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JOHNSON *v.* GAMMILL.

5-1897 328 S. W. 2d 127

Opinion delivered October 19, 1959.

Brockman & Brockman, for appellant.

Jay W. Dickey, for appellee.

CARLETON HARRIS, Chief Justice. This action was brought by appellants, Winna C. Johnson, *et al,* against appellees, Lewis H. Gammill and wife, on February 8, 1957, seeking judgment for an alleged indebtedness in the amount of $16,523.48, together with interest, and appellants prayed foreclosure of several real estate and chattel mortgages, which had been given to secure the indebtedness. The various notes (15) were due more than five years before the filing of the suit, but on January 26, 1952, the parties stipulated in writing as to the amount of indebtedness. After hearing the evidence, the court rendered judgment for appellants in the amount of $8,462.37, plus interest at the rate of 8% per annum until paid. Appellants bring this appeal, contending that appellees were allowed certain credits to which they were not entitled, and appellees cross-appeal, alleging, first, that the indebtedness was barred by the Statute of Limitations, and further, that the court erred in not permitting them to go behind the stipulation for the purpose of showing that a certain $6,000 note was a duplicate of another note in the same amount, rather than each note representing a different indebtedness.

Inasmuch as the contention that the entire debt was barred by limitations, if correct, would terminate the litigation, we proceed to discuss this point first. Arkansas Statutes (1947) Anno., § 37-209, provides: "Ac-

tions on promissory notes, and other instruments in writing, not under seal, shall be commenced five (5) years after the cause of action shall accrue and not after." The parties entered into a written stipulation on January 26, 1952, as to the total amount of indebtedness due (which agreement will be more fully discussed hereafter), and the suit was brought on February 8, 1957. However, several payments were made subsequent to January 26th, one payment being made on March 21, 1952, at which time, appellant and cross-appellee sent to Mrs. Johnson several checks totaling approximately $1,900. There was no direction as to which note or notes should be credited with this amount, and Mrs. Johnson accordingly had the right to apply this credit as she saw fit. *Hawkins* v. *Hawkins,* 200 Ark. 38, 137 S. W. 2d 904. We have held that part payment interrupts the running of the statute. In *Smith* v. *Grimsley,* 215 Ark. 279, 220 S. W. 2d 428, this Court said:

"The statute of limitations applicable to a promissory note is five years after maturity, as fixed by § 8933, Pope's Digest, and § 37-209 of Ark. Stats. (1947) Anno. Part payment, before the bar attaches, forms a new point from which the statute will begin to run. *Less* v. *Arndt,* 68 Ark. 399, 59 S. W. 763."

The stipulation between the parties heretofore referred to, was entered into in writing, sworn to before a notary public, and we hold that this instrument constituted an account stated, and started the running of a new five year period.

In Vol. 1, Ruling Case Law, page 211, it is said:

"An account stated presupposes an absolute acknowledgment or admission of a certain sum due, or an adjustment of accounts between the parties, the striking of a balance, or an assent express or implied, to the correctness of the balance. If the acknowledgment or admission is qualified and not absolute, or if there is but an admission that something is due, without specifying how much, there is no account stated, nor does an account stated exist if there is but a partial set-

tlement of accounts, without arriving at a balance, or if there is a dissent from the balance as struck."

Here, there is an acknowledgment of a specific sum due, without any qualification whatsoever; for that matter, there is no contention in the pleadings that the instrument is in error, or that it was fraudulently obtained. In other words, the account stated has not been attacked.

A large part of the argument in the briefs is devoted to a credit given appellees by the court in the amount of $3,236.66. The controversy over this item relates to a note dated April 26, 1950, in the amount of $6,000, which note was secured by a real estate mortgage. The back of the note reflects figures of $236.66 and $3,000, which are added together, making $3,236.66. There is then the notation, "Amt. paid by ck., 12-2-50", and it is initialed "L.H.G." Mr. Gammill testified that this was a payment on the note,[1] which he did not receive credit for, while Mrs. Johnson stated that this was not a payment on the note, and had nothing to do with that indebtedness, but was 1950 rent,[2] which had been figured on the back of the note. The court apparently reached the conclusion that since, admittedly, the amount in question had not been credited on the note, it had not been credited at all, and proceeded to allow this amount as a credit against the total indebtedness agreed to in the account stated. Be that as it may, the payment was made approximately fourteen months before the agreement was reached, stating the account. So, it would certainly appear that the payment was taken into consideration on January 26, 1952, when the parties agreed as to the total amount due. In fact, Mr. Gammill testified that all credits and debits were taken into consideration when the agreement was reached. Inasmuch as no attack is made upon the correctness of the account stated, we are of the opinion that the Chan-

[1] Why Mr. Gammill made this notation, rather than Mrs. Johnson, is not explained by appellees.

[2] Mrs. Johnson and others had rented a farm to Mr. Gammill for an annual amount of $6,000, her part being $3,000.

cellor erred in going behind this instrument, and allowing this credit to appellees.

Appellees and cross-appellants allege a mistake in the existence of two notes for $6,000, both dated April 26, 1950, contending that one is a duplicate of the other. We are unable to understand the basis of this assertion, since both notes appear in the record, one being secured by a mortgage on certain town lots in Gould, Lincoln County, Arkansas, due November 15, 1950, and the other secured by a deed of trust on land in Jefferson County, Arkansas, and due November 1, 1950. Hence, it appears that the notes were given to cover different indebtment, and the contention is without merit; at any rate, the same reasoning applies here as in the previous paragraph, *i.e.,* the account stated not being attacked, the parties could not go behind it.

On one of these $6,000 notes, appellees gave a mortgage on a house and four lots in Gould. This property was conveyed to Mrs. Johnson by appellees on February 28th, 1953. Mrs. Johnson credited the note with the amount of $4,500, which she testified was the amount agreed upon between the parties. Mr. Gammill testified that Mrs. Johnson agreed to credit him with whatever amount the property brought at sale, and that she had sold it for $6,500. The deed itself reflects the consideration to be $10 and "other valuable consideration." The Chancellor found, "On the delivery of the deed by the mortgagor to the mortgagee, there was constituted a merger of estates. The mortgage debt was satisfied by the acceptance of the deed." This resulted in appellees receiving a $6,000 credit, instead of the $4,500 credit, which had been given by Mrs. Johnson. Generally speaking, the law seems to be as stated in *Corpus Juris Secundum,* Vol. 59, § 440, page 677:

"The question whether a conveyance of the equity to the mortgagee results in a merger of the mortgage and fee is primarily one of intention of the parties, particularly, according to the decisions on the question, the intention of the mortgagee, for the mortgagee has

an election in equity to prevent a merger and keep the mortgage alive."

Of course, in the instant case, neither party stated there was any agreement to cancel the $6,000 note as a result of the execution of the deed; to the contrary, appellants say a lesser amount was to be allowed, while appellees say that a larger amount was to be allowed. Reading further, however, in § 440 of *Corpus Juris Secundum*, we find this language:

"The intention of the parties on the question of merger may be expressly declared, or it may appear from the conduct of the parties, the circumstances of the transaction, and the particular equities of the case. In any event, however, the intention to merge must be clear. An intent to effect a merger is indicated where, after acquiring the equity, *the mortgagee conveys the property or leases it to a stranger*, * * *."[3]

Admittedly, Mrs. Johnson sold this property, and further, the record indicates that the property was of sufficient value to cover the indebtedness which it secured. We conclude that the Chancellor correctly found a merger, and properly held this mortgage debt extinguished.

The amount of interest allowed appellants is questioned by appellees in their exceptions to the Findings and Decree of the court; however, this is not argued in appellees' brief, and is therefore waived. *Purifoy* v. *Lester Mill Co.*, 99 Ark. 490, 138 S. W. 995, *Bowling* v. *Stough*, 101 Ark. 398, 142 S. W. 512, *Connell* v. *Robinson*, 217 Ark. 1, 228 S. W. 2d 475.

We have examined the entire record, and are unable to say that the Chancellor erred in any respect, other than in allowing appellees the credit in the amount of $3,236.66. The decree is therefore modified to the extent of disallowing this credit, and the cause is remanded to the Jefferson Chancery Court for further proceedings not inconsistent with this Opinion.

[3] Emphasis supplied.

Opinion delivered October 19, 1959.

[Rehearing denied November 16, 1959]

[redacted]

Kenneth Coffelt, for appellant.

Bruce Bennett, Atty. General, by *Thorp Thomas,* Asst. Atty. General, for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Emmett Earl Leggett, was on January 25, 1956, charged by information with the crime of first degree murder, and on the same day he was also charged by separate informations with the crimes of raping two different girls. On June 4, 1956, he was tried on the first degree murder charge and the jury returned a verdict of guilty of first degree murder as charged. The trial court thereupon sentenced Leggett to death in the electric chair and this court affirmed the judgment February 18, 1957, *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59. Thereafter, on December 3, 1957, Leggett, pursuant to the provisions of the Uniform Post-Conviction Procedure Act (Ark. Stats. 1947 Anno. Sec. 43-3101), filed in the circuit court a petition for a new trial, asserting that at the first trial he had been denied certain constitutional rights. The circuit court denied his petition and on appeal to this court, we affirmed the action of the trial court, *Leggett* v. *State,* 228 Ark. 977, 311 S. W. 2d 521. The next action taken by Leggett was the filing of a petition for a writ of mandamus in the Jefferson Circuit Court on August 19, 1958. The substance of this petition was appellant's allegation that

the Superintendent of the State Penitentiary had acted arbitrarily and had abused his discretion in refusing to call a jury to inquire of Leggett's sanity at that time. At the hearing on August 21, 1958, Leggett offered no testimony and the court denied his petition and on March 9, 1959, this court affirmed the action of the lower court, *Leggett* v. *State,* 230 Ark. 183, 321 S. W. 2d 764.

During every step in all of the above proceedings, Leggett was, and is now, represented by able counsel.

By proclamation by the Governor of Arkansas, Leggett was scheduled to die in the electric chair on July 24, 1959. On July 14, 1959, Leggett filed a motion in the Pulaski Circuit Court in which he prayed for the dismissal of the two rape charges against him on the ground that "there has been more than two regular full terms of this court passed since he was charged in these cases, and committed to prison. Therefore, under the provisions of Section 43-1708 Ark. Stats. he cannot now be brought to trial, and the charges are a nullity and cannot be enforced, and he is entitled to now have said cases dismissed under the provisions of said statute. There has been no delay in a trial on these charges occasioned by the defendant, and the prisoner himself." The trial court denied and dismissed this motion and the present appeal followed.

For reversal appellant relies on the following point: "The trial court erred in his refusal to sustain the motions, and to dismiss the charges, under the provisions of Sec. 43-1708, Ark. Stats., and under the admitted and uncontradicted facts and proof in the record."

So specifically the question for our decision is whether Leggett is entitled to be discharged on the two rape charges under Sections 43-1708, Ark. Stats. 1947 (Sec. 3132, C. & M. Digest) which is as follows: Sec. 43-1708 — "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such

indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

Appellant insists that on authority of *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777, construing Ark. Stats. Sec. 43-1708, quoted above, he should be discharged on the informations charging him with rape. It is true that in the Fulton case this Court held the statute in question applies to a convict serving a term in the penitentiary, but there is a vast difference in the situation of the defendant as it existed in that case and the situation of the defendant in the case at bar. Fulton was charged with separate robberies in six different indictments. He was tried and convicted on three of the indictments. After the lapse of two terms of court he filed a motion asking for dismissal of the indictments on which he had not been tried. If the untried cases had not been dismissed, he could have been tried on such charges after having served the sentences on which he was committed. In the case at bar, if the judgment of the court is carried out, the rape indictments will be abated.

It will be noticed that the statute (Sec. 43-1708) provides that the defendant "shall be discharged so far as relates to the offense for which he was committed . . ." True, in the Fulton case the language of the statute was construed as applying to offenses for which the defendant had *not* been committed, but we do not believe the construction of the statute should be broadened to include defendants who have been sentenced to death. In the case at bar the defendant has been convicted and sentenced to death for murder; he has not been committed on the rape charges, and the statute is therefore inapplicable.

Finding no error, the judgment is affirmed.

JOHNSON, J., dissents.

Opinion delivered October 19, 1959.

[redacted]

Mehaffy, Smith & Williams, for appellant.

Langston & Walker, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case. Emmett Allen Harrison collapsed and died while at work for Safeway Stores; and a claim was filed for compensation. The trial referee, and also the full Commission, denied a recovery to the widow and children of the employee. The Circuit Court reversed the Commission and found that compensation should be awarded; and the employer, Safeway, has brought this appeal. Both sides recognize the rule that if the findings of fact of the Workmen's Compensation Commission are supported by substantial evidence, then such findings must be sustained. *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82.

So the crucial issue on this appeal is whether there is substantial evidence to support the Commission's findings in denying compensation. The Circuit Court answered in the negative.[1] On this appeal Safeway con-

[1] The Circuit Court order recites that Safeway "did not offer medical testimony to contradict the medical testimony of the claimants; that the order of the Commission is not supported by substantial evidence and should be set aside". Tr. Vol. 1, p. 1.

tends: (a) that "the Circuit Court erroneously shifted the appellee's burden of proving a causal connection between the death and the employment"; and (b) "the evidence affirmatively shows that it was the deceased's rheumatic heart condition, and not his employment, which caused his death".

The basic facts reflect that Emmett Allen Harrison was 26 years of age at the time of his death. He was an employee of Safeway Stores, and had been so employed for several years. While at work on Friday, November 16, 1956, Harrison collapsed and died of a heart seizure. Immediately prior to his collapse he was engaged in manually removing produce from boxes resting on a pulley truck and placing the produce on the counters. Cause of death, according to the death certificate, was coronary occlusion. Safeway contends that Harrison had a "terrible rheumatic heart condition" ever since childhood and that death occurred because of the rheumatic heart condition and not because of the work he was doing. The Commission agreed with Safeway, holding that there was no causal connection between the work and the collapse.[2] But we conclude that there was no evidence to support the Commission's findings to that effect. We have repeatedly held that when a person has a pre-existing weakness, such as a heart condition, and the work load which the employer requires of the worker causes a collapse, then such employee is entitled to compensation. Some of our cases so holding are: *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albert-*

[2] The Commission said: "Now, in the light of this background, have we evidence which will sustain the burden of proving that the work deceased was doing on the day of his death or on days prior thereto, was causally connected with that death as either a precipitating or aggravating factor? We think not. The death of deceased from heart failure was to be expected with or without exertion. To say, under these circumstances, that exertion of a degree to which this deceased had become accustomed did in anywise contribute to the death, is sheer speculation. It would be as well to speculate that deceased lived longer because of the very exercise regime he regularly engaged in in his work. Thus we do not think the cases cited herein constitute a precedent making instant claim compensable inasmuch as the causation factor as opposed to a natural death has not been proven. True, the only medical opinion of record, being that of Dr. Anderson Nettleship, is to the contrary."

son, 208 Ark. 866, 187 S. W. 2d 961; and *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629.

Here, the evidence is undenied that Harrison had suffered with a rheumatic heart condition since early childhood. Back in 1951 Safeway had him examined by a physician and the report showed that he had a bad heart condition. The doctor's recommendation was, "reject unless accepted by medical director". Formerly, Safeway had a man to assist Harrison in the heavy work, but that extra man quit a month or six weeks before Harrison's collapse. Mr. Conn, who was employed as the produce manager at the Safeway Store where Harrison worked, testified that on the morning of November 16th, the date of Harrison's collapse, somewhere between 10,000 and 12,000 pounds of produce arrived at the store and it was Harrison's job to unload it. Mr. Conn also testified as to conditions at the time of Harrison's collapse:

"A. Allen had fallen on his back and was lying flat on his back, breathing, just gasping; no continuous breathing at all.

Q. Was all the produce you had given him still on the truck or not?

A. No, sir, he had unloaded one crate of potatoes and had put the apple box full of onions on the rack and turned around — it looked like he had fallen then.

Q. Why did it look like after — he fell after the crate with the onions?

A. The potato crate stacked on the buggy was setting on the floor and the apple box had fallen off at the side. It wasn't on the truck.

Q. What would you estimate the weight of a crate of potatoes such as he had to be?

A. Sixty pounds."

There is no evidence that contradicts the recited facts. The claimants introduced the testimony of two doctors, one of whom had treated Harrison for several

years and testified of his bad heart, and the other doctor testified unqualifiedly that the work was the cause of Harrison's collapse and death. The said medical testimony was uncontradicted; but the Commission refused to follow the testimony. The case at bar is ruled by such cases as the following: *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; *Frank Lyon Co.* v. *Scott,* 215 Ark. 274, 220 S. W. 2d 128; *Qaulity Excelsior Coal Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38; *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26; *Scobey* v. *Southern Lumber Co.,* 218 Ark. 671, 238 S. W. 2d 640, 243 S. W. 2d 754; *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436; and *Bettendorf & Co.* v. *Kelly,* 229 Ark. 672, 317 S. W. 2d 708.

We therefore conclude that the Circuit Court was correct in reversing the Commission. We affirm the Circuit Court, and direct that the Circuit Court remand the case to the Commission with directions to award compensation.

LEGGETT *v.* STATE.

4960 328 S. W. 2d 252

Opinion delivered October 19, 1959.

[Rehearing denied November 16, 1959]

Kenneth Coffelt, for appellant.

Bruce Bennett, Atty. General by *Thorp Thomas,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. This is another chapter in the litigation involving Emmett Earl Leggett, convicted in the Pulaski Circuit Court in 1956 for the murder of Joe King, and sentenced to death.

The judgment in the murder case was affirmed by this Court on February 18, 1957. See *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59, and hereinafter referred to as the "first case". Leggett later filed in the Pulaski Circuit Court a proceeding under the then existing Uniform Post Conviction Procedure Act (being Act No. 419 of 1957 and found in § 43-3101 Ark. Stats.).[1] That proceeding was unsuccessful when on March 31, 1958 we affirmed the Circuit Court judgment which denied Leggett the relief sought. See *Leggett* v. *State,* 228 Ark. 977, 311 S. W. 2d 521, and hereinafter referred to as the "second case". Leggett then filed in the Jefferson Circuit Court a petition against Lee Henslee, Superintendent of the Arkansas State Penitentiary. The relief sought was a writ of mandamus to require a jury to be empanelled to investigate Leggett's sanity. From an adverse judgment in the Circuit Court, Leggett again appealed to this Court and was again unsuccessful, when

[1] This Act was subsequently repealed by Act No. 227 of 1959.

on March 9, 1959 we affirmed the Jefferson Circuit Court judgment. See *Leggett* v. *Henslee,* 230 Ark. 183, 321 S. W. 2d 764, and hereinafter referred to as the "third case".

With the court proceedings thus concluded, the Governor of Arkansas, in accordance with the law (§ 43-2623 Ark. Stats.), set the date for Leggett's execution to be July 24, 1959. But on July 23rd Leggett filed in the Pulaski Circuit Court a pleading entitled, "Motion to Stay the Judgment of Death Sentence and Electrocution Ordered Thereunder", and in that pleading it was claimed, *inter alia*:

"Since the original trial in this case and since the affirmance by the Supreme Court of Arkansas of the original trial record and the sentence imposed in this case, there has been newly discovered evidence, to-wit:

"At the request of state officers and officials, impartial psychiatrists were prevailed upon to examine the defendant as to his sanity. They filed a written report addressed to the Governor of Arkansas which states that the defendant is insane and was insane at the time of the commission of the offense as charged herein. A copy of said report is attached hereto, marked Exhibit 'A', and made a part hereof. The State of Arkansas although having acquired this information at its own request has denied the availability of this newly discovered evidence to a jury of defendant's peers. The defendant in this case was defended as a pauper in the original trial and had no way of acquiring at the time of the trial this additional evidence. Before the additional evidence was discovered at the instigation and request of the State the time had expired for the defendant to ask for a new trial by reason of such newly discovered evidence."

On the same day (July 23, 1959) the Pulaski Circuit Court entered "Final Judgment", which recited no appearance by anyone for the State, but which de-

nied Leggett's motion.[2] The same day — July 23, 1959 — the transcript of the said Pulaski Circuit Court proceedings was lodged in the office of the Clerk of the Arkansas Supreme Court. The Court was in vacation (having adjourned in June to August), and Justice JIM JOHNSON granted the appeal of Leggett and forthwith issued a stay of execution to the Superintendent of the Penitentiary.[3] The Superintendent of the Penitentiary honored the stay order; and the correctness of such stay order is now before us in this case,[4] hereinafter referred to as the "present case".

[2] The entire text of this judgment was as follows: "On this 23rd day of July, 1959, is presented to the court the written verified motion of the defendant with the exhibits attached thereto, praying that this court stay the judgment of the death sentence imposed on the defendant herein, and the electrocution ordered thereunder; and the court after reading said motion and the exhibits, and after being well and sufficiently advised as to all matters of law and fact pertaining hereto, finds:
"That said motion should be denied.
"WHEREFORE, it is the final order and judgment of this court that the motion of the defendant praying that the death sentence imposed on the defendant herein, and his electrocution ordered thereunder be stayed, be, and the same is, hereby denied, and the defendant duly excepts to this judgment and prays an appeal to the Supreme Court of Arkansas which appeal is hereby granted by the court. It is so ordered."

[3] Justice Johnson wrote the following, which is affixed to the transcript: "The defendant and his rights are again squarely before this Court. I am called upon by an earnest plea from his counsel to grant a temporary stay of his execution until this case can be presented to the full court on its merits. Serious allegations are made in this record that the State itself, since the original trial, has acquired newly discovered evidence that the defendant is insane which has never been considered by any court.
"If I allowed this young man to die without granting him the benefit of every legal recourse available to him, my conscience would not let me escape the feeling that I had been a party to a lynching.
"For the reasons stated above and after prayerful consideration, I am granting the request for a temporary stay of execution and the appeal in this case."

[4] It is argued in the briefs for appellee that under § 43-2621 Ark. Stats. and the concluding part of § 43-2623 Ark. Stats. (both sections from the Criminal Code of 1869), neither this Court, nor any Judge thereof, has power to suspend the execution after the date has been set by the Governor. But such argument overlooks some of the provisions of Act No. 55 of 1913—as now found in § 43-2617 Ark. Stats.—which provision uses this language: ". . . a writ of error from the Supreme Court, or should the execution of the sentence be stayed by any competent judicial proceeding, notice of . . . such writ of error or stay of execution shall be served upon the superintendent of the penitentiary . . . and the said superintendent shall yield obedience to the same. . . ." The said Act of 1913 constituted legislative recognition of the inherent judicial power, so the § 43-2621 and § 43-2623 Ark. Stats. cannot have the strict meaning argued for them.

At the outset it must be pointed out that the Pulaski Circuit Court was not the correct tribunal to entertain jurisdiction of the present case: rather, a petition should have been filed in the Arkansas Supreme Court for permission to file a petition for writ of error *coram nobis*. In *State* v. *Hudspeth,* 191 Ark. 963, 88 S. W. 2d 858, we held that where a judgment had been affirmed by this Court, the permission of the Supreme Court should be obtained before applying to the trial court for a writ of error *coram nobis,* saying:

"We think, however, that the better rule is that, when a judgment has been affirmed by this court, no application for the writ of error *coram nobis* may be made to the trial court without permission to make such application has been given by this court; and hereafter this rule will be enforced."

We have continued to adhere to the rule stated in the Hudspeth case. See *Black* v. *State,* 216 Ark. 805, 227 S. W. 2d 629; and *Jenkins* v. *State,* 223 Ark. 245, 265 S. W. 2d 512. The Pulaski Circuit Court should have dismissed the motion filed by Leggett on July 23rd.

Leggett's counsel now apparently recognizes the holdings in the cases just cited, because we are asked to treat the present case as a petition for permission to file a writ of error *coram nobis.*[5] In other words, we are asked to treat this case as though the appeal lodged in this Court on July 23, 1959 had been a request for permission to file a petition in the Circuit Court for a writ of error *coram nobis*; and we are asked to treat Justice JOHNSON's stay order as a temporary stay until this Court *en banc* could hear the petition on its merits. A discussion of the propriety of such treatment will gain nothing because we have concluded that, even if this proceeding had been a request for permission to file a

[5] "*Coram nobis*" means, literally, "before us ourselves"; whereas, "*coram vobis*" means "before you". "Writ of error *coram nobis*" is the legal way of saying, "Motion for new trial in a criminal case filed after the term of court has expired". "Writ of error *coram nobis*" early became a writ issued by the higher court (Court of King's Bench) to the trial court (court of *nisi prius*); and in that similarity, it is used in our jurisdiction today. See 18 C.J.S. p. 281.

petition for a writ of error *coram nobis,* nevertheless the stay order should not have been granted,[6] since the allegations made for Leggett presented no grounds for a writ of error *coram nobis.*

We have heretofore copied the allegations about newly discovered evidence, and that is the sole point urged in the present case. The Exhibit "A", referred to in the quotation heretofore, is a document of eighteen pages. It begins with a 2-page letter from the Menninger Foundation in Kansas to Honorable Orval E. Faubus, Governor of Arkansas. The letter is dated September 6, 1957, and attached to the letter is a report of sixteen pages, dated August 29, 1957, and being a report on the mental condition of Emmett Earl Leggett; and the conclusion of the report is that Leggett was insane at the time of murdering Joe King and at the time of the trial. This letter and document are referred to as the "Menninger Report"; and thereafter the Governor set the date for the execution, as heretofore mentioned.

For a writ of error *coram nobis* to be granted by this Court on the basis of newly discovered evidence, it must be shown that the issue alleged to involve newly discovered evidence was an issue that was not presented at the original trial.[7] In *Jenkins* v. *State,* 223 Ark. 245, 265 S. W. 2d 512, two days before Jenkins was to be electrocuted, this Court was requested to grant permission for the filing in the trial court of a petition for writ of error *coram nobis,* and it was claimed that Jenkins was insane. We refused the request, saying:

"The question of appellant's insanity at the time of the killing was submitted to the jury in instructions

[6] We have other cases in this Court in which one Judge has made an order which was subsequently disapproved by the full Court. See *Carr* v. *State,* 93 Ark. 585, 122 S. W. 631; and *Levy* v. *Albright,* 204 Ark. 657, 163 S. W. 2d 529.

[7] In seeking a new trial for newly discovered evidence under § 43-2203 Ark. Stats. it is essential that the alleged newly discovered evidence be more than merely cumulative. *Ary* v. *State,* 104 Ark. 212, 148 S. W. 1032; *Hawthorne* v. *State,* 135 Ark. 247, 204 S. W. 841.

given on the court's own motion and other instructions requested by both the State and appellant."[8]

In the case at bar, we have examined the transcript in the first case — the one in which Leggett was tried for the murder of Joe King, convicted, and sentenced to death. The record contains 856 pages, and shows that Leggett was represented by able and experienced counsel; and Leggett's alleged insanity was one of the main defenses. We refer to the following matters appearing on the numbered pages in the transcript in the first case:

(a) The Trial Court ordered the defendant committed to the State Hospital for examination as to sanity, in accordance with Initiated Act No. 3 (Tr. p. 5); and the hospital report was filed (Tr. p. 612);

(b) The defendant's counsel asked and obtained access to all files in the office of the State Hospital (Tr. p. 8);

(c) Defendant's counsel called Dr. Thomas H. Hickey, who testified as to Leggett's alleged insanity (Tr. p. 718-739);

(d) Defendant's witness, Dr. Elizabeth Fletcher, also testified as to Leggett's mental condition (Tr. p. 756-799);

(e) The defense called Dr. Goss of the State Hospital to testify (Tr. p. 607-647);

(f) The defense also called Dr. Crawfish (Tr. p. 647-658);

(g) The defense called Dr. McKelvey on the matter of Leggett's mental condition (Tr. p. 658-665).

The defendant requested, and the Court gave, three instructions all on the matter of insanity, these being Defendant's Instruction No. 6 (Tr. p. 835), Defendant's Instruction No. 7 (Tr. p. 837), and Defendant's Instruction No. 8 (Tr. 837).

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[8] The case of *Black* v. *State*, 216 Ark. 805, 227 S. W. 2d 629, was similar in many respects to the Jenkins case.

Thus, it is crystal clear: (1) that in the first case (being the one of Leggett's trial and conviction for the murder of Joe King) Leggett's mental condition at the time of the homicide was fully explored; and (2) that the "Menninger Report" is only cumulative of the testimony of some of the doctors who testified in Leggett's behalf in the first case. Since cumulative evidence is not sufficient grounds for the granting of a new trial, it is certainly not sufficient to authorize this Court to grant permission to file a petition for writ of error *coram nobis*. So, even if we treat the present proceeding as having been a petition for writ of error *coram nobis* filed in this Court on July 23, 1959, we reach the conclusion that the petition is without merit, and that the stay order should not have been issued.

The stay order is now revoked, and the Clerk of this Court will issue a certificate, under § 43-2724 Ark. Stats., so that the Governor of Arkansas may proceed under § 43-2623 Ark. Stats. and exercise the power delegated to him by law to fix the date for the electrocution of Emmett Earl Leggett.

SMITH, JOHNSON and ROBINSON, JJ., concur.

JIM JOHNSON, Associate Justice, concurring. After prayerful consideration of this entire case on its merits, and after untold hours reviewing the law, I concur with the result reached by the majority. This conclusion is based upon the law and facts in the case and not upon the reasoning set forth in the majority opinion.

The Attorney General argues that neither this Court nor any Judge thereof has the power to suspend an execution after the date has been set by the Governor. The majority opinion in a footnote properly refutes this argument in the following language:

"But such argument overlooks some of the provisions of Act No. 55 of 1913 — as now found in § 43-2617 Ark. Stats. — which provision uses this language: '. . . a writ of error from the Supreme Court, or should the execution of the sentence be stayed by any competent judicial proceeding, notice of . . . such

writ of error or stay of execution shall be served upon the superintendent of the penitentiary . . . and the said superintendent shall yield obedience to the same . . .' The said Act of 1913 constituted legislative recognition of the inherent judicial power, so the § 43-2621 and § 43-2623 Ark. Stats. cannot have the strict meaning argued for them."

thereby conceding that I, as a member of this Court, had authority to grant the stay of execution until the full Court could consider the case upon its merits.

This authority was not granted to this Court or a member thereof by the Acts cited by the majority. The Supreme Court of this state is a court created by the Constitution and as such it possesses the inherent power to do all acts necessary to enable it to effectually exercise the jurisdiction conferred upon it. The authority to review and revise necessarily includes the power to enforce the law and administer justice. Independent of any statutory provision, this Court has the power to so frame its judgments and orders as to secure justice to litigants within its jurisdiction since the right of appeal carries with it a right to a judgment awarding justice according to law. The judiciary is an independent department of state government. It derives none of its judicial power from either of the other departments. It is true the General Assembly may create courts under the Constitution but it cannot confer on them judicial power for it possesses none to confer. Therefore, it must be concluded that a member of this Court has the *inherent* judicial power to stay executions.

Conceding that I, as a member of this Court, had the authority to issue the stay of execution, the question becomes, was it proper for me to use that authority. The majority opinion says: "The stay order should not have been granted". In so holding, the majority came to this conclusion after more than 80 days of deliberation and consumed 10 pages in so stating. It must be remembered that I had less than two hours to consider this matter of such grave importance involving an

issue of life or death. It would have been presumptuous of me to have assumed the grave responsibility of denying the petition without allowing the other members of the Court to review the same. As can be readily seen, in that short span of less than two hours it would have been impossible for me to have reviewed the authorities and the facts in this case and reached an intelligent conclusion. Particularly is this true in view of the concession by the majority that the first Leggett case alone contains 856 pages. Given the opportunity and time which the majority has had, and which I have now had, no doubt I would have reached the same conclusion that I have now reached. This petitioner was to have been executed within a matter of hours from the time the petition was presented to me. I chose then that if I should make a mistake it would be made in favor of life rather than death. Five members of this Court on the day following the issuance of the stay in this case met to review the action taken by me. After oral argument by the Attorney General and the attorney for petitioner, the majority present refused to disturb the stay until the case could be briefed and heard. Let us assume that after investigation the petitioner was proven to be right and I had denied the relief sought. The result would have been the execution of the appellant and an investigation of his case afterwards. I shudder to think of the consequences that I and each member of this Court would have suffered. The most that we could have done then would have been to have reversed the judgment and to that extent vindicate the memory of the deceased. This is not the justice contemplated by the law. I said then: "If I allowed this young man to die without granting him the benefit of every legal recourse available to him, my conscience would not let me escape the feeling that I had been a party to a lynching." I gave the appellant the benefit of every legal recourse available to him that was within my power to give. His petition has now been prayerfully considered by the full Court on its merits and found to fall short of the requirements of the law. My conscience is clear. Therefore, in

respectfully concurring with the majority opinion in the results reached, nothing is said in the reasoning of the majority opinion that would ever cause me in the future under the same or similar circumstances to deny to any person, white or black, the same relief granted petitioner herein.

For the reasons stated above, I respectfully concur.

SMITH *v.* SMITH.

5-1916 328 S. W. 2d 133

Opinion delivered October 19, 1959.

Vol T. Lindsey, for appellant.

Bryce Ballinger, Miami, Oklahoma, *Jeff Duty,* and *Claude Duty,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellee, Dema E. Smith, to quiet her title to three parcels of land in Benton county. She contends that she and her husband, Wesley M. Smith, owned the lands as tenants by the entirety and that she succeeded to the title upon her husband's death in 1957. The appellant, Wesley's sister and sole heir at law, denies that an estate by the entirety existed and insists that the three parcels were owned by Wesley alone, so that his widow is entitled only to her dower interest. The chancellor awarded the lands to the widow, holding that a tenancy by the entirety was created by a written agreement executed on October 1, 1955, by Wesley and Dema Smith

and by Earl T. and Minnie G. Wayne. The proper construction of that agreement is the decisive issue in the case.

All the facts are stipulated. Before his marriage to the appellee in 1954 Wesley Smith had lived for several years in the home of his friends, Mr. and Mrs. Wayne. In 1950 and 1951 Smith, a man of substantial means, purchased the three parcels now in dispute, with an oral understanding that the Waynes were to have an interest in the properties. One or both of the Waynes were named as grantees in each of the deeds, but in the trial court the Waynes, who were made defendants, asserted no claim under the deeds and conceded that their interest in the lands was only that set forth in the contract of October 1, 1955. The chancellor's decree protected the Waynes' interest as recited in the contract, and no one has appealed from that part of the decree.

When the Smiths and the Waynes executed the contract upon which this case turns the title to each of the three parcels was as follows: (*a*) One parcel, the apartment house property, had been paid for in full by Smith, and at his direction the sellers had conveyed that parcel to Earl T. Wayne and Wesley M. Smith. (*b*) Another parcel, the clubhouse property, had been partly paid for by Smith, and a deed to Earl T. and Minnie G. Wayne was being held in escrow by a Springdale bank, delivery to be made upon the payment of the final annual installment of the purchase price in 1959. (*c*) The third parcel, the farm property, had been partly paid for by Smith, and a deed to Wesley M. Smith and Earl T. Wayne was being held in escrow, delivery to be made upon the payment of the final annual installment on October 1, 1955.

On the date just mentioned Smith paid the last installment on the third parcel and directed that the deed in escrow be destroyed and that the sellers execute a new deed to Wesley M. and Dema E. Smith, which was done. At the same time the Smiths and the Waynes

undertook to define their respective interests in the three parcels by executing the following instrument:

"Agreement.

"This agreement, made and entered into this October 1, 1955, by and between Wesley M. Smith and Dema E. Smith, husband and wife, hereinafter referred to as first party, and Earl T. Wayne and Minnie G. Wayne, husband and wife, hereinafter referred to as second party, witnesseth:

"In confirmation of original oral agreement and oral or written agreements since then, with reference to purchase of three properties in Benton County, Arkansas, consisting of two residence properties in Rogers, Arkansas, and one farm, described as follows: [Here appears the legal description of each parcel, together with a statement of the original cost of each parcel]. It is herein understood and agreed by and between the parties that first party is to pay the purchase price for each property as and when they become due.

"Second party agrees to manage and supervise all property above described in cooperation with first party. He is to collect rentals, supervise rental of the property, pay taxes and repair bills from the income received from rentals until such time as any or all of the properties are sold or disposed of. Second party agrees to maintain all properties in good repair. If any property is sold, first party is to be reimbursed his entire investment in each property. Thereafter second party is to share 50-50 or in equal parts in any and all money received over and above the original cost of the property. When first party has been reimbursed his original investment, then any income to the above described properties shall be divided equally between the parties over and above cost of maintenance. No property shall be sold at a loss, nor shall it be sold at a price lower than a fair prevailing profit-yielding price that is mutually agreed upon. Should any money accumulate from rentals of the above properties, first party is to receive any amount over necessary expenses

and any money he receives from such rentals shall reduce the original cost of the property to that extent.

"This confirmation agreement is accepted by Earl T. and Minnie G. Wayne and Wesley M. Smith.

"In witness whereof we have hereunto set our hands and notarial seal this 1st day of October, 1955.

Wesley M. Smith, First Party
Dema E. Smith, his wife
Earl T. Wayne, Second Party

Accepted:
Earl T. Wayne
Minnie G. Wayne

(Acknowledgment.)"

We are unable to agree with the chancellor's conclusion that this contract created a tenancy by the entirety. It seems quite apparent that the dominant motive of the Smiths and the Waynes was to reduce to writing the oral agreements by which the Waynes' interest in the three parcels was actually much smaller than their ostensible interest under the wording of the deeds. The agreement twice refers to its confirmatory nature; every operative provision deals with the reciprocal rights of Smith and the Waynes rather than with rights between Smith and his wife. Dema Smith was evidently made a party to the contract in order to bind her to a recognition of the rights vested in the Waynes; she was not joined for the purpose of being made a grantee.

In discovering an intention to create an estate by the entirety the chancellor relied largely upon the fact that the first paragraph of the agreement refers to Mr. and Mrs. Smith as the first party. We are unwilling to attribute such a far-reaching substantive effect to what we regard as merely a preliminary designation of the parties. If Wesley Smith sought to use this contract with the Waynes as a vehicle for conveying to his

wife an interest in the properties he could, and we think he should, have inserted language making his intention at least reasonably clear. In the absence of such language we do not think a precedent should be set by which an estate by the entirety might spring from any casual reference to a husband and wife in a deed, mortgage, lease, or other instrument affecting the title to land.

The decree is affirmed as to the third parcel, the farm, for this tract was conveyed to Wesley and Dema Smith, husband and wife. That deed undeniably created an estate by the entirety, subject to the rights of the Waynes as recited in the contemporaneous agreement. But with respect to the other two parcels the decree must be reversed and the cause remanded for the entry of a decree not inconsistent with this opinion.

BUGH *v.* WEBB.

5-1902 328 S. W. 2d 379

Opinion delivered October 19, 1959.

[Rehearing denied November 23, 1959]

Bernard Whetstone and *Joe B. Hurley,* for appellant.

L. B. Smead, W. R. McHaney, Melvin E. Mayfield, for appellee.

PAUL WARD, Associate Justice. This litigation arises out of a "drag-racing" incident. The principal question to be resolved is: Does a guest assume the risk of injury when he consents to ride with one who engages in drag racing? Most of the material background facts leading up to the issue here involved are not in dispute.

On Saturday night, September 14, 1957, the appellee, Charles Webb (a minor), was riding in a Dodge car being driven by appellant, Joe Bugh (a minor), when Joe engaged in an automobile race, commonly known as a "drag race", with a Ford car being driven by one Jerry Smith on Highway No. 7 about one and one-fourth miles north of Smackover. Incident to the race a pick-up truck was struck by the Ford car and instantly thereafter by the Dodge car, resulting in damage to the vehicles involved and in injuries to Charles. Charles' father, individually and as next friend of Charles, brought suit against Joe and his father to recover damages.

Upon a trial the jury returned a verdict in favor of the complainants and from the judgment entered thereon, the Bughs prosecute this appeal. For a reversal appellants rely on one ground only, *i. e.,* that the trial court erred in refusing to instruct a verdict in their favor. After much deliberation we reach the conclusion that the trial court erred in refusing to grant appellants' motion because, we think, appellees' own testimony shows that Charles assumed the risk.

At the close of plaintiffs' testimony appellant moved for a directed verdict. This motion was based on several different grounds which included the guest statute, joint enterprise and assumption of risk. The motion was overruled and exceptions duly saved. When the trial judge overruled appellants' motion for a di-

rected verdict he stated that he thought the testimony of Charles Webb was sufficient to make a jury question. We, likewise, think that the issue depends almost entirely upon the testimony of Charles Webb and we shall set out that testimony in some detail, but first we refer briefly to the testimony of appellees' other witnesses.

Wylie Parham, a State Policeman, testified that the collision occurred at approximately 7:45 P. M., Saturday, September 14, 1957, and that he appeared on the scene approximately thirty minutes later; that Highway No. 7 on which the collision occurred "is a very heavy traveled highway" and that "the traffic at all times is heavier on Saturday nights than at other times". Clifford Brewer testified that he lives on the outskirts of Smackover and that he heard the collision and that it happened on the highway near a drive-in. Ivy Fowler, who was driving the pick-up truck, stated that he was in the process of making a turn from the highway when he "heard a loud, roaring noise" and saw a car coming trying to get around him; that the Ford car (driven by Smith) hit his left front fender and almost simultaneously another car hit the pick-up truck from behind and knocked him two hundred feet across the road into a ditch, and that the second car that hit him was a Dodge car. Curtis Butterfield testified that he knew Charles Webb and that he saw him at a dance a short while before the collision occurred. The father of Charles Webb and the father of Joe Bugh each testified but gave no testimony material to the issue here to be decided.

The uncontradicted testimony shows that this portion of Highway No. 7 where the drag racing took place was a heavily traveled highway and particularly so on Saturday nights. This was testified to by the highway policeman and was admitted by Charles Webb. The testimony shows beyond question that Charles Webb had engaged in drag racing on previous occasions not only with Joe Bugh but with the other boys involved on this occasion. This is shown by his own testimony:

"Q. Also, when you were working at Kenova and they were in school would you come at noon time and you all would have drag races toward the colored schoolhouse, or, did that occur?

A. Once or twice.

Q. That was after you were working at Kenova and they were going to school?

A. Yes, sir.

Q. And you had already assumed the position of a young man and you were making $265.00 a month at that time, and they were in school, is that right?

A. Yes, sir, that's right.

Q. And you did take your noon hour off and come up and drag race with them during the noon hour, is that right?

A. Not very often, once or twice.

Q. But you've done that, haven't you?

A. I have done that.

Q. Do you remember dragging anywhere at night when Malory was present and Joe was present?

A. One time on the bridge, out there, it might have been after dark, that's all the time I recall."

Witness Charles Webb also stated that he remembered dragging one time with Jerry Smith out on what was called "Nigger Hill" about two miles south of Smackover.

"Q. And Malory Neal has gone with you dozens of times when you and Malory would be together and you would drag against somebody?

A. No, sir; not many times.

Q. About how many times have you ever dragged with Malory Neal with you?

A. Probably two or three times, would be the most.

Q. How frequently were you and Joe together for the last five months before this collision?

A. We were together several times a week.

Q. And many times you would bring your car over to his house, and leave your car there, and the two of you would get in his car and ride around, didn't you?

A. Not many times; I have done it.

Q. At other times he would park his car and ride with you, wouldn't he?

A. Yes, sir.

Q. You have seen him break the speed limit a few times, is that what you are saying?

A. I have seen him break the speed limit.

Q. And you and him were both interested in dragging, generally, isn't that right?

A. I dragged with him a few times.

Q. And you and him were interested in the subject of drag racing?

A. I guess so.

Q. You and him talked about dragging and racing?

A. On a few occasions."

Charles Webb's testimony likewise shows that he knew they were going to drag race on this particular occasion. In speaking of Jerry Smith who was driving the Ford car the witness stated:

"A. He pulled over on the lefthand side of the slab and Joe pulled up beside him.

Q. Well, let's get this straight; now, did you know when Jerry parked on the lefthand side of the slab, or not?

A. I noticed him over there when Joe pulled up beside of him.

Q. Now, what did you think when you saw Jerry Smith stop over on the lefthand side of the slab?

A. And then we pulled up beside him and they counted and took off.

Q. Well, here's my question, though: What did you think when you saw this car stopped there on the lefthand side of the road?

A. I didn't know what to think. I thought that Joe was going to pull up—

Q. You were real familiar with drag racing, weren't you?

A. Yes, sir, I was familiar with it.

Q. And then he (Joe) stopped and they were abreast of each other and both of them stopped, is that right?

A. Yes, sir.

Q. At that time did you have any idea what was about to happen?

A. Yes, sir, I had an idea of what was going to happen.

Q. I believe you said you realized, though, when they both were stopped there by the side of each other, you realized for the first time that they were going to drag, is that right?

A. That's right.

Q. And the cars were stopped at that time?

A. Until they counted one, two, three.

Q. Yes, sir, and all the time they were counting one, two, three you knew they were fixing to drag?

A. I thought that was what they were fixing to do."

Charles Webb at no time contends that he made any effort to get out of the car or that he in any way

voiced his disapproval of what he knew was about to take place. In view of the above admissions and the undisputed facts as we have disclosed them it is our opinion that Charles Webb, as a matter of law, assumed the risk and that he should not be allowed to recover in this case.

In this State our court has recognized that the defense of the assumption of the risk applies not only in master and servant cases but that it also applies in ordinary cases of negligence. This was discussed in the case of *Chicago, Rock Island and Pacific Railway Company* **v. *Lewis,* 103 Ark. 99, 145 S. W. 898. In that case** the court stated: "The doctrine of assumption, or, as sometimes termed, acceptance of the risk is founded on the maxim *'volenti non fit injuria'*. It is generally applied as part of the law of master and servant, but it is a distinct principle of law which may be otherwise applied in some instances." See also *St. Louis and San Francisco Railroad Company* v. *Fritts,* 85 Ark. 460, 108 S. W. 841.

In the case of *Peay* v. *Panich,* 191 Ark. 538, 87 S. W. 2d 23, appellant contended that appellees' Instruction No. 4 was erroneous because it stated that a guest assumes the usual and customary habits of the driver which are known to the guest. The court, however, rejected this contention stating: "We think this instruction is a correct declaration of the law, when measured by the facts and circumstances of this case. The great weight of authority is to the effect that one who enters an automobile as a guest takes not only the car as he finds it but also assumes the known risks incident to the driver's incompetency, inexperience and driving habits".

In an article by Robert S. Lindsey found in Volume 10, Arkansas Law Review at Page 70, the writer stated: "Many of us are in the habit of thinking that assumed risk is peculiar to master-servant cases but that is not correct. Not infrequently the same set of facts from which contributory negligence has been argued can be the basis for an assumed risk defense". This state-

ment we find is fully justified by the authorities. The rule which we think is most applicable in the case under consideration is set forth in 15 A.L.R., Second, Page 1180, Section 9, under the heading "Assumption of Risk." It is there stated that the necessary elements of assumption of risk by guests are clearly defined as follows: "First, there must be a hazard or danger inconsistent with the safety of the guest; second, the guest must have knowledge and appreciation of the hazards; and third, there must be acquiescence or willingness on the part of the guest to proceed in the face of danger."

Applying the rules above announced to the case under consideration we cannot escape the convictions; first, that the hazard of drag racing at night on such a heavily traveled highway was inconsistent with safety; second, that Charles Webb was fully cognizant of this hazard and third, that he had an opportunity to make a protest of some nature but wholly failed to do so. Since the testimony on which these conclusions are founded was furnished by appellee, Charles Webb, himself, and since it is susceptible of only one reasonable interpretation, no jury question was presented.

It is our conclusion, therefore, that the trial court erred in not sustaining appellants' motion for a directed verdict and the judgment of the court is, therefore, reversed and the cause of action dismissed.

Reversed and dismissed.

5-1920 328 S. W. 2d 136

Opinion delivered October 19, 1959.

Sydney S. Taylor, for appellant.

C. A. Stanfield, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a decree of the chancery court refusing to set aside a divorce decree granted appellee on May 8, 1956. The appellant alleges as grounds for setting aside the decree that it was obtained by fraud on the court in that appellee was never a resident of Arkansas and that the grounds for divorce were untrue.

The Sariegos were married in New York City in March, 1950. The next year appellee entered the United States Air Force and has been on active duty since that time. While stationed at a United States Air Base in Puerto Rico, appellant and appellee lived together until October, 1953, when appellant returned to New York. Appellant testified there was no separation at that time and, in fact, that she and appellee cohabited as late as November, 1954. Appellant's testimony is to the effect that she was prepared to rejoin her husband upon his return to the United States when, in September, 1955, she received a letter from a Hot Springs attorney asking that she execute a waiver and entry of appearance in a divorce action her husband had filed. This was executed by appellant and sent to appellee's

attorney, C. A. Stanfield. During this time appellant was employed by Hamburger & Green, attorneys at law, New York City.

After some delay in the divorce proceeding, on November 25, 1955, one of appellant's employers, who was acting as her attorney, wrote Stanfield for the return of the waiver and entry of appearance, which had not been filed. Stanfield promptly returned same. Subsequently appellee commenced constructive service by publication of warning order on April 3, 1956. About April 5, 1956, appellant received a letter from the attorney *ad litem* enclosing a copy of the divorce complaint and informing appellant that she had thirty days within which to file an answer.

Appellant testified that after consulting with her attorneys she decided to do nothing and that no defense would be offered. On this point her testimony is as follows:

"Q. Did you decide not to defend the action?

A. Inasmuch as the Chancery Court of Garland County, Arkansas had no jurisdiction over me nor my husband because neither of us was a resident of Arkansas, there was nothing to defend.

Q. What steps did you take, if any?

A. I took no steps because I did not believe the Court would grant a decree where it was without jurisdiction and I did not believe my husband would perjure himself."

Appellee was awarded a divorce May 8, 1956, and on the following day he was married to one Catherine Dempsey Beyea.

On October 22, 1956, after term, appellant brought suit to vacate the decree for the reasons above stated. Appellee demurred to the complaint and upon same being overruled entered a general denial. Catherine Beyea Sariego intervened, stating that she and appellee were married and she would be injured if the divorce decree were set aside.

To support her complaint appellant introduced evidence pertaining to the residence of appellee during the period from the date of their marriage until the divorce decree was granted. Certain portions of the testimony went toward contradicting the grounds on which the divorce had been awarded (three years' separation). Both the testimony of the appellant and that of supporting witnesses were supplemented by various exhibits. The entire file of the divorce action was also made a part of the record. Appellee presented no testimony in defense.

We will not comment further on the evidence in that the case should be disposed of on other grounds.

All of the evidence offered by appellant goes toward contesting the jurisdiction of the court and grounds for divorce. This same evidence was readily available to appellant at the time the divorce action was pending. Despite the fact that she had actual notice of the filing of the action and had received proper notification from the attorney *ad litem,* she allowed her husband to proceed without offering any defense, either to jurisdiction or on the merits of the case. Further, she waited six months from the granting of the divorce to file the present suit, despite knowledge of all the facts.

It is well established by this Court that a party seeking to cancel a decree of divorce for fraud must proceed with diligence after discovery of the fraud. *Allsup* v. *Allsup,* 199 Ark. 130, 132 S. W. 2d 813; *Bauer, Exr.,* v. *Brown,* 129 Ark. 125, 194 S. W. 1025. In *Corney* v. *Corney,* 97 Ark. 117, 133 S. W. 813, we said: "In deciding upon an application to strike out a judgment after the term is past, for fraud, irregularity, deceit, or surprise, the court acts in the exercise of its *quasi* equitable powers, and in every such case requires the party making the application to act in good faith and with ordinary intelligence. Relief will not be granted if he has knowingly acquiesced in the judgment complained of, or has been guilty of laches or unreasonable delay in seeking his remedy."

In the case at bar the appellant had actual notice and was properly served under our law, yet she sat idly by and allowed the court to enter judgment by default, without raising a hand in defense, and six months later asked that the decree be set aside for fraud. In the meantime, appellee had married again. In the case of *Hagen* v. *Hagen,* 207 Ark. 1007, 183 S. W. 2d 785, this Court said: "Moreover, appellee was negligent in not defending the original action. She had ample notice of the pendency of the action and when it would be heard. She made no defense and took no appeal, although promptly advised that the decree had been granted on October 19, 1942. She waited until March 15, 1943, to take any action whatever. In *Gaines* v. *Gaines,* 187 Ark. 935, 63 S. W. 2d 333, we held, to quote a headnote, that: 'A nonresident defendant, who received notice seven days before entry of a decree of divorce but took no action thereon, could not have the decree set aside for fraud.' "

The decree is affirmed.

MISSIONARY SUPPORTERS, INC. *v.* ARK. STATE BOARD OF DENTAL EXAMINERS.

5-1908

Opinion delivered October 19, 1959.

Kenneth Coffelt, for appellant.

James A. Robb and *Robert H. Dudley,* for appellee.

JIM JOHNSON, Associate Justice. This case has caused us more than the usual amount of concern. This same concern is reflected in the learned Chancellor's profound opinion which sets out so clearly the facts and issues here involved that we adopt it in its entirety as our own:

"This is an action by the Arkansas State Board of Dental Examiners to enjoin and restrain the respondents from further violation of the Arkansas Dental Practice Act (Sections 72-538, 72-540, 72-543, and 72-559) and from the pleadings, the testimony adduced at the trial of the cause at Salem on October 23, 1958, and the very able briefs submitted to the court by counsel for petitioners and respondents, the court finds:

"That W. G. Lewis is a very intelligent and well educated man who has many years of practical experience in dentistry, having practiced in many parts of the world and that, for more than twenty years he has devoted much of his time and personal income to foreign mission work; that he formed respondent, Missionary Supporters, Inc., under the laws of the State of Delaware for the purpose of lending aid to his work in providing dental training to those who were engaged, or planned to enter, foreign mission fields.

"Mr. Lewis, learning of the very serious need for dental services in Fulton and surrounding counties, came to Salem and, with the aid and assistance of local people, opened his training school for missionaries there.

It had been operating for several weeks when this action was filed and it seems to have served about 950 patients up to the time of the trial. Testimony seemed to indicate that only ten to twelve weeks are required for the trainees to complete the course. Although contributions are accepted, no fee is charged the patient. No proof was made as to any actual damage or injury to any patient and, while the service of the patients is wholly incidental to the main purpose of training practical missionary dentists, it has in fact helped to alleviate a desperate need for dental service in Fulton and adjoining counties and it offers little, if any competition to licensed dentists because of the scarcity of licensed dentists all through that area.

"Section 72-538 of the Arkansas Statutes clearly defines the qualifications and requirements of dental college but respondents make no pretense of qualifying anyone to become licensed dentists or to practice dentistry anywhere in the United States and no diploma is awarded any of the trainees.

"Section 72-540 reads as follows: 'No person shall practice dentistry or dental hygiene, or attempt or offer to practice either, within the State of Arkansas, without first having been authorized, and issued a regular license, by the Arkansas State Board of Dental Examiners.' The language of this statute is clear and unequivocal and does not leave any room for interpretation or construction. Respondents lay no claim to license for the practice of dentistry from the Arkansas State Board of Dental Examiners or elsewhere and are clearly operating in violation of this Section.

"Section 72-543 clearly defines what constitutes practicing dentistry within the meaning of the statute and respondents' testimony brings the respondents clearly within this definition.

"Section 72-559 reads as follows: 'It is unlawful for a dentist or dental hygienist to practice in the State of Arkansas under any name other than his own

true name or to use the word 'company, corporation, association,' or any word of similar import in connection with the practice of his profession; or to operate, manage, or be employed in any room, office or laboratory where dentistry or dental hygiene is practiced or contracted for in the name of any company, corporation or association; or to aid or assist in any manner any unlicensed person to practice dentistry or dental hygiene or any branch thereof. It is unlawful for any corporation to practice dentistry or dental hygiene or to hold itself out as entitled to engage therein'.

"From testimony of respondent, Lewis, the President of Missionary Supporters, Inc., it is clear that the respondent corporation is in violation of this Section through the activities of its President.

"Counsel for respondents argues very forcefully that petitioners do not have an absolute right to injunction. Section 72-542 reads as follows: 'The Arkansas State Board of Dental Examiners is entitled to the equitable remedy of injunction against any person who practices dentistry or dental hygiene, or attempts or offers to practice either, in violation of Sec. 7 (Sec. 72-540).'

"The language of this Section clearly refutes counsel's contention, is very pointed and leaves nothing to the discretion of the court.

"Counsel for respondents also argues with equal force and conviction that the Arkansas Dental Practice Act in this case conflicts with respondents' rights under the First and Fourteenth Amendments to the Constitution of the United States in that it affects their Freedom of Religion. The State has the right under its police power to regulate the practice of dentistry and to prescribe such rules as it may deem best for the protection of the public health, safety and welfare.

"Such regulation does not violate rights of respondents under either the First or the Fourteenth Amendment.

"Although close scrutiny and reappraisal seems to be indicated with a view to remedying such a situation as has been revealed as existing in so large an area of our state where not even one licensed dentist is available, the statutes are clear and petitioners are entitled to the relief prayed. The court knows of no better way to correct the situation than to enforce the clear and unambiguous provisions of the statutes. The courts are quick to resent attempts of the legislative body to infringe on the rights of the judiciary and the Legislature would have just as much right to resent intrusion of the Judiciary on its rights to make the laws. If this is a matter that requires correction, it is the responsibility of the Legislature to make such correction.

"Respondents will be restrained as prayed in the Petition filed herein."

A careful review of the record reveals that it isn't denied that appellants' practice is clearly within the terms of the statute. Those terms are mandatory, and the court may not write into them an exception or exemption. We must recognize the ancient maxim that "equity follows the law" and that the appellant has collided with the law. See: *Ritholz* v. *State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410; *Hudkins* v. *State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538; *Marvel* v. *State ex rel. Morrow,* 127 Ark. 595, 193 S. W. 259; *Melton* v. *Carter,* 204 Ark. 595, 164 S. W. 2d 453.

Affirmed.

5-1936 328 S. W. 2d 260

Opinion delivered October 26, 1959.

Dinning & Dinning, for appellant.

Cracraft & Cracraft, for appellee.

CARLETON HARRIS, Chief Justice. Suit was instituted by Maggie L. Martin, appellee, for the possession of a motor vehicle held by appellant, Rosetta Robinson. Affidavit for delivery was executed by appellee, in which she asserted the value of the vehicle (a 1955 Ford convertible automobile) to be $1,250, and the vehicle was seized under a Writ of Replevin. Appellant answered, denying that Maggie Martin was the owner of the vehicle, or had any right or claim to same, and asserted, to the contrary, that she (appellant) was the sole and exclusive owner of the property. At the conclusion of the testimony, appellee moved for an instructed verdict, which was acted upon by the court as follows:

"The motion for an instructed verdict will be granted in favor of the Plaintiff for the reason that the certificate of title introduced in evidence by the Plaintiff makes a *prima facie* case insofar as the title to the vehicle is concerned and this Court holds there is no evidence to rebut or overturn a *prima facie* case."

Whereupon, the court instructed the jury to return a verdict for appellee, and judgment was entered in accordance therewith. From such judgment comes this appeal.

Admittedly, the automobile in question had belonged to Willie Bridgman at the time of his death, which occurred on January 16, 1958. Appellee claims to be the daughter of the deceased, and appellant had lived with Bridgman for several years prior to his death.

Appellant contends that the court erred in excluding her testimony that Bridgman had stated he was buying the automobile for her (appellant), and further, that the deceased in referring to appellee, "always told me that she was his step-daughter"; still further, that Bridgman had stated he was not married to the mother of Maggie Martin. The court held that the "Dead Man Statute"[1] applied, and the witness could not testify to anything told to her by Bridgman. The transcript reflects the following colloquy between the court and counsel:

"The Court: You can't testify to that, he is dead.

Counsel: Isn't there an exception to that rule?

The Court: No, sir, I don't think so.

Counsel: This is not a contest with the dead man, this is a contest between two persons claiming the car.

The Court: Nevertheless, the Court holds the "Dead Man's Statute" applies and witnesses can't testify to anything the dead man told them.

Counsel: As to the relationship between the parties?

The Court: Yes, sir.

Counsel: Doesn't the court think there is an exception to the "Dead Man's Statute" where relations between members of the family are involved?

[1] Section 2, under "Schedule" of Arkansas Constitution of 1874.

The Court: That was not involved in the question you just asked the witness, was it?

Counsel: If the Court holds differently, *it is all right.*[2]

The Court: Proceed."

Under this state of the record, it becomes unnecessary for this Court to pass on appellant's contention, since no proper objection was made to the trial court's ruling which precluded the evidence offered.

The instructed verdict was based on the certificate of title, introduced by appellee, showing herself as owner, issued by the State Department of Revenues, on May 8, 1958, which made a *prima facie* case of ownership; the trial court found that there was no evidence to rebut this *prima facie* case. We do not agree. Though she held the certificate of title,[3] appellee's claim to the automobile is actually based on the contention that she is the daughter, and only heir, of deceased. It might be here noted that her testimony relative thereto, was somewhat less than positive. For instance, "Q. * * * as a matter of fact, you are not his daughter, are you? A. He is the only father I know anything about. Q. Don't you know he always called you his stepdaughter? A. No, sir, if he did, I didn't know anything about it. Q. He was not married to your mother at the time of your birth, was he? A. That is what my mother said. Q. When do you first remember seeing Willie Bridgman? A. I was a very small kid, he was the only father I knew anything about. * * * Q. You make no claim to the car at all except as the daughter and only heir of Willie Bridgman? A. That is right. Q. Are you his daughter? A. He is the only father I know

[2] Emphasis supplied.

[3] The testimony relative to appellee acquiring the certificate of title is rather vague. There is an indication that the clearing of the title was handled through an attorney, but this is not definite. From the testimony of appellee: "Q. I hand you a paper which purports to be a certificate of title to a motor vehicle, have you ever seen it before? A. Yes, sir. Q. Where did you see it? A. It was sent to me. Q. From where? A. I don't remember where, but I was living on Route 2, Lexa. * * * Q. You don't know who caused this to be issued, do you? Did Mr. Sheffield get this for you? A. I don't know, it was sent to me."

anything about, if he was not my father, I was never told that he was not. Q. Were you ever told that he was? A. Yes, sir, my mother told me he was."

The certificate of title was not obtained until several months after the death of Bridgman. Appellant had possession of the automobile until it was taken from her by virtue of the Order of Delivery. According to her testimony, she had in her possession the "pink slip" and other papers relating to the title of the car, but turned them over to appellee. From the testimony:

"Q. How did she get the papers away from you?

A. She came to my house and told me she would help me. I let her have the papers because of the shock, the man died all of a sudden, and she claimed she came to help me.

Q. You had all of the papers in your possession?

A. Yes, sir.

Q. She told you she was going to help you?

A. That is right.

Q. That is the reason you gave her the papers?

A. That is right.

Q. Then you had possession of this property from the time it was bought until he died?

A. Yes, sir."

As reflected by the evidence, Bridgman worked on a boat which would dock at Memphis, and appellant would drive the car to Memphis and pick him up. She further testified that she operated the car for her personal use. While, as previously set out, appellee held this certificate of title at the time of instituting the suit, — we have held that the certificate *is not title itself, but only evidence of title. House* v. *Hodges,* 227 Ark. 458, 299 S. W. 2d 201. We are of the opinion that the evidence was sufficient to place in issue whether appellant

held the vehicle by gift, or whether appellee was actually the owner.

The judgment is accordingly reversed, and the cause remanded.

GOYNES *v.* GOYNES.

5-1930 328 S. W. 2d 258

Opinion delivered October 26, 1959.

Byron Goodson and *M. M. Martin,* for appellant.

Nabors Shaw, for appellee.

J. SEABORN HOLT, Associate Justice. The sole question for our decision on this appeal, is whether the trial court abused its discretion in allowing the wife (appellee), against whom her husband (appellant) had filed a suit for divorce in Arkansas, January 19, 1959, $200 for her attorney's fees and $50 expense money. The court's order contained this recital: "That plaintiff (husband) should be and is hereby ordered to pay the sum of Two Hundred ($200) Dollars into the registry of this court as attorney fees, and the sum of Fifty ($50) Dollars as expense money in the taking of depositions on behalf of the defendant in the defense of this cause of action. After the plaintiff has complied with the terms of this order, by paying the attorney fees and expense money for defending this cause of action, into the registry of the Chancery Court of Polk County, Arkansas, the defendant will then be ordered to file her answer or otherwise plead, and the cause will be set down for hearing upon its merits."

The record reflects that the parties here were married March 30, 1913, and separated January 8, 1958 in Baton Rouge, Louisiana where they owned a home. Appellee has never left Louisiana, but continues to occupy the home property there. Appellant left his wife, came to Mena, Arkansas on January 8, 1958 and on January 24, 1958, he and his wife entered into a property settlement under the terms of which his wife was awarded the home in Louisiana which was unencumbered and valued by appellant at $7,000, and also $5,000 in cash. Appellee (wife) also receives Social Security in the amount of $52.50 per month. Appellant received $3,000 in cash, a 1949 model Dodge automobile and draws a "pension" of $200 per month. In addition, appellee did "convey, transfer, assign and deliver unto Lester Aubrey Goynes the following described property, to-wit: 1. Whatever interest she may have in that certain property acquired by inheritance by Lester Aubrey Goynes situated in the County of Nevada, State of Arkansas."

After a careful review of the record presented, we cannot say that it has been shown that the trial court abused its discretion in awarding appellee (the wife) attorney's fees and suit money *pendente lite.* We reannounced our rule relating to the granting of attorney's fees and suit money in *Gladfelter* v. *Gladfelter,* 205 Ark. 1019, 172 S. W. 2d 246, in this language: "This court has also consistently held that the questions of alimony, and the amount to be allowed to the wife, during the pendency of a suit for divorce, together with her costs and attorney's fees, are within the sound discretion of the trial court, and unless there has been abuse of this discretion the court's action will not be disturbed here. In *Plant* v. *Plant,* 63 Ark. 128, 37 S. W. 308, this court held (quoting the headnote) that "The allowance of alimony to a wife during the pendency of a suit by her for divorce, and of her costs and attorney's fees, is within the discretion of the chancellor, under Sand. & H. Digest, Sec. 2512, Sec. 4388 Pope's Digest (now Sec. 34-1210 Ark. Stats. 1947), providing that during the pendency of an action for divorce the court

may allow the wife maintenance and a reasonable attorney's fee."

In the very recent case of *Fitzgerald* v. *Fitzgerald,* 227 Ark. 1063, 303 S. W. 2d 577, we said: "The court did not err in awarding costs and an attorney's fee to appellee. Such allowances are always within the sound discretion of the trial court and unless abuse of such discretion be shown, we will not disturb it."

Finding no error, the decree is affirmed.

SMITH *v.* MCNAIR.

5-1925 328 S. W. 2d 262

Opinion delivered October 26, 1959.

James L. Sloan, for appellant.

J. Frank Holt, Prosecuting Attorney, for appellee.

ED. F. MCFADDIN, Associate Justice. The purpose of this suit is to determine the constitutionality of Act No. 70 of the Arkansas General Assembly of 1951, which Act is captioned: "An Act Directing the Issuance of Hunting and Fishing Licenses to Persons Sixty-five (65) Years of Age and Over Without Fee or Charge Therefor." The first sentence of the Act reads: "After the effective date of this Act any resident of this State who has attained the age of sixty-five (65) years shall be entitled to have issued to him upon application therefor a license to hunt and fish in this State without payment of any fee or charge therefor".

Appellant, as plaintiff below, filed suit for declaratory judgment and mandamus. The complaint alleged that the plaintiff was a citizen and resident of Arkansas over the age of 65 years; that the defendant was the Circuit Clerk of Pulaski County; that the plaintiff, with due proof, applied to defendant for a free fishing license under the provisions of said Act No. 70 of 1951; and that defendant refused to issue such license, making the claim that the Act was unconstitutional.[1] The defendant's demurrer to the complaint was sustained; and from a judgment dismissing the complaint there is this appeal.

We conclude that the Trial Court was correct, because the Act No. 70 of 1951 is unconstitutional. Amendment No. 35 to the Arkansas Constitution was adopted in November 1944; and the amendment[2] has this positive language: "Resident hunting and fishing license, each, shall be One and 50/100 Dollars annually, and shall not exceed this amount unless a higher license fee is authorized by an act of the legislature. The Commission shall have the exclusive power and authority to issue licenses and permits, . . ."

The quoted language does several things: (a) it puts a floor on the license fee at $1.50 per annum, but gives the Legislature power to *increase* the fee to a greater amount, as the Legislature has done[3] by Act No. 190 of 1957; and (b) it vests the Commission, *and not the Legislature,* with "exclusive power and authority to is-

[1] In 1953 the then Attorney General of Arkansas gave an opinion that the Act was unconstitutional; and in 1958 the present Attorney General of Arkansas gave an opinion that the Act was unconstitutional; so the defendant was merely following official legal advice in claiming the Act to be unconstitutional.

[2] We have considered this amendment in a number of cases, some of which are: *W. R. Wrape Stave Co.* v. *Ark. State Game & Fish Comm.*, 215 Ark. 229, 219 S. W. 2d 948; *Hampton* v. *Ark. State Game & Fish Comm.*, 218 Ark. 757, 238 S. W. 2d 950; *State Game & Fish Comm.* v. *Hornaday*, 219 Ark. 184, 242 S. W. 2d 342; *Shellnut* v. *Ark. State Game & Fish Comm.*, 222 Ark. 25, 258 S. W. 2d 570; *State ex rel Wright* v. *Casey*, 225 Ark. 149, 279 S. W. 2d 819; and *Farris* v. *Ark. State Game & Fish Comm.*, 228 Ark. 776, 310 S. W. 2d 231.

[3] A nice question could be posed as to whether the Act No. 190 of 1957 impliedly repealed the Act No. 70 of 1951, even if the 1951 Act had been constitutional; but our present decision renders such question immaterial.

sue licenses and permits". Thus, after the 1944 Constitutional Amendment became effective, all the Legislature could do, as regards license fees, was to determine an increase: the Legislature had no power to say[4] who might be entitled to free license. Amendment No. 35 expressly limits the legislative power as regards license fees, and vests the Commission with "exclusive power and authority to issue licenses and permits". This constitutional language is crystal clear.

Affirmed.

JIM JOHNSON, Associate Justice, dissenting. I do not believe with the majority of the Court that Amendment 35 has so enfeebled the Legislature's lawmaking function that it was impotent to exempt residents of 65 years of age or over from the burden of paying a fee for the privilege of hunting and fishing in Arkansas.

In my opinion the majority has elevated form over substance in holding that because Amendment 35, Section 8, provides that, "The Commission shall have the exclusive power to issue licenses and permits . . .", it must follow that the Legislature is bereft of power to make exemptions relating to the objects upon which the power of the Commission can be brought to bear. This is what the Legislature did in substance, though in form it directed the issuance of licenses without payment of fees therefor. Undoubtedly Amendment 35 has granted powers of broad scope to the Commission. In Section 1 the Commission is invested with the "control management, restoration, conservation, and regulation of birds, fish, game and wildlife resources of the State . . .". However, it is hardly reasonable to assert that the Legislature cannot enact laws on general subjects merely because a game animal, a bird, or a fish lurks in the background. For if this were so, the Legislature would be hamstrung in such areas as water conservation, water pollution control, irrigation, forestry, and many others. What is there, if the majority of the Court is correct, to prevent the Commission from frustrat-

[4] Appellant argues that the classification, by age of 65, is a reasonable classification. Such an argument might be made if we were considering Constitutional Amendment No. 14, which prohibits special legislation, but that Amendment is not the one ruling in this case.

ing a legislative program of water pollution control or of forest conservation on the bases that fish live in the water and game animals and birds live in the forest. It is hardly consoling to consider that this has not happened yet—that when it does, a line would have to be drawn between the powers of the Legislature and of the Commission.

I believe the time for drawing a line is now, because I am convinced that the people did not intend by the adoption of Amendment 35 to create a Game and Fish Dictatorship but a Game and Fish Commission. They did not intend to embarrass the enactment of welfare legislation for the benefit of elderly people, but to provide for the conservation of wildlife resources for the enjoyment of all.

The majority opinion today, however, gives the Commission a *earte blanche* to exercise power unparalleled in any other department of State government, and, it has in the process, unwisely, I think, deprived a class of citizens of a privilege richly deserved to the detriment of all.

If the Legislature cannot provide for the welfare of the State's elderly people, who can?

For the foregoing reasons I respectfully dissent.

HICKS *v.* STATE.

4961 328 S. W. 2d 265

Opinion delivered October 26, 1959.

Charles Roscopf and *W. G. Dinning, Jr.,* for appellant.

Bruce Bennett, Atty. General, by *Bill J. Davis,* Asst. Atty. General, for appellee.

George Rose Smith, J. Hicks was tried upon two charges of burglary, it being alleged that he broke and entered the dwelling of J. W. Stevens and on another occasion broke and entered the dwelling of Frank DeGunnion. The informations did not specifically allege that the unlawful entries were made with the intent to commit the felony of assault to rape, but the State's proof was to that effect, and the jury were instructed upon that theory of the case. Hicks was found guilty and appeals from a judgment sentencing him to the maximum confinement of twenty-one years upon each count.

The judgment must be reversed for the court's error in permitting a deputy sheriff and others to testify that Stevens' daughter and DeGunnion's wife had each identified Hicks by singling him out in a lineup of suspects arranged by the police. We have frequently held that the admission of such testimony constitutes reversible error; the cases were reviewed recently in *Trimble & Williams* v. *State,* 227 Ark. 867, 302 S. W. 2d 83, and need not be re-examined in this opinion.

Among the other asserted errors there is one matter that should be discussed, as it is apt to recur upon a new trial. The State was allowed to prove, in addition to the two unlawful entries described in the informations, that at about the same period Hicks had wrongfully entered a third dwelling and committed rape therein and had attempted to break into a fourth house by

cutting a window screen. The court charged the jury that the evidence of the other offenses was admitted only for its bearing upon the defendant's intent in the two cases being tried.

The State had the burden of proving, by the circumstances if not by direct evidence, that Hicks made each of the two unlawful entries charged in the informations, with the specific intention of committing an assault with intent to rape. Ark. Stats. 1947, § 41-1001, as amended in 1955; *Duren* v. *State,* 156 Ark. 252, 245 S. W. 823; *Sanders* v. *State,* 198 Ark. 880, 131 S. W. 2d 936. In neither instance was Hicks' intention incontrovertibly established by his own conduct, for he was frightened from both houses as soon as his presence was discovered. In the DeGunnion home he was seen in a lighted hallway and fled at once when an alarm was given; in the Stevens home he pulled the cover off Stevens' sleeping daughter but ran away when the girl screamed.

In view of this proof the State was properly permitted to show that Hicks had entered another dwelling and committed rape. This case differs from *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804, relied on by the appellant, in that there Alford overpowered his victim and ravished her, so that his intention could not be in doubt. Here the intention with which Hicks broke and entered the Stevens and DeGunnion houses was not demonstrated by an unequivocal overt act; hence evidence of a similar offense was competent to assist the jury in ascertaining his real intention. On the other hand, the fact that he had previously cut a window screen in an effort to effect an entry for some unknown purpose could shed no light upon the specific reason for the unlawful entries upon trial. Consequently that evidence should have been excluded, for the reasons given in the *Alford* case.

Reversed.

MANUFACTURERS CASUALTY INSURANCE CO. *v.* WILHELM.

5-1886 328 S. W. 2d 270

Opinion delivered October 26, 1959.

O. E. Williams and *Wright, Harrison, Lindsey & Upton,* for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. This litigation presents a legal question of first impression in this State relative to rights of subrogation. The pertinent facts are not in dispute.

On June 25, 1957, Mrs. Margaret McLaughlin secured a judgment in the Carroll Chancery Court against Milton Wilhelm in the amount of $3,700.00; against Jeanne Luptak in the amount of $1,300.00, and,

against the Manufacturers Casualty Insurance Company (hereafter called Company) in the amount of $2,000.00.

A brief explanation of the reasons for the above judgments is necessary. Wilhelm, who was a real estate broker, and Luptak, who owned a motel, were supposed to have mishandled a business transaction for McLaughlin, the Company having undertaken to see that any judgment against Wilhelm (up to $2,000.00) would be paid. Hence, the June 25th decree provided that when the $2,000.00 was paid it would apply on the $3,700 judgment against Wilhelm. In other words, McLaughlin was entitled to collect only $5,000.00 ($3,700.00 and $1,-300.00).

Within apt time Wilhelm and Luptak prosecuted an appeal to this court (See *Wilhelm* v. *McLaughlin,* 229 Ark. 118, 313 S. W. 2d 821), where the judgments against them were affirmed. Before the appeal was perfected Wilhelm and Luptak executed a supersedeas bond with Sheehan and Tyrrell as sureties. However, the Company did not appeal from the $2,000.00 judgment against it, and, after the time for appeal had lapsed, McLaughlin had an execution issued and the Company paid over to her $2,000.00. This payment by the Company was made after its attorneys had written Wilhelm's attorneys that it would expect reimbursement from Wilhelm.

On July 21, 1958, after this court's affirmance above mentioned, the Company filed, in the original case, a Motion for Summary Judgment against Wilhelm and all the sureties (on the said supersedeas bond) for the sum of $2,000.00. Attached to the motion, as exhibits, were copies of the decree in the original case, of the said supersedeas bond, McLaughlin's assignment to the Company, and Wilhelm's agreement (in his application for a bond) to hold the Company harmless for any loss. The Motion also set out many of the pertinent facts heretofore stated.

The trial court sustained the Company's motion for judgment against Wilhelm for $2,000.00 but denied the

motion as to the sureties on the supersedeas bond executed for Wilhelm. The Company now presents this appeal from that portion of the decree denying judgment against the sureties.

In the absence of any brief on behalf of the appellees we have made our own research of the authorities but are unable to find any definite pronouncement which sustains the trial court's action. On the other hand all the legal and equitable principles of which we are cognizant indicate the contrary.

The supersedeas bond signed by appellees bound them to "satisfy and perform the judgment . . . appealed from in case it should be affirmed". The judgment against Wilhelm was, of course, affirmed as heretofore noted. Ark. Stats. § 27-2146, dealing with appeals to the Supreme Court, provides that upon the affirmance of a judgment which has been superseded — "Judgment shall be rendered and entered up against the securities on the supersedeas bond, and the Court shall award execution thereon". It is obvious then that McLaughlin had the right to collect the $2,000.00 in question from the sureties had appellant not paid her that amount. But when she did receive $2,000.00 from appellant she assigned her right to collect to appellant. This assignment reads as follows: "In consideration of payment of the $2,000.00 judgment against the Manufacturers Casualty Insurance Company, which was paid to me after execution was issued in the case of *Margaret O. McLaughlin* v. *Milton Wilhelm, et al,* in the Carroll Chancery Court, Western District, I hereby transfer, assign and set over unto the Manufacturers Casualty Insurance Company, the surety on Wilhelm's real estate broker's bond, all the right, title, interest and equity that I may have had in said judgment on October 3, 1957, or at any other time".

It seems logical to us then, since appellant was not primarily liable and since appellees voluntarily assumed payment of the $2,000.00 to McLaughlin, that appellees are legally bound to pay the $2,000.00 to ap-

pellant. In other words, we fail to see how appellees have been placed in a worse condition merely because one payee has been substituted for another. This same view was expressed in *Howell* v. *Alma Milling Co.*, 36 Neb. 80, 54 N. W. 126, where surety liability to a substituted party was under consideration in a situation similar to the one here, and where the court said: "The surety took this risk of substitution. He was not in the least prejudiced by the change of plaintiffs. The cause of action remained the same. He was not placed in a worse situation, for had there been no substitution Howell could have prosecuted the suit to judgment in the name of the original plaintiff". A similar statement is found in 3 Am. Jur., Appeal and Error, § 1296: "Where the substitution of a person who has succeeded to the rights of a party to an action is authorized, a surety on an appeal bond is not discharged by the fact that a person to whom the appellee's interest in the subject matter of the action has passed, while the appeal is pending, is substituted for the appellee without the consent of the surety, as the law permitting the substitution of parties must have been known to the surety when he became surety and he must be held to have signed the bond subject to such contingency; and so, if there had been no substitution, the person succeeding to the rights of the appellee could have prosecuted the action in the name of the appellee, and as the cause of action remained the same, the surety is in no way prejudiced by the substitution."

In addition to the above there appears to be respectable authority, in cases of this nature, to the effect that a later surety (in point of time) will be liable to an earlier surety, based on equitable principles. Although not in point on facts, the early case of *Chrisman* v. *Jones, et al,* 34 Ark. 73, apparently bears out the significance of the time factor. At Page 77 we find this statement: "The principle in equity seems to be well established, that when successive securities for debt have been given in judicial proceedings upon the request of the debtor alone, to enable him to prolong the litiga-

tion, whilst all will be liable directly to the creditor, they will be, as amongst themselves, liable to exoneration in the inverse order of their undertakings. That is to say, those who contract last become sureties, not only for the benefit of the creditor, but in the exoneration of those who precede, and all will be liable to exonerate the original sureties for the debt, if any there be". The *Chrisman* case (along with other cases) is cited in support of the above announced rule in L.R.A. 1918 D at Page 1191, where it is stated: ". . . In cases where the appeal is not taken with the consent of the prior surety, the first surety, upon payment of the obligation of his bond, is entitled to be subrogated to the rights of the creditor as against the sureties on the supersedeas bond". The rule relevant to the sequence of liability among sureties, often referred to as the *rule of inverse order,* is recognized to depend to some degree on the equities involved. The equitable element is recognized in connection with the inverse order rule in 117 A. L. R. at Page 584. It is there said: "The rule of inverse order, considered *infra,* III., has been sometimes laid down, to the effect that the sureties will be exonerated in the inverse order of their undertakings. However, it will be noted that this is not an absolute rule, distinct from the equitable rule, and that the cases in which the rule as to inverse order has been applied have usually been those in which there was some equity in favor of the earlier surety".

A consideration of the present case under the modified rule still, we think, calls for a reversal. Although the equities on the side of appellant and the sureties are not easy to assess, we believe, as before indicated, that they favor appellant. In assessing the equities in favor of the sureties we should not be swayed too much by the fact that they must pay a debt which they did not create and from which they derived no tangible benefit, because it is after all an obligation which they voluntarily assumed with full knowledge of all inherent consequences. Equity must not be confused with hard-

ship. It is always a hardship for one person to have to pay the debt of another, but it is no excuse for refusal to pay. On the other hand, under appellant's policy of indemnity, its obligation to pay could arise only in case McLaughlin could not obtain payment from Wilhelm who was the prime obligor. The sureties, in an effort to help free their friend (Wilhelm) from all liability (by appealing) chose to assume Wilhelm's debt, and we fail to see in what way it is inequitable for appellant to reap the benefit. After all, appellant seeks not to gain but only to avert a loss.

It follows from the above that the decree of the trial court must be, and it is hereby, reversed.

Reversed.

McFaddin and Johnson, JJ., dissent.

