and credit clause, we are not convinced that domicile must be the sole basis for the exercise of jurisdiction over the marriage relationship. As the court observed in *Wallace* v. *Wallace,* 63 N. M. 414, 320 P. 2d 1020; "Where domicile is a statutory jurisdictional prerequisite it is quite correct to say that jurisdiction for divorce is founded on this concept. It is quite another matter to flatly declare that there may be no other relation between a state and an individual which will create a sufficient interest in the state under the due process clause to give it power to decree divorces . . . Precedent is not lacking for the conclusion that divorce jurisdiction can be founded on circumstances other than domicile." The court concluded that a soldier's residence in the state for a year, although insufficient to establish domicile, was a reasonable basis for the exercise of jurisdiction over the marital status.

The appellee relies strongly upon the decision in *Jennings* v. *Jennings,* 251 Ala. 73, 36 So. 2d 236, 3 A. L. R. 2d 662, where the court held invalid a statute permitting nonresident couples to confer jurisdiction by consent and thus obtain a divorce in Alabama with no residence there at all. We agree with that decision, for there was no reasonable basis for the exercise of jurisdiction over the marital status.

It has been pointed out repeatedly that the theory of basing divorce jurisdiction solely on domicile has led to conflicting decisions and to legal confusion ever since the theory was first formulated in connection with the full faith and credit clause. Domicile differs from residence only in the existence of a subjective intent to remain more or less permanently in the particular state. Whether that intent exists on the part of a person who comes to Arkansas can seldom be proved with any meas-

ure of certainty. Often it is only after the court has decided this perplexing question that the lack of intent becomes apparent, as when the successful plaintiff immediately leaves the state. Although the court reached its decision in the utmost good faith, the want of domicile becomes retroactively so demonstrable that the issue must be decided the other way when the decree is relied upon in another state.

By Act 36 the legislature has substituted the simple requirement of three months residence, which can be proved with certainty, for the nebulous concept of domicile, which usually cannot be proved. We concede that the period of residence might be shortened so unreasonably, as in the *Jennings* case, as to indicate that the state has no reasonable basis for exercising jurisdiction over the marriage. We are not convinced, however, that the act before us is open to that criticism. Under the holding in *Squire* v. *Squire, supra,* the rule of Act 36 actually prevailed in this state for fifteen years. Now that the legislature has unmistakably expressed its intention in the matter, we do not feel that the due process clause compels us to say that its action is arbitrary.

Reversed.

HARRIS, C. J., concurs. HOLT and MCFADDIN, JJ., dissent.

CARLETON HARRIS, Chief Justice, (concurring). I write this concurrence, not because I disagree with the reasoning of the majority, but simply to express my personal feelings on the issue involved. There has not been a case before this Court, subsequent to my entering upon the duties of this office, wherein my personal views have been so much in conflict with my interpretation of the law, or to state it simply, my "legal views." Perhaps my greatest interest, since entering upon judicial duties in 1949 (as Chancery Judge), has been the preservation of marital harmony, and the discouragement of divorce. My personal feeling is that legislation should be directed to making divorces more difficult to obtain rather than

easier to obtain, and I am unable to find too much consolation in the fact that, after all, the Act in question has no effect upon our *bona fide* citizens, but only affects those who take up a temporary residence for the purpose of obtaining a divorce. It might be added, that in my view, any divorce granted under the provisions of this statute, in numerous of our sister states, will probably be worth only the paper it is written on.

But while this legislation is personally repugnant to me, I have been forced to conclude that the legislature had full power to validly enact the provisions of Act 36 of 1957. It is not within the scope of our authority to pass upon the wisdom of legislation, or to hold an Act invalid because we deem it unwise; to take such a view, would propel the Court into the field of legislating, which, under our system of government, is entirely alien to the proper function of the judiciary. So—while I strongly disapprove of the legislation, and hope that the General Assembly will see fit to repeal Act 36, I am of the opinion, for the reasons set forth in the majority opinion, that the Act is valid.

J. S. Holt and Ed. F. McFaddin, Associate Justices (dissenting). We respectfully dissent.

When this case was submitted the Honorable Minor W. Millwee was a Justice of this Court, and he prepared an opinion, which he hoped would be adopted. His opinion was not acceptable to the majority, and was never delivered. However, his views won our support; and he has given us permission to use his original opinion as our dissent. Here it is, just as he prepared it:

This appeal involves the validity of Act 36 of 1957 (Ark. Stats. Sections 34-1208 and 34-1208.1). The first section of the act provides *inter alia,* that no decree of divorce shall be granted until a plaintiff has maintained an actual residence in this State for three full months.

The second section (34-1208.1)[1] provides: "The word 'residence' as used in Section 34-1208 is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the State and this is declared to be the legislative intent and public policy of the State of Arkansas."

The problem and issues presented are well stated in the following opinion rendered by the trial court as the basis for a decree holding the Act invalid:

"On August 6, 1957, Myron W. Wheat filed suit against his wife, Alice S. Wheat, for a divorce in Crittenden County. On August 28, 1957, Mrs. Wheat filed her answer in the action and alleged, among other things, that Mr. Wheat was not a *bona fide* resident of the State of Arkansas.

"On or about October 31, 1957, plaintiff completed the taking of his proof (all on depositions); and, on that data, the defendant filed her motion to dismiss the complaint 'for the reason that the evidence is insufficient to warrant the court granting the relief prayed . . .'

"Argument in support of this motion was based entirely upon the premise that when plaintiff rested in the development of his case, the evidence was not sufficient to warrant a finding that he was a *bona fide* resident of Arkansas. If that premise is correct, then the complaint must be dismissed and this action is at an end.

"Facts relative to residence (or domicile) of the plaintiff are undisputed except as to plaintiff's own personal statement that it is his intention to make Arkansas his permanent home. That self-serving conclusion is challenged by the defendant as being inconsistent with all other facts in the record.

"Though the fact does not appear of record, argument by plaintiff's counsel indicated that Mr. Wheat is a native of Oklahoma and was formerly a school teacher

[1] Act 36 designated this section as 34-1208(a) but this was changed by the compilers of Arkansas Statutes to preserve the uniformity of the numbering system of the statutes.

in that State. His mother still resides in Oklahoma. He has a married sister in Fort Smith, Arkansas.

"Mr. Wheat, now about 57 years old, is employed by North American Aviation Corporation, whose headquarters are in Columbus, Ohio. The company has places of business all over the nation, especially around U. S. Air Force bases, and in foreign countries. Mr. Wheat is subject to transfer to a new location on 24-hour notice.

"The present Mrs. Wheat is plaintiff's third wife. The first wife went by way of a divorce in the State of Illinois; and the second one by the same route in the State of California. Dates of these events are not in the record. Plaintiff married the present Mrs. Wheat in February, 1948, but the place is not revealed. It was not in Arkansas. The parties never lived in Arkansas during their married life. They separated around July or August, 1952, in Leonardtown, Maryland.

"Following this separation, Mr. Wheat was transferred from Maryland to Florida, where he purchased a home and brought suit against the present Mrs. Wheat for divorce. Mrs. Wheat resisted the Florida suit and it was, on advice of Mr. Wheat's counsel, dismissed by Mr. Wheat. While living in Florida, Mr. Wheat wrote his wife and advised that he was finding happiness there and intended to make it his permanent home.

"After a little more than two years in Florida, Mr. Wheat was transferred to Columbus, Ohio, for two months and thence to California. Plaintiff volunteered the information that while in California he formed an intention to make that State his permanent home. Several months later he was transferred to Pennsylvania; and on May 1, 1957, his employer transferred Mr. Wheat to duty at the Naval Air Station, Millington, Tennessee (near Memphis).

"On the 3rd or 4th day of May, 1957, plaintiff rented a furnished apartment at a motel in West Memphis (Crittenden County), Arkansas, and has been using that

as his home continuously since, to the extent that he sleeps there at night. He still (at the time of depositions) has a Pennsylvania license plate on his automobile and operates under a California driver's license. He has not assessed his automobile or anything else for tax purposes in Arkansas. His official, and only, mail address is 'P. O. Box 7, Memphis, Tennessee.' He drives fifty miles daily to and from his work at Millington, Tennessee. He says he pays $110.00 a month rent for his furnished apartment; his landlady says he pays $80.00 a month. At least one or two other persons who came to Arkansas for a divorce have lived in the same motel but they do not still live there.

"Plaintiff makes no pretense that he intends to make Crittenden County his permanent home. Instead, he says, 'I intend to go to the Ozarks in Arkansas' and settle down to a little farming and fishing.

"After considering all the foregoing facts carefully, and weighing them against the plaintiff's expressed intention to make Arkansas his permanent home, the court is not able to reach a satisfactory conclusion that Mr. Wheat is a *bona fide* resident of Arkansas. It is our finding that Mr. Wheat is not domiciled in Arkansas.

"Counsel for plaintiff directs our attention to Act 36 of 1957 and urges that, under its provisions, it is not material whether Wheat has an honest intention to make Arkansas his permanent home. This Act, it seems to the court, does specifically eliminate 'intention' as one of the elements of residence or domicile for divorce purposes and sets up a single element, to-wit: 'actual presence' in Arkansas 'for three full months'.

"Counsel for defendant urges that Act 36 of 1957 is void, and of no avail to plaintiff, because it was beyond the power of our State Legislature to remove 'intent' as an element of domicile. It appears that this Act has not been considered by our Supreme Court from any point of view. This court proceeds, therefore, to an evaluation of its validity.

"We draw our first ray of light from a general statement of the meaning of 'residence' and 'domicile' as it appears in 159 A.L.R. 499, to-wit:

> 'The weight of authority continues to be that a *bona fide* "residence", necessary under statutes in order to confer jurisdiction in divorce proceedings, is within the legal meaning of the word "domicile", that is, an *abode animo manendi,* a place where a person lives or has his home, to which, when absent, he intends to return and from which he has no present purpose to depart.'

From innumerable jurisdictions it is clear that 'intention' to establish a *bona fide* permanent home within the State is an indispensable element of residence or domicile as it relates to actions for divorce. *Carlson* v. *Carlson,* 198 Ark. 231, 128 S. W. 2d 242; *Sneed* v. *Sneed,* 14 Ariz. 17, 123 P. 312; *Wade* v. *Wade,* 93 Fla. 1004, 113 So. 374; *Perzel* v. *Perzel,* 91 Ky. 634, 15 S. W. 658; *Wright* v. *Genesee,* 117 Mich. 244, 75 N. W. 465; *Andrews* v. *Andrews,* 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366; *Bell* v *Bell,* 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804.

"In *Jennings* v. *Jennings,* 251 Ala. 73, 36 So. 2d 236, 3 A.L.R. 2d 662, the highest court of Alabama considered a problem very similar to the one at issue here. From the official opinion, we quote:

'* * * the statute provides that when the defendant is a nonresident of this state, the complainant need not be a resident of this state when the court has jurisdiction of both parties.

'Has the court by virtue of the statute the power to render a decree of divorce when not only the respondent, but also the complainant resides in another state?'

"If our finding in the case at bar that plaintiff is not a *bona fide* resident of Arkansas with an 'intention' to make this State his permanent home is a correct finding, then the foregoing question posed by the Alabama court defines our problem exactly. That court proceeded to answer its own question thus:

'Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law * * * This is true because domicile in the state gives the court jurisdiction of the marital status or the *res* which the court must have before it in order to act. * * * The domicile of one spouse, however, within the state gives power to that state to dissolve the marriage. * * * Unless one of the parties has a residence or domicile within the state, the parties cannot even by consent confer on the courts of that state power to grant a divorce. 17 Am. Jur. 273.'

'An act to be valid must be within the legislative jurisdiction of the enacting state. 59 C.J. 21 * * * Here the statute seeks to act on a status which is beyond the boundaries of the state. That it cannot do.'

"When one state undertakes to apply its marriage and divorce laws to a marital status in another state, then the sovereignty and jurisdiction of the other state is being invaded. Such an attempt by one state to control a marital status entirely within another state is *ultra vires*. A state legislature may not exercise powers which the state itself does not possess. *The People* v. *Dawell,* 25 Mich. 247, 12 Am. Rep. 260, 273; *Kegley* v. *Kegley,* 16 Cal. App. 2d 216, 60 P. 2d 482; *Lister* v. *Lister,* 86 N.J. Eq. 30, 97 A. 170; *Hood* v. *State,* 56 Ind. 263, 26 Am. Rep. 21.

"It is the conclusion of this court that 'intent' to establish a permanent home is an indispensable element of domicile; and that domicile of one of the parties is the only basis upon which Arkansas may dissolve a marriage by divorce. Applying that fundamental concept of law, it follows that the Arkansas Legislature exceeded its powers when, in Act 36 of 1957, it attempted to remove 'intent' as an element of domicile; and we declare said Act to be void and of no effect. The complaint herein will be dismissed at the cost of the plaintiff."

For reversal of the decree, the plaintiff-appellant relies primarily on *Young* v. *Young,* 207 Ark. 36, 178 S. W.

2d 994, where we held valid Act 20 of 1939 which abolished recrimination as a defense against three years separation as a ground for divorce. In doing so we pointed out that the legislature generally has the right to establish the grounds and conditions of divorce and that the plaintiff in that case had resided in the county where he brought suit fifteen months and made ample proof of a *bona fide* residence in Arkansas.

The authorities generally appear to be in accord with the Chancellor's holding that a court has no jurisdiction to grant a divorce when neither party is domiciled within the state. Since our decision in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, we have consistently held that domicile of one of the parties is necessary to confer jurisdiction. In that case we said: "Before a person can become a resident of this State so as to have his marital status determined by the courts of this State, he must, in truth and in fact, be a *bona fide* resident of the State, * * * A divorce decree in this State, to fulfill all the requirements for full faith and credit under the United States Constitution, can determine status only when there is a *bona fide* residence in this State. We quote from Sec. 111 of the American Law Institute's Restatement of the Law on Conflict of Laws: 'A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state.' " See also, *Oberstein* v. *Oberstein,* 217 Ark. 80, 228 S. W. 2d 615, where we said: "In the case at bar neither spouse was ever domiciled in this State, so it is clear that the divorce decree rendered by the Garland Chancery Court in this cause on October 28, 1947, was a decree rendered without jurisdiction, and was and is void, and is not entitled to full faith and credit under Article IV, Sec. 1 of the United States Constitution."

In Leflar, Conflict of Laws, Sec. 133, the learned author states: "Since in legal theory the marital relationship is a status, or *res,* having a *situs* at the place where the married parties are domiciled, it follows that in legal theory an action undertaking to terminate the *res* in an

action *in rem,* to be maintained only at the *situs* of the *res,* towit, the domicile. That is the way the law has developed. If a divorce is granted at the place which is the common domicile of the husband and wife, it is valid, and everywhere entitled to full faith and credit. If a court purports to grant a divorce at a place which is the domicile of neither party, the decree is a complete nullity, and entitled to no faith or credit anywhere.'' The rationale of the rule requiring domicile as a basis for divorce jurisdiction is set forth by another well known authority on the subject in Goodrich, Conflict of Laws (3rd ed.) p. 396, as follows: ''Divorce, since it concerns the termination of the marital status, is a matter of state concern, and an act of law must accomplish it. What law? The natural answer would be the law of that place with which the person is most intimately concerned, the place 'where he dwelleth and hath his home'; in other words, his domicile. It is the law of the domicile which determines whether or not a marriage may be terminated by divorce. In marriage cases it has been shown that the marriage will generally be recognized as good by the domiciliary law, if valid by the law where contracted. This is not true of divorce. Here there is no general policy favoring termination of the relation. It is only allowed if at all upon statutory grounds. A divorce may be granted only for a cause recognized by the domiciliary law; furthermore, only a court at the domicile has jurisdiction to grant a divorce. This is true both in England and in the United States. In the language often used by the courts: 'This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens * * *'.'' See also Lorenzen, Extraterritorial Divorce—*William* v. *North Carolina II,* 54 Yale Law Journal 799.

In the famous second case of *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366, Justice Frankfurter, speaking for the Court said: ''Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on

domicile. *Bell* v. *Bell,* 181 U. S. 175, 45 L. Ed. 804, 21 S. Ct. 551; *Andrews* v. *Andrews,* 188 U. S. 14, 47 L. Ed. 366, 23 S. Ct. 237. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a *nexus* between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina,* 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 A.L.R. 1273, *supra,* the jurisdictional requirement of domicil is freed from confusing refinements about 'matrimonial domicil', see *Davis* v. *Davis,* 305 U. S. 32, 41, 83 L. Ed. 26, 30, 59 S. Ct. 3, 118 A.L.R. 1518, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. If affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."

It is true that *Williams* v. *North Carolina, supra,* and similar cases decided by the U. S. Supreme Court were concerned with the extra-territorial effect that must be given to a foreign decree under the full faith and credit clause, and did not involve the question of the validity of a non-domiciliary decree in the state where rendered, as did the Alabama case of *Jennings* v. *Jennings, supra.* After pointing this out on page 398 of his work on Conflict of Laws, *supra,* Judge Goodrich posed these questions: "May we expect to see it decided that such a decree is not entitled to recognition where rendered, also? Since the Fourteenth Amendment, U.S.C.A. Const., a money judgment rendered against a defendant not before the court by virtue of allegiance, valid personal service, or consent, is void even in the jurisdiction where rendered. *Riverside & Dan River Cotton Mills* v. *Menefee,*

237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910, 1915. Could not the same argument be applied to a case where a court has attempted to adjudicate upon the status of persons domiciled elsewhere and so is without jurisdiction in the international sense?"

Strangely enough, the author soon joined his colleagues in fashioning an affirmative answer to these questions. In *Alton* v. *Alton,* (C.C.A. 3rd Cir.) 207 F. 2d 667, the court considered the validity of a statute of the Virgin Islands which, in effect, declared six weeks residence by a plaintiff in a divorce action to be the equivalent to domicile where there was personal service on the defendant. After finding that the constitutional restrictions on the actions of a Virgin Islands government were substantially the same as those on the states, the majority held that the portion of the statute which empowered a court to grant a decree of divorce without reference to domicile violated the requirements of due process. Judge Goodrich, speaking for the majority, said: "Before the days of the Fourteenth Amendment, a state could and some states did, pass rules for the exercise of jurisdiction against nonconsenting, nonresident absentee defendants. These rules were not based upon what are now considered the fundamental requisites for such jurisdiction. The judgments were not recognized in other states under the full faith and credit clause, but there was no foundation for testing their validity in the state where they were rendered. After the Fourteenth Amendment provided a way for testing the validity of these judgments in the rendering state under the due process clause, it became well settled that an attempt to give a personal judgment for money against one not subject to the state's jurisdiction was invalid at home under due process, as well as invalid abroad under full faith and credit. With regard to this type of case one can generalize and say that due process at home and full faith and credit in another state are correlative.

"The Restatement of Conflict of Laws says flatly that a state may not create an interest where it does not

have jurisdiction. Undoubtedly the result of a divorce decree is to affect interests in a matrimonial relationship. If it is still correct to say that the basis for divorce jurisdiction is domicile, a state where the party is not domiciled is, in rendering him a divorce, attempting to create an interest where it has no jurisdiction. Its attempt to do so is an invalid attempt, and contrary to the due process clause.

"We think that the premise that divorce jurisdiction is founded on domicile is still the law. It was reiterated by the Supreme Court in unequivocal language in the quotation cited above, which language is the more significant because of the strong dissent expressed by Mr. Justice Rutledge. If that premise is to disappear in the light of real or supposed change in social concepts, its disappearance should be the result of the action of higher authority than ours.

"The result suggested above is not spelled out in the books. If the Restatement generalization is correct the application necessarily follows. The Restatement generalization is demonstrably correct so far as a personal judgment for money is concerned. The arguable point here is whether in a world of changing modes jurisdiction for divorce based on domicile is as fundamental as the rule that you must have a defendant subject to your jurisdiction before you can give a personal judgment against him. Minority *dictum* from a member of the Supreme Court has indicated impatience with the domiciliary requirement.

"We think that adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens. The instant case would be typical * * * Domestic relations are a matter of concern to the state where a person is domiciled. An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The de-

fendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere. The Supreme Court has in a number of cases used the due process clause to correct states which have passed beyond what the court has considered proper choice-of-law rules."

Although the U. S. Supreme Court granted *certiorari* in the *Alton* case, it became moot when the husband procured a divorce in another jurisdiction before the court reached it on the merits and the case was dismissed in *Alton* v. *Alton,* 347 U. S. 610, 74 S. Ct. 736, 98 L. Ed. 987. The problem came before the U. S. Supreme Court again in *Granville-Smith* v. *Granville-Smith,* 349 U. S. 1, 75 S. Ct. 553, 99 L. Ed. 773, where the material facts were the same as in the Alton case and the same result was reached in the Circuit Court of Appeals as in that case. The Supreme Court affirmed by a divided court but the majority did not explore the issue of jurisdiction and, instead, held that Congress had not given the Virgin Islands power to enact the statute.

The holdings in *Williams* v. *North Carolina* and similar cases as well as those in the *Jennings, Alton* and *Granville-Smith* cases have evoked much comment, critical and commendable, by law writers generally.[2] At least one state has adopted the reasoning of the dissenting judges in the *Williams* and *Alton* cases in dealing with the issue in cases which did not reach the U. S. Supreme Court. See *Wallace* v. *Wallace,* 63 N. M. 414, 320 P. 2d 1020, where the court held it was within the power of the Legislature to establish mere residence of the petitioner for one year as a basis for jurisdiction in the case of military personnel stationed in the state for that period. This conclusion is apparently bottomed on the theory that American divorce law has outgrown the

[2] Goodrich, Conflict of Laws, *supra;* 32 Va. L. Rev. 555; 93 U. of Pa. L. Rev. 341; 28 Harvard L. Rev. 930; 67 Harvard L. Rev. 615; 54 Yale L. J. 799, *supra;* 42 A.B.A. 225.

doctrine of jurisdiction *in rem;* and that a reasonable period of residence alone should be regarded as a sufficient substitute for domicile as a basis of jurisdiction. One able writer[3] feels that one year should be the minimum if mere residence is to be substituted for domicile while another[4] suggests that a six months period might be sufficient. Either period would present a much closer question than is in issue here. Even in Nevada, a petitioner is still theoretically required to prove domicile in addition to six weeks' residence before jurisdiction is acquired.

The problem presented in the instant case is difficult and highly controversial. Admittedly no clear, comprehensive and satisfactory basis for determining divorce jurisdiction in all cases has yet been devised either legislatively or judicially. Perhaps the most appropriate remedy would be for Congress to specify a period of residence which it deemed sufficient to satisfy the full faith and credit requirements of the U. S. Constitution. Until this or some similar action is taken, we are unwilling to abandon the traditional rule that domicile in the state is an indispensable requisite for divorce jurisdiction. Even while this court still adhered to the doctrine of *Squires* v. *Squires,* 186 Ark. 511, 54 S. W. 2d 281, it paradoxically refused to recognize or give any effect to a divorce granted in another jurisdiction which is the domicile of neither spouse. In doing so, we approved and followed the reasoning of those courts which hold to the domiciliary theory of jurisdiction and proclaim that recognition of the non-domiciliary decree would hopelessly frustrate and make vain all state laws regulating and limiting divorce. *Bethune* v. *Bethune,* 192 Ark. 811, 94 S. W. 2d 1043, 105 A.L.R. 814; Leflar, Conflict of Laws, Sec. 135.

Surely there is something fundamentally wrong with a judicial double standard under which the court of one state fondly embraces a jurisdictional practice within its

[3] Rabel, The Conflict of Laws—A Comparative Study, 397.
[4] Lorenzen, *Haddock* v. *Haddock,* Overruled, 52 Yale L.J. 352.

own realm which it condemns as downright reprehensible when indulged in by the courts of a sister state. We decline to lend a hand to such judicial amorality and duplicity. If domicile is the jurisdictional test for the compulsory recognition of a foreign divorce decree, as the U. S. Supreme Court has repeatedly held, then the same test should determine the validity of a decree in the state where rendered. In our opinion the holdings of the Alabama Supreme Court and the Circuit Court of Appeals to that effect in the *Jennings* and *Alton* cases, *supra,* are logical and sound.

TATUM *v.* CHANDLER.

5-1716 319 S. W. 2d 513

Opinion delivered December 22, 1958.

[Rehearing denied February 2, 1959]

Joe Purcell, for appellant.

John L. Hughes & Fred E. Briner, for appellee.

PAUL WARD, Associate Justice. This litigation relates to the probation of a will made by W. M. Tatum March 31, 1954. Mr. Tatum, a widower at the time, died on February 24, 1957 at the age of 86, leaving three sons and one daughter. Appellee, May Belle Chandler, is the daughter and two of the sons are J. W. and James L. Tatum, the appellants. The other son is Auda L. Tatum.

The trial court admitted the will to probate, and appellants here seek a reversal on three grounds, to-wit: *One,* the will was not executed according to law; *Two,* the testator lacked mental capacity, and; *Three,* undue influence on the part of appellee.

The testator left an estate estimated at approximately $40,000 principally in real estate. By the terms of his will J. W. received 6 acres of land out of a certain forty on which the home of the deceased was situated; Appellee received the balance of that forty; J. W. and appellee together received an additional 90 acres; James L. received three acres with certain restrictions valued at about $800 and; Auda L. received one dollar.

From the record it appears that J. W. and his family lived with his father on the home for many years and that, until recent years, they farmed together; Appellee lived in Missouri but visited her father on numerous occasions; She made several gifts to her father totaling, according to her statements, about $2,000; At one time the son Auda, who lives in California, was given 40 acres of land by his father, and at another time he

was given a place to build a house; J. W. and James L. had also received gifts from their father.

One. Appellant's contention that the will was not legally executed is based on the testimony of the two attesting witnesses. They both admitted they saw W. M. Tatum sign his name at the bottom of the paper or will, and also admitted they signed their names at the bottom of the attesting clause in the testator's presence and in the presence of each other. Both witnesses however, said the will was not read in their presence and that the testator did not state the paper was his will or request them to sign as witnesses. In support of their contention appellants cite *Orr* v. *Love,* 225 Ark. 505, 283 S. W. 2d 667.

We are unable to agree with appellants. The will and the attesting clause admittedly appear to be regular in every respect. The attesting clause which the two witnesses admit signing states that they signed at Tatum's request and that he declared in their presence the instrument was his last will and testament. The *Orr* case just cited merely holds that it is indispensable that the testator should know the contents of the will at the time of its execution, and that no presumption of due execution of a will arises from the mere production of an instrument purporting to be a last will.

In this case there is much more than the mere production of an instrument. The undisputed testimony of appellee was that Tatum had talked to her previously about making a will; that he, on this occasion, not only requested a will be made but dictated to her, while she made notes, just what he wanted in it; that he gave her land descriptions which she had never known; that she had an attorney to write the will as directed, and; that she personally invited the attesting witnesses to be present and informed them fully of the purpose. Before the

two witnesses attested the will they visited a few minutes with J. W. Tatum and his wife in a room near where the will was executed, and J. W. knew at that time the will was to be executed. All these circumstances and others which could be cited from the record leave little doubt that all parties knew exactly what was going on at the time the will was executed. The Probate Judge's finding that the will was properly executed is supported by the weight of the evidence. This court has held that such circumstances may be considered in this kind of a case. In *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936, we approved this statement.

"Each of the attesting witnesses must sign his name as a witness at the request of the testator, but such request might be inferred from the attendant circumstances in proof by signs or gestures as well as words . . . by the testator desiring the witnesses to be sent for to attest the execution of his will, or from a request made to such witnesses by another person in the testator's presence."

This court, in the case of *Meek* v. *Bledsoe,* 221 Ark. 395, 253 S. W. 2d 369, used language which we think is applicable here. In holding that it was not necessary to the validity of a will to show it was read by the testator before he signed it, the court quoted with approval:

"It is sufficient if the court is satisfied by competent evidence that the contents of the will were known to and approved by him. Where a will, written in the presence of the testator according to his dictation, is executed according to the statute, it is valid though not read to or by him."

"The doctrine as stated by the English cases on this point is illuminating, *viz.*: 'If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make a good will, if executed by the testator, is that he should be able to think thus far, "I gave my solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt

that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' ''

In the case under consideration the record shows, in addition to what is heretofore set forth, that the testator had talked with the attorney who wrote the will and had paid him for writing it, that he actually signed the instrument which is now conceded to be his will, and that he talked to others later about having made the will. All this, we think, leaves no doubt that the will was properly executed in compliance with the statute. Certainly in the absence of any showing to the contrary, we must say that the court's finding is supported by the weight of the evidence.

Two. In our opinion the record supports the finding of the Probate Court that W. M. Tatum was competent to execute his will. Mr. Tatum who was approximately 83 years old when he signed his will on March 31, 1954 and lived about 3 years thereafter. It is true that he had been in feeble health for a few years, that he was in bed at his home when he signed, and that he entered the Arkansas Baptist Hospital on April 5th or 6th, 1954. At that time Dr. Autry examined him, and later testified that Tatum's condition was very poor, that he was not mentally alert, and that in his opinion Tatum was not mentally competent on March 31, 1954 to execute the will. On cross-examination however he stated "I cannot say that W. M. Tatum did not know what he was signing when he executed his will on March 31, 1954." The testimony of Dr. Brown was much the same as that of Dr. Autry except there was no qualifying statement on cross-examination. There was also lay testimony to the effect that Tatum did not recognize some of his neighbors from time to time.

On the other hand there was somewhat convincing evidence that Tatum was competent to execute the will. James C. Verdier, minister of the First Penecostal Church, testified that he had known Tatum since 1938, that Tatum was a friend but not a member of his church; that he visited him often — once just about the time the

will was signed; that he talked with Tatum, and he appeared to be very rational, and; that Tatum discussed the matter of the will with him in 1955. Dr. John W. Ashby, in substance, stated: I had known Tatum for 15 years, and treated him frequently during that time; I examined him the day the will was signed and he was suffering from uremia; I had been treating him for this disease several years; W. M. Tatum was mentally clear when I examined him, (the day the will was executed) he knew what he was doing and was capable of making a will. In addition to the above it was shown that Tatum was up and around visiting neighbors and transacting business after the will was signed.

We have frequently said that the test of mental capacity to execute a will is that the testator must be able to retain in mind without prompting the extent and condition of his property, to comprehend to whom he was giving it, and relations of those entitled to his bounty. See: *McWilliams* v. *Neill,* 202 Ark. 1087, 155 S. W. 2d 344; *Parette* v. *Ivey, Executor,* 209 Ark. 364, 190 S. W. 2d 441, and; *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433.

The burden of proving mental incapacity rests upon the one who seeks to prove it. See: *Parette* and *Shippen, supra,* and *Gray* v. *Fulton,* 205 Ark. 675, 170 S. W. 2d 384; *Jones* v. *National Bank of Commerce,* 220 Ark. 665, 249 S. W. 2d 105, and; *Thiel, Adm.* v. *Mobley,* 223 Ark. 167, 265 S. W. 2d 507.

Three. The Probate Judge found no undue influence was exercised to induce the execution of the will, and again we think this finding was justified by the evidence. Appellants admit that they carry the burden of proving undue influence, but say this burden was met by showing appellee was the prime beneficiary and that she helped in preparing for its execution. Due to this circumstance, they say, more strict proof was required of appellee, citing *McDaniel* v. *Crosby,* 19 Ark. 533. The rule alluded to however does not relieve appellants of the burden of proof. In fact there is no direct evidence

in the record of undue influence on the part of appellee or anyone else. The fact that appellee received under the will a larger portion of the estate than each of the appellants is not alone convincing or even significant. First, because the testator had a right to dispose of his property as he saw fit, and secondly, the discrepancies are partially justified at least by gifts previously made to some of his children.

Affirmed.

ANTRIM *v.* MCKELROY.

5-1706 319 S. W. 2d 209

Opinion delivered December 22, 1958.

[Rehearing denied January 26, 1959]

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

Richard W. Hobbs & B. W. Thomas, for appellee.

PAUL WARD, Associate Justice. In this litigation appellee, J. A. McKelroy, sought to cancel a deed which he executed to his son (and also to cancel subsequent conveyances stemming therefrom including the one to appellant) on the ground of the lack of sufficient mental capacity at the time said deed was executed. From the decee of the Chancery Court cancelling the deeds and restoring the property to appellee, appellant prosecutes this appeal.

After a careful reading of all the testimony relating to appellant's mental capacity at the time he executed the deed in question we have concluded the trial court's finding that he did not have the necessary mental capacity is supported by the weight of the evidence.

We have, however, further concluded that the decree of the trial court cancelling the deeds and restoring the property to appellee must be set aside. Our reasons for this conclusion will be discussed hereafter, and in doing so all relevant testimony will be set out. This makes it unnecessary to re-examine separately all the evidence relative to appellant's mental status at the time he executed the deed to his son. Some of it will be noted as other points are discussed.

We find that, regardless of appellee's lack of mental capacity at the time he made the deed, he later ratified the transaction at a time when he was capable of doing so.

For a better understanding of the issues, a brief factual background will be helpful. On March 13, 1954 appellee executed a warranty deed to his son, T. F. McKelroy, conveying Lots 12, 14, and 15 of Block 1 of J. H. Smith Addition to Hot Springs; On May 2, 1955 T. F. McKelroy conveyed the same property to his brother, Scotty E. McKelroy, and his wife, and; on February 16, 1956 Scotty and his wife conveyed the same land to appellant, the consideration being $5,600. This sale

was negotiated by H. Ward Conde as appellant's agent who is a real estate broker and who apparently assisted appellant with her financial and business affairs generally.

Appellee's mental history and condition is adequately set forth in a letter, dated June 6, 1957 and admitted as evidence by agreement, written by Dr. Robert G. Carnahan, Assistant Superintendent of the State Hospital. In substance it shows: Appellee was admitted to hospital first time on March 17, 1954 on a Physician's Statement but was never admitted through a court; He stayed until May 21, 1954 and was released; He was returned to the hospital on June 7, 1954, and conditionally discharged on October 18, 1954; He was returned November 12, 1954 and conditionally discharged again October 18, 1955. He was completely discharged on October 18, 1956 after he had been out of the hospital a year, and; He has had no further trouble and he could be considered competent at the present time. Dr. Carnahan further stated that he considered it unlikely appellee had sufficient mental capacity to understand the nature and effect of business at the time he executed the deed on March 13, 1954. Other medical testimony regarding appellee's mental capacity is that contained in a letter by Dr. Charles D. Yohe dated June 18, 1957, admitted by agreement. Dr. Yohe's testimony, based on an examination of appellee three days previously and on reports by Dr. Carnahan, is, in substance: He agrees with Dr. Carnahan that appellee lacked mental capacity to execute the 1954 deed, but that he was now mentally competent. Among other things, his letter states:

"Relative to the situation that he (appellee) is in, he could now be considered sane and competent"; ". . . as one sees him now . . . he does think rationally, forms logical conclusions, and his memory is intact"; "He is not senile."

In view of the above medical testimony and in view of other lay testimony and certain facts to be later noted, we cannot escape the conclusion that appellee had regained

normalcy (to the extent of understanding ordinary business transactions) as early as October 18, 1955. Dr. Carnahan stated that, according to the hospital records, appellee was conditionally discharged on October 18, 1955, and that he was completely discharged one year later. It is not shown that he needed or received any treatment during the intervening one year period. Mrs. Johnson said she saw appellee nearly every day for several years, that she saw and talked to him in September of 1956, and that she saw no difference in his conduct and attitude from that of other neighbors. H. Ward Conde testified to many small business transactions with appellee beginning early in 1956, to which reference will be made later.

It is appellee's actions and conduct during the year 1956 that impel us to conclude he ratified the 1954 conveyance of his property. It is noted that there were three houses on the lots conveyed by appellee and that appellee's son and his wife lived in one of the houses. After appellee was discharged from the hospital on October 18, 1955, he went to live with this son. The uncontradicted testimony of Conde was that he told appellee that Scotty and his wife had given appellant a mortgage on the property for $1,800 and that appellee's only reply was "well, those kids shouldn't do that". After this, on February 16, 1956 appellant bought the property assuming the $1,800 mortgage and paying Scotty $3,600 in cash, and took a deed from Scotty and his wife. From that time on Scotty became a renter. Scotty's wife paid the rent of $30 per month to appellant up to April, 1956. It seems that shortly after this time Scotty and his wife moved to Texas, leaving appellee in the house. Following this appellee paid the rent for May, 1956; In June (same year) he paid $23 and $7 on separate occasions; then appellee asked to have the rent reduced, and appellant made a reduction of $5 per month; and after that appellee made rent payments on June 12, August 20, September 26, September 28, October 2, October 18, and October 30, all in 1956. Appellee admits paying rent. Conde testified that ap-

pellee never said anything about being the owner or about not having to pay rent. It was not until appellee got behind with his rent in a sizeable amount and was threatened with eviction that he employed attorneys and filed this suit on January 11, 1957 to cancel the deeds. We feel that these acts on the part of appellee clearly amounted to a ratification of the deed to his son.

This court has many times held that a person who has regained sanity can ratify his act or deed performed while *non compos*. See: *George* v. *St. L., I. M. & S. Ry. Co.*, 34 Ark. 613 at page 626; *Eagle* v. *Peterson*, 136 Ark. 72, 206 S. W. 55, and; *Brandon* v. *Bryeans*, 203 Ark. 1117, 160 S. W. 2d 205. In this connection we have uniformly held that a deed executed by an insane person is voidable only and not void. See: *George* v. *St. L., I. M. & S. Ry. Co.*, supra; *Langley* v. *Langley*, 45 Ark. 392; *Eagle* v. *Peterson, supra*, and *Brandon* v. *Bryeans, supra*.

The defense of Ratification should ordinarily be pleaded but it was not done in this case, and that gives us some concern. It seems, however, that this is not a fatal defect under certain circumstances and especially where equities are involved.

In the case of *Fairbanks-Morse & Company* v. *Hogan*, 201 Ark. 1114, 148 S. W. 2d 162, where a similar question was presented, the court said: "When appellee introduced evidence which tended to create an estoppel there was no objection, and it cannot be complained of now." While the above case dealt with estoppel, it must also be pleaded as a defense ordinarily. In *Parker* v. *Jones*, 221 Ark. 378, 253 S. W. 2d 342, we said: "Where a case is tried upon an issue not tendered by an answer and evidence is introduced concerning it without objection, the answer will be treated as having been amended to conform to the proof and the sufficiency of the answer may not be challenged on appeal." Where a waiver was not pleaded in *Athletic Tea Company* v. *McCormack*, 159 Ark. 405, 252 S. W. 7, it was stated: "It is true appellee did not interpose the waiver as a defense, in

his written answer, but, without objection on the part of appellant, evidence was introduced, and the case tried, upon the theory that appellee had been released as surety because appellant waived the weekly reports required by the contract." For holdings to the same effect see: *Nance* v. *Eiland,* 213 Ark. 1019, 214 S. W. 2d 217, and *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S. W. 2d 645. The reason for the rule seems to be based partly at least on the equitable policy of deciding litigation on its merits, and applies only where there is no objection to the introduction of the questioned testimony. There was no objection made in this case.

We cannot help being impressed by the fact that appellant paid $5,600 for the property to one of appellee's sons without (as she stated in her deposition) knowing about appellee's mental condition in 1954. In addition, she has made valuable improvements on the property. It would manifestly be unfair for her to suffer the entire loss if, in fact, appellee ratified the transaction at a time when he was sane and in possession of the pertinent facts.