Ed. F. McFaddin, Associate Justice, dissenting. The majority is holding that the Manufacturers Casualty Insurance Company was subrogated, to the extent of $2,000.00 to the position of Mrs. McLaughlin against Sheehan, Tyrrell, and Hoover, who were sureties on Wilhelm's supersedeas bond in his first case in this Court. My study convinces me: (a) that the insurance company can now assert by subrogation only the rights that Mrs. McLaughlin could have asserted against the sureties on Wilhelm's supersedeas bond; (b) that Mrs. McLaughlin lost the right to assert the $2,000.00 claim here involved, against the sureties, Sheehan, Tyrrell, and Hoover, on the supersedeas bond because Mrs. McLaughlin did not rely on that bond: instead she pursued the insurance company by execution; and (c) that when the insurance company paid the $2,000.00, it merely satisfied a judgment against the insurance company, and is not entitled to any subrogation.

The present case is a sequel to that of *Wilhelm* v. *McLaughlin,* decided by this Court on June 2, 1958, 229 Ark. 118, 313 S. W. 2d 821, and referred to as the "first case", to distinguish it from this one, referred to as the "present case". Wilhelm was a real estate broker, duly licensed by the State, and, as a prerequisite for such license,

Wilhelm was required to, and actually did, file with the State a fidelity bond in the sum of $2,000.00, with Manufacturers Casualty Insurance Company as surety thereon. The bond was conditioned as required by law. (See § 71-1301 *et seq.* Ark. Stats.)

In the first case, Mrs. McLaughlin established that Wilhelm had defrauded her. She sued, not only Wilhelm, but also Manufacturers Casualty Insurance Company (hereinafter called "Manufacturers"), as surety on his said real estate broker's bond. Mrs. McLaughlin recovered judgment against Wilhelm for $3,700.00, and against Manufacturers for $2,000.00 on its bond, and the judgment provided that the $2,000.00, when paid, would apply on the $3,700.00 judgment against Wilhelm.[1] *Manufacturers did not appeal from the judgment against it in the first case.* Wilhelm appealed to this Court in the first case and posted a supersedeas bond with Sheehan, Tyrrell, and Hoover as the sureties thereon. The judgment against Wilhelm in the first case was dated June 25, 1957, and the supersedeas bond was dated July 23, 1957. When Manufacturers did not appeal the judgment against it, Mrs. McLaughlin threatened execution against Manufacturers and took the matter up with the State Insurance Department to recover on the bond. Manufacturers finally paid Mrs. McLaughlin the $2,000.00, which was the judgment against Manufacturers, and took from Mrs. McLaughlin, under date of October 3, 1957, a so-called "Assignment".[2]

When we affirmed the chancery decree in the first case, Manufacturers then initiated the present case by filing in the Chancery Court on July 21, 1958 its "motion for Summary Judgment" against Myrtle A. Sheehan, E.

[1] Mrs. Luptak was a defendant in the first case. Mrs. McLaughlin obtained a separate judgment against Mrs. Luptak for $1,300.00, but that is not involved in the present case in any way.

[2] This instrument, which is the basis of the claim of subrogation herein, reads as follows: "In consideration of payment of the $2,000.00 judgment against the Manufacturers Casualty Insurance Company, which was paid to me after execution was issued in the case of *Margaret O. McLaughlin* v. *Milton Wilhelm et al,* in the Carroll Chancery Court, Western District, I hereby transfer, assign and set over unto the Manufacturers Casualty Insurance Company, the surety on Wilhelm's real estate brokers bond, all the right, title, interest and equity that I may have had in said judgment on October 3, 1957, or at any other time."

F. Tyrrell, and Warren P. Hoover, for the said $2000.00 that Manufacturers had paid Mrs. McLaughlin to satisfy the judgment rendered against Manufacturers by the Chancery Court in the first case. The Chancery Court refused Manufacturers' plea for summary judgment against Sheehan, Tyrrell, and Hoover (but gave summary judgment against Wilhelm), and Manufacturers has now appealed. The majority of this Court is now allowing Manufacturers a judgment against Sheehan, Tyrrell, and Hoover on the theory of subrogation; and I dissent from the majority opinion. Here are my reasons:

(1) Manufacturers was a party to the first case and suffered a judgment to go against it for $2,000.00 and failed to appeal or supersede the judgment; rather, Manufacturers paid the judgment against it and should not now reap a windfall profit against the sureties on Wilhelm's bond.

(2) Mrs. McLaughlin did not rely on the supersedeas bond signed by these sureties, Sheehan, Tyrrell, and Hoover: rather, she pursued Manufacturers with a threat of execution. When Mrs. McLaughlin did not rely on the supersedeas bond, she thereby discharged the sureties; and Manufacturers cannot stand in any position better than Mrs. McLaughlin could occupy. The text in 3 Am. Jur. 773 states the rule:

"Where the appellee declines to accept the potection of an appeal or supersedeas bond, the surety has been held discharged in some, though not all, of the cases."

Likewise, in C.J.S. Volume 5B, page 720, the text gives the rule:

"A surety on a supersedeas bond may set up the defense that plaintiff has declined to accept the full protection of the bond and has acted inconsistently therewith concerning the subject matter of the judgment."

In 53 A.L.R. 807, there is an annotation entitled: "Failure of obligee in supersedeas bond to accept protection thereof or his act inconsistent therewith as affecting liability on bond."

It is true that the sureties, Sheehan, Tyrrell, and Hoover have filed no brief in this Court; but, from the study I have made, I have reached the conclusion that we should not allow subrogation in this case in the face of the authorities that I have mentioned none of which is cited or discussed in the majority opinion. When Mrs. McLaughlin pursued Manufacturers, she waived her right to also claim under the supersedeas bond; and she could not convey to Manufacturers a right that she had already waived. I submit that the Chancery Court was eminently correct in refusing Manufacturers its summary judgment against the sureties; and for these reasons I respectfully dissent, with Justice JOHNSON joining in this dissent.

LINCOLN INCOME LIFE INSURANCE COMPANY *v.* ALEXANDER.

5-1911 328 S. W. 2d 266

Opinion delivered October 26, 1959.

Bethell & Pearce and *Lawson Cloninger,* for appellant.

Sexton, Holland & Morgan, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves a suit to recover under a double indemnity clause in a life insurance policy.

Appellees, Elzo Alexander and Rosie Alexander, are the named beneficiaries in a life insurance policy issued by appellant, Lincoln Income Life Insurance Company, upon the life of Evard O'Leary Alexander, brother of Elzo Alexander. The policy provides for the payment of $1,000 in the event of death of Evard O'Leary Alexander and further provides for the payment of an additional $1,000 should the death of Evard O'Leary Alexander result from violent, external and accidental means.

The insured, Evard O'Leary Alexander, died on September 12, 1957. The cause of death was a pene-

trating stab wound in the abdomen inflicted upon him by one Lovely Lee during an encounter in front of the Nightingale Tavern in Kansas City, Missouri, on September 5, 1957.

Proof of loss was filed and appellant paid the appellees $1,000, the face amount of the policy, but declined to pay the double indemnity amount. Appellees filed this action to recover the sum of $1,000 under the double indemnity provision of the policy, plus the statutory twelve per cent penalty and attorneys' fee.

Answering, appellant denied that the death of the insured resulted from accidental cause, and alleged that the insured died as a result of his participation in an assault and as a result of a stab wound intentionally inflicted by another, claiming that either would exempt the appellant from liability for double indemnity under the terms of the policy.

Appellant admitted that the death of Alexander was from violent and external means. It undertook to establish that the death was not accidental, or that if accidental, the death came within one of the exclusions contained in the policy. To sustain this burden appellant offered the testimony of four persons. The testimony of these witnesses is summarized as follows:

Rosa Lea Harding, a 29-year-old unmarried colored female, was evidently a woman of the night. Her testimony established solely that she was in the Nightingale Tavern on the evening of the fatal occurrence, that Lee and Alexander were present, that both were ejected for loud talk, and that she saw Alexander immediately after the stabbing and that he had no weapon.

Carl Di Gerlamo testified only that he was an insurance agent and that he was in the Nightingale Tavern on business. Beyond this he professed no knowledge of the facts, except that he did not see a weapon on either man at any time.

Gurinder Abner, the bouncer in the Nightingale Tavern, testified that he escorted both men from the Tav-

ern because they were talking loud, but that both men were agreeable to leaving the establishment. That he walked between them to the door and that Lee preceded Alexander out the door because he, Abner, was between them until they reached the door. That he did not see any fight, but that he saw Alexander within one minute after Alexander left the Tavern and that at that time he had been stabbed and he did not have a weapon on him.

Lovely Lee, the admitted killer of the insured, admitted that he struck the fatal blow. Beyond that point his testimony is in conflict, not only with that of the other witnesses, but with his own testimony given at the time of his trial for the murder of Alexander. In fact, Lee was so evasive in giving answers that he refused even to concede that he was a colored man. Lee denied that either he or Alexander were ejected from the Nightingale Tavern. The testimony of Gurinder Abner and Rosa Lea Harding (witnesses for the defendant) squarely contradicts this. Lee claimed that he had left the Tavern and was sitting outside with his hand in his pocket when Alexander came out. The testimony of Gurinder Abner again squarely contradicts him for Abner testified that the two men left at the same time and that Alexander was outside the door less than a minute before returning stabbed. Lee here claimed that Alexander was coming at him with a knife. Yet he admitted that at his own trial for murder, where his life was at stake, his then story was that Alexander had his hand in his pocket. Portions of Lee's testimony are undisputed. It is undisputed that Alexander did not strike Lee; it is undisputed that Alexander did not say a word to Lee after leaving the Tavern and it is undisputed that Lee and Alexander did not agree to fight. Lee also testified that someone outside had yelled "Look out" and that there were 25 or 30 persons inside the Tavern.

The case was tried before a jury. A verdict was returned for the appellees. Judgment was entered for

appellees against appellant for the sum of $1,000, plus statutory damages of $120, attorney's fee of $500, and court costs, from which comes this appeal.

For reversal, appellant relies on four points. Point 4, relied on by appellant for reversal, will be discussed first. Appellant contends that: "The Court erred in giving to the jury Instruction No. 11 at the request of plaintiffs and over the objections of defendant." Instruction No. 11 is as follows:

"The killing of an unarmed person by one upon whom he is moving aggressively is by accident or accidental means if the unarmed person did not know and had no reason to believe that his adversary was armed and intended to kill him upon such advance. Thus, should you find that Alexander was moving aggressively upon Lee, but was unarmed, you are instructed that the death of Alexander was by accident or accidental means unless Alexander knew or had reason to believe that Lee was armed and intended to kill him."

The language in this instruction is taken from *Gilman* v. *New York Life Insurance Company,* 190 Ark. 379, 79 S. W. 2d 78. This rule has been the law in Arkansas for more than 20 years. It has been cited with approval by other courts and treatise writers and is in accordance with the prevailing general rule. We find no error in the trial court's giving Instruction No. 11.

Appellant's point 1, relied on for reversal, contends that "The evidence is insufficient to support a finding that the insured died as a result of accidental injury."

It is undisputed that the death of Evard O'Leary Alexander was caused by a penetrating stab wound of the abdomen, and that the stab wound was caused from "violent and external means." This being so, a presumption of law arises that the death was accidental. *Gilman* v. *New York Life Insurance Company, supra.* The jury was so instructed, without objection from appellant, and in fact appellant recognized this presump-

tion and accepted the burden of proving that death was not caused by accidental means and claimed the privilege of opening and closing because of its assumption of the burden of proof.

Appellant introduced all of the evidence but the essential facts were in dispute. It was for the jury to decide which testimony it would accept and which it would reject and the weight to be assigned to each item of evidence and the credibility of the witnesses. *Missouri Pacific R.R. Co.* v. *Hancock,* 195 Ark. 414, 113 S. W. 2d 489.

Appellant's point 2 relied on for reversal contends that "The evidence is insufficient to support a finding that death of the insured did not result from his participation in an assault."

The policy of insurance sued upon contains an exclusion for "death resulting from . . . participation in a riot, assault, or felony." It is settled law in this jurisdiction that the character of assault contemplated by such words of exclusion is not a simple assault but it must have been of such severity as would have justified the assaultee in inflicting death or serious injury by way of self-defense. *Gilman* v. *New York Life Ins. Co., supra.* Also see: 26 A. L. R. 2d, beginning on page 406 where it is said:

"But most of the courts, in stating the conditions of the accident insurer's non-liability for injury or death to an insured in the course of an assault wrongfully committed upon another have indicated that in order to excuse the insurer, the insured's injury or death must have been a reasonably foreseeable, as well as a natural consequence of his wrongful acts."

Great weight is attached to the insured's ability to foresee the natural and probable consequences of his action. If the action of the insured is such that a reasonable person would conclude that danger of serious injury might result, recovery would be denied. If the action is such that the insured could not reasonably fore-

see the fatal consequences, recovery will be permitted. The testimony on this point in the case at bar was in irreconcilable conflict, hence a question for the jury.

Appellant's point 3 relied on for reversal contends that "The evidence is insufficient to support a finding that the death of the insured did not result from an injury intentionally inflicted by another. The general rule is that an exclusion for death resulting from injuries intentionally inflicted by another means that there must be an intention not only to commit the injury but that the fatal consequences will result therefrom. *Southern National Insurance Company* v. *Lofton,* 178 Ark. 839, 12 S. W. 2d 402.

Appleman, Insurance Law and Practice, Vol. 1, Sec. 483, states the rule:

"Under the principles of liberal construction, the courts have in many instances held that if the assailant did not intend to cause death . . . even though the assailant intentionally caused injury, recovery would not be denied."

This author cites cases from Florida, Kentucky, Louisiana, Oklahoma, West Virginia, and California, as well as the Arkansas rule to support this proposition. In the instant case, Lee, the appellant's star witness, told the jury that he did not intend to injure or kill the decedent at the moment of striking. The jury was justified in so believing and finding, since it was indicated that Lee was acquitted of the killing.

After a careful review of the record, we are convinced that there is substantial evidence to support the verdict of the jury. Finding no error, the judgment is affirmed.

We have decided that appellees' attorneys are entitled to a combined additional fee of $100. This is because the trial court, in allowing the attorneys' fees, made it plain that said amount did not include any attorneys' fees for an appeal to this Court.

Opinion delivered November 2, 1959.

[Rehearing denied December 7, 1959]

[redacted]

John Harris Jones and *Wilton E. Steed,* for appellant.

Bruce Bennett, Atty. General, by *Thorp Thomas* and *Ancil Reed,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. William Frank Nail, appellant herein, was convicted of the crime of Murder in the First Degree, and his punishment fixed at death by electrocution. From the judgment so entered, comes this appeal. Numerous assignments of error are contained in appellant's motion for new trial, the first several dealing with the sufficiency of the evidence.

Proof reflected that Nail, James Moss, and James Leroy Montgomery, were convict trusties at the state penitentiary farm located at Tucker. Nail and Moss were riflemen on the plow squad, and Montgomery was the rider.[1] According to the State's evidence, Nail was fixing the bridle on his horse, and when the horse kept jumping about, he picked up a piece of leather and began hitting the horse with it. Montgomery was sitting on a box, preparing to eat. Rising, and starting toward Nail, he told the latter to quit whipping the horse. Appellant replied that it only concerned him (Nail) and Captain Bruton, and when Montgomery continued walking toward him, appellant drew his pistol. The rider then backed off and stated, "You won't get a chance to pull that pistol on nobody else". According to witness Moss, Montgomery "started to turn and walk off and about that time I heard Frank's rifle go off and he fired the first shot then. * * * Montgomery backed up and I backed up out of the way, too. Montgomery backed up and I walked out of the way and Montgomery run around the other side and Frank fired again. I told Montgomery, I said, 'Montgomery, Frank is mad, you had better leave while you can', I said, 'You had better

[1] Riflemen, commonly called "high power", have the duty of guarding the men working under them, known as rank men. They ride a horse, and use a 30-30 high power rifle. The rider is the boss, and directs the rank men in their work. According to evidence by the assistant superintendent at Tucker, the rider carries a pistol when going to and coming from the job, but not when he is with the men.

run, you had better go to the building or do something'." Montgomery ran toward the bayou, while Nail mounted his horse, and according to the witness, fired two more shots. Montgomery ran under the bridge at the bayou. Further, from the testimony of Moss: "Montgomery told him, he said, 'I am not going to the man, I will call it off', something like that, something of that nature, and Frank told him, 'All right, come on out'." Montgomery then walked out from under the bridge, holding up his hands, and Nail again fired. Montgomery fell. Other witnesses, in substance, corroborated Moss' testimony. According to witness Jimmy Mullins, Nail "went down and told him to come out from under the bridge, that he wasn't aiming to hurt him. He finally come out. Q. Did Mr. Montgomery say anything? A. Yes, sir, he come out with his hands up begging. Q. What did he say when he was begging? A. Well, he said he wasn't aiming to tell on him — it was all over with. Q. Then what happened? A. Frank Nail said something, yes, it was over with, and up and shot him."

According to Dr. Harold Morris, who was acting as coroner of Jefferson County, three bullets struck Montgomery, and he died as a result of such wounds. The proof was undisputed that deceased was unarmed at all times during the altercation. The evidence was certainly sufficient to sustain a first degree murder conviction.

It is urged in assignments Nos. 6 and 7, and objections made during the trial, that the court erred in admitting into evidence certain photographs depicting the scene of the alleged murder. The objection was based on the fact that the scene was not the same as on the day of the killing, in that some equipment and two automobiles were shown in the photographs, which were not so located on the day of the alleged crime. Evidence in the case reflected that the house, road, and bridge, shown in the pictures, were the same as when the shooting took place, and it was stated during the testimony that no automobiles were parked there at the

time. The same contention was made, but rejected by this Court, in *Williams* v. *State,* 229 Ark. 1022, 323 S. W. 2d 922.

By assignment No. 10, and objections made during the trial, appellant claims the court erred in admitting into evidence his confession. Counsel contend that the confession was incomplete, and that Nail lacked the mental capacity to understand the confession. Buck Oliger, a deputy sheriff, who took, and wrote the confession, stated that he included everything that appellant told him at the time of the taking. The confession was taken in question and answer form, signed by Nail, and witnessed by two other persons. If it was felt that Nail had made other statements which did not appear in the confession, counsel were at liberty to question the witness in detail. In fact, the court advised counsel that Oliger could be interrogated about any additional statements made by appellant. This action of the court conformed to our ruling in *Whitten* v. *State,* 222 Ark. 426, 261 S. W. 2d 1. Relative to the contention that Nail lacked mental capacity to understand the confession, it was obviously appellant's duty to offer proof to that effect, and this not having been done, he was in no position to complain.

Assignments Nos. 8 and 9, together with objections during the trial, maintain that error was committed by the court in permitting the State to re-examine certain witnesses, it being contended that the matters under re-examination should have been included on direct examination. The witness Moss was asked if the photographs correctly represented the scene of the homicide at the time it occurred. Since the introduction of the photographs had been objected to on the ground that the scene portrayed was not the same as on the day of the murder, the evidence was proper rebuttal. Oliger was also recalled to testify in regard to taking Nail's confession. We have held that the reopening of a case either for the re-examination of a witness, or the taking of further testimony after testimony on both sides has been concluded, is a matter within the discretion of

the court. *Simmons* v. *State,* 184 Ark. 373, 42 S. W. 2d 549.

Numerous assignments of error deal with the instructions given by the court, and the refusal of the court to give various requested instructions. Appellant specifically objected to the court's instruction No. 12, which reads as follows:

"You are instructed that the premeditation and deliberation to do murder may be formulated in the assailant's mind upon the instant. It does not have to exist in the mind an appreciable length of time. All that is necessary is for it to exist when the assailant commits the act; so if you find from the evidence on the whole case, beyond a reasonable doubt, that William Frank Nail, wilfully, deliberately, maliciously, with premeditation, killed James Leroy Montgomery, then you will find him guilty of murder in the first degree, unless you find the defendant insane as defined in these instructions."

This specific objection was based on the contention that the instruction was in conflict with another instruction dealing with premeditation; that it gives unnecessary emphasis upon a negligible period of time as involved in the element of premeditation, is incompetent in failing to take into consideration the low mentality or mental defectiveness of the accused, and is vague. We find no conflict, nor vagueness, and further find that the instruction correctly states the law in conformity with numerous holdings of this Court, going as far back as 1869. *McAdams* v. *State,* 25 Ark. 405. See also *Jackson* v. *State,* 133 Ark. 321, 202 S. W. 683; *Jenkins* v. *State,* 222 Ark. 511, 261 S. W. 2d 784. As to that part of the objection relating to the failure to include a reference to the alleged low mentality of the accused, suffice it to say that the court's instructions Nos. 14 and 15, given on the court's own motion, properly instructed the jury as to the defense of insanity. Of course, the fact that one is simply of "low mentality", is no legal defense to the commission of crime, unless of such low mentality as to render him incompetent. We have also

examined the other instructions submitted, and find no error therein, nor in the court's refusal to give requested instructions.

By assignment No. 18, appellant contends that the court erred in allowing the jury to separate. Ark. Stats. (1947), § 43-2121, permits this to be done in the discretion of the trial court, and we held in *Borland* v. *State,* 158 Ark. 37, 249 S. W. 591, that this was entirely proper, no abuse of discretion having been shown, and it not appearing that any of the jurors were subject to improper influences during the dispersion of the jury. Likewise, in the instant cause, there is no showing that appellant was prejudiced by the action of the court permitting the jurors to separate. Preceding the separation, the court admonished the jury as follows:

"Now, gentlemen, I want you to remember this distinctly, in all cases when you are permitted to go, the court has confidence in you, we are going to permit you to separate and go to your respective homes — do not discuss this case and do not permit anyone to discuss it with you because that would be highly improper and entirely wrong, and I am sure you will not do that. I want you to bear in mind, keep in mind, what I told you this morning, don't discuss it with anyone. That means what it says, anyone, and do not permit them to discuss it with you — should they mention it to you, tell them you are on the jury and under orders of the court not to discuss it and as I said again this morning, if they insist it, bring it to the court's attention, and we will attend to that. With that, be back in the morning."

There was no request that the jury be admonished not to read newspapers, or listen to radio or television programs, regarding the trial.

It is contended that the trial court erred in denying appellant a new trial on the ground that nine of the jurors had read a newspaper article about the trial. Following an afternoon recess, when the jury had been separated, an account of the day's proceedings was pub-

lished in the Pine Bluff Commercial, and in next morning's Arkansas Gazette. Appellant first complains that the Commercial stated the accused was serving a term for burglary and grand larceny, and the Gazette article stated he was sentenced for grand larceny. Counsel argue that appellant was greatly prejudiced by the fact that members of the jury, in reading the articles, became acquainted with appellant's prior offenses. We do not agree. It necessarily was obvious to all the jurors that Nail had committed some offense, else he would not have been serving time in the penitentiary. If the articles had erroneously stated that Nail was serving time for rape, or some other crime of that nature, which might well tend to arouse prejudice in the mind of a juror, appellant would have a stronger point, but such was not the case. There was perhaps some slight discrepancy in the testimony of Deputy Sheriff Oliger and the written account in one of the newspaper articles, but we fail to see where this could be prejudicial, since the jurors had, at first hand, heard Mr. Oliger testify, and therefore, certainly were acquainted with his actual testimony. Appellant also objects to the lead sentence in the article which states that the accused "went on trial for his life." This was certainly a correct statement, since Nail was being tried for first degree murder. In addition, the court made the following statement to the jury:

"The Court wants to say something to the jury. Is there any of you who read the articles who cannot disregard the articles totally and try this case solely on the law and the testimony you hear here in the court room? The Court saw no hands. The Court is going to further instruct you if you read the articles, those of you who did, the Court is asking you to totally disregard anything you might have read in there and try this case solely on the evidence you heard here yesterday and today and the law as given you by the Court."

Appellant has suggested error on two points that we feel merit detailed discussion. The first of these relates to the dismissal of a juror after the juror had

been accepted, and after appellant had exhausted his challenges. The complete record as to what transpired is as follows:

"Mr. Brockman: At this time, Your Honor, I would like to excuse a juror that has already been taken.

The Court: All right.

Mr. Jones: If the Court please, we want to object to him excusing a juror that has already been taken.

The Court: The objection is overruled.

Mr. Brockman: The state will excuse Mr. McIntyre.

The Court: Mr. McIntyre is excused.

Mr. Jones: Well, note our objection — our objection is under the statute that the defendant is to have the last challenge as to each juror and the state has accepted him.

The Court: Yes, sir, note the objection.

Mr. Jones: Save our exceptions.

Mr. Steed: If the Court please, the defendant would like for the record to show that all of his challenges had been exhausted.

The Court: The Court has a record of them."

Appellant argues that the court committed reversible error in permitting the State to challenge this previously accepted juror after the defendant had exhausted his challenges. In *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709, this Court did hold such action to be prejudicial error, though a strong dissent was written by Mr. Justice Riddick. Under the *Williams* case, appellant's contention would be correct, and he would be entitled to a reversal herein. However, the latest case dealing with point is *Green* v. *State,* 223 Ark. 761, 270 S. W. 2d 895, which was handed down on June 7, 1954, and rehearing denied on October 4, 1954. There, a juror was accepted

by each side, but was later excused by the Court through fear that ineligibility might be assigned as error.[2] In an Opinion written by the late Chief Justice GRIFFIN SMITH, this Court said:

"Assuming, without deciding, that the disqualification could be waived, appellant has failed to show that he was prejudiced by the ruling. Insistence is that when the juror was removed, the defendant had exhausted his challenges. He does not, however, show that the person accepted in lieu of Baker was objectionable, or that the court on request would not have excused a questioned substitute under a rule of fairness if the person objected to could with reason be regarded as unfit, or favorable to the state's view of the transaction. We have often said that a litigant is not entitled to a particular juror."

Of course, in the *Green* case, *supra,* the juror was excused on the court's own motion, while here, the juror was excused at the request of the state's attorney. We see no material difference however, since this juror was actually excused by the court, and had the court refused its permission, the juror would have continued to serve. We recognize that these decisions are conflicting, but the *Green* case, of course, being the latest pronouncement upon this point, constitutes the law, and this construction has been in effect for more than five years. Actually, the *Green* case overruled the *Williams* case though the Opinion did not specifically so state. We therefore take this occasion to point out our adherence to the *Green* decision. As pointed out in that case, we have frequently held that a litigant is not entitled to a particular juror. This being true, there is no valid reason to refuse the request to excuse one who has already been taken, even though a defendant's challenges have been exhausted, *unless it first be shown that the defendant will be prejudiced by the service of the venireman accepted in lieu of the juror excused.* The record in this case, with reference to this matter, completely

[2] When the juror's name was called, he stated that he had served during the last court term, but the trial judge did not hold him disqualified.

quoted above, shows nothing further. Counsel raised no objection to the substituted juror, nor endeavored to show any reason why the replacement could not, or would not, try the case with fairness or impartiality.

While the Opinion in the Green case cited no authority for the Court's position, such authority does exist. In *People* v. *Rich,* 237 Mich. 481, 212 N. W. 105, the Michigan Supreme Court said:

"After the defendant had exhausted his peremptory challenges, the prosecution was permitted to exercise peremptory challenges although it had previously expressed satisfaction with the jury. There was no error in allowing this to be done."

We like the logic of the Michigan Court in the case of *People* v. *Mullane,* 256 Michigan Reports, 54 (a case similar in some respects to our own *Green* case, and also bearing some similarity to the case at Bar). There, the defendants were being tried on a charge of kidnapping, and it developed that two jurors, who had already been finally accepted by counsel for all parties, were probably disqualified by reason of prior jury service. These jurors were excused by the court. The defendants had theretofore exhausted all their challenges, and at a conference in Chambers, the trial judge announced that he would be "liberal in any reasonable objection to any juror which would be taken as a challenge for cause", but would allow no more peremptory challenges. Two jurors were then called in lieu of the two excused, and after examination by counsel, the jury was completed and sworn. The defendants were convicted, and the action of the court in excusing the jurors after defendants had exhausted their challenges, was assigned, *inter alia,* as error, on appeal to the Supreme Court.

From the Opinion of the Supreme Court:

"The examination of these jurors does not appear in the record, nor do counsel claim that they were not in every way qualified to sit. * * *"

Further:

"In what way can it then be said that the defendants were deprived of the right of further peremptory challenge by the course pursued? If defendants' counsel chose to exercise all of their peremptory challenges before the jury were ordered to arise and be sworn, they took the chance that after they had done so it might be discovered that a person not qualified to sit was among the number in the jury box and that he or she might be removed therefrom by order of the court. * * *"

To this language, we might add that there is nothing to prevent a defendant saving a peremptory challenge for such a situation as occurred in the instant case.

If it be said that this holding may well permit a wholesale discharge of jurors after acceptance, we disagree.[3] Of course, in the Michigan cases just cited, more than one juror was excused, but we conclude this is a matter that rightly directs itself to the discretion of the trial court, which conducts the trial, and is charged with the responsibility of maintaining a proper balance, seeing that no undue advantage is taken by either side. We cannot conceive of any court permitting the challenge of several jurors already accepted, unless good and sufficient reason be shown, and such action by a trial court, without sufficient cause, might well constitute an abuse of discretion.

The purpose of the law is to give a defendant a fair and impartial trial, and in furtherance of affording full protection, a defendant is given more peremptory challenges than the State. To compel the showing of cause as to why a substituted juror should not serve, is certainly not an unreasonable requirement. Can it be doubted but that a trial court would quickly excuse a prospective venireman if the slightest hint of prejudice were shown? Nor can it be said that a defendant is

[3] That is, if one juror can be discharged at the instance of the State after the defendant has exhausted his challenges, additional jurors can be peremptorily challenged to an extent limited only by the number of peremptory challenges remaining to the State.

discriminated against by permitting the State to exercise such a peremptory challenge, for if the circumstances are reversed, and the State has previously exhausted all of its challenges, the defendant has the privilege of peremptorily challenging a juror already accepted.

Appellant's contention is held to be without merit. In order that there may be no misunderstanding, the case of *Williams* v. *State, supra,* is specifically overruled insofar as it holds that the State cannot peremptorily challenge a juror, already accepted, after the defendant has exhausted his challenges; likewise, the cases of *McGough* v. *State,* 113 Ark. 301, 167 S. W. 857, and *Temple* v. *State,* 126 Ark. 290, 189 S. W. 855, are overruled to the same extent.

The other point which, we feel, merits detailed discussion, relates to the testimony of Dr. E. I. Shaw of the State Hospital. Dr. Shaw stated that it was his opinion that Nail knew right from wrong, and he further testified regarding the hospital staff report, which was introduced, relating to appellant. Dr. Shaw signed the report as the examining physician, and the report states that it is his opinion and the joint opinion of the psychiatric staff that William Frank Nail was not mentally ill to the degree of legal irresponsibility at the time of the alleged commission of the crime, nor at the time of the examination. The report was a composite report, compiled from the findings of fourteen state hospital physicians. Appellant accordingly contends that in admitting this report and permitting Dr. Shaw to testify relative to it, hearsay evidence was admitted; that he had no opportunity to examine the unnamed persons whose findings were included in the report, and the admission of such evidence was highly prejudicial. In *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37, we held that it was necessary for the examining physician to sign the report and appear to testify. True, in the *Gerlach* case, the diagnosis is confined to the statement of the examining physician, *i.e.,* the report states, "It is my opinion that Robert Earl Gerlach is

mentally competent", *etc.,* but the report commences with the statement, "*We*[4] have completed our examinations in the case of Robert Earl Gerlach, who was admitted to the state hospital under Act No. 3, and I hereby certify that this is a true and correct finding of the facts in this case. * * *" While the exact point here raised was not urged in the *Gerlach* case, it has been subsequently raised and held to be without merit. In *Leggett* v. *State,* 228 Ark. 977, 311 S. W. 2d 521 (the second *Leggett* case), this Court said:

"The present petition states that Leggett, in connection with his plea of insanity, was sent by the court to the State Hospital for a medical examination. The petition charges that, although the Hospital's report reflected the opinion of the examining medical staff, not all the members of the staff were called as witnesses at the trial. This omission, it is said, deprived Leggett of his constitutional right to be confronted with the witnesses against him. U. S. Constitution, Amendment 6, Ark. Constitution, Article 2, Section 10.

This contention is foreclosed by our affirmance of the original judgment. This same argument was made upon the first appeal and was found to be without merit. The issue was not specifically mentioned in the opinion, for it was necessary to examine dozens of objections in the record, and, as is our practice, we limited our discussion to what were considered to be the appellant's strongest points. The Opinion explained, however, that we had examined the entire record and had considered all the issues raised."

Since no discussion of the Court's reasoning was included in either the first or second Leggett cases, we take this occasion to more fully detail the basis for this holding.

In the first place, only the defendant and his counsel know what defense will be relied on, and it may not be known until the day of the trial whether the defendant will plead insanity as a defense. Accordingly, it

[4] Emphasis supplied.

would seem most illogical, or unreasonable, to require all of the doctors, who participated in any phase of the examination, to leave their varied duties and travel to some point in the state, perhaps a long distance away, solely on the possibility that the defendant might want to call them as witnesses. In fact; Section 12 of Initiated Act No. 3, adopted in November, 1936,[5] provides, "Witnesses employed by the State Hospital shall be so summoned to appear as to require as little loss of time as possible from their other duties." Let it be remembered that the report is prepared and forwarded to the court and clerk sometime in advance of the trial, and there is nothing to prevent defense counsel from ascertaining the names of all the doctors who participated in any phase of the examination, and talking with those doctors relative to their findings. Should counsel then deem it advisable, particular doctors could be summoned to appear at the trial. Section 12 also provides, "The physician or physicians who prepared the report shall be summoned as witnesses at the trial at the order of the trial judge or at the request of either party, and if summoned, shall be examined by the court, and may be examined by either party, and a copy of the written report hereby required shall be given in evidence in every case in which the fact of sanity is an issue at the trial." Accordingly, a defendant is not denied the opportunity to question those who examine him. Relative to the contention that the report constitutes hearsay evidence, we point out that hearsay evidence is, by legislative enactment, presently admissible in several types of cases.[6] Such statutes, of course, authorize specific exceptions to the hearsay rule, and the people likewise by enactment, have the authority to authorize exceptions. The report is such an exception, and the act mandatorily requires that a copy of the written report be filed.

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[5] Under the provisions of this Act, a defendant may be committed for observation.

[6] For instance, see § 48-940, which permits evidence, in certain liquor violation cases, of defendant's reputation for boot-legging or being engaged in the illicit manufacture of, or trade in, intoxicating liquors.

By assignment No. 4, appellant asserts that the verdict is excessive, but as we have many times stated, the matter of assessing punishment is strictly within the province of the jury, and we have no power to change the fixed punishment unless the proof fails to sustain the charge for which the defendant is convicted. See *Allison* v. *State,* 204 Ark. 609, 164 S. W. 2d 442, *Rorie* v. *State,* 215 Ark. 282, 220 S. W. 2d 421, *McCall* v. *State,* 230 Ark. 425, 323 S. W. 2d 421.

Other objections and assignments of error are noted, but a discussion of each would only prolong this Opinion, which is already lengthy, and serve no good purpose. Suffice it to say that we have considered each objection and alleged error, and find them to be without merit.

Counsel in this case were appointed by the trial court to defend appellant, and were paid a fee of $125 each, under the provisions of § 43-2415, Ark. Stats. (1947) Anno. Said statute provides *inter alia* that "any attorney at law appointed by the Circuit Court to defend a person charged in said Court with the commission of a crime, whether misdemeanor or felony, shall receive for his services in representing said accused a fee of not less than Twenty-five Dollars ($25.00) and not more than Two Hundred Fifty Dollars ($250.00), the amount of which shall be fixed by the Circuit Court."[7] Counsel list the work done in preparation of the case, suggest that the fee allowed was not intended to cover an appeal, and request an additional fee. It will be noted that the statute recites that the fee shall be fixed by the Circuit Court, which we consider a salutary provision, inasmuch as that court is familiar with the finances of the county, and has knowledge of the amount appropriated for this purpose. We therefore hold that the amount of fee awarded under this section is entirely within the discretion of the Circuit Court.

[7] This section provides that the quorum court of any county "whose population did not exceed 100,000 by the most recent federal census may make an appropriation to pay for the services of attorneys appointed by the Circuit Court to defend persons accused of committing a crime." The appropriation must have been made before any fee can be allowed.

Finding no reversible error, the judgment of the Circuit Court is herewith affirmed, but there is a matter we think worthy of comment. The accused did not testify in his own behalf, and we note from the record that this decision was made by appellant himself. Counsel took appellant into Chambers, and requested the court to advise Nail of his rights. The court then explained that the defendant has the privilege at all times to either take the stand and testify in his own defense, or to not take the stand, and Nail was twice asked if he desired to take the stand. Each time, he replied that he did not. There is a heavy responsibility upon any attorney defending one charged with crime, and this is particularly true where one is being tried for a capital offense, and even more so when defendant's counsel are court appointed. Under the circumstances of this case, we think these attorneys should be commended for leaving this decision to appellant, and making a record of the proceedings thereto, for when this is done, there is no possibility that an accused can blame his appointed lawyers for his failure to testify, possibly feeling that this omission contributed to his conviction, nor later embarrass them by stating that he was prevented from testifying by the advice of counsel. We think the attorneys exhibited good judgment in handling the matter as they did, and we commend this procedure as worthy of consideration by any attorney acting under court appointment.

George Rose Smith, J., concurs.

Robinson & Johnson, JJ., dissent.

George Rose Smith, J., concurring. When this case was discussed in conference I voted to overrule *Green* v. *State* and to return to the rule adopted in *Williams* v. *State,* which I consider to be the better rule. But a majority of the court took the other view and decided to adhere to the doctrine of the *Green* case. In this instance I think the desirability of certainty in the law outweighs the advantages that are to be found in the rule of *Williams* v. *State.*

For that reason I yield by personal convictions to the majority and will in the future regard today's decision as a binding precedent, not to be overruled.

SAM ROBINSON, Associate Justice, dissenting. One of the most important parts of a jury trial is the selection of the jury. This is especially true where a ciminal case has received wide publicity and a great number of citizens are likely to have some feeling in the matter, one way or the other, although such opinion or belief by a particular venireman is not sufficient to challenge for cause. For instance, a venireman states on his voir dire examination that he has read accounts of the alleged offense in the newspapers; that he has heard the case discussed and has formed an opinion as to the guilt or innocence of the accused, but has not talked to anyone that purported to have personal knowledge of the facts; and that he can put aside any opinion he has formed and try the case according to the law and the evidence. According to many decisions of this Court such a venireman is qualified to serve as a juror. Very likely in a case of this kind the defendant is compelled to exercise a peremptory challenge unless he feels to a moral certainty that the opinion the venireman has is in his favor.

When all things are taken into consideration, the 12 peremptory challenges allowed the defendant in a capital case are not excessive by any means; in fact, prior to the adoption of the Criminal Reform Act in 1936 the defense could exercise 20 peremptory challenges. Usually by the time 12 jurors are accepted the defendant has exhausted all 12 of his peremptory challenges, and then at that stage of the proceedings to allow the State to challenge jurors that have already been accepted, without giving any reason whatever, is contrary to the statutes and contrary to fair play.

If the prosecuting attorney can challenge one juror in such circumstances, why should he not be allowed to challenge all 12? Is it because challenging one would be a little error and challenging 12 would be a big error? One is naive indeed who does not think that both the prosecution and the defense take full advantage of every angle of

the law to get on the jury people they believe will be most likely to see their side of the case.

The statutes of this State pertaining to the selection of a jury are clear as to every detail. But for some reason the majority have completely ignored the statutes. In my opinion the very issue involved is regulated by statute. In the first place, Ark. Stat. § 43-1903 provides:

"Felonies, selection in.—In a prosecution for felony, the clerk, under the direction of the court, shall draw from the jury box the names of twelve petit jurors, who shall be sworn to make true and perfect answers to such questions as may be asked them touching their qualifications as jurors in the case on trial, and each juror may be examined by the State and cross-examined by the defendant, touching his qualifications. *If the court decide he is competent, the State may challenge him peremptorily or accept him, then the defendant may peremptorily challenge or* accept him. . . ." [Emphasis supplied]

It will be noticed that after the court decides a venireman is competent the State must first challenge him peremptorily or accept him. It is clear from the statute that the defendant has to accept or challenge only after the State has first done so. This statute does not provide that both the prosecution and the defense can accept a venireman as a juror and then the prosecuting attorney change his mind and exercise a peremptory challenge, after the defendant has exhausted his challenges. If such action is permitted, the above statute is nullified, and that appears to be what the majority have approved.

Ark. Stat. § 43-1910 provides: "Challenge defined.—A challenge is an objection to the trial jurors and is of two kinds:

"First. To the panel.

"Second. To the individual juror."

§ 43-1913: "Individual juror, challenge to.—The challenge to the individual juror is:

"First. For cause.

"Second. Peremptory."

§ 43-1914: "When challenge taken.—It must be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time before the jury is completed."

Surely the majority must think this section means something; the statute in effect says that the court can permit a juror to be excused, after once being accepted, only for a *good cause.* I just don't see how this statute can be construed as having any other effect, and yet it is completely ignored. The prosecution was permitted to challenge the juror without stating any cause, good or otherwise.

§ 43-1915: "Challenge for cause.—The challenge for cause may be taken either by the State or by the defendant."

§ 43-1916: "General or particular.—It may be general, that the juror is disqualified in serving in any case, or particular, that he is disqualified from serving in the case on trial."

§ 43-1917: "Cause of general challenge.—Causes of general challenge are:

"First. A want of the qualifications prescribed by law.

"Second. A conviction for a felony.

"Third. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of properly performing the duties of a juror."

§ 43-1918. "Particular causes.—Particular causes of challenge are actual and implied bias."

§ 43-1924. "Order of challenges.—The challenge to the juror shall first be made by the State and then by the defendant, *and the State must exhaust her challenges to each particular juror* before such juror is passed to the defendant for challenge or acceptance." [Emphasis supplied]

No effect can be given to this statute and permit the State to challenge a juror previously accepted, after the defendant has exhausted his challenges. Of course, the court can excuse a juror for cause after he has been accepted by both sides. But it must be remembered that in the case at bar the juror was peremptorily challenged; no cause or reason was given.

In an uninterrupted line of cases extending over a period of nearly a hundred years, this Court has consistently held that it was error to allow the prosecution to peremptorily challenge a juror previously accepted, after the defendant had exhausted his challenges. *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709; *McGough* v. *State,* 113 Ark. 301, 167 S. W. 857; *Ruloff and Berger* v. *State,* 142 Ark. 477, 219 S. W. 781; *Dewein* v. *State,* 114 Ark. 472, 170 S. W. 582; *Hanna* v. *State,* 183 Ark. 810, 38 S. W. 2d 1090; *Bevis* v. *State,* 90 Ark. 586, 119 S. W. 1131. The majority specifically overrule the *Williams* case, decided in 1897, but fail to mention *Temple* v. *State,* 126 Ark. 290, 189 S. W. 855, decided in 1916. There the Court said: "It was held in some of these cases that the court, in its discretion, might permit the State to use a peremptory challenge on a juror who had been accepted by both sides where the defendant had not exhausted all of his peremptory challenges; but in all the cases in which it was held not to have been error to permit this action, the defendant had not exhausted his peremptory challenges. The test seems to be whether the defendant has remaining as many challenges as the State is permitted to exercise, and upon the authority of these cases, the judgment of the court must be reversed".

To sustain its opinion the majority have cited *Green* v. *State,* 223 Ark. 761, 270 S. W. 2d 895. But that case is not in point with the case at bar. There a juror was excused by the court on its own motion, the court being of the opinion that the juror was disqualified because of having rendered jury service within the past two years and that the defendant could not waive such disqualification. The court's action was not arbitrary. The juror was excused because the court thought it would be error not to

excuse him. Such action on the part of the trial court is not analogous to the situation in the case at bar, where the prosecuting attorney, after the defendant had exhausted his challenges, was permitted to peremptorily excuse a juror who had been accepted by both sides. The statute provides that "for a good cause" a challenge may be exercised at any time before the jury is completed. Here the prosecuting attorney stated no cause and gave no reason for challenging the juror, and certainly this court does not know the reason for such action, but it could have been that at that stage of the proceedings the prosecuting attorney knew the identity of the next veniremen to be called and decided he would be a better juror from the standpoint of the State than the juror previously accepted. The majority say that the defense should always reserve some challenges to meet such a contingency. The least that can be said is that the suggestion does not show a realistic concept of the problem of selecting a jury. In a capital case the defense has only 12 challenges. Of course, the personnel of the jury is of the utmost importance. Frequently whether a case is won or lost depends on the judgment exercised by counsel in using his peremptory challenges. In many instances the 12 challenges allowed are a great deal less than the number counsel feels he should have to get a fair and impartial jury, and to say that a defense lawyer should use only 7 or 8 peremptory challenges during the selection of the 12 jurors, out of perhaps dozens or even hundreds of veniremen that are examined, because after the 12 had been selected the prosecution may excuse 4 or 5 of those already accepted by both sides, deprives the defendant of the right to select a jury as provided by statute.

The majority say "a litigant is not entitled to a particular juror." Of course, this assertion is good law, but in the case at bar that principle of law is not followed, because here the State was allowed to have a particular juror, the prosecution challenged one previously accepted, without giving any reason, and selected another juror after the defendant had exhausted his challenges. Thus the State was allowed to select a particular juror.

To support their views, after a most diligent, exhaustive and careful search the majority have been able to cite only two cases from any of the state or federal courts over the whole United States, and neither case is in point. First, the *Green* case [223 Ark. 761, 270 S. W. 2d 895], heretofore discussed, which is shown to be not in point; and, second, the Michigan case of *People* v. *Rich,* 237 Mich. 481. Upon careful investigation it will be seen that neither does this Michigan case support the majority. In Arkansas the statutes, as heretofore pointed out, clearly govern and control the order of challenge of the respective parties in the selection of a jury. In the Michigan case of *Hamper's Appeal,* 51 Mich. 71, the court said: "The question of order of challenge is one of practice and discretionary with the trial court. Peremptory challenge, so far as it extends, is a right secured by statute, of which neither party can be deprived until the jury are sworn."

But our statute, § 43-1914, provides that only a *challenge for cause* may be made after a juror has been selected. Moreover, the Michigan statute, 3 Mich. C. L. 1948, § 769.26, requires that the judgment be affirmed regardless of error unless it affirmatively appears that the error resulted in prejudice. That is not the law in Arkansas. Here it is presumed that an error is prejudicial unless it affirmatively appears to the contrary. *St. Louis & S.F.R. Co.* v. *Crabtree,* 69 Ark. 134, 62 S. W. 64; *Neal* v. *Brandon,* 70 Ark. 79, 66 S. W. 200; *St. Louis, I.M. & S.R. Co.* v. *Steed,* 105 Ark. 205, 151 S. W. 257. Certainly there is no showing in this record that the prosecution's action in challenging a juror already accepted and substituting another was not prejudicial to the defendant. This Court said in *Williams* v. *State,* 63 Ark. 527, 39 S. W. 709: "It is true that we cannot certainly say just how the discharge of these jurymen was prejudicial to the defendant. Indeed we may not be able to say positively that it was prejudicial to him at all; but at the same time we cannot say that it was not detrimental to him, and in fact we are rather inclined to think it was. But this uncertainty is, of itself, a strong argument against the pro-

priety of such a procedure." Moreover, in the Michigan case of *People* v. *Rich,* 237 Mich. 481, the court was equally divided. Apparently according to Michigan law under such circumstances judgments are affirmed. In the other Michigan case of *People* v. *Mullane,* 256 Mich. 54, cited by the majority, the court points out that the jurors were *excused for cause.* And, incidentally, the earlier case of *People* v. *Rich* is not even mentioned in the Mullane case.

In my opinion it boils down to the proposition that there is no authority to sustain the majority in holding that the prosecuting attorney can peremptorily challenge a juror previously accepted, after the defendant has exhausted his peremptory challenges. In fact, all the law of this State, both statutory and case law, is to the contrary. The *Green* case [223 Ark. 761, 270 S. W. 2d 895] cited by the majority, is not in point, because there the court excused the juror on its own motion, thinking the juror was disqualified; and the Michigan case of *People* v. *Rich* is not in point because the order of exercising challenges is not regulated by statute in Michigan, but is discretionary with the trial court, whereas in Arkansas such order of challenge is specifically regulated by statute. In criminal cases especially a statute prescribing the manner in which challenges shall be exercised is mandatory. *State* v. *Jones,* 191 Pac. 1075.

For the reasons set out herein, I respectfully dissent.

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

5-1987 328 S. W. 2d 357

Opinion delivered November 2, 1959.

[redacted]

Murphy & Arnold, for appellant.

Charles F. Cole, for appellee.

J. SEABORN HOLT, Associate Justice. This case involves the correctness of an injunctive order.

Appellees, six property owners in the town of Cave City, Arkansas, with a population of about 350 people, alleged in their petition, in effect, that the appellant owned property in Cave City near plaintiffs' property; that the appellant was engaged in raising broilers and was expanding his operation; that existing brooder houses could provide for 40,000 broilers; that the business was being operated in such a way that

the broilers produced odor, attracted flies and made loud and distracting noises at all hours of the day and night; that dust and litter were deposited on appellees' dwellings making it impossible to open their homes and that the odor was such that it was "almost impossible" for them to remain at their homes, thus reducing the market value of appellees' property. An injunction was sought by appellees. Appellant answered with a general denial. A trial resulted in a decree granting certain injunctive relief prayed. The decree contained these recitals: "It being conceded that defendant's broiler houses are not nuisances *per se,* the question for the court to determine in this case is whether petitioners have proved by fair preponderance of the evidence that the operation of defendant's broiler business constitutes a nuisance and, if so, whether it constitutes such a nuisance as should be abated entirely or whether he should be required to change his method of operation so that all the equities may be equalized.

"I find that even his recent operations have infringed upon the rights of petitioner, Simpson, to the peaceable use and enjoyment of his home and to the several petitioners who live along the Strawberry-Cave City road although due to the greater distance, they probably have suffered to a lesser degree than has Simpson. It seems clear from the testimony of almost all the petitioners that his operation has been less obnoxious the past year or so than for some time prior.

"It seems clear that much of the difficulty is traceable to defendant's handling of litter and his disposal of dead chicks and his custom of loading out batches of chicks during the late hours of the night (although that may be customary in his line of business) arouses and disturbs the occupants of the residences nearby.

"I find that a preponderance of the evidence fails to show that the petitioners are entitled to an order restraining defendant from operating his broiler business at all but I find that he should be restrained from leaving litter outside the buildings, anywhere on the premises, for a period of more than twenty-four hours;

that he should be restrained from leaving dead chicks anywhere about the premises but that they should be promptly buried (not burned); and that he should be restrained from catching out chicks after nine o'clock P.M. * * * As to the new broiler house which is being built considerably north of the present broiler houses, counsel for defendant very forcefully argues that, since it is conceded that it is not a nuisance *per se* and since it is not yet in operation, it cannot be enjoined but I find that it is simply an enlargement of his present operation, and hence, this restraining order will apply to it the same as to the other houses. Defendant will pay the cost."

The court then entered the following order restraining appellant from: "1. Leaving litter outside his building or anywhere on his premises for a period of more than twenty-four hours. 2. Leaving dead chicks anywhere about the premises and from burning them. They are to be promptly buried. 3. *Catching out chickens after nine P.M. and before seven A.M.*"

Following that decree this appeal followed. For reversal appellant relies on the following point only: "The Chancery Court erred in granting a restraining order which totally prohibited the appellant from 'catching out chickens after 9:00 P.M. and before 7:00 A.M.' ".

Our governing rule in cases such as here presented, where the act complained of is not a nuisance *per se* (as conceded here) is well stated in 92 Ark. 546, 123 S. W. 395, *Town of Lonoke* v. *Chicago, Rock Island & Pacific Railway Company,* in this language: "Where the thing complained of is not a nuisance *per se,* the burden is upon the complaining party to show that it is a nuisance in fact. In order to authorize an injunction in such case, the evidence must be determinate and satisfactory, and it must clearly show that the things complained of do constitute a nuisance. 29 Cyc. 1244, 1246. In 29 Cyc. 1225 it is said: 'In order to obtain an injunction against or the abatement of an alleged nuisance, the complaining party must show a clear and strong case supporting his right to such relief' * * *". In the pres-

ent case a great mass of conflicting testimony was introduced covering some 300 pages, and as indicated, appellant questions only the court's action in granting an injunction against "catching out chickens after 9:00 P.M. and before 7:00 A.M.".

The testimony on this issue, that is catching out chickens at night, seems to have been confined almost entirely to the question of the noises made by the chickens while being caught and taken from the houses in which they were confined. It appears that it requires about ten weeks to produce a broiler, and three times a year appellant catches and ships thousands of his broilers in the nighttime between the hours of 9:00 P.M. and 7:00 A.M. But appellant argues that there are reasons other than the noise issue to support his contention that he should be allowed to catch and load his chickens at night. He says in his brief: "The grown broilers are caught and loaded into trucks at night. The catching of the chickens at night can be done with less labor, and in shorter time, and without the chickens being bruised in the catching process. As industry requirements become more strict with Government grading now in effect the price of the broiler is adversely affected if the bird has an unusual amount of bruises. Thus, it is the universal practice now to catch broilers at night and deliver them during the night to the processing plant and each group of birds requires only a part of one night to be caught. The industry is highly competitive and a difference of as much as a cent a pound because of the chickens being bruised can mean the difference between a profitable enterprise and a losing venture."

We have been unable to find any substantial testimony in the record to support these contentions which it appears that appellant is assuming to be true. We have concluded, however, that the testimony bearing upon the above contentions should be fully developed and submitted to the trial court for further consideration.

Accordingly, the decree is reversed and the cause remanded for further proceedings not inconsistent with

this opinion, with costs of this appeal to be equally divided between the litigants.

Appellees have cross-appealed and contend that "the court should have also taken into consideration the fact that appellant's operations resulted in a depreciation of the values of appellees' properties, and granted appellees relief from that injury. The only way to obtain for appellees the relief to which they are clearly entitled is that appellant be enjoined from raising broilers in this area which is predominantly a residential area." We hold that appellees are not entitled to the equitable relief of injunction.

ARK. STATE HWY. COMM. *v.* THOMAS.

5-1932 328 S. W. 2d 367

Opinion delivered November 2, 1959.

W. R. Thrasher, O. Wendell Hall, Jr. and *W. B. Brady,* for appellant.

Fred E. Briner, for appellee.

J. Seaborn Holt, Associate Justice. This is an eminent domain action instituted by the Arkansas State Highway Commission to condemn certain lands owned and leased by appellees, Louis Thomas and wife. Mr. Thomas operated a cattle farm and business composed of approximately 559.51 acres, of which approximately 204 acres were leased from W. R. Hughes, the owner, and 28 additional acres owned outright by appellees, making a total of 232 acres which were located on the east side of the Saline River, and the remainder, (of the 559.51 acre farm) approximately 327.51 acres, owned outright by appellees, was located on the west side of the Saline River. Appellees operated the entire farm as a unit with sufficient access across the river to permit cattle to pass from one side to the other without hinderance. Appellant condemned 7.56 acres of the land owned by the appellees on the west side of the river and 9.37 acres on the east side of the river, 204 acres of the land used by the appellees on the east side of the river having been leased from Hughes as indicated. At the trial before the court sitting as a jury, Thomas and wife, appellees, were permitted to put in issue and try the value of their leasehold interest in the leased Hughes farm on the east side of the river, and in addition, were permitted to put in issue and try the value of their own land that was condemned. Besides the value of their own land, appellees alleged damages because of a severance between their property and the leased farm on the east side of the river and because of an impairment of their leasehold interest. The lessor, Hughes, was not made a party and did not participate in the proceedings. There was a judgment for appellees in the total amount of $10,000.00. The judgment contains this recital: "Upon oral motion of plaintiff the court declared this verdict to be composed of: an award of $400.00 per acre for the 7.562 acres taken, or a total of $3,024.80; an award of $3,487.60 for damage to the leasehold interest of Louis Thomas in the lands of Walter R. Hughes and Doris Hughes; and an award of $3,487.60 for damage resulting from a severance of the property of Louis Thomas and Elsie Thomas from the

property leased from Walter R. Hughes and Doris Hughes by Louis Thomas, said severance resulting from the taking of land for the aforementioned highway purposes." From the judgment comes this appeal.

For reversal appellant relies on three points.

I

In his first point he alleges that the trial court committed error in allowing separate trials for the interest of the freeholders (Thomas and wife) and also for their interest as lessees of the Hughes land. Ordinarily in (eminent domain) condemnation cases, such as the present case, our rule is that the interest of the freeholder, his interest as lessee in property leased and the interest of the lessor in his own property leased to another, should be determined in a single trial and not in separate trials as was done in the present case. We so held in 104 Ark. 187, 148 S. W. 1038, *Hare* v. *Fort Smith & Western Railroad Company.* We there said: "In a condemnation proceeding, all persons owning an interest in the property are proper parties; and this includes tenants in common, life tenants, remaindermen, lessees, in fact every person having an interest in the land." Citing cases. In *Corpus Juris Secundum,* 1202, the text writer announced the rule in this language: "The owner of the property sought to be condemned, and all persons having any interest therein which will be affected by the proceedings, are, as a general rule, proper and necessary parties respondent or defendant, except to the extent that the rule is modified or limited by statute. The owners of several tracts may be joined in one proceeding." We find no Arkansas Statute modifying or limiting the above rule. And 29 C. J. S. 1206, "Lessor and lessee. A lessee of the property sought to be condemned is not only a proper party to the proceedings but also is a necessary party, in most states, although not in all, nor under all circumstances." In support of the text, *Hare* v. *Fort Smith & Western Railroad Company* is cited. We hold, therefore, that the rights of the freeholder, his rights as lessee, and also

the rights of the lessor must be determined in one trial unless the right to a single trial be waived. In the present case, we think the right to a single trial by appellant was, in effect, waived. The record reflects that on the date set for the trial, appellant appeared, by its attorney, announced ready for trial and the trial proceeded. No objection was made, by appellant, to proceeding with the trial nor was any motion made for a consolidation of appellees' interest with that of Hughes, the owner of the property leased by appellees. Not, it appears, until after the testimony of two witnesses appearing on behalf of appellees was completed did appellant (highway department) move to consolidate. In the circumstances we hold that appellant's motion to consolidate came too late and its action, as indicated, amounted to a waiver.

Points: "2. The judgment of $3,487.60, representing damage to the Thomas Leasehold in land of Walter Hughes, is not supported by competent evidence. 3. The judgment for severance damage is not supported by competent evidence."

As to these two points, the evidence is conflicting, and without attempting to detail it here, we hold that there was sufficient substantial evidence to support the findings and judgment of the court, sitting as a jury, as to the damages to the freehold, leasehold, and the severance damages. While the aggregate amount of the damages allowed appears to us to be most generous, however, as indicated, we are unable to say that such amount is not supported by some substantial evidence.

Affirmed.

5-1933 328 S. W. 2d 391

Opinion delivered November 2, 1959.

[redacted]

W. R. Thrasher, O. Wendall Hall, Jr. and *W. B. Brady,* for appellant.

John L. Hughes, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from a condemnation action instituted by the appellant, Arkansas State Highway Commission, to obtain certain lands belonging to the appellee, W. R. Hughes.[1] The case was tried to a jury; and, from a verdict and judgment for $3,200.00, there is this appeal in which only two points are urged.

I. The appellant says: "*The Trial Court Committed Error in Allowing Separate Trials for the Interest of the Freeholder and for the Interest of His Lessee.*" Hughes owned a tract of 177 acres which he had leased to Thomas for a number of years; and Thomas used the Hughes land, and other lands owned by Thomas, for a cattle ranch. When the Highway Commission undertook to obtain the right-of-way for a new road, there was filed in the Saline Circuit Court a case styled:

"Arkansas State Highway Commission, Plaintiff, v. 29.77 acres of land, more or less, situated in Saline County, Arkansas, Louis Thomas and Elsie Thomas, his

[1] Mrs. Hughes is a party because of dower rights; but we refer to "appellee" in the singular.

wife; Walter R. Hughes and Doris Hughes, his wife; Mike Richards and Delores Richards, his wife, and H. L. Abercrombie and Evelyn Abercrombie, his wife, defendants."

The Hughes land proposed to be taken amounted to only 9.374 acres; so the lands of Thomas and the other named parties made the total of 29.77 acres. In some way not shown in the record before us, there must have been a severance allowed as to the tract of each landowner, but there is no mention in any of the proceedings or evidence in the transcript before us as to any request made by the Highway Commission, or any other party, to have determined in this case the value of the Thomas leasehold rights in the Hughes land. So far as the record before us shows, the matter was never mentioned in the trial court in this case, and, of course, cannot be raised here for the first time. In short, there is no foundation in this record on which the appellant can predicate the point now argued.

II. The appellant says: "*There is No Substantial, Competent Evidence to Support the Jury Verdict.*" As aforesaid, Hughes owned a tract, of 177 acres. The Highway Commission condemned, through the northwest corner of the Hughes tract, a right-of-way amounting to 9.374 acres; and there resulted a tract of two acres entirely cut off from the remaining Hughes land. Witnesses for the land-owner placed the value of the Hughes land anywhere from $300.00 to $500.00 an acre. One witness testified that he purchased a tract of 29.9 acres similar to and near the Hughes land for $500.00 an acre. Values before and after the taking were given, and one witness summarized the testimony by saying that Hughes' total damage was $4,500.00.

The two witnesses for the Highway Commission gave lesser values. One witness said that the total damage suffered by the Hughes land was $1,540.00 from which should be deducted $250.00 as the damage to the Thomas leasehold: thus leaving $1,290.00 as the amount due Hughes. The second witness said that the total damage suffered by the Hughes land was $1,487.40 from

which should be deducted $63.59 as the damage to the Thomas leasehold: thus leaving $1,423.81 as the amount due Hughes.

It is thus clear that if the jury had taken the testimony of the plaintiff's witnesses of $4,500.00 as the total of Hughes' damage and had deducted therefrom the $250.00 testified by the Highway Commission's witness as the value of the Thomas leasehold, then the difference due Hughes would have been $4,250.00. Instead, the jury verdict was only $3,200.00, which is amply sustained by the evidence.

Affirmed.

COMMERCIAL CREDIT CORPORATION *v.* KITCHENS.

5-1887 328 S. W. 2d 355

Opinion delivered November 2, 1959.

Barber, Henry, Thurman & McCaskill and *James M. Rowan, Jr.*, for appellant.

Spencer & Spencer, for appellee.

ED. F. MCFADDIN, Associate Justice. This is another case involving usury in a conditional sales contract. The Chancery Court held that usury was established; and for reversal appellant urges only this point: "The Chancellor erred in voiding the conditional sales contract in the instant case, since the reservation of usurious interest, if any, was the result of an honest mistake of fact". This point is really a two-pronged statement because appellant argues: (a) there was no usury; and (b) even if usury be found the same was the result of an honest mistake.

On October 4, 1957 appellee, Walter G. Kitchens, purchased an automobile from Lindsey Brothers Motor Company for the sum of $1,695.00. Kitchens paid $500.00 cash and the balance was evidenced by a conditional sales contract. Here is the tabulation of the transaction as appears on the note:

Purchase price of car	$1,695.00
Less cash payment	500.00
Unpaid Balance	1,195.00
Car Insurance Premiums	179.00
Life Insurance, Accident, Hospitalization, *etc.* premiums	70.12
Time Price Differential	234.84
Amount of Conditional Sales Contract Note	$1,678.96

This note was to be paid in four installments of $419.74 each, and the four payments were due as follows: No. 1 due April 1, 1958; No. 2 due December 1, 1958; No. 3 due April 1, 1959; No. 4 due as hereinafter discussed. The appellant furnished the contract form to Lindsey Brothers, as well as the information as to insurance charges, the price differential, and schedule of payments; and the contract was immediately transferred by Lindsey Brothers to the appellant. *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973. After the first payment became due, Kitchens filed this suit seeking to void the entire transaction on the basis of usury. The appellant denied usury and

cross-complained for judgment. As previously stated, the Chancery Court held the contract to be usurious; and this appeal ensued.

I. *Contract Date For Payment No. 4.* In approaching the usury question it is essential to know the contract payment date. Appellee says that the payment No. 4 was due October 1, 1959; and appellant says it was due December 1, 1959. We have examined the original contract, as also did the Trial Court; and clearly one date has been superimposed over the other: that is, "Oct." was written in ink and over it there has been placed "Dec."; or *vice versa.* There is testimony that the final payment was not to be more than two years after the purchase date (October 4, 1957) because the insurance coverage was only for two years,[1] which would have expired in October 1959. Because of such evidence, and other in the record, it is clear that a question of fact was made as to when the fourth payment was due; and we cannot say that the Trial Court was in error in holding that the fourth payment was due October 1, 1959 and that the change of the contract was from October to December.

II. *The Alleged Mistake.* On March 22, 1958 appellant wrote appellee a letter admitting an overcharge of $40.11. The germane portion of the letter reads:

"We would like to call to your attention that the first note on the above account will be due April 1, 1958. The first installment was $419.74 however, there was an overcharge on the *insurance* of *$40.11* which leaves a balance of $379.63 due April 1." (Emphasis supplied.)

Another letter from the appellant to the appellee said the overcharge was in the finance charge. That letter read:

"We have rechecked the *finance charges* on your 1956 Chevrolet and have found that you were overcharged $40.11 on the account. We are crediting your account with $40.11 and you may deduct this amount

[1] The bail bond was for two years from October 4, 1957; and the life insurance was to expire October 4, 1959.

from your first instalment which will be due April 1, 1958." (Emphasis supplied.)

If the overcharge of $40.11 was in insurance, then the time price differential (another way of saying interest) would still remain at $234.84; and if the overcharge of $40.11 was in the finance charge, then the interest would be $194.73. It must be borne in mind that the appellant calculated all insurance charges and all interest charges, and never furnished the appellee any itemization. The salesman who sold the car to the appellee testified that he (salesman) did not know how to figure the charges and called appellant's office and obtained the figures. Appellant's witness substantiated such testimony but was unable to satisfactorily explain why one letter to appellee said "insurance" and the other letter said "finance charges". In such confusion of testimony by appellant's own witness, we cannot say that the Trial Court was in error in treating the overcharge as insurance, since no detailed itemization was furnished as to what was insurance and what was interest. *Jones* v. *Jones,* 227 Ark. 836, 301 S. W. 2d 737.

III. *Calculation.* When we come to the matter of calculation, it makes very little difference whether the $40.11 be treated as a credit on interest or a credit on insurance, because the testimony shows that, even with the $40.11 credited to interest, the contract still remains usurious. Plaintiff called an accountant, who submitted detailed figures to substantiate his testimony that, even if the $40.11 was credited to interest, the contract would still be usurious by the amount of $1.83; and that if the $40.11 was credited to insurance, the usury would amount to $48.25. So, even under the appellant's own claim of an honest mistake, the contract was still usurious in fact. The appellant had a definite intention to charge a certain sum of money, which turns out to be usurious. *General Contract Purchase Corp.* v. *Duke,* 223 Ark. 938, 270 S. W. 2d 918.

Affirmed.

HARRIS, C. J., HOLT & WARD, JJ., dissent.

COUNTZ *v.* BOGGS.

5-1956

Opinion delivered November 2, 1959.

[redacted]

Phillip H. Loh and *Frank H. Cox,* for appellant.

Parker & Mobley, for appellee.

GEORGE ROSE SMITH, J. These two cases are companion election contests involving two local option elec-

tions held in Yell county on November 4, 1958. In the principal case, No. 5-1923, the wets challenge the result in the county-wide election, in which the vote was certified as having been against the manufacture and sale of intoxicants. In the second case, No. 5-1956, the wets present a similar challenge to the result in a township election held in Ward township. The circuit court, hearing the cases upon the pleadings and certain stipulations, dismissed both complaints upon the ground that the contestants had failed to state a cause of action.

In the county-wide contest the appellants assign four asserted errors in the trial court's conclusions of law. It is first insisted that the holding of a separate election in Ward township rendered the contemporaneous county-wide election void, because the Thorn Liquor Law provided that no election in any district or precinct of a county should be held on the same day as an election for the entire county. Ark. Stats. 1947, § 48-816. Assuming, without deciding, that this section of the Thorn act was not repealed by Initiated Act No. 1 of 1942, Ark. Stats., §§ 48-801 *et seq.,* as might be contended on the basis of our holdings in *Mondier* v. *Medlock,* 207 Ark. 790, 182 S. W. 2d 869, and *Winfrey* v. *Smith,* 209 Ark. 63, 189 S. W. 2d 615, we think the appellants' position to be clearly without merit. What the Thorn act prohibits is the precinct election, not the county-wide election. It follows that a violation of the statute might avoid the precinct election, but it could have no effect upon the validity of the county-wide election.

A second contention is that the county court was in error in ordering that the election be held on November 4, the date of the general election. It is insisted that the 1942 initiated measure requires that the election be held not less than twenty nor more than thirty days after the county court determines the petitions to be sufficient, Ark. Stats., § 48-801; and in this case that determination was made on August 29, 1958. The answer to this contention is that this particular provision of the 1942 initiated measure has been superseded

by Act 15 of 1955, Ark. Stats., § 48-824, which directs that local option elections be held only on general election days. The county court was therefore correct in fixing the date of this election, since the court's discretionary authority in the matter has been withdrawn.

The appellants' third grievance is that the county election commissioners' failed to recount the votes, even though the contestants requested a recount in accordance with Ark. Stats., § 48-802. On this point we agree with the circuit court's view, that the contestants' remedy was by an action for mandamus against the county election commissioners and that the absence of a recount is not a ground for contesting the election in the present proceeding.

The appellants' final point in the principal case is that the court erred in holding that the complaint did not state a cause of action. The complaint alleges that several named advocates of prohibition unlawfully electioneered at certain polling places on election day, that only two judges and no clerks were on duty in one precinct during the morning hours, that the first twenty-five ballots in one box were not numbered, and that the judges and clerks did not properly deliver the ballot boxes or properly certify the results of the election. The complaint does not charge that any specified voter was wrongfully influenced, nor does it attempt to explain just how the asserted irregularities redounded to the benefit of the drys. General statements of this kind do not state a cause of action. *Craig* v. *Barron*, 225 Ark. 433, 283 S. W. 2d 127.

In the companion case, No. 5-1956, the appellants complain of the fact that the county court did not declare the result of the election until the twenty-first day after it was held, though the statute requires the court to act within twenty days. Ark. Stats., § 48-802. The winning side, in this case the drys, might be aggrieved by the county court's failure to promptly declare the result of the election; but we fail to see how these appellants have been prejudiced, and in any event we are firmly of the view that the county court could not de-

feat the will of the voters by neglecting to declare the result.

The appellants also ask us to determine whether their petition to contest the election was filed prematurely, but such a holding would not result in a reversal of the judgment, and we therefore decline to pass upon the question, the issue being merely academic. *Hogan* v. *Bright,* 214 Ark. 691, 218 S. W. 2d 80.

Affirmed.

GLOVER *v.* HENRY.

5-2020 328 S. W. 2d 382

Opinion delivered November 2, 1959.

Warren & Bullion, for appellant.

Frank Holt, Prosecuting Attorney, *Bruce Bennett,* Atty. General, *Howard Cockrill, Herschel H. Friday, Jr.,* for appellee.

George Rose Smith, J. This is a suit by the appellant, as a taxpayer and school teacher, for a declaratory judgment fixing the interpretation to be placed upon two recent statutes affecting the public schools, Act 248 of 1959 and Act 9 of the 1958 special session. The appellees, the members of the County Board of Election Commissioners and of the Little Rock School Board, reduced the issues to questions of law by demurring to the complaint. The chancellor entered a decree construing both statutes in a manner contrary to the plaintiff's contentions, and she has appealed.

The controversy as to Act 248 may be disposed of in two paragraphs. The title states that this act is to require that the annual school election be held on the last Saturday in September, but the body of the act provides that the election is to be held on the first Tuesday in December. The legislative journals show that the conflict arose in this way: The act was introduced as a Senate bill to change the election date to the last Saturday in September. Senate Journal of 1959, p. 70. The House, without changing the title, amended the text of the bill to fix the date as the first Tuesday in December. House Journal, p. 868. The Senate concurred in the amendment, Senate Journal, p. 1667, and thus the bill as approved by both houses contained the variance between title and text.

The appellant contends that this conflict renders the act void and hence leaves the election date to be determined by prior laws. The chancellor was right in rejecting this contention. The title of an act may be considered in arriving at the legislative intention, but the title "is still no part of the act and is not controlling in its construction." *Special School Dist. No. 33* v. *Howard,* 124 Ark. 475, 187 S. W. 444. We have accordingly held, in a case closely similar to this one, that

it is necessary to disregard words in the title which the legislature neglected to change when the corresponding language in the body of the measure was deleted by amendment. *Morgan* v. *Hattendorf,* 210 Ark. 495, 197 S. W. 2d 477. That principle is controlling in the case at bar; the chancellor's construction of Act 248 is therefore affirmed.

The remaining issues arise under Act 9 of the 1958 special session. The parties have not questioned the constitutionality of this act, and ordinarily we would not consider that issue, in view of the familiar rule that points not properly raised are deemed to have been waived. *Campbell* v. *Beaver Bayou Dr. Dist.,* 215 Ark. 187, 219 S. W. 2d 934; *Latham* v. *Hudson,* 226 Ark. 673, 292 S. W. 2d 252. Here, however, the appellant in her capacity as a taxpayer represents the general public, and we have recognized the fact that persons acting in a representative capacity do not have an unlimited right to control the litigation, as is normally true in purely private cases. *Pafford* v. *Hall,* 217 Ark. 734, 233 S. W. 2d 72. Since the validity of Act 9 is undoubtedly a matter of public interest we deem it better to express our view on this point than to leave this important question open to doubt.

Act 9 establishes a procedure for the recall of school directors and provides in § 8 that vacancies created under the act are to be filled by the county board of education. The constitutional question is whether the vesting of the appointive power in the county board of education rather than in the governor violates this language in constitutional amendment No. 29: "Vacancies in the office of United States Senator, and in all elective state, district, circuit, county, and township offices except those of Lieutenant Governor, Member of the General Assembly and Representative in Congress of the United States, shall be filled by appointment by the Governor."

The difficulty is that of determining the scope of the word "district" in the enumeration of elective officers. It is obvious that the word was intended to refer

to the offices of prosecuting attorney and chancellor, for their districts fall between the state and the county in geographical area, and the word district is so placed in the enumeration. The question is whether the term "district" was chosen not only as a means of referring to prosecuting attorneys and chancellors but also as a means of referring to school directors, who are elected by school districts.

Our study of the amendment convinces us that there can be no reasonable doubt of the fact that school directors do not come within the scope of the amendment. No less than three pertinent considerations point compellingly to this conclusion.

First, a familiar and sensible rule of constitutional interpretation requires that the word district be read in the light of its context. The amendment refers to all elective state, district, circuit, county, and township offices. This enumeration, extending from the state constitutional officers down to the township justice of the peace, encompasses those public officers who are mentioned elsewhere in the constitution and who exercise in some measure the state's governmental powers. The office of school director does not fit at all harmoniously into the enumeration. This office is not a part of the constitutional scheme. It is a subordinate administrative position, created by statute only, and exercises only the limited powers possessed by the school district. See *Schmutz* v. *Special Sch. Dist. of Little Rock,* 78 Ark. 118, 95 S. W. 438. It is not reasonable to suppose that the word district was selected for the purpose of bringing into the enumeration an office that differs sharply from all the others listed.

Secondly, § 4 of Amendment 29 contemplates that the successors to the governor's appointees will be elected at the general election and will take office on the following January first. The constitution has always provided that elective state, district, circuit, county, and township officers be elected at the general election, Schedule, § 3, and Art. 3, § 8; so Amendment 29 creates a workable plan for filling vacancies in these offices.

On the other hand, school directors have never been elected at the general election. From 1875 to 1931 they were selected at an annual meeting of the patrons of the district, held on the third Saturday in May. C. & M. Dig., § 8909. By Act 169 of 1931, § 81, the date was changed to the first Tuesday in March, and by Act 30 of 1935, § 3, which was in force when Amendment 29 was adopted, the school election date was fixed as the third Saturday in March. It is wholly impossible to apply the provisions of § 4 of Amendment 29 to the office of school director, owing to the fact that the school board members are not selected at the general election.

Thirdly, in construing a constitutional amendment it is helpful to determine what changes the amendment was intended to make in the existing law. *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470. Amendment 29 provides that the governor shall fill vacancies in the office of United States senator and in all elective state, district, circuit, county, and township offices except lieutenant governor, member of the legislature, and member of Congress. It is significant that these provisions made no substantial change in the law as it already existed, for the governor had the power to fill vacancies in the office of United States senator (Pope's Dig., § 11807) and in the designated elective offices (Const., Art. 6, § 23) with the exception of the lieutenant governor (Amendment 6, § 5), member of the legislature (Const., Art. 5, § 6), and member of Congress (Pope's Dig., § 4676). Thus the purpose of Amendment 29 was not to create a new appointive power in the chief executive; it was to reaffirm the existing law as a basis for the operation of the other provisions in the amendment. Vacancies upon school boards were not filled by the governor when the amendment was adopted, Pope's Dig. § 11524, and we find it impossible to believe that the word district was inserted in the amendment for the purpose of creating a new power of appointment pertaining to school directors only. Had that been the intention of the draftsman he could easily have inserted the phrase "school district" in the enumeration, be-

tween county and township. The absence of any such reference to school districts convinces us that they were not meant to come within the scope of the amendment.

Turning from the constitutional question the other issue is that of determining whether, under Act 9, a person appointed to succeed a recalled school board member serves (*a*) for the entire unexpired term of the recalled member or (*b*) only until the next regular annual school election. The chancellor adopted the latter view.

The pertinent facts are recited in the complaint and admitted by the demurrer. In the spring of 1959 three of the six members of the Little Rock School Board were recalled at a special election conducted under the provisions of Act 9. In accordance with the act Mackey was appointed to succeed one recalled member, Rowland, whose term would have expired in 1959; McDonald was appointed to succeed another recalled member, Laster, whose term would have expired in 1960; and Cottrell was appointed to succeed the third recalled member, McKinley, whose term would have expired in 1961. Upon the first branch of this case we have already held that a school election must be held on the first Tuesday in December of 1959. It is conceded that a successor to Mackey must be chosen at that election, for the unexpired term being filled by Mackey expires in 1959. The disputed question is whether the other two appointees are to remain in office until the expiration of their predecessors' terms or only until the positions can be filled by popular vote at the annual school election. The answer to this question must be found in the provisions of Act 9.

This act (with a minor amendment contained in Act 19 of 1959) is the only statute having to do with the recall of school board members. The first six sections of the act establish a procedure by which the electors of any school district may petition for an election to determine whether one or more school board members are to be recalled by majority vote. The act provides for the appointment of persons to succeed recalled board mem-

bers, but it contains no explicit language governing the duration of the appointee's term of office. The solution to that inquiry must be discovered in these three sections of the act:

"Section 7. In the event that a majority of the qualified electors voting at the election shall vote in favor of removing the subject school board member or members, a vacancy or vacancies are hereby declared to exist.

"Section 8. Vacancies occurring under the provisions of this act shall be filled by the County Board of Education. Not more than one election for recall shall be held under the provisions hereof in any one school year. Persons appointed to fill the vacancies hereunder may also be recalled under the provisions of this act.

"Section 9. All laws and parts of laws in conflict herewith are hereby repealed except Act 30, Ark. Acts of 1935, § 4 (Ark. Stats. (1947) § 80-504), pertaining to vacancies occurring other than under the terms of this act."

After studying the act carefully and long we are of the opinion that § 8 contains the only clear and reliable guide to the legislative intention. That is the only section in which the lawmakers turned their attention to the matter of filling vacancies created by a recall election. On that subject two pertinent, unequivocal declarations are made: First, not more than one recall election shall be held in any one school year. Secondly, persons appointed to fill vacancies arising under the act may also be recalled under its provisions.

It can be demonstrated with complete certainty that the second declaration becomes completely meaningless if an appointee is to serve only until the next annual school election. Since only one recall election can be held within a year, it follows that an appointee must serve for more than a year in order to be subject to recall, as the act declares him to be. But, if we adopt the appellees' contention that an appointee serves only

until the next annual school election, it would be impossible for any appointee ever to serve more than a year and thus be subject to recall, for an annual school election must always be held within a year after the first recall election. Hence the legislative assertion that appointees are subject to recall becomes mere surplusage under the appellees' construction of the act.

On the other hand, the provision is meaningful and effective if the view is taken that an appointed board member serves until the end of his predecessor's term. It is a familiar rule of law that we must, if possible, give effect to *all* the language that the legislature sees fit to insert in a statute. We are not at liberty to reduce any section or sentence to a nullity if some meaning and some effect can be given to the wording of the law. *Cypress Creek Dr. Dist.* v. *Wolfe,* 109 Ark. 60, 158 S. W. 960. Unless we are to strike out, arbitrarily, the legislature's explicit command that appointees are subject to recall under the terms of the act, there is no logical or defensible basis for saying that the lawmakers did not intend for such appointees to serve beyond the date of the next annual school election.

The appellees, tacitly conceding the force of the appellant's argument under § 8 of the act, suggest that a contrary legislative intention may be found in § 9. That section provides that all laws conflicting with Act 9 are repealed, with the exception of § 4 of Act 30 of 1935, "pertaining to vacancies occurring other than under the terms of this act." The cited section of the 1935 statute provides, with respect to school boards in general, that vacancies shall be filled by the remaining directors or, in certain cases, by the county judge, and that all directors so appointed shall serve only until the next annual school election.

We are unable to find, in the legislature's reference to the 1935 statute, any indication that its provisions were being embodied in the 1958 law; indeed, counsel frankly concede that this interpretation can be reached only if one strikes out some of the words in § 9 and substitutes others of his own choosing. No principle

of statutory construction calls for that action on our part. Section 9 of the act, as worded by the legislature, has a meaning not difficult to ascertain. The lawmakers evidently believed that the 1935 act should be expressly protected against the possibility of an implied repeal — a possibility that came about because Act 9 provided a new and different method for filling vacancies on the school board. But in preserving the older law the legislature took occasion to point out that it pertained "to vacancies occurring *other than* under the terms of" Act 9. To say that the 1935 statute applies to vacancies arising under Act 9 would be to proceed in the teeth of the lawmakers' express declaration to the contrary.

With respect to Act 9 the decree is reversed and the cause remanded with directions to overrule the appellees' demurrer.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. This case involves two separate and distinct points of law. The first point was obviously raised to divert attention from the second point which is the gravaman of this lawsuit. Certainly I agree with the majority opinion relative to point one.

Point two urged by appellant for reversal is as follows:

"The lower court erred in holding that persons appointed to serve on the school boards, to fill vacancies created as the result of recall, pursuant to Act 9 of 1958, Acts of Arkansas, were appointed to serve only until the next annual school election, at which time the unexpired terms of the recalled members would be filled."

The trial court adopted the view that under Act 9 a person appointed to succeed a recalled school board member serves only until the next regular annual school election, thereby sustaining the demurrer filed by appellees. I am convinced that the demurrer should

have been sustained but not for the reasons given by the Chancellor. We have said many times that we would not disturb a decree in Chancery if the results reached, even though based on incorrect reasons, corresponded with the result reached by us on trial *de novo*. *Martin* v. *Taylor,* 188 Ark. 114, 65 S. W. 2d 4. The Chancellor based his ruling on § 8 and an exception contained in § 9 of Act 9 of the 1958 Special Session of the Legislature. This dissent is based not on the terms of the Act but upon the crystal clear language of the Constitution of the State of Arkansas.

It is true that the constitutionality of Act 9 was not raised in the trial court nor was it argued in the briefs. In fact, appellees came very near confessing judgment in this case. The last time we were called upon to render a decision in a case involving a matter of such public interest, wherein it was obvious from the briefs that all parties to the lawsuit wanted the same result, we invited all attorneys in Arkansas, who were interested in the question involved, to file briefs *amici curiae.* See: *Andres* v. *First Arkansas Development Corp.,* ..... Ark. ....., 324 S. W. 2d 97. This same procedure should have been followed in this case. I am confident that had such procedure been followed, it would have been helpful in preventing the majority from interpreting the constitution according to their notion of what the constitution ought to say rather than what its language clearly provides.

I am acutely aware of the long standing rule that this Court will not pass upon a constitutional question unless necessary for disposition of the pending cause. *Dept. of Public Utilities* v. *Ark. La. Gas Co.,* 194 Ark. 354, 108 S. W. 2d 586. Certainly it is necessary to the disposition of this cause to rule on the constitutionality of Act 9 since § 8 of the Act is diametrically opposed to § 1 of Amendment 29 of the Constitution of the State of Arkansas.

Section 8 of Act 9 is as follows:

"Vacancies occurring under the provisions of this act shall be filled by the County Board of Education.

Not more than one election for recall shall be held under the provisions hereof in any one school year. Persons appointed to fill the vacancies hereunder may also be recalled under the provisions of this act."

Section 1 of Amendment 29 is as follows:

"Vacancies in the office of United States Senator, and in *all elective* state, *district*, circuit, county, and township offices except those of Lieutenant Governor, Member of the General Assembly and Representative in the Congress of the United States, shall be filled by appointment by the Governor." (Emphasis supplied).

It is obvious that these two sections cannot be reconciled. This being true, then the Constitution must prevail. The majority opinion contends that § 1 of Amendment 29 does not apply to school districts. My research reveals that Amendment 29 was initiated by the people and approved at the General Election November 8, 1938; that there was in existence at the time of the adoption of this Amendment an Act of the Legislature, Act 30 of 1935, which provided a method for filling all vacancies occurring on school boards contrary to Amendment 29; that the boards have consistently followed Act 30 since the adoption of this Amendment and that the method of selection has remained unchanged until the adoption of § 8 of Act 9 of 1958; that this Court has never had occasion to pass on the constitutionality of either of these acts until the appeal of the case at bar. Does the fact that school boards have ignored Amendment 29 exempt them from its application? My research fails to reveal one single precedent where this Court has held that an Act of the Legislature, which is clearly contrary to a constitutional provision, should be held valid simply because certain persons failed or refused to follow the law. It is unthinkable that the majority should now at this late date so hold.

What is a district? Webster defines the word "district" as a defined portion of the state. Can the majority say that a school district is not a defined portion of the State? C. J. S. Vol. 27, page 617 defines "dis-

trict" as follows: "In its ordinary meaning the word is commonly and properly used to designate any one of the various divisions or subdivisions into which the State is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, *school,* or road district, depending always on the connection in which it is used . . ." (Emphasis supplied). Can the majority say that a school district is not a political subdivision of the state which enjoys the privileges and immunities as such? Every other Supreme Court in the United States that has ruled on this question, that I have been able to find, says that a school district is a political subdivision of the State. See: Vol. 26, Sec. II B, Key 21, page 1340, Sixth Decennial Digest. The Supreme Court of New York in *Nassau County* v. *Lincer,* 165 Misc. 909, 3 N.Y. S. 2d 327, page 334, said that: "School districts are, like counties, governmental subdivisions of the state, though their governmental function is confined to education." The Supreme Court of Florida in *State* v. *Special Tax School District No. 5 of Dade County,* 144 So. 356, held that where a constitutional amendment authorized issuance of refunding bonds by *counties, municipalities,* and *districts,* the word "district" included school districts. The Supreme Court of Nebraska in *State ex rel Gordon* v. *Moores et al.,* 96 N. W. 1011, in interpreting the following language in their constitution, "all state, district, county, precinct, and township officers, by the Constitution or laws made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid," had this to say: "It would seem that the word 'district' as used in the Constitution in reference to general elections, must refer as well to districts created by the Legislature as those provided for in the Constitution, because it excepts specially 'school district officers,' thus mentioning a district that must be created by the Legislature, *but which would be included in the requirement unless so specially excepted.*" (Emphasis supplied).

Unlike the Nebraska Constitution, our Constitution does not except school districts. There are, however, other exceptions in the amendment and it is reasonable to believe that if the people had meant to make further exceptions they would have done so. The majority opinion, in effect, says that because of the sequence in which the word "district" appears in the amendment that its meaning changes according to the position it holds in the same sentence.

I have been unable to find one single opinion in the history of recorded cases from any jurisdiction so holding, nor was the majority able to supply one. All of the decisions are to the contrary. See: *State ex rel Gordon* v. *Moores et al, supra.* It is a well settled rule of construction that where words or a group of words have received a judicial interpretation, it is presumed that they are used in the light of the interpretation placed upon them. *Glover* v. *Hot Springs Kennel Club,* 230 Ark. ....., 323 S. W. 2d 902.

The majority says that a school district office is not a part of the constitutional scheme. Obviously they must have overlooked Amendment 40 to the Constitution, and as to school districts Art. 14, § 3, and Amendment 11. In fact, the office is so much a part of the constitutional scheme that the framers of the Constitution found it necessary to add a special constitutional provision, Art. 19, § 26, allowing them to hold executive or judicial offices at the same time they were holding a public school office. To the majority, the office of school director may be merely a subordinate administrative position, but to me they hold one of the most important positions in government. Not only do we place under their supervision our most treasured possession (our children) but we entrust them with the expenditure of more public money than is expended by any other political subdivision of the State. I will admit that school districts are created by statute, however, it must be admitted by the majority that the districts of the two offices they contend Amendment 29 applies to are also created by statute.

Let's assume that the Legislature had made the office of Commissioner of Education an elective state office, the same to be filled at the following school election. John Doe was elected. Two months after assuming office he dies. Would the majority say that the vacancy could not be filled by the Governor under Amendment 29? The amendment says: "all elective state, district, circuit, county, and township offices . . ." *Not* all elective state, district, circuit, county, and township offices *created by the Constitution.* Since prosecuting attorneys and chancellors are paid by the State and participate in the State Retirement Act, it seems to me much more logical to say that the offices of prosecuting attorney and chancellor are state offices and not district offices than it is to say that a school director is not a district office.

It is true that § 4 of Amendment 29 contemplates that the successors to the Governor's appointees will be elected at the general election and will take office on the following January first. Point one of the present opinion with which I agree affirms the date of the annual school election to be on the first Tuesday in December. Section 80-505, which was Act 30 of 1935, provides:

"Each school director elected or appointed shall, within ten (10) days after receiving notice of his election or appointment subscribe to the following oath * * *

"The County Clerk upon receipt of oath prescribed for school director, shall immediately commission such persons and they shall enter at once upon their duties as school directors."

From the date of the election, the time required for the certification of the votes, the sending and receiving of the notice of election, the preparation and filing of the oath, and the preparation and delivery of the commission, could easily consume a great part of one month. If it should not, the greatest span of time possible between the election and assuming office under

the above statute would be less than 30 days. The majority is grabbing at straws when it cites this as an excuse for not yielding to the clear terms of the Constitution; particularly is this true since the variance in the time of assuming office would only occur in cases of elections following the filling of vacancies by appointment. The same variance of time, for example, would occur in an election following the appointment of a Secretary of State, State Auditor, State Treasurer, or Attorney General, since neither of them assume office on January 1st. Certainly the Constitution must prevail.

The majority says that "The Constitution has always provided that elective state, district, circuit, county, and township officers be elected at the general election and cites Schedule, § 3, Art. 3, § 8, as authority for such statement. Schedule, § 3, says absolutely nothing about general elections and Art. 3, § 8, simply gives the Legislature the authority to fix the time of general elections. The Legislature has exercised this authority many times. It has set some general elections on odd number of years. See: *Laster* v. *Pruniski,* 228 Ark. 132, 306 S. W. 2d 123; some on even number of years. See § 3-802, Ark. Stats.; and some, such as school elections, every year. A general election is one that regularly recurs in each election precinct of the state on a day designated by law. *Bethune* v. *Funk,* 166 P. 931, 85 Ore. 246. Since school elections under Ark. Stats. regularly recur in each election precinct of this state on a day designated by law, the annual school election is a general election.

I agree with the majority when they say that "in construing a constitutional amendment it is helpful to determine what changes the amendment was intended to make in the existing law. *Bradley* v. *Hall,* 220 Ark. 925, 251 S. W. 2d 470." However, I sharply disagree with them when they say, in effect, that no changes were made; that Amendment 29 was passed simply to reaffirm powers that the Governor already possessed in order that other powers he possessed might be changed a bit. If the majority view is correct in this matter,

then there was no need for the greater portion of Amendment 29. Having personally sponsored two proposed constitutional amendments by initiative petitions, as Amendment 29 was sponsored, I find it hard to believe that the people who circulated the petitions to get it on the ballot were working just for the exercise. From what I have said above, the only rational conclusion that I can reach is that a school board member under Arkansas law is an elected district officer within the clear terms of § 1 of Amendment 29.

Act 9 has a separability clause, construing it liberally as we must in favor of effectuating its purpose. It is our duty to strike the invalid portions of the Act and allow the other portions to stand. *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183. Therefore, I would hold that Section 8 of Act 9 of 1958 is unconstitutional and must fall in its entirety; that the exception in § 9 relative to Act 30, Ark. Acts of 1935, must fall because of its unconstitutionality. Following this action I would declare that the remaining portions of Act 9 of 1958 are valid and constitutional. The balance of this Act would be far from meaningless since § 4 of Amendment 29 would supply the machinery to make the application of the remaining portions of the Act complete and whole.

Section 4 of Amendment 29 is as follows:

"The appointee shall serve during the entire unexpired term in the office in which the vacancy occurs if such office would in regular course be filled at the next General Election if no vacancy had occurred. If such office would not in regular course be filled at such next general election the vacancy shall be filled as follows: At the next General Election, if the vacancy occurs four months or more prior thereto, and at the second General Election after the vacancy occurs if the vacancy occurs less than four months before the next General Election after it occurs. The person so elected shall take office on the 1st day of January following his election."

In construing § 4 of Amendment 29 relative to the case at bar, I would declare that the 1st Tuesday in December is the date of the next General School Election. See: *Laster* v. *Pruniski, supra.*

I would further declare that the present appointees serving on the Little Rock School Board are *de facto* officers serving only until replaced by valid appointees of the Governor; that since the span of time between such gubernatorial appointment and the next General School Election would be less than four months, such appointees, except the one filling the position the term of which expires this year, would serve until the second General School Election following their appointment.

In addition to the fact that I am convinced that appellant is not a proper party in interest to bring this action under our declaratory judgment statutes,[1] which point *also* was not argued by appellee, I respectfully dissent.

[1] See *Micklish* v. *Grand Lodge of the Loyal Star,* 162 Ark. 71, 87 A.L.R. 1243.

FARMERS UNION MUTUAL INSURANCE CO. *v.* BLANKENSHIP.

5-1931 328 S. W. 2d 360

Opinion delivered November 2, 1959.

Charles A. Wade, for appellant.

Arnold & Hamilton, for appellee.

PAUL WARD, Associate Justice. We are here dealing primarily with the interpretation of certain language contained in a fire insurance policy.

Appellee, W. R. Blankenship, d/b/a Ashley County Saw Company, had for several years been engaged in the business of retailing chain saws and allied merchandise in Crossett, when on or about September 11, 1957, numerous articles of his merchandise were damaged allegedly as a result of a fire originating in his place of business. The merchandise was covered by a fire insurance policy insured by appellant, Farmers Union Mutual Insurance Company, which policy was in full force and effect at the time.

When appellant refused to pay the amount of damages demanded by appellee, suit was filed which resulted in a verdict and judgment in favor of appellee in the amount of $2,500.00 which was approximately $800.00 less than the amount sued for.

In seeking a reversal appellant sets forth four points, one point is not argued and the others can be adequately considered under two subdivisions, namely; One, the trial court erred in refusing to direct a verdict, and Two, there is no substantial evidence to support the full amount of the judgment. These assignments will now be discussed in the above order.

One. Appellant's motion for an instructed verdict is based upon the following factual situation. The policy insured against all "DIRECT LOSS AND DAMAGE BY FIRE". The proof shows that the saws and allied articles were not damaged by coming in contact with the flames but that they were damaged by a gaseous vapor caused by using a fire extinguisher in an effort to put out the fire, the vapor causing precision parts to corrode and deteriorate. Appellant makes no contention that the fire extinguisher was improperly designed or improperly used, but it does contend that the

above quoted language in the policy excludes loss or damage caused in the above manner.

Much stress is placed by appellant upon the word "DIRECT" found in the above quotation. Consequently, it is contended by appellant that the damage or loss under the above circumstances was not the *direct* result of the fire. Appellant appears to be correct in stating that the wording of this policy is different from the wording in the usual policy, and that this court has never had occasion to construe the phraseology used here.

Our investigation of the authorities from other jurisdictions drives us to conclude that appellant is liable under the provisions of its policy since the fire in this instance was the proximate cause of the loss or damage. In the case of *Princess Garment Company* v. *Firemans Fund Insurance Company of San Francisco,* 115 F. 2d 380, a policy was under consideration which insured "against all direct loss or damage by fire . . ." In that case the fire started some five hundred yards away and was spreading toward the insured's building. At the same time rising flood waters were threatening contents stored in the insured's building and apparently they could have been saved from the water had the fire chief not ordered all men out of the building preparatory to destroying it in an effort to prevent the fire from spreading. Damages under the policy were denied by the trial court. In reversing the trial court the Appellate Court, after stating the general rules relative to proximate cause, stated: "Applying the rule that the phrase 'all direct loss or damage by fire . . .' is not restricted to fire on the premises and that a loss would be held to be within such policies where a fire was a means or agency in causing it, we are of the opinion that there is substantial evidence in the record that the proximate cause of the loss complained of was the fire in question". In *O'Connor* v. *Queen Insurance Company of America,* 140 Wis. 388, 122 N. W. 1038, the insured lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not supposed

to be used which caused intense heat and great volumes of smoke to escape into the several rooms and greatly damaged insured's property. The policy in force insured "against direct loss and damage by fire". The Supreme Court after reviewing numerous authorities relative to policies containing the phrase "direct loss or damage by fire" defined said words to "mean loss or damage occurring directly from fire as the destroying agency in contradistinction of remoteness of fire as such agency". In the same connection the court stated that "to render a fire the immediate or proximate cause of loss or damage it is not necessary that any part of the insured's property actually ignited or was consumed by the fire". For other decisions to this same effect see *Board of Commissioners, etc.* v. *Norwich Union Fire Insurance Society,* 51 F. Supp. 245; *California Insurance Company* v. *Union Compress Company,* 133 U. S. 387; see also Cyclopedia of Insurance Law (Couch) Vol. 6, Page 5304, § 1467 and Insurance Law and Practice (Appleman) Vol. 5, Page 219, § 3083.

In addition to what we have heretofore said we think it is clear from other provisions in appellant's insurance policy that appellee is entitled to recover in this instance for a loss occurring in the manner heretofore stated. The policy, under Standard Provisions, states: "This company shall not be liable for loss or damage caused directly or indirectly . . . by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire on neighboring premises". Under the above provisions of the policy it seems that appellee in this instance would have faced a dilemma when the fire broke out in his building, for if he had failed to try to extinguish the fire and protect his property then appellant would not have been liable. Since, however, appellee did attempt to extinguish the fire and save his property it would seem unjust if appellant should escape liability.

Two. We do not agree with appellant that there is no substantial evidence to support the amount of the verdict and judgment. In order to substantiate the amount of his damage appellee introduced the following testimony. Witness Bob Fallin who was an employee of the company from which appellee purchased his saws and accessories and who stated that, by virtue of his employment, he was "familiar with chain saws and chain saw parts", stated that he received a request from appellee to visit his shop and review the results of the fire. On the witness stand he was shown five sheets of paper which he identified as being a list of the parts which he examined and initialed. He then stated that he examined each piece shown on the inventory and stated that the iron and steel parts were rusted; that the magnesium parts were corroded or coated and that in each case it was not a surface condition but rather one that actually deteriorated the article involved.

"Q. In your opinion, were those parts suitable for resale?

A. No, sir, they were not."

The total damage as set forth in the inventory or list amounted to $2,528.03. Similar testimony was offered by Bill Womack who was a chemical engineer and by Robert S. Williams who was a field representative for the Poulan Chain Saw Company which furnished saws to appellee. None of the testimony offered by appellee's witnesses was objected to, and each witness was fully cross-examined by appellant. It is true that there was other testimony tending to show less damage than that claimed by appellee but that is a situation which presents a jury question.

Under these circumstances we must conclude that there was substantial evidence to support the jury's verdict and the judgment of the trial court is accordingly affirmed.

Affirmed.

FLETCHER *v.* JOHNSON.

5-1943 328 S. W. 2d 373

Opinion delivered November 2, 1959.

[Rehearing denied November 23, 1959]

J. H. Spears and *Ralph W. Sloan,* for appellant.

Hale & Fogleman, for appellee.

PAUL WARD, Associate Justice. On September 22, 1957, a large trailer truck allegedly belonging to one Hollis Fletcher and being driven at the time by Henry Atkins, Jr., collided with an automobile occupied by W. H. Johnson, his wife, Consada, and their minor daughter, Carolyn. The collision took place near the city of West Memphis on Highway 63. It is alleged that the occupants of the automobile were injured and that the automobile was damaged as a result of the collision.

At a trial held on December 4, 1958, the jury returned a verdict in favor of Mr. Johnson in the amount of $750.00 for damages to the automobile and $10,000.00 for personal injuries, a verdict in favor of Mrs. Johnson in the amount of $15,000.00 for personal injuries, and a verdict in the amount of $2,000.00 in favor of their minor child (Carolyn). Judgment was entered accordingly.

Upon appeal to this court appellant, Fletcher, abstracts no instructions and complains of none except one as hereinafter set out, but he does seek a reversal on five separate assignments of alleged error. These allegations of error are substantially as follows: Point one, the judgments are excessive; Point Two, the court should have declared a mistrial; Point Three, there was no valid service; Point Four, the court erred in allowing appellees to amend their complaint; and Point Five, the court erred in giving appellees' requested Instruction No. 3.

Before proceeding to the discussion of the points above mentioned, it is in order to make a brief explanation of one phase of this appeal about which there is

considerable discussion by both sides. In the original complaint filed by appellees on October 14, 1958, it was alleged that the vehicle of the defendant (Fletcher) was responsible for the resulting damages. On the same day a summons was issued against Fletcher and, on November 3, 1958, Fletcher filed an answer in which, among other things, he specifically denied all allegations of negligence and in addition thereto pleaded contributory negligence. On November 15, 1958, Fletcher filed an amendment to his answer in which he denied "that he is individually the owner of the truck described in plaintiff's complaint". During the trial testimony was produced to the effect that Fletcher was not the owner of the truck individually but that it belonged to a partnership composed of himself and two other people, namely, Henry Sciambra and Leo Bondi. Thereupon appellees asked to have the complaint amended to conform with the proof and the court gave them permission to do so. It appears from the record, however, that this amendment was not considered as adopted because no instruction was requested or given referring to Sciambra or Bondi, and judgment was rendered against Fletcher only. The notice of appeal to this court was given by the partnership. It is our conclusion that Sciambra and Bondi were never actually made parties to this action, and consequently in our further discussion of the case we treat it as an action against Fletcher only.

Point One. On this appeal appellant asks us to resolve a very difficult issue — an issue which has been before this court many times and about which there is usually a great deal of uncertainty. That is, he has asked this court to reduce the amount of the jury verdict. After a great deal of deliberation we have concluded that the judgments must be affirmed. The evidence relative to the verdicts in favor of each of the appellees will now be discussed in some detail after first making a preliminary statement. Appellant does not question the judgment of $750.00 for the damages to the automobile.

At the time of the accident on September 22, 1957, none of the appellees appeared at that time to be seriously injured, although it is shown that Mrs. Johnson did go to the drug store and secure a sedative. There were no outward signs of injuries to any of the appellees at the time of the accident nor were any shown to exist thereafter. After appellees had stayed at the scene of the accident for something like an hour or an hour and a half while an investigation was being made they continued their journey to Memphis where they had lunch and then drove to the Tri-State Fair. They remained there until rather late in the afternoon and then drove to their home that evening a distance of several miles. Apparently no one of the appellees thought it necessary to go that day to see a doctor. It also appears from the record that although each of the appellees was examined from one to two or three times no doctor seemed to think it was necessary to prescribe any kind of treatment except in the case of Mrs. Johnson.

Mr. Johnson. Mr. Johnson's testimony in substance was as follows: Soon after the accident his neck was somewhat stiff and stayed that way for six or eight weeks — he had some trouble in moving his head sideways but could move it up and down, and his arm and back gave him considerable trouble. He had had trouble with his back some years before the accident happened, and for this he had worn a brace but had not worn it for several months prior to the accident — he runs a service station and used to be able to change tires but is not able to do so now. Since the accident he has continued to operate his business but has employed one extra boy. He has more pain now than he had before the accident. He is unable to do heavy lifting around the station.

Dr. Gernstetter examined Mr. Johnson on May 13, 1958, but did not treat him; he stated that Mr. Johnson wanted to be examined because of symptoms complained of and that he made a general medical examination primarily of bones, joints, extremities and a

neurological examination of nerves and made X-Rays of his neck, cervical spine and lumbar region; the X-Rays showed developmental deformities with large bony processes in the sacrum. He stated that Johnson complained of pains in his neck which were relieved by turning and twisting his neck until he could make it pop; that Johnson had pains in his right leg prior to the accident but thought they were intensified since the accident; that Johnson had several years previously been given treatment and that he wore a metal brace. In the opinion of the doctor there was a good chance of spontaneous recovery of symptoms of his neck within a year after the injury but there was a chance that he would have some symptoms indefinitely from the neck injury.

Mr. Johnson was also examined by appellant's witness, Dr. Nicholas Gotten. Among other things he testified that Johnson told him that his ability to work was impaired; that it was his opinion that Johnson sustained a cervical neck strain but was making a good recovery except for the subjective symptoms which he manifested, that he was complaining of soreness in his neck, and he did not think any active treatment was indicated but thought he could continue to work. The doctor stated that it was difficult to give an opinion regarding his back injury because of the back trouble he had had previously.

The doctor's prognosis was that Johnson's condition was "more or less stabilized, that no treatment for his injury was indicated" and further stated "I think he will continue to improve in the future and that he will make a complete recovery."

In view of the above and considering that he has been forced to hire extra help around his filling station and will have to hire extra help for his wife for an indefinite period, and considering further that he is entitled to something for the partial loss of the full companionship of his wife due to her injury, we cannot say there is no substantial testimony to support a judgment in his favor in the full amount.

The questions of the extent of injury and the renumeration therefor are traditionally within the province of the jury and, as we have frequently said previously, this court will not reduce the amount of a jury verdict unless it is so grossly excessive as to shock the conscience. We are unwilling to say it is so excessive in this instance.

As to Mrs. Johnson, we are not willing to say that the judgment for $15,000.00 in her favor is not supported by substantial evidence. Unlike Mr. Johnson she did indicate some injury immediately after the accident and stated that she was suffering pain that afternoon and that night and that she would have called a doctor when she got home but that it was too late and she did not want to disturb him. The following day she went to a doctor who gave her a sedative and told her to come back if she did not feel better in a few days. She got no better but got worse and went to Dr. Hopkins several times; Dr. Hopkins gave her medicine and put a brace on her neck to support her chin; she got very little relief and the pain began to get worse — she was really suffering; Dr. Hopkins suggested that she go to a hospital in Memphis where she stayed three days during which time she was put in traction; she bought traction equipment which she took home and wore it at night and most of the day; this treatment gave her some relief but she was still in terrible pain; later she went to see Dr. Gernstetter some fifteen or eighteen times; she is unable to do her ordinary housework and is bothered with the lack of balance; she gets staggery and sometimes she has to go to bed to keep from falling; at one time she fell on a coffee table and bruised her leg severely and at another time she fell on a stove and was burned — the scar is still on her left elbow. Dr. Gernstetter confirms her testimony regarding treatment; he made X-Rays which show persistence of forward and backward dislocation between the 4th and 5th vertebrae and in addition showed a degenerative lipping or mild spur formation from the anterior margin of the 5th and 6th vertebrae. His diagnosis was a strain with nerve root pressure caused by a whiplash; that the

nerve root pressure is responsible for headaches; his prognosis was that she is likely to continue to experience pain in the neck, headaches and dizziness and will continue to so suffer indefinitely and may become progressively worsened as time goes on. Dr. Nicholas Gotten, who also examined Mrs. Johnson, did not specifically contradict the foregoing testimony; his opinion was that she had sustained a cervical neck strain moderately severe and that she continued to have these symptoms as a result of injuries which he thought to be legitimate. Dr. Gotten further stated that from his examination of Mrs. Johnson he found that she had a limitation of motion in her neck which was in his opinion about 25%.

Carolyn. The testimony relative to Carolyn's injuries to sustain a judgment in her favor in the amount of $2,000.00 is not so convincing as it is in the case of Mrs. Johnson but we are unable to say that the judgment is not supported by substantial evidence. Carolyn is a girl about 14 years of age and is an accomplished piano player, obviously requiring considerable practice. It appears as a result of her injury she is not now able to continue her practice as she did formerly. According to her testimony it is painful for her to move her head in a forward motion. Dr. Gernstetter examined her on May 13, 1958, and made X-Rays of the bones in her neck and cervical spine and right shoulder. This shows evidence of a subluxation and instability between the 2nd, 3rd, 4th and 5th cervical vertebrae — or bones in the neck; the doctor also found limitation of full rotation of the right shoulder to the extent of about 15% and stated that she complained of pains in the right shoulder blade region and that they were aggravated when she attempted to practice at the piano.

Point Two. We find no merit in appellant's contention that the court should have declared a mistrial. When Mr. Johnson was testifying he stated that the police officer investigating the accident said that he would have to take the driver to town. Appellant feels that the above statement violates Ark. Stats. § 75-1011

which prohibits the introduction of evidence concerning a conviction. This, of course, was not evidence of a conviction — in fact there is no evidence that the driver of the truck was ever arrested. We agree with the trial court in this connection that there is no inference from this statement that any arrest was made and that the driver might have been taken into town to complete the report, to get a wrecker or to see a doctor. Moreover, the court asked counsel for appellant if he desired the jury to be instructed in any manner with reference to the above testimony and no such instruction was asked for. We are unable to see anything in this occurrence that would have justified a mistrial, and we think the trial court was correct in refusing one. Appellant also asked for a mistrial because an arrest report was found lying on the table occupied by appellees' attorneys during the trial. The inference sought to be left was that the jury might have seen this report and might have construed therefrom that the driver of the truck was actually arrested. We think any such inference, however, was completely overcome since it appears that the report was ten or twelve feet away from the nearest juror and was lying sideways to the jury or with the top of the report in the direction of the jury. In the latter instance the jury would have had to read it up side down. In the absence of anything showing that any one of the jurors actually saw or read any portion of the report we conclude that the trial court was amply justified in refusing to grant a mistrial.

Point Three. There is no merit in appellant's contention that Fletcher was not properly served. A summons was issued October 14, 1958, and a return was filed thereon four days later. On November 3, 1958, appellant filed a complete answer without having made any objection to the manner or method of service. It is well established by many of our opinions that an appearance is entered by the filing of an answer.

Point Four. It is insisted by appellant that the court erred in permitting appellees to amend their complaint to conform to the proof. This has reference to

the proof that Fletcher was only one of the three partners. As heretofore indicated the record does not show that the complaint was at any time amended, therefore, the court committed no error. For procedure necessary to take advantage of defect of parties see *Kane* v. *Coker-Dover Mercantile Co.,* 206 Ark. 674 (pages 676-677), 177 S. W. 2d 41.

Point Five. Finally, it is contended by appellant that the court erred in giving Plaintiff's Requested Instruction No. 3. It is not incumbent on the court to consider this an assignment of error for the reason that said instruction is not set forth in appellant's abstract. See *Griffin* v. *Missouri Pacific Railroad Company,* 227 Ark. 312 (at page 313), 298 S. W. 2d 55; and *Porter* v. *Times Stores, Inc.,* 227 Ark. 286 (at page 287), 298 S. W. 2d 51.

A search of the record, however, reveals that said Instruction No. 3 told the jury that **Hollis Fletcher** would be responsible for any negligence of Henry Atkins, Jr., if any. From the above it appears, of course, that said Instruction No. 3 was a proper declaration of the law, *i.e.,* the master is responsible for the negligence of the servant. See *Ward* v. *Young,* 42 Ark. 542 and *Hunter* v. *First National Bank of Morrilton,* 181 Ark. 907, 28 S. W. 2d 712.

Although the point is not specifically raised by appellant, we think that it is in order to consider whether there is substantial evidence in the record from which the jury could have found that Fletcher was the owner of the trailer truck. We find that such substantial evidence is shown by the record. It was shown that on the side of the truck appeared this sign: "Hollis Fletcher, 604 Clearview Drive". Henry Atkins, Jr., (the driver of the truck) testified:

"Q. Did you have a sign on the side of your tractor?

A. Yes, sir, I had a sign.

Q. What did it say?

A. It said 'Hollis Fletcher, 604 Clearview Drive'.

Q. Did Mr. Sanders look at your invoices, waybills, manifest?

A. No, sir.

Q. He didn't know where you had been?

A. He asked me where I had been.

Q. He asked you who you worked for?

A. Yes, sir.

Q. You told him Hollis Fletcher?

A. Yes, sir.

Q. Did you tell him Sciambra, Bondi and Fletcher?

A. No, sir, I didn't tell him that.

Q. But your boss is Mr. Hollis Fletcher, isn't it?

A. Yes, sir, he is boss."

It is true that testimony was introduced which tended to show that this truck might have belonged to a partnership but appellant in his testimony leaves that question in somewhat of a confused status. It shows that some of the trucks had the name of one partner on them and others had the name or names of still another partner on them but no explanation was given as to why this was true. It would place an unreasonable burden on appellees to require them to explore all of the ramifications of a partnership which was domiciled in another state in order to determine the exact status of each individual partner. Taking the record as a whole we find there is substantial evidence to support the jury's verdict against Fletcher.

In accordance with the above, the several judgments rendered by the trial court will be affirmed.

Affirmed.

ARK. POWER & LIGHT CO. *v.* ARK. PUBLIC SERVICE COMMISSION ET AL.

5-1940 330 S. W. 2d 51

Opinion delivered November 2, 1959.

[Rehearing denied January 11, 1960]

House, Holmes, Butler & Jewell, for appellant.

Tom Gentry, for appellee.

SAM ROBINSON, Associate Justice. The United States Government purchased several thousand acres in Pulaski County to be used as an Air Force Base. Prior to this purchase by the Government, the right to sell electricity in a portion of the area had been allocated to the First Electric Cooperative Corporation, hereinafter called the Co-op, and the right to sell electricity in the other portion had been allocated to the Arkansas Power & Light Company, hereinafter called the Power Company. After the Government acquired the land it required the Co-op and the Power

Company to remove all their electrical equipment of every kind and description from the area and paid them for doing so. Subsequently the Government constructed on the property an electrical distribution system that it owns and operates. In 1954 the Government contracted with the Power Company for the purchase by the Government of electricity to be used at the Air Base. The electricity is supplied by the Power Company at its substation located in an area previously allocated to it by the Public Service Commission and adjacent to the Air Base property.

In 1957 the Government began construction of several hundred housing units for Air Force personnel. Some of these houses are located in the area formerly supplied with electricity by the Co-op before the Air Base was established, and part were constructed in the area which had been supplied by the Power Company under the allotment made before acquisition of the land by the Government. The Government uses electricity obtained under a 1957 supplemental contract with the Power Company to supply all the housing units within the Air Base area.

This litigation was started when the Co-op filed a complaint with the Arkansas Public Service Commission asking that the Power Company be ordered to cease and desist from furnishing electric power to the Government to be used in supplying the Government housing units located in that part of the Air Force Base which had been serviced by the Co-op before acquisition of the property by the Government. Of course, the effect of such an order would be to enable the Co-op to supply electricity to the area mentioned. The Commission in effect granted the petition but attempted to simplify the matter by ordering the Power Company to meter separately the electricity going into that part of the housing units located on property formerly supplied by the Co-op and to settle with the Co-op by charging it at the rate it pays the Power Company for electricity and giving it credit for the price received from

the Government. A meter or meters would have to be installed on Government property and made a part of the Government distribution system. Such an arrangement would give the Co-op a handsome profit without any investment whatever on its part. It was shown that the Power Company has spent several hundred thousand dollars to enable it to supply electricity to the Air Base. The circuit court affirmed the order of the Commission.

The real question is whether the Public Service Commission has authority to force the Government to buy electricity from the Co-op, for such is the effect of the order. The Government wanted to construct in the area its own electrical distribution system. The Power Company and the Co-op were required to remove their equipment from the property. In contracting with the Power Company for electricity, the Government required the Company to provide certain facilities to guarantee as nearly as possible an uninterrupted supply of electricity. The Government then tied its facilities in to those constructed by the Power Company. It was shown that the Government initiated the negotiations with the Power Company to purchase electricity. A fair abstract of the testimony of Mr. H. F. Minnis, Vice-President of the Power Company, on this point, as prepared by appellant, is as follows:

"The negotiations first started on February 5, 1953 when the Corps of Engineers came to us about relocation or removal of our existing facilities in the Air Base area and the possible relocation of our 115 kv transmission line. That was all consummated by the Corps of Engineers, but later on February 25, 1953 Colonel Ben Harvey of the Corps of Engineers asked our Company for a conference with reference to a power supply. The government solicited us to furnish the power supply and set a tentative date for a conference on October 8, 1953. On that date we had a meeting and went into all requirements upon the power supply. In these negotiations the government laid down specifications as to

the material and kind of power it would need to serve the Air Base and the type of load it would be. They requested a source of power from our transmission system and that the sub-station be located adjacent to the Air Base property but not on it. They requested that the service be metered and the point of delivery be at the south boundary line of the Air Force property so that from that location the Air Force would build its entire distribution system to serve the requirements of the Air Base . . .

"We built a 115 kv transmission line adjacent to the south border of the Air Base property fed directly from our 115 kv transmission system, that is energized from two ways so that they could have continuous service so far as primary distribution voltage was concerned. In order to do that we built a new transmission line from Little Rock to Jacksonville completely shielded up to this sub-station site and put in an oil circuit breaker that would protect the rest of the line towards Newport so if there was a fault beyond Jacksonville to Newport it would not affect the Air Base. The contract was reduced to writing as to the electric service specifications in which the Government stated the amount of capacity and energy they wanted and the delivery voltage. The contract provides that the premises to be served is the Little Rock Air Force Base. The electric service specifications are on page 10 of the contract, showing 7,500 kilowatts estimated maximum demand and 32,400 kilowatts estimated annual consumption. It provides that the point of delivery of service should be at the Base boundary as shown on Exhibit D to the contract. Exhibit A to the contract, or the specifications of the sub-station we were required to furnish the government, consists of a schematic diagram which shows exactly how to build the station and shows the point of delivery and that the government would have as near a continuous source of supply as possible. From the point of delivery to the south boundary indicated on Exhibit A to the contract, the government built their entire distribution system to serve the whole Air Base.

On the map introduced in evidence the sub-station site is shown in Section 18 adjacent to the south boundary of the Base and is shown as a small green square south of the Air Base boundary. The 115 kv line is fed from two ends and originated at the Dixie substation at one end and the Newport sub-station at the other. We built an entirely new line from the Dixie sub-station to the Air Base. I don't know the exact cost of the construction, but I judge it is approximately ten miles and costs about $25,000 a mile so it is approximately $250,000. It is a heavy line, big conductor, completely shielded.

"Our sub-station was built according to government requirements, and the line was built according to government requirements set forth in the contract. The government gets transmission line connection at our sub-station right at the terminus of the new line which we built from the sub-station. On towards Newport the old line goes in and that is the reason they insisted we put an oil circuit breaker there so if there is a fault between the sub-station and Newport, it would not interrupt service to the Air Base. All of this was done to meet requirements of the United States. Cost of the sub-station was negotiated, and the government paid approximately three-fourths of it and the power company paid the other one-fourth less any salvage we might get if the government discontinues service. It resolves itself down into a connection charge of $85,860, and this is detailed in the contract.

"Under the terms of our agreement with the government they will get back the connection charge in electricity as we give them credit for ten per cent of the monthly billing until they recover their money. I am familiar with the government's distribution system within the Base and have been over it. From the point of delivery at our sub-station the government built two circuits of heavy conductors, about 500,000 circular mills aluminum to a switching station, which is about three-fourths of a mile northwest from the sub-station

in the Air Base. From there it goes into the switching station, and they installed three circuit breakers. From these circuit breakers go three different 13 kv lines that radiate out over all the Air Base property on which are installed air break switches which permit the government to sectionalize any part of these feeder circuits and operate them as a loop. Where they have a small lateral over one of these big feeder circuits they have installed fuse switches so if there is a fault on one of the small laterals it does not interfere with service from the main feeder and if there is a fault on the feeder circuit they can sectionalize it quickly and feed the rest of the area from the other circuits. To protect it from lightning, which is quite a problem, they shielded their feeder circuit just as we shielded our 115 kv line. Their whole grid system of distribution voltage, except for some laterals, which are not complete, is shielded. The government's entire system at the Air Base is what is ordinarily known as a loop system, and you can get service three ways from almost any portion of it. This was done to preserve the continuity of service as far as is possible."

Although it does not appear that the United States has acquired jurisdiction pursuant to Title 40, § 255, USCA in the circumstances of this case the Power Company cannot be prevented from selling electricity to the Government for use over the entire area of the Air Base. The Air Base is a facility established for a national purpose. In the case of *Public Utilities Commission of California* v. *U. S.*, 355 U. S. 534, 2 L. Ed. 2d 470, 78 S. Ct. 446, the principle was reiterated by the United States Supreme Court that state laws or their administrators cannot interfere with the carrying out of a national purpose. There the court held invalid a state statute authorizing the state commission to approve rates charged by common carriers to the United States as being an unlawful interference with the activities of the Federal Government. If a state cannot regulate the rates a utility charges the Federal Government, then it is hard to understand how the commis-

sion can enjoin the utility company from furnishing all the service the Government requires.

In 1958 an issue almost identical with the one in the case at bar was before the North Dakota Public Service Commission. *Re Souris River Telephone Mutual Aid Corp.,* 24 P. U. R. 3d 84. There the question was whether the public service commission should revoke a certificate of convenience and necessity theretofore granted to the Northwestern Bell Telephone Company and grant such a certificate to the Souris River Telephone Mutual Aid Corporation. The commission held that it had no authority to dictate to the Government as to the persons or corporations with which it should contract for utility facilities. In that case it was said: "The thing to be remembered is that the responsibility for this decision [the obtaining of utility facilities] is with the Secretary of the Air Force and no one else. If it was to be said that a company not having an established service area must obtain a certificate from the commission before it can enter into a contract with the secretary, then it follows that the commission would also have the power to deny the company such authority and thus directly interfere with the discretion vested by Congress in the federal officer. The federal statute does not require that the company with whom the secretary desires to contract also obtain a certificate of authority from a state commission and if Congress had intended such to be the case it would have so stated." The Commission was referring to USCA, Title 50, § 491, but Title 10, § 9773 is equally applicable. It provides: "The Secretary of the Air Force shall determine the sites of such additional permanent air bases and depots in all strategic areas of the United States and the Territories, Commonwealth, possessions, and holdings *as he considers necessary.* He shall also determine when the enlargement of existing air bases and depots is necessary and for the effective peacetime training of the Air Force. . . . At each Air Base or depot established under this section the Secretary shall remove or remodel existing structures as neces-

sary; do necessary grading; and provide buildings, *utilities,* communication systems, landing fields and mats, roads, walks, aprons, docks, runways, facilities for the storage and distribution of ammunition, fuel, oil, necessary protection against bombs, and all appurtenances to the foregoing. . . ." (Emphasis supplied)

In *Johnson* v. *Maryland,* 254 U. S. 51, 65 L. Ed. 126, 41 S. Ct. 16, Mr. Justice HOLMES quoted from *Osborn* v. *Bank of U. S.,* 9 Wheat. 738, 867, 6 L. Ed. 204, as follows: "Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

And in the *Osborn* case the court goes on to say: "It is true, that the property of the contractor may be taxed, as the property of other citizens . . . But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control." Likewise, in the case at bar the Public Service Commission cannot designate the utility company from whom the Government must purchase electricity, nor can the Commission dictate the area of Government owned property in which the Government must use the electricity it has purchased.

The Co-op argues, also, that under the terms of the contract between the Power Company and the Government, regulations adopted by the Public Service Commission shall prevail. The contract provision in question is as follows:

"5. PUBLIC REGULATION AND CHANGE OF RATES. (a) Public regulation. Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction. If during the term of this contract the public regulatory commission having jurisdiction receives

for file in authorized manner rates that are higher or rates that are lower than these stipulated herein for like conditions of service, the Contractor agrees to continue to furnish service as stipulated in this contract and the Government agrees to pay for such service at the higher or lower rates from and after the date when such rates are made effective."

Disregarding the question of whether the Co-op can properly invoke a provision of the contract between the Government and the Power Company, the above quoted provision of the contract appears to apply only to rates. But in any event, it is not subject to the construction that the Government cannot do the principal thing it was seeking to do, and that was to buy electricity from the Power Company for use on the entire Air Base.

Reversed, with directions to dismiss the complaint.

HARRIS, C. J., and WARD and JOHNSON, JJ., dissent.

CARLETON HARRIS, Chief Justice, dissenting.

My dissent in this matter is based purely and simply upon the provisions of Section 5 of the contract No. DA-03-050-eng-2399, between the United States of America and the Arkansas Power & Light Company, dated February 19, 1954. Section 5 provides as follows:

"5. PUBLIC REGULATION *AND*[1a] CHANGE OF RATES

(a) Public regulation. *Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, State, or local regulatory commission having jurisdiction.*[1b] If during the term of this contract the public regulatory commission having jurisdiction receives for file in authorized manner rates that are higher or rates that are lower than these stipulated herein for like conditions of service, the contractor agrees to continue to furnish service as stipu-

[1a] and [1b]. Emphasis supplied.

lated in this contract and the government agrees to pay for such service at the higher or lower rates from and after the date when such rates are made effective."

To me, the underscored language indicates clearly that the Government voluntarily subjected itself to the regulations of the Public Service Commission, and inasmuch as the Commission's holding was based upon substantial evidence, was not arbitrary, and in my view, entirely lawful, I would affirm.

PAUL WARD, Associate Justice, dissenting.

There is nothing in the record in this case to show that the United States Government cared which Company furnished its electricity, but, as pointed out in another dissent, the record does show that it was willing to abide by State regulations. This, I submit, is the reasonable and sensible attitude that the Government should have taken —and did in fact take.

It is apparent to me that this case is before us now in its present status simply because appellant contracted with the Government before the question here involved could be raised. Putting it another way, it appears that appellant never disclosed to the Government that any question of assignment of territory might be involved. On this point consider the testimony of appellant's Vice-President:

"Q. The question that I asked you is this: Did you tell the government at the time that they contacted you concerning the power for the Air Base that you did not have a Certificate of Public Convenience and Necessity to serve the entire Air Base?

A. In the negotiation the Government gave us the point of delivery they wanted. We looked at that and saw that it was in an area that was allocated to the Arkansas Power and Light.

Q. Now then, answer my question. Did you tell them the First Electric Cooperative had a Certificate of Public Convenience and Necessity to serve the area?

A. Did I tell them?

Q. Yes, sir.

A. No, sir, I did not.

* * *

Q. Do you know of your own knowledge, Mr. Minnis, whether or not the Contracting Officer had any idea who had the right to serve that territory under a Certificate of Convenience and Necessity from this Commission?

A. I think I know the Contracting Officer had the right to sell the service at the point he sold it and I think he knew the U. S. Government can do what they dern please with it after they get it.

Q. That is not the question I asked you and I am going to stay here all day until I get an answer to my question if the Commission will permit me. My question was: You did not know whether or not the Contracting Officer knew that the First Electric Cooperative had a right to serve a part of that territory at that time when you entered into the contract, do you?

A. I don't think these Contracting Officers are dumb. We have dealt with them a lot of times and they knew all about their business in a big way and they came in with their requirements and we met them on that basis.

Q. And you did not tell them that you did not have a Certificate of Necessity to serve all the territory in the Air Base?

A. We have a certificate to serve the Base at the place we did serve it and he knows that.

Q. But you did not tell him that you did not have a Certificate of Public Convenience and Necessity to serve all of the Air Base, did you?

A. It was not necessary from our standpoint.

Q. You did not do it whether it was necessary or not, did you? Why are you so reluctant to answer?

A. Because we did not try to tell the Government how to run their business.

Q. Just answer my question, did you or did you not?

A. They asked us for a point of delivery and it was at a place we had a right to serve. We sold it there and took it from there.

Q. You did not tell them?

A. I told them just exactly what I told you.

Q. And that was no, I believe you said.

A. Sir?

Q. That was no.

A. I said we had a right to serve at the place we did serve and they took it from there."

JIM JOHNSON, Associate Justice, dissenting.

In respectfully dissenting to the majority opinion, I want to state at the outset that I do not disagree with any of the cases cited therein. The cases, as I view them, simply do not touch top, side nor bottom the issues involved in this lawsuit. This dissent is based wholly upon the clear language of Section 5 of the contract between the United States and the Arkansas Power & Light Company. This section is headed: "Public Regulation and Change of Rates." The title alone shows that two subjects are covered in Section 5: (1) Public Regulation; and (2) Change of Rates. The first sentence in Section 5 is as follows:

"Service furnished under this contract shall be subject to regulation in the manner and to the extent prescribed by law by any Federal, *State,* or local regulatory commission having jurisdiction." (Emphasis supplied)

I can place only one interpretation upon this sentence and that is the United States voluntarily submitted to the regulations of the commission having jurisdiction. In

reading Section 5 and the contract in its entirety I am unable to find one word indicating that it was the intention of the United States to limit the jurisdiction to which it voluntarily submitted to rates alone. Section 5, as I see it, (1) submits the United States to general public utility regulation, including (2) regulation of rates.

It must be conceded that under our law the Public Service Commission is the "regulatory commission having jurisdiction." This being true, I can see no good reason for abandoning our well settled rule that we only review the following four questions on appeals from the Public Service Commission:

1. Is the Commission's order supported by substantial evidence?

2. Is the Commission's order free from fraud?

3. Is the Commission's order arbitrary?

4. Does the order of the Commission violate any right of the appellant under the United States or State Constitutions? See: *Inc. Town of Emerson* v. *Ark. Public Service Commission,* 227 Ark. 20, 295 S. W. 2d 778.

Nowhere in the record is it seriously indicated that any of the above questions could be answered in the affirmative. In fact, I am convinced that the Commission's Order is the only logical conclusion that could possibly be reached in this case under the circumstances. The United States indicated its recognition of the clear terms of its contract by its failure to intervene in this lawsuit. The majority opinion, in effect, is saying that this does not matter; Arkansas Power & Light Company is entitled to all the privileges and immunities of the United States Government, yea even entitled to rights that the Government itself is not claiming. The states of this Union have already, voluntarily or otherwise, relinquished too many rights to the central Government without our forcing upon a contractor with the Government rights which the

Government has voluntarily relinquished to our State utility regulatory authority.

For the reasons stated above, I respectfully dissent.

MERCER *v.* MERCER.

5-1901 328 S. W. 2d 365

Opinion delivered November 2, 1959.

Brockman & Brockman, for appellant.

John Harris Jones, for appellee.

JIM JOHNSON, Associate Justice. This is a divorce case; the parties are negroes. The Plaintiff-Appellee is Pantroy Mercer; the Appellant is Bertha Lee Mercer. It questions the correctness of a decree granting the husband a divorce and denying the wife alimony or property rights.

The parties were married in 1933 and lived together as husband and wife until February 1942. There were no children born of this marriage. In June 1944, Pantroy filed suit for divorce alleging Bertha Lee had deserted him. On July 17, 1944, Pantroy was granted a divorce on constructive service. On August 26, 1944, this decree was set aside at the instance of Bertha Lee. Pantroy was in the service at the time and insists he did not receive notice that the divorce decree had been set

aside. Pantroy married Cleo Mercer in 1947 and they have lived together since that time.

Bertha Lee, in the meantime, after leaving Pantroy, moved to another location in Pine Bluff and operated a beauty shop for awhile and then moved north. In 1946, she married Jim Henry Marsh in Ohio. This relationship was annulled in 1949. In 1954, Bertha Lee married Willie Thomas in Detroit and this relationship culminated in a divorce in 1955.

In August, 1958, Pantroy, in attempting to arrange a loan, found that his divorce decree from Bertha Lee had been set aside in 1944. He then brought this suit for divorce. Bertha Lee defended on the ground that both parties were guilty of adultery and therefore neither could obtain a divorce.[1]

Under our statute[2] allowing three years separation as a ground for divorce, the defense of recrimination has been abolished, so the question of the plaintiff being guilty of adultery is immaterial insofar as it affects the divorce decree.[3] *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994; *Larsen* v. *Larsen,* 207 Ark. 543, 181 S. W. 2d 683; *Martin* v. *Martin,* 225 Ark. 677, 284 S. W. 2d 647.

Appellant also contends she is the injured party so as to entitle her to alimony and a division of the property. Ordinarily, where the wife shows she left the husband's home, she must allege and prove that she is not guilty of desertion by showing that her husband's conduct was such as to justify her leaving the home. *Mullikin* v. *Mullikin,* 200 Ga. 638, 38 S. E. 2d 281, 2 A. L. R. 2d 318. If she cannot prove she was justified in leaving she cannot obtain alimony or maintenance. *Reischfield* v. *Reischfield,* 166 N. Y. S. 898, 6 A. L. R. 10. In *White* v. *White,* 228 Ark. 732, 310 S. W. 2d 216, we said:

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[1] Ark. Stats. 34-1209—"If it shall appear to the court that the adultery, or other offense complained of, shall have been occasioned by the collusion of the parties, or done with an intent to procure a divorce, or that the complainant was consenting thereto, or that both parties have been guilty of adultery, or such other offense or injury complained of in the bill, then no divorce shall be granted or decreed."

[2] Ark. Stats. 34-1202.

[3] This subject is annotated in 152 A.L.R. 327.

"Appellant earnestly insists that she is the injured party in this case, and should be awarded a division of the property . . . The evidence was conflicting, but we think the preponderance sustains the holding of the Chancellor. It is also noticeable that though Mrs. White testified she was forced to leave the home in December, 1953, because of indignities suffered at the hands of the appellee, no suit was filed for two and one-half years, and the matter was not heard until the parties had been separated for more than three years and the complaint amended to that effect. At any rate, considering that the witnesses were before the court, where the Chancellor had the opportunity to observe their demeanor and attitude from the witness stand, we are unable to say that the court's holding was against the preponderance of the testimony, and without so finding, Mrs. White cannot prevail."

In the instant case there was no attempt to obtain alimony and other property until fifteen years after the separation, during which time the appellant considered two other men as her husband.

As to the fault of the parties, in *Martin* v. *Martin,* 225 Ark. 677, 284 S. W. 2d 647, we said:

"Here the Chancellor found that the fault as between the parties appeared to be equal, that the fault of Mrs. Martin was at least equal to that of her husband, and in the exercise of the discretion accorded him, denied, as indicated, both alimony and a property settlement to Mrs. Martin."

It would serve no purpose to set out in detail the testimony which leads us to our conclusion. Suffice it to say that it appears Bertha Lee was more at fault in the separation.

The entire question of the allowance or disallowance of alimony is for the trial court and rests within its sound discretion. *Carty* v. *Carty,* 222 Ark. 183, 258 S. W. 2d 43; C.J.S. Volume 27A, Divorce § 232 at page 1027. It appears this discretion was not abused and the decree is therefore affirmed.

REYNOLDS METAL COMPANY *v.* ROBBINS.

5-1921 328 S. W. 2d 489

Opinion delivered November 9, 1959.

[redacted]

Wooten, Land & Matthews, for appellant.

McMath, Leatherman & Woods and *James E. Youngdahl,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the action of the Workmens Compensation Commission in awarding compensation to Vera Love Robbins, widow, and Mary Catherine Robbins, minor child of Joe Jack Robbins, deceased. Robbins died as a result of a heart attack, suffered at the Jones Mill plant of Reynolds Metals Company on the night of July 4, 1957 (death occurred about 1:30 a.m., July 5). By a 2-1 vote, the Commission found the claim compensable, and made an award for the benefit of the widow and minor child in accordance with the provision of the compensation law. On appeal, the award was affirmed by the Circuit Court of Hot Spring County, which entered its judgment in accordance therewith. From such judgment, appellants bring this appeal.

The facts, in brief, are as follows. Robbins, an electric cellman for appellants, arrived home from work on July 4, 1957, about 8:45 a. m. He went to bed about 9:30 a. m., remaining there until suppertime about 5 p. m., thereafter returning to bed until approximately 10 p. m., at which time he arose, had coffee, and left for his work about 10:45 p. m. According to Mrs. Robbins, her husband had never had any trouble with his heart before, and had never complained of pains in his chest. The evidence showed that Robbins arrived at the gate of the plant around 11:30, and walked from there to the bath house with a fellow employee, Fay Gnau, for the purpose of changing his clothes. Nothing was said to Gnau to indicate that he was not feeling well. He then reported to his post of duty in Section 14 of the pot line[1] about five minutes before 12. The "graveyard" shift, to which Robbins had just recently been transferred (this was the third night he had worked on this particular shift), commenced at midnight. The testimony reflected that before commencing actual work, Robbins remarked to a fellow worker, John Vaughn, that he felt pretty bad; that he had a choking sensation in his chest; "said it seemed like he couldn't get his good breath"; that he was "awful white". Vaughn testified that he helped Robbins put out one light on a pot.[2] About 12:15 a. m., fellow employees talked Robbins into going to First Aid, and he reluctantly agreed to go. Robbins returned from First Aid around 1:30, and told fellow employees that he felt no better. When asked if he had been given anything at First Aid, he replied, "Well, they gave me a dose of soda." Deo Henderson, who worked in an adjoining section, suggested that Robbins go home, but the latter replied he would like to "stay and make the double time at night". Robbins then proceeded to knock

[1] His duties required him to attend electric smelting pots.

[2] This was a two or three minutes operation, which involved pushing a weighted rake, about 12 or 14 feet long, weighing approximately 100 pounds, back and forth on rollers, along the length of the pot to break down the crust of aluminum ore which formed on the top. Electric charges are passed through carbon along the bottoms and sides of the pot (or vat) creating high temperatures and transforming the ore into a molten mass.

down two pots,[3] *i.e.*, breaking up the crusts, an operation which, according to witness Vaughn, took "maybe five minutes or a little longer". After breaking down the second pot, he hung up his rake, turned, made two steps, and collapsed. It appeared to witnesses that he was headed in the direction of a curtain wall, from which ventilation came. Death was practically instantaneous. An autopsy was performed, which disclosed an occlusion of the posterior coronary artery.

Appellants contend "there was not substantial testimony sufficient to sustain the award of the Commission", and that the judgment of the Circuit Court should be reversed, and the case dismissed.

Appellants point out that Robbins' work on the morning of his death consisted of his usual and ordinary duties, and that he engaged in no unusual strain or overtaxing work. In one of our earlier heart cases, *McGregor and Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210, the widow and children of H. L. Arrington, who died while engaged in his employment as a carpenter, were given an award by the Compensation Commission. At the time of his death, Arrington was engaged in sliding a plank into place. He suddenly slumped, and was dead by the time his body could be lowered from the scaffolding, where he was at work, to the ground. Arrington was engaged in the ordinary duties of a carpenter at the time. This Court affirmed the award. The holding seems to have been somewhat qualified by later decisions, typified by *Baker* v. *Slaughter,* 220 Ark. 325, 248 S. W. 2d 106. In that case, compensation was denied by the Commission, a finding reversed by the Circuit Court, but this Court reversed the trial court with directions to affirm the Commission, which had found that Slaughter was only pursuing in the normal and usual way, the work he had been performing for some time. However, the inconsistencies of these and other cases were settled

[3] According to the evidence, a pot is a long vat, around 20 or 22 feet long, with a row of carbon on either side. The vat contains a bath of the general materials that are used in converting alumina into aluminum. A very high heat is maintained in the bath, and the alumina is poured over the top, and during the course of the process, it will sometimes crust over. The rake is used to break down the crust of ore.

by the case of *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436, wherein we re-affirmed the rule set out in the *McGregor* and similar cases, including *Harding Glass Company* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961, wherein it was said:

"While appellants cite authorities holding to the contrary, we think the better rule, and the one supported by the great weight of authority is that a heat prostration which resulted as here, and was sustained by a workman or employee, while engaged in the employment, and which grew out of the employment, whether due to unusual or extraordinary conditions or not, is deemed an accidental injury and compensable, and we so hold."

Further, in that case, quoting from Schneider, Workmen's Compensation Text, Sec. 1328:

"The majority of the American courts follow the English rule as set out in the case of *Clover, Clayton & Co.* v. *Hughes* (1910), A. C. 242: 'An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or condition of health.' "

The *Bryant* opinion then concluded with this language:

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

Accordingly, the fact that Robbins was only engaged in his ordinary and usual duties at the time of his death does not bar a recovery.

The unusual part of this case relates to the fact that Robbins' heart attack admittedly had commenced before he had actually performed any labor. The question therefore before this Court, is whether there was substantial evidence to show that Robbins' condition was aggravated by the work performed, as heretofore set out; or stated differently, whether his death occurred sooner than would have otherwise occurred if the work had not been performed. That is the rule as stated in *Frank Lyon Co.* v. *Scott,* 215 Ark. 274, 220 S. W. 2d 128, and *Quality Excelsior Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38. It is true that in those cases the deceased had already performed some labor before the heart attack occurred,[4] but we see no material difference *if the labor performed hastened the death.* The Commission, in its opinion, stated:

"Let us now turn to a consideration of that portion of the evidence which describes the work performed by the deceased and the conditions under which that work was done. An electric cell man attends a smelting pot used in processing alumina. Heat generated by electricity is conducted through the pot and thus transforms ore placed into the pot into a molten mass. A crust frequently forms atop this molten mass and it is one of the duties of a cell man to break or dissolve this crust. In so doing, the cell man runs a metal rake weighing approximately 100#, and resting upon rollers, back and forth across the pot. This process is called "breaking down a pot". After breaking down a pot, the cell man removes the rake and places it in a fastening device located alongside the pot. Deceased had just completed the task of breaking down a pot and had placed the rake at its assigned resting place when he fell and died. As for conditions at the plant at the time, witnesses herein testify that the weather was hot. The Weather Bureau reports, admitted to the record herein, reflect that the temperature in Little Rock at 1:00 a. m., on July 5, 1957, was slightly in excess of 80 degrees. We take judi-

[4] Of course, it is most unusual, as in the instant case, for one to continue work after a heart attack has commenced, and cases of this nature would be extremely rare.

cial notice that Little Rock is only some 45 miles distant from Jones Mill. * * * The temperature at the site of the smelting pots where deceased was working is described as being in excess of outside temperatures by some 15 degrees."

There is quite a bit of evidence relative to the heat.[5] Witness Vaughn stated that it was much hotter inside than outside, and much hotter close to the pot than away from it . . . Witness Deo Henderson testified that many of the men, including Robbins, wore "long handled" underwear, as a means of protection . . . R. O. Carpenter testified that the temperature inside was at least 20 or 30 degrees hotter than outside . . . Ernest Cassidy estimated the temperature around the pots that particular night to be from 110 to 120 degrees. "You can get up on the pot, and it will scorch your clothes if you stay there." We have several times noted the influence of heat on heart attacks. See *McGregor & Pickett* v. *Arrington, supra, Harding Glass Co.* v. *Albertson, supra,* and *Tri-State Construction Co.* v. *Worthen,* 224 Ark. 418, 274 S. W. 2d 352.

However, in addition to the heat angle, we think the medical testimony of the two doctors who testified, supplied evidence of a substantial nature in support of the award. Dr. Howard Dishongh and Dr. Drew F. Agar, both of Little Rock, testified, and each stated that he was of the opinion that Robbins' work did not cause the heart attack. Dr. Dishongh testified[6] that when Robbins complained of the indigestion and choking sensation, the acute attack had already begun. From his testimony:

"I would be foolish to state that the cause of that man's coronary occlusion was his work. I feel that it could have happened in bed as well as at work, but I do feel that perhaps it was aggravated by the fact, first,

[5] Actually, the Weather Bureau report reflects that the temperature in Little Rock on July 5, 1957, at 1:00 a.m., was 82 degrees, which was the hottest 1:00 a.m. temperature recorded during the entire month of July.

[6] The doctor stated that, from the autopsy, Robbins suffered from "a hardening of the artery, and no doubt that had been developing for years rather than for weeks", and the attack resulted from a hardening of the arteries rather than a thrombosis.

that he had to walk to the rest room. I have been told it took approximately ten minutes to get there. That didn't do him any good after he had the pain. Q. You mean the first aid, Doctor? A. The first aid, I mean. The heat could have been a precipitating factor. Now, I am not saying that his work caused this coronary occlusion, but I can say that it aggravated a pre-existing condition, and it could have been that if he hadn't had that extra work to have done, he might have survived the attack."

The Doctor testified that one who suffers a coronary occlusion should be immediately placed in bed, and that any exertion would aggravate the condition . . . that the heart tends to work faster when one is walking or taking physical exercise, and there is thereby a greater demand on the coronary artery. In answer to the question, "Wouldn't it be your present thought that his work in that heat would have aggravated his pre-existing condition? A. A pre-existing condition? Yes." Further, "Q. Doctor, when a man has a coronary occlusion as this man had, if he is completely immobilized, if he is diagnosed and completely immobilized immediately when the attack becomes acute, wouldn't you say that that man would have a far better chance of surviving than if the man went ahead and performed some physical exertion? A. There is no question about that, yes. That is absolutely a fact." On direct examination, Dr. Agar, who testified at the instance of appellants, stated that in his opinion, Robbins' work did not cause his death; however, on cross-examination, the doctor stated that the most widely used treatment for people suffering heart attacks is to immobilize the patient, preferably bed rest. In response to a question as to whether the heat and work would contribute to the severity of a heart attack which had already commenced, Dr. Agar replied:

"* * * first, I don't think the heat would affect it. Heat *per se,* but if we are to accept our theory that the best treatment is bed rest or inactivity as much as possible, after a heart attack has begun, then we would have to say that yes, that an exertion might have aggra-

vated it, providing it had already begun. If we are to accept our first premise that bed rest is treatment, we would have to follow along with that. * * * Q. Providing it had already begun, it would aggravate it? A. Oh, yes."

Further:

"Q. So, if this man, once the attack had begun, if he had been immobilized and if he had immediately been taken to a hospital and given oxygen, wouldn't you say the man would have had a better chance of survival? A. I think you would have to say that, yes, although he could have gone on regardless of the treatment."

Still further:

"* * * In the usual case, if a man begins to have a heart attack, wouldn't you say that exertion would hasten his death? A. I think — well, it would aggravate the condition. Now, whether it would hasten his death I don't know. I don't know if he is going to die or not. Q. Well, if it aggravated his condition that certainly would be likely to hasten his death, would it not? A. I think you would have to say that, yes."

While neither doctor stated that Robbins would have lived if he had not continued with his work after the attack commenced, contrariwise, neither doctor stated that he would have died just as quickly if the work had not been performed.

Of course, the law in this state is that workmen's compensation cases shall be broadly and liberally construed, and that doubtful cases shall be resolved in favor of the claimant. *Boyd Excelsior Co.* v. *McKown,* 226 Ark. 174, 288 S. W. 2d 614. But there is even a stronger rule, namely, our oft repeated holding that if there is any substantial evidence to support the findings of the Commission, we will not disturb such findings. This is the strongest rule in compensation cases, and the one carrying the greatest weight. We are of the view that the testimony herein set out was sufficient to justify the Commission in reaching its conclusions, and the judg-

ment of the Circuit Court upholding the award is hereby affirmed.

ROBINSON *v.* WILLIAMS.

5-1948 328 S. W. 2d 494

Opinion delivered November 9, 1959.

Milton McLees, for appellant.

Digby & Tanner, for appellee.

J. SEABORN HOLT, Associate Justice. Appellee, Gertrude Williams, was divorced from James C. Fulmer (now deceased) July 18, 1929. Fulmer had no children at his death. Following the divorce, as part of a property settlement, appellee (then Gertrude Fulmer) received title to certain real property described as Lots 10, 11 and 12, Block 2, Henry's addition to Argenta (now the city of North Little Rock). On that date, appellee con-

veyed said lands to James C. Fulmer for his lifetime, the deed containing the provision that on Fulmer's death the land should revert to appellee. It appeared that in order to allow Fulmer to realize the full use and control of said property, to make improvements and to sell any part of it, in 1934 an agreement was reached thereto and on January 18, 1934, the following instruments were executed by the parties affecting said lands. (1) A quit-claim deed executed by James C. Fulmer to Gertrude Fulmer (the appellee), conveying the whole of the three lots described above, (2) a warranty deed was executed by Gertrude Fulmer to James C. Fulmer, conveying the fee simple title to the south half of said three lots, and (3) a will was executed by James C. Fulmer, in which he devised the south half of said three lots to Gertrude Fulmer. No consideration was paid at that time by the said James C. Fulmer to the appellee, but the agreement of the parties was that the said James C. Fulmer should execute his will, devising to the appellee the property which she conveyed to him on that date, and his will contained, among others, the following provision. "3. Having on this day entered into an agreement with Gertrude Fulmer whereby she has deeded to me the S½ of Lots 10, 11 and 12, Block 2, Henry's Addition to the City of Argenta, now North Little Rock, Pulaski County, Arkansas, and in consideration for said deed, I hereby will and bequeath to Gertrude Fulmer the S½ of Lots 10, 11 and 12, Block 2, Henry's Addition to the Town of Argenta, now North Little . . ."

The deeds of conveyance were properly filed for record and the last will and testament of James C. Fulmr was delivered to the appellee and remained in her possession from January 18, 1934, when executed, until the date of his death on February 11, 1958.

During his lifetime, Fulmer sold a portion of this property which appellee concedes he had the right to do. The record further reflects that on February 3, 1958, James C. Fulmer executed another will in which, after directing the payment of his just debts and funeral expenses, the will further provided: "3. Being unmar-

ried, and leaving no child or issue of a deceased child, I hereby give, bequeath and devise all the rest, residue and remainder of my estate over which I have the power of testamentary disposition, wherever located and of every kind and character, real, personal, and mixed, unto Bertha Robinson, presently residing at 4000 Pike Avenue in the City of North Little Rock, Arkansas, to have and to hold the same as her property in fee simple, absolutely and forever. 4. I hereby nominate and appoint the said Bertha Robinson, as Executrix of this, my last will and testament, and direct that she be permitted to serve without bond." The present action was instituted by appellee, first, by petition in probate court and later by agreement transferred to chancery, in which she sought specific performance of the 1934 will as an irrevocable instrument in so far as same affected the south half of the three lots above less that portion conveyed by decedent in his lifetime.

The appellant defended on the grounds that the 1934 will was not an irrevocable instrument; that appellee did not come into court with clean hands, and that appellee had fraudulently transferred title to the property in 1934 to defeat a judgment creditor, that appellee is barred by the principle of estoppel and as an affirmative defense, appellant alleged that she was entitled to receive all of the property of the decedent and occupied the position of an innocent purchaser by virtue of an alleged agreement between the decedent and appellant to devise the property to her in consideration of her performing certain personal services and administering to him, during part of the two last years of his life.

Trial resulted in a decree in favor of appellee. The decree contained this recital: "— the court . . . doth find that the terms and provisions of the written instrument dated January 18, 1934, in the form of a will executed by James C. Fulmer, deceased, devising certain real property hereinafter described, claimed by the plaintiff, was a valid contract to convey, based upon a valuable consideration; that, as such, the same was not subject to revocation by his will dated February 3, 1958,

which has been admitted to probate; that said contract to convey to the plaintiff should be specifically enforced; and that the relief sought by the plaintiff should be granted.'' This appeal followed.

For reversal, appellant lists her points relied upon as follows: (1) The decree is contrary to the proof and the equities of the case. (2) Estoppel operates to bar appellee's claim. (3) Appellee does not seek equity with ''clean hands''.

On the record presented we think the issues, when boiled down, consist of two points. First, was the instrument dated January 18, 1934, in the form of a will of the decedent based on a valuable consideration entitled to specific performance, and second, is the appellant, Bertha Robinson, in the position of a *bona fide* purchaser in regard to the property she claims in a devise from the decedent in the 1958 will, and is she correct in her contention ''that the agreement which she made with decedent during his lifetime, for her future care and attention, to be given him the rest of his life, which obligation on her part was completely performed, was equally a binding 'contract' supported by a consideration of equal dignity as a money value, by which decedent was bound to devise to her.'' We consider these two issues together.

On the first point we hold that the trial court correctly held that the 1934 will of the decedent, dated January 18, 1934, was based upon a valuable consideration and entitled to specific performance. We think that the great weight, if not practically all the testimony, supports appellee's contention. The appellee testified that she would not have conveyed the property to the decedent except on condition that it would return to her upon his death. As indicated, the will itself recites that decedent had entered into an agreement with appellee, that in consideration of the deed of conveyance to him, that he had devised the property in question to appellee at his death. The evidence appears to be conclusive that no purchase money was paid by decedent for the conveyance to him, and that the sole consideration was his

unconditional covenant to devise the property to appellee at his death as evidenced by the 1934 will. It further appears undisputed that this 1934 will was delivered to appellee and remained in her possession for some 24 years, until after the death of the decedent on February 11, 1958, when it was submitted to the court for specific performance. It further appears that decedent recognized the binding effect of this will by stating to a daughter of the appellee, on more than one occasion, shortly before his death, that he could not revoke this will and make other disposition of his property. Clearly, we think, in these circumstances decedent lacked the power to revoke his 1934 will with his subsequent will of February 3, 1958. In circumstances similar in effect to what we have here we have consistently held that the appellee was entitled to specific performance of the 1934 will which was, in effect, a binding, irrevocable contract obligating decedent to convey the property in question to the appellee.

The principles of law announced in our recent case of *Janes, Executor* v. *Rogers,* 224 Ark. 116, 271 S. W. 2d 930, apply with equal force here. In that case, the husband and wife simultaneously executed identical wills, devising all their property to the survivor for life and remainder over to their children and step-children. Rogers pre-deceased his wife and she assumed control of the property and about two years subsequent to his death, she attempted to revoke her will and substitute another. The court there held, in effect, that her first will was based upon a valuable consideration and not subject to revocation. We there said: "It is also well settled that a will is generally ambulatory until the death of the testator, and that mutual or reciprocal wills, may be revoked at pleasure unless founded on, or embodying, a binding contract.

"The fact that the parties have concurrently executed separate wills, reciprocal in terms, is not sufficient of itself, to show that the parties had entered into a contract to make such wills; but the terms of such wills afford some evidence of the contractual relation and,

when read in connection with other evidence which tends to show the execution of the contract, may establish that fact. Page on Wills, Sec. 1710; Annotation on Joint, Mutual and Reciprocal Wills, 169 A. L. R. 9.

"Although it is advisable from the standpoint of good draftsmanship that reciprocal wills embody a reference to a contract for their execution, it is not essential to the establishment of such a contract. See 57 Am. Jur. Wills, Sec. 733 where the author further states: 'An agreement to execute wills containing reciprocal bequests and provisions for the benefit of third persons may result from implication from the wills themselves, the relation of the parties, and other circumstances surrounding the parties, and the execution of the wills, all considered in combination.'

"The case of *Schramm* v. *Burkhard,* 137 Or. 208, 2 P2d 14, involved facts similar to those in the instant case. In upholding and enforcing the oral contract in that case the court stated: 'It is an established rule that equity will not allow one person to receive advantage under a contract and then refuse to perform his part of the agreement, and that, where mutual wills are the result of a contract between the parties making them, which could not be rescinded without the consent of both, and one of them has died and his part of the contract has been carried into execution, equity will not permit the other to violate the agreement but will enforce the contract by declaring the executor, devisee, or other person coming into possession of the property which was the subject of the contract to be trustee for those who would have benefited had the contract been performed.' "

In the present case, no oral contract was relied upon. Reliance here is upon the 1934 will itself which contains all necessary recitals along with the circumstances surrounding the transaction and the parties, together with the corroborated facts.

It appears to us that appellant has utterly failed to disprove any of the circumstances attendant upon execution of the 1934 will. Neither has appellant produced

sufficient testimony to warrant the revocation of this 1934 will.

As to the other issues raised by appellant, but little need be said. Her contention is that appellee did not come into court with clean hands, for the reason that some twenty-four years earlier she had conveyed the property in question to her divorced husband to defraud a judgment creditor; without attempting to detail the testimony on this issue, we hold that the burden is on the party alleging fraud to prove it by a preponderance of the evidence which is clear and convincing, which appellant in this case has failed to do.

In *Biddle* v. *Biddle,* 206 Ark. 623, 177 S. W. 2d 32, we so held. ". . . There is no rule more firmly established than the one that fraud will not be presumed, and the burden is on the party alleging it to prove it by a preponderance of the evidence which is clear and convincing. . . . While fraud need not be shown by direct or positive evidence but may be proved by circumstances, . . . it must reasonably and naturally follow from circumstances proved. . . . Circumstances of mere suspicion leading to no certain result are not sufficient grounds to establish fraud." Citing cases.

On the question of *estoppel,* again little need be said. Appellant argued that because Fulmer (decedent) had conveyed by deed a portion of his property during his lifetime, that appellee is *estopped* to claim the remainder of the property. We do not agree. As we have pointed out above, decedent had the right to convey or dispose of any of the property in question during his lifetime, and appellee, in fact, makes no claim to any of the property which decedent so conveyed, but she does claim, and rightly so, that she is entitled to all of the real property here involved which he owned and was undisposed of at his death.

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

5-1929 328 S. W. 2d 501

Opinion delivered November 9, 1959.

Orion E. Gates, for appellant.

John F. Gibson, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal necessitates a study of Act No. 53 of 1957. The question posed is the correctness of the Circuit Court ruling which refused the plaintiffs a default against the defendant because of his failure to file answer within twenty-one days after service of summons.

Here is the chronological order of events:

(a) On January 22, 1958 appellants, as plaintiffs, filed action in the Drew Circuit Court against the appellee, William Harris. The complaint sought damages for plaintiffs because of an alleged traffic mishap.

(b) Summons was served on defendant, Harris, in Chicot County on January 22, 1958; and on January 23rd Harris' attorney, Mr. Gibson, wrote the Drew Circuit Clerk and obtained a copy of the complaint.

(c) On February 7, 1958 the Circuit Judge was in Drew County for the purpose of setting cases for the ensuing term of the Circuit Court which would convene on February 17, 1958 (the third Monday in February, as fixed by § 22-310 Ark. Stats.).

(d) Mr. Gates, for the plaintiffs, and Mr. Gibson, for the defendant, were both present before Circuit Judge Golden on February 7th; and Judge Golden dictated the following into the record as his recollection of what transpired on that occasion:

"On February 7 the Court set the docket, including this case, and on that date the following notation was made by the Court: 'Set for 2/17/58, to be reset', and as I recall what transpired on that date Mr. Gibson stated that he wished to file a motion for an order to have permission to have the plaintiffs examined by some physician and that Mr. Gates immediately responded that that wasn't necessary, that he would submit them to an examination at any reasonable time or place. That was a verbal motion."

(e) On February 13th defendant filed his answer, which was twenty-two days after the day of the service of summons.

(f) On February 17th plaintiffs filed their motion to strike the answer and for default, since the answer was filed one day too late.

(g) The Circuit Court denied the motion to strike and the motion for default; and the correctness of that ruling is the sole issue[1] on this appeal.

In the briefs and in the oral argument before this Court, appellants cite Act No. 49 of 1955 and insist that

[1] After the denial of the motion to strike and the motion for default, the case was tried to a jury and resulted in a verdict and judgment for the defendant; but plaintiffs preserved their objections to the order denying the motion to strike and the refusal of the default, and thus the issue reaches this Court.

under the law[2] it was mandatory on the Circuit Court to render a default against the defendant since he had failed to file an answer within twenty-one days after service; and appellants cite, *inter alia, Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439; and *Pyle* v. *Amsler,* 227 Ark. 785, 301 S. W. 2d 441. These cases were decided under Act No. 49 of 1955 and hold exactly what the appellants say; but appellants have apparently failed to attach the proper importance to Act No. 53 of 1957, which amended the said Act No. 49 of 1955. The germane portion of Act. No. 49 reads:

"Judgment by default shall be rendered by the Court in any case where the defense has not been filed within the time allowed by this Act; provided, that the Court may for good cause allow further time for filing a defense, if application for granting further time is made before expiration of the period within which the defense should have been filed."

The quoted language of the above Act was amended by Act No. 53 of 1957; and below we emphasize the amendatory language for convenient information:

"Judgment by default shall be rendered by the Court in any case where *an appearance or pleading, either general or special,* has not been filed within the time allowed by this Act; provided, that the Court may for good cause allow further time for filing an appearance or pleading, if application for granting further time is made before expiration of the period within which the appearance or pleading should have been filed; *and that nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause.*"

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[2] The Act No. 49 of 1955 has been mentioned or referred to in a number of our cases, some of which are: *Howell* v. *Van Houten,* 227 Ark. 84, 296 S.W. 2d 428; *Walden* v. *Metzler,* 227 Ark. 782, 301 S.W. 2d 439; *Pyle* v. *Amsler,* 227 Ark. 785, 301 S.W. 2d 441; *Cummings* v. *Lord's Art Galleries,* 227 Ark. 972, 302 S.W. 2d 792; *Douglas* v. *Douglas,* 227 Ark. 1057, 304 S.W. 2d 947; *West* v. *Page,* 228 Ark. 13, 305 S.W. 2d 336; *Stokenbury* v. *Stokenbury,* 228 Ark. 396, 307 S.W. 2d 894; *Flippin* v. *McCabe,* 228 Ark. 495, 308 S.W. 2d 824; *Lambert* v. *Lambert,* ..... Ark. ....., 316 S.W. 2d 822; and *Burton* v. *Sanders,* ..... Ark. ....., 321 S.W. 2d 209.

Thus, by the Act No. 53 of 1957 the Trial Court had power to set aside a default, even if it had granted one, for either of three causes: (a) excusable neglect; (b) unavoidable casualty; or (c) other just cause. In the case at bar the Circuit Court exercised the power contained in the amendatory language because the Circuit Judge, in denying the motion for default, called attention to the fact that, if on February 7th Mr. Gibson for the defendant had filed a written motion to have the plaintiffs examined, that motion would have certainly constituted a pleading; but that Mr. Gates, by his response, made the written motion unnecessary.

Further, it is easy to see that when the parties agreed for the case to be set on February 17, 1958, subject to be reset, Mr. Gibson was certainly lulled into a feeling of security that the case would not be tried before February 17th. Under all the facts and circumstances in this case, Mr. Gibson's failure to file his answer until February 13th comes either under the heading of "excusable neglect", or "other just cause". At all events, we cannot say that the Trial Court was in error in refusing to strike the answer and in refusing to render a default.

Affirmed.

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

GEORGE ROSE SMITH, J., dissenting. The trial judge did not, as I read his opinion, make a finding of excusable neglect; his decision rested on a different ground. On February 13 the defendant had filed two pleadings, an answer and a motion to strike the complaint for want of verification. On February 17 the plaintiffs in turn filed two pleadings, a response to the motion to strike the complaint and a request for judgment by default. The trial court held that the plaintiffs, by responding to the defendant's motion to strike, had waived the defendant's delay in pleading to the complaint. I do not agree with the trial court's reasoning; but it seems unnecessary to discuss the point, since the majority have not adopted the lower court's position in the matter.

The majority opinion suggests two reasons for permitting the defendant to file his answer out of time. First, it is said that when the parties agreed for the case to be set on February 17, "Mr. Gibson was certainly lulled into a feeling of security that the case would not be tried before February 17th." Perhaps so, but how is that fact material? Under the statute the defense must be filed on the twenty-first day, and it makes no difference that counsel may know with certainty that the case cannot be tried for weeks or even months. The date of trial has nothing to do with the time for answering the complaint. By their intimation to the contrary the majority have most unfortunately unearthed the ghost of the very statutes that were repealed by Act 49 of 1955.

There is left only the majority's second suggestion, that Mr. Gates waived a compliance with the statute by agreeing that his clients might be examined without the necessity of the defendant's filing a written motion for such an examination. It seems plain enough that the defendant's oral motion would not alone have prevented a default judgment, because (a) our practice does not recognize oral pleadings, *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439; and (b) Act 53 of 1957 refers to the *filing* of an appearance or pleading, which undoubtedly contemplates a written instrument. It follows, then, that the sole basis for a finding of excusable neglect is the fact that Mr. Gates said that a written motion for a physical examination would be unnecessary. I find it impossible to believe either that Mr. Gates intended by his statement to grant an extension, which must have been indefinite as to time, for the filing of an answer, or that Mr. Gibson could excusably treat the statement of his adversary as an assurance that the defendant's answer need not be filed within the time allowed by law.

It is with regret that I record my disagreement with the majority; we all have an understandable aversion to holding that a litigant should suffer a default judgment on account of his lawyer's failure to file an answer promptly. But the defense offered no testimony what-

ever in response to the plaintiffs' motion for a default judgment. Thus there is nothing to show that the neglect was excusable, and in these circumstances I am not willing to say that the plaintiffs should be penalized because their attorney extended a commonplace professional courtesy to his opponent.

HARRIS, C. J., and JOHNSON, J., join in this dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* NICHOLS.

5-1934 328 S. W. 2d 856

Opinion delivered November 9, 1959.

Pat Mehaffy and *W. A. Eldredge, Jr.*, for appellant.

John Harris Jones, for appellee.

GEORGE ROSE SMITH, J. The appellee recovered a judgment for $3,500 for personal injuries and property damage suffered when his car was struck by one of the appellant's trains at a railroad crossing in the city of Pine Bluff. Since the judgment must be reversed on

account of an erroneous instruction it becomes necessary to discuss only that instruction and the sufficiency of the evidence to make a case for the jury.

The accident happened at about seven o'clock upon a November evening in 1956. Nichols, who was familiar with the crossing, says that he stopped his car at a point about 52 feet from the tracks, looked both ways, and did not see the approaching train, though it must have been within view. He proceeded slowly forward without again looking in either direction and was hit when he had almost crossed the tracks. The defendant's train was traveling at about ten miles an hour, with its headlights burning, but there is evidence that no whistle was sounded nor any bell rung. Upon these facts the appellant insists that it was entitled to a directed verdict, citing as conclusive our holding in *Mo. Pac. R. Co.* v. *Dennis,* 205 Ark. 28, 166 S. W. 2d 886.