Since, however, there was no plea of ratification, and since it is possible that appellee would have introduced proof in rebuttal had such a plea been made and will do so if given a chance, we have decided the cause should be reversed and remanded for further development, consistent with this opinion, along the lines indicated. It is so ordered.

Reversed and remanded.

McFaddin and George Rose Smith, JJ., dissent; Harris, C. J., and Robinson, J., concur.

Sam Robinson, Associate Justice, (concurring). I concur for the reason that I believe the pleadings and the evidence justify a conclusion that appellant should prevail on the theory of being a *bona fide* purchaser without notice of any equities in appellee's favor.

I am authorized to say that the Chief Justice also has this view.

GEORGE ROSE SMITH, Associate Justice, (dissenting). The majority rest their decision on the doctrine of ratification. Not only was this defense not pleaded, it was not even mentioned in the briefs filed in this court. We have repeatedly held that an appellant abandons any error not argued in his brief. *Harris* v. *Edwards,* 129 Ark. 253, 195 S. W. 1064; *Mo. Pac. R. Co.* v. *Harding,* 188 Ark. 221, 65 S. W. 2d 20; *Connell* v. *Robinson,* 217 Ark. 1, 228 S. W. 2d 475. Those precedents are binding on us in the sense that they should be followed or overruled; we are not at liberty simply to ignore them. The rule protects the trial court by not requiring him to pass upon issues not presented to him and protects the appellee by not requiring him to argue points not mentioned in the appellant's brief. I am unable to join in the majority's action in ignoring this settled rule of practice.

MCFADDIN, J., joins in this dissent.

BOWLING *v.* STATE.

4924 318 S. W. 2d 808

Opinion delivered December 22, 1958.

Bryan J. McCallen, Claude F. Cooper and *Gene Bradley,* for appellant.

Bruce Bennett, Atty. General and *Bill J. Davis, Asst. Atty. General,* for appellee.

SAM ROBINSON, Associate Justice. The appellant was convicted in Clay County, Arkansas, on the charge of possessing stolen property exceeding in value the sum of $35.00. The information charged, also, that he had previously been convicted of a felony in Oklahoma and had been convicted of a felony in the District Court of the United States for the Eastern District of Illinois. The jury was unable to agree on the punishment, and the court fixed the penalty by sentencing the defendant to ten years in the penitentiary.

On appeal appellant urges several points for reversal, one of which is that the evidence is not sufficient to sustain the conviction. There is no contention that the defendant did not have in his possession mer-

chandise which had been stolen, consisting of several guns, but appellant does maintain that there is no substantial evidence from which an inference can be drawn that he knew the guns had been stolen. In view of the fact that the judgment must be reversed on other grounds, there is no need to abstract the evidence here. Suffice it to say that in our opinion there is substantial evidence to sustain the verdict.

Appellant contends that the State was permitted to impeach its own witness,. Charles Skaggs. The court permitted the prosecuting attorney to cross-examine this witness, on the theory that the prosecution was surprised by his testimony. Apparently the cross-examination included the reading from documents by the prosecuting attorney in the presence of the jury. The question is whether the cross-examination went so far that it can be said to amount to impeachment, but it is not necessary to dwell on this point, because in a new trial there will be absent the element of surprise giving the State's attorney the right to cross-examine a State's witness.

The jury was unable to agree on the punishment. Therefore, on the authority of Ark. Stat. § 43-2306, the court assessed the punishment by sentencing the defendant to ten years in the penitentiary. Appellant contends that the statute authorizing the court to fix the punishment is contrary to several provisions of the Constitution. But we do not reach the constitutional question. The rule is well established that the Constitution is not construed unless the cause cannot be disposed of on any other ground. *Bailey* v. *State,* 229 Ark. 74, 313 S. W. 2d 388.

On cross-examination, over the objection and exception of defendant's counsel, the defendant was asked if he had been charged with other crimes. This was error. In *Reddell* v. *State,* 216 Ark. 197, 224 S. W. 2d 812, we said: "It is well settled in Arkansas that the defendant as a witness may not be questioned about mere previous arrests, indictments, or charges filed against

him. The mere fact that a charge has been made, as distinguished from the doing of a criminal act or a conviction therefor, tends to prove nothing as to the credibility of the witness. *Johnson* v. *State,* 161 Ark. 111, 255 S. W. 571; *Wray* v. *State,* 167 Ark. 54, 266 S. W. 939; *Jutson and Winters* v. *State,* 213 Ark. 193, 209 S. W. 2d 681. And see 3 Wigmore, Evidence (3d Ed., 1940) § 980a."

After his arrest on November 24, 1956, the defendant's case was set for trial the following January. The case was continued to April 22nd. At that time the defendant failed to appear, and his bond was forfeited. In explaining his absence, on April 22nd, he stated that he was in jail at Kennett, Missouri, from February 1st to July 16th. The fact that the bond had been forfeited was wholly immaterial, as was the reason for the defendant's absence. Neither sheds any light on the issue of the guilt or innocence of the accused, and we do not think the defendant's effort to explain his absence by stating he was in jail in Missouri opened the door for the prolonged cross-examination of the defendant about other charges. The first fifteen pages of the record given to cross-examination are devoted almost exclusively to questioning the defendant about other offenses and other charges. Of course, we have held that a witness (and this includes the defendant who takes the stand in his own behalf) can be asked on cross-examination about acts embracing moral turpitude, for the purpose of shedding light on his credibility. But the rule is universal that a witness cannot be asked if he has been indicted or charged with an offense. "Nor should the court permit a question whether the witness has ever been arrested, incarcerated or imprisoned, accused, charged with, informed against, tried without being convicted, or indicted, or prosecuted for crime." Underhill's Criminal Evidence, 5th Ed., Vol. 1, § 244.

It would unduly extend this opinion to set out the fifteen record pages of cross-examination above mentioned, but a liberal portion of it is as follows:

"Q. Doc, how old are you? A. 38 years old.

Q. Where were you born? A. Clinton, Arkansas.

Q. Where is Clinton? A. Van Buren County.

Q. When did you move to Missouri? A. In 1941 when I came to Missouri.

Q. You moved to Missouri in 1941? A. Yes sir.

Q. Were you ever arrested or convicted of anything in Arkansas before you moved to Missouri? A. No, sir.

Q. You had never been charged over there with anything? A. No, sir.

Q. Are you sure of that? Public drunkenness or anything else? A. No, sir.

Q. You moved from Clinton right to Missouri? A. No, sir, moved from Clinton to Henrietta, Oklahoma.

Q. Is that where you stole the cattle? A. Where I, was supposed to have stolen cattle.

(Previously the State had proved the conviction for stealing domestic animals.)

Q. You weren't guilty of that either? A. No, sir.

Q. But you were tried by a jury? A. Yes, sir.

Q. And found guilty by the jury? A. Yes, sir.

Q. You started serving time when? A. I believe the spring of '40.

Q. When did you get out, February '41? A. I believe that's right.

Q. When did you go in service? A. January 5, 1942.

Q. You were in service about three years? You got out what month in '45? A. I got out October 12th.

Q. October 12, 1945. How many days was it before you stole the car? A. I couldn't be exact.

(In its case in chief, the State had proved this offense.)

Q. How many days did you have the car before you were arrested? A. I think maybe over night, something like that.

Q. If you were arrested 11/17/45, then you stole it on the 16th, didn't you? Did you steal the car or did they have you charged with it? A. I drove my car and left the— went in a saloon, and got in another car and drove it off. I stopped at Centralia, Illinois at a beer joint.

Q. You didn't have a bill of sale on that car? A. I didn't have nothing.

Q. You pleaded guilty there, too? A. No.

Q. Did you plead guilty? A. I did.

Q. What was your lawyer's name? A. Mr. Hans W. Wulff of St. Louis and I believe Mr. George K. Reeves from Caruthersville.

Q. You plead guilty there in stealing a car? A. Yes, sir.

Q. But you plead not guilty of larceny of domestic animals, cattle theft? A. Yes, sir.

. . .

Q. You were out of the Army less than a month when you got in trouble stealing a car? A. I would say around that length of time.

Q. When did you get out of the Federal Penitentiary? A. I don't remember.

Q. Was it December 29, 1946? A. I believe it was along about that time, yes, sir.

. . .

Q. Where did you serve the Federal time? A. Leavenworth.

Q. On January 6, 1954, were you picked up by the State Highway Patrol at Poplar Bluff? A. What day?

Q. January 6, 1954.

MR. COOPER: That is objected to.

Q. In January—

MR. COOPER: He can ask if he was convicted.

MR. SHELL: You asked about charges, Mr. Cooper.

MR. COOPER: No matter about that. All he can ask (is) if he has been convicted or if he did a certain thing.

COURT: Mr. Cooper, did you ask this witness on direct examination about charges he had been placed in jail on?

MR. COOPER: No, sir, I certainly did not. If I did, I was asleep.

MR. SHELL: I would remind the court about all the charges in Missouri having been dismissed and that have not been dismissed. I submit that opened it up.

COURT: Did you ask him about the charges he had been placed under?

MR. COOPER: I asked why he didn't come to Arkansas on charges —

COURT: I am asking you this question, Mr. Cooper, did you ask about charges he had been placed in jail on?

MR. COOPER: Yes, sir, in Caruthersville.

COURT: Then this is proper cross examination.

MR. BRADLEY: Just a minute.

(Conference at the bench.)

MR. BRADLEY: The court then is overruling Mr. Cooper's objection?

COURT: Sustaining the objection to that question there. The court is permitting the prosecuting attorney to examine on any charges since December 1956 for the reason that the direct examination of the defense counsel made it competent.

MR. BRADLEY: Of course the defendant is objecting to the court's ruling. Exception.

MR. COOPER: If the court please, my objection was to the whole business.

COURT: I sustained the objection to 1954, but by your direct examination of defendant on charges since December 1956, the court is holding this is competent for the prosecuting attorney to examine him on arrests and charges since December 1956.

MR. BRADLEY: Same objection.

COURT: All right.

MR. BRADLEY: Same exception.

Q. In May 1954, in or about Poplar Bluff, did you break into any place and steal something?

A. No, sir.

Q. You didn't? Specifically the date is May 6, 1954.

MR. COOPER: I object to that.

COURT: Overruled.

MR. COOPER: Exception.

A. No, sir.

Q. On or about April 9th, or on or about April 7, 1955, in or around Caruthersville, Missouri, did you steal anything? A. No, sir.

. . .

Q. What happened to you between January and April? A. I was put in jail at Kennett.

Q. On charges over there for receiving stolen property, property alleged to have been stolen from places in Missouri? A. No, sir, not at Kennett.

MR. COOPER: We object to that.

COURT: Overruled.

MR. COOPER: Exception.

Q. Why were you put in jail? A. The warrant you fellows sent over there.

Q. Is that why you were put in jail over there first? A. At Kennett, yes.

Q. After you made bond in November or December, you came back to court in January, didn't you? A. Yes, sir.

Q. You left here? A. Yes, sir.

Q. Freely and voluntarily? A. Yes, sir.

Q. Went back to Missouri? A. Yes, sir.

Q. You were in jail in April at the time the bond was forfeited, were you not? A. Yes, sir.

Q. What were you in jail for then? A. I don't remember the charge right now.

Q. You are telling the jury you were in jail and you don't even remember the charge? A. I don't.

Q. As the truth of the matter, you know what the charge is, receiving stolen property alleged to have been stolen from places in Missouri, wasn't it? A. No.

MR. COOPER: I object to the manner of examination of this witness. If Mr. Shell wants to know, he can get the *alias* warrant issued and the information from over there.

COURT: Mr. Cooper, the examination is proper and the statement you made is improper.

MR. SHELL: The alias warrant was issued after the bond was forfeited.

Q. Where were you in jail on—

MR. BRADLEY: I would like a ruling on Mr. Cooper's objection.

COURT: Overruled.

MR. COOPER: I am objecting to statement of the prosecuting attorney testifying what was done because the record speaks for itself.

COURT: Do you want the court to state what the record shows?

MR. SHELL: Yes, sir, at this time I would like the court to state.

MR. COOPER: Yes, sir, I would like to see the record.

COURT: April 22, 1957, defendant called three times, failed to answer. Not present, forfeiture on bond, *alias* warrant for defendant.

MR. SHELL: That is on the—

COURT: April 22, 1957.

Q. Where were you on April 22, 1957? A. In jail at Kennett.

Q. What kind of charge? A. I don't remember what the charge was.

Q. And at that time there were also charges against you in Pemiscot County and another county, three different counties, wasn't there? A. No sir, there was two counties.

MR. COOPER: I ask that the witness be given time to answer the questions.

COURT: He can't answer with you interrupting. The witness was trying to answer with you talking. Go ahead and answer.

A. Two counties in Missouri had warrants for me.

Q. You are telling this jury you can't remember the charge? A. No, not Kennett.

Q. What in the other counties? A. Pemiscot, burglary and larceny.

Q. What other charges? A. That's all.

Q. Did you have a charge of receiving stolen property or buying stolen property? A. No, sir.

Q. You don't know what the charge was in Kennett? A. No, I don't remember what it was. I had it read to me.

Q. Do you remember if it was murder? A. No, it was not murder.

Q. Do you remember whether it was rape? A. No, it wasn't that.

Q. Do you remember whether it was stealing an automobile? A. I don't remember what the charge was.

Q. You were in jail but you don't remember what the charge was? A. That's right."

The rule is that a witness cannot be asked if he has been charged with a crime. There was nothing in the direct examination of the defendant that justified the prosecution in pursuing the subject of the defendant's incarceration in the Kennett, Missouri, jail. He was asked on cross-examination: "Q. What happened to you between January and April? A. I was put in jail at Kennett. Q. On charges over there for receiving stolen property, property alleged to have been stolen from places in Missouri? A. No, sir, not at Kennett." and "Q. As the truth of the matter, you know what the charge is, receiving stolen property alleged to have been stolen from places in Missouri, wasn't it?" and "Q. Where were you on April 22, 1957? A. In jail at Kennett. Q. What kind of charge? A. I don't remember what the charge was. Q. And at that time there were also charges against you in Pemiscot County and another county, three different counties, wasn't there?" Questions concerning other charges against the defendant were repeated again and again by the prosecution. The effect of these questions was to impress upon the

jury that the defendant had been charged in Missouri with offenses similar to the one for which he was then being tried. Evidence of other crimes (not charges) is admitted solely for the purpose of shedding light on the credibility of the witness, but such evidence is not admissible for the purpose of showing that the defendant is a person likely to commit the offense charged. *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804; *Moore* v. *State,* 227 Ark. 544, 299 S. W. 2d 838.

Next, the appellant contends that the federal offense of transporting a stolen automobile in interstate commerce will not support the charge of having been convicted of a prior offense under our statute. Act 228 of 1953 (Ark. Stat. §§ 43-2328-43-2330) is known as the "Habitual Criminal Act". The first section (Ark. Stat. § 43-2328) deals with the punishment when the prior offense was committed in this State. Section 2 (Ark. Stat. § 43-2329) applies where the prior conviction was not in the courts of Arkansas. Section 2 provides:

"SECTION 2. Effect of conviction in another State. Any person convicted in any of the United States, or in any district or territory thereof, or in any Federal Court, or in a foreign country, of an offense which, *if committed in this State, would be punishable by the laws of this State by imprisonment in the penitentiary,* shall, upon conviction for any subsequent offense punishable by imprisonment, within this State, be subject to the punishment prescribed in Section 1 upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court in this State." (Emphasis ours)

Obviously before Section 2 would apply the offense committed elsewhere would have to be punishable by the laws of this State if committed here. The evidence introduced by the State to prove the charge of having been convicted of a felony in a district court of the United States showed that the defendant had pleaded guilty to the violation of the Dyer Act on two counts. Appellant cites *Landreth* v. *Gladden,* 253 Or. 205, 324

P. 2d 475, as authority for the proposition that a prior conviction of transporting a stolen automobile in interstate commerce cannot be used as the basis for a charge of a prior conviction under a statute substantially the same as our Habitual Criminal Statute. But in the case at bar, not only did the defendant plead guilty to violating that section of the Dyer Act (18 U. S. C. A. § 2312) dealing with transporting a stolen vehicle in interstate commerce, but pleaded guilty, also, to violating § 2313, which provides: "§ 2313. Sale or receipt of stolen vehicles. Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft, moving, as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

The distinction between § 2312 and § 2313 is pointed out in the *Landreth* case, and there the conviction in the federal case was under § 2312, which applies to transporting a stolen automobile in interstate commerce. Section 2313 makes it unlawful to "receive" a stolen automobile moving in interstate commerce, and such an act would also be a violation of the laws of this State. The fact that the vehicle was or was not moving in interstate commerce would be immaterial. *People* v. *Morgan,* 270 App. Div. 859, 60 N. Y. S. 2d 774.

For the error in permitting the State to cross-examine the defendant in regard to other charges, the judgment is reversed and the cause remanded for new trial.

SMITH *v.* THOMASON.

5-1707 318 S. W. 2d 814

Opinion delivered December 22, 1958.

Garvin Fitton and *Arnold Adams,* for appellant.

Virgil D. Willis and *Eugene W. Moore,* for appellee.

WILLIAM J. SMITH, Associate Justice. This case grew out of an automobile accident that occurred on U. S. Highway 62 in Carroll County at a place known as Mockingbird Hill on March 23, 1956 at approximately 10:30 o'clock in the evening.

All of the appellees, E. O. Thomason, his wife, Imogene Thomason, his son, David Thomason, Pearl Boren and Freda Boren, were riding in an automobile traveling to the east and being operated by E. O. Thomason, when at the crest of Mockingbird Hill it collided with an automobile traveling to the west on the south side of the highway being operated by appellant Joe R. Hosley, and also occupied by Roy Larimer. The Hosley automobile had come up the hill almost abreast of an automobile being operated by appellant Jerral Smith, and also occupied by David Gooley, Leon Hudson, Raymond Bunch and John D. Lively. The Smith automobile remained on the north side of the highway and did not collide with either of the other two automobiles. Appellant Arthur C. Berry had signed for a driver's license for his stepson, Joe R. Hosley, who was 16 years of age, and appellant Joseph H. Smith had signed for a driver's license for his son, Jerral Smith, who was 17 years of age. Sec. 75-315, Ark. Stats. 1947.

Appellees filed a complaint against appellants in which they alleged that Hosley and Jerral Smith were negligent in speeding and racing; that Hosley was negligent in attempting to pass the Smith automobile; that Jerral Smith was negligent in speeding up to prevent Hosley's passing; that Jerral Smith was negligent in crowding Hosley's automobile; and, that Hosley was negligent in operating his automobile on the left-hand side of the highway. Appellees prayed a judgment against appellants for damages to compensate for personal injuries and property damage. The cause was tried to a jury and was submitted on interrogatories. Pursuant to the jury's answers to the interrogatories the court entered a judgment for appellees for a total of $21,500, together with costs.

Appellants rely upon ten points for reversal of the trial court's judgment and we have determined that at least one of these points requires that the cause be remanded for a new trial. We agree with appellants' contention that it was prejudicial error to permit appellees to impeach their own witness, Roy Larimer, by in-

troducing a statement previously signed by him. This witness was called by appellees and on direct examination testified in part as follows: "Q. Did Jerral Smith speed his car up? A. I can't say. Q. Did you succeed in passing the Jerral Smith car? A. No, sir. Q. What prevented it? A. Either our car lost speed or he speeded up. * * * Q. Do you know why you didn't get ahead of him? A. No, sir. * * * Q. It just happened instantly? A. It happened pretty fast. Q. Roy, to refresh your memory I want to ask you if you signed this statement? Mr. Adams: We object to the impeachment of the witness. Mr. Willis: I am not impeaching him. The Court: Is it contradictory to what he has testified? Mr. Willis: No, because he says he doesn't know whether his car slowed or whether Jerral Smith speeded up." Thereafter the court permitted appellees to show this witness his previous statement and then ask if it refreshed his memory. When the witness answered "not too much", appellees announced to the court that they were taken by surprise and the court ordered the matter argued out of the presence of the jury. After the jury retired testimony and argument were heard by the court relative to Larimer's statement and the circumstances under which it was signed. The jury was recalled and over the continuing objection of appellants this procedure was followed: "Further examination by Mr. Willis: Q. Roy, did you sign a written statement presented to you by the Deputy Sheriff of Carroll County in regard to this accident here about 3 months ago? A. Yes, sir. Q. Is this the statement which you signed? A. Yes, sir. Mr. Willis: May I read it to the jury? The Court: Very well (reading from the written statement) 'I was a passenger in an automobile driven by Joel Hosley; that about half way between Alpena and Green Forest the Hosley car overtook a car driven by Jerral Smith. Hosley attempted to pass the Smith car on the west slope of the hill. Smith speeded up to prevent Hosley from passing and there was a race through the hollow and on up the Mockingbird Hill. We were traveling side by side when we reached the top of the hill. The Hos-

ley car struck a car at the top of the Hill.' Signed Roy Larimer. The Court: Mr. Willis, I think the court should mention to the jury at this point the statement that you have read, which the witness has stated he signed previously, if you find that it contradicts the testimony that he is giving now, or has given, you will consider it solely and only for the purpose of going to the credibility of this witness, and in determining how much credit should be given to his testimony, not to prove any facts in issue."

Prior to the introduction of this statement, Larimer had given no positive testimony relative to the allegations that the boys were speeding and that Smith had speeded up to prevent Hosley from passing. These questions were vital and all important and had a direct bearing upon the liability, if any, of appellants. The use of Larimer's statement served to supply a deficiency at that point in the trial in appellees' evidence. Under these circumstances appellees were permitted to introduce a statement containing substantive evidence not otherwise admissible by contending it was for impeachment purposes, Sec. 28-706, Ark. Stats. 1947, at a time when there was nothing to impeach and nothing to contradict. We hold that this was prejudicial and was error, even though the court instructed the jury that the statement was to be considered as only going to the credibility of the witness. It is significant that appellees admitted (see counsel's statement above) that Larimer had not testified to the contrary and it is to be noted that he had not testified to anything prejudicial to appellees. The mere fact that he did not give the positive testimony anticipated by appellees did not render his previous statement admissible, and enable them to use his statement to supply evidence they had failed to elicit from him.

In the recent case of *Milum* v. *Clark,* 225 Ark. 1040, 287 S. W. 2d 460, this court stated: "For such evidence to be admissible, however, the witness to be impeached must have given substantive testimony damaging to the

party who seeks to attack his credibility. It is settled that inconsistent prior statements cannot be used to impeace a witness who merely fails to give the positive testimony that the party expected from him. *Doran* v. *State,* 141 Ark. 442, 217 S. W. 485; *Murray* v. *State,* 151 Ark. 331, 236 S. W. 617; *Williams* v. *State,* 184 Ark. 622, 43 S. W. 2d 731. The reason is that the prior statements are not competent evidence of the basic fact, being hearsay, and are admissible only as bearing on the issue of credibility. *Comer* v. *State,* 222 Ark. 156, 257 S. W. 2d 564. But if the witness has testified to nothing his credibility is immaterial."

The test for determining when a party may impeach his own witness by the use of contradictory statements requires two conditions: First, the witness must give testimony at variance with that anticipated by the party calling him; and, second, such testimony must be prejudicial or detrimental to the case of the party calling him. Here the witness testified to nothing in favor of or against the party calling him. 58 Am. Jur., "Witnesses", Secs. 799 and 800.

Ordinarily we would not refer to the other points argued in the briefs, but since this case is being remanded for a new trial, we think it proper for us to discuss certain of the points raised.

The first four points argued by appellants pertain to the *voir dire* examination of the veniremen on the subject of insurance. The rules governing *voir dire* inquiry into this subject were set forth in the case of *DeLong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370, and we do not consider it necessary for us to further elaborate on the rules laid down in that case.

During the trial of this cause the appellants who are minors moved for a directed verdict because a guardian had not been appointed to defend them, as required by Sec. 27-825, Ark. Stats. 1947. We do not think they were entitled to a directed verdict, but a mistrial, as to these minors, should have been ordered. This would

have halted the proceedings against these minors until there was a compliance with the statute.

The only other point we deem it necessary to mention is appellees' closing argument in which counsel stated: "* * * Mr. Adams didn't call them — he asked why we didn't call them, because gentlemen of the jury we have got their statements in the file and their statements are they were racing and that car increased his speed." Appellants objected and requested the court to admonish the jury not to consider the statement, and this was done. We are constrained to say that in our opinion this statement was highly improper and grossly prejudicial and would have called for a mistrial upon proper motion by appellants. *Gregory* v. *Rees Plumbing Co., Inc.,* 222 Ark. 908, 263 S. W. 2d 697.

The judgment is reversed, and the cause is remanded.

ANDREWS *v.* LAUENER.

5-1724 318 S. W. 2d 805

Opinion delivered December 22, 1958.

J. Kenton Cochran, for appellant.

Richard Mobley, for appellee.

WILLIAM J. SMITH, Associate Justice. This is an appeal from a decree by the Chancery Court of Pope County dismissing the appellants' action alleging that a mineral deed from Luller Etta Webb and John M. Webb to W. E. Lauener, conveying an undivided one-half interest in all oil, gas and other minerals in, under, and upon the following described lands lying in Pope County, Arkansas, to-wit: The South Half of the Northeast Quarter; Southeast Quarter of Northwest Quarter; Northeast Quarter of Southeast Quarter; all in Section 26, Township 9 North, Range 18 West, dated the 2nd day of August, 1929, appearing of record in book 4-E, page 526, of the Deed Records of Pope County, Arkansas, is a forgery.

The appellants first argue that the court erred in refusing to strike the appellees' answer. On December 11, 1957, appellant B. B. Andrews verified the appellants' complaint and on the next day the appellants filed a motion to strike the appellees' answer because it was not verified. This motion was not presented to the court until the appellants had completed their proof and the appellees had moved for dismissal on February 4, 1958. At that time the court permitted appellee W. E. Lauener to verify the answer in open court. We find no error in this procedure.

In construing Ark. Stats. 1947, Sec. 27-1105, pertaining to the verification of pleadings, we said in *Bank of Dover* v. *Jones,* 192 Ark. 740, 95 S. W. 2d 92, that the court did not abuse its discretion in permitting the defendant to verify her answer when it became apparent that the plaintiff sought to take advantage of her failure to do so.

The second point raised by the appellants is the contention that the court erred in denying their motion for

a continuance. In determining whether this point has any merit, we think it significant that the motion was not presented until the day the case was set for trial when the appellees and their witnesses were present and ready for trial; that this case was set on November 21, 1957, for trial on December 19, 1957, and continued due to the inability of the court to hear the matter on that date; and, on January 16, 1958, the case was set for trial on February 4, 1958. Certainly the appellants had sufficient notice of the trial date to be prepared. Further, they made no effort to comply with the statute pertaining to information to be filed in support of a motion for continuance, Ark. Stats. 1947, Sec. 27-1403. It is settled law, *Crisco* v. *Murdock Acceptance Corporation,* 222 Ark. 127, 258 S. W. 2d 551, that whether a continuance should be granted is a matter within the sound discretion of the trial court. We find nothing in the record to indicate an abuse of the court's discretion in denying this motion and in our opinion the appellants' argument on this point is without merit.

Next, the appellants urge that the court's findings are against the preponderance of the evidence.

Appellants B. B. Andrews and Luller Etta Webb did not attend the trial and testify, and the notary, R. L. Hillis, and W. L. Hamm, the witness to the mark of John M. Webb, were deceased.

The court heard voluminous testimony from nine witnesses in behalf of the appellants and four witnesses (including one hand-writing expert) in behalf of the appellees. Several of the appellants' witnesses limited their testimony to collateral issues. The appellants introduced six exhibits, and seventeen exhibits were introduced by the appellees. A great deal of this evidence was conflicting and we can see no useful purpose in summarizing it in this opinion. A careful review and consideration of all the evidence convinces us that the trial court's finding that the disputed deed is not a forgery is supported by a preponderance of the evidence. Having so determined the issue on the allegation of for-

gery, we do not reach the court's finding as to limitations and laches.

The fourth and last point argued by the appellants calls for a ruling on a question we have not decided since Act 555 of 1953 was enacted, Ark. Stats. 1947, Sec. 27-2106.1, *et seq.*

After giving notice of appeal but before the record was filed in this Court and the case was docketed in this Court, the appellants filed a motion to vacate the judgment, and the appellees then filed a motion to quash, on the ground that the court was divested of jurisdiction by the filing of notice of appeal. The motion to quash was granted and we have concluded that this was error. The trial court held that after notice of appeal was filed it retained limited jurisdiction and could act only pursuant to Ark. Stats. 1947, Sec. 27-2127.1 and Sec. 27-2129.1.

In construing Act 555 of 1953, we note that the General Assembly said: 'If an appeal has not been docketed in the Supreme Court . . ." (Sec. 27-2106.1); ". . . and if the action is not yet docketed with the appellate court . . ." (Sec. 27-2107.2); "The record on appeal shall be filed with the appellate court and the appeal there docketed . . ." (Sec. 27-2127.1); "Where the Supreme Court has acquired jurisdiction of a cause, but it is made to appear that the record is incomplete for want of documents, exhibits, or a bill of exceptions, and the trial court has lost such jurisdiction . . ." (Sec. 27-2129.2). In our opinion there is a clear legislative intent in this Act that after notice of appeal is filed the trial court retains jurisdiction of the case until the record (under proper circumstances a partial record, *Norfleet* v. *Norfleet,* 223 Ark. 751, 268 S. W. 2d 387) is filed with this Court and the appeal is docketed in this Court, and we so hold.

However, we have determined that this holding does not require that the case be reversed, because the motion to vacate does not allege facts sufficient to put in issue the chancellor's qualification.

The appellants' motion to vacate the judgment is predicated upon the allegation that the chancellor who rendered the decree against them was disqualified by reason of his former service, many years ago, as counsel in a similar case.

Article 7, Sec. 20 of the Constitution of the State of Arkansas is as follows:

"No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court."

We find no allegation indicating to us that the chancellor may be interested in the case; or, that the chancellor is connected with any party to the suit by consanguinity or affinity; or, that he has acted as counsel in this cause. The mere allegation that the chancellor acted as counsel in similar litigation many years ago between different parties is certainly not sufficient to put his qualification in issue in this case. Something more than a suggestion of disqualification is required to support such a motion. *Rowland* v. *State,* 213 Ark. 780, 213 S. W. 2d 370.

The appellees found it necessary to file a supplemental abstract, without which we could not have considered the merits of this case. Under our Rule 9(e) they have requested and are entitled to additional costs in the amount of $85.50.

The decree is affirmed.

5-1693 318 S. W. 2d 818

Opinion delivered December 22, 1958.

Peyton D. Moncrief, for appellant.

No brief filed for appellee.

WILLIAM J. SMITH, Associate Justice. It appears that Mrs. Wilmer A. Rose filed a charge of insanity against her husband in the Probate Court of Arkansas County, Southern District, and following a hearing, without notice to him and at which he was not present, the court adjudged him insane and ordered him committed to the State Hospital for Nervous Diseases. This appeal is by C. F. Rose, father and next friend of Wilmer A. Rose.

The appellant has argued several points for reversal, one of which is the court's failure to comply with the statutory requirement that a person be present before the court at the time his sanity is inquired into, Sec. 59-101, Ark. Stats. 1947. In the case of *Monks* v. *Duffle,* 163 Ark. 118, 259 S. W. 735, we discussed the mandatory provision of this statute, stating:

"The order contains no recital that appellant was before the probate court when the condition of her mind

was inquired into. Under Article 7, Sec. 34, of the Constitution of 1874, exclusive jurisdiction in matters relating to persons of unsound mind and their estates is conferred upon probate courts. *Watson* v. *Banks,* 154 Ark. 396. This jurisdiction can be exercised only in the special manner provided in Sec. 5829 of Crawford & Moses' Digest, which is as follows: 'If any person shall give information in writing to such court that any person in his county is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, shall cause the person so charged to be brought before such court and inquire into the facts by a jury, if the facts be doubtful.'

"It will be observed that, in order to exercise its jurisdiction, it was necessary to have appellant before the court. Where the jurisdiction conferred upon a court must be exercised in a special manner, and not according to the course of the common law, it is necessary for the facts essential to the exercise of such jurisdiction to appear in the record. *Oliver* v. *Routh,* 123 Ark. 189; *Massey* v. *Doke, Id.,* 211; *Jones* v. *Ainell, Id.,* 532. The failure of the record to affirmatively show the presence of the appellant in court when the condition of her mind was inquired into renders the probate order void. The letter of guardianship must fall with the order."

In the case of *Hyde* v. *McNeely,* 193 Ark. 1139, 104 S. W. 2d 1068, we said:

"The direction that the subject of the inquiry be brought before the court has been held to be mandatory, and an order which fails to recite such jurisdictional fact is void."

It is undisputed that Wilmer A. Rose was not present at the time when the court adjudged him insane and ordered him committed. Accordingly, under the statute and cases, *supra,* the court was without jurisdiction to make the order and it must be reversed.

The circumstances in this case are quite different from those we had under consideration in *Barbee* v. *Kolb,*

Superintendent, 207 Ark. 227, 179 S. W. 2d 701, wherein Barbee was seeking his release from the State Hospital for Nervous Diseases in a *habeas corpus* proceeding. During the hearing on his petition, Barbee established by his own witnesses that he was of unsound mind. In this case Rose has appealed from the order declaring him to be of unsound mind and we are called upon to determine whether there was reversible error in the proceedings in the trial court.

If Wilmer A. Rose is still confined to the State Hospital for Nervous Diseases, he should remain in protective custody while a hearing is had in compliance with the applicable statute, *supra.*

The order is reversed and remanded for further proceedings consistent with this opinion.

CARLETON HARRIS, C. J. (dissenting). While I agree with the majority that Rose is entitled to a hearing, I do not agree that the order should be reversed. These exact contentions were made to the Court in the case of *Barbee* v. *Kolb,* Supt., 207 Ark. 227, 179 S. W. 2d 701. There, Barbee, through *habeas corpus* proceedings, sought to obtain his discharge from the State Hospital for Nervous Diseases, setting out that the proceedings of the Probate Court committing him to the hospital were void for the following reasons:

> "a. Such proceedings were conducted in the absence of appellant and without his knowledge because he was not given notice of the institution and pendency of such proceedings or the nature of the charge, or the time when and the place where the hearing thereof would be had; * * *
>
> * * * * *
>
> c. No competent evidence was introduced tending to establish appellant's insanity."

The proof showed that the commitment was issued by the Probate Judge, following the filing of the affidavit and interrogatories of the doctors. Barbee was not present and was not notified in any way of the proceedings there-

to. This Court, in passing upon appellant's contentions, stated:

> "For the purpose of this opinion we may, and do, assume, without deciding, that such proceedings were not in conformity to then existing law. It is not contended that the warrant for commitment was void on its face. On the contrary, such warrant was introduced in evidence by appellant's attorney, and the copy thereof set out in the record before us discloses that the same was, on its face, in all things regular.
>
> Since appellant, indubitably an insane person, was delivered to appellee Kolb under a warrant of commitment regular on its face, such appellee acquired rightful custody of appellant, and became charged with certain duties and responsibilities with respect to him regardless of whether the inquisition for determination of his sanity was entirely regular.
>
> * * * * *
>
> At 28 Am. Jur. 679, it is said: '* * * if the evidence indicates that one committed to an institution for the insane is actually insane, the court should not order his discharge, regardless of the invalidity of the proceedings under which he was committed, but should direct his continued restraint until such time as proper proceedings can be had for a formal adjudication of insanity.' * * *"

In *Payne* v. *Arkebauer,* 190 Ark. 614, 80 S. W. 2d 76, it was held that, while a person charged with insanity must be present in a proceeding for appointment of a guardian, such presence is not necessary in a proceeding solely for a commitment to the state hospital. In the instant case, the order was valid on its face, and recited evidence by physicians to establish the incompetence of Rose, including the oral testimony of one physician. The other, Dr. Kolb, in his certificate, stated:

> "My diagnosis is maniac depressive reaction, maniac type, and he is incompetent. I feel this man can be potentially dangerous to himself and others.

> In view of the above pattern of behavior, it is evident that prolonged psychiatric care will be needed for a recovery. If he will not submit to hospitalization voluntarily, then I recommend commitment."

There is nothing to prevent Rose from instituting *habeas corpus* proceedings for a hearing on his sanity here in Pulaski County, and, in my view, this would be the proper step. While the majority hold that the Court was without jurisdiction, and reverse the order, they state that Rose "* * * should remain in protective custody while a hearing is had in compliance with the applicable statute, *supra.*" This, to me, is inconsistent, for I see no authority for the hospital authorities to hold Rose if the order of commitment is invalid. It is true that the superintendent himself can still apply for an order of commitment under the provisions of Section 59-234, Ark. Stats. (1947) Anno., (and, for that matter, under Section 59-236, no liability is incurred by the superintendent or staff for the detention of any person until 30 days after such patient has made demand in writing for his release). But I see no reason to impose this duty upon the superintendent in the instant case. Under the *Barbee* case, *supra,* Rose could obtain his hearing, but would remain in custody until his sanity was determined.

For the reasons herein set out, I respectfully dissent.

BRUERE *v.* MULLINS.

5-1671 320 S. W. 2d 274

Opinion delivered January 12, 1959.

[Rehearing denied February 23, 1959]

[redacted]

Mahony & Yocum & Eugene R. Warren, for appellant.

Brown & Compton, for appellee.

CARLETON HARRIS, Chief Justice. This is a will contest. K. W. Bullion of El Dorado died on February 12, 1957. Among his effects was found the will here in question. Under the terms of this instrument, $2,500

was left to the Roman Catholic bishop of Little Rock to be used for the best interest and welfare of the Church of the Holy Redeemer in El Dorado, and the balance of the estate was devised to appellee herein, M. E. Mullins. Appellants, a niece and nephew of the deceased, filed a petition objecting to the admission of the said document[1] to probate as the Last Will and Testament of K. W. Bullion, alleging that K. W. Bullion lacked the mental capacity to make a will on April 16, 1954 (execution date of the will), and later amended the petition to further allege that appellee exerted and exercised undue influence on the deceased, "causing him to disinherit his kin and devise his entire properties to her." The court was asked to declare the instrument null and void. Following the filing of a response to the petition and amendment, denying such allegations, and after various other motions and orders, the cause proceeded to trial. Subsequent to a lengthy and extended hearing, the court found that K. W. Bullion was mentally competent to make the will, that no undue influence was exercised upon him, and that the instrument should be admitted to probate as the Last Will and Testament of the deceased. From such order, comes this appeal. Five points are relied upon by appellants for reversal, the first three relating to the alleged lack of testamentary capacity, and the allegation of undue influence. Point four deals with the failure of the trial court to admit the deposition of Judge George LeCroy, a close friend of Bullion for a number of years, and it is finally contended that the purported will was not executed, witnessed, or published in accordance with law.