The case was properly submitted to the jury upon the issue of comparative negligence. The *Dennis* case is not controlling, for it was decided under the original railroad comparative negligence statute, by which the plaintiff was precluded from a recovery if his negligence exceeded that of the railroad company. That statute was repealed by Act 191 of 1955, which governs the present case. *St. Louis S. W. Ry. Co.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282; *Chism* v. *Phelps,* 228 Ark. 936, 311 S. W. 2d 297. Under the 1955 act the appellee is entitled to a proportionate recovery if the appellant's negligence contributed in any degree to the cause of the collision, even though the appellee's negligence was the greater of the two. Since the jury might have found that the carrier's failure to give the statutory signals was a contributing cause of the accident the evidence presented a question for the jury.

The court erred, however, in giving this instruction at the plaintiff's request: "If you believe from the preponderance of the evidence in this case that reasonably prudent operation of a train in a heavily populated residential area requires the use of locomotives equipped with brakes which can be operated by the fireman as

well as the engineer, then the failure of defendant to use such a locomotive in this case would constitute negligence."

The complaint did not allege that the defendant was negligent in not using a locomotive with brakes that could be operated by the fireman as well as by the engineer. There was nothing in the pleadings to put the defendant on notice that any such question would be an issue in the case. The proof indicates that this train was traveling in interstate commerce, but it is not suggested that the locomotive's brakes did not meet the requirements of the Federal Safety Appliance Act or the regulations thereunder, which are for the benefit of the traveling public. 45 USCA §§ 1 and 9; *Fairport etc. R. Co.* v. *Meredith,* 292 U. S. 589.

The only testimony on the point arose almost by chance during the cross examination of the defendant's fireman. This witness stated that he did not have access to the brakes "on this particular engine." Upon being questioned further he said that there are some classes of engines, a newer type, that have a valve by which the fireman can operate the brakes. This meager testimony, narrowing down to the bare statement that some of the more modern locomotives have dually controlled brakes, could not enable the jury to make an intelligent and informed determination of the question submitted to them. Compare *Miller* v. *Fort Smith L. & T. Co.,* 136 Ark. 272, 206 S. W. 329. Without passing upon whether the challenged instruction is in all respects a correct declaration of law we are of the opinion that in this case the instruction provided the jury with a roving commission to make a finding of negligence without any substantial or relevant proof to support that determination.

Reversed.

GREAT AMERICAN INDEMNITY CO. *v.* STATE, EX REL. ARK. BITUMULS CO.

5-1942 328 S. W. 2d 504
Opinion delivered November 9, 1959.

Moses, McClellan, Arnold, Owen & McDermott, By *Jack Young,* for appellant.

Mehaffy, Smith & Williams, By *Pat Mehaffy* and *Robert V. Light,* for appellee.

GEORGE ROSE SMITH, J. In 1957 the State Highway Commission awarded a paving contract to T. F. Scholes of Arkansas, Inc., and the contractor executed a performance bond with the appellant as surety thereon. Ark. Stats. 1947, § 76-217. The appellee, Arkansas Bitumuls Company, furnished the contractor with asphalt to be used upon the paving job. The contractor failed to pay the materialman's account, and the appellee brought this action against the contractor and its surety to recover a principal debt of $45,318.96. The defendants at first denied the claim, but three days before the date of trial they amended their answer to admit liability for the full amount sued for. The surety, however, resisted the plaintiff's right to recover the statutory 12% penalty and attorney's fee. Ark. Stats., § 66-514. The trial

court allowed the penalty and an attorney's fee of $6,000, and this appeal questions those allowances.

The appellant's principal contention is that it was never in default, for the reason that it was not required to make any payment as surety on the performance bond until the Highway Commission had first certified that all sums owed to the State under the bond had been paid. Ark. Stats., § 76-217. It is conceded that the Highway Commission has not made the certification mentioned in the statute, but the appellee insists, and the trial court held, that this requirement was repealed by Ark. Stats., §§ 14-604 and 14-606. We have concluded that the trial court was correct, the issue being governed by our decision in *Consolidated Ind. and Ins. Co.* v. *Fischer Lime & Cement Co.,* 187 Ark. 131, 59 S. W. 2d 928.

The statute relied upon by the appellant was § 53 of Act 65 of 1929. The provisions relevant to this case were (*a*) that performance bonds should be required for highway construction contracts in excess of $1,000, (*b*) that payment of claims for labor or material under such a bond should be postponed until the Highway Commission had certified that all sums due the State had been paid, and (*c*) that all such claimants should, as a condition to bringing an action upon their demands, file their claims with the Highway Commission within thirty days after the completion of the work.

Later in the same session of the legislature there was passed Act 368 of 1929, upon which the appellee relies. This statute provided that all bonds required by public officers or agencies should be construed to cover certain specified items of labor and material, whether or not the language of the particular bond included the enumerated items. The act also provided that suits to enforce claims under such a bond should be commenced within six months from the date of the final estimate to the contractor.

In the *Fischer* case the claimants had not filed their claims with the Highway Commission in accordance with

what we have designated as provision (*c*) of the earlier statute. We examined the two acts in detail and found that several clauses in the later act were contrary to the provisions of the earlier act. It was our conclusion that Act 368 had impliedly repealed the requirement that claims be filed within thirty days after the completion of the work. "The only condition upon the right to sue under act 368 is that the suit shall be commenced within six months from the date of final estimate to the contractor."

We are unable to distinguish that case from this one. What we have set out as provision (*a*) of Act 65 is a substantive requirement that the performance bond be given. But provisions (*b*) and (*c*) are procedural clauses having to do with the claimants' remedy upon the bond. The *Fischer* case holds in effect that in enacting Act 368 the legislature covered the matter of procedure anew and laid down the limitation of six months as the only condition upon the claimants' right to sue. It follows that provision (*b*), with reference to the Highway Commission's certificate, was also impliedly repealed, for there is no sound basis for treating one of the procedural clauses differently from the other one.

The appellant also insists that the amount allowed as an attorney's fee is excessive. On this point one of the appellee's attorneys made a sworn statement about the services that had actually been rendered, but this statement has not been brought into the record. In testimony which the trial court regarded as advisory two disinterested attorneys stated that a reasonable fee would be from $7,500 to $8,750, while a third thought the amount should fall between $3,700 and $4,500. Owing to the fact that some of the proof is not before us the trial court was in a better position to fix a reasonable fee than we are, and we cannot say that his allowance is excessive. We do hold, however, that the appellee's request for an additional fee for services upon this appeal should be denied.

Affirmed.

5-1938 328 S. W. 2d 498

Opinion delivered November 9, 1959.

[redacted]

Willis V. Lewis, for appellant.

Langston & Walker, for appellee.

PAUL WARD, Associate Justice. The questions involved on the appeal relate to the amount of child support and the rights of visitation in a divorce action.

Appellant and appellee were divorced May 16, 1957. There were two children, ages at the time approximately three and five. The decree granting appellee a divorce provided that appellant should pay $25.00 a week for support of the minor children, $45.00 per month to pay installments on the residence in Little Rock, and gave custody of the children to appellee with the right of appellant to visit them on each Tuesday or Wednesday between 2:00 P. M. and 6:00 P. M. There was no appeal from the above decree.

On September 25, 1957, on petition of both parties the trial court issued an order in which it was noted that appellant had given to appellee a quitclaim deed to the residence mentioned above. The order relieved appellant of the $45.00 monthly payments heretofore mentioned and reduced the child support from $25.00 a week to $20.00 a week. No appeal was taken from this order.

Sometime after the divorce appellant remarried but he did visit the children generally on Wednesday afternoons, and once in a while he was allowed to keep them on Saturday nights. After appellant's remarriage it appears that some friction developed between him and appellee and on one occasion at least a fight took place between appellant and appellee's father at her residence.

On November 17, 1958, appellee filed a motion in the original divorce action seeking to restrain appellant from visiting her home and from molesting her and the children, asking that appellant's visitation rights be discontinued and asking that appellant be required to pay $100.00 per month for support of the minor children and also pay certain medical bills and court costs including an attorney's fee. On the same day appellant also filed a petition in the same case in which it was stated that he and appellee had formerly agreed that he should pick up the children each Saturday at 8:00 A. M. and keep them overnight; that appellee was prejudicing the children against him since his remarriage and also refusing to let him visit the children on Saturday. The prayer in appellant's petition was that appellee be required to show cause why she should not be held in contempt of court, and that she be restrained from interfering with his visitation rights with the children.

Upon the above motion and petition a hearing was had and on February 27, 1959, the trial court denied appellant's petition and also denied appellee's motion to discontinue appellant's rights of visitation. The trial court did, however, fix appellant's visitation rights to every other Saturday from 9:00 A. M. to 5:00 P.M.; and ordered appellant to pay $25.00 each week for support

of the two minor children, to pay $78.00 medical bill for the children, to pay $69.20 court costs, and to pay a $75.00 attorney fee for appellee.

Appellant has duly prosecuted an appeal from the above decree and seeks a reversal on three separate grounds, namely: One, the court erred in changing appellant's visitation rights; Two, the court erred in ordering appellant to pay $25.00 each week for the support of the minor children; and, Three, the court erred in ordering appellant to pay certain costs including an attorney's fee. We are unable to agree with appellant on any of the grounds set forth above and our reasons therefor are set out below.

One. We think it was in the sound discretion of the court to fix reasonable visitation rights for appellant and we are unable to say that its discretion was abused in this instance. In the original decree it was provided that appellant should have the right to visit his minor children on each Tuesday *or* Wednesday between 2:00 P. M. and 6:00 P. M. for a total period of four hours each week. Under the order appealed from appellant is given the same number of visitation hours but they are to be used between 9:00 A. M. and 5:00 P. M. on each alternate Saturday. The record discloses several things which might have prompted the trial court in making this change. It appears that one of the children is now of school age and it seems reasonable that the hours formerly fixed might easily cause a conflict. It also appears that there has been friction between appellant and appellee, at one time resulting in a fight as before mentioned. There is also testimony in the record given by Dr. N. T. Hollis from which the court could have found that appellant's demeanor was not what it should have been. As in all child custody cases, the trial court retains jurisdiction to make any change in visitation rights which future circumstances might dictate. We cannot, therefore, say that the trial court abused its discretion under the facts and circumstances above set forth.

Two. Likewise we see no merit in appellant's contention that the trial court erred in increasing the child support from $20.00 to $25.00 each week. Appellant contends that he and appellee had agreed on the lesser amount and that the court was bound thereby. In the first place the record does not establish that any such agreement was ever made. At least it was not set forth in the court's decree and the court was, therefore, not bound by it. Moreover, the matter of child support is something over which the trial court has continuing jurisdiction and it cannot be bartered away even by the parents. Also, the amount of support is a matter within the sound discretion of the trial court under the facts of each case. See *Johnson* v. *Johnson,* 165 Ark. 195, 263 S. W. 2d 379; *Martin* v. *Martin,* 225 Ark. 677, 284 S. W. 2d 647; and *Childers* v. *Childers,* 229 Ark. 12, 313 S. W. 2d 75.

Three. Likewise, we are unable to agree with appellant's contention that since appellee did not succeed on her motion relative to a discontinuance of appellant's visitation rights he should not have been required to pay for appellee's depositions, court costs, and attorney's fee. While it is true that appellee in her motion filed November 17, 1958, asked that appellant's visitation rights be cancelled and while it is true this was not done, it is also true that appellant did not get what he asked for in his petition filed on the same day. As to the rights to cost of the deposition, appellant's contention is fully met by our holding in *Hardy* v. *Hardy,* 228 Ark. 991, 311 S. W. 2d 761. Again it was within the sound discretion of the trial court to decide who should pay the court costs and the attorney's fee as well as the doctor bill for the treatment of the minor children. In each instance the amount of the allowance appears to be reasonable and we are unable to see in what way the trial court abused its discretion.

Affirmed.

ROBINSON, J., not participating.

Opinion delivered November 9, 1959.

[redacted]

George Howard, Jr., for appellant.

James C. Cole and *Ed F. McDonald,* for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from an order dismissing appellant's petition for determination of heirship.

Grant Monts, a Negro resident of Grant County, Arkansas, died in February, 1926, at the age of 45. At

death he owned 120 acres of land in Grant County upon which he was living. Following his death one Adoria Ludiway Monts, who allegedly was Grant Monts' widow, continued to live on said land until her death on September 4, 1957.

Shortly after Adoria's death, Veltee Cole, a granddaughter of Adoria, filed a petition for appointment as administratrix of the estate of Grant Monts, stating that appellees, Jethrow Dorn and James Davis, were the sole surviving heirs of Grant Monts. This was based on the allegation that appellees are the sons of Torpelia Monts Davis, deceased daughter of Grant and Adoria Monts. Thereafter Henry Mays, Veltee Cole's father, filed a petition for appointment as administrator in succession to Veltee Cole, which was granted.

Subsequently Veltee Cole, through her father as guardian, filed a claim in the amount of $7,280 against the estate, alleging she had an agreement with appellees as sole heirs of Grant Monts whereby she would be paid by the estate for caring for Adoria, Grant Monts' widow.

On April 28, 1958, this claim was allowed in the amount of $2,000. In allowing same the court found that appellees were the legal heirs of Grant Monts and as such they entered into the alleged agreement with Veltee Cole to care for Adoria Monts as Grant Monts' widow.

On May 13, 1958, appellant Donnie Coogler filed a petition for determination of heirship as provided in Ark. Stat. § 62-2914. He alleged that he was a nephew of Grant Monts and as such was the sole surviving heir; that appellees claim to be heirs of Grant Monts; that decedent owned certain land in Grant County; and that the net value of the estate was approximately $5,000. The petition asked that the court set a hearing for same in order that notice thereof could be given under paragraph (c) of Ark. Stat. § 62-2914 and that appellant be declared the lawful heir of Grant Monts. After two hearings on the petition, the court took the case under advisement and on February 6, 1959, entered an order dismissing appellant's petition.

Three grounds are argued for reversal:

First, it is contended that the court erred in dismissing appellant's petition. Appellant's principal argument is that Grant Monts and Adoria Ludiway Monts were never married and for that reason appellees would not be the grandchildren and legal heirs. Testimony showed that Grant Monts came to Arkansas from South Carolina about 1906. Adoria came to Grant County about 1910. They lived together as man and wife from the time of Adoria's arrival until Grant's death. Following his death Adoria lived on the land and exercised all the rights of a widow, with the knowledge of both the appellant and appellees. There was testimony offered by appellant to the effect that Adoria arrived in 1910 with four children, the youngest of whom was appellees' mother; that these were the children of Adoria and not of Grant; that the children started using the name Monts when they started in school; that both Grant and Adoria had admitted on several occasions that they were not married; and that acts of ownership of the land by Adoria after Grant's death were done only after permission of appellant had been obtained.

There is strong evidence of a marital relationship in the record. First of all, before coming to Arkansas both Grant and Adoria lived in South Carolina, where common law marriage is recognized. *Ex parte Romans,* 78 S. C. 210, 58 S. E. 614; *Jackson* v. *United States,* 14 F. Supp. 132. When Adoria and children arrived from South Carolina, they were met at the train by Grant and went home with him. From that moment on Grant and Adoria lived together as husband and wife for sixteen years. During this time the children went by the name Monts and Grant cared for them and held them out to be his own. Several instruments were introduced regarding mortgaging and leasing of the land, where Adoria executed same as Grant's wife and relinquished dower. One instrument, an oil and gas lease on this same land, was executed on July 1, 1942, by Adoria Monts as widow and Torpelia Monts, daughter of Grant Monts, deceased. Where there is cohabitation appar-

ently matrimonial, a strong presumption of marriage arises which increases with the passage of time, during which the parties lived together as husband and wife, especially where the legitimacy of a child is involved. This rule was recognized by this Court in *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189; see also *Locket* v. *Adams,* 212 Ark. 899, 208 S. W. 2d 428. The burden is on one claiming otherwise to prove there was no such marriage. See *Bruno* v. *Bruno,* 221 Ark. 759, 256 S. W. 2d 341, at page 764, and cases cited therein.

The evidence before the lower court established the presumption of a valid marriage between Grant and Adoria Monts. The necessary result is the relationship of the appellees as grandchildren of Grant Monts. In order to disprove appellees' right to inherit, appellant had the burden of overcoming the presumption of marriage. We cannot say the probate judge erred in finding that appellant had not discharged this burden.

Next the appellant says the court erred in permitting appellees to file a response to appellant's petition and to offer testimony. This contention is based on the fact that notice of the date of hearing was received by appellee James Davis by registered mail on May 17, 1958. Appellees appeared at the hearing on June 20, 1958, without having filed a response, and at a second hearing on July 16, 1958, the court allowed appellees to dictate a response into the record over the objection of appellant.

Appellant argues that according to Ark. Stat. § 62-2004(e), Ark. Stat. § 27-1135 controls the time within which an answer to the petition should have been filed. Under § 27-1135 the appellees would have been allowed only 20 days to answer. However, the first sentence of § 62-2004(e) is as follows: "Procedure and rules of evidence in probate court, except as in this Code otherwise provided, shall be the same as in courts of equity." Ark. Stat. § 62-2914, setting forth the procedure in petitions for determination of heirship, at paragraph (c), states: "Upon the filing of a petition, the court shall fix the time for the hearing thereof, notice

of which shall be given to . . ." and then follows the persons to whom the notice should be sent. In addition, Ark. Stat. § 62-2011, which pertains to the general provisions governing all probate matters, is as follows: "An interested person, on or before the day set for hearing, may file written objections to a petition previously filed. Upon special order or general rule of the court, objections to a petition must be filed in writing as a prerequisite to being heard by the court." Under these sections all persons desiring to be heard would have the right to appear at said hearing, as did the appellees in the instant case, unless by order or general rule the court required a written response. The record contains no such order or rule.

Finally appellant maintains the court erred in sustaining the objection to certain testimony. Appellant challenges the ruling of the court in not allowing testimony offered by two of his witnesses to the effect that Grant and Adoria were not married. There is ample unchallenged evidence in the record on this same point. We try appeals from probate court *de novo* and consider the competent testimony regardless of the ruling of the trial court on the above evidence. *Suits* v. *Chumley, Administrator,* 218 Ark. 488, 236 S. W. 2d 1001; *Walsh* v. *Fairhead, Executrix,* 215 Ark. 218, 219 S. W. 2d 941; *Morris* v. *Arrington, Administratrix,* 215 Ark. 564, 221 S. W. 2d 406.

Affirmed.

5-1963 328 S. W. 2d 510

Opinion delivered November 9, 1959.

Wright, Harrison, Lindsey & Upton, for appellant.

D. Leonard Lingo & Harry L. Ponder, for appellee.

Jim Johnson, Associate Justice. Appellant, St. Paul Fire & Marine Insurance Company, issued to appellee, J. R. Kell, a combination auto policy for the period July 7, 1956, to July 7, 1957, providing liability, collision, comprehensive, and medical payments.

By endorsement, the policy also provided for a $10,000 indemnity for the death of J. R. Kell as a result of an automobile accident and a weekly indemnity of $50 during the period of total disability suffered by J. R. Kell as a result of an automobile accident.

On May 15, 1957, (during the policy period) J. R. Kell was injured in an automobile accident while driving to work in his Dodge pickup truck. He was totally disabled for a period of twenty-one weeks. Appellee gave notice of claim and executed a proof of loss, claiming $1,050 under the total disability indemnity provision of the policy. The claim was denied by appellant and this

suit followed. The case was tried before the Court sitting as a jury and resulted in judgment in favor of appellee in accordance with the relief prayed for in the complaint.

Appellant relies upon an exclusion which is part of the endorsement under which claim was made and which reads as follows:

"This insurance does not apply: (a) to bodily injury or death sustained in the course of his occupation by any person while engaged (1) in duties incident to the operation, loading or unloading of, or as an assistant on, a public livery conveyance or commercial automobile . . ."

Appellant argues that the undisputed testimony reveals that J. R. Kell was operating a commercial automobile in the course of his occupation at the time of the accident of May 15, 1957, and that the trial court should, therefore, have entered judgment in favor of appellant.

The initial policy of insurance contains the following language under Item 8:

". . . (a) The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as use *principally* in the business occupation of the named insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes . . ." (Emphasis supplied).

The endorsement also contains the following provision:

"The company agrees with the named insured, in consideration of the payment of the premium and in reliance upon the declarations and subject to the limits of liability, exclusions, conditions and other terms of this endorsement and *of the policy* . . ." (Emphasis Supplied).

It is a well settled rule of this Court that in construing contracts of insurance, where a provision of an

insurance policy is susceptible of two equally reasonable constructions, one favorable to the insurer and the other to the insured, the latter will be followed: *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Wolff* v. *National Liberty Ins. Co. of America,* 191 Ark. 146, 83 S. W. 2d 836; *Phoenix Assurance Co.* v. *Loetscher,* 215 Ark. 23, 219 S .W. 2d 629; *Washington Fire & Marine Ins. Co.* v. *Ryburn,* 228 Ark. 930, 311 S. W. 2d 302.

In the case of *Travelers Protective Association of America* v. *Sherry,* 192 Ark. 753, 94 S. W. 2d 713, this Court also said:

"In all contracts of insurance of dubious or doubtful meaning, the construction should be placed upon them most favorable to the insured; but where the provisions are unambiguous they must be construed according to their plain meaning."

The endorsement attached to the policy of insurance plainly states that the endorsement is "subject to the limits of liability, exclusions, conditions and other terms of this endorsement and of the policy." This is an unambiguous statement and the policy itself defines "commercial automobile" as one used *principally* in the business occupation of the named insured.

The Courts do not rewrite the contract into which the parties have entered. The law does not permit the Courts to add to, subtract from, or substitute for the language employed in the policy. It is the duty of the Courts to construe the language used by the parties and such construction is performed by considering the sense and meaning of the terms which the parties have used as they are taken and understood in their plain ordinary and popular sense. *State Farm Mutual Automobile Ins. Co.* v. *Belshe,* 195 Ark. 460, 112 S. W. 2d 954.

The undisputed testimony of appellee, J. R. Kell, is as follows:

"I used my truck for practically everything, you know run around and stuff like that. When we were working in a neighboring town I took Carl and Darrell

Colburn to work when I took my truck. We went about half of the time with another bricklayer who lived in Walnut Ridge, and rode in his car. I used the truck like I would a car or anything else for my transportation anytime that I had some where to go. I used the truck part of the time when I was going out with my wife and child for social affairs. I went fishing in my truck about as much as work."

Appellant concedes that a pickup truck is susceptible to a variety of uses and can be used for non-commercial purposes. The test must necessarily be whether the pickup truck was a commercial vehicle as defined by the terms of the policy.

The only testimony indicating that the truck was ever used in appellee's employment was that appellee did need his truck when he changed jobs in order to move his mortar boards and box. It is undisputed that at the time this accident occurred appellee was using the vehicle for transportation to the job site the same as he would a private automobile and was not using the truck to perform any duties incident to his occupation.

From the above, we cannot say that the pickup truck in question was a commercial vehicle used principally (or primarily) in the business occupation of appellee. Therefore, following our rule that where a jury is waived and the case is tried before a judge sitting as a jury, his finding on a question of fact is as conclusive on appeal as a jury verdict and will not be disturbed if supported by any substantial evidence. *Pate* v. *Fears,* 223 Ark. 365, 265 S. W. 2d 954. We conclude that there is an abundance of substantial evidence to support the finding of the trial court.

Affirmed.

We have decided that appellee's attorneys are entitled to a combined additional fee of $150.

DAVIS *v.* ADAMS.

5-1912 328 S. W. 2d 851

Opinion delivered November 16, 1959.

J. Wesley Sampier, for appellant.

Floyd L. Rees, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from an order of the Probate Court removing appellant as administratrix in succession of her deceased husband's estate, and subsequently appointing another administrator in succession.

W. K. Davis died testate in Benton County on March 12, 1951, leaving his entire estate to his widow, Vida Smith Davis, appellant herein.[1] The record before us reflects that on August 26, 1955, the said Vida Smith Davis filed a petition requesting that she be appointed personal representative; however, she never qualified, and was never issued Letters Testamentary. On January 17, 1957, William Linton Davis, a son of the deceased, was appointed Administrator With the Will Annexed,

[1] The Will did not designate an Executor or Executrix.

posted bond, and received Letters Testamentary. On April 11, 1957, appellant obtained the discharge of William Linton Davis by virtue of his disqualification (Davis was a non-resident of this state). Appellant was appointed administratrix in succession on said date, but did not make bond ($1,000 bond was required), never received letters of administration, has filed no reports, nor taken any action as administratrix.

Approximately a week before obtaining her own appointment (April 5, 1957), and while William Linton Davis was still serving as administrator, appellant entered into a written contract, in her own individual capacity, with A. V. Adams, wherein it was agreed "that seller has sold and agrees to convey" certain described real estate located in Benton County to A. V. Adams and wife (two-thirds interest), and Sophia Eckert (one-third interest). The agreement sets out the purchase price as $7,000, acknowledges that the buyer has paid the sum of $300, (which sum entitles the buyer to the use of the land for a term of one year in the event that the seller should fail to tender within a reasonable time the deeds and abstract of title, and buyer should elect to terminate the agreement) and contains the following provisions:

"It is understood between the parties that the lands herein agreed to be conveyed by the Seller were the property of W. K. Davis, now deceased, who was the husband of the seller, and whose estate is now in process of administration in the Probate Court of Benton County, Arkansas, and that the buyer shall not be required to accept a conveyance of said title until said administration is closed and the title to said real estate is conveyed to the buyer and the other person or persons to whom buyer has agreed to convey the same by the person or persons in whom the title to said real estate is vested. It is understood that to meet these requirements, a period of some eight months may be required. In the meantime, the buyer shall be permitted to occupy and use said land without payment of rent other than the said sum of $300.00, and seller shall not be considered to be in default while said necessary delay occurs to wind up the

administration of said estate. But seller shall be required to comply with her agreement within a reasonable time after the close of the administration of said estate." On November 6, 1958, Adams filed a petition in the Benton County Probate Court praying that the court issue an order directing Mrs. Davis to appear to show cause why she should not be removed as administratrix and attaching a copy of the contract entered into between appellant and Adams. Mrs. Davis responded, denying that any cause existed for her removal, and further alleging that petitioner was not "an interested person" within the meaning of the provisions of § 62-2003, of Ark. Stats. (1947) Anno., and accordingly had no right to file the petition. A second petition was filed by Adams on November 13th, enlarging upon the original petition. On December 12th, the "show cause" citation came on for hearing, at which time counsel for the administratrix requested that the hearing be continued because the administratrix was physically unable to attend court.[2] The matter was continued until December 18th, at which time the attorney for the administratrix appeared with a written statement from Dr. C. S. Wilson, M.D., wherein it was stated that Mrs. Davis was in ill health, and that she "is also a subject of the worry type to a degree that a call to 'Court' is a hazard to her health." The court found that Mrs. Davis should be removed as "Administratrix in Succession with Will Annexed of the Estate of W. K. Davis, because she has failed to furnish bond and qualify as such Administratrix as required by law and for the further reason that her health would be impaired if she was required to appear in Court or perform the other duties pertaining to the administration of said estate"; entered its order removing Mrs. Davis, directed her to file an accounting to that date, and sub-

[2] The Court's Order, with reference to this proceeding, found "That on December 12, 1958, the attorney for said Administratrix appeared in open Court and requested that said hearing be continued because the said Administratrix was too nervous and physically unable to attend Court, and introduced evidence by Catherine Key Davis, a daughter of said Administratrix to the effect that the citation into Court had caused said Administratrix to become very nervous and sick for several days, and that the Administratrix was physically unable to be present in Court on said date."

sequently appointed James T. McDonald of Rogers as administrator in succession. From the order removing Mrs. Davis as administratrix, and the order naming McDonald administrator in succession, appellant brings this appeal. For reversal, appellant relies upon two points, as follows:

"Point 1.

The Probate Court is not the appropriate forum, and these are not the appropriate proceedings, whereby the Appellee may enforce whatever rights he may have acquired, by Contract, against the Appellant as an individual and not against her as the Personal Representative of this Estate.

Point 2.

Even though the Probate Court has the power, on its own motion, to remove Vida Smith Davis as the Administratrix of this Estate, on technical grounds, still no useful purpose could be served, at this late date, by her removal and the appointment of an Administrator in Succession, to go through the idle motions, at considerable expense, of formally winding up the Estate and delivering the assets thereof to Vida Smith Davis, the sole beneficiary under the Will, there being no claims pending, and the time for filing claims having long since expired, and the heirs of the deceased having agreed to the provisions of the Will."

We proceed to a discussion of each point in the order named.

I.

We, of course, agree that the Probate Court is not the proper forum to enforce contractual rights, but this Probate proceeding was apparently instituted only as a necessary preliminary to the commencement of a Chancery suit for specific performance. The contract provides "but seller shall be required to comply with her agreement within a reasonable time *after the close of*

the administration of said estate."[3] Accordingly, any present suit to enforce specific performance might well be met with the defense that administration had not been completed on the estate; in such event, any alleged rights of Adams under the contract might well "dangle" indefinitely, for Mrs. Davis, if she desired to avoid performance of the contract, or for any other reason wanted to keep the estate open, would certainly be in a position to do so. It would appear that the closing of the estate is a condition precedent to any action seeking to enforce alleged rights under the agreement.

II.

Appellant points out that there are no creditors; the time for filing claims has expired, and the heirs have agreed to the provisions of the will; in other words, there is no necessity for administration. It is further pointed out that this will was not admitted to Probate until more than five years after the death of the deceased. From appellant's brief: "Now the appointment of William Linton Davis was nearly six years after the death of the testator on March 12, 1951, at which time it was too late, under Ark. Stat. 62-2125, for the Will to be admitted to Probate." These contentions cannot be here maintained, for the propriety of opening the estate has never been questioned by any pleading, or objection, to the Probate Court. The petition of William Linton Davis seeking probate of the will recites: "The wife of W. K. Davis has heretofore filed her petition to be appointed administratrix of the estate but over a year has elapsed since said petition was filed and no action has been taken upon it. Vida Smith Davis is now 78 years of age and is too feeble to administer said estate. Your petitioner is a son of the decedent and wishes to be appointed administrator in order that he may conserve the estate for his mother and her heirs after her death." The order admitting the will to Probate, which found "there is need of administration being had", and naming William Linton Davis as Administrator with the Will Annexed, was apparently uncontested. On April

[3] Emphasis supplied.

11th, appellant filed her petition in which she alleged that William Linton Davis was a non-resident and asked that she be named administratrix in succession. It is noted that none of the matters now contended were raised in that petition. She did not allege that the estate was improperly opened; that there were no creditors; no need for administration, and certainly, it does not appear there was any more need of administration at that time than at present. To the contrary, appellant invoked the aid of the court, asking that she be permitted to serve as administratrix of the estate. Having requested the court to appoint her, appellant cannot now be heard to complain that the court was without power to make such appointment. This is in accordance with general principles of *estoppel.* As stated in *Corpus Juris Secundum,* Vol. 21, § 108, page 162. "Save where the court is completely without jurisdiction of the subject matter, a party will be *estopped* to question the court's jurisdiction if he invokes it, * * * or accepts benefits resulting from the court's exercise of jurisdiction."

A substantial part of appellant's brief, and oral argument before the court, relates to her contention that Adams is not "an interested party" as provided by § 62-2003k, Ark. Stats. (1947) Anno.; that he is accordingly without right or authority to maintain this action. The section provides as follows:

"k. 'Interested persons' includes an heir, devisee, spouse, creditor or any other having a property right or interest in or claim against the estate being administered, and a fiduciary."

While this Court has never had occasion to define the term "interested party" under this section of the Probate Code, *i.e.,* construe the phrase "any other having a property right or interest in", we are of the opinion that this litigation does not present the appropriate set of facts to enable, or require, the formulation of a clear-cut definition. If Mrs. Davis had qualified by making the required bond—if her physical competency to serve had been established—and she had thereafter been removed as a result of the petition by Adams—the ques-

tion would be squarely before the Court. Likewise, if the Probate Court had not removed Mrs. Davis, and Adams had perfected the appeal—the question would be properly before us. But those conditions do not exist. The trial court removed appellant because she had failed to furnish bond and qualify; further, because the court found that her health would not permit her to perform the duties pertaining to the administration of the estate. While, of course, the matter was called to the attention of the court by Adams, the trial court had full authority to remove Mrs. Davis on its own initiative. The record before us clearly justifies this removal. In fact, the court might well have been derelict in its duty if it had not removed her, for § 62-2218 provides:

"If at any time a personal representative fails to give a bond as required by the court, or, if no bond be required, fails to file written acceptance of his appointment within the time fixed by the court, *some other person shall be appointed in his stead.*[4] If letters have been issued, they shall be revoked."

Section 62-2203 also sets forth grounds for removal, including "unsuitable or incapable of discharging his trust," or "failed to perform any duty imposed by law or any lawful order of the court * * *." It is undisputed that Mrs. Davis did not make bond as required by the court, and has not qualified to receive Letters. Since we have concluded that the court's order of removal was entirely justified, it makes little difference as to what prompted the court to make the inquiry, or enter the order. The court could have taken this action upon being informed by the clerk that Mrs. Davis had never qualified, or by ascertaining in any other manner that its order had not been complied with. Our views in this connection, are somewhat expressed by the Supreme Court of Massachusetts in the case of *Quincy Trust Co.* v. *Taylor*, 317 Mass. 195, 57 N. E. 2d 573. There, Jane Taylor was appointed executrix of the will of her deceased husband. There was no creditor other than the Quincy Trust Company, which held four mortgage notes.

[4] Emphasis supplied.

The company filed a petition for the removal of the executrix on the ground, among others, that she was "evidently unsuitable for the discharge of said trust." The executrix filed a motion to strike the appearance of the Quincy Trust Company on the ground that it had been paid and was no longer a creditor. The trial court refused to grant the motion, and removed the executrix. In affirming the action of the trial court, the Supreme Court said:

"We see no need to decide upon this record whether the Quincy Trust Company was a creditor at the time when the present petition was filed. Even if it was not, no error is shown in the decree for removal. The denial of the motion to strike out the appearance of the Quincy Trust Company was of no practical consequence.

Ordinarily courts properly remain inactive unless and until judicial action is required by some party in accordance with recognized practice. But courts have a wide inherent power to do justice and to adopt procedure to that end. * * * Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular *sua sponte*. * * *

Especially appropriate for the exercise of judicial power *sua sponte* is a case in which an appointee of the court to a position of trust is found to be unworthy or unsuitable. A simple illustration will suffice to show the necessity of that power. Suppose a Probate Court should learn that an administrator has embezzled money and has become thoroughly untrustworthy. The persons entitled as distributees, let us suppose, are residents of a distant country, are without experience in affairs, and have no counsel or representative here. In such case it would be a reproach to the law if the Probate Court were compelled to remain inactive until some interested person should appear and file a petition for removal.

The question whether the Quincy Trust Company had a private right to appear and petition becomes imma-

terial in view of the result to which we have come as to the legality of the decree of removal."[5]

Likewise, under our conclusion that the administratrix was properly removed, the question of whether A. V. Adams had a right to appear and petition becomes immaterial.

Affirmed.

[5] The Court also, in this Opinion, gave an interesting discussion on the word "unsuitable", as follows: "The statutory word 'unsuitable' gives wide discretion to a probate judge. Past maladministration of a comparable trust, bad character, misconduct, neglect of duty, or physical or mental incapacity, warrants a finding that an executor or administrator is unsuitable. Such a finding may also be based upon the existence of an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly, and dispassionately in his trust. It may also be based upon any other ground for believing that his continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted. Actual dereliction in duty need not be shown."

Cox *v.* Wentz.

5-1966 329 S. W. 2d 413

Opinion delivered November 16, 1959.

[Rehearing denied December 21, 1959]

James R. Hale, Lovell & Evans, for appellant.

John H. Joyce, O. E. Williams, for appellee.

J. Seaborn Holt, Associate Justice. This action grew out of the Republican Primary held in Washington County in the summer of 1958.

September 6, 1958, appellee, Keith Wentz, filed a petition in Washington Circuit Court for a *writ* of *mandamus* to compel appellants, R. B. Cox, chairman, U. A. Lovell, (later succeeded by E. A. Maestri) secretary, of the Republican Central Committee of that county to certify him as the duly elected central committeeman from Ward Two, Springdale, Arkansas, on August 12, 1958, and further to issue to him a certificate of election, alleging that he had received a majority of the votes cast for the office; further alleging that it was their duty to issue a certificate of election to him but they had refused to do so, thus depriving him of said office. The notice required under Section 33-105 Ark. Stats. was duly served on U. A. Lovell and R. B. Cox. Cox and Lovell filed a motion to quash service of summons which the court overruled. Appellants then filed a demurrer to the petition, which was overruled by the court, with the rights of the parties specifically reserved. Appellants then filed an answer alleging that petitioner was not a qualified elector, did not receive a majority of the votes cast, did not file a corrupt practice pledge, attempted to file for State Committeeman, Precinct Committeeman and Delegate to the County Convention, failed to pay his fee as provided by law, wrongfully and unlawfully caused an alleged ballot form to be used which was inserted in the ballot box in *lieu* of the official ballot prepared by the secretary and that he tried for two positions on the ballot and the official ballot shows that petitioner was

not a candidate for precinct committeeman, alleged that the central committee, as required by statute, on petition of John Rose, a valid candidate for precinct committeeman, threw out the results of the election in Ward Two, Springdale, and certified the rest of the ballots.

Following a hearing on October 31, 1958, the trial court granted the petition for writ of *mandamus* requiring Cox and Maestri to certify appellee, Wentz, as the central committeeman of Ward Two, City of Springdale. The order contains this recital: "The Court finds that the law and Rules of the Party were substantially complied with and petitioner was duly elected as Central Committeeman of the Republican Party of Washington County, Arkansas, in and for Ward 2, Springdale, and should now be given a certificate of election by the present Secretary, E. A. Maestri, who has since succeeded Ulys A. Lovell as Secretary. The Court finds that the former Secretary of the Committee, Ulys A. Lovell, who was Secretary at the time the election was held, had the duty under the law of preparing and printing the ballot for said primary election, and that he accepted and used the substituted ballot and said Respondents are now *estopped* from objecting to same. And now, the Court having taken said matter under advisement, on this 13th day of January, 1959, it is Ordered and Adjudged by the Court that the Respondents, R. B. Cox and E. A. Maestri, as Chairman and Secretary, respectively of said Republican Central Committee of Washington County, Arkansas, be and they are hereby commanded and required within ten days hereafter, to execute and deliver to said petitioner, Keith Wentz, a certificate of election as Central Committeeman of the Republican Party in and for Ward 2 (2), Springdale, Washington County, Arkansas,". This appeal followed.

For reversal appellants rely on three points which we consider in the order presented. "Point I — The court erred in overruling respondent's special appearance and motion to quash." In support of this contention, appellants strongly rely on Section 27-306 Ark. Stats., which has to do with "summons". We do not

agree that this section has any application here since we are dealing with a petition for *mandamus* and in this situation, *notice* of a hearing on the petition must be served in the manner set out in section 33-105 Ark. Stats. (*MANDAMUS* AND PROHIBITION in PROCEEDINGS) which provides: "Notice of hearing upon any such petition shall be served in writing upon the officer or persons against whom the relief is sought, for such time in such manner as may be prescribed by the court having jurisdiction. Such notice shall state the style of the court, the docket number of the action or proceeding, the date and place of hearing, and the relief sought. The sufficiency of the notice shall be a question for the court." Obviously this section specifically applies to *mandamus* and provides that notice shall be served in writing upon the person or officer against whom relief is sought for the time and in the manner as may be prescribed by the court and the sufficiency of the notice shall be a question for the court. We later point out that appellants were officers. We are not here concerned with a summons as required in Section 27-306 above, but with a *notice* which we think was properly served on appellants in compliance with Section 33-105 above. The trial court so found and overruled appellants' motion to quash in this language: "I. That the notice issued by Lloyd McConnell and served by the Sheriff of Washington County, Arkansas, dated the 14th day of October, 1958, and the notice issued by Lloyd McConnell and served by the Sheriff of Washington County, Arkansas, dated the 6th day of September, 1958, were issued and served according to the laws of the State of Arkansas. II. The Court further finds that Friday, October 31st, 1958, at 9 A. M. is a proper and appropriate time to hear the cause set forth by petitioner in his Petition for Writ of *Mandamus*.

"IT IS, THEREFORE, ORDERED AND ADJUDGED that special appearance and motion to quash of R. B. Cox, Ulys A. Lovell and E. A. Maestri, respectively, be and are hereby overruled, to which action of the Court each respondent specifically objects and excepts.

"IT IS FURTHER ORDERED OF THE COURT that hearing on the petition of Keith Wentz for Writ of *Mandamus* is set for hearing Friday, October 31st, 1958, at 9 A. M., *said respondents being present in open court on this date and are accordingly notified,** to which action of the Court respondents severally object and except." We hold that appellants' motion to quash was properly overruled.

"Point II. The court erred in overruling respondent's demurrer for the reason that the petition stated no cause of action against the respondents. Point III. The court erred in overruling respondent's demurrer for the reason that a writ of *mandamus* will not lie where any question of fact must be determined." We consider these contentions together.

As we view this record, it is in no sense an election contest as appellants seem to contend. The facts appear to us to be undisputed and show that appellee, Wentz, and John R. Rose opposed each other and Rose was defeated. Rose received 7 votes and Wentz 11. Rose did not contest the election, he is not a party here in which Wentz seeks by *mandamus* to require appellants, as chairman and secretary of the Republican Central Committee of Washington County, to perform the purely ministerial duty of issuing to him a certificate of election to which we think he is clearly entitled. *Mandamus* petitions may be heard in either the circuit or chancery courts. Sec. 33-101 Ark. Stats. provides: "Jurisdiction of circuit and chancery courts.—The Circuit and Chancery Court shall have power to hear and determine petitions for the writ of *mandamus* and prohibition, and to issue such writs to all inferior courts, tribunals and officers in their respective jurisdictions." Thus it is clear that these courts have the power to issue the writ of *mandamus* to these officers, Cox and Maestri, appellants.

Section 3-221 Ark. Stats., makes all chairmen and secretaries of county central committees officers within the meaning of Section 33-101 above and subject to *mandamus*. Sec. 3-221 provides: "Members of county cen-

*Emphasis ours.

tral committee declared officers.—The members of the various County Central Committee and the chairman and secretary of each committee are hereby declared to be officers within the meaning of section 7020, Crawford and Moses' Digest (Sec. 33-101). (Acts 1929, No. 116, Sec. 3, p. 568; Pope's Dig., Sec. 4716.)"

In *Irby* v. *Barrett,* 204 Ark. 682, 163 S. W. 2d 512, where it appears that a candidate for state senator sought a writ of *mandamus* requiring the chairman and secretary of the Democratic State Committee to certify him as a candidate for the office of state senator, this court, in holding that *mandamus* was the proper remedy, said that Rule 58 of the Democratic Party "requires the chairman and secretary to certify the names of all candidates 'who have complied with the rules herein prescribed.' The fact stands undisputed that the petitioner has complied with these rules and, having done so, no duty rests upon, nor is there any power vested in, the chairman and secretary of the committee except to perform the ministerial duty of certifying the names of petitioner and all others who have complied with the party rules."

So here, as indicated, we think that appellee has complied with the rules of the Republican Party and the law, if not fully—then substantially so, and having done so, no duty rests upon, nor is there any power vested in the appellants, the chairman and secretary of the committee, except to perform the ministerial duty of certifying the name of appellee in this case. We have not overlooked the authorities primarily relied upon by appellants, but we think they are not in point here for the reason that practically all of them involved election contests and not *mandamus* proceedings.

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

DAVIS *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE CO.

5-1918 330 S. W. 2d 276

Opinion delivered November 16, 1959.

[Rehearing denied January 18, 1960]

S. L. Richardson, for appellant.

James A. Robb and *Robert H. Dudley,* for appellee.

ED. F. MCFADDIN, Associate Justice. The question on this appeal is whether the plaintiff's complaint, together with the two amendments, stated a cause of action. The Trial Court sustained the defendant's demurrer and dismissed the cause when the plaintiff refused to plead further; and plaintiff has appealed. We will refer to the parties either by name, or as they were styled in the Trial Court.

The original complaint (filed August 2, 1958) alleged: that plaintiff, Ed. Davis, had a traffic mishap with another car owned by Bud Williams and both cars were damaged; that plaintiff's car was damaged $150.00 and Williams' car was damaged $205.86; that plaintiff had no insurance of any kind, but that Williams had both

public liability insurance and also insurance against collision damage (subject to $50.00 deduction) in the defendant, Southern Farm Bureau Casualty Insurance Company (hereinafter called "defendant").

The original complaint further alleged: that the defendant caused the Arkansas State Revenue Department to give notice to the plaintiff[1] that plaintiff's driving license would be revoked unless the plaintiff either (a) made cash deposit sufficient to cover the amount of damage, (b) gave bond to cover the damages, or (c) obtained a release from Williams; that plaintiff was financially unable to comply with either requirement (a) or (b), so plaintiff approached Williams and proposed the execution of mutual releases in compliance with Item (c) above; that Williams consulted the defendant as his insurance carrier, and ". . . the defendant willfully, maliciously, and intentionally, wrongfully interfered and persuaded, and forbade the said Williams from executing the promised release as aforesaid, and by reason thereof the said Bud Williams would not carry through and execute such release, and thereafter, . . . plaintiff's licenses aforesaid were revoked for such time until said revocation was withdrawn, which has not been done, . . ."

The original complaint further alleged that when Williams, on the advice of the defendant, refused to execute the release to Davis, the State revoked plaintiff's (Davis') driving license to plaintiff's damage in the sum of $400.00; and "That by reason of the defendant's said conduct, interference, persuasion, and forbidding, wilfully, maliciously, and intentionally so done, wrongfully causing the said Bud Williams not to execute the release, all as aforesaid, in clear violation of plaintiff's right under the law, resulting in the revocation of his said licenses and in his actual damage as aforesaid, defendant

[1] This notice was given pursuant to Act No. 347 of 1953, known as the "Motor-Vehicle Safety Responsibility Act", which may be found in § 75-1401 *et seq.* Ark. Stats. Particular attention is called to: § 75-1418 requiring report of accident; § 75-1424 on security following accident; and § 75-1425 on amount of security required.

is liable unto the plaintiff for punitive damages in the sum of $5,000.00 in addition to actual damages; . . ."

Plaintiff's first amendment to the complaint (filed September 20, 1958), alleged:

"That under the terms of said contract of insurance between defendant and the said Bud Williams, the defendant was subrogated to all the rights of the said Bud Williams, and it was the duty of the said insured, in the event a claim was made against the insured, covered by said insurance contract, to assist defendant in every manner in connection with said claim, and defendant would pay in settlement of such claim such sum as was agreed upon, if such agreement was reached, within the limits of said contract, and if a suit was brought on said action the defendant would defend same and would pay any judgment recovered thereon, within the limits of said contract; and, further, said contract provided that it was cancellable by either party at will upon giving five days notice of said cancellation, and said insured desired to keep said contract in force, and defendant was in a position to, and therefore did, in the manner and for the purpose and intent as aforesaid, cause said insured to refuse to execute said release, all as aforesaid."

Plaintiff's second amendment to the complaint (filed November 19, 1958) alleged:

"That on the 17th day of November, 1958, in Action No. 2621 in this Court between the said Bud Williams, as plaintiff, against the plaintiff herein, as defendant (Case No. 2621), wherein this plaintiff cross-complained and asked for damages to his automobile against Doyne Williams who was driving the said Williams car at the time of the collision, a trial of the issues were had by jury in which the verdict of the jury was that both the said Doyne Williams and this plaintiff were equally negligent and the jury allowed no recovery for either side in said Case No. 2621; . . ."

As aforesaid, the Trial Court sustained the defendant's demurrer and dismissed the complaint; and on this

appeal learned counsel for both sides have favored us with briefs which show tremendous study. We have concluded that the Trial Court was correct in its ruling.

I. *Williams Had The Absolute Right To Refuse To Execute Any Release To Davis.* When Davis asked Williams to execute a release and Williams refused, Davis had no cause of action against Williams, even if such refusal had been prompted by malice. This is true because a person has an absolute right to refuse to contract. There was no contract relation between Davis and Williams: Davis was merely proposing to Williams the execution of a contract; that is, a release or agreement not to sue. In Cooley on Torts, Fourth Edition, Vol. 2 § 224, the holdings are summarized in this language:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern."

In *Harding* v. *Ohio Casualty Ins. Company,* 230 Minn. 327, 41 N. W. 2d 818, the plaintiff sued the insurance company for withdrawing as a surety on his fidelity bond and the Minnesota court, in holding that the insurance company could withdraw, used this language:

". . . some rights are absolute in nature and may be exercised by a person acting singly without regard to his motive, even where it is malicious in the sense that it is done solely to cause harm to a third person. Of this sort, is the right to enter into contractual relations with another or to refuse to do so. *Hundley* v. *Louisville & NR. Co.,* 105 Ky. 162, 48 S. W. 429, 63 L. R. A. 289, 88 Am. St. Rep. 298; *H. D. Watts Co.* v. *American Bond & Mtg. Co. Inc.,* 267 Mass. 541, 166 N. E. 713, 84 A. L. R. 12; *McMaster* v. *Ford Motor Co.,* 122 S. C. 244, 115 S. E. 244, 29 A. L. R. 230; 30 Am. Jur., Interference, § 39."

In *McMaster* v. *Ford Motor Co.*, 122 S. C. 244, 115 S. E. 244, 29 A. L. R. 230, the Supreme Court of South Carolina used this language:

"But in refusing to deal with him they violated no legal right of his, since they owed him no such duty. The fundamental conception of a contract is that it is an agreement, and that implies mutual consent. Therefore the law allows one to determine for himself with whom he will contract; hence one may refuse to contract with another, or to buy or sell his goods, without incurring liability for resulting damage, even though his refusal be prompted by the intent to injure the other. Cooley, Torts, 278."

In *H. D. Watts Co.* v. *American Bond & Mortg. Co.*, 267 Mass. 541, 166 N. E. 713, 84 A. L. R. 12, the Supreme Judicial Court of Massachusetts used this language:

"A party not under contract with another has a right to refuse to enter into contractual relations with him, no matter what his motive for such refusal may be. 'Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. . . . He may refuse to deal with any man or class of men'."

We are not here dealing with an interference bringing about the *breach* of a contract: we are dealing here with the refusal to contract. So it is clear that Williams had the absolute right to refuse to execute any release to Davis and would not have been liable, even if in so refusing Williams had acted with malice.

II. *The Defendant Insurance Company Was Subrogated To All The Rights Of Williams.* We have heretofore copied a portion of the first amendment to the complaint, which alleged: "That under the terms of said contract of insurance between defendant and the said Bud Williams, the defendant was subrogated to all the rights of the said Bud Williams, . . ." The original complaint alleged that Williams carried collision insurance with defendant, so this allegation in the first amend-

ment, when given its fair understanding, meant that the defendant had paid its obligations for the repair of Williams' car and, therefore, was "subrogated to all the rights of the said Bud Williams". The rule is well recognized that the person subrogated to the rights of another has all the rights of the original party. In 50 Am. Jur. page 752, "Subrogation" § 110, the holdings are summarized in this language:

"Subrogation contemplates full substitution and places the party subrogated in the shoes of the creditor. Generally speaking, the party subrogated acquires all the rights, securities, and remedies which the creditor has against the debtor who is primarily liable, . . . A subrogee, as just stated, occupies the position of the party for whom he is substituted, and succeeds to the same but no greater rights."

And in § 111 of the same article the text reads:

"Thus, the rule is well settled in fire insurance as well as in marine insurance that the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."[2]

The application of the quoted texts is exemplified in some of our cases. In *Boone County Bank* v. *Byrum*, 68 Ark. 71, 56 S. W. 532, the tax collector had deposited in a bank a portion of the taxes collected by him; and the bank, with notice of the trust, appropriated the money to the payment of the individual indebtedness of the collector. The sureties on the collector's bond, who paid

[2] In Blashfield's Cyclopedia of Automobile Law and Practice, Permanent Edition, Vol. 6 § 4181, the text reads: "While subrogation, strictly speaking, can logically arise only after a payment by the insurer of the claim for injury to or loss of the automobile, still an additional and supplementary rule exists, even where the policy expressly mentions subrogation and provides for its effectuation by assignment of the insured's claim against the wrongdoer to the insurer upon or after payment by the latter, that any payment as damages received by the insured from the wrongdoer before settlement with the insurer, reduces by operation of law the liability of the insurer *pro tanto*, and where the insured releases his right of action against the wrongdoer before settlement with the insurer, that release destroys, by operation of law, his right of action on the policy.

the State the amount misappropriated by the collector, were held entitled to be subrogated to the rights of the State as against the bank. In *Myers Bros. Drug Co.* v. *Davis,* 68 Ark. 112, 56 S. W. 788, judgment was recovered against the constable and the sureties on his bond for wrongful seizure and sale of property under process; and the judgment was paid by the sureties. The constable died insolvent, and the sureties were held to be subrogated to the rights of the constable to sue on the note given for the purchase price of the property sold under process. In *Carroll County Bank* v. *Rhodes,* 69 Ark. 43, 63 S. W. 68, the sureties on a collector's bond who paid the State the amount of money misappropriated by the collector were held subrogated to the State's right of recourse against the party knowingly receiving the misappropriated money.

The defendant, Southern Farm Bureau Casualty Insurance Company, as a paid surety, was entitled to the same right of subrogation as were the sureties in the adjudicated cases. So the defendant insurance company, subrogated to all the rights of Williams, could with impunity refuse to contract with Davis, just as Williams could. In short, the refusal of the defendant insurance company to allow its insured (Williams) to contract with Davis was a right of refusal to contract which gave Davis no cause of action against Williams or the defendant insurance company as Williams' subrogee.

Affirmed.

5-1959 329 S. W. 2d 411

Opinion delivered November 16, 1959.

[Rehearing denied December 21, 1959]

[redacted]

Paul K. Roberts, for appellant.

James A. Ross, for appellee.

GEORGE ROSE SMITH, J. The principal question in this case is whether the plaintiff-appellee Lula Bell Green is barred by limitations or laches from foreclosing a mortgage executed in 1929 by the appellee Morton Green, who is now Lula Bell's husband. The chancellor held that the cause of action is not barred and accordingly entered a decree of foreclosure. The appellants, defendants below, are the personal representative and heirs

of Addie Bell Green, a sister of Morton's, who held the record title to the mortgaged land at the time of her death in 1957.

This is the chronological sequence of events: In 1929 Morton Green, then unmarried, mortgaged forty acres to Trotter & Sons to secure a $300 note. Morton and Lula Bell were married a few months later. In 1930 Morton and Lula Bell executed a second mortgage to Morton's sister, Addie Bell Green, to secure a debt of $130. The second mortgage does not appear to have been paid, but it was long ago barred by limitations and is not a factor in the case.

From 1929 through 1942 Morton made two or three small payments upon the Trotter note in every year except one. On September 19, 1934, the Trotters endorsed on the margin of the record a notation that a payment of $48.40 had been made on November 16, 1933. The next marginal endorsement by the Trotters was made on May 17, 1939, and recited a payment of $4.89 on October 10, 1938.

On January 7, 1935, Addie Bell sent her brother a letter in which she said that the Trotters were about to foreclose and had told her that they would do so unless Morton deeded the land to Addie Bell, so that she could raise money to pay off the Trotters' mortgage. With this letter Addie Bell enclosed a quitclaim deed the Trotters had prepared. Five days later Morton and his wife signed the deed to Addie Bell, and the title remained in her name until she died in 1957. The appellants argue that Addie Bell's letter to her brother is rendered inadmissible by the dead man's statute, but the point was decided adversely to their contention in *Josephs* v. *Briant*, 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916E, 741, as testimony that a letter was received does not involve a personal transaction with the decedent.

Addie Bell is not shown to have made any effort to refinance or discharge the debt to the Trotters. In 1943 Morton's wife Lula Bell paid the Trotters in full and took an assignment of the note and mortgage. There-

after Lula Bell kept the mortgage ostensibly alive by endorsing part payments on the margin of the record at about four year intervals. She and Morton both testified that Morton actually made the part payments, Lula Bell having been advised to follow that course to keep the mortgage in force. After Addie Bell's death in 1957 Lula Bell brought this suit for foreclosure. The decree in her favor is an *in rem* judgment against the land, no personal judgment against Addie Bell's estate having been asked.

In insisting that the debt is barred by the statute of limitations the appellants rely upon the fact that more than five years elapsed between the date of the payment that was made on November 16, 1933, and the date of the next marginal endorsement, May 17, 1939. A sufficient answer to this contention is that the Trotter mortgage was not apparently barred of record when Addie Bell received the quitclaim deed in 1935, and she was therefore not a third party within the statute that requires the endorsement of payments. Ark. Stats. 1947, § 51-1103; *Jimerson* v. *Reed,* 202 Ark. 490, 150 S. W. 2d 747. Since the mortgage was not then barred of record Addie Bell was not, under the holding in the *Jimerson* case, entitled to gain by the mortgagees' failure to endorse subsequent payments upon the margin of the record.

The appellants urge us to reject the appellees' testimony that Morton really made payments to his wife after she acquired the note and mortgage, but on this issue of credibility we defer to the decision of the chancellor, who had the advantage of seeing the witnesses as they testified. We conclude that the debt was not barred by limitations when the suit was filed, and there is no sound reason to charge Lula Bell with laches or with an estoppel. It does not appear that Addie Bell Green was prejudiced in any way by her sister-in-law's failure to enforce the mortgage promptly; to the contrary, Addie Bell profited by the delay, as she received income from the land for a number of years.

Finally, it is insisted that the court erred in allowing one of the Trotter partners to prove, by means of the firm's ledgers, the various payments that Morton Green made upon the debt. The cases cited by the appellants, *Johnson* v. *Murphy,* 204 Ark. 980, 166 S. W. 2d 9, and *Covington* v. *Covington,* 216 Ark. 549, 226 S. W. 2d 557, do not support their objections to Trotter's testimony, for in those cases the account books were offered without any competent testimony to establish their authenticity. Here the witness Trotter was not a party to the suit, so his testimony was not affected by the dead man's statute; and the book entries made in the regular course of business were admissible. *Rice* v. *Moudy,* 217 Ark. 816, 233 S. W. 2d 378; *Vickers* v. *Ripley,* 226 Ark. 802, 295 S. W. 2d 309.

Affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* SPENCER.

5-1944 328 S. W. 2d 858

Opinion delivered November 16, 1959.

Warner, Warner & Ragon, for appellant.

Hubert L. Burch, John Wm. Murphy, for appellee.

PAUL WARD, Associate Justice. This is a railway crossing accident case in which there was a jury verdict in favor of appellee. Appellant prosecutes this appeal for a reversal on the ground that there was no substantial evidence to support a submission to the jury. The basic facts and pleadings are substantially as set out hereafter.

Mrs. Beulah E. Harris and her husband, both elderly people, were returning from Winslow in a 1941 DeSoto automobile to their home. They left Highway No. 74 and proceeded to drive west on a private road for a distance of approximately 285 feet where the private road crossed the tracks of the St. Louis-San Francisco Railway Company, to their home. This said portion of the private road runs through a densely wooded area and just as it approaches the said crossing there is a 20% incline. When their automobile was crossing the railroad tracks it was struck by the front end of the engine attached to a freight train, belonging to appellant, proceeding from the north. As a result of the collision Mrs. Harris and her husband were both killed.

This action was instituted by Wayne Spencer as the administrator of the estate of Beulah E. Harris. Among other things it was alleged in substance that on June 8, 1958, Beulah E. Harris was riding in an automobile driven by her husband traveling west on a road near the town of Winslow, and that said automobile collided with appellant's southbound train, resulting in the death of Mrs. Harris. It was further alleged that Mrs. Harris' death was a result of the negligence of appellant's agents and employees in the following particulars: 1. They failed to keep a proper lookout as required by law; 2. They failed to give proper signals; 3. They failed to maintain the right-of-way free of trees, brush, weeds and grass which obscured the view of both the driver of the car and the operators of the engine; and 4. They

failed to keep the track in proper state of repair at said crossing. At the close of all of the testimony the trial court, without objection on the part of appellee, instructed the jury "that the allegations dealing with signals, and maintenance of right-of-way are withdrawn from your consideration and the only allegation of negligence presented to you concerns the matter of keeping a proper lookout".

For a reversal appellant relies on two designated points. One: There was no substantial evidence of violation of the lookout statute and the trial court erred in submitting the case to the jury on this issue. Two: The collision in question was the direct and proximate result of the negligence of the driver, (Mr.) Harris, and the contributory negligence of plaintiff's decedent, Mrs. Harris. Since we have concluded that the judgment of the trial court must be reversed on Point Number One we deem it unnecessary to discuss Point Number Two.

The testimony and the exhibits show that as appellant's railroad track approached the crossing from the north, it ran through a rather deep cut for approximately 500 feet which necessarily limited the view which the engine operators had of any automobile which might be approaching the crossing from the east. The freight train in question was being pulled by three diesel engines with an engineer and a fireman in charge of the front engine. The engineer was situated on the right side of the engine and the fireman on the left side of the engine. This arrangement placed the fireman on the side from which the Harris automobile was approaching the crossing and consequently gave him a better opportunity than the engineer had to discover the Harris automobile, and to do so sooner. The evidence reveals that the freight train was traveling at the rate of approximately 30 miles per hour and that the Harris automobile was traveling about one-third of that speed at the time of the accident.

Since Mr. and Mrs. Harris were both killed there were only three witnesses who testified relative to the kind of lookout that was observed by appellant's agents

and employees. Those witnesses were the engineer, the fireman, and a Mr. Marvin Anderson.

The testimony of the above witnesses was substantially as set out hereafter. James Hankins, the fireman, stated: On June 8th I was acting as fireman on the train that was involved in the accident; my job is on the left-hand side in the front seat of the engine and the cab is located about 12 feet back from the front of the engine; we were pulling a freight train of approximately 14 cars, part of which were loaded; we had three engine units on the train and three brakemen, two of which were riding in the second engine, one on the left and one on the right, and the third was riding with the conductor; I have been on this run about seven years and make it approximately three times a week; "I maintained a constant lookout ahead"; I first saw the Harris' car when the train was approximately 60 to 70 feet from the crossing and determined that it was not going to stop; I told the engineer to set the brakes; the engineer set the emergency brakes at approximately 45 to 50 feet from the crossing; the brakes were in good condition and remained on until we stopped; when I first saw the Harris' car it was approximately 35 feet from the crossing—I could tell someone was in the car but did not see how many or which way they were looking; the draw bar of the train hit the back door of the automobile on the right-hand side. E. Vincent, the engineer, testified: I have worked for appellant for 43 years; at the time of the collision I was in my seat on the right-hand side of the engine; the train was headed south which would put me on the west side of the track; at the time of the accident I was whistling for the crossing, after having whistled for the tunnel; the fireman hollered for me to "big-hole" the train, *i.e.,* put on the emergency brakes; I put on the emergency brakes when the train was from 45 to 50 feet from the crossing; the train made a good stop and only twelve cars passed the crossing; the emergency brakes were on from the time the fireman yelled at me and they were in good condition. Marvin Anderson testified: I operate a cafe on Highway 71 about 300

feet from the railroad track and about 1,000 feet away from where the Harrises live; on the day of the accident I heard the train whistle and I waved at a fireman or brakeman as the train went by and he waved back; the whistle blew a lot; I did not hear the impact but I did hear the train stop.

As the record stands we find no testimony to contradict the statement of the fireman that he maintained a constant lookout ahead, that he first saw the automobile when the train was about 70 feet from the crossing, that he promptly yelled to the engineer to set the emergency brakes; and there is no testimony in the record to contradict the engineer's statement that he applied the emergency brakes promptly when the fireman yelled at him to do so. On the other hand the fact that the brakes were set, as testified to by the engineer, about 45 or 50 feet from the crossing and the fact that the train actually stopped as quickly as it did, seemed to indicate that there was prompt action after the discovery of the peril on the part of both the fireman and the engineer. There is nothing in the record to indicate that either was negligent or dilatory, or that they could have done more than they did to prevent the collision. On the other hand some confirmation of the reasonableness of their testimony is found in the surrounding circumstances as they are revealed in the testimony and by the exhibits. From such source it clearly appears that the fireman's view was definitely limited by the "cut" through which the train approached the crossing, by the steep incline of the private road as it approaches the crossing, and from the trees that lined that portion of the private road. We find nothing substantial in the testimony of Marvin Anderson to indicate that the fireman, Hankins, was not keeping a constant lookout in accordance with his testimony. Anderson's testimony and the exhibits clearly show that if Hankins did wave at him he did so at a time and place which in no way prevented him from keeping a constant lookout when and where it would have been effective. In other words, Hankins could have waved at Anderson and still have maintained a proper lookout

for automobiles approaching the crossing in question. In addition, it is not clear from the testimony that Hankins was the man who waved at him. It could have been one of the brakemen mentioned in Hankins' testimony.

Arkansas Statutes, Section 73-1002, which imposes a duty upon those operating a train to keep a lookout, in all material parts, reads as follows: "It shall be the duty of all persons running trains in this State upon any railroad, to keep a constant lookout for persons and property upon the tracks of any and all railroads, and if any person or property shall be killed or injured by the neglect of any employee of any railroad to keep such lookout, the company owning or operating any such railroad, shall be liable and responsible to the person injured for all damages resulting from neglect to keep such lookout". In the case of *Kansas City Southern Railway Company* v. *Shane, Administratrix,* 225 Ark. 80, 279 S. W. 2d 284, this statement was made: "In construing Section 73-1002 above our rule appears to be well settled where an injury is caused by the operation of a railway train a *prima facie* case of negligence is made against the company operating such train and the burden rests on the company to show that it was not guilty of negligence". In that case it was stated that the statute in question creates a presumption or inference of negligence on the part of the railroad company. In the same case, however, the court approved what now appears to be the settled rule of this court to the effect that " 'The only legal effect of this inference is to cast upon the railway company the duty of producing some evidence to the contrary. When this is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence' ".

As we have pointed out above the fireman in this case testified that he kept a constant lookout, and, as said in the case of *St. Louis-San Francisco Railway Company* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992, "The jury could not arbitrarily disregard the testimony of the engineer and the fireman". It was likewise held in the case

of *St. Louis-San Francisco Railway Company* v. *Williams,* 180 Ark. 413, 215 S. W. 2d 611, that where an engineer testified that he kept a constant lookout and there was no testimony to the contrary, the burden of proof imposed by the statute upon the railroad company was therefore discharged.

In view of the above announced rules and in view of the record in this case as set forth above, we are bound to conclude that any burden resting upon appellant has been fully discharged and that appellee failed to show any actionable negligence on the part of appellant's employees. In the absence of any evidence the jury could only have speculated on why the deceased and her husband drove upon the railroad track in front of appellant's train. In the case of *St. Louis-San Francisco Railway Company, Thompson, Trustee* v. *Thurman,* 213 Ark. 840, 213 S. W. 2d 362, we said: "Verdicts cannot be founded on conjecture; negligence must be proved".

Since as heretofore pointed out the record shows conclusively that appellant's employees maintained a constant lookout in accordance with the statute heretofore mentioned and since there is no substantial evidence in the record to the contrary, and since the record contains no other evidence of any negligence on the part of appellant's employees relative to the only issue here presented, it must follow that the trial court was in error in submitting this case to the jury. Therefore, the judgment of the trial court is reversed and the cause of action is dismissed.

Reversed and dismissed.

5-1926 328 S. W. 2d 849

Opinion delivered November 16, 1959.

[redacted]

Victor L. Nutt, Lloyd Henry, for petitioner.

John D. Eldridge, Jr. and *George P. Eldridge,* for respondent.

Sam Robinson, Associate Justice. Helen McPherson filed suit for divorce in the Woodruff Chancery Court alleging as grounds three years separation. The complaint also asked that her husband, W. E. McPherson, be required to render an accounting of a trust of which he was co-trustee. The case is here on a petition for a writ of prohibition. Petitioner is the defendant in the action filed below in chancery court.

Petitioner filed two motions to strike, both of which contained the allegation that the complaint stated two causes of action, namely, one for divorce and the second for a trust accounting. In addition, the first motion alleged that the court had no jurisdiction of the trust *res* in that it was not located in Woodruff County and petitioner was not a resident of and was not served in Woodruff County. The second motion alleged that the two causes of action were improperly joined. The chancery court overruled both motions to strike.

For his writ of prohibition, petitioner argues the points relied on below in both motions to strike. It is unnecessary, however, to discuss anything other than the question of improper joinder of actions.

The case turns on the complaint filed in the chancery action. In it the normal allegations for a divorce are first made and then it alleges that the plaintiff and petitioner in 1951 executed a trust instrument naming themselves as trustees and their three children beneficiaries. The trust instrument, a copy of which was attached to the complaint, states that one of the children, W. E. McPherson, Jr., is to become a co-trustee upon reaching 21 years of age. He is now 22 years of age and has assumed this role. The prayer of the complaint asks "that the defendant, W. E. McPherson, be required to account to this court for the operation of the trust property from the beginning of the trust to the present ime; that he be required to make distribution to the beneficiaries under the terms of the trust; and that if the court finds that the defendant has violated the terms of the trust that he be enjoined from engaging in such violations in the future and required to make the trust estate whole", and then follows the prayer for divorce, adjudication of property rights and other customary relief in divorce actions.

The test of whether more than one cause of action is stated is whether more than one distinct primary right or subject of controversy is presented for enforcement or adjudication. This rule has been applied in numerous cases. 1 C. J. S. "Actions", § 64, p. 1185. Respondent argues that the relief prayed for pertaining to the trust is only incidental to determining the rights of plaintiff below in the divorce action. However, no one would question the right of plaintiff below to maintain a separate cause of action on the relief prayed for regarding the trust. Therefore, applying the above test there can be no doubt that there are two distinct and separate causes of action.

It follows that we must determine if they are improperly joined. One action is for divorce against peti-

tioner individually. The other is for an accounting in his representative capacity as a trustee. As a general rule a cause of action accruing in favor of or against one individually cannot be joined with a cause of action existing in his favor or against him in a representative capacity. *Governor, to Use of Lyon* v. *Evans,* 1 Ark. (1 Pike) 349; *McDaniel* v. *Parks,* 19 Ark. 671; 1 Am. Jur. "Actions", § 82, p. 468. Here we have two distinct causes of action, one against the petitioner individually and one against him in a representative capacity. We find nothing in our controlling statute, Ark. Stat. § 27-1301, or in our decisions, allowing such joinder.

The writ will be granted in accordance with the above opinion.

FOSTER *v.* UNIVERSAL C. I. T. CORP.

5-1947 330 S. W. 2d 288

Opinion delivered November 16, 1959.

[Rehearing denied January 18, 1960]

John D. Eldridge, Jr. and *George P. Eldridge,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a Chancery decree in which a conditional sales contract between the appellant, James H. Foster, and appellees, Universal C. I. T. Credit Corporation, and The Augusta Motor Company, Incorporated, was held not to be usurious. The facts, being stipulated, are not in dispute.

Appellant purchased from appellee, Augusta Motor Company, an automobile and agreed to the issuance of certain insurance policies. The conditional sales contract covered the cost of the policies. The contract was later assigned to appellee, Universal C. I. T. Credit Corporation. Subsequent to this transaction the insurance carrier cancelled a collision insurance policy against the automobile thereby causing appellant to be entitled to a *pro rata* return premium in the amount of $172.44. The contract allowed the appellee to purchase a single interest policy to protect its interest, which was done at a cost of $41.09, leaving a net amount of $131.35 due appellant. The appellee advised appellant of its action in a letter in which it also advised that the difference had been credited to the last installment of appellant's account, and further, that if appellant within the next 30 days obtained another policy to protect both of their interests they would cancel the single interest policy and credit appellant's account with the full return premium. Soon thereafter, appellant notified appellee by letter that he felt he was entitled to a reduction in his monthly payments. Appellee advised appellant that it could not revise the contract to change the monthly installments. Appellant then brought this suit to cancel the contract for usury alleging that he was overcharged by the amount of interest that would have been due on the return premium.

Among other points relied on by appellant for reversal, there is this one, which we find to possess merit: The contract is usurious in that the portion of the payments representing interest charges demanded by appellee exceed 10 per cent of the principal balance due after the cancellation of the insurance policy, and it

is the intention of the appellee to take and receive more than the legal rate of interest.

The appellant shows that the contract at its inception had in it the seeds of usury, because it allowed the appellee—under the circumstances that came into existence in this case—to retain some of appellant's money without promptly crediting such amounts on the maturing payments due on the contract.

To support his contention, appellant introduced the affidavit of Mr. Elbert R. Miller, Public Accountant, which stated that taking into consideration the cancelled insurance premium, the appellant would have been required to pay $1,383.22 under the contract, and that if the indebtedness had been recalculated as requested, the appellant would have owed twenty-one payments of $62.25, and one payment of $62.41, or a total of $1,369.66. Therefore, the contract with the appellee is usurious to the extent of $13.56. A calculation prepared electronically by Finance Publishing Company of Boston, Mass., also introduced by the appellant, differs from that of the accountant by only two cents.

The appellee, on the other hand, contends that the contract is not usurious, since the contract was not modified, and the refund of the unearned insurance premium represented merely a prepayment on the contract.

It must be conceded that appellee is correct when it states that the premium represents a prepayment on the contract since there was a provision in the contract which provided:

"Customer hereby assigns to holder any moneys not in excess of the unpaid balance hereunder which may become payable under such and other insurance, including return or unearned premiums, and directs any insurance company to make payment direct to holder to be applied to said unpaid balance and appoints holder as attorney in fact to endorse any draft."

According to the above provision in the contract, when any amounts are received by the appellee they are

to be applied on the account and in this sense it is the same as a prepayment option. Further conceding that the weight of authority is that prepayment of the principal before it is due does not in itself make a contract usurious, however, in applying the rule this court has recognized some limitation according to whether the prepayment is voluntary or involuntary. In *Eldred* v. *Hart,* 87 Ark. 534, 113 S. W. 213 (1908) this Court said at page 539:

"Where a debt, including both principal and interest and due by installments, if paid according to the terms of the contract, is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the installments matured, although as a result the creditors would receive, in the aggregate, a sum amounting to more than the principal and the maximum legal rate of interest." *Savannah Savings Bank* v. *Logan,* 99 Ga. 291; *Keckley* v. *Union,* 79 Va. 458.

Also, 55 Am. Jur. § 48, at page 360 states:

"The comparatively few jurisdictions in which the question has arisen seem to be in accord in holding that a borrower's voluntary payment of a loan before maturity, made pursuant to a prepayment option in the contract, will not render the transaction usurious if the total interest received by the lender does not exceed the interest computed at the maximum lawful rate from the time the loan became available to the borrower to the absolute maturity date specified in the contract. Similarly, a provision in a loan contract privileging a borrower to pay the loan in advance of maturity ordinarily will not make the contract usurious on its face if its exercise is entirely optional with the borrower and cannot be demanded or required by the lender."

No cases have been called to our attention nor have we been able to find decisions in which the court held that involuntary prepayment would make the contract usurious under these circumstances. However, in view of the language of *Eldred* v. *Hart, supra,* and 55 Am.

Jur., *supra,* in addition to the discussion in the annotation titled "Usury as affected by repayment, or borrower's option to repay loan before maturity," in 130 A. L. R. 73, the only logical conclusion which can be reached is that involuntary prepayment would make the contract usurious if it resulted in the interest exceeding the constitutional limitation. The issue in this case is, therefore, whether the prepayment on the debt was involuntary. According to the provision in this contract, the form of which was prepared by appellee, the appellant had no choice as to whether the sums applied as a payment on the indebtedness at the time they were received by appellee. Construing this contract, as we must, strictly against the party preparing it; *Yellow Cab Co. of Texarkana, Inc.* v. *Texarkana Municipal Airport,* 230 Ark. 401, 322 S. W. 2d 688; *W. T. Rawleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S. W. 2d 886; and taking into consideration the request made by appellant to have the monthly payments reduced, which was denied, we must conclude that the prepayment was involuntary. Therefore, in the absence of testimony refuting appellant's contention that a usurious rate of interest was charged on this contract, it is our opinion that the contract from its inception contained the seeds of usury which matured into usury upon the happening of the contingency, *i.e.,* the cancellation of the insurance policy.

Reversed.

Mr. Justice Holt dissents.

Opinion delivered November 23, 1959.

[Rehearing denied January 11, 1960]

Virgil Roach Moncrief and *John W. Moncrief,* for appellant.

Bruce Bennett, Atty. General, By: *John T. Haskins,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Leroy Smith, was charged by Information on September 23,

1958, with the crime of Manslaughter. On April 6, 1959, appellant demurred to the information as follows:

"The Defendant Leroy Smith demurs to the information herein and says the information does not charge this defendant with a crime and does not state facts sufficient to charge him with a crime and does not state facts sufficient to charge defendant with voluntary manslaughter and does not state facts sufficient to charge defendant with involuntary manslaughter and information does not state or show what crime the Prosecuting Attorney is attempting to charge against defendant and does not state the nature and cause of the accusation, or either, and does not give defendant sufficient information as to the accusation or the nature or cause thereof and does not furnish him with information sufficient to prepare his defense or to know what is called upon to meet and defendant demurs and moves dismissal and quashing of the information and prays all other proper relief in the premises."

The court overruled the demurrer, to which action appellant noted his exceptions, following which a plea of not guilty was entered by counsel (without waiving appellant's demurrer), and the cause proceeded to trial on April 7th. The jury found Smith guilty of voluntary manslaughter and fixed his punishment at three years confinement in the penitentiary. From the judgment so entered by the court, appellant brings this appeal.

For reversal, appellant contends that the Information is insufficient, does not comply with the requirements of the Constitution, and the court accordingly erred in overruling the demurrer. Further, that Initiated Act No. 3 is unconstitutional insofar as it relates to the required contents of the Information.

The Information, under attack, reads as follows:

"I, W. M. LEE, Prosecuting Attorney, within and for the 17th Judicial Circuit of the State of Arkansas, of which ARKANSAS NORTHERN DISTRICT County is a part, in the name and by the authority of the State of Arkansas on oath, accuse the defendants, LEROY

SMITH and GLENN STIGGER[1] of the crime of Manslaughter committed as follows, to-wit: The said defendants on the 20th day of September, 1958, in Arkansas Northern District County, Arkansas, did unlawfully, and without malice or deliberation, kill one James Johnson, Jr., by shooting him, the said James Johnson, Jr., with a pistol loaded with gun-powder and leaden balls, and held in his, the said Leroy Smith's hands against the Peace and Dignity of the State of Arkansas."

It is first contended that since appellant was not specifically charged with either *voluntary* or *involuntary* manslaughter, he was not given adequate information as to the nature of the crime with which he stood accused, and the charge did not furnish sufficient details to enable him to properly prepare his defense. Section 41-2207, Ark. Stats. (1947) Anno., defines manslaughter as follows: "Manslaughter is the unlawful killing of a human being, without malice, express or implied, and without deliberation." While subsequent sections specifically define voluntary and involuntary manslaughter,[2] we do not agree that it was necessary that the Information designate the particular category of manslaughter in the formal charge. Certainly, the Information filed by the prosecuting attorney charged appellant with the offense as defined in § 41-2207, and also complied with the provisions of Sections 22 and 23[3] of Initiated Act No. 3, adopted by the people in November, 1936. Section 22 of that Act provides as follows:

"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. * * *"

In the instant case, the title of the prosecution is clear, the name of the court in which the Information is presented is given, and the name of the defendant and of

[1] The case against Stigger was dismissed on motion of the prosecuting attorney on November 5, 1958.
[2] Sections 41-2208 and 41-2209, Ark. Stats. (1947) Anno.
[3] Form of Information.

the person killed is definitely stated. Actually, the charge contained more language than was necessary since, under the provisions of Sections 22 and 23, the allegation "with a pistol loaded with gun powder and leaden balls, and held in his, the said Leroy Smith's hands", is no longer essential. We find nothing vague or confusing in this Information, and are unable to comprehend how Smith could have failed to know with what offense he was charged. At any rate, appellant was not precluded from obtaining more specific details. Section 22 also provides: "The State, upon request of the defendant, shall file a bill of particulars, setting out the act or acts on which it relies for conviction."

The people adopted Initiated Act No. 3 as a means of reforming and modernizing our criminal procedure which, throughout the years, had become overburdened with excessive technicalities; cases dragged interminably, and the efficiency of our Courts was gravely impaired.

A very fine discussion of this Initiated Act is found in the Arkansas Law Review of the spring of 1957, Volume 11, page 117, which is entitled, "The Criminal Procedure Reforms of 1936 — Twenty Years After."[4] The article is written by Dr. Robert A. Leflar, Distinguished Professor of Law, former Dean of the University of Arkansas Law School, former Associate Justice of this Court, and presently connected with the law schools of the University of Arkansas and New York University. Relative to the sections here under discussion, Dr. Leflar writes:

"Excessive technicalities probably produced more inexcusable delay and more miscarriages of criminal justice in connection with the sufficiency of indictments at common law than in any other area. One classic example is a case from Missouri where the law, as in Arkansas, requires that indictments conclude with the words 'Against the peace and dignity of the State'. The

[4] Constitutional Amendment #21, permitting prosecutions by the filing of Information by the Prosecuting Attorney, as well as indictments by the Grand Jury, is also discussed. Amendment #21 was also adopted in November, 1936.

particular indictment used only the words 'Against the peace and dignity of State.' Omission of the last 'the' was held to call for reversal of the defendant's conviction of rape. The Arkansas court never went as far with such technicalities as did some other states. Nevertheless there were many cases, like the one in which an indictment, charging that defendant 'after having given birth to a bastard child did feloniously and unlawfully conceal the death of said bastard child', was held invalid because it did not affirmatively allege that the bastard child was dead, where technicality overrode common sense.

"Section 22 of the Initiated Act undertook as far as possible to simplify the wording of indictments, by providing that within the standard verbal framework it should be enough to charge the commission of the crime by its common legal name, without necessity for detailing the specific acts allegedly done by the defendant and without specifying the bad state of mind set out in the statutory definition of the crime. Such formal allegations were deemed to be included in the name of the crime charged. The defendant could, however, in any case in which further information was actually needed, require the state to file a bill of particulars. * * *

"The act's broad provisions for bills of particulars invited prompt legislative implementation, and the act prepared by the Prosecuting Attorneys Association with aid from members of the Criminal law Reform Commission, and enacted by the 1937 General Assembly, declared that bills of particulars, when required by law, should set out the facts with sufficient certainty to apprise the defendant of the specific crime charged so that he can prepare his defense. A copy of the bill must be furnished to the defendant at his request, and a supplemental bill is required if the court finds that the one originally filed by the prosecuting attorney was inadequate. Though the prosecuting attorney may file a bill of particulars under section 24 of the Initiated Act without any request from the defendant, and the court may presumably require one to be filed on its own mo-

tion, it is held that a defendant may not object to the failure to file one if he did not request it. Also it is held that a defendant's motion for a bill of particulars was properly denied when the indictment or information itself set out all the relevant facts and there was no showing that the additional facts requested would actually have helped the defendant pepare his defense, or where the prosecuting attorney stated that the information, itself sufficient, set out all the facts that were known to him. Actually, the granting of bills of particulars is of necessity largely governed by the discretion of the trial court, though not entirely, and that is the general effect of the decisions that have been rendered on the matter since 1936.

"The Supreme Court's attitude toward the simplified forms of indictment permitted by the Initiated Act is indicated by the statement in *Underwood* v. *State*: 'That act was adopted by the people, however, 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.' * * *

"The Court has consistently accepted sections 22 and 23 in spirit as well as letter, and has invalidated indictments and informations only when they actually failed to make clear what offense was being charged against the defendant."

Dr. Leflar cites numerous cases in the footnotes to substantiate the statements made. In *Mortensen* v. *State,* 214 Ark. 528, 217 S. W. 2d 325, appellant was charged by Information with the crime of obtaining money under false pretense, and filed a demurrer to the Information because it did not recite details of the false pretenses employed in obtaining the money. The demurrer was overruled, and appellant then filed a motion to require the filing of a bill of particulars, which motion was complied with. Appellant was convicted, and sentenced to five years in the penitentiary. On appeal, he contended that the court should have sustained his demurrer, and further contended that the bill of particu-

lars filed in response to his motion, did not contain sufficient information to fully apprise him of the specific offense committed. In affirming the conviction, this Court, in an opinion by the late beloved Justice Frank Smith, said:

"The demurrer was properly overruled as the information complies with the form of indictment set out in § 23 of Initiated Act No. 3, amending § 3029 C. and M. Digest, prescribing the form of an indictment in which a violation of the law is charged."

Further, in referring to the Bill of Particulars, the Court said:

"The response was not as definite and full as appellant had the right to require it to be, but there was no request that it should be made more particular and certain. Section 4, Act 160 of the Acts of 1937, appearing as § 3796, Pope's Digest, provides that 'A supplemental bill of particulars may be required upon order of the trial court, if the bill of particulars filed by the prosecuting attorney is not sufficiently definite to apprise the defendant of the specific crime with which he is charged.'

Without requiring a supplementary bill of particulars, which appellant had the right to ask, he filed a demurrer to the information which alleged that the information and bill of particulars did not state an offense or crime under the statutes of Arkansas, and that the court did not have jurisdiction of the appellant, or of the subject matter of the alleged offense."

In *Craig* v. *State,* 195 Ark. 925, 114 S. W. 2d 1073, in referring to Section 22 of Initiated Act No. 3, this Court said:

"By § 22, above quoted, naming the offense charged is made sufficient to carry with it the allegations required to constitute that offense, without a statement of the acts constituting it, unless the offense cannot be charged without doing so. If the allegations are insufficient to enable the accused to properly prepare his

defense he may require the state to file a bill of particulars 'setting out the act or acts upon which it relies for conviction.'

Here, the accused did not ask that the state be required to file a bill of particulars. Had he thought it necessary to properly prepare his defense that the names of the other rioters be alleged, or if their names were unknown, that that fact be alleged, he should have made such a request, which the trial court, no doubt, would have granted. We conclude, therefore, that the information is sufficient to sustain the conviction."

See also *Budd* v. *State,* 198 Ark. 869, 131 S. W. 2d 933. Here, if appellant considered the charge vague, and insufficient to apprise him of the nature of the offense, it was only necessary that he file his motion asking that the State be required to file a Bill of Particulars, — but this was not done.

Appellant argues that this Information did not comply with the requirements of the Constitution, and that the provision relating to the contents of the Information (Sec. 22 of Initiated Act No. 3) is in violation of the Declaration of Rights of our Constitution; specifically in violation of Section 10 of Article II, which provides that the accused shall enjoy the right " * * * to be informed of the nature and cause of the accusation against him." The constitutionality of the short form of indictment and bill of particulars has been upheld in numerous of our sister states.[5] As stated by the Arizona Supreme Court in the case of *State* v. *Chee,* 250 P. 2d 985:

"Article 2, section 24, of the Constitution of Arizona bestows upon every person accused of crime certain invaluable rights none of which can be said to be now in controversy unless it be that of having the right to 'demand the nature and cause of the accusation against him.' Of the rules of procedure Section 44-712 confers the right to demand a bill of particulars supplemental to the allegations set forth in the indictment.

[5] Among others, Arizona, California, Iowa, New Mexico, Massachusetts, and New York.

The constitutional guarantee does not in terms or by implication require that the 'nature and cause of the accusation' appear in the indictment or information."

In *State* v. *Benham,* 58 Ariz. 129, 118 P. 2d 91, the court said:

"In view of the simplified forms of indictment and information under the new criminal procedure, bills of particulars assume an important place in criminal trials. What was formerly essential to allege in the indictment or information may now be supplied to a defendant in a bill of particulars."

Further:

"The provisions of the law with reference to furnishing a defendant the facts of the charge against him cannot be ignored or treated lightly. It has always been the law among right-thinking peoples, and we hope will continue to be the law in this land of ours, to require the state fully to inform the accused what he is charged with and to allow him time to prepare his defense, if he has one. The simplified rules of procedure do not take from a defendant one whit of a meritorious defense, but those rules do not tolerate defenses that only delay or obstruct the termination of criminal cases. An indictment or information that charges a homicide by name, as for instance, manslaughter, is good under the code, but one thus charged is entitled to know what the state expects to prove against him before he is put on his trial. * * *"

There is nothing in Initiated Act No. 3 which deprived appellant of any constitutional right, nor was any undue burden placed upon him, for the requesting of a bill of particulars requires no more trouble than the filing of a demurrer.

What, after all, is the purpose of the language in the Declaration of Rights? The clear purpose is to insure that every defendant shall be advised of the nature of the crime with which he is charged, in order that he may have adequate information to provide his defense.

There was never any intent that one accused of crime should hide behind a curtain of technicalities, for our law is based as much upon the concept that justice shall be done, as upon the concept that injustice shall not be committed. The bill of particulars was designed to be used in lieu of numerous, and generally superfluous, allegations in the indictment or information. In giving to a defendant the privilege of obtaining this bill of particulars, the rights of the accused are as fully protected as though each detail were set out in the information; in fact, he is even able to obtain more pertinent facts than were ever required for the sufficiency of an indictment. We accordingly find no conflict with the constitutional requirement.

A few assignments of error are listed in the Motion for New Trial, but none of these points are argued in the brief, nor have we been provided with a Bill of Exceptions, and therefore, no evidence relative to these assignments is before the Court. Accordingly, such assignments must fail.

Finding no error, the judgment is affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. I do not agree with the majority opinion for two reasons.

First: The sufficiency of the information. A defendant is innocent until proven guilty, and the indictment must be tested upon a presumption that the defendants have no knowledge of the facts charged against them. *United States* v. *Westbrook,* 114 F. Supp. 192 (DC Ark.), 42 C.J.S. page 893.

To me it appears unreasonable, to say the least, to put our stamp of approval on an information such as the one in this case. An information dealing with manslaughter should be more specific. The reason it should be more specific is because, as far as an information is concerned, there are two distinguishing features between our statutory voluntary and involuntary manslaughter. Where one or both of these features are present the law should require the information to designate which crime is charged.

These features are intent and punishment. In 27 Am. Jur. page 631, it is stated:

"The criminal intent of the accused must be alleged where the criminality of an act depends upon the intent with which it was done, but criminal intent need not be charged unless the statute makes such intent one of the constituent elements of the offense."

In voluntary manslaughter there is intent; in involuntary manslaughter there is none.[1]

In *Hettle* v. *State,* 144 Ark. 564, 222 S. W. 1066, on the question of punishment, this Court said:

"If the punishment to be inflicted is greater or less, according to the value of the property, the value must be stated in the indictment, because every indictment, for whatever offense, must set out every fact which the law makes an element in the punishment thereof."[2]

There is a difference in the punishment of voluntary and involuntary manslaughter in Arkansas.

If this information charged the defendant with either of the two crimes it should be involuntary manslaughter. "Without malice" is part of our statutory definition of involuntary manslaughter. This phrase is not found in the statutory definition of voluntary manslaughter. In the instant case, the information resembles a definition of involuntary manslaughter moreso than voluntary manslaughter and the defendant was convicted of voluntary manslaughter, the highest degree possible. Other than this distinguishing feature just mentioned, I don't think a defendant could tell from this information whether he was charged with killing a man after catching him flagrante delicto or accidentally, while shooting at a target. We can easily say all he has to do is ask for a bill of particulars if he needs to know more about the crime, but this time spent trying to find out the facts of the alleged charge could be better spent preparing the defense of this presumably innocent man.

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[1] On the question of intent, compare *McGough* v. *State,* 119 Ark. 57, 177 S. W. 398, and *Tharp* v. *State,* 99 Ark. 188, 137 S. W. 1097.

[2] Also see 31 C. J. page 734, to the same effect.

Ark. Stats., § 43-1011, says the indictment will be sufficient if it can be understood therefrom that the act or omission, charged as the offense, is stated with such a degree of certainty, as to enable the court to pronounce judgment on conviction, according to the right of the case. In this case, how could a judge know whether the defendant had been convicted of voluntary manslaughter or involuntary manslaughter? One might say the jury cured this problem for him by assessing the punishment but what if they had merely returned a guilty verdict with nothing more. What would the defendant be guilty of in that event? I suppose he would be guilty of violating Ark. Stats. § 41-2207, which is the statute the information appears to have been copied from. This statute has no criminal sanction which makes the violation thereof merely a misdemeanor.

Second: The bill of particulars.

Quoting from the majority opinion:

"At any rate, appellant was not precluded from obtaining more specific details. Section 22 also provides: 'The state, upon request of the defendant, shall file a bill of particulars, setting out the act or acts on which it relies for conviction.' "

Quoting further from the majority opinion in Dr. Leflar's article:

" 'The defendant could, however, in any case in which further information *was actually needed,* require the state to file a bill of particulars.' " (Emphasis supplied).

Quoting further from the majority opinion in the case of *Mortensen* v. *State,* 214 Ark. 528, 217 S. W. 2d 325.

"Without requiring a supplementary bill of particulars, which appellant had the right to ask, he filed a demurrer to the information which alleged that the information and bill of particulars did not state an offense or crime under the statutes of Arkansas."

Quoting further from the majority opinion in the case of *Craig* v. *State,* 195 Ark. 925, 114 S. W. 2d 1073:

"Here, the accused did not ask that the state be required to file a bill of particulars. Had he thought it neces-

sary to properly prepare his defense that the names of the other rioters be alleged . . . he should have made such a request."

Quoting further from the majority opinion:

"Here, if appellant considered the charge vague, and insufficient to apprise him of the nature of the offense, it was only necessary that he file his motion asking that the State be required to file a bill of particulars, but this was not done."

And quoting further from the majority opinion:

"The bill of particulars was designed to be used *in lieu of* numerous, and generally superfluous, allegations in the indictment or information." (Emphasis supplied).

The reason I have set out the quotes from each of these authorities is to attempt to show where each of them is in error in their opinion as to the proper use of a bill of particulars. In each of these cases this Court has put the burden on the accused to perfect a criminal charge against himself. In other words, it is evident from reading these cases that this Court considers a bill of particulars as capable of amending an information or is using it to refuse the defendant his demurrer because he did not ask for a bill of particulars.[3] In 27 Am. Jur. page 672, there is this:

"A bill of particulars is not an amendment of the indictment or information, and cannot change the offense charged in the indictment or in any way aid an indictment fundamentally bad. Furthermore, it is not a remedy or cure for an indictment so defective that it charges no offense."

And in *State* v. *Lassotovitch,* 162 Md. 147, 159 A. 362, 81 A.L.R. 69, the Court said:

"The rule allowing a bill of particulars is for the benefit of the accused. He may, but is not bound to, request it; and if he does not, he is entitled to attack the validity of the charge as made out by the indictment. To hold otherwise would be to say that no indictment could be attacked

[3] There is an annotation "sufficiency of indictment as affected by bill of particulars" in 10 A.L.R. page 982.

by demurrer by an accused, for vagueness or indefiniteness of its allegations, without first demanding a bill of particulars."

In my opinion, this Court is denying the accused the opportunity to demur without first asking for a bill of particulars. The people did adopt Initiated Act 3 to modernize our criminal procedure but I do not believe they also intended to do away with a demurrer, which would test the sufficiency of the information in a criminal prosecution. In my opinion, the majority seems to consider this constitutional right of an accused to be apprised of the charge against him as a mere technical right, used often to escape justice. In 42 C.J.S. page 960, there is this:

"This right of accused is a substantial right, and not a mere technical or formal right."

If we are to say that an accused cannot attack an information without first requiring a bill of particulars, then we are saying an information can never be held bad for violating the accused's constitutional right to be informed of the charge against him. The reason for this is that anytime the information is bad the accused can ask for a bill of particulars and if it is still not sufficient he can ask for another and if that is insufficient he should ask for another. How many times does an accused have to ask for a bill of particulars before he can demur to an information? With this reasoning to go on an information would be sufficient if it said: "John Doe broke the law," and then we could fill in the rest of it by bills of particulars *unless* the defendant did not ask for one, in which case he cannot attack the information on the constitutional ground previously mentioned.

The Arizona case of *State* v. *Benham*, cited by the majority can be distinguished as to the charge because in Arizona the maximum punishment for voluntary manslaughter and involuntary manslaughter is the same, and, as previously stated, this is one reason the information should be more specific. The Arizona case of *State* v. *Chee*, cited by the majority, is interesting because of the reasoning used. The Arizona Court said: "The constitutional

guarantee does not in terms or by implication require that the 'nature and cause of the accusation' appear in the indictment or information.'' At first glance, this appears reasonable, but what is the result? The result is this Court has, by interpretation of one statute, destroyed the purpose of the demurrer statutes.

If we can say an accused should ask for a bill of particulars, why couldn't we also say he should dig up the facts himself before he can demur. This might appear farfetched but it is only a question of degree. What burden do we want to put on the defendant? Where should we stop? The constitution gave us a guidepost, recognized in Anglo Saxon jurisprudence for many years, and in an attempt to simplify our criminal laws and do away with technicalities, this court has done away with the guidepost. For this, and the other reasons heretofore set out, I respectfully dissent.

[redacted]

REBSAMEN MOTORS *v.* MOORE.

5-1971 329 S. W. 2d 155

Opinion delivered November 23, 1959.

[redacted]

Moses, McClellan, Arnold, Owen & McDermott and *James R. Howard,* for appellant.

O. W. Pete Wiggins, for appellee.

J. Seaborn Holt, Associate Justice. This is a replevin action, Sections 34-2102 — 34-2118 (Ark. Stats. 1947). On September 11, 1958, appellant, Rebsamen Motors, and appellee, Burley B. Moore, entered into a written contract whereby Rebsamen Motors was to sell and Moore was to buy a 1958 ford automobile. The purchase price was $3,051.09. Appellant gave Moore a trade-in allowance on his 1957 automobile of $1,521.09, leaving a balance due and owing Rebsamen Motors $1,530.00, plus insurance and carrying charges. This balance of $1,530.00 was to be financed through the Government Employees Finance Company of Fort Worth, Texas. Moore drew a draft on this finance company for $1,530.00 payable to Rebsamen Motors and forwarded it to the finance company in Fort Worth. The finance company refused to honor the draft because it appeared that there was a lien for a balance due on the 1957 automobile which Moore had traded in, a little in excess of $400.00, and the finance company refused to honor the draft in question until this balance was paid. Upon the return of the draft, unpaid, appellant, Rebsamen Motors, filed suit to repossess the 1958 automobile, alleging that it owned it and was entitled to its immediate possession and did take possession, after

posting the bond required. Moore answered with a general denial and counter-claimed, alleging that appellant's possession was wrongful, asked that the 1958 automobile be returned to him, for damages for its wrongful taking, and further prayed for costs and attorney's fee. Trial resulted in a verdict in favor of appellee, Burley Moore and a judgment was entered containing these recitals: "We, the jury, find for the defendant. (s) Jack S. Bew, Foreman. The jury also returned into the court the further verdict as follows: And we the jury find for the defendant on his cross-complaint, and fix his recovery in the sum of $350.00 (s) Jack S. Bew, Foreman. IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, Burley B. Moore, recover of and from the plaintiff, Rebsamen Motors, Inc., the Possession of the automobile taken by the plaintiff from the defendant. It is further considered, ordered and adjudged by the Court that the defendant have and recover of and from the plaintiff and H. A. Hemmenway the sum of Three Hundred and Fifty ($350.00) Dollars on his cross-complaint together with interest thereon from this date until paid at the rate of six (6%) per cent per annum, and that said defendant have and recover of and from the plaintiff and H. A. Hemmenway all of his costs herein expended."

For reversal appellant relies on two points as follows: "(1) The court erred in admitting testimony which contradicted the terms of a written agreement (2) The court erred in failing to grant plaintiff's motion for a new trial and in giving defendant's instruction number 8."

—1—

Appellee contended that under his written contract and agreement with appellant, appellant was to allow him $1,521.09 for his 1957 car and also that appellant orally agreed to assume and pay off a lien that existed against the 1957 Ford in the amount of $430.00. Without attempting to detail here the testimony of several witnesses on this issue, it suffices to say that we think

such testimony amply supports appellee's contention that appellant did so agree. We think this testimony was properly admitted by the court, in the circumstances, to show just what were the terms of the agreement and contract between the parties. Our governing rule, in a case such as this, was stated by this court in 90 Ark. 426, 119 S. W. 822, *J. H. Magill Lumber Company* v. *Lane-White Lumber Company,* where we said: "The principal contention in the case is that the bill of sale is complete and unambiguous, that it is the sole evidence of the contract between the prties, and that an additional parol agreement to pay the mortgage debt as a part of the consideration for the sale cannot be engrafted upon the contract. It has been decided by this court in numerous cases that, though the recitals as to consideration in a deed cannot be contradicted by parol evidence for the purpose of defeating the conveyance, it is competent to prove by such evidence that the consideration has not been paid as recited or to establish the fact that other considerations not recited in the deed were agreed to be paid, when it does not contradict the terms of the writing." See also 99 Ark. 218, 138 S. W. 978, *Cox* v. *Smith.*

—2—

Appellant, Rebsamen Motors, brought an action alleging and claiming that it was the owner and entitled to immediate possession of the 1958 car and after executing the bond required, did take possession of the 1958 car, as indicated, and at time of trial Rebsamen had possession of both the 1957 Ford and the 1958 car, including Moore's equity in both cars. The record reflects, as pointed out above, that the jury found for appellee, Moore, so obviously the finding means that Rebsamen was not the owner and not entitled to possession of the 1958 car. Since Moore admits owing a balance of $1,530.00 on the 1958 car, we think it was error for the court to accept a verdict wherein no value of the 1958 car was found and render a judgment on such verdict. Sections 34-2115 and 34-2116 (Ark. Stats. 1947) provide: "34-2115. Jury to assess value of property

and determine damages.—In actions for recovery of specific personal property, the jury must assess the value of the property, as also the damages for taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property."

"34-2116. Judgment for recovery.—In an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery can not be had, and damages for the detention. Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value, in case a return can not be had, and damages for the taking and withholding of the property."

The verdict for $350.00 in favor of Moore on his cross-complaint is indefinite. What does it intend to cover? Was it intended to cover everything? We are unable to tell from the form of the verdict. Does this verdict mean that Moore is to get the 1958 car and make all payments on his contract with Rebsamen? Section 51-1102 (Ark. Stats. 1947) provides: "In any action in a * * * circuit court of this State, where it is attempted to foreclose any mortgage, deed of trust or to replevy, under such mortgage, deed of trust or other instrument, any personal property, the defendant or defendants in said action shall have the right to prove or show any payment or payments or set-off under said mortgage, deed of trust or other instrument, and judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten (10) days and satisfy the judgment and retain the property."

In *Harper* v. *Futrell,* 204 Ark. 822, 164 S. W. 2d 995, we held, in effect, that this statute is applicable to a replevin action by the seller under a conditional sales contract. In 15 Ark. Digest (West) Page 185, Section 101 (1) under Form and requisites in general, Replevin, the author says: "Ark. 1867. Under Gould's Dig. c. 145, Sections 44, 45, the defendant in replevin,

upon a finding in his favor, is entitled to judgment for the return of the property to him, or may waive that right and take judgment for the value of the property, in which case it is the duty of the jury to find the value. —*Hill* v. *Fellows,* 25 Ark. 11.'' These sections of Gould's Digest are embraced in the above section 51-1102.

We conclude, therefore, that the judgment must be reversed and the case remanded for further proceedings consistent with this opinion.

WADSWORTH *v.* GATHRIGHT.

5-1941 330 S. W. 2d 94

Opinion delivered November 23, 1959.

[Rehearing denied January 11, 1960]

Wm. I. Prewett and *Melvin E. Mayfield,* for appellant.

Shaver, Tackett & Jones, for appellee.

Ed. F. McFaddin, Associate Justice. This appeal and cross appeal stem from a traffic mishap which occurred when an automobile driven by appellee, J. Frank Gathright, struck and seriously injured E. K. (Ken) Maroney, Jr., a little boy two-and-a-half years of age.

As Mr. Gathright and his wife were driving westerly down the highway in Strong, Arkansas, Sunday afternoon, September 1, 1956, they observed a little girl, five years of age, crossing the highway in front of the car. She was going from north to south, riding a tricycle, and several puppies were running along near her. The Gathrights, driving slowly and watching the little girl, did not see her 2½-year-old brother on a "stick-horse"[1] following along behind her and the puppies. The left front bumper of the Gathright car struck the little boy, Ken Maroney, and knocked him to the pavement. Among other injuries, Ken had a fractured shaft of the left femur in the upper or middle third, and this fracture caused great pain, required extensive treatment and surgery, and probably will result in permanent injury.

[1] This word is not in Webster's dictionary; but, at all events, it is an extremely well known colloquialism. What little boy hasn't gone astride a stick and imagined he was on a horse!

Action for damages was filed against Gathright by E. K. Maroney individually, being the father of Ken Maroney, and by Harry Wadsworth, as guardian of Ken Maroney. E. K. Maroney sued to recover amounts expended and to be expended for doctors, hospital, nursing, ambulance, and other medical expenses in the treatment of his son; and Wadsworth, as guardian of Ken Maroney, sued to recover for physical pain and suffering experienced by the little boy and for damages for permanent injuries. Trial in the Union Circuit Court resulted in verdict and judgment (1) for $1,250.00 in favor of E. K. Maroney, Sr., father of the little boy; and (2) for $1,000.00 in favor of Wadsworth, guardian of the minor, Ken Maroney. On the direct appeal in this case the guardian for the minor is the sole appellant; and he presents the three points herein listed and discussed.

I. *The guardian says: "The judgment returned in behalf of Harry Wadsworth, guardian of E. K. Maroney, Jr., was grossly inadequate under the law and the evidence".* Appellant points out that the little boy, being of such a tender age, could not be guilty of contributory negligence;[2] that the jury necessarily found that Mr. Gathright was negligent; and that after such finding the $1,000.00 verdict was grossly inadequate. We are asked to conditionally reverse the judgment because of the inadequate verdict, just as we would do in the case of an excessive verdict. In some jurisdictions[3] reversal because of an inadequate verdict is ordered independent of any other error. But, with becoming candor, appellant concedes that in Arkansas our cases hold, that reversal because of an inadequate verdict is ordered only when some other error occurs in the trial.

In *Smith* v. *Ark. P. & L. Co.*, 191 Ark. 389, 86 S. W. 2d 411, we discussed this matter in considerable detail and cited, *inter alia, Fulbright* v. *Phipps,* 176 Ark. 356,

[2] The Court so charged the jury in Instruction No. 2; and this is in accord with our cases. *Miles* v. *St. L. I. M. & S. Ry. Co.*, 90 Ark. 485, 119 S.W. 837.

[3] There is an exhaustive annotation on this point in 16 A.L.R. 2d 393, entitled: "Adequacy of damages in action by person injured for personal injuries not resulting in death"; and it is there pointed out that many courts reverse on account of inadequate damages, just as they do on account of excessive damages.

3 S. W. 2d 49; and *Kimbrough* v. *Johnson,* 182 Ark. 522, 32 S. W. 2d 154; and then said: "When substantial damages are awarded, a judgment will not be reversed because of inadequacy if there be no other error than that committed by the jury in measuring the damages. But a judgment, even for substantial damages, will be reversed were the undisputed testimony shows the damages to be inadequate, if error of a substantial and prejudicial nature was committed at the trial of the case." We adhere to the rule as quoted above. The amount awarded the guardian in the case at bar was $1,000.00, which constitutes substantial damages: therefore, we will not consider the matter of inadequacy of damages until and unless we find some substantial and prejudicial error committed in the trial of the case.

II. *The guardian says: "The Court erred in refusing to permit the taking of pictures of appellee's automobile and in refusing to permit Glen Thompson to testify as to the distances from which E. K. Maroney, Jr., could be seen from said automobile".* Mr. Gathright was driving a 1956 Chevrolet car at the time of the mishap on September 1, 1956. The action was filed August 27, 1957, and the discovery deposition of the defendant was taken on October 1, 1957. Later, on October 23, 1957, appellant filed a motion that the Court require the defendant to permit the taking of pictures. The motion said: "It would be of great benefit to the jury in considering the defendant's range of vision if photographs could be taken of the vehicle at the scene, with a camera both in and out of the vehicle". The Court overruled the said motion and appellant claims error, citing § 28-356 Ark. Stats., which is a part of the Statute Concerning Discovery.

The germane portion of this Statute reads: "Upon motion of any party showing good cause therefor . . . . the court in which an action is pending *may* . . . ." (Emphasis supplied). It will be observed that the court is not required to allow the taking of pictures, but *may* do so. In the case at bar the ruling of the Court was not prejudicial in any way to the guardian because at

the trial of the case the testimony, along with other pictures admitted, clearly explained the entire situation existing at the time of the mishap. We have repeatedly held that the admission, relevancy, and materiality of photographs as evidence is left to the discretion of the trial judge, and unless that discretion has been abused his ruling will not be disturbed. *Kansas City Southern Ry. Co.* v. *Morris,* 80 Ark. 528, 98 S. W. 363; *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79; *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566.

Further, appellant says that when the case came for trial the Court refused to permit appellant to ask its witness, Glen Thompson, as to the distances from which Ken Maroney could have been seen from an automobile driven by Thompson and similar to the Gathright car. Irrespective of all other answers to this contention, we hold that no harm occurred to appellant in the Court's ruling. The entire purpose and object of the desired testimony from Thompson was to show that Gathright was guilty of negligence. The jury verdict of $1,000.00 necessarily reached such conclusion: so we fail to see how any evidence as to vision or distance could have adversely affected the appellant.

III. *The Guardian says: "The Court erred in giving defendant's requested Instruction 5 and 6."* These two instructions are copied in full in the footnote[4], with

[4] DEFENDANT'S REQUESTED INSTRUCTION NO. 5: You are instructed that the mere happening of the accident complained of raises no presumption of negligence on the part of the defendant, and that the burden of proof is on the plaintiff to establish by a preponderance of the evidence that negligence on the part of the defendant *contributed directly to cause said accident.* If the minds of the jury are left in a state of even balance as to the existence of negligence on the part of the defendant, then, in that event, the plaintiff is not entitled to recover against the defendant and the verdict of the jury should be for the defendant.

DEFENDANT'S REQUESTED INSTRUCTION NO. 6: You are instructed that the law does not impose any duty to guard against *sudden,* unforseen, and unanticipated acts of another. Therefore, if you find that the accident and resulting injuries, if any, were due to the unanticipated and unforeseen act of E. K. Maroney, Jr., and that the defendant did not see, or by the exercise of ordinary care could not have seen or anticipated that the child was crossing or would cross into the path of his automobile, then, in that event, the plaintiffs in this case cannot recover.

(Emphasis supplied.)

the objected portions italicized. In Instruction No. 5, appellant objected to the words, "contributed directly to cause said accident". In view of all the other instructions given, we see no difference between *"contributed directly to cause said accident", as was given,* and *"proximate cause of the accident",* as was urged by the appellant.

In Instruction No. 6, the objection is to the use of the word *"sudden"*. In the sentence immediately thereafter, the word "sudden" is omitted; so there is no force to this objection.

The final objection to Instruction No. 6 is, "It does not take into consideration or require the defendant to keep a proper lookout; it does not require him to use reasonable care in the operation of his vehicle unless he actually sees the little boy in this case". This point is without merit, because, in other instructions given, the Court told the jury: the duty of a driver to anticipate the presence of pedestrians; that the little boy, Ken Maroney, could not be guilty of contributory negligence; that the driver of an automobile has a duty to maintain a constant lookout; and that the driver of an automobile should exercise due care to avoid injuring any pedestrian. All the instructions, when taken together, make clear that the Court committed no error in the instructions, as against the objections here made.

IV. *Gathright's Cross Appeal.* On his cross appeal Gathright insists that the Court erred in refusing a directed verdict in his favor. He claims that no actionable negligence was shown. There was ample evidence of negligence sufficient to take the case to the jury. There was evidence from which the jury could have found that Mr. Gathright was watching the little girl and the puppies and did not look around to see where the little boy was. There was also evidence to show that Mr. Gathright's car was slightly over the center line of the road when the little boy was struck by the left bumper. In short, we find no merit to the cross appeal.

Therefore, the case is affirmed on both direct appeal and cross appeal.

TRAMMELL *v.* RAMEY.

5-1972 329 S. W. 2d 153

Opinion delivered November 23, 1959.

James M. Roy and *Elsijane Trimble Roy,* for appellant.

Taylor & Sudbury, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellants, E. H. Trammell and his wife and child, to recover for personal injuries suffered in a collision between the Trammell car and a car that was owned and being driven by the appellee's employee, Banks, whose drunkenness caused the accident. The collision happened on a Sunday night, at a time when Banks was upon a mission of his own having no connection with his employer's business. The appellants seek to hold the employer liable on a theory so novel that it does not seem to have been asserted in any reported American case. The trial court sustained the appellee's demurrer to the complaint, on the ground that no cause of action was stated, and this appeal is from the ensuing order of dismissal.

The complaint is long, but its essential allegations are simple. At the time of the collision in August of 1958 Ramey, it is said, operated a general store situated on U. S. Highway 61 in a small community which seems to be a few miles south of Blytheville. Banks, a man of fifty-three, was Ramey's senior employee, having worked regularly at the store for the preceding ten years. The two men were living in adjacent houses behind the store and had been friends for twenty years.

Banks had had an alcoholic problem throughout the time Ramey had known him. In 1952 and again in 1958, a few months before the collision, Banks was arrested for driving while intoxicated. Ramey was frequently forced to send Banks home for drinking on the job. Ramey had discharged Banks several times on account of his alcoholism, but in each instance Banks had been re-employed. From the complaint: "Recognizing Mr. Banks' weakness and addiction for alcohol and for driving motor vehicles while intoxicated, Mr. Ramey had assumed control thereof and responsibility therefor many months, if not years, before the accident. In connection therewith Mr. Ramey discussed the problem with Mr. Banks innumerable times and he also placed Banks in communication with the Blytheville Chapter of Alcoholics Anonymous and similar agencies."

In August of 1958 Ramey decided to take his wife and children to Tennessee for a week's vacation. It is asserted that Ramey knew that his own presence was the strongest deterrent to Banks' drinking and that in Ramey's absence a substitute restraint was necessary. Despite this knowledge Ramey left without taking any precautions to forestall Banks' drinking and particularly without notifying the Blytheville representatives of Alcoholics Anonymous, who had expressed their willingness to help at any time.

Ramey departed for Tennessee on Sunday morning and put Banks in charge of the store, which was to be reopened on Monday. That Sunday night Banks took his own car and drove to Blytheville, where he bought and consumed two pints of whiskey. Completely drunk, Banks attempted to drive back home, but before reaching the city limits he ran into the Trammell car and caused the injuries sued for. It is asserted that Banks has neither property nor liability insurance, so that the plaintiffs are without an effective remedy if Ramey is not liable for their injuries.

The trial court was right in holding that the allegations of the complaint do not establish liability on the part of Ramey. The principal charge is that Ramey had the power to control Banks and failed to exercise that power with knowledge of the harmful consequences that might follow. The question is, was Ramey guilty of negligence? We think it plain that he was not.

Ordinarily one person is under no duty to control the actions of another person, even though the former has the practical ability to govern the latter. The exceptions to this basic principle all involve situations in which the defendant's duty of control arises from a relation that exists either between the defendant and the plaintiff or between the defendant and the person who injured the plaintiff. Discussions of the general subject, upon which there is comparatively little authority, may be found in Harper and Kime, "The Duty to Control the Conduct of Another," 43 Yale L. Jour. 886;

Harper and James, The Law of Torts, § 18.7; Rest., Torts, §§ 317 to 320.

The relation of master and servant is one that may give rise to a duty on the part of the master to control his employee outside the scope of his employment, but the duty exists only with respect to conduct by the servant which nevertheless has a substantial connection with the master's business. The Restatement of Torts, which states the prevailing view, imposes that duty upon the master only when the servant is upon the master's premises or is using a chattel belonging to the master. "Thus, a manufacturer is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour from indulging in games involving an unreasonable risk of harm to persons outside the factory premises. He is not required, however, to exercise any control over the actions of his employees while on the public streets or in a neighboring restaurant during the lunch interval even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist therein." Rest., Torts, § 317.

It is clear that the bare relation of master and servant did not impose upon Ramey any responsibility for Banks' conduct in Blytheville on the night of the accident. The appellants argue, however, that Ramey rendered himself liable by taking an interest in Banks' alcoholic problem and endeavoring to help Banks overcome his weakness. Cases such as *Haralson* v. *Jones Truck Lines,* 223 Ark. 813, 270 S. W. 2d 892, 48 A. L. R. 2d 248, are relied upon for the general principle that one who assumes to act, even though under no duty to do so, may thereby become subject to an obligation to act carefully.

The doctrine in question falls decidedly short of visiting liability upon Ramey in this case. If a person gratuitously goes to the assistance of someone in distress he exposes himself to the consequences of his negligence, but there the matter ends; he is not bound to

play the good Samaritan again if he is confronted with the same situation upon a wholly different occasion. Ramey's friendly guidance may have reduced the number of Banks' sprees and in that way may have prevented highway accidents that would otherwise have occurred, but this does not entitle the public to demand that Ramey devote the rest of his life to the care of Banks. Even if Ramey had given up his vacation and had stayed at home to look after Banks, as the appellants think he should have done, he would still have been free to abandon his voluntary supervision and let Banks go into Blytheville for the avowed purpose of getting drunk. Thus the complaint is not one but two steps away from the assertion of a cause of action.

Counsel for the appellants discuss at some length the law pertaining to nuisances, but if Ramey was not negligent in leaving Banks in control of his own car (and Ramey had no legal right to interfere with that control), there is even less reason to hold that upon the same facts Ramey was absolutely liable for maintaining a nuisance. It is also argued that Banks was acting in the scope of his employment because he was returning to the store, but under our holding in *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, LRA 1918D, 115, and many later cases, it is clear that Banks was still engaged wholly in his own affairs.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* MUSWICK CIGAR & BEVERAGE CO.

5-2031 329 S. W. 2d 173

Opinion delivered November 23, 1959.

Dowell Anders and *William H. Donham,* for appellant.

Catlett & Henderson, for appellee.

PAUL WARD, Associate Justice. This is an eminent domain action brought by the State Highway Commission (hereafter called the "State") against the Muswick Beverage Company, Inc. (hereafter called the "Company") for the acquisition of the entire parcel of land and improvements thereon belonging to the Company. The jury rendered a verdict fixing the value at $212,000.00 and judgment was accordingly entered in that amount plus interest on the excess (over the court deposit of $149,300.00) from the date of the Declaration of Taking which was March 31, 1959.

On appeal to this court the State contends (a) that the judgment in its full amount is not supported by substantial evidence and (b) that interest should begin running from October 31, 1959, this being the date on which the court ordered the Company to vacate.

(a) From the record in this case we can find no satisfactory reason for holding that the full judgment is not supported by substantial evidence. Mr. Henry Hoffman, President and General Manager of the Company, and three other witnesses testified on behalf of appellee relative to the value of the land while two witnesses so testified on behalf of the State. The values fixed by appellee's witnesses were respectively $250,000.00; $200,345.00; $200,000.00; and $210,000.00. The values fixed by the appellant's witnesses were respectively $151,700.00 and $165.000.00. The testimony of the above named witnesses was substantially as hereafter set out.

Hoffman: I am the President, General Manager, Director, and the largest stockholder of the Company which is located six blocks east of Main Street on Third Street between Ferry and Rector Streets; the Company sells at wholesale cigars, cigarettes, tobacco, candy, beer and vending machines of candy and cigarettes, operating 31 pieces of automatic equipment; there are 32,002.5 square feet in the entire property which consists of six lots; the buildings cover 12,000 square feet, the covered loading dock approximately 6,000 square feet, and

a gravel driveway approximately 6,000 square feet; the property is served by a Rock Island siding running the entire length of the building on the Third Street side; the General Offices which face Rector Street cover around 16,000 square feet and they are modern, air conditioned and equipped with fluorescent lights and rubber tile floors; directly behind the offices is a merchandise warehouse with rubber tile floor which contains cigars, candies, heating and air conditioning units and rest rooms and in the merchandising area are located two storage rooms, one of which must be kept at a certain temperature; there is also a beer warehouse containing 2,945 square feet, behind which is a two-story vending machine operation. The place is strategically located and is the best location in town for the type of business we operate, it has been in operation at this same location since 1921 and I have been with the Company for 36 years; we serve a trade territory of which our property is the center, this territory includes North Little Rock; the place is only five blocks from the Depot which makes it convenient for our employees; and, it is in the central fire district and has good police protection. I have walked every railroad track in town looking for another location since learning that our property was to be taken by the State, and there just isn't any location with rail service available in our price limit. I am acquainted with the value of property in that vicinity, and the value of this land with the improvements is $250,000.00 or a little more.

James H. Larrison, who has been in the real estate business 13 or 14 years and is connected with the Walthour-Flake Company and has had much experience in buying, selling and appraising real estate for a large number of years, stated that he was acquainted with the subject property and that he made an examination of it recently. It was his considered opinion that the subject property would have sold for $200,345.00 on the 31st day of March 1959. In making up his mind as to the value of the property he took into consideration the nature of the business, what the land and buildings were

worth, and the street pattern around the property, and the location of the railroad facilities. On cross-examination he stated that he contacted many of the property owners in that immediate area and found no property for sale at less than $3.00 a square foot with improvements or unimproved. Later, on cross-examination, he stated that he had found some property, though not comparable to the Company's property in respect to location and surrounding facilities, which had sold for a lower price than $3.00 a square foot. After going into a detailed explanation of the value of the improvements the witness estimated the value of the land at $95,993.00 and the improvements at $104,352.00.

Frank Fulk, who lives in Little Rock and has been engaged in the real estate business for approximately 30 years testified that he was acquainted with the subject property and had made a detailed examination of the property recently. In his opinion the subject property was worth $200,000.00 on March 31, 1959. On cross-examination he explained in some detail as to how he arrived at the above figure.

C. V. Barnes, who has lived in Little Rock all of his life and operates a real estate firm stated that he was acquainted with the subject property and that in his opinion its fair market value on March 31, 1959, was $210,000.00. He explained that he had arrived at this figure by considering the three common approaches to value: sale, the income it would produce if the property were rented, and from a replacement cost approach. On cross-examination he stated that he was chairman of the Equalization Board and was familiar with the fact that the market value and the assessed value of property are not always the same.

On behalf of the State the following testimony in substance was given by Warren Baldwin and James M. East. Baldwin lives in Little Rock and has been engaged in the real estate business since 1913. He was employed by the State to appraise the subject property which he did by using the reconstruction less deprecia-

tion method. In 1957 he appraised the property at $145,000.00 but revised that estimate as of March 31, 1959, valuing the property at $151,700.00. He figured the land at $1.75 a square foot which, he thought, was the highest valuation of any land in that area at that time. He appraised the improvements at $93,081.00 and the land at $58,619.00. On cross-examination he stated that his business consisted principally of appraising and renting property but not selling property. He also admitted that it is difficult to find a location the size of the subject property in that area. Mr. East, who has been a real estate appraiser for 13 years all over Arkansas and who at sometimes represented practically all life insurance companies making loans in this state and who has also represented the F.H.A. and the V.A. made an appraisal of the subject for the State. He stated that he had made a thorough study of the area in question for 14 months and originally appraised the land alone at $1.75 a square foot but later raised it to $2.00 a square foot, making the total value of the subject land $64,000.00. In his opinion the land and the improvements had a market value of $165,000.00 as of March 31, 1959.

In support of the State's contention that there was no substantial evidence to support the verdict of the jury we assume that it is meant there is no substantial evidence to support the verdict and judgment in its entirety. In this connection appellant points out, and we agree, that the question of whether there is any substantial evidence is one of law and not of fact. See *Missouri Pacific Transportation Company* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958, and *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738. On the other hand, appellee calls our attention to certain rules well established by the decisions of this court, which we must apply in considering a question of this nature. One such rule is that the jurors are accorded great latitude in considering testimony relative to damages. See *Arkansas State Highway Commission* v. *Carder,* 228 Ark. 8, 305 S. W. 2d 330. Another rule is that on appeal in determining the sufficiency of the evi-

dence, we will consider the evidence in the light most favorable to appellee. See *Mutual Benefit Health and Accident Association* v. *Basham,* 191 Ark. 679, 87 S. W. 2d 583. This court recognizes that a question of this nature constitutes one of the most difficult problems with which the court is confronted on appeal. We also recognized another general rule which is applicable here in the *Carder* case, *supra,* where it was stated that a jury's verdict ". . . will be set aside as excessive only when it is not supported by proof, or when it is so excessive as to indicate passion, prejudice or incorrect appreciation of the law applicable to the case". We find nothing in the record before us to indicate passion or prejudice.

If we have a right to consider the testimony of all of the witnesses, including Mr. Hoffman, relative to the value of such property we are not satisfied to say that there is no substantial evidence to support the jury's verdict in its entirety. Our decision might be other wise if, as appellant strenuously contends, we should not place any value upon Hoffman's testimony. It was pointed out by appellant that Hoffman is an interested party to the outcome of this litigation and, further, that he did not testify to any particular fact within his personal knowledge but only as to his personal conclusions. We are unable to agree with this contention on the part of appellant. We think that the circumstance of Mr. Hoffman's personal interest was something which went only to the weight his testimony should have with the jury. On this point the State was fully protected by the court by its instruction to the jury to disregard biased-opinion testimony in arriving at their verdict. We know of no rule, and none has been pointed out to us by appellant, which denies the right of an interested party in a lawsuit to give his testimony for what it is worth. Nor do we agree with appellant's statement that Hoffman testified to no facts within his personal knowledge. As heretofore set out, he testified to many facts which have a direct bearing on the value of the subject property, and he also stated that he was acquainted with prop-

erty values in that vicinity. On all these items he was, of course, subject to cross-examination.

This court has on numerous occasions affirmed the right of the owner of property (and it is pointed out that Hoffman was not the sole owner of subject property) to testify as to its value. In the case of *Jonesboro, Lake City & Eastern Railroad Company* v. *Ashabranner,* 117 Ark. 317, 174 S. W. 548, we find this statement: "Plaintiff resided on the land and was familiar with the conditions, and we think the court was justified in allowing her to state her opinion of the extent of the injury to the land and the depreciation in the value thereof". For decisions to the same effect see *Carder, supra; Stuttgart & Rice Belt R. R. Co.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511; and *Arkansas State Highway Commission* v. *O. & B., Inc.,* 227 Ark. 739, 103 S. W. 2d 739. This same rule appears to be generally accepted in other jurisdictions. See *Provo River Water Users Assn.* v. *Carlson,* 103 Utah 93, 103 P. 2d 777 and *Telluride Power Co.* v. *Williams,* 164 F2d 685. The jurors must have recognized the well known fact that property appraisement is not an exact science. They certainly noticed that even the State's own witnesses were not in agreement to the extent of over $13,000.00. They also had a right to believe Hoffman knew more about the value of the location and serviceable features of the property than any of the other witnesses. It is our conclusion, therefore, that the judgment of the trial court in the full amount of $212,000.00 must be affirmed.

(b) On March 31, 1959, when the State filed its complaint in this matter, it deposited the sum of $149,-300.00 and affirmed its declaration to take all of the property belonging to appellee. It appears that the deposit has been paid to appellee and that the court ordered interest on the balance of $62,700.00 to start running as of the above date.

The record further shows that on May 21, 1959, the State filed a petition for the right of entry on and possession of subject property by October 15, 1959, and on

June 12, 1959 an order was entered by the trial court granting appellee possession as of October 31, 1959, ordering appellee to vacate the property by that date. The relative statutes in this case are Ark. Stats. Section 76-532, *et. seq.* Section 76-538 provides for the State to file a declaration of taking and to make a deposit with the Clerk of the estimated compensation; that the State shall thereupon have the right of entry and the parties in possession shall be required to render the possession to the State *upon such terms as shall be fixed by the court.* Section 76-536 provides that immediately upon the making of the deposit provided for in the above section, title to the lands shall vest in the State and that compensation for the land shall be ascertained and established by judgment. That section further provides that ". . . said judgment shall include as a part of the just compensation awarded interest at the rate of six per cent (6%) per annum on the amount finally awarded as the value of the property *from the date of surrender of possession to the date of payment* . . ." (Emphasis supplied).

Upon oral argument it was agreed by both sides that interest should not begin to run until October 31, 1959 — the date when possession was surrendered, and, therefore, the judgment of the trial court should be modified to so read. This modification should not, and will not, result in taxing any part of the costs against appellee since appellant, with commendable candor, assumed full responsibility for writing the precedent for judgment which contained the error in dates.

Accordingly the judgment of the trial court is modified as above indicated and, as modified, it is affirmed.

Modified and affirmed.

Opinion delivered November 23, 1959.

W. R. Thrasher, W. B. Brady, O. Wendell Hall, Jr., for appellant.

Ben M. McCray, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a jury verdict in the amount of $1,000 in favor of appellees in an eminent domain action brought by appellant to condemn land for a highway overpass at Benton.

Pursuant to Act 115 of 1953 (Ark. Stat. § 76-534 *et seq.*) the Arkansas Highway Commission filed a declaration of taking of the land involved and made a deposit of estimated just compensation in the amount of $500. The deposit was withdrawn by appellees under the provisions of this act. The matter was tried to a jury and a verdict of $1,000 was returned in favor of appellees. The sole question raised on appeal is upon the correctness of the trial judge's ruling denying appellant's motion for a mistrial based on the contention that prejudicial error occurred when the amount of the deposit of estimated just compensation was mentioned by appellees' attorney while cross-examining one of appellant's witnesses.

Mr. Robert E. Hamilton testified on behalf of appellant as an expert on the damage to appellees as a result of the condemnation of approximately ¼ acre of a

3-acre tract of land. On direct examination he testified that he appraised the property for the Highway Department and estimated the value of the land before the taking at $5,500 and after the taking at $5,302, rounding off the damage at $200. It would appear from the direct examination of this witness that he had been the expert used by the Highway Department in arriving at the estimated just compensation at the time of the declaration of taking.

The incident which occurred on cross-examination of the witness by appellees' attorney and upon which appellant relies for reversal, is as follows:

"Q. Now, I believe you were working for the highway department back in April of 1958, when the appraisal was made and five hundred dollars deposited down here with the Clerk as fair compensation, were you?

A. No, sir, I was not."

It is a well settled rule that in order to test the credibility of a witness for purposes of impeachment a witness may be cross-examined to show prior inconsistent statements. *Missouri Pac. R. R.* v. *Zolliecoffer,* 209 Ark. 559, 191 S. W. 2d 587; *Stevens* v. *State,* 117 Ark. 64, 174 S. W. 219; *Tullis* v. *State,* 162 Ark. 116, 257 S. W. 380.

If the witness had made the first appraisal, his answer to the question asked above would have been "yes". Then, of course, appellees' attorney would undoubtedly have had the right to continue questioning him on this point for purposes of impeaching his testimony regarding his appraisal already admitted in evidence. But when his answer to the question was negative, and he subsequently testified that he knew nothing about the deposit, then the matter was dropped.

Affirmed.

HARRIS, C. J., and HOLT, J., dissent; WARD, J., concurs.

PAUL WARD, Associate Justice, concurring. I concur because I think the majority opinion is subject to the in-

terpretation (and it may hereafter be so cited) to hold the questioned testimony admissible in any event even on direct examination.

I am inclined to the view that such testimony is not admissible except for the purpose of impeachment.

The only point relied on by appellant for reversal is stated in its brief as follows: "The trial court committed reversible error in overruling appellant's motion for a new trial". This exact point was not discussed in the majority opinion. Although I think the testimony was not admissible and not proper yet I would affirm the case because I think the error could have been cured by a cautionary instruction.

CARLETON HARRIS, Chief Justice, dissenting. In my opinion, this judgment should be reversed and the cause remanded because of the question propounded to Hamilton by counsel for appellees, for I am of the view that the evidence of the amount deposited by the Highway Department with its Declaration of Taking was inadmissible. This deposit is apparently made for a two-fold purpose: first, to vest the condemner with title and give him the right to immediate entrance upon terms fixed by the court, and secondly, to avoid the payment of interest on the amount deposited. The deposit actually is in the nature of an offer of compromise, and in fact, many cases are terminated without trial, *i.e.,* the cases are concluded by a withdrawal under prejudice of the amount deposited as estimated just compensation. In 1 Orgel, *Valuation Under Eminent Domain,* (2d Ed. 1953), Sec. 148, p. 625-6, it is stated:

"Offers made to or by the condemner during the pendency of the condemnation proceeding have generally been held incompetent as evidence, for the reason that they represent mere attempts to compromise the suit and as such are not a true indication of market value. And this rule is applied to the amount paid into court by the government as a pre-requisite to a taking under the present federal condemnation practice."

At an institute on real property, held in Fayetteville on October 9-11, 1958, and sponsored by the University of Arkansas School of Law and the Arkansas Bar Association, an address on the subject "Rules of Evidence in Eminent Domain Cases" was given by Fred Winner, an attorney from Denver, Colorado. This address is printed in 13 Arkansas Law Review 10 (1959). At page 15, Mr. Winner discusses "Offers Made by Condemmer", and states:

"The few cases which have considered the admissibility of offers made by the condemner to purchase the property under condemnation have almost uniformly excluded evidence of such offers on the ground that they are privileged as an offer of compromise, and under the federal practice of filing a declaration of taking supported by a deposit in court determined in advance by the government's appraisers, it seems settled that the amount of the deposit cannot be shown."

Of course, we have many times held that testimony showing an offer of compromise is incompetent. See *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198 (1927). From a practical standpoint, it seems most illogical to allow such evidence. One thing is certain, *if the landowner is permitted to establish the amount deposited by the Highway Commission with its Declaration of Taking, there is no need for the Highway Department to ever offer evidence that the land is of less value than the amount deposited,* for, of course, the jury will consider that the Highway Department deposited the very minimum. Certainly, it is contemplated under the statute that the amount determined by the jury may be less than the amount of the deposit, for Section 76-537 provides: "If the compensation finally awarded shall be less than the amount of money so deposited and paid to the persons entitled thereto, the Court shall enter judgment in favor of the State of Arkansas and against the proper parties for the amount of the excess." Of course, the net result is that the Highway Department, instead of depositing a fair and just sum, will be forced to deposit as small an amount as possible, and the court will frequently be called upon to

determine the proper sum for deposit. When this happens, I am of the view that the size of the deposit can be kept from the jury, for this figure fixed by the Court would have the effect of pitting the trial judge's opinion against the condemner's evidence, and would therefore amount to a comment upon the weight of the evidence, which is forbidden under Arkansas practice.

In addition to considering the evidence of the amount of the deposit inadmissible and prejudicial, I am also of the view that the manner in which the evidence was offered was clearly erroneous. The majority uphold this inquiry on the basis that counsel had the right to ask the question for purposes of impeachment by showing a prior inconsistent statement, but the witness had not made the appraisal. Yet this information (sum deposited) was conveyed to the jury *via* counsel's question. It should have first been ascertained that the witness had made a higher appraisal before any amount was mentioned. The attorney could have commenced his interrogation with the question, "Did you not, in April, 1958, make a higher appraisal on this property?" The conclusion of the matter in my view is (1) appellee introduced evidence which was inadmissible and (2) introduced this inadmissible evidence by an inadmissible method.

Mr. Justice HOLT joins in this dissent.

RYE *v.* BAUMANN.

5-1928 329 S. W. 2d 161

Opinion delivered November 23, 1959.

Wiley W. Bean, for appellant.

Edward H. Patterson and *Williams & Gardner,* for appellee.

JIM JOHNSON, Associate Justice. This is an adverse possession case concerning one acre of land situated in the Southwest corner of the SE¼ NE¼ of Section 22, Township 9 North, Range 22 West, Johnson County, Arkansas.

Appellee, J. J. Baumann, was in possession of the land and on attempting to move a fence Appellant, C. W. Rye, prevented him from doing so. Appellee brought this suit to quiet title in him to the one acre. The lower court found that although he did not have color of title, he and his predecessors in possession had exercised sufficient acts of ownership over the land for a period long enough to perfect title to it under Ark. Stats. 37-101.

There have been three predecessors in possession immediately prior to the Appellee involved in this litigation and their deeds are as follows:

On May 19, 1945, R. A. Stout, by warranty deed, conveyed to Edwille Birkhahn a tract of land and excepted from the conveyance the one acre in question. This deed pointed out that the one acre had previously been conveyed to L. J. Anthony.[1] The exception in the deed set out the legal description of the one acre as follows:

"And one acre of land conveyed to L. J. Anthony described as beginning at the Southwest corner of said Southeast Quarter of the Northeast Quarter of Section

[1] Mr. Anthony is the predecessor in paper title to the Appellant.

Twenty-two, Township Nine North, Range Twenty-two West, running East on Quarter section line three-fourths of an acre, thence North to Dover County Road; thence West to Quarter section line; thence South along said line to beginning."

On February 24, 1953, Edwille Birkhahn conveyed to Ira Whorton a tract of land by warranty deed and also excepted from this conveyance this one acre of land.

On December 27, 1954, Ira Whorton conveyed to the Appellee a tract by warranty deed which also excepted this one acre from the conveyance.

On June 24, 1955, L. J. Anthony conveyed to Appellant this one acre by warranty deed.

The Appellant claims that the exception in the deed to the Appellee forbids the Appellee to tack the possession of his predecessors in possession because, by taking the deed with the exception, he recognized a superior title. Appellant also relies on a statement made during cross-examination of Mr. Birkhahn, one of the prior possessors, that he never claimed any more than his deed called for, and that this shows a lack of intention on his part to claim adversely to the appellant. In Arkansas, if the intent of the disseisor is merely to hold to the true line, no adverse possession can arise. *Ogle* v. *Hodge,* 217 Ark. 913, 234 S. W. 2d 24; *Carter* v. *Roberson,* 214 Ark. 750, 217 S. W. 2d 846; *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419.

On direct examination Mr. Birkhahn testified as follows:

"A. The whole time that I owned the land, there wasn't a soul said anything about the house. I thought that it was mine and I still think that it was. It was mine."

We think the remark relied on by the Appellant loses its force when considered along with the testimony of Birkhahn on direct examination, and the fact that Birkhahn put a roof on the house and windows in it and cut a twelve foot room from the back of the house

and rented it out and remained in possession, without disturbance from Appellant or his predecessor, for a period of over seven years. In a situation such as this, an honest claimant upon being asked about his intent, unless previously warned, might not think to qualify his answer so as to claim what he considered his own, but would state that he claimed only his own,[2] and on such a chance statement his claim would disappear. In arriving at the intent of the disseisor we think it is better to weigh the reasonable import of his conduct in the years preceding the litigation rather than rely on one remark made during the stress of cross-examination (which is elsewhere refuted).

Next, we must decide the effect of the exception in the deeds. Land embraced in an exception in a deed must be described with the same certainty that is required when describing the property conveyed and failure to do so will render the exception void and the grantee takes the whole tract, including that part which was intended to be excepted.[3] *Parker* v. *Cherry,* 209 Ark. 907, 193 S. W. 2d 127; *Glasscock* v. *Mallory,* 139 Ark. 83, 213 S. W. 8; *Mooney* v. *Colledge,* 30 Ark. 640.

The deed from Birkhahn to Whorton and the deed from Whorton to Appellee did not describe this exception but referred to the deed from Stout to Anthony. The deed from Stout to Birkhahn contained a description and it was recorded. A description of land may be established by reference to other instruments, such as another deed on record. Jones on Arkansas Titles, Sec. 254; *Oliver* v. *Howie,* 170 Ark. 758, 281 S. W. 17.

The rule is well established that a deed will not be held void for uncertainty of description if by any reasonable construction it can be made available and if the descriptive words themselves furnish a key for identifying the land conveyed, nothing more is required. *Davis* v. *Burford,* 197 Ark. 965, 125 S. W. 2d 789. In the present description we have this call: "running east on Quarter Section line three fourth acres". It might be

[2] There is a note on this subject in 6 Ark. Law Review page 67.
[3] There is an annotation on this subject in 162 A.L.R. 288.

argued that "three fourth acres" is not a unit of lineal measure but it has been used in that respect. In the case of *Fowler* v. *Tarbet,* 45 Wash., 2d 332, 274 P. 2d 341, the court had before it a deed containing the description "2 acres in width". It was there held that "2 acres in width" is a definite lineal measurement and would be a line approximately 417.4 feet in width. An "arpen" is a square measure of land[4] and it has often been held to be sufficient as a lineal measure along one side thereof. *Cause of the New Orleans Batture,* 4 Hall's Am. Law J. 518; *Strother* v. *Lucas,* 6 Pet. 763, 8 L. Ed. 573; *United States* v. *Le Blanc,* 12 How. 435, 13 L. Ed. 1055; *McMillan* v. *Aiken,* 205 Ala. 35, 88 So. 135.

In the present case we have a description that lends itself to no other interpretation than the surveyor intended to run East on the quarter section line one hundred fifty-six feet and six inches, which is approximately three-fourths the distance of one side of an acre. Even ignoring the probable existence of monuments on the premises to aid him, a surveyor, after running East three-fourth acre, could easily run north to the "Dover County Road" and measure the distance, then run west to the quarter line, then South on the quarter line to the point of beginning, and by doing so could close the description.

The exception in the deed forbids the Appellee from the claiming under color of title,[5] so any claim of adverse possession must be founded on possession alone. Mere possession, without color of title, for the statutory period is sufficient to vest title in the disseisor. Ark. Stats. 37-101 to 37-103; *Dierks Lumber & Coal Co.* v. *Vaughn,* 131 F. Supp. 219, affirmed 221 F. 2d 695. The possession must be actual, adverse, continuous, open,

[4] An arpen is defined as a measure of land of uncertain quantity, mentioned in Domesday and other old books, by some called an acre, by others a furlong, being a French measure of land containing 100 square perches of 18 feet each, or *an acre.* 94 C.J.S. Weights & Measures page 538.

[5] "Color of title is an apparent title to land founded upon a written instrument, such as a deed, levy of execution, decree of court or the like. Color of title, for the purpose of adverse possession under the statute of limitations is that which has the semblance or appearance of title." Bouviers Law Dictionary, 3rd Ed.

notorious, exclusive and hostile and for the statutory period.

It might be contended Appellee is estopped to claim adversely by accepting his deed with the exception in it. In the case of *Guaranty Loan & Trust Co.* v. *Helena Imp. Dist.,* 148 Ark. 56, 228 S. W. 1045, this Court said:

"A rule, apparently universal in its application, seems to be that a reservation or exception in favor of a stranger to a conveyance is void or inoperative, and that a grantee in a deed containing a reservation or exception in favor of a stranger to the conveyance is not estopped to deny its efficacy."

Birkhahn, by virtue of time in possession and the other requisites heretofore set out having been met, obtained title to this one acre through adverse possession. In 1954, Birkhahn conveyed by warranty deed to Whorton, the deed containing an exception in favor of Anthony, the immediate predecessor in paper title to Appellant.[6] There are two questions presented by this conveyance: First, what effect does this exception have on Anthony and his grantee, the Appellant? The rule is, an exception in a deed in favor of a stranger to the deed is void and inoperative except to confirm a right which the stranger already has. *Guaranty Loan & Trust Co.* v. *Helena Imp. Dist., supra;* 26 C. J. S. Deeds, Sec. 140 (3); 39 A. L. R. 128; 16 Am. Jur., Deeds, Sec. 300, Thompson on Real Property (permanent edition) Sec. 3483. Anthony was a stranger[7] to this deed and the exception did not confirm a right which he already had because prior to this deed Birkhahn had divested him of title.

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[6] "A reservation is always of something taken back out of that which is clearly granted; while an exception is of some part of the estate not granted at all." 4 Kent's Commentaries, 468 *Bodcaw Lbr. Co.* v. *Goode,* 160 Ark. 48, 254 S.W. 345, 29 ALR 578.

[7] "A person who is not a party to a deed is said to be a stranger to it." Byrne's Law Dictionary, 844.

"The word 'stanger' comes almost directly from the latin 'extra', meaning beyond or outside, and, observing all the common and legal definitions of the word, it has only the same value in expressing thought as its Anglo-Saxon counterpart, the word 'outsider' ". 83 C.J.S. page 109.

The second question is did the giving of the deed with the exception in favor of Anthony revest title in Anthony after Birkhahn, the disseisor, had held the land for over seven years? This question was answered in *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444, where this Court said:

"If one before the statutory period has run, and before he has acquired title by adverse possession, acknowledges or recognizes the title of the owner, such recognition will show that his possession is not adverse, and the statute of limitations will not commence to run against the owner until the adverse claimant repudiates the title of the owner, but recognition after the full statutory period had elapsed will not have that effect; for where title by limitation has become vested in the adverse claimant, a mere recognition of some other title does not revest title acquired by adverse possession."

This is conclusive against the Appellant, but there is still the question of the effect of the exception in the deed from Birkhahn to Whorton, as between the parties. The rule is, the land embraced in the exception cannot pass to the grantee. See: Thompson on Real Property (permanent Ed.) Sec. 3484; 16 Am. Jur. Deeds, Sec. 301; 39 A. L. R. 132. So it seems Whorton did not receive title to this one acre under his deed from Birkhahn and title would remain in Birkhahn. But we have Birkhahn's testimony that he sold the land to Whorton and that Whorton went into possession of it. As between the parties to a conveyance, intention will govern if the description furnishes a sufficient key for identification. *Wood* v. *Haye,* 206 Ark. 892, 175 S. W. 2d 189.

There is sufficient testimony to support the intention of Birkhahn to transfer the property to Whorton, but the deed from Whorton to Appellee also contained the exception, and, since Whorton was not present at the trial below, we cannot say whether he intended to convey to Appellee only what his deed called for or if he intended to convey all the tract, including that part embraced in the exception. In the absence of Whorton's testimony on this subject, the decree is reversed and re-

manded for further proceedings consistent with this opinion.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, J., dissenting. I would affirm the decree on the ground that the description of the excepted one acre is void. This description can be followed by a surveyor only if an acre is taken to be a measure of distance. "Acre" is defined by Webster's New International Dictionary (2d Ed.) as the area of a parcel forty rods long by four rods broad, and by Bouvier's Law Dictionary as a quantity of land containing 160 square rods, "in whatever shape." The term is essentially a measure of area; I do not think it has a sufficiently fixed and definite meaning as a measure of distance to warrant its use in that sense in the legal description of real property.

The majority's statement that three fourths of an acre is 156.5 feet is apparently based on the fact that a square acre, containing 43,560 square feet, would have sides approximately 208.7103 feet long. (The length is necessarily an approximation, as it is mathematically impossible to find the exact square root of 43,560.) Apart from the fact that the majority have introduced an element of uncertainty into the law of real property, where certainty is the most important requirement in the law, I have never heard the word acre used as a measure of distance and am not convinced that it has an established meaning in that sense. Who ever heard of a man walking ten acres before breakfast? One might as well declare that a gallon is 6.14 inches, because that would be the approximate length of the side of a cubic gallon. In my opinion the grantors in the deeds before us failed to describe the excepted acre with the certainty that the law wisely requires in matters of this kind.

5-1957 329 S. W. 2d 170

Opinion delivered November 30, 1959.

[redacted]

Robert J. Brown and *Alonzo D. Camp,* for appellant.

Paul L. Barnard and *Frank J. Wills,* for appellee.

CARLETON HARRIS, Chief Justice. Willie B. Rose and wife, Vera Rose, held title to property at 3216 Arch Street, Little Rock, as an estate by the entirety. In 1943, Willie left and went to California. On December 8, 1949, Vera obtained a divorce in the Pulaski Chancery Court. The decree recites that "the defendant comes not in person but files herein a letter through his attorney, John D. Drake, 721 W. McArthur Blvd., Oakland 9, Calif.", and further recites that the action is heard "upon the complaint of plaintiff, the testimony of Vera Rose, plaintiff, and Carrie B. Flagg, taken *ore tenus* at the bar of the Court, the letter of John D. Drake, Attorney at Law, 721 West McArthur Blvd., Oakland 9, California, stating that the defendant has filed a complaint in California

wherein he did not ask for any interest in the community property owned by the parties. * * *" The court dissolved the estate by the entirety and vested title absolutely in Vera Rose. On April 3, 1954, Vera died intestate, being survived by her father, J. W. Glasco, now deceased, and a sister and brother, Zenobia Jacobs and Cleopas Glasco. On July 21, 1954, Willie Rose brought an unlawful detainer action for said property against J. W. Glasco, but took a non-suit on April 4, 1955. In March, 1957, Willie filed two motions in the original divorce suit, alleging that the court "had no jurisdiction to dissolve the estate by the entirety, and had no jurisdiction to decree divestment of defendant's title as a tenant by the entirety, and no jurisdiction to vest title thereto in plaintiff"; asked that the court enter an order reopening the case; that Zenobia Glasco Jacobs and Cleopas Glasco be made parties thereto; that the decree of December 8, 1949, "be amended and modified to decree ownership in fee by right of survivorship in Willie B. Rose"; and further asked judgment for $1,875 as rent. The court's decree, entered on August 2, 1957, recites that "said cause was submitted to the Court upon the records in this case and upon testimony of Willie Rose, Zenobia Glasco Jacobs and others taken *ore tenus* at the bar of the court, * * * and the Court being well and sufficiently advised as to all matters of fact and law arising herein and the premises being fully seen, doth order, adjudge and decree that the two motions of Willie B. Rose filed herein March, 1957, be and they are hereby dismissed." On March 7, 1958, appellant filed a suit in ejectment against Zenobia Glasco Jacobs and her husband, Willie S. Jacobs, seeking substantially the same relief as was sought by the two motions in 1957, and appellees answered, asserting the defense of adverse possession, and also the defense of *res judicata,* based on the court's decree of August 2, 1957. The parties waived a jury and submitted the cause to the Circuit Court. On hearing, the Court found for appellees, and entered its judgment dismissing appellant's complaint "as being without merit." From such judgment comes this appeal.

We are of the opinion that this litigation is controlled by the rule of *res judicata; i.e.,* we hold that appellant's rights in and to this property were adjudicated by the order of the Chancery Court on August 2, 1957; it therefore becomes unnecessary to discuss other points which have been raised.

Appellant contends that this prior order is not *res judicata* for two reasons. First, because the original decree in 1949 was void insofar as it dissolved the estate by the entirety, and second, the defendants in the 1957 motions were not the same defendants as in the present litigation. We first consider the second point. The 1957 defendants were Zenobia Glasco Jacobs, also a defendant in the present action, and her brother, Cleopas Glasco. In the instant case, Glasco is not a defendant, but instead, Willie S. Jacobs, husband of Zenobia, was made a party. While the record does not disclose the reason for making Willie Jacobs a party, it was evidently based on the fact that he was living on the property with his wife. There is no intimation that Jacobs has any rights, other than through his wife, but at any rate, this is not a defense available to appellant. Had Rose been successful in 1957, and it developed that Jacobs had an interest in the property apart from any interest claimed by his wife, then *Jacobs, in the present action, might well contend that he was not barred by the* 1957 *decree* since he was not made a party at that time. *But appellant had his day in Court.* The issue before the Circuit Court in the present litigation, while a suit in ejectment, actually was the same issue heard before the Chancellor in 1957, for in each instance, appellant was contending that the property belonged to him and he was entitled to possession of it. In 50 *Corpus Juris Secundum,* § 763, page 291, it is stated:

"Since the identity of parties is not a mere matter of form, but of substance, the rule of *res judicata* should not be defeated by minor differences of parties. Thus, where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal to the conclusive effect of the prior judgment,

and a substantial identity is sufficient. * * * This rule, that there must be a substantial identity of parties as well as of the subject matter, is based on the fundamental principle that no man can be deprived of his property except by due process of law, a principle which in the United States has been embodied in the Federal Constitution and in the constitutions of the several states. *It has also been held that the true reason for holding an issue res judicata is not necessarily the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy, and that a plaintiff who deliberately selects his forum is bound by an adverse judgment therein in a second suit involving the same issues, even though defendant in the second suit was not a party, nor in privity with a party, in the first suit.*"[1]

More vigorously, appellant contends that the order of the court on December 8, 1949, in the original divorce decree, dissolving the estate by the entirety, and vesting the title absolutely in Vera, was a complete nullity; that since the decree of dissolution was completely void, no subsequent proceedings in the court were of any effect; in other words, that all proceedings founded on a void judgment are a nullity.

It is not necessary for us to pass on the validity of the original order of dissolution (though there is some indication that appellant may have entered his appearance), for we do not agree with appellant's assertion that all subsequent proceedings were void. Even if the 1949 decree was void, the defense of *res judicata* was properly raised by virtue of the 1957 proceeding. These motions to modify the 1949 decree were heard by the court, and its decree rendered. In *Restatement of the Law of Judgments,* § 13, page 73, we find:

"Where an action is brought upon a judgment in a court having jurisdiction over the parties and a judgment is rendered for the plaintiff, the second judgment is not

[1] Emphasis supplied.

open to collateral attack on the ground that the original judgment was void."

Under the comment, it is further stated:

"Where a court renders judgment against a defendant over whom it has no jurisdiction, and the plaintiff thereafter brings an action upon the judgment in the same State or in another State and the defendant appears in the action and sets up the invalidity of the prior judgment as a defense, and the court erroneously holds that the prior judgment was valid and gives judgment for the plaintiff, this judgment is not void and is not open to collateral attack. Where the court in the second action has jurisdiction to render a judgment, the judgment is not subject to collateral attack even if it is erroneous on the law or the facts. The decision of the court makes the matter *res judicata.*"

If appellant felt aggrieved, he had every right and opportunity to appeal from the decree of August 2, 1957; not having done so, he is bound by the findings and order made. Were it otherwise, appellant could, by regularly filing motions seeking to set aside the dissolution feature of the 1949 decree, continue to obtain hearings until the court agreed with his contentions.

Finding no error, the judgment is affirmed.

INTERNATIONAL HARVESTER CO. *v.* BROWNLEE BROTHERS.

5-1982 329 S. W. 2d 177

Opinion delivered November 30, 1959.

Owens, McHaney, Lofton & McHaney, for appellant.

Frierson, Walker & Snellgrove, James M. Gardner and *Marcus Evrard,* for appellee.

J. SEABORN HOLT, Associate Justice. The present action was instituted by Brownlee Brothers, a partnership, and the Monette State Bank, a corporation; against appellants, International Harvester Company, a corporation; M. O. Stevenson and J. W. Birdsong, to recover damages for the unlawful conversion by appellants of two tractors, title to which tractors was claimed by appellees, and on which appellee, Monette State Bank, held a note and contract executed by Brownlee Brothers whereby said bank retained title as mortgagee. From a jury verdict in favor of appellees in the amount of $7,500.00 is this appeal.

For reversal, appellants contend that the trial court erred in refusing appellant's request for an instructed verdict in their favor. We do not agree. The primary

and controlling question, as we read the record, is whether the title to the two tractors in question was in appellees at the time they alleged appellant's wrongful conversion of them. "Appellees agree that title must have passed for conversion to lie."

Briefly, the record reflects that on September 30, 1957, Van Hooser Implement Company, the authorized dealer for International Harvester Company, sold two 450 diesel tractors and other related equipment to Brownlee Brothers and that the Brownlees and Van Hooser signed a conditional sales contract covering the two tractors. This contract provided for delivery on February 1, 1958. There was evidence that Van Hooser changed the delivery date on the contract and thereafter sold it to appellee, Monette State Bank. It appears to be undenied that Van Hooser was International Harvester's agent with the right to sell the tractors. Under the terms of the agreement, Brownlee Brothers paid for the tractors by note to Van Hooser in the amount of $6,183.21 and delivered certain used equipment to Van Hooser in payment of the balance of the purchase price. Van Hooser immediately hypothecated this note with the Monette State Bank. The record reflects that in December 1957, Brownlee Brothers discovered that the Monette State Bank had their contract and the bank learned that the tractors had not, in fact, been delivered. At this point, the Brownlees at once contacted Van Hooser and International Harvester and they learned that Van Hooser was in a bad financial condition and Harvester was trying to assist him, their dealer, to get on his feet financially and continue as their dealer. The evidence shows that the appellees, in talking with Van Hooser and International Harvester agents, received no notice whatever that International claimed title to the tractors, but on the contrary, Harvester's dealings with appellees amounted to ratification of the sale of the tractors to appellees.

Appellant, Stevenson, Harvester's agent, testified that he "—Met Mr. Brownlee January 10th in the morning, discussed his purchase with Van Hooser Implement

Company of two 450 diesel tractors'' and no mention was made as to Harvester's claim of title, but appellees were assured that the two tractors which they had purchased were in Jonesboro and would be delivered to them.

Appellant, Birdsong, the other Harvester agent present at the trial, did not testify as to any claim of title by Harvester or of any notice to appellees of any purported claim of title by Harvester. There was evidence that following the promise of Van Hooser and Harvester to the Brownlees that the tractors were in Jonesboro and delivery would be made at Monette, Harvester had the two Brownlee tractors transferred from a Harvester lot in Jonesboro to the Van Hooser lot in Monette and they were parked outside for the Brownlees to pick up. The evidence reflects that Harvester made no claim to the tractors but on the contrary, stated that they were the Brownlee tractors. Sometime during the night following the return of the tractors to the Van Hooser lot, Harvester ordered the two tractors to be repossessed and placed on a Harvester lot in another city and this was done by International's agents and employees, depriving the Brownlees of their possession and use.

As indicated, the taking possession of the tractors by International Harvester is admitted. It is also undisputed that the Brownlees paid for the tractors, delivered to them by the dealer, Van Hooser and Harvester when they were brought from Jonesboro and placed on the lot in Monette, with the request that the tires be changed which was being done at the time of the conversion by Harvester. ''It seems to be well recognized under the modern decisions at least, that where the sale is of specific identified property the title may pass, if such is the intention of the parties, even though something remains to be done by the seller to put the property in its final condition* * *'', American Jurisprudence 46, Sec. 420, Page 590, Sales. The tractors were in a deliverable state and the tire changes did not alter passage of title to the Brownlees.

Under the provisions of the Uniform Sales Act, Sec. 68-1418 Ark. Stats. 1947, Ann., it is provided: "68-1418. PROPERTY IN SPECIFIC GOODS PASSES WHEN PARTIES SO INTENDED.—(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. (Acts 1941, No. 428, Sec. 18, p. 1231.)"

In the circumstances and on the record presented, the question whether title was in International Harvester, its dealer, Van Hooser, or appellees, was a question of intent and as such, a jury question. The court, by proper instruction about which no complaint is made, submitted this question to the jury and we hold that the verdict of the jury, which was, in effect, a finding that title to the tractors was in appellees and that such was the intention of the parties, was supported by substantial evidence.

Accordingly, we affirm.

SMITH *v.* WEST LAKE QUARRY & MATERIAL CO.

5-1958 329 S. W. 2d 167

Opinion delivered November 30, 1959.

Bryan & Fitzhugh, for appellant.

Shaw, Jones & Shaw, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a Workmen's Compensation case; and the sole question is whether the Commission was correct in finding that appellant, Smith, was an independent contractor and not an employee of the appellee, West Lake Quarry & Material Company, Inc. (hereinafter called "West Lake").

West Lake was furnishing crushed rock to a prime contractor for use on a river bank stabilization project, approved and supervised by the United States Corps of Engineers. Appellant Smith furnished his own truck, gas, oil, and maintenance, and was paid 55¢ per ton for hauling the crushed rock from the quarry to the river bank. Smith alone determined when he started to work and stopped, how many loads he hauled, and the regularity of the hauling.[1] West Lake only paid him for the rock hauled. While Smith was so engaged, his truck failed to operate as he desired, and he undertook to make repairs. The truck rolled back and seriously injured Smith's right arm, and he filed claim against West Lake under the Workmen's Compensation Act. West Lake resisted the claim, contending that Smith was an independent contractor and not an employee. The Commis-

[1] Smith testified:

"Q. But your deal was fifty-five cents a ton?

A. That's right.

Q. Now this matter of showing on your payroll record so much an hour for regular time work and so much an hour for overtime work, that was not in addition to your fifty-five cents a ton?

A. No.

Q. In other words, all you made was fifty-five cents a ton?

A. That's right.

Q. And the way they would pay you is, they would show so many hours work as regular time and overtime and then whatever that lacked of making up fifty-five cents a ton on your tonnage haul, they would pay you the difference, so that you actually made fifty-five cents a ton?

A. Yes, sir . . .

Q. For the fifty-five cents a ton you furnished your own truck and kept it up?

A. Yes."

sion denied compensation, the Circuit Court affirmed, and Smith has appealed, urging here four points, being:

I. The undisputed proof shows that Smith was an employee and not an independent contractor at the time he was injured.

II. West Lake Quarry construed its contract with Smith as being one of an employer-employee relationship and it is bound by this construction.

III. By deducting withholding and social security taxes and paying unemployment compensation on behalf of Smith, West Lake Quarry is estopped to deny this claim of Smith as an employee.

IV. The denial of the award by the Workmen's Compensation Commission is based on hearsay evidence and this Court should remand this case with direction to the Commission to enter an award to the Appellant.

We consider these points together. The determination of the relationship—that is, whether independent contractor or employee—is ordinarily a question to be determined by the Commission from the facts elicited; but in the case at bar appellant claims that there were certain salient facts which required the Commission to reach the conclusion that Smith was an *employee,* rather than an independent contractor. These facts were that West Lake: (a) withheld Federal income tax on Smith's pay and made remittance to the Government; (b) made social security deductions from Smith's pay and paid the Government as though Smith were an employee; and also (c) paid unemployment tax on Smith as an employee. Smith contends that these three factors conclusively establish that West Lake treated him as an employee, that West Lake was estopped to deny such relationship, and that the Commission erred in failing to hold that Smith was an employee.

West Lake's explanation of these three tax matters was: that the rock was being furnished for use in a river bank stabilization project approved and supervised by the United States Corps of Engineers; that the prime contractor and West Lake both understood that the Fed-

eral law, known as the Davis-Bacon Act (U. S. C. A. Title 40 § 276(a) *et seq.*),[2] required that all persons working, in any way in connection with the project, receive minimum pay of $1.05 per hour for all time worked; and that West Lake figured the number of hours that Smith worked at $1.05 per hour and on that basis made the withholding tax reports and paid the social security and unemployment taxes. But West Lake contended that with these bookkeeping matters completed, West Lake then paid Smith any and all additional amounts to equal his contract price of 55¢ per ton for all crushed rock he hauled; and that each load was weighed, and Smith kept the record of his weight loads.

The Workmen's Compensation Commission stated in its opinion:

"The reason for withholding taxes has been satisfactorily explained to this Commission in the testimony adduced on behalf of respondents. That testimony is to the effect, that the mode of payment was dictated by the U. S. Corps of Engineers in accordance with the Davis-Bacon Act. We thus believe that the Referee[3] correctly found claimant herein to be an independent contractor, . . ."

Appellant insists that the withholding, social security, and unemployment tax matters are, in themselves, conclusive evidence that Smith was an employee of West Lake, and that West Lake is estopped to claim otherwise. Appellant cites these cases to sustain his contention: *Carter* v. *Hodges,* 175 Tenn. 96, 132 S. W. 2d 211; *Employers' Liability Assurance Corp.* v. *Warren,* 172 Tenn. 403,

[2] This Act provides in part: ". . . every contract . . . shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers . . . the full amounts accrued at the time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics . . ."

[3] The Referee stated in his opinion: "The status of the various pay checks, withholding and social security payments by the respondent employer—has been explained satisfactorily to this Referee, and it appears that same was figured in this matter for the purpose of satisfying the Corps of Engineers and to keep some semblance of records, but that the sole basis of pay was 55¢ per ton for rock hauled."

112 S. W. 2d 837; *Nash* v. *Meguschar* (*Ind. App.*), 89 N. E. 2d 227; and *Scott* v. *Rhyan,* 78 Ariz., 80, 275 P. 2d 891. A study of these cases convinces us that they do not hold that such tax deductions *conclusively* establish an employer-employee relationship, irrespective of all other evidence. These cases use the fact of tax deductions or insurance payments to corroborate other evidence as to the employer-employee relationship. In short, the tax deductions or the insurance payments are circumstances to be considered along with all the other circumstances in the case in looking at the relationship.

In *Ozan Lbr. Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341, we said that the payment of workmen's compensation insurance on the worker would be "relevant as a circumstance" in determining whether the relationship was employee or independent contractor. In *Farrell-Cooper Lbr. Co.* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 445, we said: "Evidence that an employer pays workmen's compensation or liability insurance on a workman is a *circumstance to be considered in determining whether said workman is an employee* and thus subject to the employer's right and power to control.[4] (Emphasis supplied.) All the authorities that we have been able to find support the statement contained in Larson on Workmen's Compensation Law, § 46.40, that such tax deductions and/or insurance payments are "a factor to be given weight",[5] but are not determinative or conclusive on the issue. To the same effect, see 99 C. J. S. p. 351, "Workmen's Compensation" § 104.

The Commission found that the withholding and the tax payments were satisfactorily explained in the case at bar, and we cannot say that there is an absence of substantial evidence to support such finding. With the with-

[4] In 85 A.L.R. p. 784 there is an annotation entitled: "Insurance as bearing on question whether one is an employee or independent contractor". We do not have a statute in Arkansas similar to the Oklahoma statute considered in *National Bank of Tulsa Bldg.* v. *Goldsmith,* 226 P. 2d 916.

[5] In the supplement to the text the following additional cases are cited: *Peck* v. *Adams,* 219 Ark. 540, 243 S. W. 2d 562; *Bituminous Cas. Corp.* v. *Johnson* (Ky.) 259 S. W. 2d 448; *Wilson* v. *Swing* (Ida.), 230 P. 2d 995; and *Commission of Finance* v. *Industrial Commission* (Utah), 239 P. 2d 185.

holding and the tax payments as only "circumstances to be considered", it is clear that a fact question was made as to whether Smith was an independent contractor or an employee; and the Commission's decision on that fact question has ample evidence to sustain it within the purview of our cases, some of which are: *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620; *Wren* v. *D. F. Jones Const. Co.,* 210 Ark. 40, 194 S. W. 2d 896; *Farrell-Cooper Lbr. Co.* v. *Mason,* 216 Ark. 797, 227 S. W. 2d 445; and *Massey* v. *Poteau Trucking Co.,* 221 Ark. 589, 254 S. W. 2d 959.

Affirmed.

MITCHELL *v.* OWEN.