Before examining these specific points, it might be said that we see no need to relate the testimony in detail. Twenty-nine witnesses testified, nine for appellants, including one of the contestants, and twenty for appellee, including contestee. Some of the evidence was near revolting (certain letters from appellee to deceased), and a detailing of such evidence, and a pro-

[1] The will had been discovered by the nephew, who had previously been appointed administrator of the estate.

longed discussion of the testimony of the various witnesses, could serve no useful purpose, since there is no unusual point in the litigation, nor any phase that could make this opinion worthwhile as a precedent. After all, the law governing testamentary capacity and undue influence has long been established in this state, and the outcome of this litigation, as far as appellants' first three points are concerned, depends entirely upon the weight of the evidence. With this preliminary statement, we proceed to a discussion of whether K. W. Bullion possessed the mental capacity to execute the will in question.

Appellants' evidence reflected that K. W. Bullion divorced his wife in 1945. According to some witnesses, a gradual personality change began in 1946. Though having formerly been a meticulous and neat dresser, he became slovenly in his dress and habits . . . extremely hard to please . . . careless with his insurance business . . . though formerly a member of the country club and an attendant at parties, he subsequently abandoned his close friends and pulled away to himself . . . was forgetful . . . had delusions of persecution. According to Dawson Hawkins, an insurance agent in El Dorado, and formerly associated with deceased, Bullion had the idea that people were entering the office at night, and he stated that Bullion had locks changed on the doors of both the office and his home . . . witness was told by Bullion that people were coming into his home . . . this knowledge was gained by stretching wires across the backyard and observing where someone had tripped over the wires and fallen . . . people followed him in his car . . . in 1948 or '49, Bullion began to carry a gun . . . he would get mad at a waitress and require her to bring him additional glasses of water, but would then tip her $5 or $10. It was the witness' opinion that Bullion was not mentally competent to make a will after the middle of 1949. Appellants' evidence reflected that Bullion became interested from time to time in several young women (hereafter mentioned), in their 20's, and

in 1952, he married a young woman named Madolyn. She almost immediately divorced him, and received a property settlement of $50,000 and a Cadillac. According to the testimony, he became enamored, in the early part of 1953, with a young woman named Beth, and sent his nephew to determine whether this woman would marry him. The nephew, one of the appellants herein, discovered that Beth was holding $1,500 belonging to his uncle, and insisted that it be returned. This fact was later learned by Bullion, who apparently considered the nephew's action as interference in his personal affairs, and was deeply resentful. Bullion subsequently became interested in two young women, sisters, named Duke, and sent each large sums of money. Among other witnesses, in addition to the appellant nephew, who testified that in their opinion, Bullion was not competent in 1954, were Lizzie McClellan Davis, Bullion's part-time housekeeper (this testimony was rather weak evidence), Tom Moore, a long time friend, Dr. E. J. Munn, family physician for many years, and Carolyn Price, who was Mr. Bullion's secretary for ten years. Father Thomas Walshe, a Priest, formerly of El Dorado, also a friend of Bullion's, testified that he considered Bullion incompetent, and observed personality changes as early as 1938; however, he had only seen Bullion approximately a half dozen times since 1940, and had not seen him at all since sometime in 1952, just prior to his marriage to Madolyn. Probably appellants' strongest evidence, relative to the alleged incompetency of Bullion, was the testimony of Dr. Munn. Dr. Munn testified that in his opinion, Bullion was not competent, because of senility[2], to make a will in the spring of 1954. He stated that the latter had suffered from hypertension and arteriosclerosis[3], the latter a progressive hardening of the arterial system, causing the muscular walls of the arteries to become less pliable, and affecting the blood supply to the brain. According to his testimony, this condition is progressive, and increasingly slows down the physical and

[2] On re-direct examination, he testified that Bullion's senility was more than normal senility; he was suffering from senile dementia.

[3] Numerous physical ailments were also mentioned.

mental reactions of the person affected. Dr. Munn is a general practitioner, and admittedly has never specialized in mental diseases. Actually, we do not consider the Doctor's testimony to be overly impressive. He appeared, on cross-examination, to be somewhat reluctant to give direct answers, and some of his statements were a bit surprising. For instance, he stated that "old age" might commence at the age of 40. It was his opinion that the average person 60 years of age, suffers from some degree of senility. Further, from his testimony:

"* * * Your position, as I understand, as having been stated by you, is that when a man arrives at the age of sixty-five years of age, senility has set in?

A. Sixty-five?

Q. Yes. And this senility has set in to the point that the average person, now, now the average person, having arrived at the age of sixty-five, does not have the capacity to understand his properties and his (interrupted)

A. The valuation of everything he does, now?

Q. He doesn't have the proper evaluation of things —(interrupted)

A. In a true business way.

Q. And he doesn't, then, have the capacity to make a will after that time, without help?

A. Help in some way.

Q. Help in some way?

A. Is going to have to get help in some way. He is going to consult somebody. He is going to have an advisor.

Q. Suppose he doesn't have an advisor, what do you say about that?

A. He better find one.

Q. He better find one?

A. Yes, sir.

Q. Because the average person, if he doesn't do it, you say that that instrument is such — subject at all times to attack because he did not have the capacity, standing alone, to make that?

A. The average person.

Q. That is true, is it?

A. That's true."

We are prone to feel that this witness' opinion as to the senility of Bullion was based to some extent upon his opinion as to when senility commences, rather than solely upon Bullion's apparent mental condition at the time.

On the other hand, numerous witnesses testified that Bullion appeared normal in 1954 and thereafter, and they noted no change from his previous mental condition. Among those so testifying, were Mrs. Mary Engelke, a neighbor, Mrs. Marshall Craig, Jr., a next door neighbor, Tom Plair, who had some business dealings with Bullion, Mrs. Margaret Craig Parham, a neighbor, Joe Dunn, yard boy, T. P. Oliver, attorney of El Dorado, Sam D. Babb, president of the National Bank of Commerce of El Dorado, Jimmy Wilkins, operator of a laundry and dry cleaning plant at El Dorado, who had been acquainted with Bullion for 25 years, Eddie Stringfellow, shop foreman for the George Morgan Pontiac Company, who serviced Bullion's automobile, Ned Wilfong, in the oil production business, who had transacted business with Bullion in 1953 or 1954, and Henry Crook, grocerman, who had known Bullion from 1944, and saw him nearly every day. Their testimony reflected his conduct to be entirely normal . . . the reading of daily newspapers, Reader's Digest and Life magazines . . . listening to the radio . . . playing cards and dominoes. Witness Oliver testified that they discussed politics, baseball, and that he noted but little deterioration in Bullion's physical appearance until five or six months before the latter's death . . . witness noted no change in Bullion's mental status, even on the last oc-

casion when they talked together, which was only a few days before Bullion's death. Neighbors testified that he talked about current events, children, and flowers, that his conversations seemed to be normal, and he appeared entirely clear in his thinking.

While according to appellants' evidence, Bullion did commit some acts which, to the average mind, would appear rather eccentric, and perhaps indicate an overwrought imagination, such acts would not necessarily establish an impairment of testamentary capacity. There does not appear to be any connection between the alleged delusions (if such there be), and the making of the will. In probably one of the longest opinions ever handed down by this Court, *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405, a case with 51 headnotes, the subject of testamentary capacity, insane delusions, and insanity, generally, is thoroughly discussed. Relative to delusions, the Court, quoting other Arkansas cases, said:

"The law now recognizes the fact, well established by the investigation and observation of medical experts, that there may be a derangement of mind as to a particular subject and yet capacity to comprehend and intelligently act on other subjects. * * * The fact that the grantor was a monomaniac, and possessed of insane delusions on some subjects not connected with the conveyance or the matters out of which it grew, is not sufficient to invalidate his deed. To have that effect, the insane delusion must be such as to disqualify him from intelligently comprehending and acting upon the business affairs out of which the conveyance grew. * * * It is unquestionably true that one may be possessed of a delusion concerning one subject and yet be of sound mind on all other subjects, according to the weight of modern authority, and this should be so declared as a proposition of law. * * *"

However, irrespective of this established law, in the litigation before us, as previously stated, numerous people who had daily contact with Bullion testified as to his normal behavior and mental competence, and, as

stated by the trial court, "In addition, there is in evidence the personal records which he kept up to a short time before his death in which he minutely detailed his every day business affairs." While irritability and an overfondness for young women are not admirable characteristics, such traits do not establish incompetency. From a careful reading of the testimony, we are unable to say that the Chancellor's finding that K. W. Bullion was possessed of testamentary capacity at the time of the making of the will, is contrary to the weight of the evidence.

The testimony reflects that appellee lived in Union County from the time she was ten or eleven years of age, except for several years in college, until 1944, when she joined the army as a WAC. According to her evidence, she began keeping company with Bullion in December, 1942, at which time she was 25 or 26 years of age and Mr. Bullion was in his late 50's, and continued to keep company with him until she entered the army. Upon returning, the previous relationship was resumed, except for the period of his marriage to Madolyn in 1952. In October, 1955, appellee went to New Orleans, and subsequently to Tulsa, Oklahoma, during which time, almost daily letters were written between the parties. According to her testimony, she last saw Bullion during Christmas, 1956, and learned, for the first time, of the existence of the 1954 will. It was during this period of courtship and correspondence between the parties, that Bullion became interested, from time to time, in the other young women previously mentioned. While the evidence reflects that gifts of money were made to some of the others, appellee contends that she only exchanged gifts with Bullion, giving as much as she received. Appellants' evidence does not establish otherwise. The contention of undue influence is principally based upon the letters written by appellee to Bullion, establishing that the two had been sexually intimate. However, the letters make no demand upon Bullion concerning money or property, and clearly establish that

she knew he was interested in, and spending his money on other women.

Our views, relative to the issue of undue influence, are well expressed in the Chancellor's written opinion, wherein he said:

"In view of the letters introduced, which were written by the beneficiary under the Will, the second count of the exceptions to the Will, *viz.*, "Undue Influence", presents a more serious problem. However, our Supreme Court has often said that one having the testamentary capacity to make a will, is not required to mete out equal and exact justice to relations, and the motives or partiality, affection or resentment by which they are influenced are not reviewable; and if one has the capacity to make a will, he may make it as eccentric, injudicious and unjust as caprice, frivolity or revenge can dictate.

"No doubt there existed an illicit relationship between the deceased and the beneficiary, but it is also apparent that she, at no time, over the years, took advantage of deceased by reason thereof. The testimony disclosed that when a gift was made to beneficiary by the deceased, she reciprocated by giving him a gift of comparable value. The evidence also disclosed that deceased had given other women friends large gifts from time to time, and there is no evidence that either of them gave gifts in return. It also appears from the evidence that shortly before or about the time of the execution of the Will in question, one of those women friends to whom a large gift was made was contacted by one of the contestors of this Will, and the gift was recovered by him, which no doubt, was the reason for the "falling out" of the deceased and the contestor." As did the Chancellor, we likewise hold that such contention was not established.

It is next alleged that the court erred in refusing to admit the deposition of Judge George LeCroy, an attorney of El Dorado, a close friend, and attorney for deceased. Judge LeCroy was in bad health (which was

the reason for taking the deposition), and in fact, died before the trial of the case. The court's refusal to admit this evidence was based upon the fact that appellee did not receive sufficient notice of the taking of the deposition. While we agree with the holding of the trial court, a discussion of this contention is deemed unnecessary, since we do not consider that this evidence would have added sufficiently to appellants' case to establish the preponderance necessary for a reversal.

This brings us to consideration of appellants' final contention. K. W. Bullion's will recites *inter alia* that he is of sound and disposing mind and memory, and the attestation clause recites that the will "* * * was signed by the said K. W. Bullion in our presence and by him published and declared as and for his Last Will and Testament and at his request and in his presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses at El Dorado, Arkansas, this 16th day of April, 1954." The attesting witnesses are Robert H. Archer and D. M. Hawkins, and their respective addresses in El Dorado are listed. Neither of the witnesses, in their testimony, seemed to have much recollection about the occurrence. Archer testified that it appeared to be his signature, and that he had attested a will for Bullion. He stated that as far as his personal relationship with the latter was concerned, he had no reason to question the mental capacity of Bullion, and that he really could not say whether Bullion was competent or incompetent at the time. Hawkins testified that he had witnessed several wills for Bullion between 1948 and 1954. He identified his signature to the will in question, but stated he did not think any will made by Bullion after mid-1949 was any good. We consider appellants' contention to be without merit. The testator's signature on the will is not questioned, and the evidence shows that the will was found among his effects. Of course, after several years, attesting witnesses rarely remember any details or circumstances surrounding the witnessing of a will, and the testimony of the attesting witnesses is not unusual

in that respect. Both recognized their signatures, and Archer stated that he had no reason personally to question the testator's competency. While Hawkins stated that he did not consider Bullion competent after 1949, it will be noted that this statement covers a general period of time, rather than the particular occasion on which the will was executed. Further, such evidence is due to be closely scrutinized. As stated in American Jurisprudence, Volume 57, page 133, paragraph 145:

"It is generally held that when an attesting witness attempts to impeach a will by testifying that the testator did not have testamentary capacity, his evidence will be received with suspicion and the utmost caution, * * *. Such testimony is deemed to reflect on the credibility of the witness. The theory is that the fact that a person voluntarily identifies himself with the execution of a will and a witness, is an indication that, in his opinion, the person executing the instrument is competent so to do."

To the same effect is our holding in *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936.

Concluding, let it be remembered that approximately three years elapsed from the time of the making of the will until Mr. Bullion's death. During a good portion of that time, appellee was away, in New Orleans or Tulsa, without opportunity to personally exert any influence upon the testator. He had every opportunity to revoke the will had he desired to do so, and the evidence reflects that he had several times revoked other wills executed by him. Also, this is not a case wherein a child, or one living in the home and closely associated with the testator, is disinherited. The relationship of nephew and niece to uncle is not, within itself, a particularly close relationship, nor is there evidence that would establish an unusually close connection between the parties herein. There is no evidence that would establish such a relationship between the niece and Mr. Bullion, and the record reflects that Bullion never had anything further to do with his nephew after the inci-

dent concerning Beth, hereinbefore referred to. On the whole, appellants have fallen short in meeting the burden of proof necessary to invalidate the will.

The judgment of the Probate Court is affirmed.

Justice JOHNSON not participating.

Justice HOLT dissents.

J. SEABORN HOLT, J., dissenting. It is true that a donor has the right to dispose of his own property as he chooses. It is equally true, however, that such a right is not unlimited. When it is shown that the maker of a will lacks the mental capacity to make a will, or that he was subjected to undue influence in making it, then the will should be declared invalid. After carefully considering the evidence presented, I am convinced that K. W. Bullion, at the time the will in question was made—April 16, 1954, was not mentally competent to dispose of his property and was the victim of the undue influence of a shrewd, designing, scheming and an admittedly immoral and unprincipled woman, appellee.

Here we are dealing with a mentally weakened man, easily influenced, who was in his late fifties who fell under the spell of a woman in her middle twenties, not related to him in any manner, and who willed his entire estate of about $50,000 (except $2,500 to the Catholic church) to her and gave nothing to appellants, who were his nephew and niece, who had his love and affection until appellee intervened, and would have inherited his property had he died intestate. Among the tests of testamentary capacity the most commonly used and pointed out by this court are: (1) Was this a natural or unnatural will; (2) what was the testator's physical condition; (3) what was the opinion of the family physician; (4) what was the opinion of the subscribing witnesses; (5) what was the lay opinion by his intimate friends and family; (6) how had the testator conducted his business and affairs at the time or prior to the execution of the will; and (7) had the testator undergone marked personality changes prior to the execution of the will.

To me this was a most unnatural will. ". . . evidence of an unnatural disposition of his property by a testator is admissible as a help to be considered with the other evidence as tending to show an unbalanced mind or a mind easily susceptible to undue influence. In other words, it is a help which the jury may consider in connection with the other evidence in passing upon the soundness of mind of the testator," *Howell* v. *Miller,* 173 Ark. 527, 292 S. W. 1005. The present will was unnatural.

Until appellee came on the scene the evidence showed that the testator had a warm affection for his niece and nephew and in previous wills he had made his nephew, Bruce, his heir. The evidence shows that Mr. Bullion's physical condition had deteriorated until he was almost helpless at the time of the execution of the will. His lifelong family physician, Dr. Munn, testified without reservation that he was incompetent when he made the will, that he lacked mental capacity to make a will, that he had been treating Mr. Bullion for twenty years or more. Mr. Bullion became almost a recluse. He had few friends with the exception of Tom Moore, Dawson Hawkins and Judge LeCroy. His physical condition was so bad that he needed constant attention from his family physician. There is no question about the high qualifications of Dr. Munn as a physician.

One of our outstanding authorities on wills, Mr. Schouler, in his book on "*Wills, Executors and Administrators,*" § 97, page 106, uses this language: "Where one's mental condition appeared to his medical attendant suitable for the testamentary act, or the reverse, shortly before or after the will was made, testimony to this purport should carry great weight." Other witnesses testified that he walked with a peculiar tottering gait, had to have assistance in getting in and out of cars, needed constant attention; had to have a nurse with him at all times during the day and a colored boy at night, was unable to control himself physically. Appellee, Mullins, testified that at the time of the execution of the will he was so agitated and upset he was unable to sign his checks or list his household

expenditures, and it was three or four months before he was able to resume signing his checks.

In the present case there were two attesting witnesses, one a close and lifelong friend of the testator and the other a casual acquaintance. Dawson Hawkins, one of these witnesses, a man of unquestioned integrity and who had known the testator, Mr. Bullion, for a decade or more, and was very close to him, testified that in his opinion Mr. Bullion did not have mental capacity to make a will; that he did not possess the capacity to know the condition and extent of his property; nor to know the just deserts of those to whom he would normally leave his property. He further testified that he witnessed the will to humor Mr. Bullion, and that Mr. Bullion did not know what he was doing at the time the will was executed. The other subscribing witness stated that he could not say whether Mr. Bullion was competent or not, that he was merely an acquaintance of Mr. Bullion.

Here the testimony is undisputed that Mr. Bullion had been living in immoral relations with appellee for many years prior to the execution of the will, at the time it was executed, and until his death. She brazenly admitted writing him the most obscene letters on sex (too obscene to be presented in any court record) and to using every method at her command to excite and accommodate the sexual desires of this sex crazed man. There is no evidence that she was in love with him, ever had any intention of marrying him, and to me it is obvious that her one and only motive was to induce him, in his weakened mental and physical state, to will all of his property to her, a stranger to the blood. Just here it may be said that the Catholic priest to whose church the will provided a gift of $2,500, frankly testified that he did not think Mr. Bullion was competent to make the will in question and apparently his church has made no demand for this $2,500.

Thiel, Special Adm. v. *Mobley,* 223 Ark. 167, 265 S. W. 2d 507, "Mental weakness, though not to the extent of incapacity to execute the instrument designated, 'may render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of these, or even

with unfairness, such as great inadequacy of consideration, may make a contract voidable, when neither such weakness nor any of these other things alone, or of themselves, would do so'." *Alford* v. *Johnson,* 103 Ark. 236, 146 S. W. 516, ". . . the proof of such undue influence may be made, not only by direct and positive testimony, but by facts and circumstances from which such undue influences may be reasonably inferred. And this proof is permitted to take a very wide range. There must be free agency on the part of the testator, but in order that there may be such free agency there must be a state of mind on his part free to act, and if, therefore, he is restrained or coerced unduly by the relation he bears to, or the influence exercised by, one over him in the execution of his will, his free agency is to that extent destroyed. . . . There is a distinction between influence exerted through a lawful relation and that exercised by one occupying an *unlawful and adulterous relation. Much less evidence will be required to establish undue influence on the part of one holding wrongful and meretricious relations with the testator.* . . . The testimony adduced in this case was not only sufficient to warrant a finding that there existed wrongful sexual relations between the testator and the proponent of this will, but it was sufficient also to prove a course of adulterous conduct between them that continued for years. . . . The jury were warranted in finding that the testator was influenced during the entire latter portion of his life by the appellant, who obtained an ascendency over him that dominated him. . . . Under these facts and circumstances, we are of opinion that the jury were warranted in finding that the proponent of the will, who had lived with the testator in adultery for all these long years, exercised over him an influence that destroyed his free agency and caused him to forget the relation and deserts of his own flesh and blood, and to make her in effect the sole beneficiary of his bounty." This case is on all fours with the case at bar.

In addition, the proof in this case appears to be undisputed that Mr. Bullion dissipated at least $150,000 during the last few years of his life, $100,000 of which is unexplained.

I am convinced, on the record before us, that the great preponderance of the evidence shows that Mr. Bullion was so weak physically, and his mind so weakened by disease, senility, and insane delusions, that he was incapable of executing a will on April 16, 1954. I would reverse the judgment with directions to deny the will to probate.

RANNALS *v.* SMOKELESS COAL CO.

5-1713 319 S. W. 2d 218

Opinion delivered January 12, 1959.

Luke Arnett, for appellant.

Hardin, Barton, Hardin & Garner, for appellee.

J. SEABORN HOLT, Associate Justice. This appeal involves our Workmen's Compensation Law (Secs. 81-1361—1349 Ark. Stats. 1947). Claimant's claim for an award of compensation benefits for injuries from silicosis received while in the employ of appellee and while in the course of his employment, was denied by the full commission and on appeal, was also denied by the circuit court of Johnson County. This appeal followed.

It appears that counsel, in effect, agreed that the sole question for determination here was whether Ran-

nals' claim was filed within the statutory period required. The applicable law is set forth in Sec. 18 (a) (2) of the Workmen's Compensation Law, Sec. 81-1318 Supplement Ark. Stats. 1947, as follows: "A claim for compensation for disability on account of injury which is either an occupational disease or occupational infection shall be barred unless filed with the commission within two years from the date of the last injurious exposure to the hazards of the disease or infection, *except that in a claim for compensation for disability on account of silicosis or asbestosis, the claim must be filed with the commission within one year after the time of disablement therefrom,* and such disablement must occur within three years from the date of the last injurious exposure to the hazards of silicosis or asbestosis."

The trial court in its findings of facts said: "The Facts: The facts and evidence conclusively show claimant is totally and permanently disabled. No controversy as to this condition of claimant. The claim for compensation from the exhibits, show same to have been received by the commission on December 27, 1954. The claim on its face shows that employer was first notified on November 13, 1953 and that the accident (disability) occurred November 13, 1953." Rannals testified, when questioned as to his first notice of trouble with lungs and breathing: "A. Well, that happened about the last two years that I worked at the mines. . . . Q. Why did you quit work? A. One reason, the mine was abandoned, and another reason, I wasn't able to work . . . Q. When you say you have worked any at all since you quit in February of 1953? A. No, sir. Q. You knew you were through at that time? A. I knew I was through at that time. I didn't even go back and report, or help them take the machinery out. Q. The doctor tried to get you to quit before that time and told you you had silicosis? A. Yes, sir. . . . Q. When you got the x-rays, you quit? A. Yes, sir. Q. Then what date did you quit? A. That was in 1953—February of 1953." Dr. Cecil F. Boulden testified: "He

(Rannals) noted increased dyspnea with exertion, fatigability and muscle aching, which eventually caused his volunteer retirement in February 1953," and "His first knowledge of silicosis came during a hospital admission at Clarksville in October 1954." Dr. Harley C. Darnall stated "He had been unable to work since February 1953, because of this shortness of breath . . ." His diagnosis, Silicosis Grade III. Dr. George L. Hardgraves testified: "I have treated Arch A. Rannals of Clarksville, Arkansas, since 1946 for silicosis and bronchietasis, growing worse each year and now cannot work. Advised him to quit long before he did quit."

We hold that the above testimony alone was substantial and sufficient to support the findings of the commission and the judgment of the circuit court. As we read Rannals' testimony, he, in effect, admits he quit work in February 1953 because he was unable to continue, or even to go on the dismantling job on February 13, 1953. He did not work thereafter, and became permanently disabled.

The trial court correctly held that: "Under our statute where a claim is filed for compensation for disability on account of silicosis, claim must be filed within one year after the time of disablement therefrom. It is therefore, not the disease of silicosis, for however long a period it might have existed, but the actual disablement which determines the period of limitation, or the date of the commencement of the running of the statute. . . . it is the finding of this court, that the disablement of claimant, Rannals, occurred on February 13, 1953. That the claim for compensation not having been filed within one year thereafter, same is barred by the statute of limitations, and that the finding to such effect by the commission should be affirmed. That the statement of claimant, together with other competent testimony, sustain such findings."

In the case of *Donaldson* v. *Calvert-McBride Printing Co.,* 217 Ark. 625, 232 S. W. 2d 651, we said: "The rule in most jurisdictions is that the period within

which a proceeding for the recovery of compensation may be instituted, or within which an application or claim may be filed, commences to run when the injury accrues, or when the disabling consequences of the accident or injury become apparent or discoverable, rather than at or from the time of the happening of the accident from which the injury results; . . ." and in the more recent case of *T. J. Moss Tie & Timber Co.* v. *Martin,* 220 Ark. 265, 247 S. W. 2d 198, in which we, in effect, reaffirmed what we said in the Donaldson case above, we used this language: ". . . the time of injury from which the statute commences to run means the time when the disabling consequences of the accident or injury become apparent or discoverable, rather than the time of the happening of the accident from which the injury results. In short, we held that the time of injury meant the time when the injury becomes compensable."

It is elementary that the circuit court on appeal from the commission, as well as this court on appeal from the circuit court, must give to the findings of fact by the commission the same verity that would attach to a jury's verdict, or to the findings of the circuit court sitting as a jury. In other words, if we find any substantial evidence to support the findings of the commission and the judgment of the circuit court, we must affirm. *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Hughes* v. *Tapley,* 206 Ark. 739, 177 S. W. 2d 429; *Johnson* v. *Little Rock Furniture Mfg. Co.,* 206 Ark. 1016, 178 S. W. 2d 249; *Kloss* v. *Ford, Bacon & Davis,* 207 Ark. 115, 179 S. W. 2d 172; *Fordyce Lbr. Co.* v. *Shelton,* 206 Ark. 1134, 179 S. W. 2d 464; *Barrentine* v. *Dierks Lbr. & Coal Co.,* 207 Ark. 527, 181 S. W. 2d 485; *McKamie* v. *Kern-Trimble Drilling Co.,* 229 Ark. 86, 313 S. W. 2d 378; *Carty* v. *Ward Furn. Mfg. Co.,* 229 Ark. 725, 318 S. W. 2d 148.

Accordingly, we affirm.

Justice JOHNSON not participating.

TRADERS & GENERAL INS. CO. *v.* WILLIAMS.

5-1721 319 S. W. 2d 847

Opinion delivered January 12, 1959.

[Rehearing denied February 9, 1959]

Shaw, Jones & Shaw, for appellant.

Roy Dunn, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is in an action filed by appellee, Williams, against the appellant, Traders & General Insurance Company (hereinafter called "Insurance Company"), for recovery under a policy.

On March 28, 1957, the Insurance Company issued to Williams a policy insuring him against collision damage, in excess of $50.00, to his new 1957 Chrysler New Yorker automobile, which had a list price of $5,700.00. On December 3, 1957 the automobile was damaged in a collision. Williams claimed the damage to be $2,050.00.

The Insurance Company refused to do anything about paying the damage or repairing the car unless and until Williams would sign a release, and then the Insurance Company would undertake to have the car repaired at an expense of approximately $300.00. When Williams refused to sign such a release, the Insurance Company cancelled his policy as of February 1, 1958 and owed him $47.11 return premium, which was never paid.

Williams filed action against the Insurance Company on March 3, 1958 and claimed damages of $2,000.00, plus penalty and attorney's fee, and plus the $47.11 return premium due him. He attached a copy of the insurance policy as an exhibit to the complaint[1] and alleged the facts substantially as above stated. After the Insurance Company's demurrer was overruled, answer was filed containing a general denial and pleading a limit of liability. There was a jury trial, with judgment for appellee for $2,000.00, plus $47.11 refund on premium, plus 12% penalty, and plus $750.00 attorney's fee. On appeal appellant urges the three points herein listed and discussed.

I. *Overruling Demurrer.* The Insurance Company demurred to the complaint, saying, (a) that it did not state facts sufficient to constitute a cause of action; and (b) that the measure of recovery alleged in

[1] The complaint also contained these allegations: "On December 3rd, 1957, at a time when said insurance was in full force and effect plaintiff's car herein described was damaged by collision. The value of said car immediately before the collision was $3,850.00, and the value of said car immediately after the said collision was $1,800.00. The loss to plaintiff by reason of said collision was $2,050.00 . . . "Plaintiff has made demand for payment on the Insurance Company and repeatedly requested the Traders & General Insurance Company to comply with its contract with plaintiff, but said defendant has failed and refused to do so and on January 22nd, 1958, C. A. Phillips, Special Agent for Traders & General Insurance Company, and while acting within the scope of his authority, called on plaintiff in Booneville, Arkansas and stated that defendant, Traders & General Insurance Company, did not intend to comply with its contract and it was plaintiff's next move. That the Agent, Phillips, on the date he called on plaintiff in Booneville signed and executed a 'Notice of Cancellation of the aforesaid policy' and caused it to be delivered to plaintiff, said notice being to the effect that the Policy of insurance herein sued on was cancelled by the defendant, Insurance Company, as of February 1st, 1958, making no offer or tender of return of any portion of the paid premium."

the complaint (the difference in value before and after the collision) was not the correct measure of damage. The Court was correct in overruling the demurrer. The complaint alleged that the Insurance Company had cancelled a policy of insurance and refused to return the unearned premium, and the complaint prayed for such return. The complaint also alleged that the Insurance Company had issued a policy insuring against collision; that there had been a collision; that the Insurance Company had admitted liability but had failed and refused to pay the loss; and that the plaintiffs were entitled to recover $2,000.00 under the policy. Whether the damage to the car was more or less than the limit of liability, was a matter that could not be established until the evidence was offered. The complaint stated a cause of action for recovery.

II. The appellant says: "*The court erred in permitting evidence to be introduced as to the difference in the fair market value of the plaintiff's vehicle immediately before and immediately after the accident.*" This brings us to the most vigorously contested point on the appeal. The policy issued to Williams contained this language as to the liability of the Insurance Company for collision damage:

"*Limit of Liability.* The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor the applicable limit of liability stated in the declarations; . . ."

Appellant insists that the appellee sought to prove damages by the "value method" — that is, the difference in the fair market value of the car before and after the collision — rather than by the "cost of repair method"; and appellant says that the Court erred in allowing all such evidence as to the value method. Appellant points out that witnesses for Williams stated that

the value of the car before the collision was $3,900.00 and that the value after the collision was somewhere between $1,200.00 and $1,800.00. Appellee counters with the arguments: (a) that he not only introduced evidence of "value", but also introduced evidence of "cost of repair"; and that (b) the Court instructed the jury that the Insurance Company's *limit of liability* was the cost of repair, and the case was submitted to the jury on that basis.

The record sustains the appellee on both of his answers. The witness, Grady Starling, was the Chrysler dealer at Booneville who had sold the car to Williams. Starling also operated a repair department and was familiar with the cost of repairs; and after the collision he checked the car as to the cost of labor and parts to make the necessary repairs. He itemized the parts and the cost of each. The total cost of the parts was $1,312.94; and the cost of the labor to repair the car was $740.00; making a total cost of repair of $2,052.94. Starling testified that even this expenditure would not make the car as good as it was before the collision, but that the expenditure of $2,052.94 was necessary to repair the car.

The Trial Court instructed the jury in Instruction No. 5, requested by the Insurance Company:

"You are instructed that the policy or contract between the plaintiff and defendant, Traders & General Insurance Company, provides that in the event of a collision involving the plaintiff's vehicle, the defendant is, under the terms of said policy or contract, liable only for the reasonable cost[2] of repair of said vehicle or for the cost of replacing any parts of said vehicle which may have been damaged as a result of the said collision, with other parts of like kind and quality."

Thus, there was evidence offered by the plaintiff not only as to the damage to the car but also as to the

[2] In Instruction No. 7 the Court further reduced the plaintiff's recovery by the amount of $50.00, which was the deductible amount under the policy.

cost of repairs and the instruction told the jury that the defendant's limit of liability was the cost of repair, provided the repair would "replace the property".

The appellant insists that all the evidence of *value before and after the collision* was inadmissible and prejudicial; but we do not agree with such contention.[3] The Insurance Company delivered to Williams a policy which stated in the coverage section as regards collision, ". . . to pay for loss caused by collision to the owned automobile . . . but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto". (The deductible amount was stated at $50.00.) So, in the light of the above quoted section, the Insurance Company was liable for all collision loss in excess of $50.00. What was the loss? Unless otherwise limited, it was the difference in value before and after the collision. But in another section of the policy the Insurance Company had limited its liability as regards collision loss to, ". . . what it would then cost to repair or replace the property or such part thereof with other of like kind and quality . . ."

When we consider together these two sections of the policy, it is clear that Williams was entitled to show (a) his loss by the "before and after" value rule; and then (b) to completely establish that his loss was within the limit of liability he could show the cost of repairs. There was certainly no error in allowing the evidence offered, and the instruction given by the Trial Court at the request of the defendant made the point clear.[4]

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[3] In 43 A.L.R. 2d 327 *et seq.* there is an annotation entitled, "Measure of recovery by insured under automobile collision insurance policy", in which cases with various policy provisions are listed and discussed. Three of our cases somewhat similar to the one at bar are *National Ins. Co.* v. *Dalton*, 214 Ark. 120, 214 S. W. 2d 507; *Motors Ins. Corp.* v. *Lopez*, 217 Ark. 203, 229 S. W. 2d 228; and *Resolute Ins. Co.* v. *Bailey*, 221 Ark. 419, 253 S. W. 2d 771.

[4] The Court also further explained to the attorneys for the Insurance Company the purport of his holding when he declared to them in the course of the instructions: "The Court has permitted the introduction of evidence as to what the fair market value of the plaintiff's car was immediately before the collision and as to what the fair market value was immediately after the collision. The Court permitted the in-

III. *Attorney's Fee.* The judgment reflects that the Trial Court heard evidence as to what would be a reasonable attorney's fee and then fixed the fee at $750.00. We cannot find such evidence in the record regarding the fixing of attorney's fee; but, even so, we hold that the fee fixed is not excessive.[5] The statute regarding the liability of an insurance company for penalty and attorney's fee for failure to promptly pay a reasonable loss is § 66-514 Ark. Stats. It is hard to conceive of a more arbitrary position than the Insurance Company took in its dealings with Williams. When the insured refused to agree to the Insurance Company's demands, the Company cancelled the policy; and to make matters worse, refused to return the unearned premium. When the insured brought action, the Insurance Company contested every step, but without success.

The Court fixed the attorney's fee at $750.00, which was evidently intended to take care of the fee on appeal as well as in the Trial Court, because we find this language in the appellee's brief:

"Some of the obvious matters, which the trial court considers in fixing the fee, are the amount of work involved, the amount in dispute, the skill required, and whether an appeal is taken and if so, what is involved on appeal. . . . the maneuvers of the company representatives indicated that the company had no intention of paying its coverage until compelled to do so by this appellate court."

The fee fixed is not excessive for trial of a case like this before a jury and then the briefing and handling of the case on appeal.

The judgment is in all things affirmed.

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troduction of that evidence only for the jury's consideration in determining the company's liability under the provisions of the policy, as you have been instructed by other instructions herein. Such is not the measure of the defendant's liability."

[5] In 10 Ark. Law Review 439, there is an article entitled, "One State's Experience with the Statutory Remedy for Insurer's Delays: A Problem in Payment." This article contains a splendid study of our cases in reasonable attorney's fees.

KING *v.* CARDIN.

5-1683 319 S. W. 2d 214

Opinion delivered January 12, 1959.

Wright, Harrison, Lindsey & Upton, for appellant.

James C. Cole, for appellee.

George Rose Smith, J. This is an action for the wrongful death of Grover C. Dyer, who was struck and killed by a dump truck being driven by the appellant, Dyer's fellow employee. The jury returned a verdict for the appellee, Dyer's administratrix, fixed the damages at $5,000 for the estate and $45,000 for the decedent's widow and children, and attributed 5 per cent of the total negligence to Dyer.

A principal contention for the reversal of the judgment is that there is no proof of negligence on the part of the appellant. Our study of the record convinces us that the testimony presented a question for the jury on this point.

Dyer and King were employed by a contracting company, which was repaving with asphalt a highway south of Malvern. The hot asphalt is spread by what is called a Barber Green machine, which is a wide self-propelled vehicle that lays the asphalt along one entire traffic lane. As this machine moves slowly forward dump trucks carrying asphalt back up one at a time to a hopper at the front end of the machine, and the machine continues in motion and pushes each truck while the asphalt is being dumped into the hopper. The asphalt passes through the Barber Green machine and is distributed at the rear end of the machine in an even layer upon the highway. The operation requires a crew of ten or twelve men, some of whom work ahead of the machine, preparing the roadway, while others work behind the machine, smoothing the freshly laid asphalt.

On the day of the accident the west half of the highway was being repaved, in a northerly direction, with the east lane open to one-way traffic. King, who had arrived with a load of hot asphalt and had turned his truck around, started backing southward toward the front end of the Barber Green machine. King's backward movement was directed by another employee, Carl

Williams, who stood on the west shoulder of the highway near the front of the Barber Green machine. It was Williams' duty to align the dump truck so that its rear wheels would make proper contact with the rollers by which the moving Barber Green machine pushes the truck along while the hopper is being filled. At this time, however, the Barber Green machine was stationary, its operator having shut off the motor a short time earlier.

While King was backing toward the machine the decedent, Dyer, was walking in the same direction down the center of the highway. An unidentified car, traveling north in the east lane, came so close to Dyer that he stepped into the west lane, in the path of King's truck. Despite the shouts of Williams and others the truck hit Dyer and knocked him to the pavement. Dyer got up to his hands and knees, but the bed of the truck struck him and knocked him down again. He then tried to roll away, but his head was crushed by one of the wheels.

King's insistence upon his freedom from fault is based largely upon the assumption that Dyer was walking faster than the truck was traveling and had just passed the truck when he stepped into its path and was struck in practically the same instant. The testimony of the witness Cloud supports this view, but there is other substantial evidence indicating that Dyer had been ahead of the truck for an appreciable time before he stepped into the west lane. Two witnesses thought the truck was backing too fast; they estimated its speed at about eight miles an hour, which exceeds a man's walk. The witness Isaac Bell testified that Dyer was standing still with his back to the truck when he was hit.

On the issue of negligence there was also testimony that after Dyer was hit the second time the truck rocked as if the brakes had been applied, but then the truck continued to back and struck Dyer again. It was also shown that it was understood by all the crew that dump trucks were not to be backed up to the Barber Green

machine while its motor was shut off. The operator of the machine testified that when he turned off the motor King's truck had not begun to back and was standing still about a hundred feet away.

The appellant objected to the testimony about the practice just mentioned, but we think it was a proper matter for the jury to consider. The Barber Green machine was the hub around which the activities of the whole crew revolved. When the machine was stopped the trucks were not to come up to it, for the newly laid asphalt might be damaged if a vehicle backed against the machine while it was stationary. Even though the practice was not adopted as a safety measure, the jury could take it into account as a factor bearing upon the negligence of King and the contributory negligence of Dyer.

We find no error in the court's refusal to give an instruction telling the jury in substance that if King as a prudent person was backing his truck under the direction of Williams, and if Williams was in a position to observe the roadway behind the truck, then King had a right to rely upon Williams and a right to assume the roadway was clear and would not be negligent merely by reason of backing his truck under those circumstances. This instruction disregarded King's possible negligence in starting to back while the Barber Green machine was idle and might have erroneously precluded the jury from considering that fact.