5-1976 329 S. W. 2d 180

Opinion delivered November 30, 1959.

Terral, Rawlings & Boswell, for appellant.

Bridges & Young, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant to recover $126.44 as the damage sustained when her car was struck by the appellee Owen's truck at a street intersection in Pine Bluff. The truck was being driven by Owen's brother-in-law, Reynolds, who made no defense to the suit. The complaint alleges that the collision was caused by Reynolds' intoxication and that Owen was negligent in entrusting the vehicle to Reynolds with knowledge of his addiction to alcohol. The

trial court, sitting without a jury, found that the proof did not show negligence on the part of Owen. The appellant's sole contention is that the court erred in reaching this conclusion.

It is stipulated that the only relevant testimony is that of Owen. For some months before the accident Reynolds had been living with his sister and brother-in-law on the Owens' farm, about twenty-one miles from Pine Bluff. Owen says that Reynolds drinks to excess but is not exactly an alcoholic; he knows when to drink and when not to. The truck was a farm vehicle, which Reynolds had never used without permission. On the day of the collision Owen and his wife went to New Orleans for the week end, leaving Reynolds at the farm and leaving the keys in the truck. Owen instructed Reynolds not to leave the farm and not to be drinking while the Owens were away. Owen did not believe that Reynolds would take the truck, as "he never bothered anything at any time without permission," but that night Reynolds did take the truck, drove to Pine Bluff apparently to see his children, and was involved in the collision with Mrs. Mitchell's car. Upon this proof a jury of fair-minded men would not be compelled to conclude that Owen was negligent; hence there was a question of fact upon which the trial court's finding is decisive.

Affirmed.

5-1968 329 S. W. 2d 181

Opinion delivered November 30, 1959.

Van Johnson, for appellant.

Robinson & Robinson, for appellee.

PAUL WARD, Associate Justice. The questions on this appeal are whether oral evidence is admissible and whether it is sufficient to establish a resulting trust. Appellant, A. G. Payne, filed a complaint in the Circuit Court against appellees, Homer B. Box and Pearl Box, his wife, to obtain possession of Lots 9, 10, 11, and 12, Block 8, of Norwood Subdivision to the town of Stamps, alleging that he was the holder of the record title to said property. Appellees answered and alleged in substance that the land belonged to them for the reason that appellant held said property in trust for them. They asked that appellant's complaint be dismissed or in the alternative they asked that the cause of action be transferred to a court of equity. Pursuant to the above, the Circuit Court, finding that appellees were relying on equitable grounds for relief, transferred the matter to Chancery Court.

A brief factual statement will help to understand the issues hereafter discussed. Prior to the year 1950 Charlie Siebert was the owner of subject property. In that year he died testate leaving the property to certain

relatives. Appellees were living on said property at the time of the death of Siebert. On or about the 21st day of February 1950 appellees apparently entered into negotiations with Siebert's devisees to purchase the property for the sum of $2,000.00. It seems, however, that appellees did not have the money to pay the purchase price but were going to borrow it from some source, possibly a bank. It was appellees' contention that at this point appellant offered to lend them the $2,000.00 with which to purchase the property. It was appellees' further contention that it was understood that, in order to secure appellant, the property was to be deeded to appellant and he was to hold same in trust for them and convey it to them when they had paid the purchase price. It is further contended by appellees that they had paid the purchase price and were now entitled to have appellant execute a deed to them conveying the subject property.

After a full hearing the Chancery Court sustained appellees' contentions, dismissing appellant's complaint, divesting title to subject property out of appellant and vesting title thereto in appellees upon payment of 6% interest on the $2,000.00 and upon payment of taxes and certain insurance premiums theretofore paid by appellant.

Upon appeal appellant seeks a reversal on two grounds, namely: One, recovery of appellees is barred by the Statute of Frauds; and, Two, the Court erred in holding that the evidence was sufficiently clear and convincing to establish a resulting trust.

One. Conceding for the present that appellees' evidence is sufficiently clear and convincing to establish a resulting trust, appellant must fail on his contention that the action is barred by the Statute of Frauds under the authority of *Crain* v. *Keenan, et al,* 218 Ark. 375, 236 S. W. 2d 731. In the cited case appellant sought to enforce an oral contract by which appellees agreed to buy a farm for $15,000.00, taking title in their own names and conveying said title to appellant upon payment of the purchase price. Appellees bought the farm but insisted that the purchase was for their own benefit and

they only rented the land to Crain who had moved on it. The trial court held that such contract, even if made, would be unenforceable under the Statute of Frauds and appellant's case was dismissed. Upon appeal the cause was reversed upon that point. This court stated: "The Chancellor was in error in thinking the contract to be within the statute of frauds. By its terms the statute does not apply to resulting trusts. Ark. Stats. 1947, Section 38-107. Although the complaint treats the transaction as an equitable mortgage the proof establishes a resulting trust". The court then quoted with approval from Rest., Trusts, Section 448 as follows: " 'Where a transfer of property is made to one person and the purchase price is advanced by him as a loan to another, a resulting trust arises in favor of the latter, but the transferee can hold the property as security for the loan . . . In the situation stated in this Section the result is the same as though the transferee first lent the amount of the purchase price to the borrower and the borrower then paid the amount so borrowed to the vendor and the conveyance was then made by the vendor to the lender' ".

Applying the rule above stated to the brief statement of facts in the case under consideration the situation is the same as if appellees had borrowed the $2,000.00 from appellant and then gave him back the money to go buy the subject property in his name with the understanding that title to the property would be conveyed to appellees when appellant was reimbursed for the borrowed money.

Two. The next question for decision is whether the evidence is sufficiently clear and convincing in this case to establish a resulting trust. The trial judge found that it was, and, after a careful survey of the records and the facts and circumstances deducible therefrom, we are unable to say that the trial court was wrong. It is, therefore, in order to set out in some detail the material portions of the testimony.

Appellant, a resident of Lafayette County, 55 years of age, and engaged in the house moving business, testified that he purchased the subject property from the wife and heirs (or devisees) of Charley Siebert, deceased,

and paid therefor the sum of $2,000.00; that he rented the subject property for $25.00 per month to appellees who were living on the property at the time he bought it; that since that time he has paid all the taxes and insurance on the property. On cross-examination he stated that the grantors talked to his brother about selling the property; that he met them at the lawyer's office, that they wanted to get rid of the property and he agreed to buy it for $2,000.00; that after they made the deal they met in Mr. Boulware's office and closed the deal, and he made the deed out to me; he didn't remember whether he saw appellees prior to making the purchase but he did talk to them after he had bought it; that he didn't know how much appellees had paid him in the way of rent but appellees never told him that they wanted to settle up and have him execute a deed; and, that he never knew that appellees claimed any interest until this suit was brought.

Appellee, Homer Box, testified that he was renting the property from Siebert at the time of his death—that the building was what he called a garage or living quarters; that after Mr. Siebert was buried he and his wife were talking to the heirs who wanted to sell the property but didn't know what it was worth; that at their suggestion Judge LeCroy came over from El Dorado and then he made them an offer of $2,000.00 which the judge thought was a fair price; that the heirs went off and later told me that they had accepted the offer; that appellant was there at the time; that he told the heirs he had to go to the bank to make arrangements for the money, but appellant stated that he would lend him the money; that appellant got in his car with the heirs and Mr. Adams and went to town and when they returned appellant stated that he wanted to get the deed in his name. stating that when the money was paid back to him he would make us (appellees) a deed which was all right with us; that appellant (or his brother) said that they would not try to beat us, that we had been friends, and that if we paid them the $2,000.00 they would not give us any trouble; appellant stated we could pay the money back any way we wanted to and also stated that if I got

short on work they had a lot of trucks and would let me work some of it out in the shop; and that when they had paid the $2,000.00 back he went to see appellant and he said we had been renting the property and that he was not going to make us a deed. On cross-examination Box stated that when appellant agreed to lend him the $2,000.00 to buy the property he mentioned the matter of taxes to appellant and he said that he would go ahead and take care of that item. Box identified 66 out of 79 receipts which he had received for monthly payments and they were marked "for house rent"; that he mentioned it to appellant several times and told him he didn't like it, and that appellant said "Well, just give us $2,000.00 worth of them"; that after the heirs, Mr. Adams and appellant returned from Mr. Boulware's office they asked me if it was all right to put the deed in appellant's name; that from 1950 to 1956 the witness did not have a chance to say anything to appellant about it and that the first time he talked to him about it was when he had paid the $2,000.00 back; that he told appellant he had paid $2,000.00 and wanted a deed and appellant refused to give it to him.

Appellee, Mrs. Homer Box, testified to substantially the same things her husband, Mr. Box, had testified to. She stated that appellant said he would let them have the $2,000.00 to buy the property and would not require any interest; that her husband said he was willing to pay interest but appellant stated that he would let them pay it by the month like rent; that she and her husband made all the payments and never missed any payment until the full $2,000.00 was paid. Richard Wootin who lives in Stamps, Arkansas, and knew Siebert during his lifetime, stated that he was acquainted with the subject property and that he knew appellant; that he had heard the property was for sale and went up to where appellees lived; that when he got there the heirs stated that they had sold the property to Mr. Box; that appellant was there and stated that he was going to finance Mr. Box in buying it; that this all happened there under the shed in the shop; that appellant was present when it was announced that the property was going to be sold to Mr.

Box and he (appellant) voluntarily stated that he was going to help Box buy it. Ira Phillips who lives at Stamps and who knew all of the parties concerned, stated that he was present when the trade was made; that the heirs came in and told Mr. Box they had decided to let him have the property and that appellant was there; that Mr. Box said he would have to go to the bank and make arrangements for the $2,000.00 but appellant stated that it would not be necessary because he would let them have the $2,000.00, and; that appellant went away and later came back and stated that they were furnishing the money and asked about having the deed made out in his (appellant's) name. Marion May who apparently knew all of the parties concerned, stated that he knew appellees had bought the property and that he heard Homer Box say he would have to go to the bank to make arrangements to borrow the money; that when Mr. Box made that statement appellant said "No, I have got the money, let me pay it for you" and Homer Box said "O. K."

Frank Niedermeyer, Jr., an heir of Charlie Siebert, and one of the grantors in the deed to appellant gave a deposition in which he stated in substance: We sold the land on February 21, 1959 and Mr. and Mrs. Box offered us $2,000.00 which we agreed to accept; appellant was furnishing the money and appellees were to pay him back by the month; we intended to sell and did sell that property to appellees but we made the deed to appellant thinking we were helping to carry out an agreement whereby appellant would later deed the property to appellees when it was paid for; and, we never made any trade with appellant. Substantially the same testimony was given in a deposition made by Verna C. Niedermeyer who was also one of the grantors in the deed. These depositions were allowed to be introduced over the objection of appellant. Said objections were that it was an attempt to vary the terms of the written contract and that said testimony was barred by the statute of frauds. For the reasons set out in Paragraph "One" we hold that the testimony was competent.

It is apparent from the above that appellant relied almost entirely upon the statute of frauds for a defense, because, he made no attempt to deny the testimony given by appellees and their witnesses. Except for the statement of appellant that he purchased the property for himself there is no substantial testimony to contradict appellees' version of the transaction. In view of these facts and circumstances we think the findings of the Chancellor in favor of the appellees must be sustained and we cannot say such testimony and facts are not clear and convincing.

It follows, therefore, that the decree of the trial court must be, and it is hereby, affirmed.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* ARK. POWER & LIGHT CO.

5-1939 330 S. W. 2d 77

Opinion delivered November 30, 1959.

[Rehearing denied January 11, 1960]

W. R. Thrasher, Dowell Anders, W. B. Brady, for appellant.

House, Holmes, Butler & Jewell, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Arkansas State Highway Commission, hereinafter called the Commission, ordered the Arkansas Power & Light Company, hereinafter called the Power Company, to remove its poles and wires from certain property which the Commission intends to use as the right of way for the new El Dorado by-pass, a controlled access highway. The Power Company questioned the authority of the Commission to summarily order such removal, and this suit for a declaratory judgment was filed by the Commission. From a judgment in favor of the Power Company the Commission has appealed. The sole issue here is whether the Commission has authority by virtue of the police power of the State to take from the Power Company, without compensation for damages sustained, its property rights, if any, in the use of the right of way of the streets and roads to maintain its poles and wires.

The Power Company concedes that the Commission has the right to cause the utility facilities to be removed, but contends that such action in the existing circumstances must be by eminent domain proceedings and that the Power Company is entitled to compensation for damages sustained. The facilities in question, consisting principally of poles and wires, are located on property that may be divided into three categories: (1) Facilities of the Power Company located on the public streets of El Dorado; (2) facilities located on property which has been dedicated as public streets in additions outside the city limits; and (3) facilities located on county roads.

Conceding, without deciding, that the Commission would have authority to exercise the police power in some circumstances, we do not believe that the situation in the case at bar calls for the exercise of such power. The issues were submitted on a stipulation of facts, wherein it is agreed that the Power Company had the lawful right to locate, operate and maintain its existing poles in the city of El Dorado and urban areas thereof on street rights of way, as authorized by the franchise from the city of El Dorado, and also that the Power Company had acquired an easement on the right of way of the county roads, either by purchase from the adjoining property owners or by prescription insofar as such owners are concerned.

But even though the Power Company has the right to maintain its poles on the rights of way, it does not mean that the company could not be compelled to move its facilities so as not to unnecessarily interfere with use of the streets. The franchise specifically provides: That "the grantee [Power Company] shall, in the construction and operation of said electric light and power plant or plants, locate all poles on the curb lines of streets, alleys, avenues, sidewalks and public grounds of said City, and furnish sufficient power to operate all street lights and all commercial electrical lights and power continually", and, further, that "The grantee [Power Company] is hereby granted the right-of-way in, through.

under and over all streets, avenues, alleys, side-walks, and public grounds of said City for the purpose of erecting, constructing, operating and maintaining its electric light and power plant or plants; the right to trim all trees in said streets, alleys, sidewalks and public places and grounds that may come in contact with its wires, and of erecting and maintaining poles, wires, fixtures and all other attachments and equipments necessary for the carrying of electricity in and through the city, provided the streets, alleys, avenues and sidewalks shall not be unnecessarily and unreasonably impaired or obstructed thereby." Hence, if the city or county should change the right of way of a public street or road, or widen it, or relocate it, the Company could be required to change its poles and wires without compensation so as not to "unnecessarily and unreasonably impair or obstruct" the street. But here it is not a question of requiring the Power Company to relocate its poles so as not to unnecessarily or unreasonably impair or obstruct the traffic. The Commission has demanded that the Company remove its facilities entirely from the right of way.

The franchise gave to the Power Company certain property rights. The ordinance granting the franchise provides that it constitutes a contract between the city and the Power Company, and the Power Company is obligated to furnish to certain public buildings in El Dorado electricity free of charge, and for 25 years after the granting of the franchise the Power Company must supply electricity to the citizens of the city at the price named in the contract.

It was further agreed "between the city and the grantee that this franchise and contract is granted by the city upon the conditions that the grantee shall carry out the requirements herein imposed and shall complete the installation of all street lights within six (6) months from date of notice . . .".

There is no question but that under the franchise the Company owns a property right. In 18 Am. Jur. 790, it is said: "Contract rights and franchises—When

contract rights are taken for the public use, there is a constitutional right to compensation in the same manner as when other property rights are taken. A franchise which constitutes a binding contract is property in the constitutional sense. The fact that the franchise relates to the public use does not entitle the state to abrogate it without compensation, for a franchise is the private property of even a public service corporation."

"A right of way upon a public street, whether granted by act of the Legislature or ordinance of a city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts." *Southern Bell T. & T. Co.* v. *City of Mobile,* 162 F. 523, 528, 174 F. 1020.

The Court said in *Natural Gas & Fuel Co.* v. *Norphlet Gas & Water Co.,* 173 Ark. 174, 294 S. W. 52: "Again in *City of Louisville* v. *Cumberland Tel. & Tel. Co.,* 224 U. S. 649, it was held that the right to use the streets in a city for the purpose of a public utility 'has been called by various names—incorporeal hereditament, an interest in land, an easement, a right-of-way—but, howsoever designated, it is property'. This principle has been recognized and applied by this court in *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.,* 148 Ark. 260."

The police power should not be indiscriminately or unnecessarily used. In *Beaty* v. *Humphrey,* 195 Ark. 1008, 115 S. W. 2d 559, this Court said: "The police power of the State is one founded in public necessity, and this necessity must exist in order to justify its exercise." To the same effect is *City of Little Rock* v. *Smith,* 204 Ark. 692, 163 S. W. 2d 705.

Here it does not appear that it is necessary for the Commission to exercise the police power to take from the Power Company whatever rights it has in maintaining its poles and wires on property the Commission desires to use in constructing the by-pass. The controlled access road is being constructed on authority of

Act 383 of 1953 (Ark. Stat. § 76-2202—76-2207, incl.). Appellant says in its brief that these sections of the statute "specifically authorize the course of action taken by the Highway Commission in this instance." We do not find that the statutes cited authorize the course of action employed by the Commission in attempting to take from the Power Company by the exercise of police power whatever rights it has in the use of the streets to maintain its facilities. In fact, just the contrary appears. Section 76-2205 provides that the highway authorities "may acquire private or public property and property rights for controlled access facilities and service roads, including rights of access, air, view and light, by gift, devise, purchase or condemnation. . . ." Thus it will be seen that the statute gives to the highway authorities the power to acquire private or public property and property rights by gift, devise, purchase or condemnation, but the statute does not authorize the taking of property rights by the exercise of police power, and it appears from the following section, § 76-2206, that court proceedings are contemplated in the taking of property or property rights.

Appellant argues that the Power Company has no rights in the use of the streets and roads to maintain its poles and wires that entitle the Company to compensation in the event it is deprived by the State of such rights. But in the same breath appellant says: "Paragraph 10 of the stipulation of facts covers defendant's facilities located on county road right of way. Since the use of such right of way constitutes an additional servitude on the fee where the road right of way is an easement and not a fee, the utility must compensate the fee holder or is liable for damages, if only nominal. *Cathey* v. *Ark. Power & Light Co.,* 193 Ark. 92, 97 S. W. 2d 624. . . . To protect itself in this situation, for county roads are established by easement, defendant Power & Light Company has secured right of way easements or permits (presumably by purchase) or had its poles placed in the right of way so long that by prescription the fee holders' claim of damage would be

barred. . . . Paragraph 11 of the stipulation of facts concerns facilities located within the right of way of platted streets in rural areas. Again, as in the case of facilities on county road right of way, the location of poles is an additional servitude upon the subservient fee.'' Accordingly it appears that insofar as the streets in the platted additions outside the city and the county roads are concerned, the Power Company obtained nothing from the city, county or state. According to the provisions of Ark. Stat. § 35-301, the city, county or state could not prevent the Power Company from using the streets and roads provided satisfactory arrangements were made with the fee owner, which was done in this case. All its rights in regard to such streets and roads were obtained from the fee owner. It is not shown just what such easements or permits cost the Power Company, but big or little, how can it be said that the Company has no property right in an easement it has bought and paid for or obtained by prescription from the owner of the fee. The *Cathey* case holds that the use of a highway right of way by a utility is an additional servitude for which the fee owner is entitled to compensation. The easement of the Power Company on such rights of way may be abolished by the Commission, but the taking of such easement must be by eminent domain proceedings and just compensation allowed, and not by the exercise of the police power with no compensation.

Now, as to the rights of the Power Company to use the streets within the city limits to maintain its poles and wires. The Company has poles on the right of way of the streets by virtue of a contract with the city. Under the terms of this contract the Power Company obligated itself to spend thousands of dollars in placing the poles and wires in the city. There is no contention that the Company has not fulfilled its obligation to the letter. In fact, the Company would be liable for breach of contract if it had failed to comply with the conditions of the agreement. In these circumstances could the city officials change their minds the day after the Power Company had completed the installation of its equipment and

in the exercise of the police power inform the Company that it must get its equipment out of the city? The answer is "No". The Power Company, under the terms of the contract, had acquired a property right, and if it was to be deprived of such right the proceeding would have to be by eminent domain. We fail to see how the State would have any more authority to exercise the police power than would the city. Appellant has cited several cases that appear to be contrary to the view herein expressed, but in the case at bar it does not appear to be necessary that the Commission use the police power to eject the Power Company from the right of way of the by-pass, and as heretofore pointed out this Court has held that public necessity must exist to justify the use of the police power.

We do not reach any question as to the amount or measure of damages, because the parties have agreed by stipulation on the amount of damages sustained by the Power Company.

Affirmed.

PAUL WARD, Associate Justice, dissenting. When the Commission undertook to build the By-pass along or across certain streets in the City of El Dorado, along certain streets in a dedicated town outside the limits of El Dorado, and along a public road, it became necessary to have certain poles belonging to the company removed from the affected streets and roads. It is conceded that the company would have the right to replace its poles at adjacent locations without having to pay anything for the privilege of doing so. The only question involved here is whether the Company or the Commission should pay the cost of relocating the poles.

It appears to me that the majority opinion completely evades this pivotal question. I make this statement because all of the authorities relied upon by the majority go only to the proposition that a utility Company, having once obtained a franchise and having located its poles within a city, town or public road, has acquired such a

property right that it cannot be taken away without compensation. In other words, the majority seem to be laboring under the misapprehension that the Commission (which here is the same as the State of Arkansas) is attempting to take away entirely the company's right to do business under its franchise. Later I will refer to the authorities relied upon by the majority.

As stated before, the decisive question is whether the company or the Commission shall pay for removing the poles to another location or locations which will be furnished to it without cost. The authorities holding that the company must pay for the relocation of its poles at its own expense are numerous and unanimous to that effect. See: *Rockland Water Co.* v. *City of Rockland,* 83 Me. 267, 22 A., 166; *Belfast Water Co.* v. *City of Belfast,* 92 Me. 52, 42 A., 235; *Brunswick Gas Light Co.* v. *Brunswick Village Corporation,* 92 Me. 493, 43 A., 104; *Readfield Telephone and Telegraph Co.* v. *Cyr,* 95 Maine 287, 49 A. 1047; *First National Bank of Boston* v. *Maine Turnpike Authority,* 153 Me. 131, 136 A. 2d 699; *Lynn and Boston Railroad Company* v. *Boston and Lowell Railroad Corporation,* 114 Mass. 88; *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans,* 197 U. S. 543; *Scranton Gas & Water Co.* v. *Scranton City,* 214 Pa. 586, 64 A. 84; *New Orleans Public Service* v. *City of New Orleans,* 281 U. S. 682, 687; *New York City Tunnel Authority* v. *Consolidated Edison Company of New York, Inc.,* 295 N. Y. 467, 68 N. E. 2d 445; *Chicago, Burlington & Q.R.R. Co.* v. *City of Chicago,* 166 U. S. 226.

The clear and emphatic holdings of the above authorities are to this effect: While the franchise or privilege of a utility, once having made its installations, to do business in a city, town or along a public road is a property right which cannot be taken away without compensation, yet such utility acquires no such property right to erect and maintain its installations or poles at any particular place; such utility must remove its installations at its own expense when the public convenience and welfare demands such removal, and; the State, representing all the people,

under the exercise of its police power can require said installations to be removed to other locations at the expense of the utility. A careful reading of the several authorities cited in the majority opinion reveals nothing to the contrary. I shall briefly comment on these authorities cited by the majority.

The quotation from 18 Am. Jur. at page 790 deals generally with the property rights of a franchise and not with the property rights of any particular location of installations. In point regarding locations see 18 Am. Jur., § 18, page 421, and § 161, page 792; the *Southwestern Bell* case holds that the city has no power to require a utility "to remove said poles as a public nuisance per se." In the *Natural Gas* case it was sought to enjoin the company "from furnishing natural gas to the inhabitants of the town of Norfleet and to require it to remove its pipelines and gas mains from the streets and alleys of the town of Norfleet," and; the *Cathey* case has no bearing on this case except in respect to the "public road". Its holding is merely to the effect that if property owners along the public road were in any way damaged by the installation of the Company's poles along the right-of-way, they would have a suit for damages. It is not contended by anyone that the company secured permission from the property owners in this case to locate its poles along the road and certainly not at any particular spot or location. It appears from the stipulations in this case that if the property owners ever had any right to maintain such a suit against the Company that right has now been barred by the statute of limitations. I find nothing in the *Cathey* case which negates the right of the State, under its police powers, to require the Company to move its poles to another location on the new right-of-way at its own expense when it becomes necessary in the interest of progress and in the interest of the general welfare of the people.

Justice HOLT joins in dissent.

5-1965 329 S. W. 2d 184

Opinion delivered November 30, 1959.

Douglas Bradley, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

JIM JOHNSON, Associate Justice. This case involves a boundary line dispute.

Suit was brought in Chancery Court by appellee, Ralph J. Stevens, seeking to enjoin appellant, F. P. Stallcup, from interfering with fences located between the lands of the parties. A temporary restraining order was issued by the court against F. P. Stallcup enjoining him from molesting the fences in question. Appellant, F. P. Stallcup was joined in his answer and cross-complaint by appellants James F. Stallcup and Maxine Stallcup Gregg, as interveners who own an interest in the Stallcup property. The answer and cross-complaint

allege *inter alia* that the metes and bounds description contained in appellants' deed was a mutual mistake of fact both as to course and distance by the parties at the time. In addition to a prayer for dismissal, appellants also prayed that the metes and bounds description of their deed be reformed to establish the west line of their property to be a straight line between two corners alleged to be known, rather than follow the metes and bounds description contained in their deed; further praying that title to the property be quieted in them.

Appellee thereupon answered the cross-complaint and amended his complaint denying *inter alia* that the west line of the metes and bounds description contained in appellants' deed was in error; denying that there was any mistake and denying that appellants were entitled to have their deed reformed. They alleged, in effect, that fences divided the land of appellee and the land of appellant at all times for more than 30 years and that there had been an adverse holding by appellee, and those under whom he claimed, of the land up to the division fence during this entire period of time. The amendment to the complaint prayed for damages caused by acts committed by appellant against the property of appellee.

Upon final hearing the learned Chancellor found as follows:

"(1) That the intervention and cross-complaint of F. P. Stallcup, James T. Stallcup and Maxine Stallcup Gregg be and the same is hereby dismissed for want of equity;

"(2) That the temporary restraining orders heretofore rendered be and are hereby made permanent;

"(3) That the present fence is the true and proper boundary line between the lands of the plaintiff and the defendant and cross-complainants; that the defendant, F. P. Stallcup, should be and is permanently enjoined and restrained from interfering with or damaging any of the fences between said lands. He is also enjoined and restrained from interfering with or damaging any of the

fences on the lands of plaintiff along Greensboro Road or wheresoever situated;

"(4) That plaintiff have and recover of and from the defendant, F. P. Stallcup, judgment in the sum of $150 as damages sustained by plaintiff as a result of cutting fences, cutting timber and damaging land; and

"(5) The defendant, and cross-complainants pay all costs hereof."

From the above decree comes this appeal.

This being a suit in Chancery, on trial *de novo* we find the facts to be as follows:

About seventy-five years ago, F. P. Stallcup's father received a deed to land described by metes and bounds, and which was referred to as containing thirty-eight acres. The lines are all definite except that the West metes and bounds line running to the South part of the land reaches a point which is less than the thirty-five rods called for in the deed from the Southeast corner of the quarter section. The land is described as follows:

"Beginning at the northeast corner of the northwest quarter of Section 9 in township 14 north, range 4 east, and running west forty (40) rods, thence south nine degrees east eighty (80) rods, thence south nineteen (19) degrees east twenty (20) rods, thence south sixty rods to a stake with white oak 14 inches in diameter east 5 links, thence east thirty-five (35) rods to the southeast corner of the said northwest quarter of Section 9, thence north one hundred and sixty rods (160) rods to the beginning corner, containing thirty-eight acres, *more or less.*" (Emphasis supplied.)

Complaint filed by appellee sets out as an exhibit a decree awarding dower which was rendered in the same court on August 21, 1929. This decree established the line of the land which was set out by commissioners and awarded by the Court to Zilphia Dorton, (widow of Brady Dorton) the predecessor in title to appellee. The proof in this case shows that the line established by that

decree was based on fences that were then in existence and which have been recognized as separating the lands of the parties for all these years.

Testimony relative to the fence is as follows:

Ralph Stevens, appellee, testified that of his own knowledge a fence south of the Greensboro Road had been in the same location as now as far back as he can recollect. There has never been any occupancy or use of any land west of the fence and south of the Greensboro Road in the last twenty years by anyone other than appellee and his brother.

[Before Jonesboro became an important settlement in Craighead County, a community called Greensboro northeast of Jonesboro, at the Greene County line, was the commercial metropolis of the county. A road connecting Jonesboro and Greensboro is one of the historical landmarks of the county. This road crosses the south portion of the land here involved.]

Ralph Stevens further testified that there has been a fence north of the road between the land claimed by Mr. Stallcup and the land that he claimed in the same location as now more than thirty years. Neither Mr. Stallcup nor any of his relatives during the last thirty years have ever had any use of any of the land west of the fence either north or south of the road. Mr. Stallcup destroyed 600 or 700 feet of the fence. That's why there are some comparatively new fence posts north of Greensboro Road. "I put the fence on the survey line. It corresponded with where the fence had been . . . The old fence had been there longer than I can remember, at least forty years."

C. P. Chesier testified that he has lived in the area since 1898. Fences have been in the same location as now all that time. When he first became acquainted with the land, Brady Dorton was using and claiming the land west of the present fence location. He was one of the commissioners to assign dower to Mrs. Brady Dorton (Zilphia Dorton).

Alba Chesier testified there has been a fence in the present location to his recollection twenty-five or thirty years. He is forty-one years old. During 1958 he pastured the part north of the road. He gave it up about September 1; would have used it a month and a half longer at $1.00 a head; stopped using it on account of the fence being torn up and his stock got out. He had seven and eight head there. In building the fence in 1952 or '53 they followed the survey.

James Yates testified: There has been no change in the location of the fence between the Stevens land and the Stallcup land during the twelve years he has been familiar with it. The fence built in 1952 or '53 replaced a fence in the same location. One time Mr. Stallcup cut three or four hundred feet of the fence. It has been cut many times since. "It's been a question to rent it to somebody for pasture because I have to go by and fix the fence all the time." The labor and material in repairing the fence the last two years was probably not over $75.00. Timber has recently been cut in the southeast portion of the Stevens land. It would take about $75.00 to level the ruts out of the land cut by hauling the timber. "On some occasions I saw Mr. Stallcup cut the fence and on some occasions he told me he did."

Appellant, F. P. Stallcup, testified: "The north and south fence south of Greensboro Road was built by me in 1929 and 1930. Ralph Stevens' brother had the land west of the fence terraced. Q. When was the first time that you knew of anyone claiming that particular 100-foot strip adversely to you?" (This is the land immediately west of the fence). "A. Well, it was in 1928 or 1929 when the commissioners was down there. Q. What commissioners? A. The commissioners followed the decree of the Chancery Court in dividing the property belonging to B. L. Dorton. Q. This is part of the same fence that was built in 1953? A. Part of the same fence I was tearing down, yes, sir . . . I paid for the cutting of the trees west of the fence I put up in 1928 or 1929. Q. Were you present in this Court something over a year ago when you were enjoined from interfering with

the north and south fence? A. Yes, sir. Q. You have cut that fence some since then, have you? A. Yes, sir, I have cut the fence. Q. Then you later cut the east and west fence west of the north and south fence? A. Yes, sir."

As we view this case, appellants claim under a deed made in 1884 to Thomas C. Stallcup, father of appellant, F. P. Stallcup. This deed has definite courses and distances. The only difficulty is that the south line is reached at a point less than 35 rods west of the southeast corner of the quarter section as called for by the deed. Appellants desired the Trial Court to disregard the courses for the west line and to run straight from a point 40 rods west of the northeast corner to a point 35 rods west of the southeast corner. Under the law the Court could not do this because: (1) distances yield to courses; (2) the fence between the parties had been recognized as the line for over 30 years; (3) the statement of acreage was not a covenant; and (4) appellants did not make as parties those essential to reformation of a deed executed more than 70 years ago.

In a suit to reform a deed the grantor in the deed, or, if dead, his heirs, and those claiming under him, are necessary parties. *Oliver* v. *Clifton,* 59 Ark. 187, 26 S. W. 817; *Knight* v. *Glasscock,* 51 Ark. 390, 11 S. W. 580; *Ward* v. *McMath,* 153 Ark. 506, 241 S. W. 3.

It is well settled by the decisions of this Court that, in defining the boundaries of a tract of land, where the descriptions given are uncertain and conflicting, distances yield to courses, and courses to monuments. See: *Joseph* v. *Baker,* 95 Ark. 150, 128 S. W. 864; *Scott* v. *Dunkel Box & Lbr. Co.,* 106 Ark. 83, 152 S. W. 1025; *Dierks Lbr. & Coal Co.* v. *Tedford,* 201 Ark. 789, 146 S. W. 2d 918; *Garrett* v. *Musgrave,* 215 Ark. 835, 223 S. W. 2d 779.

To entitle a party to reform a written instrument upon the ground of mistake, it is essential that the mistake be mutual and common to both parties. *Hicks* v. *Rankin,* 214 Ark. 77, 214 S. W. 2d 490; *Tomlinson* v. *Williams,* 210 Ark. 66, 194 S. W. 2d 197; *McClelland* v.

McClelland, 219 Ark. 255, 241 S. W. 2d 264; *Paschal* v. *Swepston,* 120 Ark. 230, 179 S. W. 339.

It must be remembered that the line was determined by commissioners and fixed by the Court August 21, 1929, and appellant, F. P. Stallcup, testified "the north and south fence, south of Greensboro Road, was built by me in 1929 or 1930." He alone knew whether he built the fence before or after the decree awarding dower to Zilphia Dorton. His uncertain statement must be taken most strongly against him, indicating he built the fence after the line was fixed by the decree of 1929. The record reflects that his mother, Iliza Dorton, (daughter of Zilphia Dorton) appellants' predecessor in title, was a party to that proceeding. The record further reflects that he recognized the existence of the decree.

The Chancellor correctly found and established the line between the parties as being where it had been for thirty years and more. See: *McDonald* v. *Roberts,* 177 Ark. 781, 9 S. W. 2d 80; *Buchanan* v. *Roddy,* 171 Ark. 855, 286 S. W. 1020; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710; *Short* v. *Smithy,* 224 Ark. 363, 273 S. W. 2d 393; *Jewel* v. *Shiloh Cemetery Assn.,* 224 Ark. 324, 273 S. W. 2d 19; *Carter* v. *Roberson,* 214 Ark. 750, 217 S. W. 2d 846; particularly see *Seidenstricker* v. *Holtzendorf,* 214 Ark. 644, 217 S. W. 2d 836, a case directly in point and controlling here.

From what we have said above, we therefore find that there was an established line between the lands of appellants and appellee; that appellant, F. P. Stallcup, cut the fence on that line, that he was enjoined from committing such depredations, that he violated the injunction; that in addition to cutting the fence he had timber on appellee's land cut and hauled away and thereby damaged the land. The Chancellor's decree is in all respects hereby affirmed.

5-1924 329 S. W. 2d 416

Opinion delivered December 7, 1959.

[redacted]

James L. Sloan, for appellant.

Lloyd B. McCain, for appellee.

CARLETON HARRIS, Chief Justice. This appeal is a further phase of litigation dealt with by this Court in *Lawrence* v. *Lawrence,* 225 Ark. 500, 283 S. W. 2d 697. Josiah W. Lawrence, who was the owner of the realty here in question, died on November 28, 1946, leaving as his survivors a widow, Annie Lawrence, and two sons, Jay D. Lawrence, appellant herein, and Charles D. Lawrence. Charles D. Lawrence died testate on January 25, 1950, leaving as his sole survivor, his widow, Vivian H. Lawrence, appellee herein. On May 9, 1950, the mother, Annie Lawrence, conveyed the realty involved herein to her son Jay, by warranty deed. On April 15,

1952, Mrs. Lawrence died. In the earlier appeal, this Court held that the will of Josiah W. Lawrence devised the realty in trust to Annie Lawrence for life for the benefit of herself and two sons, and that the remainder in fee was vested in the sons, Jay D. Lawrence and Charles D. Lawrence.[1] The interest of Charles D. Lawrence passed under his will to Vivian. Accordingly, appellant and appellee were the owners of an equal undivided interest in the realty as tenants in common.

Pursuant to the deed from his mother on May 9, 1950, Jay Lawrence took possession of the realty, managed it, collected rentals, made improvements, and paid the taxes and insurance premiums, both before and after the death of his mother. All of the property involved is located in McGehee, Desha County, and is described as follows:

Lot 7, Block 9, Addition "A", McGehee, Desha County, Arkansas, (designated by the Chancellor as House No. 1).

Lot 8, Block 9, Addition "A", McGehee, Desha County, Arkansas, (designated by the Chancellor as House No. 2).

Lot 4, Block 8, Maulding's Addition, McGehee, Desha County, Arkansas, (designated by the Chancellor as House No. 3).

In *Lawrence* v. *Lawrence, supra,* this Court remanded the case for further proceedings, and the Chancery Court, after hearing further evidence, ordered partition and accounting between the parties as follows:

"That the claim of Jay Lawrence for repairs on the property involved during the lifetime of Mrs. Annie Lawrence shall be denied. * * * there is hereby a partition in kind of Lot 7 and 8 in Block 9 of Addition 'A' to the City of McGehee, Desha County, Arkansas, as follows:

(1) Lot 8 in Block 9 of Addition 'A' to the City of McGehee, Desha County, Arkansas, is hereby parti-

[1] This holding reversed the trial court, which held that Annie Lawrence had taken a fee simple title under the will of her late husband.

tioned to the defendant, Jay D. Lawrence, together with all the improvements thereon and the furnishings thereof.

(2) Said Lot 7 of Block 9 of Addition 'A' to the City of McGehee, Desha County, Arkansas, together with the improvements thereon and the furnishings thereof, is hereby partitioned to the plaintiff, Vivian H. Lawrence.

* * * Lot 4 in Block 8 of Maulding's Addition to the City of McGehee, Desha County, Arkansas, together with the improvements thereon and the furnishings therein is not susceptible to partition in kind and that the same should be sold and the proceeds of said sale to be divided equally between the plaintiff, Vivian H. Lawrence and the defendant, Jay D. Lawrence.

* * * that the defendant, Jay D. Lawrence, be and he is hereby ordered to account for the rentals collected from all of these properties from September 1, 1957, including the rental of Lot 8 (House No. 1) occupied by the defendant, which rental on said Lot 8 shall be at the rate of $55.00 per month, and to pay one-half (½) of the net rental into the registry of this Court for the use and benefit of Vivian H. Lawrence. It is further ordered, adjudged and decreed that the plaintiff, Vivian H. Lawrence, is indebted to the defendant, Jay D. Lawrence, in the sum of $1,059.80 for which defendant shall have judgment against the plaintiff to be paid out of the funds accruing to said plaintiff from the sale of Lot 4 in Block 9 (8) of Maulding's Addition to the City of McGehee and her one-half of the said rentals accruing from all said properties from September 1, 1957, to date, heretofore ordered paid into the registry of this Court for the benefit of said Vivian H. Lawrence."

From such decree, appellant brings this appeal.

For reversal of the decree, appellant relies upon the following points:

"I.

The Chancery Court Erred in Disallowing the Appellant's Claim for Improvements Made By Him While Holding the Realty As A Life Tenant.

II.

If the Appellant is Not Entitled to an Allowance for Services Rendered in Managing the Realty, Then The Appellee is Not Entitled to an Allowance for Use and Occupation of the Realty by Appellant.

III.

The Rule Concerning Betterments Applies to Improvements Made By the Appellant While Holding the Realty As A Tenant In Common With The Appellee."

I.

An examination of Exhibit 231 reflects that improvements of $2,042.68 were placed on house No. 1 by appellant between the time he received the deed from his mother and the time of her death. Exhibit 231 reflects no improvements on houses No. 2 and No. 3 during the same period.[2] House No. 1 was awarded to Jay Lawrence by the decree, which resulted in appellant getting the entire benefit of the improvements to that particular property. At any rate, we consider appellant's contention to be without merit. As found by the trial court, Jay D. Lawrence, after obtaining the interest of his mother, held as a life tenant (for the life of Mrs. Annie Lawrence), and not as a tenant in common with appellee. From the court's opinion:

"He is not entitled to recover for the repairs and improvements as against the fee remainder or reversionary interest. *Smith & Shoptaw* v. *Stranton,* 187 Ark. 447. In the accounting repairs are claimed but no rents accounted for. This is hardly consistent. The life tenant gets the rents but stands for the repairs. Tenants in common share the rent as well as the repairs. This claim for repairs during the lifetime of Mrs. Annie Lawrence is denied."

In *Smith & Shoptaw* v. *Stranton, supra,* we said:

[2] This fact was not specifically mentioned in the Chancellor's opinion, but was evidently considered in making the order of partition.

"It is the general rule that a life tenant may not recover from the reversioner for improvements made by the former and consequently no charge for the same can be made upon the inheritance. To this general rule exceptions may, and do, arise, where to apply it would be contrary to good conscience and fair dealing."

Such exceptions are cited in the *Restatement of the Law of Property,* Volume I, Section 127, page 404. The Chancellor apparently found that this case did not come within any exception to the general rule, with which finding we agree. Appellant relies on *Weatherly* v. *Purcell,* 217 Ark. 908, 234 S. W. 2d 32, but there, the facts were decidedly different. From the opinion in that case:

"The evidence in the present case indicates without question that up until 1946 everyone who had anything to do with the land assumed that the 1889 deed conveyed a fee simple title to John E. Purcell. John E. Purcell executed a deed in 1930 purporting to convey a fee simple to Weatherly. That gave Weatherly 'color of title' within the meaning of the Betterments Act. * * * It is not necessary now to review all the evidence introduced; it suffices to say that when Weatherly made the improvements upon the land for which he now seeks reimbursement, he had no idea that he owned only an estate *pur autre vie* while John E. Purcell lived. He peaceably improved the land while in possession under color of title believing himself to be the owner in fee simple."

It would certainly appear that Weatherly, who was undisturbed in his claim to the property for that period of time, and claiming under one whose apparent ownership had been recognized by "everyone who had anything to do with the land", was justified in believing himself to be the owner.

II.

Appellant more or less concedes that under our holding in *Campbell* v. *Selig,* 216 Ark. 330, 225 S. W. 2d 340, he is not entitled to an allowance for services rendered in caring for the property; appellant states:

"However, if the appellant is required to forego valuable services, it is no more than equity, * * * to apply the rule of *Cannon* v. *Stevens,* 88 Ark. 610, to the effect that a tenant in common in possession of the common land is not liable to a co-tenant for rent unless there has been an actual ouster of the co-tenant or a promise to pay rent for use and occupation."

We have held that since each tenant in common has the right to occupy the premises, neither can exclude the other, and a tenant in possession who does not exclude his co-tenant is not liable for rent. *Hamby* v. *Wall,* 48 Ark. 135, 25 S. W. 705. Here we deem the evidence sufficient to establish exclusion from the premises. In fact, the original suit was based on the contention by appellant that he was the sole owner of all the property here involved. He took complete charge of the realty, paying all the taxes, renting and collecting rentals, authorizing and making whatever improvements and repairs he deemed necessary, all without consultation with, authority from, or accounting to, his co-tenant. Under the record before us, it is obvious that appellant's acts were entirely consistent with the acts of one who is exercising exclusive ownership over property, and entirely inconsistent with the acts of one who is only managing for the benefit of somebody else. We find no merit in this contention.

III.

Section 34-1423, Ark. Stats. (1947) Anno., provides as follows:

"If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as aforesaid and the amount of all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment

in such proceedings shall cause possession to be delivered to such successful party."

This is commonly known as the Betterments Act. The trial court found, and appellee argues, that this was an action for an accounting and partition between tenants in common, and the Betterments Statute had no application. The court applied the rule found in 4 Pomeroy's Equity Jurisprudence 712, Section 1240.[3] A discussion of this question is unnecessary, since we are clearly of the opinion that, even if the rule of figuring betterments as such under the statute applies, appellant is not entitled to relief under the plain provisions of that statute. It will be noted that the statute provides "peaceably improved". Even the evidence on behalf of appellant reflects that most of the improvements were made after appellant had notice that appellee was claiming half interest in the property. Improvements made with the knowledge that another is claiming an interest in the property can hardly be characterized as improvements made under a *bona fide* belief of ownership, as required by the statute. While not controlling, it might also be noted here that appellant's explanation relative to the reason for his mother deeding him the property in 1950, is rather vague and indefinite. Some of the questions propounded on cross-examination were obviously based on the theory that the deed had been given solely as an attempt to strengthen appellant's position against the impending claim of appellee, and appellant's answers were hardly sufficient to dispel any suspicion that this might be true. According to his testimony, the mother

[3] "Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent, and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportionate shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors.

[In many jurisdictions it is held that a tenant has no lien as against his cotenant in respect of his share of rents or profits received by the cotenant. On the other hand, as between the parties themselves, it is frequently held that the court in partition proceedings will hold that one tenant is entitled to a lien against the interest of his cotenant for rents and profits received by such cotenant which equitably belong to the tenant.]"

"had done a lot more for C. D. Lawrence than she ever did for Jay D. Lawrence", and appellant stated that she had always wanted him to have the property. There was also an obscure reference to litigation arising out of a loan made by Mrs. Annie Lawrence to Charles and appellee "* * * I also know that before — er about the time that my mother gave me a deed to this property there was some other litigation in — er my brother had died — it was a store building involved that she loaned them $12,000.00 to build and at the time they didn't — at the time of his death the building came back to mother * * *."

The special chancellor wrote a very exhaustive opinion, and evidently gave this case considerable study and close attention. He prepared a compact summary of the three properties, showing the value of the houses, improvements and repairs, taxes, insurance, rents, and a comparative showing of values of the properties before and after repairs and improvements. It is apparent from his opinion that he considered appellant was not acting in good faith in making the improvements and was endeavoring to "improve" the co-tenant out of her interest in the property. He found "from the evidence that the amount spent and the nature of the improvements in connection with remodeling, repairing and improving House No. 1 is out of proportion in value and nature to what the court can equitably permit a tenant in common to expend and charge the other tenants with part payment thereof, if there be any equitable way around it." The court then proceeded to partition the property in a manner which, we have concluded, under the record before us, was equitable and just to each co-tenant.[4]

[4] "This court finds and holds that partition in kind as to House No. 1 and No. 2 and sale of House No. 3, may be equitably and justly done in this manner:

Partition House No. 1 to Jay D. Lawrence, defendant, he to absorb the costs of remodeling, repairing, improving, and refurnishing same, including taxes in the sum of $218.70 and the insurance during the period.

Partition House No. 2 to Vivian Lawrence, plaintiff, she to reimburse Jay D. Lawrence for the entire bill for remodeling, repairing, improving and refurnishing House No. 2 in the sum of $3,971.27, in-

Finding no error, the decree is affirmed.

cluding the insurance in the sum of $336.78 and the taxes during those years. Since the taxes on House No. 1 and No. 2 were paid on one call, a total of $437.40, Vivian Lawrence will reimburse Jay D. Lawrence for one-half that amount in the sum of $218.70, making the total reimbursement on this item of $4,526.75. As to the disparity in value between House No. 1 and House No. 2, it will be noted that the value of the properties, less the repairs and improvements, House No. 2 is valued at $4,628.73, and House No. 1 at $2,841.55, showing inferentially that the difference in value between the properties, if there be a difference, was largely made or occasioned by reason of the expenditures of Jay D. Lawrence.

On House No. 3, Jay D. Lawrence expended for repairs and improvements $2,854.15, taxes $198.90, and insurance $95.91, a total of $3,148.96. Vivian Lawrence owes Jay D. Lawrence one-half of this amount in the sum of $1,574.48. When this sum ($1,574.48) is added to the sum ($4,526.75) owing on House No. 2, there results the sum of $6,101.23 owing by Vivian Lawrence to Jay D. Lawrence.

The rents for which Jay D. Lawrence should account, figuring House No. 1 at the same rental as House No. 3, during the period of accounting, amounts to the sum of $2,964.50, plus $5,345.01, plus $2,964.50, a total of $11,274.01. Jay D. Lawrence is responsible to Vivian Lawrence for one-half of this sum of $5,637.01. Deduct this sum from the $6,101.23, leaves Vivian Lawrence indebted to Jay D. Lawrence in the sum of $464.22, to be answered for in sale of House No. 3.

This leaves House No. 3 to plaintiff and defendants as tenants in common, and it is found that this house should be sold to the highest bidder for partition and the clerk of this court named as commissioner to make sale and accounting thereof."

PRICE *v.* EDMONDS.

5-1980 330 S. W. 2d 82

Opinion delivered December 7, 1959.

[Rehearing denied January 11, 1960]

W. H. Dillahunty, Hale & Fogleman, for appellant.

Fletcher Long, for appellee.

J. Seaborn Holt, Associate Justice. Appellee, Edmonds, is a resident and taxpayer of the City of West Memphis, Arkansas, and pays electric and water rates to a distribution system there which the city owns and operates for distribution of electric power and water to its inhabitants. The ownership of the system is exclusive in the city by ordinance enacted in 1954. Appellants are the duly appointed and acting members of the utility commission and are charged with the operation of the electric power distribution system, the water works and sewer systems of West Memphis. It appears undisputed that some of the members of the commission have made contracts with concerns in which members of the commission have an interest. Appellee, Edmonds, brought the present action in which he sought a restraining order enjoining appellants, as the utility commission and as individual members, from entering into any type of contract, or making payments under any previous contracts, with concerns in which one or more of the commissioners may have an interest, and further sought permission to inspect the records and books of the utility district which he alleged had been denied him.

On a hearing for a temporary injunction, the trial court's "Order For Temporary Relief" contained, among others, the following recitals: "On the 30th day of June, 1959, the above entitled cause came on for a hearing upon the petition and prayer of the plaintiff for temporary relief in the following respects: (1) that the utility commissioners acting for the City of West Memphis, Arkansas, be enjoined and restrained from making and collecting rates for utilities; (2) that the utility commissioners aforesaid be enjoined and re-

strained from spending funds of the utility commission in connection with contracts with themselves or with companies in which a commissioner has a beneficial interest; and (3) that petitioner Cecil Edmonds, as a citizen and rate-payer, be allowed to examine any and all records of the aforesaid utility commission. * * * It is, * * *, by the court CONSIDERED and ORDERED that (1) petitioner's prayer that the utility commissioners of West Memphis be enjoined and restrained from making and collecting utility rates should be and it is hereby denied; that (2) petitioner's prayer that the utility commission of West Memphis and each member thereof be enjoined and restrained from making contracts and spending commission funds with its own members and/or companies in which they have a beneficial interest should be and it is hereby granted; and that (3) petitioner's prayer that the utility commission be compelled to make all its records available to him for examination has been taken out of the jurisdiction of this court by a Mandate of the Supreme Court of Arkansas dated July 2, 1959."

Appellant says, "The only question now before this court is that of the propriety of the granting of the temporary injunction."

On the record presented, we hold that the trial court correctly granted temporary injunctive relief and that there was no abuse of the court's discretion in so doing.

Here the facts are undisputed that appellants, while acting as the utility commissioners for West Memphis, were spending funds of the utility commission in connection with contracts with themselves or with companies in which a commissioner had a beneficial interest. In these circumstances, what we said in *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26, applies with equal force here. "The granting or refusing of injunctive relief rests within the judicial discretion of the trial court, and its action in the matter will be sustained on review by an appellate court, where the power has not been abused. Ordinarily, it is sufficient if a transaction is shown which makes a proper subject for investigation in a court of equity. The rule applies to the grant or denial of a

preliminary injunction, and to rulings on motion to dissolve the injunction. Such orders will not be disturbed on review unless they are contrary to some rule of equity, or the result of improvident exercise of judicial power." 28 Am. Jur., 500, 501.

We reaffirmed this holding in the more recent case of *Scrivner* v. *Portis Mercantile Company,* 220 Ark. 814, 250 S. W. 2d 119, in this language: "As to (c), an appeal may be taken from the issuance of a temporary injunction. Ark. Stats. 1947, Sec. 27-2102. But the granting of the order is a matter that lies within the chancellor's discretion. *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26. By his pleadings Scrivner concedes that the State owns the land and that he is in effect a trespasser. The prosecuting attorney, pursuant to his authority to represent the State in civil actions (Secs. 24-101 and 24-103), asks that the trespass be enjoined *pendente lite.* The proof taken at the preliminary hearing sustains the view that Scrivner's possession is wrongful. There was no abuse of discretion in the issuance of the injunction."

On appellant's contention that Edmonds had no right to maintain the present suit against the commission, we hold that since the evidence shows that he was a citizen, property owner, taxpayer, rate-payer or "consumer", he did have the right to maintain the present suit. The Constitution of Arkansas, Article 16, Section 13, provides: "Any citizen of any * * * City * * * may institute suit in behalf of himself, and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

Many of our cases indicate that this section of the constitution was designed to prohibit the illegal expenditure of government funds before they occur. This right has been extended in suits brought against improvement districts by property owners residing therein. In the recent case of *Keenan* v. *Williams, Chancellor,* 225 Ark. 556, 283 S. W. 2d 688, there was at issue the misuse of district funds by the commissioners of a drainage district and complaint was brought by three landowners within the district. We there said: "It cannot be doubted that

these matters are within the jurisdiction of equity. The state's policy is declared by the constitution, which authorizes any citizen of a county, city, or town to institute suit to prevent the enforcement of illegal exactions. Art. 16, Sec. 13. Even though the constitution does not expressly refer to improvement districts it has been repeatedly held that, in harmony with the constitutional policy, equity has jurisdiction of suits to prevent the misapplication of improvement district funds. *Huddleston* v. *Coffman,* 90 Ark. 219, 118 S. W. 1010; *City of Bentonville* v. *Browne,* 108 Ark. 306, 158 S. W. 161; *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175."

In this connection we must not overlook what also appears to be the undisputed facts: (1) The ownership of the distribution system is in the City exclusively. (2) The funds collected from rates, subject to payment of debts and outstanding liens for bonded obligations, are public funds. (3) The directing body of the utility district, the commissioners, has authority originating exclusively in a grant from duly elected public officials, the city council. (4) Edmonds has a proprietary and pecuniary interest in the distribution system and in the funds of the district, and represents the class which owns the whole interest. subject only to payments already mentioned.

Ordinarily, as appellants contend, the utility commission would have been the proper party to institute this action; however, in the instant case the record shows that they took no action whatever until they were brought into court by appellee who charged them with having committed illegal and unlawful acts which they admitted to be true. In the case of *Seitz* v. *Meriwether,* 114 Ark. 289, in which the right of a taxpayer to sue was questioned, (an improvement district case which involved a municipal corporation and its inhabitants) we there said: "A court of equity may, at the suit of property holders or taxable inhabitants of a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds. This is so because the corporation holds its money for

the corporators, the inhabitants of the town or city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the taxpayer, for which no other remedy is so effectual or appropriate as an injunction."

Yet it appears that they still contend that they have done no wrong officially or individually. In the circumstances, we hold, as above indicated, that appellee acted properly in bringing this suit since appellants, in effect, had declined to take action.

On the question of appellee's right to inspect the books and records of the commission, our governing rule is announced in 189 Ark. 914, 75 S. W. 2d 666, *City National Bank* v. *Wofford,* as follows: "* * * a party to a pending action has no right to call for books, papers and documents as to his adversary merely for the purpose of entering into a 'fishing examination' of them. To authorize their production there must be a substantial showing that the book, paper or document sought for contains material evidence in support of the cause of action or defense of the party asking for it. A mere suspicion that it contains such evidence does not warrant an order for its production. The enactments upon the subject generally make it a condition that the books, *etc.,* required shall contain evidence relating to the merits of the case.

"Section 1393 of Elliott on Evidence provides: 'The fundamental requirement as to the sufficiency of the motion or petition is that it must be shown upon good and sufficient cause that the books, papers or documents sought to be produced or inspected contain evidence material and pertinent to the issues and on behalf of the applicant.

"'* * * It is not sufficient to allege generally the materiality of the books or documents, as this would not only be the averment of a conclusion, but would permit the question of materiality to be decided by the applicant instead of by the court. Hence it is not sufficient to allege that such books or papers contain evidence

relative to the merits of the action, but it must be made to appear wherein such relation consists. In other words, the rule, as stated by the court is: It is well settled that an order for discovery and inspection will never be granted unless the necessity therefor is clearly shown.' "

Accordingly, the decree is affirmed.

HARRIS, C. J., and MCFADDIN, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I am of the opinion that the temporary injunction should not have been issued because all of the proper parties were not before the court. Though the utility is operated by the Board, such operation is actually under the supervision of the City Council. The statute requires that the Board shall report to the Council "with reference to the conditions and affairs of the municipal plants under its control at such time and in such manner as the City Council may designate", and the Council has full authority to repeal or amend any ordinance which it has passed pursuant to Act 562 of 1953. This is not a taxpayer's suit because no tax monies are involved. Edmonds is simply a customer of the utility. I am strongly of the view that the city of West Memphis and the City Council are necessary parties in the case, and since they were not before the court, there was a defect of parties, and the prayer for injunction should not have been granted.

ED. F. MCFADDIN, Associate Justice, dissenting. I recognize the rule to be, as stated in *Riggs* v. *Hill,* 201 Ark. 206, 144 S. W. 2d 26, and reaffirmed in *Scrivner* v. *Portis Mercantile Co.,* 220 Ark. 814, 250 S. W. 2d 119: that in an appeal from an order granting or refusing a temporary injunction, the Chancellor's exercise of discretion is usually sustained. In other words, on appeal from an order granting a temporary injunction, we are usually inclined to leave undisturbed the Chancellor's discretion because the merits of the case have not been fully decided. But, in the case at bar, I cannot agree that the temporary injunction should have been issued, because I am of the opinion that the Court did not have before it all proper

parties; and this question had been raised by a demurrer[1] which the Court had overruled before granting the temporary injunction.

This is the first time that Act No. 562 of 1953 (as now found in § 19-4051 Ark. Stats.) has been before this Court; and I think the Act deserves serious study. The Act allows a City of the first class, which owns a municipal utility, to enact an ordinance appointing a commission of five citizens to operate the public utility. I will refer to these five as the "Commissioners". The title to the public utility does not pass from the City to the Commissioners; and there is nothing in the Act that says that the Commissioners have the power to bring or defend lawsuits. The title to the property still remains in the municipality,[2] and the Commissioners are merely trustees of the municipality in the operation of the utility and at all times subject to the action of the City Council.

I am thoroughly of the opinion that the trustees of a trust have no power to deal with themselves in handling the trust funds. But I think the beneficiary of the trust (that is, the City Council) should first be called on to stop such dealings, rather than for a mere utility user (as was the appellee Edmonds in this case) to maintain a plenary suit. Edmonds does not occupy the position of a taxpayer in this case because there are no tax moneys involved: he is a mere utility user. He could no more sue the Commissioners, as he is here trying, than any utility user

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[1] The demurrer read: "That the petitioner has not the legal capacity to maintain this cause of action in that there are no tax moneys involved in the operation of the utility commission of West Memphis, Arkansas paid either by the petitioner or others that he may represent."

[2] Section 6 of the Act says: "Said board created pursuant to the provisions of this act shall have full power to operate and control the plant or plants entrusted to its direction by the city ordinance creating said board . . . . and subject to such restrictions as may be prescribed by the ordinance creating said board". Section 9 of the Act says: "Said Board shall make due report to the City Council with reference to the conditions and affairs of the municipal plants under its control at such time and in such manner as the City Council may designate"; and Section 12 of the Act says: "Nothing contained in this act shall be construed to prohibit the city council of any city subject to the terms of this act from repealing or amending any act which it may have passed pursuant to the authority herein conferred".

could sue the Board of Directors of the corporation owning and operating a utility system.

Edmonds should have gone to the City Council of West Memphis and asked the Council to investigate this matter of the Commissioners dealing with themselves. If the Council had not acted, then Edmonds could have made proper allegations to that effect and joined the City of West Memphis and the Council members in the litigation. I think that such demand on the Council was essential. The situation of Edmonds in the case at bar is very similar to that of a minority stockholder in a corporation, who may think the Board of Directors to be doing something wrongful: such minority stockholder must first go to the Board of Directors (that is, the City Council in the case at bar) and ask the Board of Directors to act. Then if the Board of Directors fails to act, the corporation and the directors must be joined in the litigation brought by such minority stockholder. See *Red Bud Realty Co.* v. *South,* 153 Ark. 380, 241 S. W. 21.

If one utility user in West Memphis can bring a suit against the Commissioners whenever he pleases, then every other utility user can at any time bring such a suit against the Commissioners of the utility; and the result will be that the Commissioners will be busy defending lawsuits rather than operating the utility and reporting to the City Council. Section 9 of the Act No. 562 of 1953 says that the Commissioners will report to the Council; and that is where Edmonds should have first gone to ask for redress. There is no allegation in the complaint in this case that Edmonds ever took the matter up with the City Council of West Memphis. In the evidence it is said that the Mayor agreed to something when Edmonds talked to him; but the Mayor is not the City Council.

I think the City of West Memphis and the City Council are necessary parties in this case. This is not a taxpayer's suit and cannot be brought under Article 16, Section 13 of the Constitution. Neither is this a suit within the purview of § 20-113 Ark. Stats., because I consider Section 8 of the Act 562 to be impotent: it violates Art. V § 23 of the Constitution. In the final analysis, this is a suit

brought by a utility user against the Commissioners who are trustees for the City; and the City and its Board of Aldermen are essential parties to this litigation. Until those parties were before the Trial Court there was a defect of parties and the temporary injunction should not have been issued. For these reasons I respectfully dissent.

WEAVER *v.* WEAVER.

5-1967 329 S. W. 2d 422

Opinion delivered December 7, 1959.

Paul K. Roberts, for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. This is a divorce case and the question is whether the Trial Court was correct in sustaining the defendant's demurrer to

the plaintiff's evidence on the issue of residence or domicile.

The appellant, Mrs. Weaver, was plaintiff below. She filed suit for divorce on May 23, 1958 alleging, *inter alia,* that she lived in Bradley County, Arkansas; that the parties were married in Bradley County in December, 1948, and lived there together as husband and wife until May, 1958, "when plaintiff was forced to leave defendant because of his indignities toward her". In his answer, Mr. Weaver said: ". . . that this plaintiff has unlawfully removed their two children, both of whom are beyond the age of tender years, from the jurisdiction of this Court, . . ."

In the trial before the Court on December 5, 1958 Mrs. Weaver testified, as regards her residence and domicile:

"I am working in the Methodist Hospital in Memphis, Tennessee, as a nurses' aid. I went up there May 24, 1958. My home is in Bradley County, Warren, Arkansas. I have maintained my home here all my life. The reason I am in Memphis is because I am trying to make a living for my two children. I could not get employment here. I am in Memphis temporarily. I am living with my mother, Mrs. Ella Dearman, 4127 Mamie Drive. . . . I am there temporarily. The only time I have been in Bradley County since I left here was on visits and a vacation."

To corroborate her testimony as to residence or domicile in Bradley County, Mrs. Weaver called two witnesses, being Mrs. Tate and Mrs. Nichols. Mrs. Tate's testimony was: "I have known Mr. and Mrs. Weaver for five or six years. I lived neighbors to them here on Shop Street in Warren from 1952 until about two months ago. From 1952 on my husband and I visited the Weavers in their home". Mrs. Nichols' testimony was: "I have known Mr. and Mrs. Arthur Weaver for years. They lived on Shop Street here in Warren. I know from my own personal knowledge that Mrs. Weaver has been a resident of Bradley County, Arkansas, for the last 9 years. She went to Memphis on May 23 or 24 in 1958."

At the close of the plaintiff's case, Mr. Weaver filed a demurrer (Act No. 470 of 1949, as found in § 27-1729 Ark. Stats.) to the plaintiff's evidence, saying: "There has been no corroboration that the plaintiff is a resident of Arkansas. There has been no proof that the plaintiff is a resident of Arkansas". The Trial Court sustained the demurrer; and we conclude that the Court was in error. Under our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, the evidence in behalf of the plaintiff should have been given its strongest probative force, and the demurrer should have been overruled if, from such evidence, the Court could have found that Mrs. Weaver was still domiciled in Bradley County and only temporarily away. We believe that it was possible for such a finding to have been made. We are not deciding here as to what the Chancery Court would hold on final weighing of the evidence: the issue here is whether there was enough evidence on residence or domicile to require a final weighing; and we hold that there was.

This case presents the repeatedly recurring distinction between *domicile* and *residence.* Prior to 1931 it was the holding of this Court that divorce proceedings could only be maintained in the county of domicile of the plaintiff or cross-complainant. But the Arkansas Legislature, by Act No. 71 of 1931, enacted that mere residence of the plaintiff was sufficient to give Arkansas courts jurisdiction for divorce. In *Squire* v. *Squire* (decided November 21, 1932), 186 Ark. 511, 54 S. W. 2d 281, this Court upheld the Act No. 71 of 1931. It is apparent that this decision did not destroy domicile as a basis for jurisdiction: it merely allowed residence as an additional basis. In other words, Arkansas would grant divorces on either domicile or residence, whichever be proved.

The rule of *Squire* v. *Squire* remained the law of Arkansas until April 28, 1947, when this Court, in *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, overruled *Squire* v. *Squire* and returned to the old rule of domicile as the essential for jurisdiction: in other words, we held residence alone was not sufficient. Then the Arkan-

sas Legislature, by Act No. 36 of 1957, enacted that residence alone would be sufficient. The said Act specifically stated that *Squire* v. *Squire* was to be followed, rather than *Cassen* v. *Cassen.* In *Wheat* v. *Wheat* (decided by this Court on December 22, 1958), 229 Ark. 842, 318 S. W. 2d 793, this Court[1] upheld the Act No. 36 of 1957. So that now mere residence is sufficient for jurisdiction in divorce cases; but certainly domicile is still, and always has been, sufficient. In *Wheat* v. *Wheat* the majority recognized that Arkansas divorces based on mere residence may not be entitled to full faith and credit in other States, whereas, divorces based on domicile are entitled to full faith and credit in other States. Thus, the majority opinion recognized that jurisdiction has all the time existed based on domicile.

In the case at bar, Mrs. Weaver certainly had a domicile somewhere. She testified that her domicile was in Bradley County, Arkansas, and that she was working in Memphis only temporarily and that she returned to Bradley County on visits and on her vacation. The divorce suit was filed May 23, 1958. Mrs. Weaver's neighbors testified that she had lived in Bradley County for more than nine years and that she did not go to Memphis until May, 1958, and had been back on visits. Had she acquired a domicile in Tennessee? Domicile includes the *animus manendi*: a person acquiring a domicile keeps such domicile until another one is acquired. Of domicile, the Supreme Court of the United States has

[1] In *Wheat* v. *Wheat* this Court said: "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. Digest § 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."

said in *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366: "Domicile implies a *nexus* between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."

In *Troillet* v. *Troillet,* 227 Ark. 624, 300 S. W. 2d 273, we cited from *Oakes* v. *Oakes,* 219 Ark. 363, 242 S. W. 2d 128: "To effect a change of domicile from one locality, state, or country, to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home. . . . The change of residence must be voluntary; the residence at the place chosen for the domicile must be actual, and to the fact of residence there must be added the *animus menendi*".

There was no showing that Mrs. Weaver had acquired a domicile in Tennessee; so it could have been found from the evidence that her Arkansas domicile continued. If such be true, then the Bradley Chancery Court had jurisdiction. It follows that the decree sustaining the plaintiff's demurrer is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

SCHNEDLER *v.* HELLER.

5-1984 329 S. W. 2d 432

Opinion delivered December 7, 1959.

[redacted]

Sydney S. Taylor, for appellant.

Richard W. Hobbs, for appellee.

GEORGE ROSE SMITH, J. This appeal from the probate court involves an antenuptial contract between the decedent, Milton Heller, and his second wife, the appellee. Heller seems to have deserted his first wife and his infant daughter in New York in about 1939. Eventually Heller settled in Hot Springs, Arkansas, and married the appellee in 1955. Before the marriage the couple executed, in triplicate, an antenuptial contract by which each renounced all interest in whatever estate the other might leave at death.

Heller died in Hot Springs on October 27, 1957, from a heart attack, as he was preparing to fly to New York to visit his daughter, the appellant, who is now grown and married. The appellee was appointed as administratrix of her husband's estate and insists that she is entitled to dower in his property. This claim is disputed by the appellant, who began this litigation by filing a petition asking that Mrs. Heller be required to produce the antenuptial contract and to abide by its terms. To this petition the appellee pleads two defenses: First, she and her late husband canceled the contract, and, second, the contract was voidable because Heller induced her to execute it by misrepresenting the amount of property he then owned. The probate judge upheld the appel-

lee's position on both issues and accordingly dismissed the appellant's petition.

On the second point, involving the contention that the appellee was overreached by her intended husband, we are of the opinion that the probate court was without jurisdiction. This issue is controlled by our decision in *Carter* v. *Younger*, 112 Ark. 483, 166 S. W. 547, where we held that the probate court is without power to set aside a separation agreement on the ground of unfairness, it being said: "Under these allegations of the pleadings, we are of the opinion that it was within the province of the probate court as incident to its jurisdiction to assign dower to determine whether the separation agreement . . . was afterward abrogated by the parties who made it. . . . This is as far, however, as the probate court had jurisdiction to inquire. It had no jurisdiction to determine as to whether or not the separation agreement was fair and just. These were issues that could only be determined in another forum. The probate court had no jurisdiction to grant equitable relief." Since that decision the jurisdiction of the probate court in this particular has not been enlarged by any new constitutional or statutory provision.

On the first point we have concluded that the weight of the evidence is against the court's finding that Mr. and Mrs. Heller agreed to cancel their antenuptial contract. The only testimony to that effect was given by the appellee herself, an interested party, who says that she and her husband threw their copies of the agreement into the fireplace in January of 1957, as part of a reconciliation following a temporary separation. This testimony is entirely uncorroborated, except for the fact that Heller's copy of the agreement was not found in his safety deposit box after his death.

The appellant testified that she and her father were reunited in New York in April of 1957, upon his initiative, after they had not seen each other for eighteen years. Mrs. Schnedler states that her father showed her the antenuptial contract and explained its terms in detail. Two other kinsmen of the decedent, an attorney

and a business associate, also testify that Heller showed them the contract on this visit to New York. We think it unlikely that Heller would have mentioned the contract to his daughter if it had been abrogated in the preceding January, as the appellee says it was. That Heller exhibited the contract in New York is further confirmed by the fact that Mrs. Schnedler, after her father's death, came to Arkansas, went to her father's attorney, and obtained his signed copy of the contract. If Heller did not discuss the matter with his daughter there is no explanation of how she knew that such a document existed and could be sought out. Thus we think the preponderance of the evidence rather clearly supports the view that the agreement was not canceled in January of 1957.

The judgment is reversed and the cause remanded, without prejudice to the appellee's right to request a transfer to equity for further proceedings upon the issue that lies beyond the probate court's jurisdiction. *Merrell* v. *Smith,* 226 Ark. 1016, 295 S. W. 2d 624.

NELSON *v.* ECKERT.

5-1973 329 S. W. 2d 426

Opinion delivered December 7, 1959.

Rhine & Rhine, L. B. Smead, for appellant.

Frierson, Walker & Snellgrove, for appellee.

PAUL WARD, Associate Justice. This appeal presents two principal questions growing out of an automobile collision which resulted in the death of all parties here concerned. One, what statute of limitation applies and two, does the right of action survive?

Carlos Levone Nelson, a resident of Greene County, Arkansas, and Charles Crumpler, a resident of Columbia County, Arkansas, were acquaintances in the Army, stationed at Fort Hood, Texas, awaiting discharge. Charles, who was discharged first and had returned to his home, borrowed his mother's car, went to Greene County, and picked up the parents of Carlos (Fred and Myrtle Nelson) and then proceeded to Fort Hood to pick up Carlos who was at that time in the process of being discharged. On the way back to Arkansas and while they were still in Texas Charles' car was wrecked and all the occupants above mentioned were killed. The wreck occurred on July 1, 1954.

On June 11, 1956, Hobert Nelson, as the Administrator of the estates of Fred Nelson, Myrtle Nelson, and Carlos Nelson, filed a Complaint in the Greene County Circuit Court where the Nelsons all lived against W. C. Eckert, the Administrator and personal representative of the estate of Charles Crumpler. In this Complaint it was alleged, among other things, in substance that the Nelsons paid a consideration to Charles to safely transport them to Texas and then to transport them and Carlos from Texas to Arkansas; that Charles was guilty of willful and wanton negligence in driving too fast and in trying to pass another car, which negligence resulted in wrecking his car and killing said occupants; and that the estate of each deceased was entitled to recover

$50,000.00 from the defendant. To the above Complaint the defendant (appellee here) filed a motion to dismiss on the grounds of lack of jurisdiction and venue.

On August 13, 1956, the Court sustained the Motion and made an Order dismissing the Complaint, stating in the Order that the plaintiff had confessed the Motion. On January 17, 1957 (within one year after the filing of the Greene County Complaint but more than two years after the accident) appellant filed a Complaint in Columbia County, Arkansas, and secured service on appellee. This Complaint was essentially the same as the one filed in Greene County except that it contained the following paragraph: "That this suit was filed in the Circuit Court of Greene County on June 11, 1956; summons issued on the same and served on the defendant and a non-suit taken on said suit on the 13th day of August 1956".

To the above last mentioned Complaint appellee filed a demurrer on the grounds that the Complaint did not state facts sufficient to constitute a cause of action, and that the Complaint shows upon its face this cause of action is barred by the statutes of limitations. Thereafter appellant filed two amendments to the Complaint, one asking for punitive damages and the other attaching the pleadings and order in the Greene County case as exhibits. After each amendment appellee offered the same demurrer except that the last one contained this additional ground, to-wit: "The Complaint as amended and exhibits show upon their face that this cause of action abated upon the death of Charles Crumpler". On February 23, 1959, the trial court sustained appellee's demurrer and dismissed plaintiff's cause of action without specifying the basis or reasons for its action.

One. Under the view which we have adopted it is unnecessary to consider appellee's contention that the Greene County Order of dismissal was in fact a nonsuit, that the statute of limitations was not thereby tolled, that the Greene County action was ineffective to toll the statute, and that, therefore, no suit had been filed by appellant within the statutory period of limitations.

These contentions of appellee are based upon the assumption that the applicable statute in this situation is the Arkansas two-year statute of limitations. In this assumption we think appellee is in error.

It is agreed by all parties that since the accident happened and the Nelsons were all killed in Texas, any cause of action which appellant has in this instance accrues by virtue of the substantive laws of Texas. It is further shown and agreed that the law of Texas provides a cause of action in favor of the estate of anyone who is wrongfully killed in that State. The Legislature of this State passed Act No. 53 in 1883, Section 1 of which is now Ark. Stats. Section 27-903 and Section 2 of said Act No. 53 is now Ark. Stats. Section 27-904. Section 27-903 for the first time provided for a cause of action in a wrongful death case in favor of the estate of a person who was killed. Section 27-904 provides, among other things, that every such action shall be commenced within two years. Thus, it is seen that the same Act which creates the cause of action in this State also contains the statute of limitations. This is known in judicial parlance as a built-in statute of limitations. Since the present cause of action does not arise under Section 27-903 it must follow that Section 27-904—the two-year limitation portion—likewise cannot apply. With one exception to be noted later it is well settled that in an action of this kind the statute of limitations of the forum (that is the State in which the cause of action is tried) controls. In fact both parties agree that the Texas statute of limitations is not applicable here. It is appellant's contention that the three-years limitation provided for in Ark. Stats. Section 37-206 is applicable in this case. Without deciding whether it is or not, we do hold that, if it does not apply, then the five-years limitation found in Ark. Stats. Section 37-213 will govern. The exception mentioned above is where the statute of a foreign State in which the cause of action arose has a built-in statute of limitations, then such statute of limitations would apply.

In the case under consideration it is admitted that the Texas statute under which this action is brought has no such built-in statute of limitations. Therefore, it must follow from what we have said above that the Arkansas statute of limitations is applicable in this case. This being true we can dismiss from further consideration the first action brought in Greene County as well as the dismissal order based thereon, because the action in Columbia County was filed within less than three years after the Nelsons were killed in the State of Texas at which time the cause of action first arose. It also follows that if the court's action in dismissing appellant's Complaint in its Order of February 23, 1959, was based on the ground that it was barred by the statute of limitations, the court was in error.

Two. Neither can we agree with appellee's contention that the cause of action abated with the death of Charles Crumpler. It is agreed that under the laws of Texas the cause of action does survive, but appellee's contention is based on the fact (conceded to be true) that under the laws of this State (as of the date of the fatal accident) it does not survive. This presents an interesting question in conflict of laws.

The question is a novel one so far as the decisions of this Court are concerned. However we find the weight of authority expressed in other jurisdictions and found in the text writers supports our conclusion that the cause of action does survive in this instance, and we feel that reason and justice support this view. We know of no law or expression of public policy of this State which forbids a survival. Since the laws of Texas which create the cause of action in the first place are conceded to be substantive laws or laws of right as opposed to procedural, then it seems that the laws of the same State which keep the cause of action alive should also be considered as substantive, and if so they would govern in this instance. In Leflar's first work on Conflict of Laws, Section 79 at Page 191 we find this statement: "The general rule is well settled that the state which creates a cause of action can also destroy it, therefore,

if by the law of the place of injury there is no survival, the death of the tortfeasor terminates the cause of action everywhere. By the same token, if by the law governing the tort the cause of action does survive the tortfeasor's death, his death should nowhere be a ground for refusal to entertain suit". In connection with the above statement Dr. Leflar cites and is supported by *Chubbuck* v. *Holloway,* 182 Minn. 225, 234 N. W. 314. In the cited case the Court, among other things, said: "Had plaintiff's facts originated in Minnesota, they would not have been sufficient to constitute a cause of action, for the simple reason that such cause of action dies with the death of the wrongdoer. But, the accident having occurred in Wisconsin, the statute of that state gives the plaintiff the right to sue the representative of the estate of the wrongdoer and recover". In Restatement of the Law on Conflict of Laws, Page 477, Section 390, Survival of Actions, this statement is made: "Whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong".

We are not swayed from the above view by appellee's excellent brief and the authorities therein which we have carefully examined. Appellee appears to believe that Dr. Leflar may have receded from his position expressed above, calling attention to his recent book on Conflict of Laws, Section 114, Page 221. We have examined this section and find no substantiation for this belief. This section, among other things, states: "In terms of substantive, or vested rights, it seems that the state which creates a cause of action can also destroy it, therefore, if by the law of the place of injury there is no survival, the death of the tortfeasor would terminate the cause of action everywhere. That result has been reached in the majority of cases. By the same token, if by the law governing the tort the cause of action does survive the tortfeasor's death, his death should nowhere be a ground for refusal to entertain suit".

Appellee emphasizes two decisions from the State of New York which he thinks hold contrary to appellant's

position. These cases are *Taynton* v. *Vollmer,* 242 App. Div. 854, 275 N. Y. S. 284, and *Herzog* v. *Stern,* 264 N. Y. 379, 191 N. E. 23. The later case is, we think, distinguishable from the one under consideration by virtue of the special New York Statute with which the Court was there dealing. The other case was based on the decision in the Herzog case and should be likewise construed.

It is our conclusion therefore that the trial court's Order, dismissing appellant's Complaint, was erroneous and the same is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

CARLETON HARRIS, C. J., and ED. F. MCFADDIN, J., dissent.

ED F. MCFADDIN, Associate Justice, dissenting. I respectfully dissent from the majority opinion because I think the cause of action is governed by the 2-year Statute of Limitations both of Texas and Arkansas; and also because I think the Arkansas Nonsuit Statute does not save the plaintiff against the plea of limitations.

I. *Limitations.* The traffic mishap occurred in the State of Texas on July 1, 1954, and the present suit was not filed in Ouachita County, Arkansas until January 17, 1957. So there was a time lapse of two years, six months, and sixteen days from the traffic mishap until the filing of the present suit in Ouachita County, Arkansas. This fact appeared on the face of the pleadings, so a demurrer was proper to raise the plea of limitations.

It is true that the Texas Statute does not have a "built in" limitations period; yet the Texas Statute was enacted in light of the Texas general 2-year Statute. The Texas Wrongful Death Statute is Art. 4671 in Vernon's Civil Statutes of Texas, published in 1952, and that Wrongful Death Statute was last amended by the Acts of 1921, page 212. The Texas 2-year Statute of Limitations is found in Art. 5526 of the same edition of Vernon's Statutes, and it was last amended in the Acts of 1852, page 128. The Texas

Survival of Action Statute is Art. 5525 of the same edition of Vernon's Statutes, and it was last amended by the Acts of 1927, page 356. So both the Wrongful Death Statute and the Survival of Cause of Action Statute, were adopted in the light of the Texas 2-year Statute of Limitations; and, while the 2-year Statute is not "built into" either of the other Statutes, each is certainly based on the foundation of the Texas 2-year Statute. I think what Mr. Justice HOLMES said in *Davis* v. *Mills,* 194 U. S. 451, 48 L. Ed. 1067, 24 S. Ct. 692, has application here:

"But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right."

I cannot follow the majority in its reasoning that a cause of action arising under the Texas Statute (in which State there is a 2-year limitation period) can still be enforced in Arkansas after two years even when the Arkansas Statute at the time of the mishap — July 1, 1954 — was a 2-year Statute. If the cause of action had been prosecuted in Texas it would have been governed by the Texas 2-year Statute: if the cause of action had originated in Arkansas it would have been governed by the then existing Arkansas 2-year Statute. But, by taking a Texas cause of action and bringing it to Arkansas, the majority is allowing the plaintiff to get a longer period of limitations than would have been allowed under the law of either State. I cannot follow such reasoning, because I cannot envisage a greater period of limitation to exist than was allowed by the law of either State at the time of the mishap.

II. *Nonsuit.* The majority opinion did not reach the nonsuit question because the suit was filed in Ouachita County, Arkansas two years, six months, and sixteen days after the traffic mishap and, on a holding that the cause of action was governed by the 3-year Statute, the majority

found it unnecessary to discuss the question of nonsuit. But under my view a discussion of the Nonsuit Statute is **vital.**

As heretofore stated, the cause of action occurred in Texas on July 1, 1954. On June 11, 1956 (within the 2-year period) Nelson, Administrator, brought action against Eckert, Administrator of the Crumpler Estate. This suit was brought in the Circuit Court of Greene County, Arkansas. The question of venue was raised because neither the defendant, Eckert, nor his deceased, Crumpler, ever lived in Greene County; and, since the cause of action arose in Texas, our Act No. 314 of 1939 had no application under the holding of *Chambers* v. *Gray,* 203 Ark. 858, 158 S. W. 2d 926. When the question of venue was raised the Greene Circuit Court dismissed the suit for want of venue on August 13, 1956. Within one year thereafter the present suit was filed in Ouachita Circuit Court. The appellants claim that the filing of the suit in Greene Circuit Court interrupted the 2-year Statute of Limitations and that the order of August 13, 1956 dismissing the case in the Greene Circuit Court was the same as a voluntary nonsuit and that under our Nonsuit Statute (§ 37-222 Ark. Stats.) the appellant had one year after the dismissal of the case in the Greene Circuit Court in which to file a new suit, even if the case were governed by the 2-year Statute.

In *Wilkins* v. *Wortham,* 62 Ark. 401, 36 S. W. 21, we held that in order to suspend the Statute of Limitations under the Nonsuit Statute the action must be *properly commenced;* and I am of the opinion that the action was not properly commenced when it was started in Greene County, which was entirely without venue. In *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828, we said:

"The term 'proper county', used in the statute referred to above, has been defined to mean the county of defendant's residence or where the defendant may be served with process. 6 Words & Phrases,* 5689, 5690. Where such action is brought in a county other than that of defendant's residence, if the writ is not served, its issuance and placing

* 34A Words and Phrases, Proper County, p. 17.

in the hands of an officer does not constitute the commencement of an action so as to arrest the statute of limitation. The subsequent issuance of another writ and the service thereof constitutes a new action."

Cases to like effect are *Cherry* v. *Falvey,* 188 Ark. 827, 68 S. W. 2d 98; *Goodyear* v. *Meyer,* 209 Ark. 383, 191 S. W. 2d 826; and *Burks* v. *Sims,* 230 Ark. 170, 321 S. W. 2d 767. In view of these cases cited I am of the opinion that the action in Greene County did not interrupt the running of the 2-year Statute and, therefore, the entire cause of action was barred when it was filed in Ouachita County.

Therefore, I would affirm the judgment of the Circuit Court. The Chief Justice joins in this dissent.

SKELLY OIL CO. *v.* SCOGGINS.

5-1962 **329 S. W. 2d 424**

Opinion delivered December 7, 1959.

C. E. Blodget, Smith & Sanderson, for appellant.

Bert B. Larey, for appellee.

SAM ROBINSON, Associate Justice. This is a suit to cancel an oil and gas lease. In April, 1943, Winnie Smith executed an oil and gas lease on 360 acres. Subsequently in the same year, appellant, Skelly Oil Company, succeeded to the rights of the lessee. In 1945 Skelly drilled two producing wells on one 40 acre tract of the property. In 1945 a dry hole was drilled on another 40 acre tract. In 1953 Skelly drilled two more holes on the same 40 acre tract where the two producing wells had been developed in 1945 and at the instance of royalty owners cancelled the lease on the 40 acres where a dry hole had been put down in 1945. In the meantime Winnie Smith died and her heirs sought to prevail on Skelly to put down other wells on the property. In response to the demands of the heirs that the property be further developed, Skelly drilled the two wells in 1953 on property where producing wells had been developed in 1945, but refused to drill on the 280 acres. The Smith heirs then leased the 280 acres to Monroe Scoggins under an agreement that he would at his own expense take whatever steps were necessary to set aside the lease to Skelly and when this was done he would immediately drill for oil on the 280 acres. Scoggins and the Smith heirs then filed this suit to cancel the Skelly lease on the 280 acres. The chancellor entered a decree cancelling the lease on the 280 acres and Skelly has appealed.

In *Ezzell* v. *Oil Associates, Inc.*, 180 Ark. 802, 22 S. W. 2d 1015, this Court said: "So it may be taken, as the well-settled rule in this State, that there is an implied covenant on the part of the lessee in oil and gas leases to proceed with a reasonable diligence in the search for oil and gas, and also to continue the search with reasonable diligence, to the end that oil and gas may be produced in paying quantities throughout the whole of the leased premises." This rule is sustained by the cases of *Nolan* v. *Thomas*, 228 Ark. 572, 309 S. W. 2d 727; *Drummond* v. *Alphin*, 176 Ark. 1052, 4 S. W. 2d 942; *Standard Oil Co.* v. *Giller*, 183 Ark. 776, 38 S. W. 2d 766.

The question in the case at bar is, did the lessee proceed with reasonable diligence in the search for oil

and gas and also to continue the search with reasonable diligence throughout the whole of the leased premises. The chancellor held that the oil company did not proceed with such diligence and we cannot say the chancellor's finding is against the preponderance of the evidence.

The original lease was executed in 1943 and although producing wells have been developed on one 40 acre tract and a dry hole was drilled on another 40 acre tract, no well has been drilled on the 280 acres on which the chancellor ordered the lease cancelled. Skelly contends that the geological structure underlying the 280 acres does not justify spending the amount of money required to drill a well thereon and therefore no well has been drilled on the 280 acres.

In *Smith* v. *Moody,* 192 Ark. 704, 94 S. W. 2d 357, the lease covered 360 acres of land. Four wells were drilled on one 40 acre tract and the lessee refused to develop any further. The chancellor cancelled the lease except as to the 40 acres on which the wells were drilled. This Court affirmed the decree, saying: "Much testimony was offered as to the necessity of drilling other wells, the contention being that the wells now producing were at the edge of the producing fields, and that new wells could not be drilled and operated except at great loss. [This is the same contention Skelly makes in the case at bar.] This contention may be disposed of by saying that, if true, the lessees have not been damaged by the cancellation of so much of the contract of lease as cannot be profitably performed." In *Sauder* v. *Mid-Continent Petroleum Corp.,* 292 U. S. 272, 78 L. Ed. 1255, 54 S. Ct. 671, 93 A. L. R. 454, the United States Supreme Court said: "The production of oil on a small portion of the leased tract cannot justify the lessee's holding the balance indefinitely and depriving the lessor not only of the expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral contents of the land."

Up to the time of the filing of this suit in January, 1956, 13 years after obtaining the lease, Skelly had evinced no intention of drilling on the 280 acres. Now Skelly says that if given the opportunity it would drill, but this offer comes only after Scoggins has been to the expense of retaining lawyers and filing suit. Appellant also contends that even if it breached the implied covenant to properly develop the property, the lessors made no formal demand that wells be drilled on the 280 acres and that the lessors waived their right to insist on such wells being drilled. The evidence shows that over a long period of time the lessors attempted to get Skelly to drill on the property in question and the lessors did nothing to waive their rights in that respect.

Affirmed.

McKelroy *v.* Antrim.

5-1985 330 S. W. 2d 99

Opinion delivered December 7, 1959.

[Rehearing denied January 11, 1960]

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

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

Jim Johnson, Associate Justice. This case is before us for the second time on appeal. It was originally remanded in order that appellant, J. A. McKelroy, might offer proof to rebut evidence of facts which this Court held constituted a ratification of a sale to appellee, Min-

nie F. Antrim, at a time when appellant was capable of making such ratification. See: *Antrim* v. *McKelroy,* 229 Ark. 870, 319 S. W. 2d 209.

Upon further hearing consistent with the original opinion of this Court, the Chancellor properly treated all the evidence of the first hearing relative to ratification as if it were before him on the second hearing. That evidence, as determined by this Court, is as follows:

"It is J. A. McKelroy's actions and conduct during the year 1956 that impel us to conclude he ratified the 1954 conveyance of his property to his son. It is noted that there were three houses on the lots conveyed by J. A. McKelroy and that McKelroy's son and his wife lived in one of the houses. After J. A. McKelroy was discharged from the State Hospital on October 18, 1955, he went to live with his son. The uncontradicted testimony of Conde (Minnie F. Antrim's agent) was that he told J. A. McKelroy that McKelroy's son Scotty and his wife had given Minnie F. Antrim a mortgage on the property for $1,800 and that J. A. McKelroy's only reply was 'well, those kids shouldn't do that'. After this, on February 16, 1956, Minnie F. Antrim 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 Minnie F. Antrim up to April 1956. It seems that shortly after this time Scotty and his wife moved to Texas leaving J. A. McKelroy in the house. Following this, McKelroy paid the rent for May 1956; In June (same year) he paid $23 and $7 on separate occasions; then McKelroy asked to have the rent reduced and Minnie F. Antrim made a reduction of $5 per month; and after that McKelroy made rent payments on June 12, August 20, September 26, September 28, October 2, October 18, and October 30, all in 1956. J. A. McKelroy admits paying rent. Conde testified that McKelroy never said anything about being the owner or about not having to pay rent. It was not until McKelroy 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 J. A. McKelroy clearly amounted to a ratification of the deed to his son."

At the hearing after the case was remanded the appellant testified substantially as he had testified in the original case. He admitted that he had paid rent on the property, admitted that appellee's agent, Conde, told him that the rent was $30 per month, and also admitted that he had asked Conde for a reduction. The only other witness testifying at the second hearing was the attorney who referred this case to appellant's present attorney. His testimony is substantially to the effect that McKelroy lacked the mental capacity to know what acts he had performed or to understand the consequences of them. That, of course, is not an issue in this case since this question was settled in the original opinion of this Court where it said:

"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. . . ."

The only issue here presented is whether appellant ratified the deed at a time when he had sufficient mental capacity to ratify it.

The Chancellor's opinion held that it had been established that appellant had been paying rent, and that the testimony was insufficient to rebut the presumption that such payments constituted a ratification of the sale to the appellee. After a careful review of the record, we cannot say that the Chancellor's holding was against the weight of the evidence.

Affirmed.

Opinion delivered December 14, 1959.

Robinson, Sullivan & Rosteck, for appellant.

Bruce Bennett, Atty. General by *Ancil M. Reed,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Willie (Bob) Brown, was charged with First Degree Murder, and on trial was convicted of Voluntary Manslaughter and his punishment fixed at five years imprisonment in the State Penitentiary. From the judgment comes this appeal.

Numerous alleged errors are cited in the Motion for New Trial, the first several questioning the sufficiency of the evidence. The proof on the part of the State reflected that appellant and Elmer Isaacs were members of the Elks Club, located at 914½ Gaines Street, and were present there on Saturday night, June 21st. Isaacs was employed at the Elks Club and was in charge of the bar and gambling activities. Brown had reported a shortage from the tables, and testified that Isaacs called him "watch-dog", and "every time I would go past him, he would wheel around like this (indicating) so that I could see that pistol." George King, who was also at the club, stated that between two and three a.m. (Sunday morning), Isaacs told him to stay away from Bob Brown — that he was going to kill Brown and didn't want to shoot King accidentally. The witness testified that he told Brown about this conversation, and asked the latter to leave. Around 7 a.m., King went

downstairs from the building, and saw Brown sitting in his car. He testified that appellant called to him, and he went over, and the two engaged in conversation. When they heard Isaacs coming down the stairs, Brown got out of the car and started around it. The witness stated that Brown called Isaacs and said, "I want to talk to you", then "don't come out of your pocket", and further testified that Brown fired three shots in quick succession. Other testimony indicated that there was a pause after the first shot, but that the last two were fired in quick succession. Both King and Bud Davis (who was walking down the stairs with Isaacs) testified that they did not see a gun in Isaacs' hand when Brown commenced shooting. From Davis' testimony:

"A. Well, he was standing up there at the curb when I saw him and he walked up and called Mr. Ike and told him not go to his pocket and I just thought they was playing and when I saw anything he shot him and he kind of staggered, and after he came to the door and kind of straightened up, Bob shot him a couple more times.

Q. You heard him say, 'Don't go for your gun'?

A. Yes, sir.

Q. Did Ike have his gun out coming downstairs?

A. No, sir.

Q. Did you know he had a gun?

A. No, sir.

Q. Did you see it in his hand coming down the steps?

A. No, sir.

Q. When did you see it?

A. When he straightened up to come back to the door."

All three shots struck Isaacs, and Dr. H. A. Dishongh, county coroner, testified that any one of the three could

have been a fatal wound. A pistol was found under Isaacs' body, but was on safety. The proof thus clearly reflects that Brown was armed in advance, had been told several hours earlier that Isaacs had threatened him (Brown), but instead of leaving or trying to avoid an encounter, was apparently waiting in his car for Isaacs to leave the club. The jury could certainly have found that Brown was in no danger of losing his life, or of receiving great bodily harm; that he was the aggressor, and opened fire without any legal justification.[1] The proof was adequate to justify a conviction for manslaughter, and in fact, might well have justified a conviction for a higher degree of homicide.

By assignment No. 9, appellant argues that the court erred in refusing to allow Buford Husband to testify relative to threats made by the deceased toward appellant. A record was made in Chambers, which reflects only threats made toward Husband, rather than threats toward appellant. The testimony was properly refused.

By assignment No. 10, appellant argues that the Court erred in making a remark in open court, which was printed in the Arkansas Gazette, on Tuesday, February 17, 1957, as follows:

"When all of Sullivan's cross-examination questions to King produced only more details about the threat, Judge Kirby asked Sullivan if King were his witness. Kirby remarked that Sullivan had not challenged any of King's testimony on cross-examination." The assignment of error pointed out that the jury had ample opportunity to read the article containing this statement. As noted by the Attorney General, it is not clear whether this assignment of error deals with the remark made by the court in the presence of the jury, or whether the assignment relates to the newspaper article which could have been read by the jury. As regards the former, the record reflects that near the end of the cross-examination, after several questions by appellant's counsel, the court said:

[1] Brown claimed self defense, but this made a question for the jury.

"The Court: Let him answer the questions. Is this your witness?

Mr. Sullivan: No, I am cross-examining him.

The Court: You haven't been cross-examining him."

No objection was made to the remark, and accordingly, the alleged error cannot be considered by this Court. See *Roach* v. *State,* 222 Ark. 738, 262 S. W. 2d 647. Turning now to the newspaper article, it might first be stated that no such remark (as was attributed to it by the story) appears to have been made by the court; at any rate, it is not shown that the article in question was objected to, or even mentioned, during the trial. Furthermore, there is nothing in the transcript which indicates that any juror read the article. Of course, it is necessary that appellant show not only that members of the jury read the item, but that they were prejudiced thereby. The record also reflects that upon recessing February 16th, the court admonished the jury not to read any newspaper articles about the case. No objection having been made, and no prejudice having been shown, it follows that this assignment is without merit.

It is argued that the court erred in "permitting the State to offer parts of a statement or confession made by the defendant into evidence and in refusing defendant's request for a copy of such purported statement or confession." According to Brown, he was taken from the jail to the prosecuting attorney's office the day after the shooting occurred, and required to make a statement. "There was so many people up there — I thought it was a bunch of TV men and radio men and reporters and those two officers and I don't know who all — Deputy Sheriff Bussey." Appellant's argument indicates that he considered the statement as being in the nature of a confession. The statement was not a confession, was not signed, was not considered by the State as a confession, and was never offered in evidence by the prosecuting attorney. During

cross-examination, the prosecuting attorney, for the purpose of impeaching appellant's testimony, interrogated Brown as to some answers which had been given under questioning in the statement taken the day after the shooting, and which had been transcribed by a stenographer. The purpose was to show the inconsistencies between appellant's testimony before the jury and his statement made in the prosecuting attorney's office. Counsel's objections were overruled by the court. Prior to commencing the trial, appellant's counsel requested a copy of the statement, and during the examination, they again made the request. The request was disallowed by the court. Appellant argues that in permitting the prosecuting attorney to read excerpts from the statement, the State was enabled to present to the jury such portions as favored the prosecution, without letting them hear the portions that favored the defense; that the jury should have been allowed to see, or hear, the entire statement read. In *Black* v. *State,* 215 Ark. 618, 222 S. W. 2d 816 ('49), the appellant objected to the use, by the deputy prosecuting attorney, of notes transcribed by a stenographer relating to what the accused had said at the police station after arrest. This Court said:

"Objection was made and overruled to the use of these notes. Had a confession been shown, it would have been improper to introduce any part thereof without introducing the whole statement; however, the deputy prosecuting attorney in his examination of appellant offered to submit the transcription to appellant's attorney, which offer was declined. The principal use of the transcription was to ask appellant if he had made certain statements disclosed by the transcription, some of which he admitted, while others were denied. The testimony on the part of the state was to the effect that appellant had made at the police station certain statements which he denied having made while testifying as a witness at the trial. We think this cross-examination was entirely proper and permissible."

In *Hamm* v. *State,* 214 Ark. 171, 214 S. W. 2d 917, the same contention was made, and in affirming appellant's conviction for rape, this Court said:

"Appellant was questioned by the Prosecuting Attorney after his arrest, and his answers were taken down by the Prosecuting Attorney's stenographer. These statements were not in the nature of a confession. On the contrary, they were a denial of guilt. But appellant as a witness undertook to account for his whereabouts on the night of the crime, and particularly as to the time when he returned home that night. The stenographer was called to read her notes in contradiction of the testimony given by appellant at the trial. It is permissible always to impeach the testimony of a witness by showing that he had previously made statements in conflict with his testimony."

It appears therefore, that there was no error in permitting the State to show these prior inconsistent statements. In addition, the prosecuting attorney offered to allow the appellant's attorney to examine the statement while he read from it, and the court suggested that counsel "go over there and read it with him." We certainly see no sound reason for refusing to give a defendant a copy of any statement made by him, and are rather of the opinion that the better practice would be to furnish a defendant with a copy of a statement — or confession — made by him. However, we know of no law that requires the State to divulge every detail of its case. Be that as it may, in the case before us, we find no prejudice to appellant's rights because of the court's ruling.

It is argued that the court erred in giving State's Requested Instruction No. 8, which reads as follows:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committing the homicide."

Appellant contends this instruction is misleading, in that the jury could feel that if there was a reasonable doubt of the guilt of Brown on the murder charge, they could still convict him of manslaughter. The instruction is copied from the statute (Ark. Stats. § 41-2246). In *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96, this Court said:

"Again, the court gave section 1765 of Kirby's Digest, to the effect that, the killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves upon the accused, etc. Now, this instruction is taken from the statute, and is the law, but it should have been accompanied with an instruction that on the whole case the guilt of the defendant must be proved beyond a reasonable doubt, so that the jury might understand that, though the burden of proving acts of mitigation may devolve on the accused, it is sufficient for him to show facts which raise in the minds of the jury a reasonable doubt as to his guilt. But, so far as the record here shows, the court did not refer to the question of reasonable doubt in any portion of his charge. The only reference to that question found in the record is in an instruction asked by defendant which was refused, and properly so, because it did not state the law correctly."

In *Hogue* v. *State,* 194 Ark. 1089, 110 S. W. 2d 11, the identical instruction was given. In an opinion written by the late Justice Frank Smith, we said:

"It is argued that this instruction placed upon the defendant the burden of proving his innocence, inasmuch as he admitted the killing. Such, however, is not the effect of the instruction when read in connection with instruction No. 11, given by the court, reading as follows: 'Under the law the defendant is presumed to be innocent. This presumption is evidence in his behalf and protects him from a conviction at your hands until his guilt is established to your satisfaction beyond a reasonable doubt.' "

In the instant case, the jury was instructed that appellant started out in the trial with the presumption of in-

nocence in his favor, and that such presumption "follows him throughout the trial", and until they were convinced of his guilt beyond a reasonable doubt.

It is contended that the court committed error in giving State's Instruction No. 10 as amended. As given, the instruction read as follows:

"Although you may believe that the defendant fired the first shot in necessary self-defense, still, if you believe that the second shot was fired at a time when it was not necessary to further defend himself, then the defendant would be guilty of murder in the first degree, or murder in the second degree, or manslaughter, provided you believe that the second or third shot contributed in any manner to the death of deceased."

Appellant asserts that the proof did not support that part of the instruction dealing with the second and third shots, for all the evidence in the record shows that Isaacs had his pistol in his hand at the time the last two shots were fired. Appellant also points out that though nothing was said in the first part of the instruction about the third shot being fired in self defense, the jury was told that if the third shot contributed to the death of deceased, appellant would be guilty of some degree of homicide. While the instruction is somewhat awkwardly worded, and probably should have referred to "subsequent" shots rather than "second" and "third", we do not agree that this instruction was prejudicial. The proof was conflicting, even the State's witnesses disagreeing as to the manner in which the shots were fired. According to one witness, they were fired in quick succession; according to another, there was a short pause after the first shot. Proof was offered to the effect that Isaacs was perceptibly staggered after the first shot, and it was a question for the jury whether the subsequent shots were necessary. Likewise, the gun was found under the body with the safety unreleased. We here point out that the credibility of a witness is a matter to be determined solely by the jury. The members of a jury are not required to believe the testimony of any witness — it is within their province

to accept all of his testimony — reject all of his testimony — or accept part and reject part — and though the witness Davis testified that deceased had the gun in his hand at the time of the firing of the second and third shots, the jury was not bound to accept such testimony at face value. Of course, since the testimony reflected that any of the shots could have proved fatal the jury might well have resolved the issue on the basis of the first shot. Nor do we find merit in the last part of the objection. Juries are composed of intelligent people, and we cannot conceive that this jury was under the impression that appellant must be found guilty of some degree of homicide if the third shot contributed in any manner to the death of the deceased, even though it was fired in self defense. The omission of the "third shot" in the first part of the instruction was evidently an oversight, which would have been corrected if called to the court's attention. No specific objection was made upon this particular point, the objection relating only to the instruction including any reference to shots fired after the first.

Other alleged errors are set out in the Motion for New Trial, including the giving of certain instructions requested by the State, and the failure to give various instructions requested by the defendant. We have examined each alleged error in the Motion for New Trial, and find appellant's contentions to be without merit.

No reversible error appearing, the judgment is affirmed.

ROBINSON, J., not participating.

ALEXANDER *v.* BOTKINS.

5-1999 329 S. W. 2d 530

Opinion delivered December 14, 1959.

Harrison & Harrison, Omar Green and *Graham Partlow, Jr.,* for appellant.

Henry J. Swift and *Bruce Ivy,* for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a judgment entered in favor of Ina Ray Botkins, Administratrix, and Ina Ray Botkins, Individually, in the Circuit Court of Mississippi County, Osceola District. The jury found appellant, Betty Alexander, guilty of negligence (100%) and awarded appellee, as administratrix, $10,000 for the use and benefit of the estate of Johnny S. Botkins, deceased; awarded $25,000 for the use and benefit of the widow for loss of contributions, support, and maintenance, $15,000 for Ina Ray Botkins, individually, for loss of consortium, and $13,000 for personal injuries sustained. For reversal of the judgment, it is first asserted that the verdict and judgment are contrary to the law and the evidence, second, that the verdict is excessive, and third, that the court erred in permitting the deposition of Dr. H. K. Baldridge to be read in evidence.

We see no need to detail all of the evidence, since we are only concerned with whether there was substantial evidence to support the verdict of the jury. As stated in *Hot Springs Street Railway Company* v. *Hill,* 198 Ark. 319, 128 S. W. 2d 369:

"In determining the sufficiency of the evidence to support a verdict, the Supreme Court views it with every reasonable inference arising therefrom in the light most favorable to the Appellee, and if there be any substantial evidence to support the verdict, it will not be disturbed on appeal."

Accordingly, though appellants[1] presented evidence which, if believed by the jury, would have justified a verdict for them, we are here only concerned with whether the evidence offered by appellee was of a substantial nature, sufficient to support a finding that the collision was the result of negligence on the part of Mrs. Alexander, rather than the result of negligent acts on the part of Johnny Botkins (Botkins died as a result of the collision).

Appellant, Betty Alexander, traveling north on state road No. 77, in attempting to make a left turn on to a county dirt road, was struck by a truck operated by Botkins, who, traveling in the same direction as appellant, was in the act of passing. Mrs. Alexander testified that she gave no arm signal, but did turn on the signal light for a left turn; that the light was apparently working . . . she was traveling about 10 or 15 miles per hour when she started the turn. She further testified that the turn was gradual . . . that no horn was blown by the truck before it started by . . . that she had already observed the truck some distance behind her . . . she gave a signal about 300 feet before the turn . . . but never glanced back after giving the signal. Testimony was offered by other witnesses to the effect that they heard no horn blow. However, appellee offered evidence that the automobile driven by Mrs. Alexander left skidmarks. A deputy sheriff of Mississippi County testified that he stepped off 18 feet of skidmarks left by the Alexander car, beginning in her right lane of traffic, extending across the center line, and into the left lane of traffic, which was being traveled by the Botkins truck. The evidence as to skidmarks was corroborated by Dewey Neely and H. M. Pendergrass, the latter the driver of the ambulance which went to the scene. Mrs. Alexander was unable to state that the signal lights were functioning at the rear, and the testimony showed that these lights were not operating after

[1] The original complaint was filed by Betty Alexander and husband, W. J. Alexander, seeking judgment because of damages to their automobile. By amended complaint, Betty Alexander sought damages for alleged personal injuries. Appellee cross-complained, and also filed separate suit. The suits were consolidated for trial.

the collision, though the brake lights were working. According to evidence, there was no damage to the rear of the automobile. A bread truck driver behind the Botkins truck testified that he saw no blinking lights on the Alexander car at the time the truck pulled out to pass. Evidence also indicated that partial obstructions obscured the dirt road. Botkins was a stranger in the community, and without knowledge of the location of this road. Appellee testified that her husband blew the horn, pulled over to the left lane preparatory to passing, and that Mrs. Alexander, without giving any signal of any kind, suddenly turned to the left in front of the truck. While, as stated, the testimony was conflicting, there was ample evidence upon which the jury could find that Mrs. Alexander was operating her vehicle in a negligent manner, and that the collision resulted therefrom.

The jury awarded for the benefit and use of Mrs. Botkins as widow $25,000 for loss of contributions, support and maintenance. Mr. Botkins was 40 years of age at the time of death, and the parties stipulated that he had a life expectancy of 31 years. Appellee testified that his earnings averaged between $2,000 and $3,000 per year; that he was healthy, strong, and able-bodied. We cannot say that this award was excessive.

$10,000 was awarded for the use and benefit of the estate of Johnny Botkins. Mrs. Botkins testified that after the collision, she heard her husband calling her, ran to him, and he grasped her hand. Botkins was still alive when the ambulance reached the hospital in Osceola. Testimony reflected that the truck was worth approximately $600 before the accident, and brought only $150 as salvage. Funeral expenses amounted to $722.84, and the hospital bill for deceased was $25. Of course, there is no way to determine the amount of pain and suffering experienced by the deceased; it is likewise difficult to determine a proper pecuniary award for pain and suffering. Any reduction of this award would have to be based upon a guess, which would amount to no more than substituting our judg-

ment for that of the jury. Certainly, the amount is not so large as to "shock the conscience of the Court"; nor is there indication that the verdict was a result of "passion or prejudice". In fact, appellee and her husband were strangers to Mississippi County, while appellants were residents of that county, and if prejudice were to enter into the picture, it would certainly be logical to assume that local residents would be favored, in preference to outsiders. We are unable to say that this amount was excessive.

The jury gave appellee $15,000 for loss of consortium. Here we have a recent precedent. In *Mo-Pac Transportation Co.* v. *Miller,* 227 Ark. 351, 299 S. W. 2d 41, we allowed a recovery of $15,000 for loss of consortium. In that case, there was no total loss of companionship, for Mr. Miller did not lose his life as a result of the injuries sustained. This item of recovery is not dependent upon the income of the deceased or the beneficiary's loss of support, for all happily married persons enjoy the comfort, society, and affection of their spouse, irrespective of financial status. This loss is as poignant to one of meager circumstances as to one who is amply provided with the luxuries of life. We do not find this award excessive.

The jury awarded appellee $13,000 for injuries sustained by her. According to the evidence, her expenditures for medical expenses amounted to $1,825. Dr. H. K. Baldridge, a physician of Heber Springs, testified that Mrs. Botkins suffered the following injuries: Multiple lacerations of the face; a fracture of her nose, contusions and abrasions over a great part of her body, and a particularly severe bruise on the right leg which limited her walking considerably; a cerebral and spinal concussion; a fracture compounded of the left nasal bone; deep laceration of the upper and lower lip; laceration of the right calf with contusion, a large contusion underneath; laceration of the right knee, left forearm, and left hand; sprain of the left suprespinatus muscle and tendon; contusion of the left anterior chest and left upper lobe of the lung anteriorly; contusion of the right

knee and right calf muscle with deep hematoma; and multiple minor abrasions, contusions and sprains. The doctor testified:

"I saw her in the hospital, as an in-patient, I saw her twice a day, sometimes more. I try not to see them any less. The 10th of October 1957 through the 14th of October 1957, in the hospital; then in the clinic, I have seen her apparently about 19 times."

This covered the period from October 9th, 1957, to June 16th, 1958. Dr. Baldridge testified that appellee's left shoulder was still damaged, but that it should improve over a period of two or three years from the time of injury. He was unwilling to state whether she would have a complete recovery from this injury. Relative to her right leg, the doctor testified:

"She had a crushing injury to her right calf muscles, the lower part of it. Specifically it is, I believe, the gastrocnemius muscle and other structures. She had a large hematoma in that injury. That is, she had a large amount of blood out into the tissue. This limited her from walking at the time and it improved some, for a time, and then, recently, it is getting worse and I don't know whether, I can't determine at this time, whether it is going to continue to be worse or better."

Further:

"Now, Doctor, you say this injury to her right leg and to the calf of the right leg; is there a marked scar there now?

A. Oh, yes.

Q. What is the appearance of the scar?

A. Well, it is a defect; it is a hollowed out place and it is dark.

Q. Discolored?

A. Yes, discolored.

Q. Has this given you a lot of concern recently?

A. Well, yes, it concerned me enough that I sent her to an orthopedic specialist for examination."

Further:

"I expressed the opinion once before that she had 20% disability of that leg; probably that would be 25% now. That was April 1, and, since that time, this has become worse."

He further testified that Mrs. Botkins was not able to do any work.

Dr. Richard N. Logue, an orthopedic surgeon of Little Rock, testified that, in his opinion, Mrs. Botkins had suffered a permanent disability as far as the injury to the right leg was concerned. In describing an operation performed, Dr. Logue testified:

"I excised the scar completely which measured about an inch and a half in circumference with two or three radiating lines and found the fat and tissue under the skin to be adhered or stuck to the covering of the muscle which was in itself scarred, this scarring throughout the medial side of the muscle. I opened the facis over the muscle to examine this and determined that any attempt to repair it would probably not be, no result in any great improvement, so I excised the scar completely and did a plastic revision so that she will end up with a curved, not too unsightly scar. In other words, the leg will look better than it did before and the painful neuroma which was contained in this scar is now gone."

Further:

"The superficial branch of the saphenous nerve was involved and I merely excised the area of the scar and she will have some numbness which probably will reduce with the passage of time from the incision down towards the inner side of her ankle."

The doctor testified there was damage to the nerve that could not be repaired, in addition to permanent damage to the muscle of the leg. We are of the opinion that the evidence justified the award given.

Appellants contend that the court erred in permitting the use of the deposition of Dr. Baldridge because

the provisions of § 28-352, Ark. Stats. Anno. (47), were not complied with.[2] The Caption, Stipulation and Agreement, of the deposition provides:

"The parties hereto waive all formalities in the taking, transcribing and forwarding said deposition, and the signature of the witness is also waived. The right to object to said deposition for incompetency, irrelevancy and immateriality is reserved and may be urged at the trial of said cause."

We agree with the reasoning of the trial court as follows:

"With respect to the objections to the use of the deposition of Dr. H. K. Baldridge, the court is overruling the objection and permitting it to be used as testimony. The Caption and Stipulation and Agreement, as reflected in the deposition on pages 1 and 2, and referred to in the certificate of the person transcribing the notes as having come from her shorthand notes, contains sufficient waiver to overcome, in the court's opinion, the objections made as to the formalities required in the taking, certifying, filing, recording of the deposition. The statement of counsel reflects that, as of this time, opposing counsel did have a copy of the depositions. That they do have copies of the depositions seems to do away with the necessity of any formal notice by the clerk. The stipulation and agreement was to the effect that the same need not be submitted to the witness nor read to or by him, and reserved the right of the plaintiffs to object to the competency, materiality and relevancy of any testimony adduced. * * * The court further feels no statement is necessary further than that contained in the deposition itself, caption thereto, with reference to waiver of any rights of the

[2] Specific objections were as follows: "(a). The purported officer taking same did not certify, properly file, record or mark the same. (b). That no copy of such deposition was furnished opposing parties; (c). That no notice was given to all parties of such filing, if filed, as required by law; (d). That same was not submitted to witness or read to or by him as required by law; (e). That no opportunity was given witness to make any changes, if any were necessary; (f). Officer did not sign stating on record any waivers of rights;".

parties involved, for these reasons the objection is overruled, the motion is denied."

In addition, no exceptions were filed to the use of the deposition until the second day of the trial, though it was not denied that counsel had copies of the deposition several months before the trial. Subsection (d) of § 28-354 provides as follows:

"Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Section 5 and 6 (§ § 28-352- 28-353) are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." We hold appellants' contention to be without merit.

Finding no reversible error, the judgment is affirmed.

ARK. STATE HIGHWAY COMM. *v.* ADDY.

5-1986 329 S. W. 2d 535

Opinion delivered December 14, 1959.

W. R. Thrasher, Dowell Anders, O. Wendell Hall, Jr., W. B. Brady, Thomas B. Keys, for appellant.

C. M. Carden, for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Arkansas State Highway Commission, by proper procedure condemned and took possession of 4.622 acres of appellee's land for highway purposes. A jury trial resulted in a verdict in appellee's favor in the amount of $22,500.00 as damages for the taking of their land. From this judgment, which appellant insists is excessive, comes this appeal.

For reversal, appellant relies on but one point: "There is no substantial competent evidence to support the allowance of $22,500.00 as damages for the taking of the land."

Appellees owned before condemnation 9½ acres outright and leased 2 additional contiguous acres on the corner, upon which they had operated for some two years a commercial amusement attraction known as a speed bowl for racing stock cars, a form of automobile racing.

There was testimony from a number of witnesses on behalf of appellees. Lee Trickett, who had been in the real estate business in Benton for some five years, testified that the value of the land before taking was $1,250.00 per acre and $1,000.00 per acre after taking; or $26,389.98 including improvements, before taking and only $5,695.70 for the land after the taking and appellee's damages amounted to $20,694.28.

Appellant's witness, Mack Wilson, an employee of the State Highway Department with wide experience as a land appraiser, valued the land at $1,000.00 per acre before and $750.00 per acre after the taking, or that the value of appellee's property (the 9½ acres plus the 2 leased acres) before taking was $16,500.00, after taking $9,600.00 and that appellee's damages amounted to $6,900.00.

Wesley Adams, a witness for appellees, testified that his business was that of "realtor and appraiser" — that he had been "in the real estate business since 1939 and in the appraisal business since 1947"; that he is a member of the American Society of Appraisers and had recently appraised property in Saline County for

appellant. He testified that the value of appellee's property before the taking was $29,000.00, after taking only $3,000.00, and that appellees had been damaged in the amount of $26,000.00.

Fay Wallace testified that appellees has been damaged by the taking of their property $6,750.00 and A. W. Emmerling testified that their damages amounted to $6,-550.00. It thus appears that there is a wide difference in the views of the witnesses as to the amount of damages that appellees have suffered. The highest damages were placed at $26,000.00 by appellee's witness Adams and the lowest at $6,550.00 by Mr. Emmerling. In these circumstances it becomes the duty of this court to determine whether there is any substantial evidence to support the jury's verdict and in determining this question our rule is well settled that we must view the evidence in the light most favorable in support of the jury's verdict and when we have done so here we cannot say that there was no substantial evidence to support the verdict rendered by the triers of the facts, the jury. The test is clearly stated by this court in *Hot Springs Street Railway Company* v. *Hill,* 198 Ark. 319, 128 S. W. 2d 369, in this language: "In determining the sufficiency of the evidence to support a verdict, we must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and if there is any substantial evidence to support the verdict, it cannot be disturbed by this court. If the evidence on the part of the appellee, although contradicted by evidence of the appellant, is of a substantial character, evidence that the jury could reasonably have believed, the case will not be reversed because of the insufficiency of the evidence, although this court may think that the verdict is against the preponderance of the evidence."

While it appears to us that the amount of damages allowed in this case is liberal in the extreme, however, as indicated, we think there was some substantial evidence to support it and accordingly, we must and do affirm.

5-1922 329 S. W. 2d 544

Opinion delivered December 14, 1959.

[redacted]

Charles A. Walls, Jr., for appellant.

House, Holmes, Butler & Jewell, for appellee.

ED. F. MCFADDIN, Associate Justice. The issue on this appeal is whether the claim of appellant was presented in the manner required by the Probate Law (§ 62-2604 Ark. Stats.).

L. C. Merritt died testate, a resident of Pulaski County, Arkansas; and the appellee, Mrs. Linnie Rollins, was duly appointed executrix of his estate. Within the time provided by law (on October 10, 1957), the appellant, Mrs. Tommie Merritt, went to the office of the executrix and presented her with a document reading:

"In the Probate Court of Pulaski County, Arkansas

In the Matter of the Estate of Lawrence C. Merritt, deceased No. 32564

"During the time that the decedent and Russell and Tommy Merritt were in business together in California the earning of the Claimant and her deceased hus-

band was $80,000.00, which amount was retained by the decedent for safe keeping, and $19,000.00 which amount is now due to the claimant as her share of the operation of the business in Mississippi.

"That the decedent had in his possession $80,000.-00 of claimants moneys and the balance of $19,000.00 is due for settlement of accounts from the operation of businesses in Mississippi making a total due of $99,-000.00.

"Affidavit to claim against estate.

I, Tommie Merritt, do solemnly swear that the attached claim against the estate of Lawrence C. Merritt, deceased, is correct, that nothing has been paid or delivered toward the satisfaction thereof except what is credited thereon, that there are no offsets to the same, to the knowledge of this affiant, except as therein stated, and that the sum of Ninety Nine Thousand and no/100 Dollars ($99,000.00) is now justly due (or will or may become due as stated therein). I further state that if this claim is based upon a written instrument, the copy thereof, including all endorsements, which is attached hereto, is true and complete.

.....

STATE OF ARKANSAS
COUNTY OF PULASKI

Subscribed and sworn to before me, this day of , 19 .

(SEAL)

.....

Official Title."

It will be observed that the paper presented to the executrix was unsigned and that the affidavit was likewise unaccomplished. When she presented the paper to Mrs. Rollins, Mrs. Merritt said: "I brought you a present . . . It is some money Mr. Merritt owed Russell". Mrs. Rollins said: "This is ridiculous". Mrs.

Merritt said: "What shall I do with this?"; and Mrs. Rollins replied: "Take it and file it at the Clerk's office". Mrs. Merritt left the unsigned document, as copied above, with Mrs. Rollins; and went immediately to the Pulaski Probate Clerk's office and filed with him another document identical to the one above copied except that the filed paper was signed by Mrs. Merritt and the affidavit was duly completed by the Clerk. Both the document left with Mrs. Rollins and the one filed with the Clerk are before us, and one is a carbon copy of the other, except that the one left with the Clerk was signed by Mrs. Merritt and the affidavit completed by the Clerk and bears the notation: "Filed October 10, 1957. R. S. Peters, County and Probate Clerk, Pulaski County, Arkansas". The claim shows that it was filed in the Estate of L. C. Merritt.

On November 3, 1958 the executrix, Mrs. Rollins, filed her disapproval and disallowance of the Merritt claim; on January 22, 1959 there was a hearing in the Probate Court on the disallowance of the claim; and the Probate Court, on appellee's motion, entered judgment dismissing the claim.[1] This appeal resulted; and the only question before us is the correctness of the Court's order holding that the claim was not properly presented. We are not now concerned with the merits of the claim.

We reach the conclusion that the requirements of the law, for the presentation of the claim, were substantially complied with in this case. Our present statute on the presentation and filing of claims is § 113 of Act No. 140 of 1949, and may be found in § 62-

[1] The judgment reads: "On this day was presented to the court the motion of the Executrix of the Estate of Lawrence C. Merritt to dismiss the claim of Tommie Merritt; and the Court, after hearing oral evidence and other things and matters before the court, and argument of counsel, does find: No claim in proper form was ever presented to, nor was any proper notice of the filing of said claim ever served upon Mrs. Linnie Rollins, Executrix of the Estate of Lawrence C. Merritt, deceased. The proper time within which a proper notice may be issued and served has elapsed. Therefore, the claim should be dismissed with projudice. It is Therefore, Considered, Ordered, Adjudged and Decreed that the claim of Tommie Merritt be, and it hereby is, dismissed with prejudice."

2604 Ark. Stats.[2] A claimant may file his properly verified claim with the personal representative; or, in the alternative, the claimant may file the properly verified claim with the Court, and then the duty is on the claimant to see that the personal representative is properly notified of the claim.[3] In the case at bar the claimant notified the personal representative of the claim by furnishing an unsigned copy; and then, at the direction of the personal representative, the claimant filed with the Court—the same day—a full and correct claim, duly signed and with the affidavit completed.

It would be putting form above substance to hold that a personal delivery of a copy of the claim to the personal representative was not a sufficient compliance with the requirement for sending of a notice by registered mail. It would likewise be putting form above substance to hold that the notice to the personal representative had to be given *after* the claim had been filed with the Court, when both events took place on the same day. That the Arkansas decisions have not stood for technicalities in this matter of the form and presentation of claims, is shown by the following cases: In *Eddy* v. *Loyd,* 90 Ark. 340, 119 S. W. 264, the required affidavit to the claim did not use the exact statutory words, but rather used words of a similar import. This

[2] This section reads: "a. A person having a claim against an estate may present it to the personal representative, properly verified, for approval. The personal representative shall endorse upon the claim the date of the presentation thereof to him, his approval or disapproval thereof, and, if approved, classification thereof, and shall sign the endorsement. A claim approved by the personal representative must be filed with the court by or on behalf of the claimant within thirty days after the expiration of six months from the date of the first publication of the notice to creditors or it shall be barred, as provided in Section 110 (§ 62-2601). A claim, disapproved or not acted upon by the personal representative, must be filed with the court by or on behalf of the claimant within the period fixed by Section 110 (§ 62-2601) or within thirty days after the date of its presentation to the personal representative, whichever shall be the later date, or it shall be barred, as provided in Section 110 (§ 62-2601).

"b. As an alternative to the procedure set forth in subsection a, a person having a claim against an estate may file it with the court, whereupon the clerk shall, by registered mail, notify the personal representative of the filing of the claim."

[3] Section 62-2021 (c) (as amended by § 2 of Act No. 255 of 1951) places on the person giving the notice the burden of preparing, etc. the registered notice.

Court held that the statute had been substantially complied with, and Chief Justice McCulloch used these words: "The affidavit substantially conforms to the requirement of the statute." Likewise, in *Wilkerson* v. *Eads,* 97 Ark. 296, 133 S. W. 1039, the affidavit did not use the correct statutory words; but this Court held that the words used substantially complied with the statute. Chief Justice McCulloch *again used the words,* "There is substantial compliance with the statute". In *Davenport* v. *Davenport,* 110 Ark. 222, 161 S. W. 189, the claimant merely attached a verbatim copy of the note to the affidavit instead of the original note, as the law then required; but this Court held that the verbatim copy, along with the affidavit, was substantial compliance with the law. Judge Frank G. Smith, writing the opinion of this Court, used these words:

"Here the proper affidavit was made and was attached to a *verbatim* copy of the note sued on, and the jurisdictional requirement was complied with. If it be said that a literal reading of the statute provides that the affidavit be physically attached to the note itself, which we do not decide, there has been substantial compliance with it. This question was raised and decided in a case of *Wilkerson* v. *Eads,* 97 Ark. 296, wherein a suit upon a note instituted in the chancery court the only affidavit consisted in the verification of the complaint, but its language was such that the court held it to be a substantial compliance with section 114 of Kirby's Digest, although it was there expressly stated that the statute applied to actions according to the forms of the common law against estates of deceased persons, as well as to presentations in the probate court of claims against such estates. The law having been, at least, substantially complied with, the court below should not have dismissed the proceeding, and for its action in so doing the judgment is reversed and the court directed to hear the demand upon its merits."

The rule generally is that substantial compliance is sufficient in this matter of the presentation of claims. The point is discussed in 34 C. J. S. p. 192, "Executors

and Administrators" § 415; and also in 24 C. J. p. 347, "Executors and Administrators" § 982. In each volume the holdings are summarized in these words: ". . . a substantial compliance with the provisions of such statutes may be sufficient . . ."; and in the two volumes a score of cases from other jurisdictions are cited to sustain the text. The purpose of the presentation of a claim to the administrator or the court is well stated in 21 Am. Jur. p. 577, "Executors and Administrators" § 342:

"Presentation is, in general, required for the purpose of protecting the estate of deceased persons, by informing the executor or administrator of the claims against it and thus enabling him to examine each claim and to dermine whether it is a proper one which should be allowed. It has also been said that the primary object of the provisions requiring presentation is to apprise the administrator and the court of the existence of the claim so that a proper and timely arrangement may be made for its payment in full, or by *pro rata* portion in the due course of administration."

In the case at bar, the claim had the correct form of affidavit, just as prescribed by Official Form No. 18 of the Probate Code Forms, and the affidavit was duly completed[4] and the claim duly filed with the Court. The claim as filed with the Probate Court was complete in every respect. No registered letter was sent by the claimant to the personal representative because the personal representative had already received an unsigned copy of the claim and told the claimant to present the claim to the Probate Court. It all happened the same day; and we hold that there was substantial compliance with the law regarding presentation of the claim. Therefore, the judgment of the Probate Court is reversed and the cause is remanded for the claim to be heard on its merits; and for further proceedings not inconsistent with this opinion.

HOLT, J., dissents.

[4] This fact completely satisfies the holdings cited in *Williams* v. *Dawson*, 185 Ark. 1190, 46 S. W. 2d 634.

J. SEABORN HOLT, Associate Justice, dissenting. I would affirm the judgment of the probate court in this case. Mrs. Rollins, as executrix of the estate here, all will agree, was acting not as an individual but as an officer of the court and her duty in administering the estate placed in her hands has been clearly set out by statute. These duties are mandatory and must be literally followed by her official capacity. "Executors and administrators are officers of the court and occupy a fiduciary relation toward all parties having an interest in the estate. They are not agents of the estate, or of the decedent, and have no principal whom they can bind; they are merely instrumentalities established for performing the acts necessary for the transfer of the effects left by the deceased to those who succeed to their ownership. An executor or administrator as an individual and as an official is, in the eyes of the law, two separate and distinct persons." Vol. 33 C.J.S. Sec. 3-b (Executors and Administrators) page 879-80.

The record discloses the following facts: Exhibit One, as set forth in the majority opinion, an admittedly unsigned and unverified claim against the estate of Lawrence Merritt, is the only claim that appears in the record before us. Quoting from the testimony of Mrs. Rollins: "Q. Mrs. Rollins, were you served with an executed copy of this claim which is signed, this one having been signed by Tommie Merritt? Were you served with a signed copy of that? A. No I was not. Q. Will you tell the court the only notice — THE COURT: She is the administratrix of the estate? MR. TRIMBLE: That is correct. THE COURT: You were not served with any copy? A. The only copy I was served with, Mrs. Merritt brought it up to the office one day and she laid it on the desk, folded like this, and she said 'Mrs. Rollins, I brought you a present'. I opened it up and that is what it was. There was no date, no name or anything on it. Just like that. THE COURT: Was it the same as that? A. Same as that and it was not signed and no date. That is the way it was presented. Q. (Mr. Trimble continuing) Mrs. Rollins, have you ever been served with any notice of any type or nature other than the conversation you just referred to by any party as to the existence of any claim or the fact it had been filed in this

estate? A. I have not. Q. I will ask you, is this the instrument or paper Mrs. Tommie Merritt gave to you? A. Yes. THE COURT: Exhibit One. (Said Claim, being admitted by the court, is marked Exhibit 1 and appended hereto) . . . Q. Mrs. Rollins, the day Mrs. Merritt presented that claim to you did you all discuss it at all? A. No, only she just handed it to me and I looked at it. I said, 'What is this, Tommie?' I call her Tommie, and she said, 'It is some money Mr. Merritt owed Russell.' MR. TRIMBLE: I object to any self serving declaration made by the claimant, any evidence in direct regard to the claim itself. Q. (Mr. Walls continuing) Of course that was not the answer I was seeking. I wanted to know whether or not she stated to you it was a claim she had filed against the L. C. Merritt estate? A. No that is all she said, 'I brought you a present.' Q. She did not state she had filed the original? A. No. . . . Q. Mrs. Merritt, I hand you Exhibit No. 1. Did you or did you not deliver that to Mrs. Rollins? A. I did. Q. At the time of delivery did you state to Mrs. Rollins what it was? A. Yes. Q. Tell the court just what you did state at that time? A. Well Mrs. Rollins and I have always been very friendly and always made a joke out of it and when I told her the amount she said 'That is ridiculous' and laughed. I said 'What shall I do with this?' and she said 'Take it and file it at the Clerk's office.' And so I left her a copy (obviously Exhibit One herein) and we did look at the amount. Q. You went from there to the clerk's office? A. Yes. I also said to Mrs. Rollins, I said 'You know he has our money.' MR. TRIMBLE: I object to any conversation in regard to the merits of the claim. THE COURT: Sustained. A. I also asked the Clerk of the Court over there if that was all I had to fill out and he said yes that was all that was necessary. He did not tell me to sign it or anything. Q. Mrs. Merritt, I hand you this. Is that exactly like the one that you presented to Mrs. Rollins? MR. TRIMBLE: I think they will speak for themselves. THE COURT: One is signed and one is not. Q. (Mr. Walls) Is this the one you filed with the Clerk? A. Yes. THE COURT: One is signed by her and the other one is not. A. As well as I recall I asked Mrs. Rollins if that was all that was necessary to do."

In the present case appellant, Mrs. Merritt, claims that she has substantially complied with our statutes by filing her claim with the clerk. In the present case the executrix, Mrs. Rollins, never received and never saw appellant's claim until trial before the probate court. She did not receive it through the mail or otherwise. The only claim that she did receive was "Exhibit One", according to the record here. It seems to me that the clear and mandatory duty rested upon Mrs. Merritt to see that the required notice of her claim was given to the executrix and any doubt that she has performed this duty must be resolved in favor of the executrix. The proper procedure for perfecting a claim against an estate is set forth in Sections 62-2604 and 62-2012, Ark. Stats. That part of Section 62-2604 applicable here is as follows: "b. As an alternative to the procedure set forth in sub-section a, a person having a claim against an estate may file it with the court, whereupon the clerk shall, by registered mail, *notify the personal representative of the filing of the claim.*" The applicable portion of Section 62-2012 is: "C. . . . Except when by statute or by order of the court otherwise expressly provided, a notice in a probate proceeding shall be in writing, or print, prepared by or by the procurement of the party upon whom rests the burden of giving the notice and signed by the clerk. *If service is to be by mail,* (as was the case here) *the person preparing the notice shall deliver the same to the clerk properly prepared for the post and the clerk shall be required only to post the same . . .*"

These sections must be read together and when this is done, we think the meaning of these provisions is clear and we hold that they are mandatory. They require that a claimant (as appellant here), after filing her claim with the probate clerk, and thus requiring that serving of notice of the filing of the claim be given to the executrix (Mrs. Rollins here) by mail; then it was claimant's mandatory duty, and the burden was on her, after preparing such notice in writing, then properly to prepare such notice for the post, then deliver it to the clerk, and the only duty required of the clerk was to sign and post said notice. This appellant did not do.

The history of Section 62-2012 (c) seems to dispel any possible doubt in the matter. This was originally Section 12 (c) of the Probate Code and read as follows: "Service by publication and by mail shall be made by the clerk at the instance of the party who requires such service to be made. Personal service may be made in any part of this state and, except as provided in subsection b (2) hereof, may be made by any person not an incompetent." Act 140 of 1949, Section 12 (c). It is quite plain that under the original statute the direction that service by mail be made "by the clerk at the instance of the party" left some doubt as to where the responsibility for preparing the notice rested. In 1951 the legislature clarified its intention by amending Section 12 (c) to read as it does now, with the duty clearly placed on the party to prepare the notice and deliver it to the clerk ready for mailing, so that he need merely sign and post it. Act 255 of 1951.

As pointed out, appellee, the executrix, did not receive Mrs. Merritt's claim by mail or otherwise and the only claim that was ever presented to her, according to this record, was "Exhibit One", an unsigned and unverified claim. Therefore, I think the trial court correctly denied this claim.

TOMLIN *v.* REYNOLDS MINING CORP.

5-1989 329 S. W. 2d 552

Opinion delivered December 14, 1959.

Wright, Harrison, Lindsey & Upton, for appellant.

George W. Johnson, Warner, Warner & Ragon, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal from the order of the Chancery Court refusing a new trial. The claimed ground for the new trial was: "Accident or surprise which ordinary prudence could not have guarded against" (being the third cause stated in § 27-1901 Ark. Stats.). Appellants say that the *accident* was the inability to obtain the transcribed testimony of the witnesses.

A decree adverse to the appellants was rendered by the Sebastian Chancery Court, Greenwood District, on December 17, 1958. Notice of appeal[1] was filed in the Chancery Court on January 7, 1959, and the entire record was designated. By a series of orders the appellants were given until July 17, 1959 to file the transcript of all the testimony; but on March 18, 1959 it became established that such transcript could not be furnished. The regular Chancery Court Reporter, Mr. Batchelor, was in the hospital when the witnesses testified on December 17th, and Mr. Smith acted as substitute Reporter. Unknown to all, and for some unexplained reason, the machine used for taking the testimony of the witnesses was not working properly; and thus it became impossible to transcribe to the pages the record from the machine. This fact was definitely determined on March 18, 1959 when Mr. Batchelor advised the attorney for the appellants:

"The girl who does my typing was able to get the first 22 pages, . . . I feel that there are some additional parts of the transcript that we could transcribe, but that there is at least 75% that we will be unable to transcribe. Do you want us to transcribe the parts we can and then try to stipulate[2] on the parts that cannot

[1] The case involved the question of whether there was a constructive trust or an express trust. The appeal from the decree of December 17, 1958, has never been filed in this Court. The appeal here involved is from the order of July 14, 1959 refusing a new trial.

[2] So far as the record discloses there was no attempt made to stipulate.

be transcribed; and if this is done, it will be very sketchy and probably won't be of much aid in either determining what exhibits were introduced or what the testimony was . . ."

On April 17, 1959 appellants filed in the Chancery Court their unverified motion for new trial, alleging the facts substantially as hereinbefore stated, and also saying:

"The issues in the case involve a direct controversy between interested witnesses. The exact testimony given by each witness is extremely important in the proper determination of the issues and at this late date it is impossible to accurately stipulate the testimony given. The failure to have a proper transcript on the appeal to the Supreme Court of Arkansas constitutes an accident which the defendants exercising ordinary prudence could not have guarded against."

This motion for new trial was heard[3] by the Chancery Court on July 14, 1959 and on that date was denied; and from that order there is this appeal. The Chancery Court made the following findings in denying the motion for new trial:

"That said defendants have failed to comply with the provisions of Arkansas Statutes 1947 § 27-2127.11 . . .

"That said defendants received notice of the state of the record herein on March 18, 1959, one month and 2 days prior to the expiration of the term in which said cause was heard and a decision handed down; but said defendants failed to have said motion for new trial heard until July 14, 1959, three days prior to the expiration of the 7 months maximum time that can be granted for filing the record with the Supreme Court of Arkansas . . .

[3] The terms of the Sebastian Chancery Court, Greenwood District, are fixed by law (§ 22-406 Ark. Stats.) to be the third Monday in April and October. Thus the trial in December 1958 was in the October 1958 term, and this motion for new trial was not heard by the Court until a day in the succeeding April 1959 term.

"That to grant a new trial in this matter at this time, with said defendants having failed to comply with Arkansas Statutes 1947, Sec. 27-2127.11 and said defendants having no new evidence to present in this matter, presenting only a fact question, would result in unreasonable delay in this matter, and additional expense and inconvenience to the plaintiff and other defendants in this action, which, under the circumstances, would make it inequitable."

The question before us is whether the Chancery Court abused its discretion in denying the motion for new trial. A lengthy dissertation could be written on this matter of new trial because of the loss of the transcribed testimony. We have at least three cases in Arkansas involving such a situation, and being: *Dent* v. *Peoples Bank,* 114 Ark. 261, 169 S. W. 821; *Criner* v. *Criner,* 217 Ark. 722, 233 S. W. 2d 393; and *Mowrey* v. *Coleman,* 224 Ark. 979, 277 S. W. 2d 481. There are many cases from other jurisdictions: we list only a few. *Flickett* v. *Rauch,* 31 Cal. 2d 110, 187 P. 2d 402; *Weisbecker* v. *Weisbecker,* 71 Cal. App. 2d 141, 161 P. 2d 990; *Rambo* v. *Rambo,* 84 Cal. App. 2d 632, 191 P. 2d 480; *Duarte* v. *Rivers,* 90 Cal. App. 2d 152, 202 P. 2d 612; *Hoffart* v. *Lindquist & Paget Mtg. Co.,* 182 Or. 611, 189 P. 2d 592; *King* v. *King,* 119 Ind. App. 46, 82 N. E. 2d 527; *Brooks* v. *National Shawmut Bank,* 323 Mass. 677, 84 N. E. 2d 318; *People* v. *Kaplan,* 278 App. Div. 665, 102 N. Y. S. 2d 714; *Dudley* v. *Hull,* 105 Conn. 710, 136 A. 575; *Coan* v. *Plaza Equity Elevator Co.,* 60 N. D. 51, 232 N. W. 298; and *Reynolds* v. *Romano,* 96 Vt. 222, 118 A. 810. To these may be added the other cases cited in the annotations on "Inability to perfect record for appeal as ground for new trial", as contained in 13 A. L. R. 102; 16 A. L. R. 1158; and 107 A. L. R. 603.

We do not discuss the requirements of § 27-1901 *et seq.* Ark. Stats. on the necessity of presenting during the term an unverified motion for new trial and the necessity that a motion for new trial be verified when considered after the lapse of the term; because in *Mowrey* v. *Coleman,* 224 Ark. 979, 277 S. W. 2d 481, we

pointed out the correct way in which appellants could undertake to supply a record which otherwise could not be furnished. In that case, as here, the reporter's mechanical device for recording the evidence was out of order so that the testimony could not be transcribed, and we said: ". . . but the statute provides a method for supplying the deficiency in a situation like this (Ark. Stats. 1947 § 27-2127.11). These appellants have not availed themselves of the corrective procedure". The Statute referred to[4] above is Section 19 of Act No. 555 of 1953, which reads:

Appeals When no Stenographic Report Was Made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal."

The appellants did not prepare a statement of the evidence of the proceedings, and serve it on the appellee, and proceed as provided in the above section; therefore the appellants are not in a position to say that the Chancery Court abused its discretion in denying the motion for new trial in the case at bar.

Affirmed.

HOLT and WARD, JJ., dissents.

PAUL WARD, Associate Justice, dissenting. I do not agree with the result reached by the majority, nor do I agree with the reason assigned.

[4] This Section 19 of our Act 555 of 1953 is a *verbatim* copy of Rule 75(n) of the Federal Rules; and an interesting case in which the section was unsuccessfully invoked is that of *Hawkins* v. *Mo. Pac.* (8th Cir.), 188 F. 2d 348.

The facts in this case are essentially as follows. In certain litigation in the Chancery Court of Sebastian County in which the issue was the ownership of certain oil and gas royalties, considerable oral testimony was taken on two different occasions. On December 17, 1958, the Chancery Court found contrary to the contentions of Mr. and Mrs. Tomlin, the appellants herein. The decree was entered on December 22, 1958, and on January 5, 1959, appellants gave notice of appeal. Following this the attorneys for appellants made a request for a transcription of the testimony in order to prepare for an appeal from the decree entered on December 22, 1958, and sent as an advance payment therefor the sum of $75.00 on February 13, 1959. The testimony at the two hearings was taken on a "dictaphone" or recording machine. On March 15, 1959, the reporter informed appellants to the effect that they were having difficulty in transcribing the testimony. Two days later the Chancellor extended the time for securing the record to May 7, 1959, but one day later appellants' attorneys were notified that it was impossible to transcribe the testimony. On April 14, 1959, appellants filed a motion for a new trial on the ground that it was impossible to obtain the record. Thereafter, on April 22, 1959, the Chancellor extended the time for perfecting the appeal to June 17, 1959 and later extended that time to July 17, 1959. On July 14, 1959, the Chancery Court denied appellants' motion for a new trial on the ground, among others, that appellants had not complied with Ark. Stats. Section 27-2127.11. This section in all parts material here provides that in the event no stenographic report of the evidence or proceedings at a trial is made, the appellant MAY prepare a statement of the evidence from the best possible means, including his recollection, for use instead of a stenographic transcript. This section also provides that the appellee MAY serve his objections or proposed amendments and that thereafter appellant's statements and the proposed objections or amendments shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included by the Clerk of the Court in the record on appeal.

In appellants' motion for a new trial it was stated that: "The issues in the case involved a direct controversy between interested witnesses. The exact testimony given by each witness is extremely important and the proper determination of the issues and at this late date it is impossible to accurately stipulate the testimony given."

The majority opinion rests on the proposition that Ark. Stats. Section 27-2127.11 is mandatory. I cannot agree with this conclusion for the following reasons.

One. In the first place the wording of the statute itself strongly indicates that it is not mandatory. It seems to me if the Legislature meant for this section to be mandatory it would have used the words MUST or SHALL and not the word MAY.

Two. It is easy to imagine many situations where grave injustices would result if said statute is held to be mandatory. Let's consider a case, not unusual, where several days are consumed in the taking of testimony and further assume that the exact wording of the testimony is essential to a correct decision on the merits. Then assume that more than two months had elapsed, as in the case under consideration, before it is discovered that no stenographic record was made. In such a case it is unreasonable to expect that attorneys or the trial court to remember correctly what the witnesses said. In such a case the appellant would not have a fair chance to present his case to this court for review on its merits—a denial of his fundamental rights.

Three. The majority, in the next to the last paragraph of the opinion, relies entirely upon the decision in the case of *Mowery* v. *Coleman,* 224 Ark. 979, 277 S. W. 2d 481. In this I submit that the majority are in error. In the *Mowery* case there was an appeal from the decree of the trial court on the merits. In the case under consideration there is no appeal from the decree on the merits but this appeal is taken from the order of the Chancellor denying a new trial. In the *Mowery* case there was no motion for a new trial as there is here, and this court merely decided that the trial court had a right to enter its original decree

before the testimony taken by the reporter had been transcribed. It was not necessary to the opinion in the *Mowery* case for this court to mention Ark. Stats. 27-2127.11, and, therefore, I consider such reference as dictum only. However, regardless of whether the reference to the statute is considered dictum or essential to the opinion in the *Mowery* case, I think it is more important that we do not extend the effect of that decision any further than is necessary in view of the great injustices likely to result as heretofore pointed out.

The majority opinion did not rely upon the manner in which the motion for a new trial was presented but it is intimated that appellants could not prevail here because such motion was not heard in due time. I do not agree with this intimation. In my opinion this case is governed by the rule announced in the case of *Davies & Davies* v. *Patterson,* 132 Ark. 484, 201 S. W. 504. At Page 494 of the Arkansas Report the court made this unqualified statement: "It follows that the error complained of appeared on the face of the record proper and, therefore, no motion for a new trial was necessary". In the case under consideration it appears to me that the error complained of not only appears on the face of the record but that it actually constitutes the record. This appeal is solely for the purpose of pointing out the error — that the testimony on the trial in chief could not be obtained. In addition to that under our new procedure (Act 555 of 1953, Section II) "no motion for a new trial and no assignment of error shall be necessary".

Since it was conclusively shown to the trial court that appellants will have no opportunity to present the merits of their case to this court for a review unless a new trial is granted, it can hardly be said that the court did not abuse its discretion. It is my conclusion, therefore, that this cause should be remanded for a new trial.

HOLT, J., joins in this dissent.

Opinion delivered December 14, 1959.

W. R. Thrasher, W. B. Brady, for appellant.

Ohmer C. Burnside, for appellee.

GEORGE ROSE SMITH, J. In 1940 a number of Chicot county landowners gave the state highway department the right of way for a highway leading to the Greenville Bridge. The grant was put into effect by means of a condemnation order entered by the county court. In 1941 six of the landowners brought a suit in equity to reform the county court order, asserting that the order had wrongfully described more land than the owners meant to contribute. The chancery court, apparently with the consent of the highway department, entered a decree correcting the county court's description of the right of way. The present case turns upon the meaning of that decree, its validity not being in issue.

In 1958 the Highway Commission, preparing to reconstruct part of the highway in question, brought this action to condemn additional land so that the right of way would be 120 feet wide. With respect to the only part of the appellee's land that is involved in this dispute the Commission contends that by virtue of the original county court order it already has an easement varying from 100 to 110 feet in width, so that the Commission needs to acquire only 2.435 acres to widen the right of way to 120 feet. The Commission maintains that the

county court order, as far as these lands are concerned, was wholly unaffected by the chancery decree. This argument is disputed by the appellee, who insists that the effect of the chancery decree was to reduce the easement across her land to the 40-foot strip actually used for public travel. In this view the Commission must condemn a total of 6.423 acres to widen its right of way to 120 feet. The circuit court ruled for the appellee, and this appeal is from a judgment upon a verdict fixing the value of the 6.423 acres at $11,500.

The pivotal question is that of determining to what extent the chancery court modified the county court's description of the right of way. The land now involved lies between Station 350 00 and Station 378 50.8, and the specific question is whether the chancery court reduced, or perhaps eliminated entirely, the state's right of way between those stations.

The county court order contained a surveyor's description of the centerline of the right of way, divided into numbered stations, and then set forth the width of the right of way by means of the following paragraph and appended note:

"The right of way* widths conveyed each side of the hereinabove described centerline are as follows:

Station to Station				Lin. Ft.	Width to Left of Centerline	Width to Right of Centerline	Total Width
					Variable		Variable
236	00	240	34.8	434.8	*70±	40′	110±
Equation Station 240 34.8 back equals Station 209 36.8 ahead.							
					Variable		Variable
209	36.8	226	00	1,663.2	*70±	40′	110±
226	00	227	00	100	40′	40′	80′
227	00	249	00	2,200	60′	40′	100′
249	00	250	68	168	40′	40′	80′
250	68	256	00	532	60′	40′	100′
					Variable		Variable
256	00	348	00	9,200	*70±	40′	110±
					Variable		Variable
348	00	350	00	200	*70±	60′	130±
350	00	368	00	1,800	60′	40′	100′
368	00	378	50.8	1,050.8	60′	50′	110′

"*Note: In any event the Station numbers indicated and marked shall include right of way widths on the left extending to the low water level of Lake Chicot."

It will be seen that in the foregoing tabulation the stations are listed in ten groups or calls. In the first, second, seventh, and eighth calls the width of the right of way to the left of the centerline is given as a variable 70 feet, plus or minus, with the footnote explaining that these widths are to extend to the low water level of Lake Chicot. In the 1941 chancery suit the sole relief sought by the six plaintiffs was a correction of these four variable calls. The complaint alleged that in places the strip between the highway and the lake was more than 300 feet wide, that the landowners had intended to give an easement only 100 to 110 feet wide, and that the inclusion of excessive land in the county court order amounted to a constructive fraud upon the plaintiffs.

The decree found that the county court order should be corrected. After reciting the surveyor's description of the centerline the decree granted relief in the following paragraph, which is the focus of controversy in the case at bar:

"The right of way widths conveyed each side of the hereinabove described centerline are as follows:

Station to Station				Lin. Ft.	Width to Left of Centerline	Width to Right of Centerline	Total Width
236	00	240	34.8	434.8	40′	40′	80′
Equation Station 240 34.8 back equals Station 209 36.8 ahead.							
209	36.8	226	00	1,663.2	40′	40′	80′
226	00	227	00	100	40′	40′	80′
227	00	249	00	2,200	40′	40′	80′
249	00	250	68	168	40′	40′	80′
250	68	256	00	532	40′	40′	80′
256	00	348	00	9,200	40′	40′	80′
348	00	350	00	200	40′	60′	100′

same is vested in the State of Arkansas, for said road purposes, and that title to the remaining lands described in said county court order be and the same is hereby declared in the respective property owners, without regard to the provisions of said order of said County Court."

It will be observed that the chancery decree repeated only the first eight of the ten calls in the county court

order, omitting the last two calls that deal with Stations 350 00 to 378 50.8. This omission is the basis for the appellee's argument, as her land lies within the omitted calls. She contends that the effect of these operative words in the decree, "that title to the remaining lands described in said county court order be and the same is hereby declared in the respective property owners," was to completely destroy the state's easement across the land in the two omitted calls, though she admits that in the years since 1941 the state has acquired a prescriptive right to the 40-foot strip actually used for public travel.

Cogent reasons compel us to reject the appellee's argument. To begin with, the decree cannot be isolated from its context; it must be construed in the light of the complaint to which it was responsive. That complaint related only to the variable widths in the first, second, seventh, and eighth calls. The land that lay along the stations in the ninth and tenth calls was not subject to a variable easement and thus was not affected in any way by the issue raised in the complaint; indeed, the appellee's predecessor in title was not even a party to the suit. There is no reason to suppose that the chancellor meant to go beyond the issues framed by the pleadings and to adjudicate the rights of persons who were not represented in the case. That the chancellor did not so intend is further indicated by the fact that the preliminary recitals of the decree also refer only to the first eight calls, which suggests that the operative language of the decree was also limited to those calls.

Finally, the appellee's construction of the decree would mean that the highway department relinquished without protest its entire easement for a distance of 2850.8 feet along the centerline of the highway, which apparently had already been paved, so that the state voluntarily assumed the role of a trespasser. We are not persuaded that such a patently impractical construction must be placed upon the words of the decree.

Reversed and remanded for a new trial upon all other issues.

AETNA INSURANCE CO., INC. *v.* WARREN, ADMX.

5-1961 329 S. W. 2d 536

Opinion delivered December 14, 1959.

Dickson, Putman & Millwee, for appellant.

James R. Hale, Crouch, Jones & Blair, for appellee.

PAUL WARD, Associate Justice. We are concerned on this appeal with the construction of certain language contained in a fire insurance policy issued by the appellant, Aetna Insurance Company, Inc., hereafter called "Aetna", to the Bon Ton Cleaners, hereafter called "Cleaner", one of the appellees herein.

On June 18, 1951, Aetna issued to Cleaner a customer goods policy which insured for the account of whom it may concern "all kinds of lawful goods and articles accepted by the assured for cleaning, renovating, pressing, repairing or dyeing, being the property of its customers while contained on the premises occupied by the

assured", against loss from fire, etc. Upon the death of the owner of Cleaner the policy was endorsed to his widow who is also the administrator of his estate. The premium to be paid by Cleaner was based on gross receipts at the rate of 50¢ per $100.00. On July 21, 1957, a fire of unknown origin occurred on Cleaner's premises and damaged or destroyed, among other things, certain articles belonging to Callie M. Harp and Sara Harp, her daughter.

Mrs. Harp and her daughter brought suit against Aetna to recover their damages. Upon trial and at the end of all of the testimony of both sides the trial court directed a verdict against Aetna for the value of the clothes, penalty and costs. Hence, this appeal.

It appears to us that there are two questions that must be considered and disposed of. One: When the court directed a verdict was it acting as a jury or was it passing solely on a matter of law; and, Two: Was the trial court's action correct as a matter of law?

One. It is appellees' position (as indicated by the argument in their brief) that since both sides asked for a directed verdict the trial court, acting according to the recognized rule, sat as a jury to try issues of fact. Such a rule has been adopted by this Court. See 208 Ark. 952, 188 S. W. 2d 507, and 217 Ark. 593, 232 S. W. 2d 655.

We have concluded, however, that because of the peculiar facts of this case the rule above mentioned does not apply. Here, after appellees had finished with their testimony and had rested, appellant moved the court for an instructed verdict. This motion was overruled at that time and appellant saved its exceptions. After this had transpired appellant announced that it also rested. Then appellees moved for an instructed verdict, whereupon the trial court directed the jury to render a verdict in favor of appellees, instructing one of the jurors to sign it. In the first place it seems apparent from the wording of the trial court's judgment that it did not rely upon the rule above mentioned and did not intend

to try issues of fact because no mention is made of appellant's request for an instructed verdict. Moreover, a careful analysis of the cases cited above shows that the above mentioned rule is founded on the nature of an agreement between the parties themselves that the trial court shall sit as a jury and try issues of fact. It would seem necessary, therefore, that the trial court should have both requests for an instructed verdict before it at the same time. In this case, of course, appellant's request had already been denied and disposed of by the trial court before appellees' motion was made. It is not unusual, we think, for a defendant to request an instructed verdict at the close of the plaintiff's testimony. After doing so, such defendant would have the choice of putting on its own testimony or to rest its case and go to the jury on the testimony developed by the plaintiff. It would seem only fair that the appellant should have this choice in the case under consideration. Therefore, if any question of fact which raises a jury question is presented in the case under consideration appellant should not be denied to have such question presented to the jury.

Two. After very careful consideration of the problem presented here and after careful reading of the briefs on both sides and also the record in the case we have come to the conclusion that a fact issue is presented. There are two clauses in the insurance policy which deserve special attention. The first one is Section 2 of the rider attached to the policy and is designated "Customer Goods Policy". This section purports to state what goods are covered and reads as follows: "All kinds of lawful goods and articles accepted by the assured for cleaning, renovating, pressing, repairing or dyeing". The second provision is Section 5 of the said rider, under the heading of "Special Conditions", which reads: "Goods held by the assured without instruction from the owners to hold on storage shall not be considered as being held on storage".

Cleaner's place of business was operated in one long building with no separate building or separate compartment of the building which was used exclusively for stor-

age. However, the testimony shows that Cleaner did have certain racks set aside in the building where clothes were held in moth-proof bags for varying lengths of time, as distinguished from the place where they kept clothes which had been processed and which normally would be called for within two or three days. There is testimony in this case to the effect that when Mrs. Harp brought her clothes to Cleaner on June 1st and June 15th that she instructed Cleaner to process the clothes, place them in moth-proof bags and hold until Fall. There is other testimony to the effect that Mrs. Harp's instructions to Cleaner were that she merely told them to process the clothes and hold them until she called for them. Appellant's Exhibit No. 2 is a ticket or receipt made out to Mrs. Harp, dated June 1, 1957, showing the articles of clothing left by her at Cleaner's place of business. On this ticket appears this notation "M Proof, Store". It appears conceded that this notation meant for Cleaner to mothproof and store. It is admitted that Cleaner paid a premium to appellant based on the gross receipts for processing clothes which apparently would ordinarily be delivered to the customer in two or three days, sometimes sooner and sometimes later. This being true, it stands to reason that appellant's liability would be increased in proportion to the length of time the clothes were held in the building. Appellees introduced testimony by one of the local agents of the appellant company tending to show that he (the agent) knew that Cleaner was holding clothes for the length of time that they held Mrs. Harp's clothes, and that he informed Cleaner such clothes were covered by the policy. However, on cross-examination he stated he told her that if clothing was brought in and processed and a charge of $3.50 was made for it and it *went back out* the only premium Aetna would receive would be based on that $3.50 charge.

It can be seen from the above that the vital question here is whether Mrs. Harp's clothes were held for storage. If they were not so held then appellant is liable. but if they were so held appellant is not liable.

It, therefore, appears to us that this vital question, whether Mrs. Harp's clothes were stored or not stored

under the above quoted provisions of the policy and under the evidence as we have summarized it above is one that should be passed upon by a jury. If this were a case in which it could be said that fair minds could reach only one conclusion on the question of whether Mrs. Harp's clothes were stored or not stored then the trial court would be right in treating the question as a matter of law. We are unable to say that the testimony in this case is that simple and clear and we are, therefore, constrained to conclude that this issue should have been submitted to a jury.

It follows from what we have said above that the trial court erred in finding that as a matter of law that Mrs. Harp was entitled to recover for the cost of her clothes.

There is an abundance of decisions by this Court holding that a jury question is presented where reasonable minds might reach different conclusions: *Grand Lodge A.O.U.W.* v. *Banister,* 80 Ark. 190, 96 S. W. 742; *St. Louis I. M. & S. Ry. Co.* v. *Coleman,* 97 Ark. 438, 135 S. W. 338, *D. F. Jones Const. Co.* v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874; *Smith* v. *Stuart C. Irby Co.,* 202 Ark. 736, 151 S. W. 2d 996; *McGeorge Contracting Company* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566; and, *Williams* v. *Cooper,* 224 Ark. 317, 273 S. W. 2d 15.

It follows from the above that the judgment of the trial court must be and it is hereby reversed and remanded for further proceedings consistent with this opinion.

Reversed and remanded.

HOLT and GEORGE ROSE SMITH, JJ., dissent.

GEORGE ROSE SMITH, J., dissenting. I agree that the judgment must be reversed, but it seems to me that the undisputed evidence requires us to dismiss the appellees' complaint. I can find in the record no substantial evidence upon which a jury might say that the appellees' clothing was not in storage at the time of the fire. The loss was therefore excluded by this clause in the policy: "Goods

accepted for storage on which a process charge has been made or is to be made are covered only during process and transportation.'' It is undisputed that the processing of the appellees' clothing had been completed when the garments were placed in mothproof bags.

At the outset I lay aside, as irrelevant, the testimony that the appellant's general agent thought that the apparel in question was covered by the policy. In a number of cases, the most recent being *Metropolitan Life Ins. Co.* v. *Stagg,* 215 Ark. 456, 221 S. W. 2d 29, we have followed the familiar rule that the doctrine of waiver and estoppel cannot operate to extend the coverage of an insurance policy to a risk that is excluded by the specific language of the contract. In view of that rule no substantive effect can be attached to the fact that the appellant's agent misinterpreted the language of the policy many years after it was issued, for the misconstruction was not an inducement contributing to the issuance of the policy.

The only pertinent evidence relates to the transaction by which Mrs. Harp left the clothing at the cleaner's. It is true that on direct examination Mrs. Harp merely stated that ''I only recall that I asked if I could leave them [the clothes] and get any article I wanted at any time.'' But on cross examination Mrs. Harp candidly admitted that she had probably told the cleaners to hold the clothing until fall. With like candor she stated without equivocation that her affidavit of loss, executed soon after the fire, was correct. That affidavit contains this question and answer: ''Was article to be laundered, cleaned, pressed, altered, repaired or stored? Clean, put in M. P. bags and hold until fall.'' It will be remembered that the ticket made out at the time by the cleaning company's clerk recited that the garments were to be mothproofed and stored.

Upon this uncontradicted evidence I think the question to be one of law and not of fact. The policy admittedly did not cover the clothing while it was in storage. Mrs. Harp unquestionably left the clothing with the cleaning company with instructions that it be cleaned, placed in mothproof bags, and held until fall. The fire occurred after the garments had been cleaned and put in mothproof bags.

If a jury can permissibly find that the clothing was not in storage, then just what was its status? The majority opinion leaves that question unanswered, and in doing so it seems to me that the majority have refused to give effect to the plain language of the contract.

HOLT, J., joins in this dissent.

McGILL *v.* ROBBINS.

5-1988 329 S. W. 2d 540

Opinion delivered December 14, 1959.

Y. W. Etheridge, Ruben K. King, Alexander City, Alabama, for appellant.

Switzer & Switzer, for appellee.

PAUL WARD, Associate Justice. We are concerned on this appeal with (a) a suit on a foreign judgment and (b) a garnishment of funds in the hands of a sheriff.

On August 16, 1958 appellant, McGill, obtained a judgment in the Circuit Court of Tallapoosa County, Alabama against appellee, Robert Lee Robbins, in the amount of $1,343.39 (less $125.00 later paid thereon). This judgment was obtained in a tort action involving an automobile collision. On or about February 2, 1959, appellant filed a verified complaint in the Circuit Court of Ashley County, Arkansas, against the said Robbins and B. A. Courson, the sheriff, in which the above facts were set forth and in which it was stated that B. A. Courson, the sheriff of Ashley County, Arkansas, has in his hands the sum of $1,500.00 belonging to Robbins. (It appears that said Robbins had deposited such sum of $1,500.00 with the sheriff in lieu of an appearance bond). The prayer in said complaint reads as follows: "Wherefore, plaintiff prays judgment in the sum of $1,210.39 with interest from the date of the aforesaid judgment of August 16, 1958, the date of this judgment, with interest thereon until paid at 6% and costs of this action". Attached to the complaint was a duly certified and verified copy of the Alabama judgment.

On March 16, 1959, the Clerk of the Ashley County Circuit Court issued a WRIT OF GARNISHMENT BEFORE JUDGMENT commanding the sheriff, as garnishee, to appear in court and answer what goods, chattels, monies, credits and effect he may have in his hands or possession belonging to McGill. On the following day Robbins filed a motion to quash said Writ of Garnishment, setting forth several grounds therefor. The contentions with which we are here concerned are: (a) Garnishment cannot be issued before judgment except in actions in contract and this is a suit on a foreign tort judgment and not an action on a contract; and, (b) garnishment will not lie to seize money in *custodia legis* in the hands of the sheriff and cannot be had on any officer of a county or a state except after judgment.

On March 23, 1959 the trial court sustained Robbins' motion to quash and accordingly vacated and quashed the Writ of Garnishment. From this Order McGill has appealed.

(a) Appellees are correct in stating that garnishment cannot be issued before judgment in a tort action. See: *Allen* v. *Stracener,* 214 Ark. 688, 217 S. W. 2d 620. We likewise agree with appellees that appellant did not comply with the Uniform Act on Foreign Judgments (Ark. Stats. Section 29-801, *et seq.*) whereby the Alabama judgment could be registered in this State. This matter is not decisive here so we refrain from discussing it more fully. Section 29-816 of the Uniform Act provides that: "The right of a judgment creditor to present an action to enforce his judgment instead of proceeding under this Act remains unimpaired". Since appellant brought this action under the old procedure to obtain a judgment in this State based on the Alabama judgment, it necessarily follows that the Writ of Garnishment in this instance was issued before judgment. However, we do not think this procedure was fatal to appellant, because we are of the opinion that this present action is not a tort action but merely an action on a debt. What appears to be the general and uniform rule in this connection is stated in 30A Am. Jur. Page 821, Section 929, where, among other things, it is stated: "An action on a judgment is a suit of a civil nature. It is regarded as a new and independent action, and not for the same cause as the principal proceedings in which the judgment was obtained, even if its purpose is to revive the judgment. Technically a cause of action on a judgment is not the same as the original cause of action merged therein, thus, the cause of action on a judgment is different from that upon which the judgment was rendered". We recognize the logic and soundness of that rule and therefore adopt it as our own. We must conclude, therefore, that appellant had a right to have the Writ of Garnishment issued upon the filing of his complaint and before a judgment thereon had been obtained.

(b) We now come to the consideration of a very interesting question—whether appellant could garnishee the sheriff who held $1,500.00 placed in his custody by appellant as bail money in *lieu* of an appearance bond. This question, we think, has been resolved adversely to appellees' contention in this case by the decision in

Green v. *Robertson,* 80 Ark. 1, 96 S. W. 138. In that case F. A. Garrett who was Clerk of the Chancery Court and also a Commissioner to sell certain lands under a foreclosure decree held a certain sum of money paid to him by W. H. Schaer who was the purchaser of the foreclosed lands. Later Green commenced an action in a Justice of the Peace Court against one J. T. Reid on a promissory note and had a Writ of Garnishment issued against Garrett (the Commissioner) alleging that he had certain funds in his hands belonging to Reid. After this Reid made an assignment of his interest in the money held by Garrett to Robertson. The question then arose as to whether Green had a right to garnishee the funds in the hands of Garrett and consequently whether or not the assignment from Reid to Robertson was valid as against the garnishment. The trial court held: "That F. A. Garrett, as Commissioner, is not subject to the Writ of Garnishment". Upon appeal this court after first stating that in the absence of a statute authorizing it, a fund in court is not subject to garnishment, then stated: "We have, however, a special statute in this State authorizing the attachment of funds in court". Citing Kirby's Digest, Section 358, which is the same as Ark. Stats. Section 31-118, and which reads as follows: "Where the property to be attached is a fund in court, the execution of the order of attachment shall be by leaving with the clerk of the court a copy thereof, with a notice specifying the fund; and where several orders of attachment are executed upon such fund on the same day, they shall be satisfied out of it ratably". Based upon the above this court said: "The decree of the court is reversed, and the cause is remanded with directions to the court to enter an order commanding the commissioner to hold the said surplus subject to the garnishment".