Nineteen days before the trial the defendant, by interrogatories, asked for the names of the witnesses that the plaintiff expected to call to prove certain specified allegations of the complaint. Ark. Stats. 1947, § 28-355. Two days after the service of the interrogatories the plaintiff answered that her attorney informed her that he expected to present three named persons as witnesses to the facts mentioned. At the trial, however, the plaintiff called three additional witnesses not named in her answer to the interrogatories. In reply to the defendant's objection to the testimony of these wit-

nesses plaintiff's counsel explained that he did not discover or interview these witnesses until after the interrogatories had been answered. The court then overruled the objection and allowed the witnesses to testify.

The appellant insists that the plaintiff was under a duty to amend her response when additional witnesses were found. Otherwise, it is pointed out, a party can never obtain the names of witnesses discovered by his adversary within fifteen days before trial, as the statute allows that much time for answering interrogatories. We agree with this reasoning and hold that the additional names should have been supplied by amendment. It does not appear, however, that the omission was prejudicial in this case. The three additional witnesses were all members of the paving crew and would normally be interviewed in a routine investigation by the defendant. They were in no sense surprise witnesses; indeed, the defendant did not assert surprise as a basis for his objection to their testimony. In the absence of prejudice there is no reversible error. *Phoenix Cement Sidewalk Co.* v. *Russellville Water & Light Co.*, 101 Ark. 22, 140 S. W. 996.

We are not impressed by the argument that the Workmen's Compensation Act prevents an employee, or his personal representative, from maintaining an action for the negligence of a fellow employee. Our statute merely provides that the remedies under the act are exclusive of other remedies against the employer. Ark. Stats., § 81-1304. The making of a claim for compensation does not affect the right of the employee or his dependents to maintain an action against a third person. § 81-1340. Under a statute like ours a negligent coemployee is regarded as a third person. *Botthof* v. *Fenske,* 280 Ill. App. 362; *Kimbro* v. *Holladay,* La. App., 154 So. 369; *Churchill* v. *Stephens,* 91 N. J. L. 195, 102 Atl. 657.

The only other point that need be discussed is the size of the verdicts. The award of $45,000 for the widow and children is not excessive. Dyer, a man of forty-

nine with an expectancy of more than twenty-one years, had been earning from fifty to sixty-five dollars a week. He was survived by his widow and nine children, the youngest of the four minor children being only four years old. In view of the pecuniary loss to his dependents and the mental anguish shown by the proof we do not regard the award as excessive.

On the other hand, the evidence does not support the $5,000 verdict in favor of the estate. The funeral expenses, including a monument, totaled only $1,263.30; so the rest of the award must represent compensation for pain and suffering. There is no indication that Dyer was conscious after his head was struck by the wheel of the truck. Nor is there any proof that he actually experienced pain during the two or three seconds that elapsed after he was first felled by the slowly moving vehicle. In the absence of proof the record does not sustain an award of more than $50 as essentially nominal damages for the striking.

The judgment is affirmed on condition that a remittitur of $3,752.33, which is the excess when Dyer's contributory negligence is taken into account, be filed within seventeen calendar days; otherwise the judgment will be reversed and the cause remanded.

JOHNSON, J., not participating.

CENTRAL ARK. MILK PROD. ASSOC. *v.* CONSUMER'S WAREHOUSE MARKET, INC. ET AL.

5-1723 319 S. W. 2d 511

Opinion delivered January 12, 1959.

Bryan & Fitzhugh, for appellant.

Hardin, Barton, Hardin & Garner, Bethel & Pearce & Lawson Cloninger, Heilbron & Shaw, Owens, McHaney, Lofton & McHaney, for appellee.

PAUL WARD, Associate Justice. This litigation questions the application of Act 380 of the 1955 General Assembly (Ark. Stats. § 70-701-707) which deals with the price to be charged for milk. Appellant is the Central Arkansas Milk Producers Association, Incorporated, hereafter referred to as CAMPA, which was created by Act 153 of 1939 (Ark. Stats. § 77-1001-1025). Members of CAMPA are dairy farmers who sell raw milk to processors who, in turn, sell the processed milk to retail grocery stores at wholesale for resale, at retail prices, to ultimate consumers. Appellees are some 6 or 8 retail grocery stores located in Fort Smith.

CAMPA petitioned the Sebastian Chancery Court to enjoin each of the appellees from selling milk at retail at any price below what the milk cost it plus 4%, thereby seeking to invoke the provisions of said Act 380.

In response to said petition appellees entered demurrers which were sustained by the Chancellor on the ground (a) that said Act 380 does not apply to the sale of milk by retail grocery stores, and (b) that said Act was unconstitutional.

Plaintiff, electing not to plead further, prosecutes this appeal.

The prohibition is directed against persons engaged in *processing* and *distributing* milk. The decisive question is: Is a retail grocery store engaged in *distributing* milk within the meaning of the Act?

(a) A careful analysis of the language used in said Act 380 impels us to agree with the Chancellor's holding that it does not apply to retail grocery stores. There

are several provisions in the Act that cannot be reconciled with any other view. *First.* Section 1 of the Act contains this language: "However, it is the intention of this Act to prevent any person, firm or corporation engaged in the business of processing and/or *distributing* milk from lowering its selling price below cost, as herein defined, plus four (4%) per centum, except as hereinafter stated." It is obvious that the retail grocery stores do not *process* milk and we do not think they *distribute* milk in the sense that the word is used in the Act, as we will attempt to show later. *Second.* Section 2 defines the term "Equivalent competitive prices" as "any legal wholesale or retail price, not less than the minimum prices provided herein, at which fresh fluid milk is sold, advertised, or offered for sale by a competitor who sells not less than *five* (5%) *per centum* of the total fresh fluid milk sales in that county" (our emphasis). This clause makes sense only when applying it to the relatively few *processors* or *distributors* which would ordinarily be found in any county, but it makes no sense if applied to grocery stores in many counties, such as Sebastian County. It seems unlikely that any one grocery store would ever sell more than 5% of all the milk sold in the county. *Third.* The Act purports to prohibit the sale of milk for less than cost plus 4%. Section 3 defines the word *cost* to "include the price the processor or distributor pays the producer . . ." We believe it is common knowledge that in most instances the *producer* does not sell directly to the grocery store, but to some "middle man" such as a *processor* or *distributor.* By this we are persuaded to believe that the framers of Act 380 did not mean for the word *distributor* to include a grocery store. *Fourth.* In addition to the above, Section 3 sets out the method of arriving at what constitutes *cost.* It seems clear to us that this method might reasonably apply to a *processor* and also to a *distributor* if the latter refers to a wholesaler of milk as we think it does, but we fail to see how it could reasonably apply to a *distributor* if that word was meant to include a retail grocery store. Here are

some of the items of cost that are included: Labor, rent, interest, depreciation, selling costs, maintenance of equipment (and we know of no special equipment needed by a grocery store in order to sell milk), salaries of officers and executives, transportation, credit losses, all types of permit and license fees, all taxes, insurance, advertising, and all overhead expenses of doing business. Bearing in mind that a retail grocery store sells several hundred different items in addition to milk, we cannot believe the legislature meant for the owner of a retail grocery store to allocate the right proportion of the various expense items to the sale of milk. *Fifth.* In addition to the foregoing, Section 4 contains many provisions relating to a determination of *cost* that could not reasonably be meant to apply to a retail grocery store. Some of these are the allowance of rebates, commissions, discounts, extending certain privileges to certain customers, furnishing free equipment, etc.

Reading Act 380 as a whole and particularly because of many of its provisions as set forth above, we are driven to the conclusion that it was not meant to apply to the sale of milk by retail grocery stores, and consequently does not mean for the word *distributor* to include such stores.

It is generally recognized in the milk industry as it is now developed that *distributors* often buy milk from processors and then sell it at wholesale to the grocery stores or deliver it in trucks to the consumer. Thus, a *distributor* is engaged in a separate and distinct business from that of a retail grocery store.

Appellant attaches much significance to language in section 2 where the Act is made applicable to anyone engaged in the "business of processing and/or distributing fresh milk, either at *retail* or wholesale." (our emphasis) However we can see no inconsistency between that language and the view which we have taken. In fact, even under our interpretation, it still could be the purpose of the Act to keep a processor from sell-

ing below cost plus 4% to the consuming public, hence the use of the necessary language.

(b) The question of the constitutionality of Act 380 has been raised and discussed by both sides, but the conclusion which we have heretofore announced makes it unnecessary for us to render any opinion on it.

We have consistently refrained from deciding constitutional questions unless it was necessary to do so. See: *Porter* v. *Waterman,* 77 Ark. 383, 91 S. W. 754 and *Com. of Labor, C. R. Thornbrough* v. *Danco Construction Co.,* 226 Ark. 797, 294 S. W. 2d 336.

The decree of the trial court is therefore affirmed.

Justice JOHNSON not participating.

Justices MCFADDIN and ROBINSON concur.

ED. F. MCFADDIN, Associate Justice, concurring. I agree with the result reached by the majority; but I think it would have been much simpler to have declared the Act No. 380 of 1955 to be unconstitutional, and that such result would have saved all the wording about "producers," "processors," or "distributors."

In my concurring opinion in *Union Carbide* v. *White River Distributors,* 224 Ark. 558, 275 S. W. 2d 455, I said I considered the entire Act No. 92 of 1937 (the "Arkansas Fair Trade Act") to be unconstitutional under the authority of our own case of *Noble* v. *Davis,* 204 Ark. 156, 161 S. W. 2d 189. By the same token, I consider the entire Act No. 380 of 1955 to be unconstitutional; and to me it seems easier to so state, and save all persons any thought that by getting the Legislature to revamp price-fixing acts, the Court may ultimately hold them constitutional. *Noble* v. *Davis, supra,* settles that point.

NEVIL C. WITHROW CO., INC. *v.* HEBER SPRINGS SCH. DIST.

5-1718 320 S. W. 2d 95

Opinion delivered January 12, 1959.

[Rehearing denied February 16, 1959]

H. B. Stubblefield, for appellant.

Leon Reed, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a judgment of the Pulaski Circuit Court, Second Division, made and entered on the 28th day of May, 1958, setting aside a judgment entered on the 29th day of February, 1952. The complaint asking that the 1952 judgment be set aside was filed January 21, 1958. As a ground to set aside the 1952 judgment the complaint alleges that it was fraudulently obtained within the meaning of Ark. Stat. § 29-506. That statute provides that the trial court has authority to set aside a judgment after the expiration of the term "for fraud practiced by the successful party in the obtaining of the judgment or order".

In 1951 the appellant, Nevil C. Withrow Co., Inc., filed suit in the Pulaski Circuit Court naming Maryland Casualty Company, a resident of Pulaski County, and Heber Springs School District, a resident of Cleburne County, as defendants. Others, including Joe P. Melton,

trustee in bankruptcy for Baxter Miles, also were named as defendants, but only the defendant Maryland Casualty Company was a resident of Pulaski County. The Heber Springs School District was served with summons in Cleburne County on August 14, 1951. The school district filed no answer, nor did it enter its appearance in any manner. On February 29, 1952, Withrow took a default judgment against the school district. No judgment was taken against the Maryland Casualty Company. Withrow made no effort to collect the judgment until 1958. It was then that the school district filed this suit to set aside the 1952 judgment. After a hearing, the circuit court ordered that the 1952 judgment be set aside. Withrow has appealed.

There is only one issue: Did Withrow's action in procuring a judgment in Pulaski Circuit Court amount to a fraud within the meaning of Ark. Stat. § 29-506, subdivision (4)? If so, the 1958 judgment setting aside the 1952 judgment must be affirmed; otherwise reversed. In the circumstances of no judgment being obtained against Maryland Casualty Company, the local resident, if the school district had been present and objected to a judgment being rendered against it, the court would have sustained the objection. Ark. Stat. § 27-615; *Ark.-La. Gas Co.* v. *Tuggle,* 201 Ark. 416, 146 S. W. 2d 154. But, regardless of Withrow's right to a judgment against the school district in the first instance, it cannot be set aside in the present action unless Withrow practiced a fraud in obtaining the judgment. There is no issue in the case at bar of whether the school district waived the question of venue.

We fail to see how anything resembling fraud, actual or implied, occurred in this case. Withrow's 1951 complaint alleges that the school district was organized and operating in Cleburne County. There is no allegation in the complaint to lead anyone to believe that service could be had on the school district in Pulaski County. In fact, the 1952 judgment against the school district recites that the summons was served in Cleburne County.

Moreover, it appears that on September 24, 1951, the school district was notified by registered mail that Withrow would insist on a judgment. To sustain its position appellee relies heavily upon *Terry* v. *Plunkett-Jarrell Grocer Co., et al.,* 220 Ark. 3, 246 S. W. 2d 415, 29 A. L. R. 2d 1264, but the issue there was whether service should be quashed in the original suit, and it was held that certain parties in Saline County were not *bona fide* defendants, and for that reason the service obtained on Plunkett-Jarrell and others in Pulaski County should be quashed. Here, there was no motion to quash service or any objection to the judgment in the first instance. The case at bar is a separate suit to set aside a judgment on account of alleged fraud in obtaining it. Ark. Stat. § 29-508; *Clark* v. *Bowen,* 186 Ark. 931, 56 S. W. 2d 1032. In *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234, this Court said: "The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, . . . It must be a fraud practiced upon the court in the procurement of the judgment itself."

Here it cannot be said that any fraud was practiced upon the court in obtaining the judgment. Everything was open and aboveboard. All the facts concerning the service of summons appeared on the face of the record.

Reversed and dismissed.

HOT SPRING CO. ARK. *v.* PRICKETT.

5-1739 319 S. W. 2d 213

Opinion delivered January 12, 1959.

W. R. Thrasher & Bill Demmer, for appellant.

James C. Cole, for appellee.

SAM ROBINSON, Associate Justice. Appellee owns a house and lot in Hot Spring County, just north of the city limits of Malvern. The ground is 308 feet in width at the front, where it joins the right of way of Highway 67, and it is 210 feet in depth. Fifteen feet across the entire front was taken for the purpose of improving Highway 67. Appellee filed a claim in the sum of $15,000 for loss of the ground taken, plus damages to the remainder. Upon a trial in circuit court, a jury returned a verdict for $8,000. Appellant, Hot Spring County, has appealed, and contends that the verdict is excessive; that there is no substantial evidence to support the amount of the verdict. Appellant produced three expert witnesses, one of whom said the damages amount to $900, and the other gave a figure of $1,500 as damages.

To prove his damages, appellee introduced in evidence several pictures of the property before the highway was widened and the grade lowered, and also several pictures of the condition of the property after the new work on the highway was completed. Appellee contends that these pictures, without additional evidence, support the verdict, but we fail to see anything in the pictures indicating that appellee has been damaged to the extent of $8,000. In addition to the pictures, appellee produced two witnesses who gave testimony of the amount of damages. Appellee, Prickett, testified that there has been a depreciation in value of $25,000 because of the taking. It is not shown that he has had any experience in the real estate business, and there is no showing whatever as to how he arrived at the $25,000 damages. He gave no facts to sustain his conclusion. True, he testified that the place cost $60,000, including the cost of improving the land and building the house, but he is an interested party, and his testimony on that point is not corroborated.

In addition to himself, appellee produced only one witness, Judy Carlisle, to prove damages. She testified that she has been a real estate agent since 1954; that the property before the taking was worth $58,000 and since the taking it is worth $40,000 — damages of $18,000. She had been in Malvern only about six months at the time she gave her testimony, although she had been in and out of the city for about three years. Apparently the only sale of real estate that she has made in or around Malvern is a 160 acre farm which sold for $20,000. Her business is primarily dealing in farms and ranches, and she has not bought or sold any residential property in Malvern. She testified that the value of the Prickett lot in itself was $9,000 before the taking and $6,000 thereafter. She also said that if the property were used for business purposes it would not be as accessible as it was before the taking, but its best and most valuable use is for residential purposes, and she sees no prospect of its being used for any other purpose. She also testified that the only other lots in that community that she knows of for sale are priced at $3,000, but no one has bought at that price. It cannot be said that the testimony of this witness standing alone, excepting the testimony given by appellee himself, is substantial evidence. See *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, and cases cited therein, and *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477.

Reversed and remanded.

BRINTON *v.* CITY OF JONESBORO.

4931 320 S. W. 2d 272

Opinion delivered January 19, 1959.

[Rehearing denied February 23, 1959.]

[redacted]

McCourtney, Brinton, Segars & Ellis, for appellant.

Gerald E. Pearson, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the construction of ordinance No. 757 of the city of Jonesboro, Arkansas, which provides for payment of an annual occupation tax by persons, firms, and corporations engaged in certain occupations, vocations, professions, etc. Appellant was charged on March 8, 1957, with "engaging in or carrying on the profession of an attorney without first procuring an occupation license for year 1956 * * * , and did fail, neglect or refuse to pay said occupation tax for year 1956 * * * ," was convicted of said offense in Municipal court on April 1, 1957, and fined $37.50 and costs. On appeal to the Circuit court, this judgment was affirmed. Appellant is a member of the bar, duly licensed to practice, resides in Jonesboro, and is associated with other attorneys un-

der the firm name of McCourtney, Brinton, Gibbons and Segars. The case was submitted upon an agreed statement of facts, such stipulation providing *inter alia* that

"McCourtney is the head of the firm in general, controls all litigation, makes the business arrangements with clients, makes the decisions in general and in the conduct of each litigation, determines the retainers and fees, maintains the office space, owns and maintains the library, buys the books and stationery, is responsible for the payment of all contractual obligations of the firm, the fees are paid to him and he pays the costs and expenses of the litigations, the profit or loss is his on each case and upon the general business. (5) Brinton, Gibbons and Segars do not share in the profits and receive no division of the fees; each receive a salary for services; the head of the firm pays social security on each of them. (6) That there are four stenographers, one bookkeeper and accountant, two investigators or collectors and one janitor connected with the firm and Mr. McCourtney pays salary or other remuneration to each of them. (7) It is conceded that the defendant did not pay the occupation tax for 1956."

It is also stipulated that during the year 1956, Brinton appeared in the Municipal, Circuit, Chancery and Federal courts for litigants.

The constitutionality of the ordinance is not questioned. Appellant simply contends that he is not liable for the payment of the tax under the stipulation, ordinance, or the statute authorizing the ordinance. It is also contended that even if appellant is liable for the tax under the provisions of the law, this particular prosecution is barred by the Statute of Limitations. There are, accordingly, two issues before the Court on this appeal. 1. Is appellant liable for the occupation tax? 2. If liable, does the Statute of Limitations bar this prosecution?

The ordinance, authorized by Section 19-4601, Arkansas Statutes (1947) Annotated, provides that it shall be unlawful for any person, firm or corporation, in the city of Jonesboro, to engage in or carry on certain busi-

nesses, occupations, vocations, professions, trades, or callings without first having obtained and paid a license, the amount of such license being fixed by the ordinance. The license, or tax, for lawyers is fixed at $25. Subsequent sections provide that each day of delinquency shall constitute a separate violation, provide a penalty of 20% of the amount of the tax, and subject the violator to a fine. Appellant asserts that under the stipulation, he is not engaged in the practice of law for himself, is only an agent for Mr. McCourtney, and is therefore not liable for the tax. In other words, he is simply McCourtney's employee, receiving a salary, and accordingly occupies the same status as the stenographers and other employees. Cases involving other occupations are cited, but we do not consider such cases pertinent to the issue at hand. Appellant is certainly engaged in the practice of law, as evidenced by his appearance in the various courts mentioned in the stipulation; the representation of litigants in court is practicing law, whether done as an individual, or under a firm name. One can only engage in the practice of this profession by being licensed to practice in his own right. He receives no license as an employee of another attorney. Individually, he stands as an officer of the court. In *Blanchard* v. *the State of Florida, ex rel.*, 30 Fla. 223, 11 So. 785, 18 L. R. A. 409, the question was whether two lawyers, associated as partners, were entitled to a license as a firm or partnership upon paying the license tax prescribed for one lawyer, or whether each was required to pay the prescribed tax. The Court, in its opinion, stated:

"The assertion that a firm or copartnership is in law one person is mistaken; it, on the contrary, is an association of several persons, and their firm name is but a short way of designating the several persons for the purposes of their association. Their separate personality is not lost, * * * ."

We consider appellant's contention to be without merit, and hold that he is subject to, and liable for the tax.

Section 10 of the ordinance provides as follows:

"All persons, firms or corporations failing or neglecting or refusing to pay their license or occupation tax between the first day of January and the 20th day of January of each year or within 20 days after the license or occupation tax becomes due, shall be subject to a penalty of twenty per cent (20%) of the amount of the license fee or occupation tax, as well as subject to a fine for having violated the Ordinance."

Appellant contends that the misdemeanor was completed on the day that Brinton became subject to the penalty, *i. e.,* January 21, 1956. The Information was filed March 8, 1957, more than one year after the aforementioned date, and he accordingly asserts that the offense is barred by the Statute of Limitations, citing Section 43-1603.[1] We do not agree. The Information charged that the offense was committed on December 31, 1956. While it is true that Brinton violated the provisions of the ordinance on January 21, 1956, it is equally true that he also violated the ordinance on December 31, 1956, and, for that matter, each day in between. *The pertinent fact is that he did not pay a tax for the year 1956* — that is the offense with which he is charged. The offense having been committed prior to the filing of the information, and on a day within the Statute of Limitations, appellant's contention must fail.

Judgment affirmed.

[1] Section 43-1603: "No person shall be tried, prosecuted and punished, for any offense less than felony, or any fine or forfeiture, unless the indictment be found or a prosecution instituted within one (1) year after the commission of the offense, or incurring the fine or forfeiture."

JETER *v.* WINDLE.

5-1730 319 S. W. 2d 825

Opinion delivered January 19, 1959.

[Rehearing denied February 23, 1959.]

[redacted]

Sloan & Sloan, for appellant.

Douglas Bradley, for appellee.

J. SEABORN HOLT, Associate Justice. Appellants, (Jeters) owners, constructed six adjoining business houses, or units, in a new shopping area (called Jeter Park) in the city of Jonesboro and on August 8, 1957 they leased one of these buildings to appellants, Mounce and Pinchback, for a term of five years. An adjoining building, or unit, was leased by them to appellees, Windles. The lease to Mounce and Pinchback contained this provision: ". . . It is understood between the parties that the property is rented by the Lessee for the purpose of carrying on or conducting drug store business, and such business is to be conducted in full compliance with all city ordinances and laws applicable thereto, and the Lessee agrees not to use said building for any

other purpose without first obtaining the written consent of the Lessors so to do."

The lease from the Jeters to the Windles contained a similar provision: ". . . the property is rented by the Lessees for the purpose of carrying on or conducting Cafe business, . . . and the Lessees agree not to use said building for any other purpose without first obtaining the written consent of the Lessors so to do . . ."

Some time after Mounce and Pinchback had occupied their leased building, they began operating, along with their drug business, a soda fountain and in addition, a grill dispensing food. At this point the Windles brought the present suit seeking to enjoin the Jeters, as owners and lessors, from permitting Mounce and Pinchback to operate a soda fountain and grill in conjunction with their drug store, and to enjoin Mounce and Pinchback from operating the soda fountain and grill, and in addition, sought substantial damages against appellants. The trial court held that the Jeters were bound by an oral covenant and agreement alleged to have been made prior to the leases not to permit competition by the drug store, and further held that Mounce and Pinchback had leased the drug store premises with notice of such equity and were likewise bound, and entered a decree enjoining appellants from permitting or conducting a grill or soda fountain in connection with the drug store and allowing the Windles damages in amount of $1,321.88 from the Jeters. This appeal followed.

At the trial it appears that the Windles were permitted to testify relative to certain preliminary negotiations leading up to the written leases. Paul Windle testified that in May 1957, prior to the execution of the leases, he made a verbal agreement with Winston Jeter to lease the building adjoining the drug store for cafe purposes, on condition and assurance, that no food or drink service would be allowed in any other of the six units of the shopping center in competition with Windle. Gladys Windle testified that in July 1957 (prior to the

date of the lease) she learned from W. R. Mounce that the drug store planned to install and operate a fountain and grill. She then complained to Winston Jeter and requested him to inform Mounce that no grill or soda fountain would be permitted. Thereafter, on July 15, 1957, Winston Jeter wrote a letter to Mounce containing these recitals: ". . . we have talked it over with all parties concerned, and we wish you to know we cannot lease the drug store building to anyone who wishes to operate a grill or soda fountain in connection, as per our understanding at start.

"We do not wish any conflict between the two stores, and wish to protect the investment of each . . ."

Following receipt of this letter Mounce (one of the owners and operators of Central Drug Store) informed the Jeters that they would not lease the building which they desired unless they were permitted to operate a fountain and grill in connection with their drug store. The Jeters then informed Gladys Windle, one of the appellees, that they had changed their minds and would not "police" the businesses. Thereafter, on July 23rd, the Jeters forwarded a draft of the lease contract with the Windles to them for their signature, along with a copy of the proposed drug store lease for their information. When the Windles discovered that the drug store lease above did not contain a clause prohibiting competition in food and drink, Gladys Windle consulted her attorney who prepared an additional clause to be embodied in the drug store lease above as follows: ". . . Lessors shall prohibit the use of any other part of the property described above for sale or dispensing of food or drinks to be consumed on the premises." The Windles admitted that the Jeters refused to accept the suggested clause.

For reversal of the decree appellants say that, "The cafe and drug store leases are completely integrated written agreements, and cannot be varied by parol evidence of a covenant not to permit competition by the operation of a fountain and grill, since the leases deal with

the use to be made of the premises." After a careful review, we have concluded that appellant's contention should be sustained.

No rule of law appears to be better settled than that where a written contract is plain, unambiguous and complete in its terms, parol evidence may not be permitted to contradict, vary or add to any of its provisions. In *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978, this court used this language: ". . . the cause of action herein sued on is founded upon an instrument which is a written contract, . . . The rule of law that is applicable to all written instruments . . . is, that parol testimony is inadmissible to contradict, vary or add to its terms. . . . where the written contract is plain, unambiguous and complete in its terms, it has been uniformly held by this court that parol evidence is not admissible to contradict or to vary or to add to any of its terms. (Citing many cases) Where the written contract is complete in its terms, it is incompetent to engraft thereon any condition by parol testimony . . . Antecedent propositions, correspondence, prior writings, as well as oral statements and representations, are deemed to be merged into the written contract which concerns the subject-matter of such antecedent negotiations when it is free of ambiguity and complete." ". . . When a written instrument contains such terms as import a complete obligation, which is definite and unambiguous, it is conclusively presumed that the whole agreement of the parties, and the extent and manner of their undertaking, were reduced to writing. In such cases, the instrument is in the nature of a contract, and cannot be varied or contradicted by parol evidence in the absence of fraud and mistake,—" *Wilson* v. *Nugent,* 174 Ark. 1115, 299 S. W. 18. We hold that all negotiations prior to the execution on August 8, 1957 of the leases involved here were merged into the written leases. In the circumstances, under the plain terms of their lease with the Jeters, Mounce and Pinchback were permitted to carry on or conduct a "drug store business." It is common knowledge that such business is not confined to operating an apothecary shop alone but that drug stores, as a general rule, fur-

nish grill and fountain service and also sell various sundries such as stationery, magazines, newspapers, etc. In a New Jersey case, *Crest Drug Store* v. *Levine,* 142 N. J. Eq. 652, 61 A. 2d 190, the court said that, "Modern drug stores are no longer apothecary shops. Where compounding of drugs is not altogether abandoned, the apothecary is but an incident, and it is common observation that the sale of drugs is negligible," and that, "It is common knowledge that many drug stores are department stores to a greater or lesser degree."

The decree is therefore reversed and the cause remanded with directions to dismiss the complaint and cross-complaint.

BURNS *v.* FIRST NAT'L BANK.

5-1700 319 S. W. 2d 827

Opinion delivered January 19, 1959.

J. Sam Wood, for appellant.

Bryan & Fitzhugh, for appellee.

ED. F. MCFADDIN, Associate Justice. This litigation involves the will of John O'Kane, who died in 1927 survived by his wife, Mrs. Clara O'Kane. Mr. and Mrs. O'Kane, both residents of Sebastian County, had no children or descendants. The appellants are some of the legal heirs of Mr. John O'Kane; and the appellee is the executor of the estate of Mrs. Clara O'Kane, who

died in 1957. The appellee filed this action against all the legal heirs of John O'Kane, seeking a construction of his said will; and from an adverse judgment the appellants prosecute this appeal. The portions of Mr. O'Kane's will germane to this litigation, are:

"THIRD: I give, devise, and bequeath unto my beloved wife, Clara O'Kane, absolutely, after payment of all of my funeral expenses and just debts and the legacies provided in section two of this will, the one-half part of all of the residue of my estate, real, personal, and mixed, of which I may die seized and possessed, to have and to hold the same unto her and unto her heirs and assigns forever.

"FOURTH: I give, devise and bequeath unto my beloved wife, Clara O'Kane, for and during her natural life, after the payment of my funeral expenses and just debts and the legacies provided for by article two of this will, the one-half part of all of my estate and property, real, personal and mixed of which I may die seized and possessed, to have and to hold the same unto her and to her assigns during her natural life, for her proper use, benefit, support and maintenance, and after her decease said property so devised and bequeathed or the remainder and residue thereof is to be divided among my legal heirs as provided by the laws of this State for the distribution of estates by descent. It being my express will and purpose by the above articles three and four, that after the payment of my debts and funeral expenses and the legacies hereinbefore set forth, that my wife should be invested with the whole of my said estate, one-half of which she shall hold for and during her natural life, and one-half she will hold absolutely in her own right in fee simple, in *lieu* of dower in my said estate.

"FIFTH: I do hereby authorize and empower my said wife, Clara O'Kane for the estate hereinbefore devised and bequeathed to her during her natural life by said article four of this will, to sell and dispose of the same for such prices and upon such terms as she may deem proper and for the best interests of my said estate,

and to make, execute and deliver such deeds and other papers as may become necessary to carry the same into effect, and it will only be necessary for her to refer to this will as her authority for so doing.

"SIXTH: I hereby appoint and constitute my wife, Clara O'Kane, as executrix of this my last will and testament and request that she shall be permitted to qualify and act as such executrix without giving bond. I further desire and request that no probate reports or other annual reports be required from my said wife and executrix.

"SEVENTH: I further will and direct that my said wife shall not be held pecuniarily liable for any loss to or diminution in the said property and funds."

The net estate of Mr. O'Kane, after satisfying all debts and specific legacies, was $36,804.57, consisting of both realty and personalty. When his estate was completely administered in Sebastian County in 1928, Mrs. O'Kane took charge of all of the said net of the estate. She did not keep her *fee portion* separate from her *life portion*; but when she died in 1957 she had remaining a total of $19,866.46, after paying all of her debts and specific legacies. There is no showing that Mrs. O'Kane had any separate estate except what she received from Mr. O'Kane.

In its action for construction of the will of Mr. O'Kane, the appellee insisted that the said net of Mrs. O'Kane's estate (that is, $19,866.46) should be divided, one-half to Mrs. O'Kane's heirs and one-half to Mr. O'Kane's heirs. This would mean that Mr. O'Kane's heirs would now receive slightly less than $10,000.00. The appellants insist that under Mr. O'Kane's will, his heirs at law are now entitled to receive one-half of the net amount of his estate when it was closed, — *i.e.*, $18,402.28, which was the amount of the life estate which Mrs. O'Kane received under the provisions of Mr. O'Kane's will, since more than that amount remained after Mrs. O'Kane's estate had been completely administered. The Probate Court agreed with the contentions of the appellee, and this appeal ensued.

It is crystal clear that Mr. O'Kane provided that his estate should go one-half to his wife *in fee* and the other one-half to his wife *for life only,* with the remainder to his legal heirs. The portions of the will heretofore copied definitely so provide. Whether Mrs. O'Kane could have invaded the corpus of the life estate for her necessary self-support is a matter that need not be discussed, because, after paying all of her debts, she left more than the net value of the life estate. What she did with her fee interest is not before us. In short, Mrs. O'Kane received from Mr. O'Kane's estate a net of $18,402.28 for life, with power of disposal; and our cases recognize the legality and enforceability of life estates with power of disposition, whether the estate be realty or personalty or mixed. *Galloway* v. *Sewell,* 162 Ark. 627, 258 S. W. 655; *United States of America* v. *Moore* (and cases therein cited), 197 Ark. 664, 124 S. W. 2d 807; and *Weeks* v. *Weeks,* 211 Ark. 132, 199 S. W. 2d 955.

The Probate Court's judgment in effect treated Mr. O'Kane's will as though he had left his entire estate to Mrs. O'Kane with power of disposition for her support, because the Probate Court *divided the net remainder* which she had at the time of her death into two equal parts. Such a result defeats Mr. O'Kane's expressed directions concerning the life estate. He did not give Mrs. O'Kane the entire estate to be divided into two equal parts at her death: he gave her one-half of the estate in fee, and one-half for life, with the remainder to his legal heirs. The fact that Mrs. O'Kane did not segregate the life estate from the fee estate is of no consequence, since there remained, after closing her estate, more than the value of the life estate. (See *Chambers* v. *Williams,* 199 Ark. 40, 132 S. W. 2d 654.) So we conclude that the appealing heirs of Mr. O'Kane are entitled to their share of the value of the life estate received by Mrs. O'Kane — that is, $18,402.28.

The foregoing holding makes it unnecessary to discuss the other matters urged in the briefs. The judgment of the Probate Court is reversed, and the cause

remanded for proceedings not inconsistent with this opinion.

JOHNSON, J., not participating.

QUINN *v.* STUCKEY, ADMR.

5-1697 319 S. W. 2d 839

Opinion delivered January 19, 1959.

Bruce Ivy & James E. Hyatt, Jr., for appellant.

J. G. Waskom & John S. Mosby, for appellee.

ED. F. MCFADDIN, Associate Justice. The Trial Court sustained a demurrer to the complaint and dismissed the case. The plaintiffs (appellants) have appealed; and the sole issue is whether the complaint stated a cause of action.

The plaintiffs, as the heirs at law of Esther Lidell Sisson Goodin, brought this suit against the defendants, who together constitute all those interested in the estate of Joe Dean Goodin. The complaint alleged that Joe Dean Goodin, the husband, and Esther Lidell Sisson Goodin, the wife, were married on December 18, 1930; that they each then had only a very small estate; that at or shortly after the marriage, the said husband and wife entered into an oral agreement to form a partnership, for the purpose of acquiring lands and other properties and operating the same under the name and style of J. D. Goodin; that by the terms of said agreement, each of the parties was to and did contribute to the said partnership all of his or her property, capital, labor, and services, and each was to share jointly in the profits of the partnership; that all of the property was to be

held and used for their mutual benefit during their joint lives.

We now copy certain of the germane allegations of the complaint, against which the demurrer was sustained:

". . . that at the time of their marriage the said Esther Lidell Sisson Goodin and Joe Goodin entered into an oral agreement to form a partnership or joint adventure for the purpose of acquiring lands and property and operating farms in Poinsett County, Arkansas, under the name and style of Joe Dean Goodin or J. D. Goodin. By the terms of said agreement, each of said parties was to and did contribute to said partnership or joint adventure all of his or her property, capital, labor, and service, and each was to share equally in the profits, income, increments, losses, and labor of said partnership or joint adventure; that all of the property, profits, income and increments acquired and held by said partnership or joint adventure was to be, and was, held and used for their mutual benefit during their life time; that upon the death of either partner or joint adventurer, the survivor would hold and have the full use and benefit of all of said partnership or joint adventure property until his or her death, and upon the death of the survivor, the partnership or joint adventure would terminate, and all of said property (be) divided equally, one-half to the heirs of the said Joe Dean Goodin and one-half to the heirs of the said Esther Lidell Sisson Goodin."

The complaint further alleged that the partnership had assets of realty and personalty into the hundreds of thousands of dollars; that the wife, Esther Lidell Sisson Goodin died on October 9, 1944; and that the husband, J. D. Goodin, remained in control of the partnership assets pursuant to the agreement; that he died on January 11, 1957; and that his death terminated the partnership agreement. The plaintiffs claimed that under the partnership agreement they were entitled to one-half of all the partnership assets. To the complaint the defendants filed general demurrers, which, as hereto-

fore recited, were sustained, and the case was dismissed, when the plaintiffs elected to stand on the complaint.

At the outset it is well to state the rule for testing a case on demurrer. In *Tyler* v. *Morgan,* 214 Ark. 667, 217 S. W. 2d 606, we said:

"Appellees demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer and this appeal followed.

"The question presented is: Treating all allegations in the complaint, which are well pleaded, as true, and construing them liberally in favor of the pleader, as we must, was a cause of action stated? We hold that there was. 'It is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption would be that the defects in the complaint were cured by the proof at the trial.' *Clow* v. *Watson,* 124 Ark. 388, 187 S. W. 175."

After a careful study we reach the conclusion that the demurrer should have been overruled in the case at bar; and here are our conclusions as against the matters claimed to be defects in the complaint:

(1) The complaint alleged that the husband and wife formed a *partnership.* It is true that the case of *Gilkerson-Sloss Com. Co.* v. *Sallinger,* 56 Ark. 294, 19 S. W. 747, held that a husband and wife could not be *partners* in a commercial venture; but that case was decided in 1892 and its effect was overcome[1] by Act No. 159 of 1915 and by Act No. 66 of 1919, both as now found in § 55-401 Ark. Stats. We have recognized the partnership status between husband and wife in these cases: *Williams* v. *Williams,* 186 Ark. 160, 52 S. W. 2d 971; *Price* v. *Price,* 217 Ark. 6, 228 S. W. 2d 478; and *Reed* v. *Reed,* 223 Ark. 292, 265 S. W. 2d 531.

[1] See the article by E. B. Meriwether: "The Partnership of Husband and Wife in a Mercantile Business in Arkansas", in Arkansas Law School Bulletin of May, 1931, Volume 2, page 67. See also annotation in 157 A.L.R. 652, "Validity of partnership agreement between husband and wife."

(2) The complaint alleged that the partnership agreement was *oral,* and that the partnership was to engage in acquiring and holding *lands.* But in *Russell* v. *Williams,* 197 Ark. 1086, 126 S. W. 2d 614, we held that the statute of frauds did not apply to an oral contract of partnership formed for the purpose of buying and selling land.

(3) The complaint alleged that the partnership would continue to be operated after the death of one of the partners. But we cannot say that the bare allegation was demurrable. In 40 Am. Jur. 327, "Partnership", § 287, the holdings of many jurisdictions are summarized: "Where, as is often the case, the articles provide that the partnership shall not be dissolved by the death of a partner, such provision will be given effect by the courts".

(4) The complaint alleged that the surviving partner would have a life estate in the interest of the deceased partner, the allegation to such effect being, ". . . that upon the death of either partner or joint adventurer, the survivor would hold and have the full use and benefit of all of said partnership or joint adventure property until his or her death . . ." This allegation did not make the complaint fatally defective *on demurrer.* The matter of one partner making disposition of his interest in the partnership upon his death is not a matter unknown to this Court. In *Alexander* v. *Sims, Executor,* 220 Ark. 643, 249 S. W. 2d 832, we had such an agreement before us, which was copied in full in the footnote[2] to that opinion. We held that the agreement in that case was obtained by fraud and was, therefore, void; but in discussing the agreement we said:

"Absent any question of consideration, testamentary nature, or fraud on a partner or his creditors, spouse, heirs, *etc.,* some courts have upheld a partnership agreement in which each partner agrees that the survivor will receive all of the assets of the partner-

[2] In another footnote we cited the following: *McKinnon* v. *McKinnon,* 56 F. 409; *Michaels* v. *Donato* (N. J.), 67 Atl. 2d 911; and other cases cited in the annotations in 73 A.L.R. 983 and 1 A.L.R. 2d 1207. See also 40 Am. Jur. 347.

ship, but such an agreement is always subjected to the closest scrutiny to see if the utmost good faith was observed."

(5) The complaint alleged that after the death of the surviving partner, ". . . the partnership or joint adventure would terminate, and all of said property (be) divided equally, one-half to the heirs of the said Joe Dean Goodin, and one-half to the heirs of the said Esther Lidell Sisson Goodin".

This allegation has given us most serious concern, as it may be testamentary in character and not executed in the form and solemnities required of a will. In 40 Am. Jur. 347 the text reads: "A provision in a partnership agreement that on the death of one of the partners his interest in the partnership shall become the property of the other partners is not testamentary in nature, and the fact that the agreement is not executed according to the requirements of the statute of wills does not invalidate it".

Among other cases[3] that we have studied, there is the Alabama case of *Gomez* v. *Higgins,* 130 Ala. 493, 30 So. 417. In that case, Francisco Gomez (the father) made a partnership agreement with his son, Alexander Gomez, and it provided, *inter alia*:

"In the event of the death of F. Gomez, the entire business with all assets, profits, book accounts and money on hand shall become the property of Alexander Gomez during his lifetime, and at his death the said business, together with all assets, profits, book accounts, stock and money on hand shall be divided into three equal parts, as follows: One-third (1/3) to my daughter Florida Gomez, one-third (1/3) to my daughter Romanda

[3] In 73 A.L.R. 983 there is an annotation: "Validity, construction, and effect of agreement for disposition of interest in partnership in event of death of partner"; and on page 1000 to 1002 the annotation discusses agreements amounting to a gift of a partnership interest. Then, there is an annotation in 1 A.L.R. 2d 1178: "Provision for post-mortem payment or performance as affecting the instrument's character and validity as a contract"; and on page 1216 *et seq.* the annotation discusses, "Features which, in conjunction with post-mortem provision, make instrument testamentary".

Higgins, and one-third (1/3) to the heirs of the said Alexander Gomez."

The Alabama Court said that the instrument was a partnership agreement, ". . . but this did not prevent it being testamentary in character also in some of its provisions, . . . It has the earmarks of a testamentary disposition of the property, such as constrain us to hold, that it did not pass a present estate, but was a testamentary disposition as to the property in question."

The fundamental and basic distinction between the holdings[4] seems to be this: if the primary purpose of the contract is to merely make a disposition of the partnership assets, then it can be enforced as a contract. But, if the primary purpose of the partnership agreement is to dispose of property after the death of the partners, then the instrument is testamentary and to be valid must have been executed in accordance with the solemnity and requirements for the execution of wills. Even though we have discussed this "testamentary matter" in considerable detail, still we do not have to decide on this appeal whether the agreement here involved was testamentary because: (a) if it was testamentary and, therefore, not enforceable, the heirs of Esther Lidell Sisson Goodin might still have a cause of action unless barred by limitations and laches; and (b) if the agreement was not testamentary, the said heirs would not have a cause of action until the death of the life tenant, Joe Dean Goodin. So, in either event, the issue would not be reached on demurrer unless the complaint showed limitations or laches on its face.

(6) The appellees stoutly insist that the demurrer was properly sustained on the basis that Esther Lidell Sisson Goodin died in 1944 and the appellants, as her heirs, did not file this suit until July, 1957. Thus, the appellees claim that limitation and/or laches appear on the face of the complaint and thus can be pleaded

[4] In *Hershy* v. *Clark*, 35 Ark. 17, there was an agreement between tenants in common as to the disposition of interest in the event of the demise of either co-tenant. We held that instrument was testamentary. In the case of In Re Gardner's Will, 66 N.Y. Supp. 2d 256, a partnership agreement was held to be testamentary in disposition.

by demurrer. (*Mueller* v. *Light,* 92 Ark. 522, 123 S. W. 646, 31 L. R. A. N. S. 1013; *McGinnis* v. *Less,* 147 Ark. 211, 227 S. W. 398.) But in making such claim we think the appellees have overlooked allegations in the complaint to the effect: (a) that Joe Dean Goodin held a life estate and did not die until 1957; and (b) ". . . that after the death of the said Esther Lidell Sisson Goodin on October 9, 1944, the said Joe Dean Goodin took control of said partnership or joint adventure property, pursuant to their said agreement; that from 1944 until his death on January 11, 1957, the said Joe Dean Goodin held said property as trustee for said partnership or joint adventure using the profits, income and increases therefrom to further expand and increase said holdings; and that he held the same as such trustee for said partnership or joint adventure from that time until his death, at which time said partnership or joint adventure was terminated."

The foregoing allegation is sufficient to prevent limitation or laches from appearing on the face of the complaint, and to require the defendants to assert such defenses by answer, if they so desire.

(7) Finally, there are the claims of third parties which we have not heretofore mentioned. The complaint alleged, that some time before his death, Joe Dean Goodin transferred a portion of the real and personal property of the partnership to third persons. Because of such transfer, it is claimed that limitation and laches apply. These may be good defenses by answer, but not by demurrer: because it does not appear on the face of the complaint that said third persons were *bona fide* purchasers. Even should we hold that Joe Dean Goodin occupied some position equivalent to that of a trustee, defensive pleadings by answer and proof are needed.

In conclusion, we reiterate that we are considering the complaint only on demurrer. Matters of proof are not before us; but on the face of the complaint we conclude that the demurrer should have been overruled. Therefore, the decree is reversed and the cause is re-

manded, with directions to overrule the demurrer and allow further proceedings.

HARRIS, C. J., dissents; JOHNSON, J., not participating.

SOUTHERN FARM BUREAU CASUALTY INSURANCE CO.

v. MITCHELL.

5-1726 319 S. W. 2d 830

Opinion delivered January 19, 1959.

E. J. Butler & Jack P. West, for appellant.

Fletcher Long & Harold Sharpe, for appellee.

George Rose Smith, J. The appellee owned a truck and a trailer that were almost completely demolished in a collision in May of 1954. He contended that the appellant had insured the property, but the appellant denied that a policy of insurance was in force upon either vehicle at the time of the collision. This action against the insurance company was filed in the latter part of 1954, but the case was not brought to trial until April, 1958. The jury's verdict for the plaintiff was for slightly less than half of the sums sued for.

We are unable to agree with the appellant's principal contention, that it was entitled to a directed verdict. The two vehicles were assertedly insured separately and must be discussed separately. The appellant had previously insured the truck, but Mitchell canceled that coverage in November, 1953. He says that about three days before the collision in the following May the appellant's general agent, Gibbs, stopped at Mitchell's place of business, mentioned a collision that Mitchell's brother had been involved in, and asked if Mitchell was still insured by Gibbs' company, the appellant. Mitchell testified: "I said, 'Bill, I have canceled the fifty dollar deductible on my truck and I would like to put it back on there,' and he said, 'All right,' and he got about fifty feet away and he said, 'Bob, do you still want the same coverage you had before,' and I said, 'Yes,' and he said, 'O.K., I will see you in a few days.' " This testimony is corroborated by a man who was then working for Mitchell. Gibbs remembers the discussion about Mitchell's brother, but he says that the renewal of Mitchell's policy was not mentioned.

We think the issue was properly submitted to the jury. It is conceded that Gibbs was a general agent and had the power to bind his principal by an oral promise to insure the truck. An agreement to renew a prior policy upon the same terms is sufficiently definite to constitute a valid contract. *King* v. *Cox,* 63 Ark.

204, 37 S. W. 877; *Aetna Ins. Co.* v. *Short,* 124 Ark. 505, 187 S. W. 657. The jury were justified in interpreting Gibbs' statement, "O.K., I will see you in a few days," as an acceptance of Mitchell's offer and as an indication that a written policy would be issued in due course. It was not essential for the plaintiff to introduce a copy of the earlier policy, so that the jury might know its terms; for the appellant does not contend that the collision loss would not have been covered by that policy.

The trailer was mortgaged to a bank, which required its borrowers to carry insurance. The trailer was undoubtedly insured by the appellant during the year ending January 19, 1954, but the appellant contends that the policy then lapsed for nonpayment of the renewal premium. Mitchell's statement that he paid the premium is bolstered by the fact that the bank received no notice that the policy had lapsed and by the further fact that the appellant recognized its liability after the collision by paying the bank the amount of its loan. This phase of the case involved only a question of fact, to be decided by the jury.

Two days after the loss occurred the insurer took a written statement from Mitchell about his conversation with the general agent, Gibbs. It is now contended that the trial court erred in refusing to permit the appellant to introduce this statement. It does not appear, however, that the court actually refused to admit the statement. During Mitchell's cross-examination the appellant's counsel questioned him in detail about the contents of the statement and at one point asked Mitchell if he would agree to introduce the document with his testimony. Upon objection by Mitchell's attorney the court ruled that the statement would not be introduced with Mitchell's testimony unless Mitchell agreed to it, but the court added: "Of course, you understand the court is not holding that it is incompetent." Despite the court's apparent willingness to allow the written statement to be introduced later, counsel did not

pursue the matter further and hence cannot now contend that an error was committed.

Complaint is also made of an instruction which stated in substance that if Mitchell and Gibbs both knew the description of the truck, its value, the risks to be covered, and the amount of the premium, and if upon that knowledge Gibbs unconditionally agreed that his principal would indemnify in return for Mitchell's promise to pay the premium, then a contract of insurance was completed even though its terms were not reduced to writing. Only a general objection was made to this instruction, and we do not perceive that it is inherently erroneous in any respect.

Affirmed.

JOHNSON, J., not participating.

BRIGHAM *v.* BRIGHAM.

5-1741 319 S. W. 2d 844

Opinion delivered January 19, 1959.

J. Harrod Berry, for appellant.

Williams & Gardner, for appellee.

PAUL WARD, Associate Justice. By this appeal Alma Good Brigham challenges a decree of divorce granted to her husband, Earl Jesse Brigham.

Since the parties were married in New Orleans, April 2, 1942, while Earl was in the Navy, they have apparently had marital difficulties on numerous occasions. For a large part of the intervening years they did not live together because appellee was serving in the Navy, having re-enlisted some 2 or 3 times. Appellee's home had always (at least up to 1954) been in Pope County where his parents also resided.

After appellee's first discharge from the Navy he returned to his home, with his wife, in Pope County and served two terms as Circuit Clerk of that County for the years 1947 to 1950 inclusive. Having been defeated for a third term in 1950 he soon thereafter re-enlisted in the Navy and served for about 18 months. After a few months he again re-enlisted and served until the early part of 1954. During all of these periods of service appellee served away from his home, traveling to various parts of the world. Shortly after appellee's last discharge from the Navy he and his wife went to Benton in Saline County where they lived together and together they established a real estate agency. Although the agency appeared to be moderately successful financially, after some 7 or 8 months appellee once more re-enlisted in the Navy, about the first of January, 1955, and has remained in service up until the present time.

On January 13, 1956 appellee filed a complaint and later an amended complaint in which he alleged two grounds for a divorce. One: Indignities, in that appellant treated him with studied contempt amounting to severe mental cruelty, consisting of quarrelling, abuse, *etc.* Two: Desertion, in that appellant refused to live with him. Appellant denied all the above allegations and prayed for attorney fees, and costs. No children are involved and apparently there are no property rights to be settled.

The trial court found that appellee was entitled to a divorce on both alleged grounds, and gave appellant her costs and attorney fees.

Much of the testimony is conflicting and irrelevant, but a careful examination of the same forces us to the conclusion that it does not sustain the decree of divorce.

One. As to indignities. There is in the record some testimony by appellee, weakly supported, that appellant was disagreeable and quarrelsome while they lived together prior to 1954. However we deem it unnecessary to recount this testimony because we think any such alleged indignities were condoned by appellee by living with his wife for some 7 or 8 months at Benton. This court has held to this effect many times. In *Buck* v. *Buck,* 205 Ark. 918 (at pages 921 and 922), 171 S. W. 2d 939, we said:

"This court, in a long line of decisions, has consistently held that one spouse may condone the misconduct of the other and in the absence of acts of subsequent misconduct, all grounds for divorce prior to condonation by the injured spouse are wiped out."

Appellee attempts to avoid the application of the above rule by stating he agreed to live with his wife at Benton only on the condition she would "stop demanding that I move to Little Rock and that she make me a dutiful and loyal wife". He must fail in this attempt, however, because there is no evidence she later violated that condition.

There is no evidence of personal indignities on the part of appellant after appellee last entered the Navy, nor could there well be, because they have not lived together since that time.

Two. Desertion. This ground is based solely on the contention by appellee that appellant refused to live with him. All acts supporting this contention must likewise rest on what occurred after the last enlistment in the Navy which, as stated before, was about the first of the year 1955. A careful search of the record fails to support appellee's contention.

When appellee left for the Navy the last time, he did so, according to the uncontradicted testimony, without the knowledge of his wife and also without winding up his business affairs or making any arrangements with reference to his wife or household furniture. Upon appellee's last enlistment he went or was sent to a station in California. He remained there about 10 months when he was transferred to Alaska. Appellee states that soon after he landed in California he requested his wife to join him and she refused. Appellant says that while she was willing and anxious to join him there, yet it was impractical if not impossible for her to do so at that time, for several reasons. She had the responsibility she says, of winding up their business affairs in Benton, she had the household goods to store or dispose of, and appellee had made no definite plans for her to travel to California or a place to live after she got there. She says she was very nervous and asked appellee to come back and drive through with her but he refused to do so. The uncontradicted testimony is that appellant did not even know when appellee left California for Alaska, and that she had to make several calls to find out. Appellee says he asked his wife to join him in Alaska, but the uncontradicted testimony is that he made no arrangement for her to make the trip. Appellant says she understood that it would have been necessary for travel arrangements to be made through the Navy or the Government, but none were ever made.

Since appellee's suit for divorce was, in this connection, based on desertion and not on 3 years separation, the vital issue is not whether parties lived separate and apart for little over a year. Certainly it is not uncommon to find such extended separations where the husband is away on military service with no suspicion of desertion, especially on the part of the wife. The real issue here is whether appellant willfully and without good cause refused to live with her husband. It is on this issue that we find no convincing evidence. Moreover, viewing the evidence most favorably to appellee, his cause must fail on the vital issue because there is no corroborating evidence to support it. In *Sutherland*

v. *Sutherland,* 188 Ark. 955, 68 S. W. 2d 1022, this court said: "It is the established doctrine of this State that a divorce decree will not be granted upon the uncorroborated testimony of one of the parties." See also *Highsmith* v. *Highsmith,* 219 Ark. 123, 240 S. W. 2d 5.

Much of appellant's testimony and argument challenges the trial court's finding that appellee's residence was in Pope County for the purpose of maintaining this suit. In view of our conclusions heretofore expressed we deem it unnecessary to go into this question at length. There is, we think, sufficient evidence to support the trial court on this issue. As this court has stated on previous occasions, every person is entitled to have a residence somewhere. It is undisputed in this case that appellee's residence has been in Pope County all his life, except for the few months he lived at Benton. We do not think that one incident is decisive here. Residence, in a case of this kind, is largely a matter of intent, and a person has a right to change it when he pleases. See *McGill* v. *Miller,* 183 Ark. 585, 37 S. W. 2d 689. Appellee's testimony is to the effect that he went to Benton and lived with his wife conditionally, hence he may not have intended to abandon Pope County as his residence. The record also shows that while there he voted in Pope County. Therefore we cannot say that the Chancellor's finding, under all the facts and circumstances of this case, is against the weight of the evidence.

Appellant, who is receiving an allotment from the Government, has asked only for an additional attorney fee incident to this appeal, to which we think she is entitled.

In accordance with the above the decree of the trial court is reversed, and the cause is remanded with directions to dismiss appellee's petition and to allow appellant an additional attorney fee of $100 for this appeal.

Reversed with directions.

HARRIS *v.* MCCANN.

5-1695 319 S. W. 2d 832

Opinion delivered January 19, 1959.

Shaver & Shaver; *Davis & Davis, Memphis, Tenn.*, for appellant.

Catlett & Henderson & David Solomon, Jr., for appellee.

SAM ROBINSON, Associate Justice. Appellant, R. E. Harris, as agent for his wife, Sadie Harris, contracted to sell a large plantation to appellee, A. I. McCann. Later, a portion of the place, 640 acres, was sold to Harlen Wilson and wife for the price of $66,000, of which $10,000 was paid in cash and notes given for the balance of $56,000. Harris loaned money to McCann to operate the plantation for the years 1955 and 1956. In

January, 1957, McCann filed this suit, asking for specific performance of the contract of sale. McCann made an alleged tender of the amount he claims he owed. He contends, however, that he should have credit for $66,000, the price of that part of the land sold to Wilson. Harris answered and set up several defenses. He denied that McCann should have credit for the sales price of the Wilson land. He alleged that McCann had breached the contract by failing to make payments in accordance with the terms thereof; that there had been a forfeiture; and, further, that by mutual agreement the sales contract had been rescinded. By way of cross complaint Harris asked for judgment for the alleged unpaid balance on money loaned to McCann to make the crops. McCann answered the cross complaint, alleging that Harris had charged a usurious rate of interest for the money loaned to make both the 1955 and 1956 crops. Later, Harris filed a new suit against Florida Real Estate Loan Company, Helena National Bank, A. I. and Grace E. McCann, and B. A. and Mary Lucille McCann, alleging that the defendants had wrongfully encumbered the title to the property, and asked that the title be cleared and that the plaintiff be given judgment for damages. The cases were consolidated.

Upon a trial of the issues, the chancellor ordered specific performance of the contract, and it was the decree of the court that a usurious rate of interest had been charged by Harris on loans for both of the years 1955 and 1956, but that McCann could not recover that part of the 1955 account which had been voluntarily paid; that the 1956 loan was void because of usury and that there is no merit to Harris' claim that title to the property has been wrongfully encumbered; and, further, that McCann should have credit for the price of the land sold to Wilson. Harris has appealed. And McCann has cross-appealed from that part of the decree disallowing recovery of the payments made on the 1955 account.

On the 20th day of December, 1954, Harris and his wife entered into the contract whereby they agreed to

sell, and McCann agreed to buy, Wildwood Plantation in Phillips County, consisting of approximately 2,915 acres, and also the farming implements, *etc.*, used in operating the place. On January 1, 1955, the property was turned over to McCann. On March 2, 1955, a more formal contract of sale was executed. The purchase price, including land and equipment, was $300,000, of which $8,000 was paid in cash, and in addition McCann and his wife gave their note for $12,000 due December 1, 1956, secured by a mortgage on other property. The balance of the purchase price of $280,000 was to be paid in twenty yearly installments of $14,000 each, and interest, the first installment becoming due on or before December 20, 1955. Harris loaned McCann the necessary money to operate the place for the years 1955 and 1956. In January, 1956, the 640 acres was sold to Harlen Wilson and wife for the sum of $66,000; Wilson paid $10,000 in cash and executed notes payable to both McCann and Harris for the balance. The $10,000 in cash was paid to Harris, and McCann endorsed the notes and turned them over to Harris.

On the 10th day of January, 1956, Harris furnished McCann a statement showing that he had advanced to McCann $83,952.43, and that McCann was entitled to credits for $65,565.74, leaving a balance owed by McCann to Harris of $18,386.69. Two days later, on January 12th, additional charges and credits were made that grew out of the 1955 operation of the place, and on that day Harris furnished McCann a statement showing there was a balance of $11,635.04 owed by McCann from 1955 (this amount was carried forward into the 1956 account). The statement for 1955 included an item dated January 9th, as follows: "Interest on furnish account, $2,677.40." On the face of this statement is written, in longhand, "This settlement is hereby accepted as a true and final settlement of account. Signed R. E. Harris A. I. McCann." In addition, Harris had received and credited to the debt on the land $14,000 principal and about the same amount as interest.

Mr. John A. Moye, Jr., is vice-president of Helena National Bank and has computed all types of interest over a period of 17 years. He testified that the interest charged by Harris to McCann on the "furnish" account for the year 1955 exceeded 10% per annum by $525.05. The parties had contracted for an interest charge of 6%. All of the charges and credits are taken from the books of appellant Harris. The computation of interest made by Mr. Moye is based on the records of Mr. Harris, and it appears from a preponderance of the evidence that more than 10% interest was charged for the year 1955.

McCann contends that with the exception of two comparatively small checks for wheat and oats which he turned over to Harris, all the receipts for the crops produced were paid to Harris by the purchasers of such crops, and therefore such receipts cannot be considered as voluntary payments on his indebtedness to Harris. But McCann accepted the statement of January 12th as a "true and final settlement of account". If he did not actually authorize the application to the "furnish" account of the funds received by Harris from the crops, he certainly ratified such application, which is the same as having authorized it in the first instance.

But the situation is different for the year 1956. In that year Harris furnished to McCann $45,159.49, which includes the $11,635.04 carry-over from 1955. McCann owed Harris two separate accounts, one for the "furnish" and one for the land. Harris had received $40,949.48 from the sale of crops produced on the property in 1956, but none of this money had been applied to any particular account. It had been held by Harris as unallocated. It had not been applied to either the land or the "furnish" account. Furthermore, the parties had reached no agreement as to the allocation of the receipts. Sometime during the latter part of October (the exact date is not shown on Harris' statement) he charged McCann with a "carrying charge" of $2,290.65. According to Mr. Moye, the expert on computing interest, this carrying charge exceeds 10% per annum on

the money loaned to McCann by Harris during 1956. The chancellor held that such carrying charge was usurious and therefore Harris had forfeited the money loaned to McCann in 1956 and the interest thereon.

On the question of usury Harris contends that the carrying charge does not exceed 10%; that whatever money he received from McCann was paid voluntarily; that the transaction is not usurious because there was no agreement between the parties for the charge of interest at a rate of more than 10% per annum. In the first place, the dates of advances of money to McCann and the amounts thereof are all shown on Harris' books, as well as the interest charged, which is designated "carrying charge". The preponderance of the evidence shows that the "carrying charge" amounts to more than 10% per annum on the amounts advanced. Mr. Harris attempts to explain that items other than interest are included in the "carrying charge". But his testimony in that respect is not convincing. In the recent case of *Jones* v. *Jones,* 227 Ark. 836, 301 S. W. 2d 737, we said: "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 737. 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."

McCann actually in person had not paid anything to Harris in 1956. True, those who had purchased the crops produced by McCann had, by agreement of the parties, paid the purchase price to Harris. But, as here-

tofore pointed out, McCann owed Harris a debt on the purchase price of land and owed the "furnish" account, and the money received by Harris from the 1956 crop to apply on McCann's debts had been held in an unallocated account and had not been applied to either the land account or the "furnish" account. In these circumstances it cannot be said that there had been a voluntary payment on the 1956 "furnish" account.

Next, Harris says that since there had been no agreement by McCann to pay more than 10% per annum interest, the fact that more than that amount may have been charged does not make the transaction usurious, and cites, among other cases, *Sloan* v. *Sears, Roebuck and Co.,* 228 Ark. 464, 308 S. W. 2d 802, and *General Contract Corp.* v. *Duke,* 223 Ark. 938, 270 S. W. 2d 918, to the effect that the transaction is to be judged as of the time the contract is made and not thereafter. Appellant therefore contends that since the contract provides for only 6% per annum there can be no usury for the simple reason that the borrower has to pay only what the contract calls for.

The carry-over from 1955 of $11,635.04 embodied part of the usurious interest charged in 1955. Furthermore, to constitute usury there must be only the intention of the lender to take or receive an unlawful rate of interest. *Baxter* v. *Jackson,* 193 Ark. 996, 104 S. W. 2d 202; *Wilson* v. *Whitworth,* 197 Ark. 675, 125 S. W. 2d 112. Undoubtedly it was Harris' intention from the beginning to compute the interest by charging a straight 6% on all sums advanced, regardless of the date he actually parted with the money. For both years, 1955 and 1956, the amount of the "carrying charge" is a flat 6% of the total advanced. This is exactly the method used in computing interest in *Brooks* v. *Burgess,* 228 Ark. 150, 306 S. W. 2d 104, and was held to be usurious, the amount of the interest exceeding 10% per annum, as in the case at bar.

McCann contends that he should have credit on the land account for $66,000, the sales price of the land bought by Wilson. Harris maintains that McCann is

not entitled to credit for the sales price of the Wilson land. The sale to Wilson came about in this manner: Mr. Godfrey Merrifield is a real estate broker. He had been authorized by Harris to sell Wildwood Plantation. It was agreeable with Harris to divide the place and sell it in parcels to different buyers, provided all parcels were sold, but Merrifield negotiated a contract between Harris and McCann whereby McCann agreed to buy the whole place. This contract provides: "15. It is further mutually agreed between the parties that the purchaser may sell any portion of the approximately 2,915 acres of land hereinabove described at any time during the life of this contract, provided that the price and terms are agreeable to the sellers and the proceeds from such sales are applied to the indebtedness owing to the sellers by the purchaser as hereinabove set out."

Later, after the contract had been made between Harris and McCann, Merrifield found Wilson as a purchaser of a portion of the place, known as Section 28, consisting of 640 acres. The contract to sell the property to Wilson was signed by McCann and his wife and Harris and his wife, and, of course, by Wilson. Wilson paid $10,000 in cash, which was turned over to Harris, gave his notes, payable to both Harris and McCann, for $56,000, the balance of the purchase price, payable in annual installments. The notes were endorsed by McCann and delivered to Harris. When the first installment became due, Wilson made the payment to Harris. The contract between Harris and McCann is somewhat ambiguous, in that it does not specifically provide whether the notes taken in connection with the purchase price should be regarded as proceeds from the sale. (It will be recalled that the contract between Harris and McCann provides that the proceeds from the sale of any part of the property to a third party should be applied to McCann's indebtedness to Harris.) Appellant Harris contends that the notes should not be regarded as part of the "proceeds" as mentioned in the Harris-McCann contract and therefore should not be applied to the indebtedness owed by McCann. On the other hand,

McCann says that when all the facts and circumstances are considered, the Wilson notes should be regarded as part of the proceeds from the sale of the Wilson land and the full amount of these notes applied to McCann's indebtedness to Harris. Both sides cite numerous cases to sustain their point as to what should be considered "proceeds" of a sale in circumstances of this kind. But we think the case at bar is more closely in point with *Rose* v. *Hall,* 171 Ark. 529, 284 S. W. 776. There the Court said: "We think what was intended and the thing which was in fact done was to substitute, by consent of all parties concerned, Sarah Hall as the purchaser from Rose, instead of from Shuptrine." And that appears to be what was done in the case at bar. Wilson was substituted for McCann as the purchaser of the 640 acres. Every detail of the sale to Wilson was approved by Harris, and everything received from the sale, including the cash and the notes, was turned over to Harris. In the first place, from the very beginning Harris contemplated selling the plantation in parcels, and although he contracted to sell the entire property to McCann, the contract provided that McCann could sell any portion of the property "provided that the price and terms are agreeable to the sellers (Harris) and the proceeds from such sales are applied to the indebtedness" owned by McCann to Harris. It will be noticed that all the terms of the sale had to meet the approval of Harris, including the selling price; hence, Harris could insist on a selling price, a down payment, and deferred payments, that would give him full protection in the event of a sale. And certainly, when Wilson finally would have paid in full for the land he would have title to it free of any indebtedness that McCann might still owe to Harris. Furthermore, the entire transaction was handled by Harris as if he were selling the property to Wilson; Harris' real estate broker arranged the sale; his lawyer drew up the contract of sale on terms dictated by Harris; the proceeds of the sale — the $10,000 cash payment and the Wilson notes—were delivered to Harris; Harris kept a complete double entry set of books, and the record of the sale to Wilson was set up on Harris'

books just like the sale to McCann had been set up; Wilson was given credit for the $10,000 down payment; McCann's land account was not credited with the down payment; neither was the McCann account credited with the first installment payment made by Wilson. We think a preponderance of the evidence shows clearly that all the parties considered that Wilson was substituted for McCann as a purchaser of the 640 acres which we have spoken of as the Wilson land.

Appellant makes the further contention that the contract of sale between Harris and McCann was rescinded by mutual agreement. This is a question of fact, and there is ample evidence to sustain the chancellor in the finding that the contract was not rescinded. True, a rescission of the contract was discussed, but McCann says he did not agree to the rescission, and the conduct of the parties subsequent to the time Harris contends the contract was rescinded does not appear to sustain Harris' contention. McCann remained in possession of the property; he paid to Harris $12,000, which was part of the agreed down payment. Moreover, the notes given by McCann in connection with the $300,000 purchase price were not returned to him.

Appellant makes the further argument that McCann should not prevail because he did not come into court with clean hands, but we do not think the acts Harris alleges that McCann has committed bring the case within the clean hands doctrine.

In order to raise the money to pay Harris in full, McCann mortgaged the property to Florida Real Estate Loan Company. It is appellant's contention that both McCann and Florida are liable for unlawfully encumbering the title to the property. McCann had possession of the property and had paid part of the purchase price; he had an equitable interest which he had a right to mortgage. 41 C. J. 374; 36 Am. Jur. 708; *Oliphint* v. *Eckerley,* 36 Ark. 69.

Appellant further maintains that McCann has made no valid tender of the purchase price. It appears that

when McCann attempted to pay the debt and demanded a deed, the principal issue between the parties was whether he should be given credit for the price of the land sold to Wilson, and since it is being held that he should be given such credit, there is no doubt about the tender being sufficient. But the tender was not sufficient to stop the running of interest on the debt. Florida Real Estate Loan Company had agreed to loan McCann $187,500, and the Mississippi County Bank had agreed to loan $12,500. This money was to be used to pay off the debt McCann owed Harris. Although the money was available and could be obtained at any time for the purpose of paying off the debt, it had not actually been advanced by Florida or the Bank, and Florida was not willing to deposit the money in court. There is no indication that McCann would have to pay interest on the money until such time as it was actually advanced. In these circumstances it would be inequitable to say that the tender stopped the interest on the debt to Harris, because if that were done McCann would be having the full use and benefit of the money owed to Harris without the payment of interest to anyone. Of course, McCann did not propose to use his own money to pay off the debt, and Florida and the Bank have not actually advanced the money, but have agreed to make it available to McCann for the purpose of paying off the loan when that can be done.

In 55 Am. Jur. 779, it is said: "A tender alone however, does not keep a purchaser in possession from being liable in equity for interest; he must keep the tender good and set aside the money for the vendor's use, as by a deposit in a bank or in court. There is also authority to the effect that a vendee in possession must give notice that the money is set aside for the vendor's use in order to escape being liable in equity for interest. . . . An arrangement between a contract purchaser of real property of which he has taken possession, and a bank, that the bank will furnish the money to be paid on the contract when needed, upon security of bonds deposited with it, is not such a setting aside and appropriation of money to the contract as to exonerate the

purchaser from liability in equity for interest in case of delay in carrying out the contract."

We think that in the circumstances of this case principles of equity demand that the debt owed by McCann to Harris bear interest until the debt is paid, and the decree should be modified to that extent.

On cross-appeal McCann contends that Harris charged him a usurious rate of interest on the "furnish" account for the year 1955, and that he therefore should have credit for the amount he paid on the 1955 account. The parties had a settlement on the 1955 account, and a statement of account prepared by Harris showed McCann owed a balance of $11,635.04. This amount was carried into the 1956 account and has been held void because of a usurious rate of interest charged on the account for that year. The parties considered that all of the 1955 account except the $11,635.04 had been paid in full. Appearing on the 1955 statement of account is the following: "This settlement is hereby accepted as a true and final settlement of accounts. Signed: R. E. Harris A. I. McCann."

There can be no recovery of money voluntarily paid on an account, where a usurious rate of interest was charged, except a recovery of the excessive interest. *Anderson* v. *Shoup,* 180 Ark. 955, 23 S. W. 2d 616. Even though the borrower may ordinarily recover the excessive interest, there is no showing here of what portion of such interest is embodied in the $11,635.04 carried into the 1956 account and declared void.

Appellee further contends on cross-appeal that he should have credit for $5,134.70 profit which he claims Harris wrongfully made out of crops raised by McCann and for a compress rebate of $94.50. These are questions of fact, and it would unduly extend this opinion, which is already too long, to set out in detail the ramifications of those issues. Suffice it to say we have examined the record and carefully considered argument of counsel, and we cannot say the chancellor's finding

against appellee in that respect is against a preponderance of the evidence.

Affirmed as modified on appeal; affirmed on cross-appeal.

DOCKERY *v.* THOMAS.

5-1708 320 S. W. 2d 257

Opinion delivered January 19, 1959.

[Rehearing denied February 23, 1959.]

J. B. Reed, for appellant.

Talley & Owen & James R. Howard, for appellee.

JIM JOHNSON, Associate Justice. The question[1] to be decided is, whether compensation benefits should be paid to an employee receiving a compensable injury but whose earning capacity is not diminished by the injury. Following the opinion of this Court in *Dockery* v. *Thomas,* 226 Ark. 946, 295 S. W. 2d 319, the Arkansas Workmen's Compensation Commission awarded benefits to William Earl Thomas.

The temporary total disability was found by the Commission to be from May 4, 1954, through June 29, 1955, and the permanent partial disability was found to be 30% to the body as a whole. Under the award, Thomas was to receive $25.00 per week for the tempo-

[1] It was argued in the brief of appellant that all the unpaid Workmen's Compensation benefits awarded Mr. Thomas abated by reason of his death. But in the oral argument the appellant's counsel — with becoming candor—called attention to § 81-1323(e) Cumulative Pocket Supplement of Ark. Stats., which is Paragraph 23 of Initiated Act No. 4 of 1949, and which settles the said point argued in the brief.

rary total disability, or a total, minus credits, of $1,-472.14; for the permanent partial disability, the award was for $25.00 per week for 135 weeks or $3,375.00, plus hospital, medical, medical appliance bills, and the maximum attorney's fee allowable. Thomas died on August 27, 1957, from causes entirely disconnected with this case. On appeal by Dockery, the Pulaski Circuit Court authorized Thomas' widow to revive the action. The Circuit Court modified the Commission's award by cancelling all of the permanent partial award after August 27, 1957, the date of Thomas' death; and appellee does not complain of such modification. Appellant insists, here, that Thomas was not entitled to any award for permanent partial disability.

The evidence reflects that Thomas, during the years following his injury, received substantially the same earnings as before his injury; and it is thus argued that permanent partial disability benefits should be denied. The appellant calls to our attention the cases of *Conatser* v. *D. W. Hoskins Truck Service, et al.,* 210 Ark. 141, 194 S. W. 2d 680, and *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956. It was decided in those cases that an employee was precluded from an award of permanent partial disability when his earnings after the injury were as great as his earnings prior to the injury. But those cases were decided in 1946 and 1945 respectively, and were governed by Act 319 of 1939, § 13 (Ark. Stats. (1947) § 81-1313 (C) (23)), which provides:

"OTHER CASES: In all other cases in this class of disability there shall be paid to the injured employee 65% of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest, and in no case exceeding a longer period than four hundred fifty (450) weeks, or a maximum of $7,000."

That Section of the 1939 Workmen's Compensation Act was superseded by Initiated Measure (1949) No. 4, § 13, (Ark. Stats. (1948) § 81-1313 (d)), which provides:

"OTHER CASES: A permanent partial disability not scheduled in sub-section (c) hereof shall be apportioned to the body as a whole, which shall have a value of 450 weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury."

A comparison of the above quoted sections of the Workmen's Compensation Acts reflects that the words of the 1948 act omit the reference to the employee's *wage earning capacity* after the injury, and instead, provide that the employee shall be paid compensation for the "*proportionate loss of use of the body as a whole resulting from the injury.*"

In the case of *Lion Oil Co.* v. *Reeves,* 221 Ark. 5, 254 S. W. 2d 450, decided in 1952, we allowed a recovery even though the employee was receiving more money *after* his injury than he had received *before* his injury. We pointed out the difference between the 1939 law and the 1948 Initiated Measure, and explained that the cases of *Conatser* v. *Hoskins, supra,* and *Sallee* v. *Thompson, supra,* were decided under the 1939 law. In *Lion Oil Co.* v. *Reeves, supra,* we said:

"In view of the change in language found in the Initiated Act, and in obedience to the universal policy of courts to construe compensation measures in a manner reasonably calculated to effectuate the legislative intent (or, as in the case of an initiated amendment, to carry out the presumptive intention of those who framed the measure and the people who adopted it), we are unable to say that the Commission was in error when it determined that payment for permanent partial disability in the circumstances of this case was not the plan, and that compensation must be made whether the subject is employed or unemployed, and this is true irrespective of what his wages may be."

The holding in *Lion Oil Co.* v. *Reeves*[2] is compelling here. The Commission found that Thomas had suffered a permanent partial disability of 30% to the body as a whole. What he might have earned for a short period of time after his injury does not prove that the Commission was in error in fixing the injury to his body as a whole.

The judgment of the Circuit Court is in all things affirmed.

SMITH, J., concurs.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I respectfully dissent to the ruling of the majority for the reason that the proof reflects that the deceased received substantially the same earnings after his injury as before the injury, and it is accordingly my opinion that permanent partial disability benefits should be denied.[3] The majority concede that this was formerly the law, as previously determined by the cases cited in the majority opinion, but state that Initiated Measure (1948) § 4 changed the law to permit recovery for permanent partial disability even though the injured employee was gainfully employed after the injury, and receiving more than his former wages. The opinion cites sub-section (d) of § 81-1313, but makes no mention of sub-section (h), which provides as follows:

"If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of such refusal, unless in the opinion of the Commission, such refusal is justifiable."

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[2] In Larson on Workmen's Compensation Law, Vol. 2 § 57.21, cases from more than a score of jurisdictions are cited to sustain this textual statement: "It is uniformly held, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of actual post-injury earnings equalling or exceeding those received before the accident.

[3] It might also be pointed out that a large part of such earnings were received from identically the same occupation that Thomas had previously been engaged in.

I can see no reason to deny compensation to an injured employee simply because he refuses employment, if he is entitled to compensation whether employed or not. In other words, it would appear, under the majority opinion, that he can work and earn more wages than before his injury, and still draw compensation for permanent partial disability, but, on the other hand, if, while receiving permanent partial disability payments, he is offered a job which he can handle, and refuses such employment, compensation under the statute, would cease. This, to me, is totally inconsistent, and leads me to the conclusion that the intent, as expressed in the Act, is still to deny compensation where the employee is gainfully employed and making as much or more money than previously. Also, sub-section (m) of § 81-1319, provides as follows:

"If the employer has made advance payments of compensation he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. If the injured employee receives full wages during disability he shall not be entitled to compensation during such period."

While I agree that this sub-section has primary reference to wages paid by the original employer, I see no particular distinction in receiving the wages from that employer or a second employer. In each instance, the employee has suffered no loss in remuneration. This sub-section, read together with sub-section (h) (heretofore referred to), strengthens my conclusion that the people, in passing our Workmen's Compensation Act, did not contemplate or intend that an employee should draw compensation for permanent partial disability when his earnings, after the accident, were equal to, or greater than, earnings before the accident. In my opinion, the purpose of paying compensation to an injured employee (except for those injuries which might be classed as scheduled claims, such as loss of a hand, foot, etc.), is to prevent financial hardship during that period when he is unable to engage in his normal occupation, or maintain normal earnings.

For the reasons herein enumerated, I would reverse the judgment.

TRI-COUNTY GAS & APPLIANCE *v.* CHARTON.

5-1675 320 S. W. 2d 103

Opinion delivered January 26, 1959.

J. M. Smallwood, for appellant.

Brazil & Brazil, Gordon & Gordon, for appellee.

CARLETON HARRIS, Chief Justice. Catheryn Charton and E. A. Mayall, her father, instituted suit against the Tri-County Gas & Appliance Company and Gerald Powell for damages, alleging that Mrs. Charton ordered propane gas from appellant company, which was delivered by their employee, appellant Powell; that Powell placed more gas into the tank than it was designed to accommodate, which resulted in excess gas forcing its way through the mechanism of the head of the tank, and through the pipe leading from the tank into the house occupied by Mrs. Charton, on through the jets or burners of a stove, and subsequently into the rooms of the house. The Complaint then alleged that Mayall was visiting in the home of appellee Charton around 6 p. m. on October 2, 1957, and that appellees went into a small closet in the house to move some clothing, and, the room being dark, struck a match, whereupon an immediate explosion with a great burst of flame oc-

curred, and appellees were severely and painfully burned; that the house and contents were consumed by fire. Damages were sought by Mrs. Charton in the amount of $28,100, while Mr. Mayall alleged his damages to be $7,750. Appellants answered, denying the allegations, and further alleged that the butane system in the house, together with the container, were installed by appellee Mayall, who was inexperienced and incompetent to install the system, the latter fact being known by appellee Charton; that Mayall was negligent in said installation, and Mrs. Charton assumed the risk of injury from Mayall's negligence in installing the system. It was further alleged that appellees did not exercise ordinary care for their own safety; that the proximate cause of the alleged injuries was the negligent acts of Mayall, in which Catheryn Charton acquiesced, and that appellees were negligent in a degree equal to or greater than any negligence that could be shown on the part of appellants. On trial, the jury rendered a verdict for Mrs. Charton in the sum of $5,208, and for Mayall in the amount of $755, for which sums judgment was entered, together with interest at the rate of 6% per annum until paid.[1] From such judgment, appellants prosecute this appeal. The sole contention for reversal is that the court erred in refusing to direct a verdict for appellants at the conclusion of appellees' testimony, and at the end of all the testimony in the case.

Appellants contend that the evidence as to their responsibility or liability for causing the fire was insufficient to send the case to the jury. They argue that the fire could have occurred from several causes, and that the jury was permitted to, and did, speculate in reaching the conclusion that appellants were responsible. Of course, a verdict based upon conjecture would be of no validity. *Biddle, et al., Receivers,* v. *Jacobs,* 116 Ark. 82, 172 S. W. 258. The evidence reflects that appellee Charton started moving into the house in question on the last day of September, 1957, and concluded

[1] Westchester Fire Insurance Company, which had intervened, was subrogated to the extent of $1,000 in the judgment awarded to Mrs. Charton, as it had previously paid such amount to her in satisfaction of her claims under a policy insuring jewelry and household goods.

moving on October 1st. However, she did not spend either night on the property. Approximately 10 days earlier, appellee Mayall had made the installation of the butane system on the property. Mayall had no license to install such a system, but had installed his own butane system in two previous houses that he had lived in. He testified that he moved his own tank, which had a capacity of 115 gallons to the Charton property, and stated that the tank was 6 or 7 years old. It was placed about 15 feet from the house, and the installation consisted of putting down the line, attaching it on into the house, piping the house, and setting up two stoves, a cookstove in the kitchen, and a small butane heater "* * * back from the closet in the dining room." Mayall described in detail his method of installing the system, and H. D. Burns, chief technician of the Liquefied Petroleum Gas Control Board (whose testimony will be hereafter more fully discussed) was in the courtroom during Mayall's explanation, and subsequently testified "* * * If I understood his explanation correctly, the connections were made in a manner approved by the department." On installing the stoves, Mayall checked to see that they were properly working. The heater was lighted, then turned off, and was never lighted again. Mayall testified that he checked the tank around 10 or 11 a. m. on October 2nd, and the gauge showed it to be 10% full; that accordingly, gas was ordered from Tri-County.

Mrs. Charton testified that her father took her to the house between 6:30 and 7 o'clock on the morning of October 2nd; that she started cleaning and straightening and "* * * cooked my children just a snack." In addition to cooking breakfast, she testified that she also prepared lunch on the cookstove; that she fixed bacon and egg sandwiches for the children in the afternoon, and that the stove was intermittently off and on all day, as she was boiling water to aid in cleaning the premises. Nothing out of the ordinary was noticed concerning the operation of the stove, *i. e.,* it appeared to be working properly. Powell arrived with the gas around 4:45 p. m. Mrs. Charton stated that he filled

the tank, and then came to the door and asked for a pencil eraser. "I asked him what he needed with a pencil, or something like that, and he said, 'Well, I can't figure this.' I said, 'Well, what do you mean?', and he said, 'Well, what size tank is this?' I said, 'Well, that I just don't know.'" She testified that Powell figured for a long time and then asked her to figure it, but not knowing anything about gas, she was unable to help. She further testified that Powell stated it was the first tank he had filled by himself, and he didn't know how to figure it. He then gave her a delivery ticket.[2] The ticket showed that Powell found the tank empty and filled it to 90% full, and that he placed 135 gallons of propane gas into the tank. According to Mrs. Charton, Powell left, and around 6 p. m., her father and mother came to the house. Mrs. Charton turned on the cookstove, and a flame shot up 2 or 2½ feet, and she immediately turned the stove off. She and Mayall then went to the closet to get the children's clothes, and the closet being dark (the house not then being wired for electricity), the father struck a match. As Mayall described it:

"When I struck that match — it was just like the world on fire — of course, it didn't last over that long (indicates by snapping fingers). Of course, it burned us up nearly. It burned Catheryn and she was just having one fit after another, and I was trying to take care of myself the best that I could, it burned me pretty bad.[3]
* * *

My hands were both burned badly, and my eyes were burned bad. I mean as red as they could be. And it burned me up in my nose, up inside of my nose. My nose peeled off. It has affected my breathing ever since, and even my ears peeled out on the inside."

Father and daughter then immediately left the house, and a son-in-law took them to the hospital at Clinton. Around 8 p. m., the house caught fire, and several per-

[2] The original was burned in the fire, but the pink duplicate was obtained from the company office.

[3] There is no contention that the award to either appellee was excessive.

sons passing the property between that time and 8:30 p. m., witnessed it. Testimony reflected that the house was almost completely burned, and flames from the tank were shooting 12 or 15 feet into the air. The witnesses described the flames as not being steady, but "* * * would go off and then it would shut down and then it would pop off again." This happened 12 or 15 times while they were watching.

Appellant Powell admitted that he started work for Tri-County on October 1st, filled 15 tanks on that date in company with the local manager of Tri-County, and made 10 calls on the morning of October 2nd. He admittedly had no license to make deliveries of liquefied petroleum gases, and had only 1½ days training before filling Mrs. Charton's tank. Powell had previously been a helper on a delivery truck for the Coca-Cola Bottling Company. According to his testimony, the percentage gauge reflected that the tank was empty. After noting that the tank had the capacity of 115 gallons, he filled it approximately 90% full, and made out a sales slip reflecting that 104 gallons of gas had been placed in the container. He testified that Mrs. Charton stated the tank had a capacity of 150 gallons, and would not sign the slip showing that 104 gallons had been delivered, so he made another slip showing that he had placed 135 gallons in the tank (which is 90% of 150).

The most extensive testimony was given by Mr. H. D. Burns, heretofore identified, and who qualifies as an expert on the subject of butane and propane gas, including its propensities, proper methods of installation, proper servicing, etc. Mr. Burns' testimony was thorough, and exhibited an excellent knowledge of the subject. Necessarily, because of the length, the testimony cannot be discussed in detail, and only those portions will be mentioned which bear directly upon the issue in the litigation. In discussing the capacity to which liquid petroleum tanks should be filled, Mr. Burns stated:

"* * * you have a mark there that you fill for butane, and you have a mark there that you fill for propane, and you have a mark that you fill for a combina-

tion of butane and propane. Normally standard practice which has been proven in the past to be safe, in the summer time, normally the summer months of the year, 90% is accepted as being safe, without going into calculation and without possibly referring to the liquid level gauge which could result in a mistake. They assume that 90% is the maximum and it has been proven from past experience that it would be safe under most conditions; in the winter time it is necessary to reduce that somewhat. I do know and I will say that they have in the past even during the winter months filled to 90% and has resulted in no complications, however, that was possibly due to the fact that the consumer was using gas off at that time. Should you fill one at extremely low temperature of 90%, then the temperature for some unknown reason was to raise up to 90 or 100 degrees, then you would be overfilled."

He stated that because of the fact that propane will expand about twice as much as butane, a tank will hold less propane than butane. Propane, as it is used for domestic consumption, is in a gaseous state. Liquid propane, when warmed from the temperature, will start boiling, and form a vapor pressure above it; the vapor pressure is removed from the regulator on the tank into the houseline, and on into the appliances. When asked what would cause the flame from the burner on Mrs. Charton's stove to shoot up 2½ feet into the air, Mr. Burns replied that such an occurrence would be caused by excess pressure in the service line. He then went on to say:

"* * * assuming that the appliance had the correct orifice, had the appliance operated previously with a normal flame, then the only thing that would naturally cause that would be an excess pressure which would have a tendency to force more gas through the orifice. * * *"

Burns then stated that this excess pressure in the service line could be caused by three things.

1. The malfunctioning of the regulator, or the hanging of a working or mechanical part in the regulator.

2. An accumulation of foreign material between the orifice and the regulator seat, preventing the regulator from closing.

3. The injection of liquid gas into the regulator. The witness testified that if the regulator was working properly, and there was no obstruction, "* * * then the only thing that would cause that would be liquid going into your regulator or gas in a liquid phase going into the low pressure side of your regulator, therefore vaporizing and increasing in volume which would necessarily result in an increase in pressure." He testified that he examined the regulator, and that it was working at the time of his investigation; however, this was some months later, and Mr. Burns stated this did not conclusively prove that the regulator was working properly on the day of the fire; that he had known of regulators that would fail to function for a while, but would subsequently start working again.

Appellees' contention is simply that the tank was filled too full, which caused the injection of liquid gas into the regulator; this, in turn, resulted in high pressure building up in the low pressure line, the latter not designed to take care of such excessive pressure, with the consequence that the various connections in the house which operated normally under normal pressure would leak when subjected to excessive pressure.

Appellants argue that, before appellees can prevail under any circumstances, it must first be shown that the tank was filled 100% full, while appellees, though contending that the tank was filled to that capacity, argue that it is only necessary that it be established that the container was filled to an unsafe capacity. Be that as it may, we are of the opinion that there was sufficient evidence to have justified the jury in finding that the tank was filled to 100% capacity. In the first place, the delivery ticket given to Mrs. Charton by Powell shows

that 135 gallons of propane were placed in the tank. It is somewhat difficult to accept the explanation that the ticket was only given to this appellee because she insisted she be charged for 31 gallons more than were delivered. Of course, it is even more difficult to see how 135 gallons of gas could be placed in a 115 gallon tank, but the point is that this evidence certainly establishes that Powell did not know enough about the operation of filling the tank to be reasonably certain of the amount placed in it. Aside from this testimony, let it be remembered that Mayall testified the tank was 10% full when he looked at the gauge around 11 a. m. in the morning. It would appear that the amount of cooking done from that time until the time the tank was filled, would have consumed but little gas. Of course, Powell stated the gauge rested on "empty," but this conflict in evidence was simply a question for the jury to determine. If the tank was 10% full, there were 11½ gallons in it. If Powell placed 104 gallons in the tank, as he testified, then, at the time of the fire, it contained approximately 115½ gallons.

According to appellees' evidence, the capacity gauge on the tank on the morning after the fire registered better than 90%. Evidence on the part of appellants showed that the gauge registered 87%. As stated, witnesses testified that they saw flames shoot out of the top of the tank 12 or 15 times at the time of the fire[4] — and the house was practically completely burned when they arrived. Certainly, it is reasonable to assume that these flames "shot up" for quite some period of time before the witnesses arrived, and possibly for a while after they left. It would therefore appear that a large amount of gas would have been consumed at the time of the fire, and yet the capacity gauge still registered 87 to 90% full the next morning. This was certainly a strong circum-

[4] According to Mr. Burns, the shooting up of the flames indicated the operation of the pressure relief valve on the tank—the valve being set to go off when the pressure in the tank reached 250 pounds. The evidence reflected that the tank was 15 feet from the house, and Mr. Burns stated that, in his opinion, this was sufficiently close for the gas to catch on fire as it was released from the propane tank while the house was burning.

stance indicating that the tank was 100% full at the time of the fire.

While, of course, the violation of regulations is not such evidence of negligence as would establish liability, still evidence of violations, if pertinent to the cause, is proper for the jury's consideration in reaching its determination. One regulation of the Liquefied Petroleum Gas Board requires that an L. P. G. transport delivery driver must present satisfactory proof of on the job training for a minimum period of 30 days before taking an examination, which if passed, would qualify him for a license. As previously noted, appellant Powell had no license, and had only 1½ days training. Also, where the piping of the L. P. G. system has not been performed by a licensed and bonded butane dealer, then the dealer delivering the gas is required to advise the customer that he cannot fill the tank, until he, or some other qualified person, applies an air test to the line. According to Mrs. Charton, she requested that Powell check over the installation, but because of inadequate knowledge, he was unable to do so. Appellants complain that appellees' case is based upon speculation; yet, the dealer failed, as required by the aforementioned regulations, to report the fire within 24 hours. Instead, the report was made four months and 17 days later, and thus a proper investigation by the L. P. G. Control Board was precluded.

There was no evidence that the regulator was not properly functioning, or that there was an accumulation of foreign material between the orifice and the regulator seat. We think it significant that, according to the evidence, the stoves properly functioned prior to the filling of the tank. In *Biddle, et al., Receivers,* v. *Jacobs, supra,* the Court, quoting from a Missouri case, said:

"In actions for damages on account of negligence plaintiff is bound to prove not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. *The rule does not require, however, that there must be direct*

proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred.'"[5]

We have concluded that there was substantial evidence upon which to submit the case to the jury.

The judgment is affirmed.

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[5] Emphasis supplied.

[redacted]

RED TOP DRIV-UR SELF *v.* MUNGER.

5-1760 320 S. W. 2d 97

Opinion delivered January 26, 1959.

[redacted]

Wood & Smith, for appellant.

Mehaffy, Smith & Williams, by *Robert V. Light,* for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Munger, on October 30, 1957 executed a "Standard Rental Agreement" with Red Top Driv-Ur Self Co. Inc., owner, (at the airport in Little Rock) for the use of one of its cars. The above rental agreement contained these provisions, "Collision Protection. If the box has been initialed on behalf of owner, then for an additional fee of $1 per day (with a maximum of $5 per week) owner agrees to relieve renter of all liability for collision damage to the rented vehicle referred to above while it is operated in conformity with this rental agreement, but renter shall be fully liable for all such damage if said vehicle is operated in violation of any law or this rental agreement." Red Top initialed the box which entitled

Munger to protection. Another section of this rental agreement provides: "The vehicle described on the reverse side hereof shall not be operated: . . . (d) By any person other than the renter who signed the rental agreement or, provided he is a qualified licensed driver, by a member of the renter's immediate family, the renter's employer, or a person driving the car pursuant to said person's usual and customary employment by the renter, and in the course of said driver's regular and usual employment for the renter." The facts disclose that at about 8 P. M. on November 2, 1957 Munger picked up a young lady, an employee of appellant, at her apartment, and they had dinner at the Tia-Wanna Club west of Little Rock. It appears undisputed that the young lady's employment with Red Top was concluded at 5 P. M. and that her association with Munger was unrelated to her employment. They left Tia-Wanna at about 10 P. M., driving toward Little Rock and when about a mile from Little Rock, on the way to their destination in North Little Rock, the young lady, who apparently was better acquainted with the road, took the wheel and undertook to drive, with Munger on the front seat beside her. She drove first to Levy to a drive-in where they had coffee and on leaving, — she was still driving, — a wreck occurred damaging the automobile practically beyond repair, such damages amounting to approximately $1,500. Appellant demanded payment from Munger for these damages, and upon his refusal to pay, brought the present suit. Trial before the court sitting as a jury resulted in a judgment in favor of appellee Munger and this appeal followed.

It appears that material facts are not in dispute and only a question of law is involved. Our decision must turn on the meaning and application of the word "operated" as used in the rental agreement. In this connection appellant says, "The provision of the rental agreement withholding collision protection except when the automobile was being used in conformity with the agreement is perfectly clear and not susceptible to construction. The word 'operated' is limited to physical control of the automobile."

Appellee, on the other hand, says, "The term 'operated' as employed in the rental contract is ambiguous and therefore subject to judicial construction, and the proper construction of the term is that it comprehends the directing, superintending or overseeing of the driving of the vehicle."

After a careful review of the facts presented we have reached the conclusion that the appellant's contention is correct and must be sustained. We do not agree with appellee's argument that the word "operated," in the sense used here, is ambiguous. One of the specific requirements effecting collision protection to Munger is the stipulation that it applies only when the car is being operated by the person who signed the agreement, in this instance, Munger. Clearly we think this collision protection was meant to be, and was, strictly personal, applying only to Munger and in no sense general insurance for the benefit of some unknown operator. As indicated, it is undisputed that Munger was not at the wheel of the car when the mishap occurred and it does not appear that he was advising or instructing the driver in any manner. The young lady was physically driving. She was not acting as the agent of Munger, was not his employee, and there is no contention that any family relationship existed or that Munger was not a qualified, licensed driver. Granting, however, that the word "operator" may, in a general sense, be ambiguous (there being instances where it has been used to denote the driver of the car and also instances where it referred to the person who had control of the vehicle), we hold that it is not ambiguous as used in this particular rental agreement. Subsection (d), heretofore quoted, provides that the rented vehicle shall not be operated "by any person other than the renter who signed the rental agreement or, *provided he is a qualified licensed driver,* by a member of the renter's immediate family, etc." This language certainly makes clear that the term "operator" means "driver," for one does not need a driver's license to merely sit and tell somebody else where to go. Subsection (d) clearly has reference to who may *drive* the car, and Munger's companion is

not included. Under our statutes as applied to motor vehicles, their operation on the highways, etc., Sec. 75-303 Ark. Stats. 1947 defines the word "operator" in this language: "*Operator.* Every person (other than a chauffeur) who is in actual physical control of a motor vehicle upon a highway."

In the case of *Witherstine* v. *Employers Liability Assurance Corporation,* 235 N. Y. 168, 139 N. E. 229, 28 A. L. R. 1298, there was involved an insurance policy providing for a reduced rate when the car insured was being operated by the insured himself, a situation similar in effect to that presented here. In that case the court said, "the word 'operate' is used throughout the statute as signifying a personal act in working the mechanism of the car. The driver operates the car for the owner but the owner does not operate the car unless he drives it himself. If the meaning were extended to include an owner acting either by himself or by agents or employees the provisions of the highway law would be replete with repetitious jargon."

"When the meaning of the contract appears, it is the duty of the court to give them effect even when the words have been selected by an insurance company. Construction must not extend to the creation of a new contract for the parties."

In Blashfield on automobiles we find this statement on the construction of the word 'operate.' (*Blashfield* 6, Part 1, Section 3941) ". . . if a policy distinctly limits its protection to cases of injury occurring while the owner is operating the car, personal operation thereof by the owner is contemplated, and the insurer is not liable in any other event."

"Occasionally the policy restricts the coverage in this manner in certain states of fact and contingencies, and, when the situation at the time of the accident comes within a state of fact as to which the restriction applies, there is no liability upon the insurer for operation by persons other than the named insured."

"The word 'operate' read in the light of the context of the policy and in view of the meaning attached to the word in automobile statutes, may be construed as describing the personal act of the owner in working the mechanism of the car, and hence as excluding liability when the owner is not personally driving at the time of the accident, although he is present and directing another as to the route, speed, and general manner of operation of the car, . . ."

In the case of *Galan* v. *State,* 164 Tex. Cr. Rep. 521, 301 S. W. 2d 141, The Court of Criminal Appeals of Texas used this language, "Appellant next complains of that portion of the court's charge in which he instructed the jury that they might convict if they found that the appellant did 'drive and operate' a motor vehicle on the grounds that the complaint and information charged only that he did 'operate' a motor vehicle. We hold such terms to be synonymous, and the court's charge to be proper."

And in *State* v. *Sullivan,* 146 Me. 381, 82 A. 2d 629, the Supreme Judicial Court of Maine said: "According to popular acceptance, the meaning of the term 'to operate a motor vehicle' is the same as to 'drive' it. It usually means that a person must so manipulate the machinery that the power of the motor is applied to the wheels to move the automobile forward or backward . . ."

We conclude therefore that the word "operate" as used in the rental agreement here is plain and unambiguous and means that Munger was not protected for the reason that he was not operating the car at the time the car was wrecked. Accordingly the judgment is reversed and the cause remanded with directions to proceed in a manner consistent with this opinion.

McFaddin, Robinson, and Johnson, JJ., dissent.

Sam Robinson, Associate Justice, dissenting. The majority starts off by saying that Munger executed a "Standard Rental Agreement" with Red Top. True, the printed form containing the terms of the agreement be-

tween the parties, prepared by Red Top, is designated thereon as "Standard Rental Agreement." But there is no showing that such a form is actually standard. Certainly there is no indication that it is one of such wide use that it is generally understood by the public.

There is a principle of law so firmly established that it needs no citation to support it, to the effect that an ambiguous written contract will be construed more strongly against the party that prepared it. Such an ambiguity exists in the case at bar, and in my opinion the majority is departing from a principle of law that has heretofore been followed in dozens of cases.

In the fine print on the back of the written agreement is the provision that "The vehicle described on the reverse side hereof shall not be 'operated . . . By any person other than the renter who signed the rental agreement . . . '." At the time of the collision the vehicle was being driven by a young lady, at the direction of Munger, who had rented the car. Incidentally, the young lady was a regular employee of Red Top. However, she was not on duty at the time of the collision. If the provision of the contract relieving Munger from liability for damages to the automobile in the event of a collision is not applicable unless Munger actually was sitting under the steering wheel and driving the car, then the contract should have so provided in unambiguous language. It is a matter of common knowledge that the driver of a passenger automobile is not ordinarily referred to as the "operator" of the vehicle. In all fairness, did anyone ever hear of an "automobile operator"? The license to drive an automobile is called a "Driver's License." In this State, printed on the front of the license is "Arkansas Driver's License." Undoubtedly one who drives an automobile is an "automobile driver." But "driver" is not synonymous with "operator." Roget's *Thesaurus,* New Ed., p. 169, par. 10, deals with the term "Automobile driver" and gives as synonyms: "automobile driver, automobilist, autoist, motorist, chauffeur, James [slang]; truck driver, truckman, speed demon *or* racer; road hog [slang], Sunday driver [joc.]; joy-rider

[coll.]; hit-and-run driver; back-seat driver [joc.]; bus driver; taxi *or* taxicab driver; jitney driver; cabdriver, etc.'' It will be noticed that the *Thesaurus* does not give ''automobile operator'' as being synonymous with ''automobile driver,'' although just about every other term imaginable is used.

In the majority opinion it is stated: ''Clearly we think this collision protection was meant to be, and was, strictly personal, applying only to Munger and in no sense general insurance for the benefit of some unknown operator.'' The appellee, Munger, makes no contention in this case that the insurance was for the benefit of some unknown operator. It is his contention that he is the operator within the meaning of the contract and is therefore entitled to the collision protection. The majority cites Ark. Stats., § 75-303, defining ''operator'' as one who is in control of an automobile on the highway. The term as used in the statute is merely for the purpose of distinguishing chauffeurs from other drivers. If the majority is depending on that definition as applying to the case at bar, then a chauffeur who rented an automobile and had a collision would not be protected under the contract because of the fact that he was a chauffeur and not an operator.

To sustain the position that ''operator'' means ''driver,'' the majority relies heavily on the case of *Witherstine* v. *Employers' Liability Assurance Corp.*, 235 N. Y. 168, 139 N. E. 229, 28 A. L. R. 1298, where the word ''operate'' was construed as signifying a personal act in working the mechanism of the car. There was a strong dissent in the *Witherstine* case and later, in *Snyder, et al.* v. *United States Mutual Ins. Co.*, 312 Ill. App. 337, 38 N. E. 2d 540, the Illinois court approved and followed the dissenting opinion in the *Witherstine* case, pointing out that one of the common and ordinary meanings of the word ''operate'' is ''to direct or superintend the working of,'' and since the defendant insurance company had prepared the policy and used the word it should be given the broadest meaning in favor of the plaintiff and not be interpreted in its strictest sense. The *Snyder* case in-

volved a policy limitation as follows: "This policy shall be effective only while the within described automobile is being *operated* by the called Assured . . ." [italics supplied]. In that case the court also pointed out that the New York court had in a later case, *Arcara* v. *Moresse,* 258 N. Y. 211, 179 N. E. 389, followed the dissent in the *Witherstine* case and not the majority opinion. In other words, the principal case relied on by the majority in the case at bar has been overruled or seriously impaired. In the *Arcara* case, in speaking of the *Witherstine* case, the New York court said: "Insofar as the quoted words carry the implication, that to 'operate' a motor vehicle, one must himself manipulate the steering wheel, they cannot be regarded as conclusively determining the significance of the word 'operation' or the word 'operating'."

In the case of *Trans-Continental Mutual Ins. Co.* v. *Harrison,* 262 Ala. 373, 78 So. 2d 917, 51 A. L. R. 2d 917 (1955), the Supreme Court of Alabama held that the word "operated" within the meaning of a restrictive endorsement on a policy of liability insurance is ambiguous under "the well established and recognized rule of construction pertinent to written instruments, particularly to policies of insurance," and that the ambiguity must be construed against the party who prepared the written contract.

In the New Jersey case of *Neel* v. *Indemnity Ins. Co. of N. A.,* 122 N. J. L. 560, 6 A. 2d 722 (1939), it is said: "The question is whether the word 'operating' as used in the policy is to be limited to the manual control by the customer personally or is comprehensive of the act of the customer's servant. Our study of the dictionary definitions and of legal usage as reflected in the books brings us to the belief that sound support may be found for the use of the word with either meaning; and this presents an ambiguity. Decisions which have construed statutes with a criminal or quasi criminal aspect rather uniformly limit the words 'operator' and 'operating' with respect to driving an automobile to the person exercising immediate physical control. So, too, some of the cases which construe contracts obviously based upon the language of

such statutes. But here we have a contract drafted by the defendant insurer independent of the statute and in the preparation of which the plaintiff had no part.'' The New Jersey court held that the insured was operating the automobile within the terms of the policy, even though the customer's son was driving the vehicle and the customer was not in the car at the time of the accident.

In my opinion the great weight of authority is to the effect that the word ''operate'' in the sense that it was used in this contract, is ambiguous, and since Red Top prepared the contract, such ambiguity should be construed more strongly in favor of Munger, the other party to the contract. As was said in the *Arcara* case, in a quotation from an earlier opinion by Judge CARDOZO (*Grant* v. *Knepper,* 245 N. Y. 158, 165, 156 N. E. 650, 652, 54 A. L. R. 845), he '' 'did not abandon the car or its use when he surrendered to another the guidance of the wheel'; he was 'still the director of the enterprise, still the custodian of the instrumentality confided to his keeping, still the master of the ship' ''; he was still the operator.

For the reasons set out herein, I respectfully dissent.

WOOD *v.* HAAS.

1710 320 S. W. 2d 655

Opinion delivered January 26, 1959.

[Rehearing denied March 2, 1959]

Brown & Compton, for appellant.

Shackleford & Shackleford, for appellee.

WOOD *v.* SETLIFF.

5-1709

Opinion delivered January 26, 1959.

[Rehearing denied March 2, 1959]

Brown & Compton, for appellant.

Shackleford & Shackleford, for appellee.

Ed. F. McFaddin, Associate Justice. This appeal stems from an action for breach of warranty. On April 7, 1951 appellant, J. B. Wood, for a consideration of $14,000.00, executed a General Warranty Deed to the appellees, J. Paul Setliff and Mary Dean Setliff, his wife. The deed described by metes and bounds a tract of land in the City of El Dorado fronting eighty feet on Northwest Avenue and having a depth of 220 feet. On April 5, 1956 (just a few days prior to five years from the date of the above deed) the Setliffs filed this action against Wood for breach of warranty.

The complaint alleged that a considerable portion of the property described in the deed from Wood to Setliff was at the time of the conveyance and at all times thereafter a public street or parkway; and that as to such portion there was a breach of the covenant of warranty. Damages were claimed in the sum of $7,650.00 and interest. The defendant's amended and substituted answer admitted some of the allegations in the complaint and denied other allegations. Wood cross-complained against his grantor, Haas, for breach of the covenant of warranty in the deed under which Wood held.

On Wood's motion, the entire proceedings were transferred to the Chancery Court, where Haas pleaded the 5-year statute of limitation against Wood's cross-complaint. The Chancery Court tried all issues; and

the results were: (1) a decree in favor of the Setliffs and against Wood for $7,650.00 damages, plus interest from January 6, 1958 (the date of the decree), plus $1,000.00 attorney's fee; and (2) a decree sustaining Haas' plea of limitation against Wood's cross-complaint. From that decree two appeals have resulted. Case No. 1709 in this Court is the appeal by Wood in the Setliff matter; and in that case the Setliffs have cross-appealed. Case No. 1710 in this Court is the appeal by Wood in the Haas matter. We dispose of both appeals in this one opinion.

Case No. 1709—*Wood* v. *Setliff*

I. *Dedication.* Wood now challenges the prior dedication of a portion of the 80x220-foot tract. He does not deny that the tract is in Block "A" of the Plat, but claims—here for the first time—that the parties who signed the dedication and placed the Plat of record in 1942 were not shown to have been the owners of Block "A." This contention in this Court comes too late in view of the admissions[1] contained in Wood's answer. The tract of 80x220 feet, as described in the deed from Wood to the Setliffs, contained 17,600 square feet; but when the previously dedicated public streets and park-

[1] In his answer Wood specifically admitted all of the following allegations in the Setliff complaint: "That Parkview Realty Corporation, Marguerite Trull McWilliams, W. H. Hanna and Mary Sue Hanna, his wife, and F. L. Dumas dedicated by Deed to the City of El Dorado, Arkansas, and to the public use therein forever, all the streets, park area, travel ways and/or drive-arounds of the width, length and location as reflected by Plat attached thereto and recorded in Plat Book 2, Page 28 of the Record Books of Union County, Arkansas. That this Dedication Deed was dated May 11, 1942, and filed for record in the office of the Circuit Clerk of Union County, State of Arkansas, on May 11, 1942. That the said Dedication Deed was properly accepted by the City Council of El Dorado, Arkansas, on May 24th, 1942. That the Plat was later corrected as reflected by the Plat recorded in Plat Book 2, Page 33, of the Record Books of Union County, Arkansas. That a copy of said Dedication Deed and corrected Plat is attached hereto marked Exhibits B, C and D respectively and made a part hereof. In the Deed of Dedication and Plats hereinbefore referred to, included amongst the lands dedicated as streets, park area, travel ways and/or drive arounds, was an area around Block A and the said Block A was designated as business property; that this land for public use around said Block A was 70 feet on the West, 30 feet on the North and South and 50 feet on the East of the said Block A."

ways are taken from the described 80x220-foot tract, there is left a tract only 50x100 feet or a total of 5,000 square feet; so the Setliffs did not receive what was described in the deed to them because the public streets and parkways had admittedly been dedicated.

II. *Eviction.* Wood claims there was no eviction of the Setliffs from the streets or parkways. It was proved that the City of El Dorado accepted the dedication of the public streets and parkways. Our cases hold that when title is in the sovereign the eviction is as of the date of the conveyance. *Abbott* v. *Rowan,* 33 Ark. 593; *Selden* v. *Dudley E. Jones Co.,* 74 Ark. 348, 85 S. W. 778; *Thompson* v. *Dildy,* 227 Ark. 648, 300 S. W. 2d 270. In the case at bar the title to the public streets and parkways was in the City of El Dorado; and adverse possession could not be acquired against the City. *City of Magnolia* v. *Burton,* 213 Ark. 157, 209 S. W. 2d 684. The municipality is a creature of the State; and because of legislation as to the impossibility of adverse possession of streets (§ 19-3831 Ark. Stats.) a municipality now occupies, insofar as the said streets and public parkways are concerned, the same status as the State occupies. Therefore, the warranty was breached as of the date of the conveyance from Wood to the Setliffs; and this action was brought within five years thereafter. See § 37-213 Ark. Stats.; *Bird* v. *Smith,* 8 Ark. 368; and *Smiley* v. *Thomas,* 220 Ark. 116, 246 S. W. 2d 419.

III. *Damages.* Witnesses testified, and the Court found, that the amount the Setliffs paid for the entire 80x220-foot tract was $14,000.00; and that the 50x100-foot tract (which was left after the streets and parkways were excluded) was worth only $7,750.00. So the Setliffs' damage for actual loss of land was $6,250.00; and this portion of the decree was correct.

As to damages for required removal of a building, the situation is different. The evidence disclosed that when Wood conveyed to the Setliffs there was a "drive-in" building located on the 50x100-foot tract as to which the title was good. Shortly thereafter, the Setliffs moved this "drive-in" building several feet and located

it on what was and is a portion of the public street or parkway. In this suit, the Setliffs claim that it will cost them $1,400.00 to move the "drive-in" building back to the 50x100-foot strip. They prayed and received judgment for $1,400.00 for such expense of removal. The Trial Court was in error in allowing such recovery. The Setliffs had constructive notice of the public street or parkway, and moved the "drive-in" to such location of their own volition. Other reasons exist for such refusal to award re-removal damages; but the factual situation as detailed is a sufficient answer. So, as to the $1,400.00 item, the decree must be reversed.

IV. *Attorney's Fee.* The Setliffs claimed, and the Trial Court allowed them, $1,000.00 for attorney's fee in bringing and prosecuting the present suit against Wood for breach of the covenant of warranty. The Trial Court was in error in allowing such fee. It is true that generally a grantee who pays a reasonable attorney's fee, in unsuccessfully defending his title against a third party, may recover such attorney's fee from his grantor in an action for breach of warranty. *Brawley* v. *Copelin,* 106 Ark. 256, 153 S. W. 101; *Ark. Trust Co.* v. *Bates,* 187 Ark. 331, 59 S. W. 2d 1025; and *Bridwell* v. *Gruner,* 212 Ark. 992, 209 S. W. 2d 441.

In the case at bar the Setliffs did not pay any attorney's fee in defending their title against a third person. The Setliffs conceded that the title to the public streets and parkways was in the City of El Dorado. There has been no other litigation; and the Setliffs are here seeking to recover damages from Wood for breach of the covenant of warranty. They are not entitled to have Wood pay their attorney's fee for establishing such a breach in this direct proceeding. *O'Bar* v. *Hight,* 169 Ark. 1008, 277 S. W. 533. The decree must be reversed insofar as it allowed $1,000.00 for attorney's fee.

V. *Interest.* The Setliffs claimed that they were entitled to interest at 6% from 1951, the date of their deed. The Trial Court allowed the interest only from January 6, 1958, the date of the decree, and the Setliffs have cross-complained on this matter of interest. To

sustain their cross-appeal the Setliffs, *inter alia,* quote (1) from the case of *Quinn* v. *Lee Wilson & Co.,* 137 Ark. 69, 207 S. W. 211, wherein we said: ". . . where title is in the Government the covenant of warranty is deemed to be broken as soon as it is made . . ."; and (2) from our case of *Fox* v. *Pinson,* 182 Ark. 936, 34 S. W. 2d 459, 74 A. L. R. 583, wherein we said: ". . . we think she should be entitled to recover under the facts in the record the sum of $11,950.00 and interest thereon, from May 24, 1925, the date of her constructive eviction . . ." From these cases, and others, appellees contend that interest runs from date of the constructive eviction, which was the date of the deed.

But the facts in the case at bar make it clearly inequitable for the Setliffs to recover any interest except from the date of the decree. We mention the following: (a) the Setliffs at all times enjoyed possession of the entire 80x220-foot tract; (b) there is no showing that they have paid out any amount to the City of El Dorado for either lawful or unlawful use of the public streets or parkways; and (c) the amount of the Setliffs' recovery for breach of warranty was for only a portion of the conveyed premises and the amount of the damages to be recovered was unliquidated until the entry of the decree.[2] So the cross-complaint of the Setliffs, on the matter of interest, is without merit.

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[2] In 61 A.L.R. 10 there is an exhaustive annotation entitled, "Measure of damages for breach of covenants of title in conveyances or mortgages of real property"; and on page 174 and following of said annotation, this statement appears: "Of course, where the damages are assessed at the value of the land at the time of the eviction, the question of allowance of interest is of no importance, since it is clear that no interest is recoverable, the damages not being liquidated and capable of ascertainment prior to judgment." And on page 180 of the same annotation, this statement appears: "Where the covenantee has had possession of the land under an instrument containing a covenant of seisin, he cannot, as part of the damage for breach of this covenant, recover interest for any period prior to his eviction, without proof that he had to account to the holder of the paramount title for mesne profits, and his recovery of interest is limited to such period of time for which he may show that he had to account for these profits."

CONCLUSION

From the foregoing, it follows that the Chancery decree in the case of *Wood* v. *Setliff* (No. 1709 in this Court) is affirmed, except as to (a) the item of $1,400.00 for removal of the building; and (b) the item of $1,000.00 for attorney's fee. As to these items the decree is reversed. This being an equity case, we adjudge the costs of the appeal against the appellant; and the cause of *Wood* v. *Setliff* is remanded to the Chancery Court to reinvest it with jurisdiction.

Case No. 1710—*Wood* v. *Haas, et al.*

Setliff sued Wood for breach of warranty on April 5, 1956; and on May 28, 1956 Wood filed his cross-complaint against Haas, *et al.,* as his grantors. Wood alleged that on February 2, 1948 Haas *et al.* conveyed to him by General Warranty Deed, and he sought damages from his grantors for breach of covenant of warranty (since the dedication to the City of El Dorado was in 1942). Haas *et al.* demurred to Wood's complaint, saying, *inter alia*:

"If there has been a breach of the warranty contained in the Deed, dated February 2, 1948, said breach occurred at the time of the delivery of the said Deed, and same occurred more than five years prior to the filing of said cross-complaint, and any right of action thereunder is barred by the Statute of Limitation."

The demurrer was sustained; the cross-complaint dismissed when Wood declined to plead further; and Wood has appealed. The Trial Court was correct in sustaining the demurrer. In the case of *Wood* v. *Setliff* (No. 1709 *supra*), we held that the rule of constructive eviction — when title was in the sovereign — applied when the title was in the City. So, when Haas *et al.* conveyed to Wood in 1948 there was instantly a breach of warranty. Wood's cause of action against Haas *et al.* matured in 1948, and was governed by the 5-year statute of limitation (§ 37-213 Ark. Stats. and *Bird* v. *Smith,*

8 Ark. 368) and was barred by limitation when Wood cross-complained against Haas *et al.* in 1956. Limitation appeared on the face of the cross-complaint, and, therefore, could be raised by demurrer. See *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835.

The decree in Case No. 1710 is affirmed.

JOHNSON, J., not participating.

SPARKS MEMORIAL HOSPITAL *v.* WALTON.

5-1750 320 S. W. 2d 102

Opinion delivered January 26, 1959.

Dobbs, Pryor & Dobbs, for appellant.

Edward E. Bedwell & D. L. Grace, for appellee.

GEORGE ROSE SMITH, J. This is a claim filed by the appellee, Mary Walton, for workmen's compensation. On July 11, 1956, the claimant, a housekeeper at the appellant's hospital, strained her lower back while lift-

ing a bed. There is an abundance of evidence to show that Mrs. Walton became disabled five days later and that her incapacity still existed when the full Commission heard the case in March, 1958. The Commission found that the claimant had sustained a compensable injury, that she was temporarily totally disabled from July 16, 1956, through March 17, 1958, and that she has not reached the end of her healing period. The record was left open for further proof of her disability after March 17, 1958.

In contending that the order is not supported by any substantial evidence the employer stresses the fact that the many physicians who have examined the claimant have not been able to arrive at a positive medical explanation for her condition. Despite an extensive exploratory operation and a succession of examinations and treatments the doctors have not discovered an objective cause for the severe pain that Mrs. Walton has suffered in her side, abdomen, back, and right leg.

The physicians' uncertainty does not, in our opinion, compel the conclusion that the claim must be denied. Dr. Southard and Dr. Thompson attributed Mrs. Walton's disability to the injury she suffered at the hospital. Their testimony is substantial evidence on which to rest the Commission's finding of a causal connection between the injury and the incapacity. There is no reason for saying that the Commission, upon concluding that a compensable disability had existed for more than eighteen months, should nevertheless have withheld an award pending an exact determination of the medical cause for the claimant's condition. See Larson, Workmen's Compensation, § 79.51. The interim finding of a continuing, temporary, total disability is amply supported by the record.

The appellant questions a statement in the Commission's formal opinion, to the effect that the medical findings "indicate to us [the commissioners] that claimant is disabled by reason of a nerve root compression in the low back." We do not regard this passing observation as an attempt by the commissioners to make their

own diagnosis without regard to the medical evidence. It merely suggests a possibility to be explored in the course of the further proceedings that the order contemplates. The essential part of the interim order is the finding, supported by substantial proof, that a disability exists and that it was caused by an accidental injury suffered in the course of the claimant's employment.

The appellee asks that an additional attorney's fee be allowed in connection with the appeal to this court. This request must be denied, as the statute does not authorize such an allowance. Only the Commission is empowered to award fees for legal services, Ark. Stats. 1947, § 81-1332, and the maximum fee was allowed in this case.

Affirmed.

RIMMER *v.* RIMMER.

5-1752 320 S. W. 2d 92

Opinion delivered January 26, 1959.

Cecil C. Matthews, for appellant.

Howell, Price & Worsham & F. J. Howell, Jr., for appellee.

PAUL WARD, Associate Justice. Several issues are raised by this appeal, among which are the effect and extent of the notice of appeal and what constitutes contempt of court in a child maintenance proceeding.

General Fact Situation. Appellant, Carlos Rimmer, and appellee, Lillian Rimmer, were divorced by a decree of the Pulaski Chancery Court, 2nd Division, on August 8, 1956. At the time the parties had two children. One was an adult and the other, a son named Ralph, was 17 years of age. This litigation stems from efforts to require appellant to provide for the maintenance and education of Ralph. The only reference to Ralph in the divorce decree is the following: "That by agreement of the parties, adjudication of the custody of Ralph Rimmer is not to be considered herein." Following the divorce decree several orders were made at different times by the same court that rendered the decree. All of these orders, some of which were made after the presentation of testimony, either directly or indirectly bear upon the issues raised on this appeal.

On August 7, 1956 appellant was ordered to be present on August 13, 1956 and show cause why he should not be held in contempt "by reason of violation of its order as to attorney fee, court costs, and support for dependent heretofore rendered on the 14th day of May, 1956." No hearing was held on the specified date.

On August 22, 1956, appellant was ordered to be present on September 4, 1956 for the same purpose above mentioned. Again no hearing shown.

On September 10, 1957 the court entered an order which in substance states: Ralph is a student in A. & M. College at Monticello; appellant is able to contribute the

sum of $85 per month for Ralph's maintenance and education, and; the court retains jurisdiction over the parties regarding Ralph. Then appellant was ordered to make payment. It is not shown that appellant had notice of or was present when the above order was made.

Appellant filed a Motion on October 7, 1957, pointing out: The language in the original decree with reference to Ralph's custody; that the order of September 10, 1957 was not based on any written pleading or petition by appellee; that he had no notice, except a copy of the said order; that neither party was now a resident of Pulaski County, and; that, therefore, the court had no jurisdiction and should revoke its former order.

On October 29, 1957 a hearing was held on the above motion and also (as stated by the court) on the oral petition of appellee and Ralph for maintenance, at which all three parties were present and testified. The court over-ruled appellant's motion to dismiss, and then found: Ralph has been attending A. & M. College since the first of September, 1957; appellant is gainfully employed and should be compelled to aid Ralph financially while in college; appellant has already paid $65 for said purpose; Ralph is a semi-skilled workman and is able to obtain employment at the school and contribute to his own support, and that Ralph's grades indicate he should drop the course in Chemistry. In accordance with the above findings the court, under date of November 26, 1957, ordered appellant to contribute the sum of $12.50 each week for the support of Ralph while in school and to pay $140 due the school, and also ordered Ralph to secure employment at the school and to drop the course in Chemistry.

On January 29, 1958 the court entered an order, in which it was stated appellee orally requested a citation for appellant, requiring appellant to appear in court on February 4, 1958 and show cause why he should not be held in contempt of court for failure to comply with the order dated November 26, 1957, and provided for notice to be given appellant by registered mail.

The hearing on the above was apparently held on February 10, 1958, although the order based thereon was dated February 26, 1958. At the hearing all parties were again present and testimony was taken. The court found appellant in contempt of court for failure to comply with the order dated November 26, 1957. Appellant was ordered confined in jail, pending further orders, unless "on or before the 11th day of March, (he) pay all arrearage occurring under the order of November 26, 1957."

Notice of Appeal. On March 10, 1958 appellant gave notice of appeal "to the Supreme Court of Arkansas, from orders and judgments of this court rendered and entered herein on September 10, 1957, November 26, 1957, and February 11, 1958."

Appellant urges five grounds for a reversal but, in view of the conclusion we hereafter reach, we deem it unnecessary to discuss separately and fully each of these points.

We do not agree with appellant that the trial court lacked jurisdiction to issue the order on November 26, 1957, which required him to make certain payments for the support and education of his son. In this connection it suffices to say appellant entered his appearance by testifying at the hearing. The court already had jurisdiction of the subject matter by virtue of the 1956 divorce proceedings which appellant himself instigated.

The support decree made on November 26, 1957, was a final order from which appellant could have appealed if he had chosen to do so. His notice of appeal given on March 10, 1958 was long after the expiration of the 30 days allowed for such notice under Act 555 of 1953, consequently the order cannot be challenged on this appeal.

However appellant's notice of appeal from the contempt order made on February 10, 1958 was timely given, and gives us the right to review not only that order but all proceedings and hearings on which the order was founded. See *Harrison* v. *Terry Dairy Products, Inc.,* 225 Ark. 953 (page 957), 287 S. W. 2d 473.

In the order of February 10, 1958, the trial court adjudged appellant in contempt of court for failure to comply with its order of November 26, 1957, and also ordered him to be confined in jail if he failed within 30 days to "pay all arrearage occurring under" said order.

We are fully cognizant of the inherent power of courts to punish, even by confinement, for willful disobedience to their orders. However a careful review of the pertinent parts of the record in this case leads us to conclude that the contempt order is not supported by the weight of the evidence. Our reasons for this conclusion are set out below.

In the recent case of *Griffith* v. *Griffith,* 225 Ark. 487, 283 S. W. 2d 340, the court, in this connection said: "Imprisonment for contempt for failure to pay alimony may be imposed only in those cases where it appears that the defendant was able to pay but *willfully* and *stubbornly* refused to do so." (emphasis ours.) In the same case it was further stated: "Imprisonment in such a case is only justified on the ground of willful disobedience to the orders of the court; and, so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged." Considering the case before us *de novo,* as we do, we feel the weight of the evidence fails to show that appellant *willfully* refused to comply with the court's order. In fact the evidence indicates that appellant had substantially complied with the court's order.

Appellant is a carpenter with no substantial means. It is undisputed that he was out of work when the order was made and had been for several weeks previously although he said he had sought employment. Ralph, who was 19 years old, and had previously been gainfully employed, entered school at Monticello A. & M. College in the fall of 1957. The record is that he made very poor grades in school, and that he had a car for his own personal use.

Against this background the court, on November 26, 1957, ordered appellant to pay $12.50 per week for

Ralph's maintenance and also to pay $140 due the college. The court at the same time ordered Ralph to drop the course in chemistry and to get a part time job at the school.

At the contempt hearing it was revealed that Ralph had not dropped the chemistry course and that he was not working although a job was available. It was further revealed that appellant had made three payments of $50 each for Ralph's support, and he had made arrangements, satisfactory to the college, to pay the $140. It seems that the only deviation from a strict compliance with the court's order was that the college only applied $42 per month (instead of $50) for Ralph's support, and applied $8 per month to the retirement of the $140. It was explained by the college that it did not know the entire $50 per month was to go to Ralph, and it was not shown that appellant directed the application of payment.

Under the above facts and circumstances we think the weight of the evidence fails to sustain the finding that appellant *willfully* refused to obey the November order of the court. Therefore the order committing appellant to jail must be reversed.

We point out that nothing we have said relieves appellant from the duty of making the payments imposed by the November order of the trial court when he is able to do so. We leave it to the trial court to decide whether the three $8 payments above mentioned (applied to the college debt) are still a charge against appellant for Ralph's support and maintenance.

Therefore the order holding appellant in contempt is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

WILLIAMS *v.* STATE.

4905 322 S. W. 2d 86

Opinion delivered January 26, 1959.

[Rehearing denied April 6, 1959]

[redacted]

Kaneaster Hodges, Sam Levine, C. M. Erwin, for appellant.

Bruce Bennett, Atty. General, by *Thorp Thomas,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant, H. O. Williams, a school teacher, was convicted of the crime of involuntary manslaughter and sentenced to two years in the penitentiary and fined $1,000. On appeal appellant contends, among other things, that the evidence is not sufficient to support the verdict.

On the 25th day of February, 1957, Williams attempted to drive an old truck in a bad state of repair, to a shop at Weldon, in Jackson County, Arkansas, to have it repaired. He could not get the vehicle started, and it was therefore necessary to get assistance by having the truck pushed. Before he reached the hard surfaced road he got stuck in a mud hole. He left the truck there overnight; went back the next day and got Mr. Carr, who lived nearby, to pull him out of the mud hole with a tractor. Finally Williams arrived at the hard surfaced road with the truck and started north toward Weldon, about two miles distant. After traveling about one-half mile the truck began to sputter and stopped. The hard surfaced part of the road is 23 feet wide, and the truck came to a stop in the middle of the east travel lane. This was about 7:00 p. m. It was dark and drizzling rain. Williams had no flares. There was no tail light on the truck, and although one headlight had been burning when the truck was running, no light on the truck would burn after it stopped. Accepting Williams' testimony as true, he attempted to push the truck off the paved portion of the highway but was unable to do so. He attempted, also, to get other travelers on the highway to stop and help him, but none would stop. He then started walking toward Weldon with the intention of getting a garageman to come and move the truck. He had gone only a short distance when Mr. Burton,

with whom he was acquainted, stopped and picked him up. At that time Burton cautioned Williams that the truck had been left in a dangerous place. Williams rode to Weldon with Mr. Burton and proceeded to the garage to get Euil Malden to go move the truck. Malden was eating his supper at the time, and he told Williams that he would have to finish his supper and finish the work he had been doing on a tractor before he could go after the truck. Williams was under the impression that this would not be too long. He sat down and waited for Malden until work was finished on the tractor. This work was not completed until about nine o'clock.

In the meantime Mr. Jimmy Ray Simmons was driving his car north on the same road where the truck had been left; he was going in the same direction the Williams truck was headed when it stopped. In the car with Mr. Simmons were his wife and son, and Mr. Jim Benning and his wife and son, and Mrs. Benning's daughter, Linda, nine years of age. As Mr. Simmons approached the Williams truck, but before he got to a point where he could see it, he was met by a truck driven by Clyde Henderson, traveling south. The lights from the Henderson truck blinded Simmons to the extent that he did not see the Williams truck until just a few feet from it. In an attempt to miss the Williams truck, he swerved to his left in such a manner that he struck the end of the rear bumper of the Henderson truck, which was passing at that moment, but he was unable to avoid striking the left rear of the Williams truck, which had a grain bed on it. As a result of the collision, Mrs. Benning and her daughter, Linda, received injuries from which they died two days later. The prosecuting attorney filed a felony information against Williams, charging him with manslaughter.

The point that has caused us considerable concern is whether the evidence is sufficient to sustain the conviction. After careful deliberation we have reached the conclusion that the evidence is sufficient. The facts are pretty well outlined above. On a dark and misty night the appellant left a heavy, two-ton, unlighted truck,

equipped with a wide grain bed, in the middle of one of the travel lanes of a good hard surfaced road. He set out no flares, and had left the truck unguarded for about an hour and a half, when the tragedy occurred. Although, even if it is considered that it was necessary that he leave the truck on the highway unguarded in the first instance, it was a question for the jury as to whether Williams should have returned to the truck as soon as possible to help guard against the very thing that did happen. When he found out that Mr. Malden could not go after the truck immediately, he could have started walking and reached the truck a long time before the collision occurred. And if he had been with the truck when the cars approached at the same time from opposite directions, it is not beyond the range of possibility that he could have given signals that would have saved two lives. He knew the truck was in a dangerous place; he knew the night was dark and that weather conditions caused poor visibility; and yet, for one and one-half hours, he did nothing to remedy the extremely dangerous situation he had brought about. Ark. Stat. § 41-2209 provides: "Involuntary manslaughter defined.—If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter. Provided further that when the death of any person ensues within one (1) year as a proximate result of injury received by the driving of any vehicle in reckless, willful or wanton disregard of the safety of others, the person so operating such vehicle shall be deemed guilty of involuntary manslaughter." The defendant was charged in the words of the statute.

Appellant contends that the second part of § 41-2209 covers the offense of involuntary manslaughter resulting from the driving of an automobile exclusively; that the first part has no application when the death grows out of driving an automobile; and that the court erred in instructing the jury on doing a lawful act without due caution and circumspection. It is not necessary, however, to discuss this point, because an exception

was not saved to the instruction as given. As far back as the year 1915, in the case of *Madding* v. *State,* 118 Ark. 506, 177 S. W. 410, the court held that the first part of the statute, which was the only part in effect at that time, applied to the driving of an automobile "with reckless abandon and wanton disregard of the rights of others upon the streets and without a care as to their safety."

Appellant requested instructions dealing with efficient and immediate cause of the accident, and proximate cause. We think these instructions were covered by other instructions given by the court.

The defendant requested, also, instructions on "misfortune or accident." There is no evidence in the record to justify any instruction along that line.

Appellant also complains of the court's refusal to excuse for cause the venireman Breckenridge. On examination by counsel for the defendant Mr. Breckenridge stated that he had an opinion about the case that would take evidence to remove. But on further examination, he stated that he could and would go into the jury box with his mind completely open and try the case solely on the law and the evidence.

The appellant is a Negro. On December 9th, two days before the trial began, he filed a motion to quash the jury panel on the ground that there has been systematic exclusion of Negroes from jury panels in Jackson County and that there was no Negro on the present jury panel. Two days later when the case was called to trial, no action had been taken on the motion. Counsel for defendant orally renewed the motion; it was overruled and exceptions were saved. The court stated: "Since January 1, 1952, the matter of selecting jury commissioners and instructing such commissioners has been the responsibility of this court. In every case, when jury commissioners were called upon to serve by the court, they have been instructed specifically and in considerable detail to the effect that there should be no discrimination on their part in the selection of members of jury panels because of

race, color, creed or sex. Of course, no suggestion has ever been made as to whom should be placed on jury panels, but particular care has been used by the court to instruct these commissioners that they should place on such lists the names of people who were qualified electors and who, in their judgment, were people of good character and possessing such qualifications that in their considered opinions would make good jurors. Embodied in these instructions has been an explanation of the fact that a part of their duty was to carefully consider all of the population of Jackson County and if, in their opinions, there were members of the Negro race who possessed the necessary good character and judgment to qualify them for jury service that it would certainly be proper for them to include them on these lists. During these years it has been the court's personal observation, and the court takes judicial notice of the fact that frequently names of members of the Negro race have appeared on the jury panel lists, and not only that, but they have qualified and have served as petit jurors during this period of time." Counsel for the defendant then stated: "We are tendering the proof that there is no Negro on this panel, or these panels; there was one Negro, Willie Booker, on the February, 1957, panel; there were two Negroes, O. A. Porter and John Laird, on the September, 1956, panel; and there were two Negroes, Mack Newton and one other person, on the February, 1956, panel."

Purposeful and systematic exclusion of the members of any race from jury service is contrary to law, but, as we said in *Dorsey* v. *State,* 219 Ark. 101, 240 S. W. 2d 30, "The burden of showing facts which permit an inference of purposeful limitation is on the defendant. *Martin* v. *Texas,* 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497." In the case at bar the proffered testimony falls far short of showing that there was purposeful or systematic exclusion of Negroes from jury service.

The State introduced as evidence pictures of the scene of the collision. In one of these pictures there is a State policeman's automobile. We do not see how the automobile in the picture could in any way be prejudicial

to the defendant. The width of the road and the width of the shoulders of the road were shown by other uncontroverted evidence. We do not think there was an abuse of discretion by the trial court in admitting the picture in evidence. *Southern National Ins. Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487.

Dr. T. E. Williams, who treated Mrs. Benning and her daughter for the fatal injuries they received in the collision, over objections and exceptions of defendant, was allowed to state the nature of the injuries which resulted in their deaths. The prosecution made no effort to emphasize or dwell on the nature of the injuries for the purpose of arousing emotions of the jury. The doctor's testimony as abstracted by appellant is as follows: "Mabel Benning was very severely injured and was in deep shock; she had a compound fracture of the right elbow and of the right ankle; she had a cerebral contusion, cerebral concussions, multiple bruises and lacerations scattered around her body; Linda Schol was in extreme shock, she had cerebral contusions, a comminuted fracture of the forearm, multiple abrasions, lacerations and bruises around her body; Mabel Benning was given the usual shock treatment of glucose and an attempt was made to reduce the fracture as much as possible to help relieve the shock; she was given narcotics for pain and an attempt was made to get her out of shock (Tr. p. 114); she died February 28th at 5:20 P. M. from brain damage; Linda Schol died February 28th at 10:45 P. M. from shock plus brain damage."

Of course, it was incumbent upon the State to prove the *corpus delicti.* Failure to prove the cause of death could be fatal to the State's case. *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377. And, although the State may have had the right to rely on the defendant's admission in open court that the deaths were the result of the collision, the State was not required to rely on such admission to establish the *corpus delicti.*

Other points are argued, all of which we have examined carefully, but we find nothing calling for a reversal.

Affirmed.

HARRIS, C. J., dissents.

JOHNSON, J., not participating.

CARLETON HARRIS, Chief Justice, dissenting. I am of the opinion, that because of two errors (in my view) committed during the trial, this case should be reversed and remanded.

Dr. T. E. Williams was called as a witness for the State, and testified relative to the numerous injuries received by Mrs. Benning and Linda Schol. According to his evidence, the injuries to both were very severe, and those received by Mrs. Benning covered most of the body. He mentioned that the bone was protruding through the skin of her elbow, and also her right ankle. Appellant's counsel had previously in Chambers, made the following admission and objection:

"We concede that Mrs. Benning and the child, Linda Schol, died as a result of the collision within the statutory period. I believe a year is the statutory period, so we admit that fact. We feel that they should not pursue at any length in regard to the gravity of the injuries. We feel, Your Honor, that the State, since we have admitted the death of Mrs. Benning and the death of Linda Schol as a result of this collision, should not be permitted to introduce evidence by Dr. Williams, or anyone else, bearing solely upon the aggravated nature of the injuries, which could only serve to inflame the passions, and not to enlighten the jury as to any fact."

Also, at the conclusion of Dr. Williams' testimony, counsel again renewed the objection, and requested the court to exclude this evidence and to instruct the jury to disregard all of the doctor's testimony except that which showed the deaths of the persons involved. The court again overruled the objection and appellant's exceptions were noted. The injuries were of an extensive nature, and it is my feeling that this testimony could have influenced the jury in its verdict. The evidence was certainly unnecessary as the prosecution was based solely

upon the death of Mrs. Benning and Linda Schol, which fact counsel admitted.

I also feel that the admission of State's Exhibit No. 7, a posed photograph, showing a State Police car parked on the side of the highway, was prejudicial error. The evidence pretty well reflected that the footage between the pavement and a ditch on the right-hand side (facing north), was insufficient to be properly termed a shoulder. The photograph, however, shows the car as resting between the edge of the pavement and this ditch. The State admitted that the two-ton truck owned by appellant, involved in the collision, was wider than the automobile, but stated that the picture was only offered as an aid to the jury in visualizing the width of the side of the highway. I cannot see that it was admissible for any purpose. Evidence had already been offered as to the width between the edge of the pavement and the ditch (7 feet, 1 inch) and it is quite obvious to me that the truck, carrying a large wide bed, could not possibly have parked completely off the highway. Yet, this picture, when viewed by the jury, could have well served as a suggestion that if the trooper could park his car in that space, appellant could have done likewise.

For these reasons, I respectfully dissent to the holding of the majority.

PHILLIPS *v.* ASHBY.

5-1765 320 S. W. 2d 260

Opinion delivered February 2, 1959.

Reid & Burge, for appellant.

Taylor & Sudbury, for appellee.

CARLETON HARRIS, Chief Justice. On the night of June 11, 1957, a truck belonging to Isaac Ashby, appellee herein, became stuck in the mud on a dirt road near Blytheville. Efforts to extricate the truck only succeeded in miring it deeper, and the Phillips Motor Company was requested to send a wrecker. The wrecker, driven by Carl Allbritton, after picking up Ashby and Olin Little, who was with Ashby, went to the location of the mired truck. In getting into position to extricate the truck from the mud, the wrecker became stuck. Ashby and Little took positions on the left side of the wrecker, back of the cab, and pushed as the driver rocked backward and forward in an effort to release the wrecker from the mud. As the wrecker moved out, Mr. Ashby was struck by some portion of the vehicle along the right knee, causing painful injuries for which he instituted suit. The complaint alleged that

"defendants' servant and employee, Carl Allbritton, and while in the employ of the defendants, and who knew plaintiff's position, suddenly negligently and carelessly greatly increased the supply of gasoline, causing the said wrecker to suddenly lurch forward.

That when the defendants' wrecker suddenly and without warning lurched forward, its left rear bumper struck this plaintiff behind his right knee and right heel, bruising and cutting his leg and breaking his right heel."

Appellants answered, first denying any negligence, pleading contributory negligence, and further pleaded that appellee assumed all risks incidental to the undertaking. On trial, the jury returned a verdict in appellee's favor in the amount of $7,200, for which amount the court rendered judgment. From such judgment, comes this appeal.

For reversal, three points are urged, the first being that the trial court erred in not directing a verdict for

appellants. Under our view, as hereinafter set out, a discussion of other alleged errors is unnecessary.

The sole charge of negligence against Allbritton has previously been quoted from the complaint. According to the evidence, the back wheels of the wrecker mired down as Allbritton sought to get into position to extricate the truck. Little and Ashby walked up to the driver's side of the door, and took hold of the wrecker to help get it out. According to Ashby, Little "* * * was right at the door. I was right behind him with my hands on the door right behind the cab." After rocking back and forth two or three times, the wrecker came out. "To tell the truth, he was rocking. He hit me just like that. (snaps fingers) I was laying on the ground. * * * Q. Did this truck slide any? A. It was possible. Like I said, it was like that. (snaps fingers) I was on the ground." The witness then testified that he doubted that the wrecker slid sideways more than six inches. When asked if his foot slipped, he replied, "I don't know. It happened so quick, I don't know." Ashby was struck on the side of the right knee.[1] He stated that he was struck by the bumper, or, as he described it, the "draw bar." According to his evidence, the occurrence took place somewhere between 9:30 and 10:00 o'clock on a clear night, and Allbritton could have seen him "without any doubt." Appellee testified that he heard somebody say, "Keep rocking, and I believe we can get it out," but he did not know whether the remark was made by Allbritton or Little. On cross examination, he admitted that in trying to get his own truck out before calling the wrecker, he had rocked it and accelerated the engine, but "He rocked his more than I did mine. I accelerated mine a little and couldn't get out." Ashby admitted that to get automobiles and trucks out of mud, it is necessary to accelerate the motor, as he stated, "to a certain extent." His testimony reflects that no request was made by Allbritton for aid in getting out of the hole; that he (Ashby) did not tell the driver he was helping; that he chose his

[1] The ligaments were badly torn in the knee, ankle fractured, and the heelbone cracked.

own position from which to do the pushing, and had already observed the "draw bar" at the back.

Little's testimony was very similar. "Mr. Ashby and me went by the side of him. We went to rock it. Mr. Ashby and me said we were going to rock it out and he[2] said, 'I believe we can.'" He testified that he took a position on the south side of the truck, placing his hand on the front part of the cab "where the glass rolled down," and that appellee was right behind him. The witness stated that the driver of the wrecker could see him, and could have seen Ashby if he had looked; that the vehicle was rocked backward and forward two or three times. He heard no request from Allbritton for Ashby to push on the wrecker.

Allbritton testified that the wrecker became mired in the same mud hole as the truck; that he, quoting, "began rocking my truck backwards two or three times and accelerating it fairly heavy in order to get it out of the mud." He testified he did not ask anyone to help him, and that Ashby did not say anything to him about helping or pushing. His testimony reflects that upon pulling loose from the mud, he went straight ahead.

We are unable, from the record, to find any negligence on the part of Allbritton, and of course, such negligence must be shown before Ashby is entitled to recover. The testimony of all parties reflects that the wrecker was driven straight ahead when coming out of the mud hole, and it seems remarkable that the vehicle, with its wheels spinning in slick gumbo mud, did not slide sideways more than six inches. Admittedly, appellee took up his position of his own own accord, without any direction from the driver, and in fact, the undisputed evidence shows that no request for help was made. In *Saliba* v. *Saliba,* 178 Ark. 250, 11 S. W. 2d 774, 61 A. L. R. 1348, and *Blakemore* v. *Stevens,* 188 Ark. 755, 67 S. W. 2d 733, recoveries were allowed to parties who were injured while assisting in extricating vehicles from mud holes, but the circumstances in those cases were far different from those in the case at bar. For instance, in

[2] Evidently referring to Allbritton.

the *Saliba* case, the proof showed that the injured plaintiff was invited to get behind a stuck car and push it; that while so engaged, the driver suddenly put the car in reverse, and plaintiff was injured when the car rolled backwards. In the *Blakemore* case, plaintiff was asked to help in pushing a car out of the mire, and stationed himself on the right hand side of the car in a position to assist. The car was being pushed backwards, and without warning, the defendant driver suddenly cut the steering wheel to the left, throwing the right front wheel from under the right front fender, and the car, in its backward motion, ran over plaintiff. In the case before us, the only alleged negligence is "suddenly, negligently, and carelessly greatly increased the supply of gasoline causing the said wrecker to lurch forward." Common experience teaches that to get out of a mud hole, it is necessary to accelerate the engine. Additional power is needed. The method used by Allbritton would seem to be the usual method of those engaged in extricating a vehicle from mud and slime, *i. e.*, rocking back and forth, and accelerating the motor in an attempt to get sufficient momentum to come out of the hole. Of course, once the wheels get free of the mud and hit firm ground, the vehicle moves at a faster pace. We find no evidence that appellants' driver committed any unusual act which would result in taking appellee by surprise, and thus occasion the injuries complained of.

We are of the opinion that the trial court should have directed a verdict for appellants.

Reversed and dismissed.

JOHNSON, J., dissents.

BAXTER *v.* YOUNG.

5-1747 320 S. W. 2d 640

Opinion delivered February 2, 1959.

John F. Gibson & Smith & Smith, for appellant.

Pat H. Mullis & Lloyd B. McCain, for appellee.

J. Seaborn Holt, Associate Justice. This cause of action arose in 1952 when appellants took possession of the land involved. David and Corah Young (brother and sister) inherited the 80 acres of land here from their grandmother, Melvina Reed, who died intestate in 1938. They were her sole surviving heirs and each inherited an undivided one-half interest in the land as tenants in common. David did not live on the land after his grandmother's death. He moved to different parts of the country, finally locating in Chicago and there he saw his sister, Corah, in 1955 which was the second time he had seen her since his grandmother's death. Corah, who was living on the farm with her grandmother when she died, continued on the farm and operated it up to 1952, when she executed a quit-claim deed to the farm to John Baxter. During the time that she operated the farm, she borrowed money with which to operate and make small improvements and in 1948 executed a mortgage on the property to John Baxter to secure the payment of a $300 promissory note due November 1, 1948, and other advances if any. This mortgage was recorded March 6, 1949, and recited that, "Corah Young, only surviving heir of William Reed, Deceased, and all of which property said grantor warrant to be free from incumbrances and not subject to any adverse claim." At all times that Corah did business with Baxter she represented to him that her brother, David, was dead and that she was the sole owner of the property.

From 1950 through 1956 the taxes were paid by Mr. Baxter or the Baxter Land Company.

Following the above mortgage, Corah became further indebted to Baxter in the total amount of $2,525.13 and on January 7, 1950, to avoid a mortgage foreclosure, she executed to Baxter a quit-claim deed purporting to convey the entire title to the land. She remained in possession for the years 1950-1951 inclusive, and the deed was recorded December 13, 1951.

On February 28, 1952 Baxter conveyed the land to the Baxter Land Company, a family corporation. In February 1952, Corah moved from the land and surrendered possession to the Baxter Land Company which immediately went into possession and has claimed ownership since.

David, appellee, claimed that he had no notice of any adverse claim to his land until 1955 when his sister saw him in Chicago. He claims an undivided one-half interest either as a tenant in common with his sister, or as tenant in common with the defendants, that the quit-claim deed to Baxter which purports to convey the fee should be re-formed to show that it does not affect his one-half interest, that the deed from Baxter to the Baxter Land Company insofar as it affects him should be cancelled, that the title to his one-half interest should be quieted, and for an accounting of rents and profits of the mortgagee in possession for the years 1952, 1953, 1954, 1955 and 1956.

The appellants, on the other hand, deny that David has any interest in the land and is now barred from asserting his rights thereto by estoppel, abandonment, their adverse possession, laches and the statute of limitations, or should it be found that David was not estopped, then that appellants should be decreed to have a lien upon the full interest in said land to secure full payment of their mortgage.

The present suit was filed November 12, 1956 and on a trial March 20, 1957, after an extended hearing, the court found that appellee, David Young, and appellant, Baxter Land Company, are tenants in common of the 80 acre tract involved, each owning a one-half undivided interest therein, that David was not barred by laches, estoppel, limitations or adverse possession from asserting his rights to his one-half interest in the property and further, awarded David $898.25 which represents one-half of the rents and profits from the land while in possession of appellants for the years 1952, 1953, 1954, 1955 and 1956 inclusive.

For reversal appellant relies on the following points:

"(1) David Young has slept on his rights too long and is, therefore, absolutely barred by laches and limitations from any relief whatever . . .

(2) Finding that his sister had lost the lands, David conspired with Corah to try to help her salvage something from innocent purchasers, — the defendants.

(3) David did not come into court with clean hands . . .

(4) If, . . . David should be entitled to recover anything whatever, the lower court used the wrong formula in arriving at a rental basis of the lands."

On the record presented we have concluded that the trial court was correct in holding that David (appellee) was not estopped to claim his one-half undivided interest in this 80 acre tract as a co-tenant, by abandonment, laches, adverse possession, estoppel or for any other reason. It is undisputed that David and Corah inherited and held this land as tenants in common as the sole surviving heirs of their grandmother when she died intestate in 1938. We think the evidence falls far short of showing abandonment on the part of David or that he was in any manner barred from asserting his rights. The evidence showed that David permitted his sister, a widow, to occupy the land so that she could better support herself. There is no evidence that he ever executed a deed or other instrument affecting his title, or that he made any statements indicating his abandonment of the property. His only act, or acts, that might indicate abandonment was his non-action during the approximately 18 years he was off the land, paying no taxes, collecting no rents or profits, exercising no control or contributing to any improvements.

"At the common law, which is in force in this state, the title to real property is not lost by abandonment, unless the abandonment is accompanied by circumstances of estoppel and limitations, and this without regard to

the formality of abandonment, if it was short of a legal deed of conveyance; the title being in no wise thereby affected nor the owner thereafter prevented from re-entering and ejecting any who had entered into possession in reliance upon the abandonment"—*Carmical* v. *Arkansas Lumber Co.*, 105 Ark. 663, 667, 152 S. W. 286.

"Mere lapse of time does not dissolve a co-tenancy—" *Halloway* v. *Berenzen,* 208 Ark. 849, 852, 188 S. W. 2d 298. "The possession of some of the joint tenants, or tenants in common, is the possession of all, and continues to be such until there is some act of ouster sufficient in itself to give notice that those in possession are claiming in hostility to, and not in conformity with, the rights of others having interests in the property. One in possession is presumed to hold in recognition of the rights of his cotenants." *Newman* v. *Newman,* 205 Ark. 590, 595, 169 S. W. 2d 667. "A number of presumptions and inferences are indulged in connection with the relation of co-tenancy. Until an actual ouster is shown, the law presumes that the possession of one co-owner is the possession of all,—" 14 Am. Jur. Cotenancy, Sec. 102.

In order for appellants to prevail on their claim of adverse possession for seven years, they must show, in addition to their admitted adverse possession for four years and nine months by virtue of their deed by Corah Young to them in 1952, an additional two years and three months needed to complete the seven years, and to do this, they seek to "tack on" this two years and three months the possession of Corah Young and her co-tenant, David, under the claim that her possession was also adverse to that of David. To do this appellants had to prove actual notice to David that she (Corah) was so claiming adversely or that her conduct was so open and notorious that she was claiming adversely to him that he should have known of her claim. This, we think as indicated, she failed to do.

During this period of two years and three months, which appellants seek to tack on, the relationship of brother and sister existed and for this reason, as we

stated in *Staggs* v. *Story,* 220 Ark. 823, 827, 250 S. W. 2d 125, "In the present case, on account of the family relationship of the parties stronger evidence, of adverse possession of appellants to the disputed strip . . . was required than in those cases where no such relationship existed. Appellants have failed to meet this burden."

As to appellant's contention that David stood by, did nothing, and is estopped to assert his rights, what we have said above applies with equal force to this contention. We find it to be without merit. Corah was rightfully in possession. She was free to mortgage *her interest* in the land and use the money as she saw fit. She was required to pay the taxes, keep the property in a state of repair and was authorized to convey her *interest* in the land in satisfaction of a mortgaged debt. Her right to mortgage and convey extended only to her one-half undivided interest.—*Magnolia Grocer Company* v. *Clayton,* 179 Ark. 661, 17 S. W. 2d 877.

On appellant's contention that appellee is barred by laches, little need be said. "**Laches, in legal significance,** is not mere delay, but delay that works disadvantage to another. So long as parties are in the same condition, it matters little whether he presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from the loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side, and injury therefrom on the other, it is a ground for denial of relief." *Seawood* v. *Ozan Lumber Company,* 221 Ark. 196, 202, 252 S. W. 2d 829. We fail to find any changes in the condition or relation to the parties here to the property which would make it inequitable to enforce appellees claim.

There appears to be no loss of title, intervention of equities or change of relation of the parties and we hold that the defense of laches is therefore not applicable. We find no evidence in this record of a conspiracy between Corah and David as contended in appellant's point two above, nor do we find sufficient evidence to support appellant's claim in point three above that David did not come into court with clean hands.

We have concluded, however, that the court erred in so much of the decree directing that David should be allowed recovery for the rents and profits from operating the land for the years 1952 and 1953, for the reason that such rents and profits had not accrued within the three years next before the filing of the present suit.

Ark. Stats. 1947, Sections 34-1424-1425, known as the "Betterment Act," provide: (34-1424) "Assessment of value of improvements—Improvements exceeding mesne profits and damages—Judgment.—The court or jury trying such cause shall assess the value of such improvements in the same action in which the title to said lands is adjudicated; and on such trial the damages sustained by the owner of the lands from waste, and such mesne profits as may be allowed by law, shall also be assessed, and if the value of the improvements made by the occupant and the taxes paid as aforesaid shall exceed the amount of said damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid; and such amount shall be a lien on said lands, which may be enforced by equitable proceedings at any time within three (3) years after the date of such judgment." And Section 34-1425, "Limitation on recovery of mesne profits.—In recoveries against such occupants no account for any mesne profits shall be allowed unless the same shall have accrued within three (3) years next before the commencement of the suit in which they may be claimed."

This court, in the case of *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88, in construing these sections (which were then sections 2755-2756, Kirby's Digest) in fixing the rights of the parties thereunder, said: "As is said to the case of *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, the betterment act is 'one to adjust equities between the owners of the lands and persons who have occupied the same under color of title, believing themselves to be the owners—*bona fide* occupants. * * * In other words, when the occupant holds in good faith under color of title the owner can recover the land and mesne profits for three years, and the occupant can recover the value of his improvements and amount of taxes.' "

"These are the rights of the parties as fixed by this statute. The statute says that the owner shall be allowed the rents of the lands that shall have accrued within three years next before the commencement of the suit. It deprives the true owner of all the mesne profits that accrued prior to that time, but it gives to him the rents on the lands in the exact condition in which they are for the period subsequent to three years next before the commencement of the suit."

We therefore affirm as modified and remand for further proceedings consistent with this opinion.

McFaddin, J., concurs.

Robinson, J., dissents.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the result reached by the majority, but I am dubious concerning the authority cited for the modification. The majority says that Young is entitled to recover rent for only three years next before the filing of the suit because of § 34-1424 *et seq.,* Ark. Stats., known as the "Betterment Act." I have never considered the Betterment Act to be applicable in an accounting between cotenants, or between those standing in such a relationship as appellant and appellee occupied in the case at bar.

My reason for limiting Young to rent for only three years is because Young's suit is like any other action to recover rents, and is governed by the 3-year statute of

limitations, which is § 37-206, Ark. Stats. In 54 C. J. S. 37, "Limitation of Actions," § 124, the text states that the general principle—that limitations begins to run when a complete cause of action accrues—has been applied to proceedings for accounting; and in Footnote 8 the text lists cases from Georgia and Illinois as applying this rule of limitations to accounting between co-tenants. These Georgia and Illinois cases support the text: *George* v. *Bullard,* 173 S. E. 920; *Chambers* v. *Schall,* 70 S. E. 2d 463; *Brown* v. *Brown,* 75 S. E. 2d 13; and *Fyffe* v. *Fyffe,* 11 N. E. 2d 857.

Because of my doubt as to the applicability of the Betterment Act, I am compelled to concur; since I think the applicable statute is the rent statute, which is § 37-206, Ark. Stats.

SCOTT *v.* GREER.

5-1749 320 S. W. 2d 262

Opinion delivered February 2, 1959.

Bruce Bennett, Atty. General, *John Haskins,* Asst. Atty. General; *Dowell Anders,* Highway Dept. Atty. & *Wm. J. Smith,* for appellant.

Wright, Harrison, Lindsey & Upton, by *George E. Lusk, Jr.,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study and determination of the meaning of certain portions of the Arkansas State Highway Employees' Retirement System Act,[1] being Act No. 454 of 1949, as amended by Act No. 403 of 1953, being now found in §§ 76-1901 *et seq.* Ark. Stats. Appellee, Greer, filed this proceeding[2] against the appellants, who are the Trustees of the said Arkansas State Highway Employees' Retirement System (hereinafter called "Retirement System") to compel appellants to award Greer his claimed retirement pay. The appellants urged that Greer was not entitled to retirement pay because of the matters hereinafter stated. The Circuit Court granted Greer his prayed relief; and this appeal ensued.

The facts in this case are not disputed: Mr. Greer was born August 26, 1882; he was continuously employed by the Arkansas State Highway Department (hereinafter called "Highway Department") from January 20, 1947 to December 31, 1957. During all of such period he received a salary in excess of $2,400.00 per year. The said Highway Retirement Act became effective on July 1, 1949; and participation was compulsory for Mr. Greer because of his salary scale. Deductions were withheld by the Highway Department from Mr. Greer's salary and paid to the Retirement System at all times from July 1, 1949 to December 31, 1957, or a total of 8½ years. Furthermore, under the terms of the said

[1] It was stated by both sides in the oral argument that Act 454 of 1949 was not copied from any other State, but is rather a composite of various acts of other jurisdictions. A study of the legislative history of the Act No. 454 of 1949 shows that it passed both Houses of the Legislature without any amendment, so the Act was passed just as it was introduced.

[2] Mr. Greer's proceeding is for writ of mandamus; but all parties concede that it may be treated as *certiorari,* or action for declaratory judgment, or any other appropriate proceeding to obtain a decision of the case on the merits; so we forego any decision as to what might be the correct proceeding in a situation such as the one here.

Retirement Act, employees with service antedating the effective date of the Act were given the option to pay into the Retirement System a calculated amount for the period of service in the Highway Department previous to the beginning of the Retirement Act; and Mr. Greer took advantage of that provision and paid the Retirement System $251.24 as the calculated amount to cover his Highway service employment from January 20, 1947 to July 1, 1949, which was 2.46 years. Thus, on December 31, 1957 Mr. Greer had paid into the Retirement System the correct amount to cover a total of 10.96 years, being 2.46 prior to July 1, 1949 and 8.50 after July 1, 1949.

On May 1, 1957 the Highway Department, acting under authority not here questioned, decided to retire on December 31, 1957 all employees 75 or more years of age on said last mentioned date. Mr. Greer, having been born on August 26, 1882, was, of course, over the age of 75 years on December 31, 1957, and was, therefore, retired from employment under said decision of the Highway Department.

The said Retirement Act provides in § 76-1911 (a) that a member of the Highway System may voluntarily retire and be eligible for retirement benefits at the age of 65 if he has ten years of creditable service. When Mr. Greer applied for retirement benefits, the appellants, as Trustees of the Retirement System, discovered that under the provisions of the law, Mr. Greer was ineligible for retirement benefits; and he was tendered the sum of $1,531.91, which was the total amount that he had paid into the System, including interest. Mr. Greer refused the tender and instituted this litigation with the result previously stated. So the question is, whether Mr. Greer is entitled to retirement benefits from the Retirement System.

Estoppel. At the outset, we emphasize that no element of estoppel enters into this case: because the appellee's counsel stated in oral argument before this Court that he had not pleaded estoppel in the lower Court and was not relying on estoppel in any way in this case. This

admission and concession in this Court renders it unnecessary for us to consider any matter of estoppel and leaves us to the unfettered determination of the meaning of said Retirement Act.[3]

The Claims Of The Parties. Mr. Greer claims that he is entitled to the retirement benefits because of the first sentence of § 76-1911 (a) Ark. Stats., which reads: "A member may retire voluntarily at the age of 65, or during any year thereafter, until the age of compulsory retirement has been attained, provided such member has a minimum of 10 years creditable service in the Arkansas State Highway Department."

The appellants defend against Mr. Greer's claim by pointing to the last sentence of § 76-1911 (a) Ark. Stats., which reads: "Retirement from the System shall be compulsory to all members on July 1st following their 70th birthday, except that any employee who is 70 years or more of age as of the effective date of this act shall not be excluded from its benefits." In making their claims under the last quoted sentence, the appellants point out: (a) that the effective date of the Act was July 1, 1949, and that Mr. Greer was not 70 years of age at that time; (b) that Mr. Greer became 70 years of age on August 26, 1952, and that under the last quoted sentence he was *compulsorily retired on July* 1, 1953 *from the "Retirement System,"* as distinct from employment in the Highway Department; (c) that under the plain wording of the quoted sentence, Mr. Greer was not entitled to continue in the Retirement System after July 1, 1953; (d) that on that date he had only 6.46 years of service credit (being 4 years from July 1, 1949 to July 1, 1953, and 2.46 years for service credit prior to July 1, 1949); and (e) that through error of the bookkeeping section of the Highway Department, deductions were withheld from Mr. Greer's monthly salary and paid to the Retirement System, the return of all of which deductions, with interest thereon, has been tendered to Mr. Greer.

[3] In connection with estoppel, we call attention to the case of *Powell v. Board of Commissioners*, 210 S. C. 136, 41 S. E. 2d 780, 1 A.L.R. 2d 330.

In rebuttal to the defense of the appellants, Mr. Greer points out the definitions found in § 76-1901 Ark. Stats. as follows:

"(c) 'Employees' shall include all employees of the Arkansas State Highway Department whose compensation is or was payable on an hourly, monthly, or annual basis by the State Highway Department, including employees of the State Highway Department whose salaries are paid or reimbursed in whole or in part from Federal funds . . .

"(i) 'Prior Service' means all service as an employee of the Arkansas State Highway Department prior to the date of the establishment of the System . . .

"(1) 'Creditable Service' means the current service of the member plus such portion of Prior Service time for which contributions have been made or elected to be made by the member. Retirement benefits shall be computed upon the Creditable Service of the member . . ."

Mr. Greer also points out that § 76-1908 provides how membership in the System may be terminated; and claims that the sentence in § 76-1911 (a) relied on by the appellants, relating to compulsory retirement, means those who retire on retirement benefits.

It is clear from these contentions, and from a careful study of the Retirement Act, that "System" means one thing, and "Highway Department Employee" means another thing: that is, a person may be employed by the Highway Department and draw pay as such employee and still not be a member of the Retirement System. For example, under § 76-1907 an employee earning less than $2,400.00 per year has the option to come under the System, but is not required to. It is appellants' contention that on July 1st following his 70th birthday, every employee of the Highway Department was compulsorily retired from the Retirement System, even though such person continued to be employed by the Highway Department. We can see no answer to this last stated contention of the appellants.

It is true that retirement acts and pension acts are to be liberally construed to effectuate their humane purposes.[4] We so held in *Looper* v. *Gordon,* 201 Ark. 841, 147 S. W. 2d 24. But it must also be recognized that the State has the right to prescribe the terms and conditions under which persons may come under, or be excluded from, the benefits of a retirement system. As stated in 40 Am. Jur. 980, "Pensions" § 23: "The right to a pension depends upon statutory provision therefor, and the existence of such right in particular instances is determinable primarily from the terms of the statute under which the right or privilege is granted. The right to a pension may be made to depend upon such conditions as the grantor may see fit to prescribe."

When we see the respective claims, defenses and rebuttals as stated, it appears that there is a conflict between the definition sections relied on by Mr. Greer, and the sentence in § 76-1911 Ark. Stats. relied on by appellants, which sentence is: "Retirement from the System shall be compulsory to all members on July 1st following their 70th birthday, . . ."

Which section governs? That is the problem; and in solving the problem we are not without certain rules of statutory construction. One of these rules, recognized and applied by this Court for many years, and applicable here, is: "Where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will." We have quoted the above rule from *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656. It was also recognized in *Wiseman* v. *Ark. Util. Co.,* 191 Ark. 854, 88 S. W. 2d 81. In 50 Am. Jur. 371 "Statutes" § 367, the text states: "It is an old and familiar principle . . . that where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular

[4] For cases construing various pension plans, see annotation in 42 A.L.R. 2d 461: "Rights and liabilities as between employer and employee with respect to general pension or retirement plan."

provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision." To the same effect see also 82 C. J. S. 720; and Crawford on "Statutory Construction" § 189.

When we view the conflict between the general definition of terms and the specific provision in § 76-1911 (a) Ark. Stats. as relied on by the appellants, we reach the conclusion that the Legislature definitely prescribed that a Highway Department employee, though he might continue to be employed after July 1st following his 70th birthday, was nevertheless compulsorily retired from the Retirement System on July 1st following his 70th birthday. Under that view, it follows that on July 1, 1953, when Mr. Greer was compulsorily retired from the Retirement System he had only 6.46 years of creditable service; so he was not eligible to pension. However, under § 76-1912 (c) Ark. Stats. he is entitled to the return of all of the money that he had paid into the System, together with interest; and the record shows that such amount was tendered to Mr. Greer.

It, therefore, follows that the judgment is reversed and the cause dismissed, upon payment of the tendered amount.

JOHNSON, J., dissents.

Opinion delivered February 2, 1959.

[redacted]

W. R. Thrasher & Bill Demmer, for appellant.

Wendell O. Epperson & Joe W. McCoy, for appellee.

GEORGE ROSE SMITH, J. This is a condemnation case in which the State Highway Commission called upon the county court to provide the right of way for the rehabilitation of Highway 67 in Hot Spring county. Ark. Stats. 1947, § 76-510. The appellees, Carl Fowler and his wife, filed a claim against the county for damages of $6,000. The county court denied the claim, as excessive, but in the circuit court the appellees were awarded damages of $4,150. The sole question on appeal is

whether the county's plea of limitations should have been sustained.

On April 10, 1956, the county court entered an order condemning the right of way in accordance with the plans of the Highway Commission. The landowners did not originally have notice of the order, but the Fowlers' land was actually entered in April or May of 1956. In those months the Highway Department removed the Fowlers' fence along the old highway, cleared the right of way for the widening of the roadbed, and erected a new fence farther back on the Fowlers' property. The plans contemplated that the grade of the highway would be lowered, and this grading was completed in October, 1956. The new pavement was finished in September of 1957, and the appellees filed their claim in the county court on November 19, 1957. The question is whether the claim is barred by the one-year statute of limitations. Ark. Stats., § 76-917.

This statute has been construed in a number of cases. Although it provides that the time runs from the date of the county court order, we have held that when, as here, the landowner is not given notice of the entry of the order, the time runs from the actual taking of the property. *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803. In a more recent case, *State Highway Com'n* v. *Holden,* 217 Ark. 466, 231 S. W. 2d 113, it was indicated that the taking occurs when the owner can no longer use his land for its normal and natural purposes.

If these cases are controlling, the appellees' claim was filed too late. By May of 1956 their boundary fence had been moved back and the new right of way had been cleared. From that time on the Highway Department's possession was exclusive, but the claim was not filed until more than seventeen months later.

In seeking to avoid the statutory bar the appellees present a twofold argument. First, it is insisted that the statute did not begin to run until the exact extent of the appellees' damage could be ascertained. Counsel would limit the effect of our prior holdings to the situa-

tion in which the county simply takes a particular tract of land without damaging the rest of the owner's property. An effort is made to distinguish the case at bar on the ground that the appellees suffered consequential damage from the lowering of the grade, and that loss could not be determined with complete certainty until the pavement had been finished and the Highway Department had provided an access road to the appellees' land.

This distinction is not supported by our earlier cases and is not sound law. Uncertainty about the extent of one's damage is not a basis for staying the operation of the statute of limitations. In personal injury cases, for instance, juries often make awards for future pain and suffering or for a loss of earning power. In *Field* v. *Gazette Pub. Co.,* 187 Ark. 253, 59 S. W. 2d 19, the plaintiff's cause of action for lead poisoning was barred even though the nature of the malady and its injurious effects could not be immediately determined.

It is a familiar rule that, when land is damaged by a nuisance of a permanent character, the loss is original and must be fully compensated in a single action. "But it may be added that the fact that the extent of the injury is difficult to determine, or its ascertainment is inconvenient or expensive, does not prevent the injury from being original so as to permit recoveries for recurring injuries." *Davis* v. *Dunn,* 157 Ark. 125, 247 S. W. 793. A narrow exception to this principle was recognized in *Arkebauer* v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. 2d 916, but that exception is not pertinent here.

When the appellees' land was taken in May of 1956 the extent of their eventual loss could have been demonstrated with much more accuracy than is possible in many cases involving contracts or torts. The record shows that the Highway Commission's plans were detailed, embracing a profile of the rehabilitated road and topographical information about the old and new rights of way. Even the physical grading was completed more than a year before the claim was filed. It does not ap-

pear that the proof of damage would have involved any serious difficulties whatever, much less such insurmountable obstacles as to justify a rule that would indefinitely postpone the running of limitations. It goes without saying that a substantial change in the Commission's plans, resulting in increased injury to the landowners, would have constituted a separate taking, as to which the statute would run anew.

Second, it is asserted that the county is estopped to rely upon the defense of limitations. Fowler testified that in the spring of 1956 he had a conversation in front of his house with the county judge. Judge Wallace stated that there would be someone to settle with Fowler for his damages, and also: "I would wait until the highway is completed before you try to settle with them. You don't know how much damage they are going to do, and I don't know, and you have plenty of time after the road is completed." Fowler says that he relied on these statements in not filing his claim promptly.

This testimony is insufficient to give rise to an estoppel. It does not appear that Judge Wallace promised that the county would not plead the statute; he was merely mistaken in his understanding of the law. An estoppel must generally be based upon a material statement of fact; an erroneous expression of opinion about a rule of law does not usually result in an estoppel. Bigelow on Estoppel (6th Ed.), p. 634. In the leading case of *Andreae* v. *Redfield,* 98 U. S. 225, 25 L. Ed. 158, both the collector of customs and the Secretary of the Treasury mistakenly assured the plaintiff that the presentation of his claim to the auditor would prevent the running of the statute of limitations. Despite the plaintiff's reliance upon these assurances the court held that the collector was not estopped to plead the statute. See also *Hilliard* v. *Pennsylvania R. Co.,* 6th Cir., 73 F. 2d 473.

It must also be remembered that the statute requires that the claim be presented to the county court. Ark. Stats., § 76-917. The county judge is not synonymous with the county court. We have held that a contract made

by the county judge alone, without an order of the county court, is not binding upon the county even though the other party to the agreement has performed his part of the bargain. *Rebsamen, Brown & Co.* v. *Van Buren County,* 177 Ark. 268, 6 S. W. 2d 288. If the county judge cannot impose liability upon the county by a formal written contract we do not think it can be said that he can bind the county by a casual conversation in the street.

Reversed and dismissed.

JOHNSON, J., dissents.

KERR *v.* WALKER.

5-1725 321 S. W. 2d 220

Opinion delivered February 2, 1959.

Norton & Norton, for appellant.

Harold Sharpe, for appellee.

George Rose Smith, J. In 1952 Walker employed Kerr to manage Walker's insurance agency at Forrest City for a term of five years. Under the contract Kerr was to receive a weekly salary and an annual bonus. At the end of the first year the parties disagreed about how the bonus should be computed. Kerr eventually filed this suit to recover $3,018.41 as his bonus, and Walker then notified Kerr that he was discharged. The chancellor awarded Kerr $242.66 as his bonus and $600.00 as termination pay that accrued upon his discharge without cause. Both parties have appealed.

The principal issue, that of computing the bonus, is presented by Kerr's direct appeal. In the trial court an accountant was appointed as a master in chancery, to determine the profits of the business during the year in question, and there is very little dispute about the figures that enter into the calculation of the bonus. Instead, the problem concerns the method of calculation and hinges upon the correct interpretation of this paragraph in the contract of employment:

"First party [Walker] agrees to guarantee second party [Kerr] a weekly salary of Seventy ($70.00) Dollars per week and at the end of the first year, and each consecutive year thereafter during the term of this contract, first party further agrees to pay to second party a bonus based on Thirty (30%) per cent of the net income or profit of said Walker Insurance Agency, *less the guaranteed salary as above set out.* It is understood and agreed between first party and second party that the

net income or profit of said Walker Insurance Agency shall mean the commissions earned through the sale of insurance, less actual operating expenses of the agency." (We have italicized the pivotal clause.)

The question is, what is the guaranteed salary to be subtracted from? Walker contends, and the chancellor held, that the salary is to be applied as a credit against 30 per cent of the net profits (these profits being determined without a deduction of the guaranteed salary as an operating expense), so that the bonus represents the difference between the guaranteed salary and 30 per cent of the profits. Under this construction of the agreement Kerr ultimately receives either the fixed salary or 30 per cent of the profits, whichever is greater.

Kerr contends that the italicized clause in the contract means only that the salary is to be deducted from the net income, as an operating expense, before the bonus of 30 per cent is computed. Under this construction the bonus is in effect added to the salary, with the result that Kerr would receive altogether more than 68 per cent of the agency's net income for the year in question. Alternatively, Kerr asks that the contract be reformed if its language should be found not to have the meaning that he attributes to it.

Kerr relies heavily upon the testimony of Jack P. West, the attorney whom the parties jointly employed to prepare the written contract. West, having originally obtained his information from Kerr alone, prepared a preliminary draft of the agreement. He then called the parties together and read the draft to them, explaining it paragraph by paragraph. He states that when he read the paragraph about Kerr's compensation the parties said that they understood it and that it was what they wanted. Over Walker's objection West testified that the salary was to be deducted from the net income, with the bonus being computed upon the remaining amount.

We do not regard West's interpretation of the contract as competent evidence either to explain an ambigui-

ty or to afford a basis for reformation. It is true that prior negotiations between the parties are admissible to show that ambiguous language in the contract was intended to have any particular meaning that the words will reasonably bear, or, if that particular meaning cannot be assigned to the language, to show a mutual mistake that requires a reformation. Rest., Contracts, §§ 242 and 238 (c); *Ben F. Levis, Inc.* v. *Collins,* 215 Ark. 172, 219 S. W. 2d 762. But such testimony must relate to an understanding that was common to both parties; it is not permissible to show the uncommunicated subjective interpretation that one party or the other placed upon the language of the agreement. Rest., Contracts, § 230; *Stoops* v. *Bank of Brinkley,* 146 Ark. 127, 225 S. W. 593.

Although West testified that he explained the provisions of the contract, he does not say that he outlined the formula to be followed in the computation of the bonus. Both Kerr and Walker state that in their negotiations they did not discuss the mechanics of calculating the bonus. We do not see how the parties, without such a discussion, could have had a common understanding of the exact point now presented for decision. Since it does not appear that the attorney's interpretation of the paragraph in controversy was made known to Walker, it follows that the attorney's testimony represents nothing more than his construction of the agreement, which is inadmissible.

Disregarding West's testimony, we are limited in our study to the bare language of the agreement. Persuasive arguments are made by both sides, but we are inclined to believe that the chancellor's view is the more reasonable one. To begin with, it is pretty clear that the contract would have had the meaning that Kerr attributes to it if the italicized clause had been wholly omitted. Walker would then have undertaken to pay "a bonus based on Thirty (30%) per cent of the net income or profit" of the agency. In that case it could hardly be supposed that the fixed salary would not be deducted as an operating expense, for it would be next to absurd

to give an employee a bonus upon his own salary. Thus the italicized clause adds nothing to the contract unless we give it the meaning that Walker contends for.

Secondly, it is somewhat unlikely that the proprietor of a going concern, to which he still expected to devote at least part of his time, would enter into an arrangement by which his manager was entitled to more than two thirds of the profits. Thirdly, had the italicized clause been intended to refer to "the net income or profit" rather than to "a bonus," the comma immediately preceding the clause should not have been inserted. As a matter of punctuation the use of the comma indicates that the clause refers back to the earlier noun. See Evans, A Dictionary of Contemporary American Usage, p. 94. No really useful purpose would be served by our discussing at length the many other arguments that are made in the briefs.

On cross appeal Walker contends that Kerr was not entitled to the termination pay of $600 which the contract provides for him if he is discharged without cause. It is said that an employee who sues his employer displays such an uncooperative attitude that the employer is entitled to end their relationship. Upon the facts before us this argument is not sound. The bonus was payable at the end of the first year. Kerr says that he made repeated efforts to discuss the bonus with his employer, but Walker was evasive and kept putting him off. After delays of two months and a half Kerr finally brought the matter to an issue by filing suit. To hold that his conduct worked a forfeiture of the termination pay would enable Walker to escape that liability by persistently refusing to recognize Kerr's just request for a discussion of the bonus.

Walker also insists that the chancellor, in determining the net profits for the year, should have disallowed, as bad debts, eleven accounts receivable totaling $644.77. It appears, however, that Walker did not originally treat these accounts as uncollectible, for after the year in question he continued to extend credit to these eleven customers of the agency. All but three of them later

made payments on their accounts, and for the most part these payments exceeded the old debit entries that are now asserted to be uncollectible. The accounts seem to be still carried on Walker's books, and he has not attempted to collect any of them by legal action. The chancellor, upon evidence not designated for inclusion in the record, made a deduction of $778.22 for bad debts. We are not convinced that the weight of the evidence required him also to disallow the eleven additional accounts now in controversy.

Affirmed on direct and cross appeal.

NARISI *v.* NARISI.

5-1672 320 S. W. 2d 757

Opinion delivered February 2, 1959.

[Rehearing denied March 9, 1959.]

Heilbron & Shaw, Hardin, Barton, Hardin & Garner, for appellant.

Warner, Warner & Ragon, Bethell & Pearce, for appellee.

PAUL WARD, Associate Justice. This is a divorce action involving the custody of children, support for the wife, and maintenance for the children.

Appellant, Norma J. Narisi, and appellee, Vincent J. Narisi, were married on December 16, 1947 at Fort Smith where they both lived at that time and where they still live. The parties lived together without incident until about the middle of September, 1954 when they separated for about 3 months. During the time they were together three children were born: Jacob J. Narisi, now about 9 years old; Stella Maria Narisi, about 7 years old, and; Vincent J. Narisi, Jr., about 5 years old.

The parties resumed marital relations about the middle of December, 1954 and continued to live together until May, 1955 when they again separated for about 6 weeks.

They resumed marital relations about the middle of July, 1955 and lived together until their final separation on May 30, 1957.

On July 27, 1957, Norma filed suit for divorce on the grounds of indignities, including unmerited reproach, physical abuse, abusive language, and non-support of her and the children. She prayed for a divorce, for custody of the children with visitation rights to appellee, for $600 per month for support and maintenance, for one-third of appellee's personal property absolutely, for one-third of all real property for life, and for attorney fees.

On August 5, 1957 Vincent filed a general denial and also a cross-complaint accusing Norma with indignities, including abuse, studied neglect, physical abuse, and profane language, and stating that Norma was not a fit person to have custody of the children. His prayer was for a divorce and custody of the children.

Upon a final hearing the trial court denied a divorce to Norma, gave a divorce to Vincent and gave custody of the children to Norma. The trial court also made allowances for support and maintenance.

On this appeal appellant, among other things, asks us to hold that she is entitled to a divorce, and that appellee is not, and that she be given the statutory division of property. She also asks for additional support and maintenance, and additional attorney fees.

On the principal question of divorce we have reached the conclusion that neither party should be given a divorce. In view of this and in the hope, perhaps vain, of a reconciliation in the interest of the children, we will not attempt to recount and evaluate in detail all of the testimony which is voluminous, sometimes sordid and highly conflicting. We feel that to set out fully the testimony would not be beneficial as a precedent and might only serve to aggravate a delicate situation.

A careful examination of the record presents us with this general picture:

When the parties were married appellant, who was several years younger than her husband, was working for appellee, who was and is a substantial business man in Ft. Smith, and she continued to work in a clerical capacity until after the first child was born. Apparently marital clouds first began to gather in the fall of 1953 over money matters and over Norma taking dancing lessons. Appellee did not, and has never, given a definite allowance to appellant. Sometimes her demands for money were not granted by appellee and sometimes, it seems, they should not have been. Appellant says she borrowed money and also used money from her own small estate to pay the expenses incidental to the birth

of the children. This was denied. At first appellee went with appellant to take dancing lessons, but later she chose to go by herself under circumstances which led appellee to think, right or wrong, that she was enamored with the dancing teacher. Anyway after living together for about six and one-half years the first separation took place and lasted for about 3 months. During this period of separation the parties were together on a few occasions but it was also when appellee thought Norma strayed further from the path of rectitude. Her association with the dancing teacher aroused intense distrust in appellee. He and his private investigators professed to have found appellant and the dancing teacher in suspicious relationships, but there was no positive or direct proof of extreme indiscretions. It is undisputed that Vincent accused her repeatedly of acts of infidelity with more than one man. In spite of it all they went back together on or about December 15, 1954 and lived together in their home for about 5 months when they separated once more for a period of about six weeks. The immediate cause of this separation, in addition to some of the things mentioned above, was a fight in which, according to appellee, Norma tried to inflict injury on him with a pair of scissors.

We pass over the intervening accusations and counter accusations because the parties again effected a reconciliation on or about July 15, 1955 and lived together until May 30, 1957.

Regardless of the merits or demerits of each party's accusations prior to the July, 1955 reconciliation, we think each party condoned the actions of the other on that date and by that act. Our holdings to that effect are so numerous and specific that citations are unnecessary. We realize that condonation may sometimes be conditional, but we do not think that rule is applicable here. In the first place living together nearly two years belies any expressed or latent intent to cohabit on a trial basis, or if so, it shows that the trial period had ended. Also, the cause of the last separation was not a renewal of the alleged prior indiscretions and indignities.

The immediate cause of the final separation was a brawl that took place in their home on the night of May 30, 1957. The parties and their children, together with two visiting children, had visited a rodeo that night. When they returned around 10 or 11 o'clock after the children had gone to bed, Norma and Vincent went to their room where they were to sleep on a double bed. Shortly the brawl began. Their stories of the cause and what happened are somewhat similar, but vary as to who was most to blame. Appellant, according to her account, turned on the bed light to read for a few minutes when appellee got mad, cursed her, and dragged her bodily into the living room. She says she resisted only because she didn't want to awaken the children and make a scene. Appellee admits asking appellant twice to turn out the light so he could sleep, and that she not only refused but flew into a rage with violent language, and tried to inflict bodily harm on him. He says that he was merely trying to defend himself when he took hold of her arms until he could get to the front door and escape. It is impossible to determine with satisfaction which party has given the true account of what took place, and there is no corroborating evidence to tip the scale.

There is, however, one thing that is made clear in the record, and that is that both parties were equally at fault. Such being the state of the record we conclude that neither party should be given a divorce. In this connection, we like the general rule as stated in 27 C. J. S. at page 623, dealing with *Divorce,* under the section of *Recrimination,* Section 67a. which states: "As a general rule, sometimes declared by statute, divorce is a remedy for the innocent against the guilty; hence, if both parties are equally at fault, a divorce will not be granted. If the conduct of both parties has been such as to furnish grounds for divorce, neither of the parties is entitled to relief, or, as the rule sometimes is expressed, if both parties have a right to a divorce, neither of the parties has." Decisions from many states are cited in support of the above. The rule is known as the doctrine of recrimination and rests on the equitable maxim that he who

comes into equity must come with clean hands. There are decisions of this court in harmony with the rule expressed above. In *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675, where a divorce was denied both parties we said: "It is not necessary to recapitulate the evidence and determine whether the conduct of either would be sufficient to warrant a divorce, provided the other was less guilty. It is immaterial, for we find them about equally at fault . . ." For holdings to the same effect see: *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840; *Strickland* v. *Strickland,* 80 Ark. 451, 97 S. W. 659; *Wilson* v. *Wilson,* 128 Ark. 110, 193 S. W. 504; *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. 2d 1013; *Evans* v. *Evans,* 219 Ark. 325, 241 S. W. 2d 713; *Woodcock* v. *Woodcock,* 202 Ark. 809, 152 S. W. 2d 1013; and; *Bonner* v. *Bonner,* 204 Ark. 1006, 166 S. W. 2d 254.

In disposing of the case below the trial court made we believe a fair allowance for the support of appellant and the care of the children which we hereby approve. We also approve the action of the trial court in giving to appellant the custody of the children, together with the visitation arrangement set forth.

Several other orders and actions of the trial court are urged as error by appellant, but in view of the disposition we have made of the case, as set forth previously, we deem it necessary to refer to only one.

Appellant earnestly insists that the trial judge should have disqualified and that it was error for him to refuse to do so. This contention is based on the showing that the trial judge had formerly been somewhat closely associated with appellee, both socially and in a business way. We point out that no showing was made which would disqualify the trial judge under any statute or under the constitution of this state. Such matters of disqualification are, as we have said many times, left largely to the discretion of the trial judge himself. We cannot say that the trial judge abused his discretion in this instance.

Appellant has asked for an additional attorney fee for prosecuting this appeal, and we think she is entitled

thereto in the amount of $200 to be paid by appellee, and it is so ordered.

The decree of the trial court is therefore affirmed in all matters except that portion granting a divorce to appellee, and that part is reversed. The cause is remanded with directions to enter a decree in accordance with this opinion.

OLD REPUBLIC INS. CO. *v.* MARTIN.

5-1753 320 S. W. 2d 266

Opinion delivered February 2, 1959.

Hardin, Barton, Hardin & Garner, for appellant.

Luke Arnett, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Mrs. Emma F. Martin, widow of Arthur L. Martin, was awarded compensation under the Workmen's Compensation Law because of the death of her husband due to silicosis. The Referee, Mr. L. D. Blair, made the award.

The issue here is whether appellant took a valid appeal to the full Commission from the decision of the Referee. The Referee's opinion was filed February 1, 1957.

The time in which an appeal could be taken expired thirty days thereafter. Ark. Stat. § 81-1325. Appellant contends the appeal was perfected; that the secretary for the attorney for appellant deposited in the mail a petition for review properly addressed to the Commission. The trial court held that although there was a presumption that the petition for review had been received by the Commission, such presumption was overcome by other evidence. The trial court prepared a well considered written opinion, in which it is said:

"Under the Arkansas decisions, where a letter was properly stamped and mailed, and was never returned to the sender, it is presumed that it was received, but this presumption may be rebutted. *Planters' Mutual Ins. Co.* v. *Green,* 72 Ark. 305, 80 S. W. 151. See West Digest "Evidence," heading 71 and cases there cited. See also, cited under same heading, *Taylor* v. *Corning Bank, etc.,* 183 Ark. 757, 38 S. W. 2d 557; *Harper* v. *Thurlow,* 168 Ark. 491, 270 S. W. 607; *Dengler* v. *Dengler,* 196 Ark. 913, 120 S. W. 2d 340; *W. T. Rawleigh Co.* v. *Moore,* 196 Ark. 1148, 121 S. W. 2d 106; *Cady* v. *Guess,* 197 Ark. 611, 124 S. W. 213, and *American Fidelity Fire Insurance Co.* v. *Winfield,* 225 Ark. 139, 279 S. W. 2d 836.

"Where a letter, properly and sufficiently addressed and properly stamped, was mailed, there is a presumption of fact, not of law, that the letter was received by the addressee in due course of mail, which presumption ceases to exist, where the addressee denies having received the letter, whereupon it becomes a question of fact whether the letter was written or received. *W. T. Rawleigh Co.* v. *Moore,* 196 Ark. 1148, 121 S. W. 2d 106.

"Presumptions give way to reality when facts opposing presumptions are presented, as term 'presumption' signifies that which may be assumed without proof or taken for granted and is defined as something asserted as self-evident result of human reason and experience. *Gray* v. *Gray,* 199 Ark. 152, 133 S. W. 2d 874.

"To the same effect, see *W. T. Rawleigh Co.* v. *Moore, supra* and *Travelers Ins. Co.* v. *Thompson,* 193 Ark. 332, 99 S. W. 2d 254.

"Under the cases above cited, it is uniformly held as a presumption of fact, not of law, that where a letter, properly and sufficiently addressed and properly stamped, is mailed, that it was received by the addressee in due course of mail. But the presumption ceases to exist where the addressee denies receiving the letter. In that case it becomes a question of fact whether the letter was received.

"The presumption arising where proof shows a letter properly mailed is not conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty. Such a presumption can of course be rebutted. *Bluthenthal* v. *Atkinson,* 93 Ark. 252, 124 S. W. 510.

"This Court without reservation can accept the evidence of appellant's attorney and his secretary that a letter dated February 13, 1957 was properly addressed and stamped to the Workmen's Compensation Commission in Little Rock. Duplicate letters or copies of the original were mailed to other parties. This evidence, of itself raises a presumption, factually, that the letter, evincing a desire to appeal from the award made by the Referee, was received. But under the cases cited, this presumption disappears and is dissolved when the receipt of the letter is denied by the addressee, Workmen's Compensation Commission.

"Mr. John E. Cowne, Secretary of the Commission, was meticulously cross-examined by counsel for respondents in an effort to show that some error might have occurred upon the part of the employees in the handling and filing of incoming mail; that an error was possible. This form of questioning addressed to Mr. Cowne, resulted in his giving in detail the method and procedure followed in the handling of mail and handling and transmission of legal papers to the proper person or official of the commission . . . The subsequent searches made for the letter requesting a hearing and review by the Full Commission, confirms at least the testimony of Mr. Cowne that the letter actually, and as a matter of fact had not been received.

"The Court does not care to indulge in speculation or conjecture, as to what occurred to the letter, but it is not impossible nor improbable that the letter, when mailed in Fort Smith, before transmission in due course, might have been lost or misplaced. The court prefers, however, to predicate its finding upon the evidence in the record.

". . .

"It is to be regretted that an incident, such as is shown in this case, has occurred affecting the right of review by the Full Commission. A rule by the Commission acknowledging receipt of notices of appeal or for review by registered mail, would eliminate the present unfortunate situation.

"The Court finds and holds under the evidence and record before it, that the Opinion filed October 18, 1957, by the Full Commission should be confirmed."

We agree with the opinion of the trial court.

Affirmed.

HARRIS, C. J., and WARD, J., dissent.

HARBOUR *v.* HARBOUR.

5-1771 321 S. W. 2d 224

Opinion delivered February 2, 1959.

[Per Curiam opinion on rehearing March 23, 1959.]

Charles S. Goldberger & E. W. Brockman, Jr., for appellant.

J. S. Brooks & M. P. Matheney, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from an order of the trial court construing a mandate of this Court.

On June 9, 1958, in the case of *Harbour* v. *Harbour,* 229 Ark. 198, 313 S. W. 2d 830, this Court handed down a decision increasing from $50.00 to $125.00 per month alimony and support payments that Mr. Harbour should make to Mrs. Harbour, or an increase of $75.00 per month. Later, in a Petition for Rehearing, Mr. Harbour asked that such required monthly payments be reduced and that whatever increase was allowed should be effective

as of June 9, 1958, the date of the original opinion of this Court.

The Petition for Rehearing was granted to the extent of reducing the monthly payments to $100.00 per month to be effective as of June 9, 1958. This was done by a *per curiam* order of this Court dated July 1, 1958, the pertinent parts of which read as follows:

"Appellant's Petition for Rehearing is granted to the extent of reducing the $125.00 payment per month to $100.00 per month, commencing on June 9, 1958."

It is our conclusion that the above language is clear and definite and is not susceptible to any different construction other than that the payments should begin on June 9, 1958.

Therefore, we hold that the increase in the payment to $100.00 should be from July 9, 1958, and not from August 1, 1957, as held by the trial court. See *Watkins* v. *Ackers,* 195 Ark. 203, 111 S. W. 2d 458.

Accordingly, the decree of the trial court is reversed.

PER CURIAM

On Rehearing

When this case was tried in the chancery court on July 25, 1957, there was on deposit in court the proceeds from property owned by Mr. and Mrs. Harbour which had been taken by the Highway Department for highway purposes. $7,825 came from property owned as an estate by the entirety, and there was $1,025 which was in payment of a lot owned by Mr. Harbour, making a total of $8,850 in the registry of the court. Of this sum Mrs. Harbour was given $3,912.50 as her part of the estate by the entirety and $233.27 as her dower interest in the $1,025. She was also given $709.67 as accrued and delinquent alimony and $2,100 in payment of alimony to accrue in the future. This made a total of $6,955.44 that was awarded to Mrs. Harbour out of the total of $8,850. On appeal to this Court it was held, in an opinion handed down June 9, 1958, that Mrs. Harbour was not entitled

to the $2,100 in payment of future alimony (*Harbour* v. *Harbour,* 229 Ark. 198, 313 S. W. 2d 830) but that the original allowance of $50 a month as alimony and as support for a child should be increased from $50 to $125 per month.

This Court's opinion was not specific in stating whether the increase should be effective from the date of the decree of the trial court or from the date the case was decided here. In a petition for a rehearing, Mr. Harbour contended that $125 per month was too much to require him to pay and, further, that whatever increase was allowed should date from June 9, 1958, the date the case was decided by the Supreme Court. In response to the petition for a rehearing, Mrs. Harbour contended that the monthly payments should start as of August 1, 1957. Thus, on the petition for a rehearing there were two principal issues before this Court, both points having been briefed by the parties: (1) The amount of the alimony and support; and (2) when the increase should start. This Court granted the petition for a rehearing to the extent of increasing the alimony and support to $100 per month instead of $125 per month, as had been ordered in this Court's original opinion. And, in response to both parties' request that the opinion be clarified by stating the date the increase in alimony and support should start, this Court in a per-curiam opinion ordered that the $100 per month be started as of June 9, 1958, the date the original opinion was handed down by this Court. The trial court was of the opinion that the clerk of the Supreme Court by stating in the mandate that the $100 per month payments should start as of June 9, 1958, misconstrued the decision of the Supreme Court, and the trial court rendered a decree providing that the $100 per month should start August 9, 1957. Mr. Harbour appealed, again contending that the $100 payments should start as of June 9, 1958.

The clerk made no mistake in construing the *per curiam* opinion, which is recorded in Volume C-44, page 88, of the records of proceedings of the Supreme Court of Arkansas signed by all the members of this Court.

And on February 2, 1959, the trial court's decree fixing as August 9, 1957 the date the $100 per month became effective was reversed. On petition for a rehearing Mrs. Harbour insists the $100 per month payments should commence at the time the original decree was rendered by the trial court. But when the amount each party received from the property is considered, we think the $100 per month payments should start June 9, 1958.

Petition for rehearing denied.