Our search of the authorities discloses that this opinion has never been reversed or modified by this court.

Appellees seek to sustain the trial court in quashing the Writ of Garnishment in this case by virtue of Ark.

Stats. Sections 31-519, 31-520, 31-521. We do not agree with appellees in their interpretation and applications of these statutes, because we think they apply only to money and effects in possession of the State or some subdivision thereof and that they do not apply to money in *custodia legis*. The three sections above mentioned are Sections 1, 2, and 3 respectively of Act 44 of the Acts of 1945. The title to this Act reads as follows: "AN ACT TO PROVIDE FOR THE GARNISHMENT OF SALARIES, WAGES, AND CREDITS OWED BY THE STATE OF ARKANSAS TO VARIOUS INDIVIDUALS". Section 1 of the Act (Section 31-519) reads as follows: "Any indebtedness, goods or chattels, monies, credits or effects belonging to a defendant in a civil action and *in the hands or possession of the State of Arkansas, any subdivision thereof, institution, department, special district or instrumentality of the State of Arkansas* shall be subject to garnishment as is now provided by law". (Emphasis Supplied). It seems clear, therefore, that said Act 44 has no application to funds held *custodia legis*.

We conclude from the above, therefore, that the trial court should have overruled appellees' motion to quash the Writ of Garnishment. We point out, however, that any final action in this case on the Writ of Garnishment must be subject to the court's final disposition of the $1,500.00 held by the sheriff. The cause is reversed with directions to proceed further consistent with this opinion.

Reversed.

5-1974 329 S. W. 2d 557

Opinion delivered December 14, 1959.

[redacted]

Thomas, Phillips & Wright, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a decree granting appellee judgment in the sum of $9,267.06 and interest thereon in the sum of $5,365 because of arrears in the payment of child support. The parties were married in Nevada April 7, 1936 and separated in 1937. A child, Donna Maria, was born February 5, 1937. On March 10, 1937, Mr. and Mrs. Wilson, appellant and appellee, entered into a formal agreement whereby Wilson agreed to pay Mrs. Wilson $50 per month until the child reached the age of 21. On May 20, 1937, Mrs. Wilson filed suit for divorce in the Garland County, Arkansas, Chancery Court. She was granted the divorce and the agreement for child support was approved by the court. (the parties had made an antenuptial contract pertaining to their own finances.) Wil-

son defaulted in monthly payments of child support and up to some time in 1948 had paid a total of only $250. At that time he made a $2,000 payment and now claims that such payment was a compromise settlement of all unpaid monthly installments accrued up to that time.

In 1950 Wilson filed a petition in the Garland Chancery Court to give him custody of the child, but this petition was never presented to the court. On February 13, 1957, Mrs. Wilson filed a petition asking that she be granted judgment for the unpaid monthly installments. The court granted the petition and entered judgment for $9,267.06 plus $5,365 as interest thereon and an attorneys' fee of $1,250.

On appeal appellant contends that the five year statute of limitations applies; that the action is barred by laches and estoppel; that there was a denial of visitation rights, and such conduct is a bar to this action; that the $2,000 payment in 1948 was a compromise settlement of all accrued monthly installments; and that the evidence is insufficient to support the judgment. There is no merit to any of the points argued except the question of whether the statute of limitations is applicable.

Davis v. *Herrington,* 53 Ark. 5, 13 S. W. 215, is not directly in point because there the child was illegitimate, but it is analogous to the case at bar. In that case the father made an oral agreement to pay $3.00 per month for the support of the child. The father failed to abide by his agreement, and upon his death a claim was filed against his estate for $3.00 per month for a period of five years. This Court said: "The statement of appellee's claim shows that is was due in annual installments, and as the promise was not in writing, the remedy upon the installments which fell due more than three years prior to the institution of this suit is barred."

Here the agreement is in writing. It was entered into before suit for divorce was ever filed. In *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954, the Court said: "Our decisions have recognized two different types of agreement for the payment of alimony. One is an inde-

pendent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bachus* case, it does not merge into the court's award of alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.

"The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agrees upon 'the amount the court by its decree should fix as alimony.' "

Undoubtedly the nature of the contract involved here is such that the appellee could have maintained an action thereon in a court of law. Ark. Stat. § 37-209 provides: "Notes and instruments in writing not under seal—Five years.—Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five years after the cause of action shall accrue, and not after." But even if it could be said that the foregoing statute is not applicable, then the claim for child support accruing more than five years before the motion for judgment was filed on February 13, 1957, would be barred by Ark. Stat. § 37-213, which provides: "Actions not otherwise provided for—Five years.—all actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued."

As heretofore pointed out in *Davis* v. *Herrington,* the three year statute was held to apply to an oral contract to support a child, but obviously the three year statute would not apply here. Of course, a child would not be bound at all by the parents' contract for his support, but here there is no contention that any money recovered from the father would go to the child. It would go to reimburse the mother for the support she has furnished the child over a long period of time. Actu-

ally, there is no real distinction between the case at bar and *Brun* v. *Rembert,* 227 Ark. 241, 297 S. W. 2d 940, although in that case it is pointed out that it deals only with the situation where a motion for judgment was filed more than five years after the child became of age. Here the motion for judgment was not filed until nine years after Wilson had made his last payment and two years after the child reached her majority.

In *Brun* v. *Rembert* we said: "All agree that some statute of limitations must apply. The sole question is 'Which statute?' " We see no valid reason why the same rule should not apply in the case at bar. Here it is true that the child has been of age only two years, while in the *Brun* case action to recover arrearages was commenced more than five years after the child became of age. But this is no real distinction. Undoubtedly the mother should not be required to go into court to recover an unpaid monthly installment just as soon as it becomes due. On the other hand, it would not be unduly burdensome for her to seek such recovery at the expiration of each five year period. The great weight of authority is that statutes of limitation apply in cases of this kind. In an annotation on the subject in 137 A. L. R. 890, it is said: "In most jurisdictions, where a decree or order awards instalment payments of alimony to a wife, or support for children, the statute of limitations begins to run as against each instalment as it becomes due, and only from that time." Cases from ten states are cited in support of the text. It appears that a few states have held to the contrary, but they are greatly in the minority.

Isaacs v. *Deutsch* (Fla. 1955) 80 So. 2d 657, 52 A. L. R. 2d 1118, is directly in point. There the court said: "And we think it is much more logical to hold that in a case such as this, as in the case of an obligation payable by instalments, 'the statute of limitations runs against each instalment from the time it becomes due; that is, from the time when an action might be brought to recover it.' 34 Am. Jur., Limitations of Actions, Sec. 142, p. 114. As has been noted, this is in accord with the great majority of cases from other jurisdictions in-

volving similar contracts. And, by analogy, it accords with the view taken by most of the courts throughout the country that where the father's 'continuing obligation' to support his child is transformed into a decree of court requiring instalment payments of support money, the statute of limitations begins to run as against each instalment as it becomes due, and only from that time."

It follows from what has been said that the decree must be reversed, with directions to enter a judgment for the total of the amount of installments accruing within five years next before the filing of the petition for judgment, and for interest thereon. The trial court allowed appellee's attorneys a $1,250 fee, and they asked that they be allowed a fee for work done in connection with this appeal. An additional fee of $250 is allowed.

Reversed.

EARNEST *v.* EARNEST.

5-1990 329 S. W. 2d 543

Opinion delivered December 14, 1959.

R. Julian Glover, for appellant.

Earl J. Lane, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Laura Earnest, has appealed from a decree granting a divorce to appellee, Francis B. Earnest. The parties were married in Hot Springs in November, 1948, and lived together at appellee's sister's hotel until the fall of 1949,

when appellee moved into a separate room in the hotel. In 1950 appellee moved to the Ross Apartments, at another location. In the same year appellant moved to the Colonial Apartments. In October, 1950, appellee moved back to his sister's hotel and has lived there since that time.

On January 3, 1957, appellee filed suit for divorce, alleging three years' separation without cohabitation. Appellee testified that he and appellant had been separated since 1950 and had not lived together since that time; that appellant had not been to his room in the hotel and he had not been to her apartment except on one occasion when he went there on a business matter, but only went to the front door. His sister, Mary Taylor corroborated his testimony regarding the separation. On the other hand, Mrs. Earnest, appellant, testified that over a period of about seven years appellee had been to her apartment on numerous occasions, at which times they indulged in sexual relations.

On appeal Mrs. Earnest contends that there is no corroboration of Mr. Earnest's testimony that they had not cohabited as man and wife for the past three years. In *Wicker* v. *Wicker,* 223 Ark. 879, 269 S. W. 2d 311, the appellant made the same argument. There the witness, E. S. Blease, testified that the Wickers had not lived together for more than four years. On appeal Mrs. Wicker argued that cohabitation could have occurred without Blease's knowledge. This Court said: "Obviously the same argument could be made in every case; to sustain it would be to abolish three years separation as a ground for divorce." Not only is appellee corroborated as to the separation by the testimony of Mrs. Taylor, but also by the circumstances of living separate and apart at different apartments for more than seven years.

Affirmed.

5-1964 329 S. W. 2d 550

Opinion delivered December 14, 1959.

[redacted]

Holt, Park & Holt, for appellant.

Quinn Glover and *Wayne Foster,* for appellee.

JIM JOHNSON, Associate Justice. This is an adverse possession case concerning .68 acre located in the

SW¼ of the NW¼ of Section Twenty-Five (25), Township One (1) North, Range Thirteen (13) West in Pulaski County, Arkansas. In 1922 Bert M. Marsh, a witness for the appellant, bought the W½ of the W½ of the SE¼ of the same section. In 1922 Mr. Marsh had a surveyor run a dividing line between the SE¼ of the SW¼ of this NW¼ and the surveyor ran a line which, according to more recent surveys, encroached westwardly into the SW¼ of the NW¼ along most of its length. Mr. Marsh then built a fence more or less on this line and the fence has remained there to the present time. The fence encroaches onto the SW¼ of the NW¼ for a distance of about 45 feet, varying down to a distance of about 12 feet on the south end and merges, with the more recent surveys, on the north end. Mr. Marsh, or his family, remained in possession up to the fence from 1922 to 1945. From 1945 until 1949 the land involved was transferred to several owners, all of whom occupied up to the fence and treated the land as their own.

On July 14, 1949, the land was sold to William F. Thompson who entered into possession up to the fence also. In January 1953, Mr. Thompson and some adjacent property owners had a survey made running North and South between the SW¼ of the NW¼ and the SE¼ of the NW¼ of Section 25, and entered into a property agreement whereby they agreed to accept the new survey as the correct property line, notwithstanding the existence of any fences located elsewhere. After the agreement was made, Thompson did not move the fence bounding the west side of his property and remained in possession up to the fence. The appellants bought the property from Thompson on March 17, 1957, at which time the property line agreement was not of record.

The deed from Thompson to appellants conveyed only the W½ of the W½ of the SE¼ of the NW¼ of Section 25. Thompson was in California at the time he sold the land to the appellants and the real estate agent pointed out the fence as being the west line of the property. There is a barn situated partly on this disputed strip which belonged to Thompson and the sewage lat-

erals from his septic tank ended on the strip. Appellants brought this suit to quiet title in themselves to the strip involved. The Chancellor quieted title in the appellee and ordered appellants to remove the barn and sewage laterals to the extent they encroached on the .68 acre.

For reversal the appellants rely on: 1. their adverse possession; 2. the intention to hold adversely by their predecessors in possession; 3. the description of the property in the deed; and 4. the property line agreement being void.

Mr. Marsh made some statements on cross examination to the effect he only intended to claim to the true line. Appellee claims this keeps Mr. Marsh from claiming adversely under our cases holding if the intent of the disseisor is merely to hold to the true line, no adverse possession can arise. *Ogle* v. *Hodge,* 217 Ark. 913, 234 S. W. 2d 24; *Carter* v. *Roberson,* 214 Ark. 750, 217 S. W. 846; *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419. In the case of *Rye* v. *Baumann,* 231 Ark. 278, 329 S. W. 2d 161, this Court had this question before it and it was there said:

"In arriving at the intent of the disseisor we think it is better to weigh the reasonable import of his conduct in the years preceding the litigation rather than rely on one remark made during the stress of cross examination (which is elsewhere refuted)."

Mr. Marsh was in possession and exercised dominion over the land involved for over twenty years and therefore obtained title to it by adverse possession under Ark. Stats. § 37-101.

Each deed that passed in appellants' chain of title did not contain a description of the .68 acre, so it might be argued that if Marsh obtained title, then the title remained in him on his failure to include the .68 acre in his deed, but, in *St. Louis S. W. Railway Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913 C, 1339, this Court said:

"While it is true that the land described in the deed to her does not include the strip in controversy, still her grantors, whose adverse possession had probably already ripened into title, intended it should, and thought it did, and at the time of the conveyance transferred to her the possession of it in fact, intending that she should have all the land within the enclosure."

All the predecessors in appelants' chain of title appear to have been in possession and exercised dominion over the land and did in fact transfer possession of it to each succeeding grantee. This places the legal title in Thompson, whose deposition states he knew where the new survey line was and did not intend to transfer the .68 acre to appellants. The question remains as to the effect of the property agreement entered into by Thompson and the apparent intention of Thompson not to include the .68 acre in his conveyance to appellants. As previously stated, Thompson entered into this agreement in January 1953. The agreement was made but no action was ever taken under it and it was not put of record until after this litigation arose and, therefore, appellants not having knowledge otherwise of the agreement are not prejudiced by it.[1]

As previously stated, a real estate agent sold the land for Thompson and appellant testified the agent pointed out the old fence row as the west line of the property. An agent has the authority to point out to a prospective purchaser what he reasonably believes to be the boundary. Restatement on Agency 2d, § 63.

In deciding whether Thompson intended to transfer the property involved to appellants, we think there are things other than Thompson's testimony to be taken into consideration in this case. For instance, it seems unreasonable that Thompson would intend to transfer

[1] Ark. Stats. § 16-115: "No deed, bond, or instrument of writing, for the conveyance of real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof . . . unless such . . . instrument . . . shall be filed for record in the office of the clerk . . . of the county where such real estate may be situated."

part of the barn or only the major portion of the sewage laterals. Thompson also allowed appellants to go into possession and remain without disturbance for over a year. From the foregoing, we conclude that Thompson intended to, and did transfer the land involved to appellants.

The decree is therefore reversed and remanded for further proceedings consistent with this opinion.

STRAHAN *v.* WEBB.

5-1969 330 S. W. 2d 291

Opinion delivered December 21, 1959.

A. James Linder, Barber, Henry, Thurman & McCaskill, for appellant.

Switzer & Switzer, Jones, Blackwell, Chambliss & Hobbs, West Monroe, La., for appellee.

CARLETON HARRIS, Chief Justice. On November 5, 1957, William Warren Webb, age 47, a salesman for the Louisiana Paper Company, out of the Monroe office, was instantly killed in a collision with a truck belonging to the Kaminer Construction Company, a Georgia corporation, and being operated by their employee, Clarence E. Strahan, who, at the time, was acting within the scope of his employment. There was evidence that Strahan was drinking at the time of the collision. Webb was survived by his wife, Marteal B. Webb, and two sons, Frederick Ross Webb, age 18, and Garland Warren Webb, age 17. Suit was instituted by Mrs. Webb individually, and as next friend of the two minor sons, seeking total judgment in the amount of $320,000. On trial, the jury returned a verdict for Mrs. Webb against both defendants in the sum of $115,000 and returned verdicts for the benefit of the sons in the amount of $25,000 each, or a total verdict of $165,000. Judgment was entered in accordance therewith, and from such judgment comes this appeal.

Appellants contend: First, "The trial court erred in overruling defendants' Motion to Set Aside the Verdict of the Jury and the Judgment Rendered Thereon." Second: "The Verdicts of the Jury Were Excessive."

I.

On December 13, 1958, appellants filed a "Motion to Set Aside the Verdict of the Jury and the Judgment Rendered Thereon" on grounds that;

"(1) Since the trial, defendants have discovered new evidence which could not be brought to the Court's attention before the filing of this motion.

(2) That a certain juror or jurors, serving on the jury, on *voir dire* failed to disclose alleged information which they apparently had obtained and which, if disclosed, would have disqualified them from serving in the trial of this case. Such information was imparted to the entire jury during its deliberations, and that it was false and untrue and calculated only to cause passion and prejudice in the minds of the jury.

(3) That such improper and extraneous matter was considered by the jury to the prejudice of the defendants."

Attached to the motion were the affidavits of six of the jurors who served, the affidavits being identical in form and content as follows:

"STATE OF ARKANSAS
COUNTY OF ASHLEY

AFFIDAVIT

I, the undersigned, hereby state that I was a member of the Jury Panel that tried the case of *Webb* v. *Strahan & Kaminer Construction Company,* in the Ashley County Circuit Court on November 20, 1958, and November 21, 1958. That during the jury deliberation of the case by the Jury, the Jury was advised, and information reached the Jury that the Insurance Company of Defendants had offered to pay the sum of $120,000.00 as a compromise settlement of the case.

Witness my hand this 12th day of Dec., 1958."

This motion was overruled by the trial court. Of course, these affidavits do not state that affiants, or any other member of the jury, based their vote on the information received; there is no statement that the amount awarded resulted from this occurrence, nor that except for this incident, the verdict would have been smaller. But

it is not necessary that we consider the sufficiency of the affidavits, for though these affidavits contained all of the statements which are omitted, appellants' argument would still be of no avail. Appellants, in their brief, state:

"Not only was the statement made by the juror false, and not only was it no part of the evidence in the case, but if such testimony had been offered in the trial of the case it would not have been admissible because, (a) it would have been telling the jury the defendants were protected by insurance and (b) testimony re an offer of settlement is not admissible."

We, of course, agree, and have held numerous times, that to unnecessarily bring to the attention of a jury that insurance is involved is reversible error; likewise, an offer of settlement is not admissible as evidence of liability. These holdings are so well established as to require no citation of authority. But on the other hand, we have also held that testimony or affidavits of members of the jury cannot be used to impeach their verdict. This holding, based on statute,[1] has been reiterated many times, commencing with the case of *Pleasant* v. *Heard,* 15 Ark. 403. In *Burns* v. *Vaughan,* 216 Ark. 128, 224 S. W. 2d 365 an action was instituted for crop damage allegedly caused by a negligent spraying of the crops. A certificate of the weather bureau showing the direction of the wind on the day of the spraying, which had been excluded by the court, reached the jury by mistake. On appeal, this fact, *inter alia,* was urged as grounds for reversal. In holding this point to be without merit, this Court said:

In any event, however, the only proof that the jury saw the certificate is in the form of affidavits by several jurors. Of course, this is not a permissible method of impeaching the verdict."

[1] The present statute is 43-2204, Ark. Stats. (1947) Anno., and reads as follows: "A juror can not be examined to established a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot." This identical statute is found in the Code of 1869, and has been in effect since that time.

In *Post* v. *State,* 182 Ark. 66, 30 S. W. 2d 838:

"Appellant contends that the judgment should be reversed because the verdict was not unanimous and presents to the court the affidavit of jurors. Section 3220 of C. & M. Digest is as follows: 'A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot.' The affidavits do not tend to establish that the verdict was made by lot, but are for an entirely different purpose."

See also *Wallace* v. *State,* 180 Ark. 627, 22 S. W. 2d 395. The general rule is based upon the logic set forth in 53 American Jurisprudence, Section 1105, page 769:

"The rule is founded on public policy, and is for the purpose of preventing litigants or the public from invading the privacy of the jury room, either during the deliberations of the jury or afterward. It is to prevent overzealous litigants and a curious public from prying into deliberations which are intended to be, and should be, private, frank, and free discussions of the questions under consideration. Further, if after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath.

Testimony of the jurors to impeach their own verdict is excluded not because it is irrelevant to the matter in issue, but because experience has shown that it is more likely to prevent than to promote the discovery of the truth. Hence, the affidavit of a juror cannot be admitted to show anything relating to what passed in the jury room during the investigation of the cause, or the effect of a colloquy between the court and a juror, or the arguments made to a juror by a fellow juryman. The rule that a verdict cannot be impeached by the testimony of a juror is generally adhered to where it is sought to impeach a verdict on grounds of

misconduct on the part of the juror or his fellow jurors, despite apprehension expressed in many cases that such rule sometimes serves the cause of injustice."

Appellants state that they do not make use of the affidavits to prove "how they arrived at their verdict", but solely to prove misconduct on the part of a juror. This seems to be a matter of "coming in the back door instead of the front", and it will be noted that the last line of the citation just quoted is contrary to appellants' view. In *Capps* v. *State,* 109 Ark. 193, 159 S. W. 193, prejudicial newspaper articles (not a mere narration of the evidence connected with the trial) were read by members of the jury. This Court reversed the trial court because of misconduct of the jury, but *the case was not reversed upon the testimony of the foreman of the jury who testified at the hearing held on the motion for a new trial.* From the opinion:

"The newspaper articles complained of were published in the Fort Smith Times-Record, and the Southwest American, daily papers published in that city, and each was shown to have had a large circulation. The foreman of the jury testified upon the hearing of the motion for a new trial that he and other jurors read these articles. But this evidence was not competent for that purpose and would be insufficient to support a finding that members of the jury had read these articles, because jurors are not thus allowed to impeach their verdict. Section 2423 of Kirby's Digest; *Wilder* v. *State,* 29 Ark. 293. *Smith* v. *State,* 59 Ark. 132, *Hampton* v. *State,* 67 Ark. 266. But the finding that the papers had been read by the jury *did not depend alone upon the affidavit of the jurors,*[2] as the officer in charge of the jury and the proprietor of the hotel at which the jury was being entertained testified that the jurors bought these papers and some of the jurors read them, and that other jurors had access to the daily papers belonging to the hotel and read them as other guests did."

[2] Emphasis supplied.

Appellants also argue that the statute, heretofore quoted, is not applicable because no motion for new trial was filed, but only a motion to set aside the verdict of the jury and the judgment thereon. Certainly, logic dictates the view that the legislature, in enacting the statute, did so for reasons of public policy, akin to that set forth in American Jurisprudence, heretofore quoted, and the phrase in the statute[3] "establish a ground for a new trial" was only included because our procedure at that time required a motion for new trial as a prerequisite to an appeal. Under present procedure, a motion for new trial in civil cases is not necessary.[4] Appellants' contention is thus held to be without merit.

II.

This is a more difficult question. The judgment before us is the largest to come before this Court, and we are confronted with the question of determining whether the amounts recovered can be justified by the evidence. It is stipulated that deceased was 47 years of age, and that his life expectancy at the time of death was 23.08 years under the American Experience Mortality Table. Webb was earning $5,000 a year at the time of his death, and according to his widow, contributed $4,000 of that amount to her and the children. Mr. Sam Orchard, manager of the Louisiana Paper Company branch at Monroe, testified that Webb had been employed by the paper company since 1943, and was the top salesman. His income for the past five years had averaged $5,000 per year, but Mr. Orchard testified that the company had planned to change the method of compensation for salesmen commencing the first of January, 1958, and based on past performance, Webb would have thereafter made somewhere between $7,000 and $10,000 a year. He testified that the company was grooming Webb to succeed him (Orchard) as manager; that the company had no retirement system, and age had no effect on an employee keeping his job. Mrs. Webb, at the time of the trial of this case, was 38 years of age, and had been married to Mr. Webb since 1938. She

[3] Section 43-2204.
[4] See Act 555 of 1953.

testified that Mr. Webb had been a salesman-truck driver for Swift in West Monroe, and that they later moved to Shreveport and lived there about a year and a half, later moving back to West Monroe where Mr. Webb secured the job with the paper company. Mrs. Webb holds a master's degree from Louisiana State University and was in her ninth year of teaching in West Monroe at the time of the trial. Her average yearly earnings were $4,300. Her testimony reveals an amicable and happy relationship with her husband and family. It appears that they operated as a "family group" in work and play. They attended ball games together . . . he put up a basketball goal so the boys would have some place to practice . . . they did all of their work at home and Mr. Webb would wash dishes . . . wax floors . . . work in the yard, and bring in the clothes when Mrs. Webb was teaching . . . He had fixed breakfast for 15 years, and sometimes would fix evening meals . . . the family took a yearly fishing trip and went hunting together . . . she suffered terrible mental anguish upon the death of her husband. Mr. Webb had been a most considerate husband, always remembering birthdays, *etc.* . . . she couldn't sleep for months, and when she did sleep, dreamed about her dead husband.

Mr. Webb devoted considerable time to his children, and the older boy, Frederick Ross, age 18 at the time of his father's death, testified that his father belonged to the West Monroe Quarterback Club, attended football practice, and after practice would discuss football tactics with the son (Frederick was captain of the team during his senior year). Frederick testified that he discussed personal problems with his father, and that his father had talked with him about the future, and about the career he would follow for life — namely law. Frederick was a freshman at LSU at the time Mr. Webb was killed. Garland was 17 at the time of his father's death, and was a senior at West Monroe High School. At the time of the trial, he was attending Northeast Louisiana State College, located in Monroe, where he was studying dentistry. He likewise testified as to his

father's interest in his school, and extra-curricular activities. He stated that he and his father played baseball together many times, and the deceased started him playing baseball in the Little League. Testimony reflected that his dentistry course would require seven years, and Garland desired to go to Loyola in New Orleans to finish the course.

While we have here a picture of happy, congenial family life, we cannot say that the family relationship was any different from the average American family. Most devoted husbands are willing to help their wives in household tasks, remember birthdays and other anniversaries, and turn over the bulk of their income for family maintenance. The average father is certainly interested in the welfare of his children, and their activities. It would be a rare parent indeed, particularly if athletically minded himself, who would not become quite enthusiastic when his son was captain of the football team. While we certainly would not minimize the devotion which Mr. Webb apparently held for his wife and children, we only point out that his actions were but the actions of an average "good" husband and father.

After careful consideration, we have reached the conclusion that the verdicts are excessive. To demonstrate this statement, we point out that this award of $165,000 could be safely invested in any number of securities that would pay 5% interest. 5% interest on this amount of money would enable appellees to receive an annual income of $8,250, which would be $4,250 per year more than the family had received at any time from the deceased ($4,000 was the highest figure given by Mrs. Webb), — *and the principal would remain intact.* We think it obvious that such a result clearly shows the verdict to have been excessive. We first consider the award for the benefit of the boys. The court instructed the jury that, as regarded the minors, "* * * your verdict should be for such sum of money as you believe from the evidence would be just and fair compensation for all the pecuniary damages suffered by each of said minors during their respective minorities by reason of

the death of the said William Warren Webb, and in arriving at this sum you may take into consideration such care, support and sustenance and such advantages and benefits in the way of training and education, both moral and intellectual, if any, as you may believe from the evidence that they would each have received from or through their father if his death had not occurred." It will be noted that "mental anguish" is not included. The proof reflected that Frederick is studying law, and will be in school for total of seven years. His mother testified that the first year cost $1,200; she estimated the second year would be $1,500, and the balance would be somewhat higher. "Of course, as he advances and enters law school, his expenses are going to be higher, more expensive." Frederick had already left home, and the value of the father's moral and intellectual training would not be so great as would that of a father to a child of tender years, and living at home. In fact, both boys' habits, outlook, and moral code had, in the main, been molded and established before the death of Mr. Webb. Frederick had already decided to become a lawyer, and the matter of the future had apparently been discussed with Garland. Garland lacked nearly four years attaining his majority at the time his father was killed. The evidence reflected that Garland's expenses at Northeast College were $700 per year, and his mother testified that, from her investigation, the cost at Loyola would be around $3,000 per year. Appellant argues that the amount of recovery to the boys is limited to damages suffered during their respective minorities, and the court so instructed the jury. To these instructions, appellee objected and noted her exceptions. We do not agree that the recovery is limited to damages suffered during minority.

In *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Gilbert, Administrator,* 206 Ark. 683, 178 S. W. 2d 73, this Court said:

"Recovery for benefit of children *ordinarily*[5] should be limited to the present worth of such sum as would be contributed by the parent prior to their majority."

[5] Emphasis supplied.

In *Kansas City Southern Railway Company* v. *Frost,* 93 Ark. 183, 124 S. W. 748, this Court said:

"The right of the children to recover beyond minority depends upon evidence. Their damages are the pecuniary loss suffered by them, which is 'the probable aggregate amount of his contributions to them, reduced to present value.' *Kansas City Southern Ry. Co.* v. *Henrie,* 87 Ark. 454. It is probable the contributions of a father to the support of a child after he reaches his majority may cease altogether, or be less. That, of course, will depend upon the ability of the child to take care of himself and his success in life. Parental affection for the child will not, probably, cease after minority, and the father may still continue to contribute to the support of the child. That is a question for the jury to decide according to the evidence of the assurance the parental affection may give of aid and support to the child after minority."

See also *Jenkins, Administrator* v. *Midland Valley Railroad Company,* 134 Ark. 1, 203 S. W. 1.

The rule varies from state to state in permitting recovery for pecuniary loss, arising from the wrongful death of a parent, by a child who has reached his or her majority. Of course, damages for pecuniary loss are confined to the period of minority, where the statute so provides. There is nothing in our statute, § 27-909 (Act 255 of 1957), which so limits recovery. We are of the opinion, which is in line with the previous decisions heretofore cited, that the right to recover damages for pecuniary loss beyond the minority of the beneficiaries, depends upon the circumstances. Here, the proof is clear, that in the natural course of events, the deceased would have contributed, to the best of his ability, to the education of the two boys, and we accordingly take the view that even though they would attain their majority before finishing college, still the boys suffered a pecuniary loss (beyond the age of their minority) for which damages will lie. The question is therefore what amount will adequately compensate the sons for the loss suffered.

Under prior decisions of this Court, the awards to all appellees must be reduced. The case bearing the nearest resemblance to the instant litigation from a factual standpoint is *Southern National Insurance Co.* v. *Williams,* 224 Ark. 938, 277 S. W. 2d 487. This opinion was delivered on April 4, 1955. There, Ruben C. Knabe was killed in an automobile collision. At the time of his death, Knabe was 35 years of age, had a life expectancy of 33.44 years, and was earning about $8,000 a year, of which "well over half" was contributed to the support of his family. Knabe had three small children. The jury awarded $5,000 for the benefit of the estate and $95,000 for the benefit of the decedent's widow and children. On appeal, this Court said:

"Since his conscious pain was compensated by the $5,000 verdict, the question is whether $95,000 is too liberal an allowance for the pecuniary loss sustained by his family. Precedents are of scant value in a case like this, but it may be observed that this verdict exceeds any ever upheld by this court. In *Mo. Pac. R. Co.* v. *Bushey,* 180 Ark. 19, 20 S. W. 2d 614, the Court approved a verdict of $48,500 for the death of a father who was contributing $3,260 annually to his family, but the award included an undetermined amount for intense suffering. And in *Southwestern Bell Tel. Co.* v. *Balesh,* 189 Ark. 1085, 76 S. W. 2d 291, we sustained a $50,000 award for the death of one who was contributing $7,000 a year to his wife and children. At the other extreme, comparatively small verdicts have not infrequently been reduced; many of the cases were reviewed in *Mo.-Pac. Transportation Co.* v. *Simon,* 199 Ark. 289, 135 S. W. 2d 336. After considering this case in the light of its predecessors, and taking into account the increased cost of living, we are of the opinion that the sum of $75,000 is the most liberal allowance that can be justified by the record." It will be noted that Knabe had a greater life expectancy, contributed as much to the family support, *and had three small children.*

The testimony relative to Frederick's education denotes $1,200 spent for the first year, $1,500 to be spent

for the second, with no figure being given for the five years' balance. If we average Frederick's legal education at $1,700 per year for 6.8 years, we find that the total expenditure for his education is $11,560.00, the present value of which is an approximate $9,592.00.[6] As to Garland,[7] the evidence reflects that the cost of his education will average $1,685 per annum ($700 for four years, and $3,000 for three years), or a total of $11,795.00, the present value of which is approximately $9,749.00. As pointed out, each boy had already received, in large measure, the benefits to be derived from the moral and intellectual training contributed by the father. Since the pecuniary loss is so nearly the same, we are of the opinion that a total award to each son in the amount of $12,500 would be adequate. This means each will receive between $2,500 and $3,000 for loss of instruction, moral and intellectual training, and this award, we feel, must be limited to the period of minority.

Turning now to the award for Mrs. Webb: She testified that the deceased had been contributing $4,000 per year for the support of the family. It is obvious, when considering that the college education for the boys would average approximately $3,385 per year, that Mrs. Webb, for the next seven years, would only have received $615 per year of the total amount. Following that period, we will assume that she would have received the entire $4,000. In such event, for the period of 23.08 years (Mr. Webb's life expectancy), appellee would have received $69,220.00, the present value of which is $40,527.24. However, the proof reflected that a new plan of compensation was to go into effect January 1, 1958, under which, according to Sam Orchard, the manager of the Louisiana Paper Company, Mr. Webb would have earned from $7,000 to $10,000 per year. Splitting the amount, thus taking a figure of $8,500, and after

[6] This figure, as well as all figures hereafter given, is arrived at on the basis of 5% interest.

[7] Of course, Garland will be in school one year after Frederick finishes, but this does not substantially affect the figures herein.

deducting income tax[8] and $1,000 for Mr. Webb's personal expenditures (clothing and other personal items), Mrs. Webb would have received $18,865.00 for seven years, and $91,977.60 for the balance of 16.08 years, or a total of $110,842.60. The present value of this sum is approximately $64,896.72. This means that $45,945.88 is the interest Mrs. Webb will receive over 23.08 years. On this amount, taking the lowest rate, Mrs. Webb would pay approximately $5,500 in income tax, the present value of which is $3,217.46. The figure is based on the premise that Mrs. Webb has no other source of income, but if she continues to work, earning at least the present amount, $4,300 per year, this tax would be great deal higher.

It would seem apparent from the compilations herein given, that under our prior holdings, a substantial reduction of the judgment is not only demanded, but is further entirely justified from the evidence in this case. It is sometimes most difficult to determine how a jury arrived at its verdict, particularly where an award of money is given. *It is apparent in the instant case that the jury took the figure of Mr. Webb's salary* ($5,000 *per year*), *and multiplied that salary by his life expectancy* (*an approximate 23 years*), *and reached the amount awarded,* $115,000. Of course, under the court's instructions, this manner of figuring was erroneous, for they were told that damages should be based "* * * on the present value of the amount that you find from a preponderance of the evidence deceased would have contributed to the support and well-being of his wife during his lifetime." Actual pecuniary loss can be fairly well figured in dollars and cents, being in the nature of a property loss, and of course, property values can be definitely established, but we are prone to state that determination of an award for mental anguish suffered, and loss of consortium, is somewhat in the nature of speculation. Who can say how much mental anguish is

[8] Mrs. Webb was self-employed; allowing Mr. Webb three dependents (self and two boys) for the entire period of the boys' college education, and then one dependent (himself) for the balance of the 16.08 years, his income tax for seven years would amount to approximately $1,420, and for the balance of 16.08 years, $1,780.

worth? Who really can ascertain how much the loss of a husband or wife has affected the remaining spouse? We daresay that no happily married husband or wife would sell that happiness for any amount of judgment that would be awarded. Unquestionably, the anguish and total loss of companionship will be felt far more in some cases than in others. There are individuals who really never completely reconcile themselves to the loss of a loved one, while, on the other hand, there are those who adjust themselves within a reasonable period of time, and are pretty well able to continue along in the usual pattern. Of course, the attitude of the deceased spouse toward the survivor would influence that feeling. Here, the uncontroverted proof shows that Mr. Webb's attitude toward Mrs. Webb during life was such as to bring to her extreme sorrow and grief upon his passing.

In most of our cases, the Court has simply stated that the sum awarded is excessive by a particular amount, and reduced the judgment accordingly. Here, we have endeavored to show by an analysis made in a logical and proper manner, the amount of award that would properly compensate appellee, and at the same time, give to appellants the justice to which they are entitled.

As previously stated, the present value of the amount of money Mrs. Webb could expect to draw for 23.08 years, if her husband had lived, is $64,896.72. Adding to this the present value of the income tax she would pay on the interest over the total period of time, we find that the total present value of future contributions will approach $68,000. Taking into consideration, in addition to pecuniary loss, mental anguish and loss of companionship and consortium, we are of the view that a total award to Mrs. Webb of $98,000 is proper in this case.

We therefore are of the opinion that the judgments in favor of Frederick and Garland should be reduced from $25,000 each to $12,500 each, and the judgment in favor of Mrs. Webb from $115,000 to $98,000.

The judgments are affirmed on the condition that remittiturs are entered as indicated within 17 calendar days; otherwise the judgments will be reversed and the cause remanded for a new trial.

McFaddin and Johnson, JJ., dissent.

Ed F. McFaddin, Associate Justice, dissenting. I dissent as to the remittitur. The jury awarded the widow $115,000.00 and awarded each of the two sons $25,000.00. The majority opinion says that these verdicts, totalling $165,000.00, are "the largest to come before this Court"; and then seeks to justify the reduction of the verdicts. Finally, the majority reduces Mrs. Webb's verdict from $115,000.00 to $98,000.00, and reduces the verdict of each of the boys from $25,000.00 to $12,500.00; thus saving the appellants $42,000.00 and reducing the total verdict from $165,000.00 to $123,000.00.

I commend the majority in attempting to explain why these reductions were made. Certainly, when a jury brings in a verdict and the Supreme Court decides to reduce it, the Supreme Court should explain how and why it is making the resolution[1], rather than merely contenting itself with picking a figure out of the air. But, even so, I cannot escape the feeling that in this case the majority is "second-guessing" the jury and really sitting as an appellate jury; and such is not the function of the Supreme Court.

At the outset, there is the matter of Mr. Webb's earning capacity. He had been earning $5,000.00 a year, using $1,000.00 for his own personal items, and contributing $4,000.00 a year to his family. Mr. Webb's employer testified that Webb was to receive a promotion and would receive from $7,000.00 to $10,000.00 per year beginning immediately. It is the duty of this Court to give the evidence its strongest probative force to sustain the jury verdict; and if we give the testimony of Mr. Webb's employer its strongest probative force, then Mr. Webb would receive $10,000.00 a year, would retain $1,000.00 a year for

[1] I dissented as to the remittitur in *Southern National Ins. Co.* v. *Williams*, 224 Ark. 938, 277 S. W. 2d 487.

himself, and would contribute $9,000.00 per year *in money* to his wife and family. It was stipulated that Mr. Webb had a life expectancy of 23.08 years. If Mr. Webb had lived out his expectancy and had contributed $9,000.00 a year to his family, he would have made a total contribution in excess of $207,000.00 to his wife and family.

Now, what is the *present cash value* of $9,000.00 a year for 23.08 years? Insurance tables tell us that for a person to receive $1.00 a year for 23 years would require $14.875 to be invested at 4% *compound interest*. In other words, if a person put up today $14.875 and invested it at *compound interest at* 4% (and that is more than banks are now paying)[2], the result would be a payment of $1.00 a year for 23 years. Since Mr. Webb would have paid $9,000.00 a year for 23 years, the present cash value of Mr. Webb's earnings is just a few dollars less than $134,000.00. So just on a cold dollars and cents basis, Mr. Webb had a present cash value to his wife and children of $134,000.00, and that is entirely ignoring the great intangible value of a "Dad" to the boys and a companion to the wife, and is ignoring also the long dreary years for this family without a father and a husband.

But back to the cold cash dollars and cents value of $134,000.00: how can the majority square that with the figure of $123,000.00 to which it is now reducing the verdict? And that $123,000.00 takes into consideration $30,000.00 that is allowed Mrs. Webb for mental anguish, because the majority uses this language in next to the last paragraph: " . . . . we find that the total present value of future contributions will approach $68,000. Taking into consideration, in addition to pecuniary loss, mental anguish and loss of companionship and consortium, we are of the view that a total award to Mrs. Webb of $98,000. is proper in this case." So, even by the majority opinion, this $30,000.00 (the difference between the $68,000.00 and the $98,000.00 in the quotation) for loss of companionship, and for consortium and mental anguish, should be added to

[2] The majority opinion mentions "5% interest"; but since neither savings banks nor Government bonds paid such interest rate *when the verdict was rendered,* I submit 4% interest is a more realistic figure in support of the verdict.

the $134,000.00 (the cold cash value of Mr. Webb, as previously explained); and the result is $164,000.00, which is just $1,000.00 less than the jury verdict. How can the majority "second-guess" a jury when it is clearly demonstrable that the verdict is within $1,000.00 of figures as above explained?

There is another thing about this majority opinion that alarms me; and that is the statement previously quoted: ".... we find that the total present value of future contributions will approach $68,000. Taking into consideration, in addition to pecuniary loss, mental anguish and loss of companionship and consortium, we are of the view that a total award to Mrs. Webb of $98,000 is proper in this case." The full significance of that statement is astounding: it clearly seems to imply that as a matter of law the *total of mental anguish damage, loss of companionship damage, and consortium damage,* cannot exceed $30,000.00 in this case; and if such is the rule of law in this case, then such is the rule in every other case. The Legislature has placed no such limitations on those elements of damage. As a matter of fact, a recent Act of the Legislature[3] allowed consortium damage and placed no such limits; and yet this Court, by the present majority opinion, is in effect placing a limit of $30,000.00 on the total damages for mental anguish, loss of companionship and consortium, that a wife can recover for the death of her husband. Our Constitution says that a person is entitled to a trial by jury in a case like this one; and we have held that a jury verdict will not be disturbed unless it is so grossly excessive as to shock the conscience. It shocks my conscience to see the quoted statement in the majority opinion.

Now, as to the boys: who can measure the damage that these two young boys have sustained in the loss of their father at the very trying years when boys need a father most? How can the majority of this Court say that $12,500.00 is the limit for each boy, when fathers have for years contributed to sons up to half of the estate of the father? The story of the Prodigal Son in Holy Writ is one such example.

[3] See Act No. 255 of 1957, as contained in § 27-909 Ark. Stats.

Finally, I revert to the statement in the majority opinion first quoted herein, that these verdicts totalling $165,000.00 are "the largest to come before this Court". That is really, I think, the reason the reductions are being made. Present day verdicts should not be tested by the amounts allowed in the "horse-and-buggy" days since, now, the value of the dollar has depreciated. Courts in other judisdictions[4] sustain large verdicts. The test is whether the evidence justifies the amounts awarded; and I have undertaken to show that the evidence in this case does justify the verdicts rendered. Therefore, I dissent as to the remittitur: and Justice JOHNSON joins in this dissent.

[4] For a few recent cases allowing judgments in death cases, such as this one, see: *Devito* v. *United Airlines*, 98 Fed. Supp. 88, wherein the amount was $160,000.00; *Byrne* v. *Penn. R.R.Co.*, 169 Fed. Supp. 655, wherein the amount was $250,000.00; *O'Toole* v. *United States*, 242 Fed. 2d 308 3rd Circuit, whtrein the amount was $400,000.00; *M.S.F.&G. Co.* v. *Hotkins*, 170 N.Y.S. 2d 441, wherein the amount was $200,000.00; *Tampa Drug Co.* v. *Wait* (Fla.), 103 So. 2d 603, wherein the amount was $160,000.00; *Pennell* v. *B.&O.R.R.* (Ill.), 142 N. E. 2d 497, wherein the amount was $150,000.00; *Buck* v. *Hill* (Calif.), 263 Pac. 2d 643, wherein the amount was $150,000.00; and *Gardner* v. *IIII Corp.*, 135 N. E. 2d 55, wherein the amount was $150,000.00.

MYHAND *v.* ERWIN, COUNTY JUDGE.

5-2052 330 S. W. 2d 68

Opinion delivered December 21, 1959.

S. Hubert Mayes, Jr., for appellant.

Mehaffy, Smith & Williams, Hershel H. Friday, Jr. and *James E. Westbrook, E. W. Brockman, Jr.*, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves a construction of Amendment No. 49,[1] adopted by

[1] The amendment, in full, is as follows:

"SECTION 1. Any city of the first or second class, any incorporated town, and any county, may issue, by and with the consent of the majority of the qualified electors of said municipality or county voting on the question at an election held for the purpose, bonds in sums approved by such majority at such election for the purpose of securing and developing industry within or near the said municipality holding the election, or within the county holding the election.

SECTION 2. Such bonds shall bear interest at a rate not to exceed six per centum (6%) per annum and shall be sold only at public sale after twenty (20) days advertisement in a newspaper having a *bona fide* circulation in the municipality or county issuing such bonds; provided, however, that the said municipality or county may exchange such bonds for bonds of like amount, rate of interest, and length of issue.

SECTION 3. To provide for the payment of such bonds, principal and interest, as they mature, the municipality or county may levy a spe-

the people at the general election of November 4, 1958. The amendment provides for the issuance of bonds by cities, incorporated towns, and counties, for the purpose of securing and developing industry "within or near the said municipality holding the election, or within the county holding the election." Pursuant to the provisions of said amendment, appellee, as judge of the Desha county court, and while the court was duly and legally in ses-

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cial tax, payable annually, not to exceed (5) mills on the dollar, in addition to the legal rate permitted on the real and personal taxable property therein; provided, however, the municipality or county may, from time to time, suspend the collection of such annual levy when not required for the payment of its bonds; and provided further, however, that in no event shall the real and personal taxable property in any city or town be subject to a special tax in excess of five (5) mills for bonds issued hereunder.

SECTION 4. Such bonds shall be serial, maturing annually after three years from date of issue, and shall be paid as they mature, and no such bonds shall be issued for a period longer than thirty (30) years.

SECTION 5. The governing body of the municipality or the County Court of the county shall exercise jurisdiction over the sale or exchange of any such bonds voted by the electors at an election held for that purpose and shall expend economically the funds so provided.

SECTION 6. The election on the issuance of such bonds shall be held at such time as the governing body of the municipality may designate by ordinance, or as the County Judge of the county may designate by order, which ordinance or order shall state the sum total of the issue, the dates of maturities thereof and shall fix the date of election so that it shall not occur earlier than thirty (30) days after the passage of the said ordinance or the granting of said order. The said election shall be held and conducted, the vote thereof canvassed, and the result thereof declared under the law and in the manner now or hereafter provided for municipal elections when the election is held by a municipality, and in the manner now or hereafter provided for county elections when the election is held by a county, so far as the same may be applicable, except as herein otherwise provided. Notice of the election shall be given by the Mayor of the municipality or by the County Judge of the county by advertisement weekly for at least four times in some newspaper having a *bona fide* circulation in the said municipality or county, with the last publication to be not less than ten (10) days prior to the date of said election. Only qualified electors of the said municipality or county shall have a right to vote at the said election; provided, however, that when an election is held by the county, if any city or town within such county has previously voted a levy of five mills under the provisions of this amendment which levy shall not have expired at the time of the election held by the county, then the electors of such city or town shall not be eligible to vote in the county election. The result of the said election shall be proclaimed by the Mayor of the municipality or by the County Judge of the county, and the result as proclaimed shall be conclusive, unless attacked in the courts within thirty (30) days after the date of such proclamation.

SECTION 7. All provisions of the Constitution, or amendments thereto, in conflict herewith, are, to the extent of such conflict, hereby repealed."

sion, ordered a special election to vote on the question of issuing bonds in the amount of $225,000, following which, the voters of the county overwhelmingly approved the bond issue. The purpose of the bond issue is to provide funds for the construction of a hard surfaced, all-weather, road, necessary for the servicing of a proposed industrial site for Potlatch Forests, Inc., in Desha County. The president of the company advised that Potlatch would locate the industrial plant in Desha County only if the proposed road was constructed. Appellant, J. K. Myhand, proceeding as a property owner and taxpayer, filed a complaint against appellee in the chancery court, alleging that a tax will be levied, bonds will be issued and construction undertaken, and that the tax will be paid by appellant and other property owners and tax payers of the county. Myhand sought to enjoin appellee from taking further steps with reference to the construction of the road, and asked a declaratory judgment holding the proposed action of appellee to be contrary to the Constitution of the State of Arkansas. On September 14, 1959, appellee filed his demurrer,[2] and on October 6, 1959, after appellant declined to plead further, the chancery court entered its decree dismissing the complaint. From such decree comes this appeal. For reversal, appellant relies on the following points:

I.

"The proposed issuance of bonds by appellee is not authorized by Amendment No. 49 to the Constitution of Arkansas, but is merely an attempt to pave a county road for the use of all members of the traveling public.

II.

"The proposed bond issue is not on a 'credit-lending' basis and thus is not authorized by Amendment No. 49.

[2] Also, on September 30, 1959, J. F. Wallace, a citizen and property owner of Desha County, filed an intervention on behalf of appellee, following which appellent amended his complaint, incorporating the allegations set out in the intervention, and prayed for the same relief as originally requested.

III.

"The only enabling legislation under Amendment 49 is Act 121 of 1959, and since the proposed bonds are not being issued under said Act, they are unauthorized and illegal.

IV.

"Since the proposed bonds are not authorized by Amendment No. 49, their issuance would be contrary to and in violation of Amendment No. 10 and Amendment No. 13 to the Arkansas Constitution."

We proceed to a discussion of each point in the order listed.

I.

Appellant points out that Amendment No. 49 was not designed to supplement our present comprehensive plan of providing county road funds, and that the intent of the people in adopting the amendment was to provide a means of financing direct aid to industries, such as the purchase of industrial sites, and the construction of appropriate industrial facilities on such locations. It is also pointed out that benefits from the proposed road will not be confined to Potlatch Forests, Inc., but will likewise benefit members of the traveling public; that to permit this road to be financed under provisions of the amendment would have the effect of permitting financing for any county road so long as the road is used by any industry located in the county. Appellant suggests that the amendment might well become a catch-all for any kind of county or municipal improvement.

We do not agree with appellant's contention. It is true that some members of the public may use the road, but the fact that benefits cannot be isolated, is no reason to preclude such benefits for those who properly come within the scope of the amendment, as envisioned by the people in adopting same. This Court has been liberal in its construction of constitutional amendments, so as to carry out the obvious purpose of the people in adopting the amendments. For instance, in interpret-

ing that portion of Amendment No. 13, which provides for the issuance of bonds by a municipality "for the purchase, development and improvement of public parks and flying fields located either within or without the corporate limits of such municipality * * *", this Court held that the "development and improvement" included implied authority to employ reasonable means to make the field available to the public. See *Tunnah* v. *Moyer, Mayor,* 202 Ark. 821, 152 S. W. 2d 1007. In its Opinion the Court said:

"Express authority in Amendment No. 13 for cities to acquire 'flying fields' beyond the corporate limits carries with it implied authority to employ reasonable means in making the field available to the public, and this means roads. It is true there are streets by which the airport can be reached, but in view of the development of aviation, enlargement of local facilities, and of the fact that the airport forms a link in transcontinental flying, we do not agree with appellant that authority to consummate the questioned transaction is lacking; * * *."

In *Todd* v. *McCloy,* 196 Ark. 832, 120 S. W. 2d 160, which also involved a construction of Amendment No. 13 relating to the authorization to cities "for the development and improvement of public parks", this Court held that this language was broad enough to include construction of a stadium, where park visitors might seat themselves to witness athletic entertainment; *i.e.,* the stadium was held to be "an improvement" within the meaning of the amendment. Actually, even that liberal a construction (if it be so considered) is unnecessary to give validity to the proposal now before us. Potlatch Forests, Inc., selected a suitable site in Desha County on which to construct and operate a paper mill. The facility, incidentally, will cost the corporation approximately $35,000,000. The site of this proposed plant is located in an isolated area of the county, and at the outset, it is noted that construction of the plant will require transportation of hundreds of laborers as well as materials to the plant site. Of course, following com-

pletion, the very nature of the industry obviously requires an all-weather road the year round, as necessarily, wood and wood products will be systematically and continuously hauled to and from the plant. The proposed road is an integral and necessary component of the industry, and it would be difficult, if not impossible, to operate without it. Accordingly, we find that the primary and principal purpose of constructing the road is to secure the Potlatch industry for Desha County. We further hold that this road has a direct relation to the normal and daily activities of Potlatch. It follows that its construction is permitted and authorized by the provisions of Section 1, Amendment No. 49.

II.

Appellant contends that sections two and three are indicative of an intent by the people that bonds be issued only in those situations where funds are available from lease rentals or other sources in amounts sufficient to service the bonds. Of course, communities which are seeking industry, frequently construct a building and then enter into a lease agreement with the industry providing for rental in an amount contemplated as sufficient to retire the bonds (which were issued to finance the construction of the facility). This is not true in the instant case, as Potlatch is constructing, at its own cost, the entire plant. We do not agree with appellant's contention. Section 3 provides that the county "may, from time to time, suspend the collection of such annual levy when not required for the payment of its bonds." The mere fact that provision is made for the collection of taxes obviously indicates an intention that bonds be issued under the amendment where no funds from other sources are available, or are insufficient to service the bonds; the quoted provision, allowing suspension of the tax, was intended to give the amendment flexibility, and to take care of situations where sufficient funds might become available from lease rentals or other sources which could be applied on the payment of principal and interest. More pertinent in construing the intent of the

people in adopting the amendment, is (in providing for suspension of the tax) the use of the word "may" rather than "shall." This clearly indicates there was no intention of confining Amendment No. 49 to credit-lending situations, and, of course, the amendment itself contains no such limitation. As a matter of fact, even in situations where it is contemplated that lease rentals may be available to service the bonds, many expenses frequently arise that cannot be recouped from this rent. Certain expenses are necessary in contacting industries, and the industry might well insist on having its moving expenses paid before agreeing to relocate. We are persuaded that in adopting Amendment No. 49, the citizens of Arkansas had no intent of limiting the scope of the amendment to "credit-lending" situations, but to the contrary, approved the amendment in accordance with the natural and literal meaning of the language employed.

III.

The legislature of 1959 enacted Act 121, title of which is "AN ACT to Facilitate the Issuance of Municipal and County Bonds Under the Provisions of Amendment No. 49 to the Constitution of This State When Such Bonds Are to be Exchanged for the First Lien Serial Coupon Bonds of Local Industrial Development Corporations; and for Other Purposes." Admittedly, the proposed bonds here under discussion do not come within the provisions of Act 121, and unless Amendment No. 49 is self-executing, bonds cannot be issued except under the terms of that legislation. Let it first be stated that we do not consider the legislature intended that Act 121 should set out the exclusive method of issuing bonds, and this is plainly denoted by the use of the word "when" appearing in the title of the act. Nor do we consider that the passage of this act evidenced a belief on the part of the legislature that Amendment No. 49 was not self-executing, for legislation may be enacted in implementation of constitutional provisions so long as such legislation is not inconsistent or repugnant to the constitutional amendment. At any

rate, we think the amendment is clearly self-executing. It is true that the amendment itself does not so provide, but this is immaterial. As stated in *Corpus Juris Secundum,* Vol. 16, § 48, page 146:

"Whether or not a provision is self-executing depends on whether the language is addressed to the courts or to the legislature, — whether it indicates that it is intended as a present enactment, complete in itself as definitive legislation, or contemplates subsequent legislation to carry it into effect; and this requires a consideration both of the language used and of the intrinsic nature of the provision itself. The question is always one of intention and, in order to determine the intent, the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances."

According to American Jurisprudence, Vol. 11, page 689, there is now a presumption that all provisions of the constitution are self-executing. In our own case of *Cumnock* v. *Little Rock,* 168 Ark. 777, 271 S. W. 466, we held Amendment 10[3] to be self-executing, though the amendment itself did not so provide. Chief Justice McCulloch, in rendering the Opinion for the Court, stated:

"In the case of *Griffin* v. *Rhoton,* 85 Ark. 89, we quoted from Judge Cooley the following test: 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right

[3] The Opinion refers to this amendment as Amendment 11. Several amendments have been re-numbered, and this re-numbering is discussed by John Strahorn, Jr., Associate Professor, School of Law, in an article appearing in the University of Arkansas Law School bulletin of May, 1930. From the article: "One of the reasons for this confusion is found in the Supreme Court's recent reversal of its rule on the question of the majority necessary to adopt amendments under the first *Initiative and Referendum* plan of 1910. *Brickhouse* v. *Hill,* 1925, 167 Ark. 513, 268 S. W. 865; *Combs* v. *Gray,* 1926, 170 Ark. 956, 281 S. W. 918. These cases validated several amendments which had been voted on and declared rejected under the then existing rule. New numbers had to be assigned to them several years after their adoption. Still others had been declared adopted and numbered, only to be invalidated by the courts. Others have been adopted numbered, and then repealed. Thus the confusion is explicable if not understandable. Perhaps the greatest reason for the confusion lies in the fact that every publisher who has had occasion to list the amendments in recent years has assigned his own set of numbers to the amendments, with striking results."

given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.' "

The Opinion further quoted and adopted the language of a Minnesota case[4] as follows:

" 'If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing.' "

Applying the tests to the case before us, it is first noted that there is no language used in Amendment No. 49 indicating that the subject is referred to the legislature for action. In the next place, the substance and extent of the rights conferred by the amendment are clearly set forth in the amendment itself. Section 2 sets out the maximum interest rate, and provides that the bonds shall be sold only at public sale after advertising for twenty days in a newspaper having a *bona fide* circulation in the county issuing such bonds. Section 3 provides for the levy of the tax, not to exceed five mills on the dollar, and *inter alia,* provides for the suspension of the annual levy. Section 4 provides that the bonds shall be serial, "maturing annually after three years from date of issue, and shall be paid as they mature, and no such bonds shall be issued for a period longer than thirty (30) years." Section 5 sets forth the body that is to exercise jurisdiction over the sale or exchange of bonds. Section 6 provides in detail the manner in which the election shall be held. We hold that Amendment No. 49 is self-executing, and accordingly, the proposed bond issue is not precluded by the passage of Act 121 of 1959.

[4] *Willis* v. *Mabon,* 48 Minn. 140.

IV.

Appellee admits that Amendments 10 and 13 are violated if the proposed bonds are not authorized by Amendment No. 49. On the other hand, appellant concedes that neither amendment has been violated if the bonds are authorized by Amendment No. 49. Since we have concluded, as herein pointed out, that the bond issue is authorized by the latter amendment, it becomes unnecessary to discuss this contention. We therefore conclude that the Desha Chancery Court properly dismissed appellant's complaint, and the decree of dismissal is herewith affirmed.

WADE *v.* THORNBROUGH, COMM. OF LABOR.

5-2001 330 S. W. 2d 100

Opinion delivered December 21, 1959.

J. Gayle Windsor, Jr., for appellant.

Luke Arnett, for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, Lillian Wade, brings this appeal from a judgment of the Pulaski County Circuit Court denying her claim for unemployment compensation under the provisions of our Employment Security Act, — Sections 81-1101—81-1122, Ark. Stats., 1947 (Cumulative Supplement). The circuit court reviewed and affirmed the action of the Arkansas Board of Review which had denied appellant's claim for benefits because she was disqualified under the provisions of Section 5 (e), of the Employment Security Act (Sec. 81-1106 (e) Ark. Stats.), for the reason that she voluntarily left her last employment to perform customary household duties. Appellees are the Commissioner of Labor, Administrator of the Employment Security Division, and the AMF Cycle Company, appellant's former employer. Material facts are not in dispute.

Appellant testified that she last worked for AMF Cycle Company on May 10, 1958 and that she quit work on that date "because my children had the measles and I couldn't get a leave of absence. I asked for a month's leave of absence but Mr. Railey, our personnel manager, said he couldn't get me a leave for that long. It was about a month and a half before all of them got over the measles. My husband was working and I couldn't get anybody to take care of them. Mr. Railey told me that as soon as I got to where I could work, to call him. I called him on September 22, 1958, and he said he didn't have anything to do now and he would let me know when he had work. I didn't call sooner because the children were out of school during the summer. * * * He said if I was sick, I could get leave, but for sick children or my husband, I couldn't get a leave."

Appellant says, "The Commissioner erred as a matter of law, in that he applied the wrong section of the statute in determining appellant's eligibility for unem-

ployment benefits. Instead of disqualifying the claimant under Sec. 81-1106 (e) of the Act, pertaining to female claimants who leave jobs to marry, perform customary household duties, follow their husbands, or because of pregnancy; appellant instead should have been held eligible for benefits under the provisions of Sec. 81-1106 (a), which exempts claimants from disqualification if they voluntarily leave their jobs because of an urgent personal emergency."

On the record before us, the facts being undisputed, a question of law is presented. Appellee says: "The appellant (Lillian Wade) makes only one contention for a reversal in this case in that the Commissioner erred as a matter of law in that he applied the wrong section of the statute in determining claimant's eligibility for unemployment benefits. Instead of disqualifying her under Sec. 81-1106 (e) of the Act pertaining to female claimants who leave work to perform customary house duties, * * * that appellant should have been held eligible for benefits under proviso of Sec. 81-1106 (a)."

Section 81-1106 (e) provides that an individual shall be disqualified for benefits — "5 (e) (1) If a female claimant voluntarily leaves her work to marry or perform customary household duties. Such disqualification shall continue until she has had 30 days of paid work subsequent to the date of her separation." Mrs. Wade earnestly contends that she did not quit her work to "perform customary household duties" within the meaning of this section, but that she quit because of a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification and that she is relying upon the provisions of Sec. 81-1106 (a) (cited as Section 5 (a)) the relevant portions being: "(An individual shall be disqualified for benefits:) '5 (a) If he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall be for eight weeks of unemployment . . . Provided . . . no individual shall be disqualified under this subsection if after making reasonable efforts to preserve his job rights

he left his last work *because of a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.'* " We have reached the conclusion that appellant is correct in her contention. We cannot agree with appellees' contention that when Mrs. Wade's five children contracted measles and that when she quit work to care for them, that it amounted to nothing more than one of the customary household duties imposed upon her, as a mother, to perform; rather, we think that she was confronted, in effect, with a personal emergency of such "compelling urgency that it would be contrary to good conscience to impose a disqualification" and therefore, she was justified in quitting her work on May 10, 1958 and was not disqualified for benefits under this section.

Finally, appellees contend that Mrs. Wade is barred from asserting any claim for the reason that she failed to file any during the time of the personal emergency. In this connection, appellees say: "* * * when the claim was filed, no personal emergency was claimed to exist or had existed for the past three months, and therefore, proviso of Sec. 81-1106 (a) was not involved, as no emergency existed and had not existed for three months. It is unquestioned in the record that during all the period of time between May 10 and September 23 claimant was performing household duties, and that Sec. 81-1106 (e) should be invoked at least after about June 25 and she continued to remain at home to perform household duties at a time no personal emergency existed." We do not agree with this contention for the reason that we find no requirement, expressed or implied, in section 5 (e) above that a claim must be filed during the emergency nor at any particular time thereafter. The reason for Mrs. Wade's separation from her work and not the speed of filing her claim determines the actual eligibility of a claimant.

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

BUTKIEWICZ *v.* BREDLOW, ADMX.

5-1992 330 S. W. 2d 588

Opinion delivered December 21, 1959.

[Rehearing denied January 25, 1960]

[redacted]

Owens, McHaney, Lofton & McHaney, G. Thomas Eisele, for appellant.

Mehaffy, Smith & Williams, William H. Bowen, William L. Terry, for appellee.

J. SEABORN HOLT, Associate Justice. This litigation involves the ownership of a small herd of cattle, appellants asserting that the cattle were given to them and belonged to them, and appellee denying their claim.

Appellee, Gwendolyn Armstrong Bredlow, is the administratrix of the estate of Reuben Bredlow who died in November 1956. Bredlow left no children and was survived by his wife, Gwendolyn, and his mother, Gertrude Bredlow. He left an estate valued at more than $300,000.00. Appellant, Edward J. Butkiewicz, is the husband of appellant, Annette Butkiewicz, and she was the niece of the deceased, Reuben Bredlow, and is the daughter of Lyde Campbell.

As we read this record, it appears to us that the primary and decisive issue to be determined is whether the cattle involved were given by Reuben, during his lifetime, to the appellants. Thus a question of fact is presented and we have concluded, on trial *de novo* here, that the preponderance of the evidence presented shows that these cattle were given outright to appellants as they claim; that Reuben Bredlow's estate has no interest in them whatever and that the trial court erred in holding otherwise.

Dan Sparkman, a witness for appellant, testified that he had known Reuben Bredlow since 1933, had worked for him from 1940 until 1955 and stayed on his place until after Bredlow's death; that he was with Reuben a lot — almost daily — and was with him practically every time he went hunting or fishing which he loved. He went with Reuben to Florida in 1955 and 1956. Reuben talked to him on these trips about the anticipated purchase of cattle from Lyde Campbell and said he was buying the cattle and giving them to Ed and Annette in appreciation for their taking care of his mother to whom he was very much devoted; that he told him this before and after he bought the cattle.

Reuben's own mother, Mrs. Gertrude Bredlow, testified, in effect, that on the day Reuben purchased the cattle from Lyde Campbell he told her of the transaction and also that he had turned them over to Ed. "Q. He referred to them as Ed's cattle? A. Yes, he never — well, he never claimed the cattle at all because from the very start he had told me that he had bought the cattle and turned them over to Ed. Q. Your son, Reuben, told you that? A. Yes. Q. Is there any doubt in your mind that your son gave the cattle to Ed Butkiewicz? A. Not the least doubt."

Witness Lyde Campbell testified that he had entered into an agreement to lease to a Mr. Lynn the 160 acre Anglin tract for a five year term and also sell to him (Lynn) the 41 head of cattle in question for $3,185.00 but that Reuben told him he had arranged with Ed and Annette for them to move down to the farm and for his mother to live with them; that cancellation of the lease was accomplished and that Reuben told him (Lyde) that he would take over the purchase of the cattle and that he was buying them for Ed. He further testified that at the time the interest of Gertrude Bredlow and Phyllis Grant in the 160 acre tract was conveyed to appellant, Annette.

A summation of evidence in this case is to the following effect: Reuben's primary concern was the welfare and happiness of his mother. His wife was addict-

ed to drink, his mother was a teetotaler and was not happy in Reuben's home. Reuben wrote appellants, then living in the East, and requested their return to Arkansas. Appellant, Annette, was his favorite niece. Appellants moved back to Arkansas in August of 1949 and at that time Reuben's mother was staying with her daughter, Mrs. Lyde Campbell, at Prairie Grove, Arkansas. Appellants went to Prairie Grove and brought Reuben's mother back with them and they stayed with Reuben and appellee, Gwendolyn (his wife), for about three months when they moved to a 160 acre farm (the Anglin place) which was owned by Reuben. They then moved into a frame house on the 160 acre tract and Reuben's mother stayed with them there until January 1952. From that time until March 1953, Reuben's mother spent the weekends with Reuben and the weekdays with appellants, Ed and Annette. In March 1953 Annette's mother and father (the Campbells) moved down from Prairie Grove onto the 160 acre Anglin place and Reuben's mother immediately moved in with the Campbells and on July 27, 1953, Reuben deeded this tract of land to his mother and his sister (Mrs. Campbell) for their lives and during the life of the survivor, with the remainder to Mrs. Campbell's children, Annette (Appellant) and Phyllis Grant. Reuben's mother remained with the Campbells for the next year and a half, until October 1954 when Mrs. Campbell suffered a severe burn and was moved into town where Annette cared for her until her death in April 1955.

From October 1954 until the death of her daughter in April 1955, Reuben's mother stayed with him part of the time and with Kate Bredlow part of the time. She visited her half brother in Marked Tree for a month and beginning in May 1955, she spent the weekdays with appellants, who had now moved to North Little Rock, and the weekends with Reuben. This arrangement was not satisfactory to Reuben. As indicated, when Mrs. Campbell died, title to the Anglin place was in Annette and her sister, Phyllis Grant, subject to the life estate of Mrs. Gertrude Bredlow. Ed and Annette wanted to live on the 160 acre farm but not in the old frame

house. They wanted to build a new house, however, to do so would force them to borrow money and mortgage the land but the title, as indicated, was not in appellants. To solve this dilemma, Reuben arranged for and had title to the 160 acre Anglin farm transferred to Annette. The 41 head of cattle was purchased from Lyde Campbell and turned over to Ed and left on the place in his possession. The deed to the property from Gertrude Bredlow and Phyllis Grant was executed to Annette October 26, 1955 and thereafter appellants procured a loan of $10,000.00 (January 1956) with which they proceeded to build a spacious and modern new home. During its construction, Reuben's mother spent practically every day with them and, in fact, was the first to move in — ahead of appellants by two days. It appears that she lived happily with them in this home until her death on July 4, 1958.

The evidence further shows that Ed and Annette did all the work required to care for the herd of cattle, provided feed and supplies needed and that Reuben knew this. It is undisputed that Ed started selling the cattle almost from the beginning when he could get a good price and kept the proceeds from the sales. He butchered for his own use some of the cattle with a value of $200.00 without accounting to Reuben or his estate and that eight or more cattle died while in appellant's custody and they sold the remaining cattle December 30, 1957 at a price of $3,293.00 at which time the herd had grown to 61 head. It appears to us that this is strong evidence that Reuben intended to give the cattle outright to appellants.

As indicated, without attempting to set out the testimony of all the witnesses, when the evidence is weighed and reconciled, we think the great preponderance thereof shows that it was the clear intent of Reuben Bredlow to give the cattle in question to appellants and that he did so.

Accordingly, the decree is reversed and since the cause appears to have been fully developed, it is dismissed.

COX *v.* WATSON.

5-2007 330 S. W. 2d 66

Opinion delivered December 21, 1959.

[redacted]

W. W. Shepherd, for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from a traffic mishap. The Circuit Court, trying the case without a jury, rendered judgment for plaintiff (appellee); and defendant (appellant) prosecutes this appeal. Four points are listed for reversal; but all these are resolved by our conclusions: that a question of fact was made as to negligence; and that the finding of the Circuit Court has the effect of a jury verdict. *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 322; *Hurst* v. *Flippin,* 228 Ark. 1151, 312 S. W. 2d 915.

The appellant was driving an automobile west on Markham Street in Little Rock and undertook to execute a left turn in order to go south on Arch Street. The appellee was driving an automobile east on Markham Street. After the appellant was in the intersection turning south, the right side of his car was struck by the front of appellee's car. Appellee claimed car damage in the sum of $216.10; and appellant claimed car damage of $150.00. The Trial Court found that appellant was guilty of 75% of the negligence causing the mishap and rendered judgment against appellant for $162.08. We view the facts in the light most favorable to the verdict, as is our rule. *Harrison* v. *Rosenweig,*

185 Ark. 281, 47 S. W. 2d 2; *Potashnick* v. *Archer,* 207 Ark. 220, 179 S. W. 2d 696; and *Rogers* v. *Lawrence,* 227 Ark. 117, 296 S. W. 2d 899.

It was shown that the mishap occurred at about 6:15 P. M. on October 4, 1958, and that both vehicles had the lights burning. Officer King of the Little Rock Police Department testified that he arrived at the scene a few minutes after the collision and before either vehicle had been moved. Officer King testified:

". . . Mr. Watson's car had struck Mr. Cox's car in the side. Watson was traveling east on Markham Street and Cox was traveling west. Watson had not changed his direction. Cox was making a left turn. The evidence points to Mr. Cox as making an illegal left turn . . . Mr. Watson's vehicle was four feet west of the east curb line and four feet north of the south curb line. That is the point of impact." The Cox vehicle "was 36 feet south of the north curb line and 32 feet east of the west curb line." The Watson car "had 27 feet of skid marks . . .

"Q. In what position were the cars, do you recall, at the time when you arrived at the scene?

"A. Here is a diagram of the cars.

"Q. They were still in the same position, or had they been moved.

"A. They had not been moved . . .

"Q. Do you recall any statement that was made by either one of the parties in the presence of the other?

"A. No, sir. I don't recall any statement . . .

"Q. You say Mr. Watson's car showed 27 feet of skid marks?

"A. Yes, sir.

"Q. Did they commence before he got into the intersection or after?

"A. I believe they would have started after he entered the intersection. That is a 36 foot street there

and four and 27 is thirty one. He was about five feet into the intersection.

"Q. Five feet after he entered the intersection?"

"A. Yes."

The above copied testimony would indicate that appellant cut the corner too sharply in front of the appellee. At all events, the foregoing testimony is sufficient to support the judgment rendered.

Affirmed.

TAYLOR *v.* SLAYTON.

5-2008 330 S. W. 2d 280

Opinion delivered December 21, 1959.

[Rehearing denied January 18, 1960]

F. C. Crow, for appellant.

W. A. Speer, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant, a retail grocer, to collect an open account in the sum of $260.94. The only question is whether the trial court, sitting without a jury, was correct in holding the claim barred by the three-year statute of limitations. Ark. Stats. 1947, § 37-206.

The material facts are not in dispute, most of them having been stipulated. The account became inactive on

February 8, 1951, when Slayton made his final purchase. The debt was concededly barred three years later, but in 1956 Slayton made two $5.00 payments upon the account, less than three years before this suit was filed. In addition to these agreed facts the plaintiff proved by the superintendent at Slayton's place of employment that in 1958 Slayton orally admitted the debt and promised to pay it in small monthly installments. Slayton did not testify and offered no proof of any kind.

The circuit court was in error in sustaining the defense of limitations. It has long been settled that a part payment upon an open account, made after the bar of the statute has fallen, is presumed to start the statute running anew, in the absence of circumstances indicating that the debtor did not thereby intend to recognize his obligation. *Gorman* v. *Pettus,* 72 Ark. 76, 77 S. W. 907. The cases were reviewed in *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089, where we pointed out that a part payment is *prima facie* sufficient to revive the barred debt, though this *prima facie* case may be rebutted. In the case at hand there is no circumstance whatever tending to rebut the presumption arising from the stipulated part payments, and hence the defense of limitations must fail.

The appellee relies primarily upon this provision in our limitation laws: "No verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on a simple contract, whereby to take any case out of the operation of this act, or to deprive the party of the benefits thereof." Ark. Stats., § 37-216. This section requires that a "verbal" acknowledgment — that is, one in the form of words—be in writing, but the statute has no application to a part payment and has never been so applied. The making of a payment is an act and as such is not subject to classification as written or oral. The cited statute deals with words, not acts.

Reversed and remanded for the entry of a judgment in favor of the appellant.

4954 330 S. W. 2d 281

Opinion delivered December 21, 1959.

[Rehearing denied January 18, 1960]

Norris Webb, Penix & Penix, for appellant.

Bruce Bennett, Atty. General by *Russell J. Wools,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. Appellant, Curtis Downs, being charged with the crime of robbery, was tried, convicted, and sentenced by the trial court to 18 years in the penitentiary. Upon appeal appellant does not seriously challenge the sufficiency of the evidence to support the conviction.

There is substantial evidence in the record to show that appellant entered the Farmers' State Bank of Jonesboro at Lake City on September 5, 1958, with a gun; that he forced one of the bank employees to place $14,-841.00 in bills belonging to the bank in his brief case; that he left the bank with the money in his car; that he was followed and later apprehended; that he was thereafter identified as the person who robbed the bank; that the amount and description of money mentioned above was found in a brief case in the car which he had been driving.

The able attorneys appointed by the trial court to represent appellant have set out in their brief several assignments of error on which they rely for a reversal. An examination of the motion for a new trial reveals that all assignments of error contained therein are covered by the Points set out in appellant's brief. We proceed now to a consideration of those points.

One. Responsive to appellant's plea of insanity, the trial court gave its Instruction No. 8 which reads as follows: "The defense of insanity cannot avail in this case unless it appears from a preponderance of the evidence, first, that at the time of the robbery the

defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, second, if he knew it, that he did not know that what he was doing was wrong; or, third, if he knew the nature and quality of the act, and knew that it was wrong, then he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease". It is appellant's contention that this court "should adopt a more realistic test for determining criminal insanity" and, in this connection, it was also contended that the trial court erred in refusing to give appellant's Requested Instruction No. 1. This Requested Instruction reads as follows: "You are instructed that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. Therefore, if you find from a preponderance of the evidence that even though the defendant, Curtis Downs, committed the acts of which he stands accused, if such acts were the product of, or were caused by, a mental disease or a mental defect of Curtis Downs, then you will find the defendant not guilty".

We have carefully considered several references which appellant makes to certain psychiatric authorities and to what they term the New Hampshire rule promulgated in the case of *Durham* v. *United States,* 214 F. 2d 862. Without attempting to pass on the merits of these citations and authorities we feel inclined and bound to follow the rule heretofore announced by our own Court. The instruction given by the trial court in this case, above copied, is set out almost verbatim in the case of *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, at Page 533 of the Arkansas Report. Immediately following the above mentioned instruction the Court, in the *Bell* case, stated: "The first and second of the above tests were approved by this court in *Casat* v. *State, supra,* (40 Ark. 511) and *Williams* v. *State, supra,* (50 Ark. 511, 9 S. W. 5) and the last test was approved in *Green* v. *State,* 64 Ark. 523-534 (43 S. W. 973), *Williams* v. *State, supra,*

Metropolitan Life Insurance Co. v. *Shane,* 98 Ark. 132 (135 S. W. 836). These tests are in accord with the great weight of modern authority". We do not find that the above decision has been reversed or modified.

Two. Appellant says: "The jury should have been instructed that if they acquitted the defendant on the grounds of insanity to so state in their verdict", calling our attention to Ark. Stats., Section 43-2135. This section reads: "If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground to state the fact in their verdict". No such instruction was given by the trial court in this case. If it be conceded that it was error for the trial court to fail to give such instruction it appears to us that it was a harmless error since the jury did not acquit appellant. Moreover, we find that no proper objection and exception was saved. Such being the case there is nothing for this court to review on appeal on this particular point. See: *Hicks* v. *State,* 225 Ark. 916, 287 S. W. 2d 12; *Ford* v. *State,* 222 Ark. 16, 257 S. W. 2d 30; and *Napier* v. *State,* 220 Ark. 208, 247 S. W. 2d 203.

Three. Dr. E. I. Shaw, a psychiatric physician on the staff of the State Hospital at Little Rock, was a witness for the State and gave testimony relative to appellant's sanity as determined in the Hospital staff meetings. Upon being asked how the examination was made Dr. Shaw gave this answer: "We proceed with interviews with the patient and then you order any ancillary support you need, such as laboratory, X-rays e.e.g.'s, psychological and neurological examinations, and then you compile all your data, and then you present your case to the staff".

"Q. Does the whole staff vote on them and render an opinion?

Mr. Penix: I object.

A. Yes, sir.

Mr. Penix: I want to dictate my objection. 'It is a basic precept of American jurisprudence a defend-

ant has a right to confront any witness testifying against him. It is part of the Constitution of this State. It is the worst, rankest kind of hearsay'.

Court: He may testify as to the method of procedure. As to what any other particular member of the staff did, the objection is sustained''.

Later on Re-Direct Examination of Dr. Shaw the following occurred:

''Q. Then the defendant Downs was actually present at the staff meeting?

A. Yes, sir.

Q. At that staff meeting, how many doctors were present?

Mr. Penix: I object to that. The Constitution prohibits that.

Court: Overruled and exception noted to that particular question.

Q. How many doctors were present?

A. 14.

Q. Did all the doctors there have an opportunity to ask questions and interview this defendant Downs in the presence of all of the 14 doctors?

A. Yes, sir.

Mr. Penix: I object again to this.

Court: Overruled.

Mr. Penix: Exception.

Q. It was your separate diagnosis and the joint diagnosis he was without psychosis?

A. Yes, sir.

Q. If he had needed treatment, you would have asked for a 241 to have him committed, wouldn't you?

A. Yes, sir.

Mr. Penix: I object to leading and asking what the other doctors found, who are not present for cross-examination.

Court: Overruled.

Mr. Penix: Exception."

The essence of appellant's contention on this point appears to be that it was a flagrant violation of the hearsay rule and also a denial of his right to be "confronted with the witness against him" guaranteed under Article 2, Section 10 of the Arkansas Constitution and the U. S. Constitution, Amendment 6, to allow Dr. Shaw to testify with reference to the report compiled by himself and the other members of the Hospital staff. This point was discussed at length and decided against appellant's contention in the case of *Nail* v. *State,* decided by this Court November 2, 1959, 231 Ark. 70, 328 S. W. 2d 836. See also: *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37 and *Leggett* v. *State,* decided March 31, 1958, 228 Ark. 977, 311 S. W. 2d 521.

Article 2, Section 10, of our Constitution says that the accused shall enjoy the right to be confronted with the witnesses against him. We explained at length in the *Nail* case, *supra,* how and why that right is not impaired by Initiated Act 3 of 1936, Section 12, which allows a hospital report or staff report to be introduced in a sanity hearing, into evidence by the doctor who prepared said report. Since said Section 12 deals with such an important constitutional guarantee of a personal nature everyone, particularly this Court, should be on guard to see that this guarantee is protected. Likewise the rule against hearsay evidence is vitally important and should also be protected against inroads by piecemeal. The question can arise then, as it does in this case, as to what safeguards and limitations this Court should place around the introduction of a report which in fact reflects the view and findings of several people. As a general rule it appears fundamental that the witness by whom the report is introduced into evidence should be permitted to testify only to matters

within his own knowledge and not to what some member of the staff reported to him concerning the defendant's mental status. On the other hand, we are unable to see how testimony regarding the composition of the hospital board or the procedural methods of the staff, if such testimony is within the personal knowledge of the witness, violates either Article 2, Section 10 of the Constitution or the hearsay rule. This character of testimony is not "against" an accused. This was apparently the view expressed by the trial court and we think it was correct. Tested by this view we find no reversible error shown by the record set out above. If, as appellant contends here, the State makes improper references to such questioned testimony in its argument to the jury, that raises an entirely different matter which is within the control of the trial judge.

Four. Dr. Shaw, in response to a question, testified that appellant could distinguish between right and wrong. At another time the doctor stated that appellant was without psychosis and the court asked him if, in making his diagnosis, he was following the legal definition of insanity or insanity as defined by the Supreme Court of Arkansas. When the doctor answered in the affirmative, appellant objected on the ground that the doctor was being allowed to draw legal conclusions. Regardless of whether or not it was improper for the court to allow him to make the answer he did, no question is presented to this Court for our determination because the record fails to show that appellant obtained any ruling of the court and also failed to save any exceptions.

Five. It is here contended by the appellant that it was error for the trial court to permit the Prosecuting Attorney to make a final argument after the defense had waived its argument. The record shows that after the Prosecuting Attorney had finished his first argument the attorney for appellant stated that he waived any argument. After the court had indicated that it would permit the State to make another argument anyway, appellant objected and asked to be heard in Chambers.

After the conference appellant, without further objection, proceeded to make an argument before the jury. We have no record of what took place at the conference between the court and the attorneys and so must presume that appellant waived any objections which he first entertained to the procedure followed.

Six. It is further insisted by appellant that the court commited reversible error by making certain improper remarks and indulging in certain improper procedure in that it stated that the "irresistible impulse" rule was not applicable in Arkansas, in permitting the Prosecuting Attorney to ask numerous questions designed to show that appellant had a previous criminal record, and in interrupting his attorney while cross-examining Dr. Shaw. We have carefully examined these several contentions and find that they are too general and too indefinite to form the basis for finding reversible error. The record moreover fails to reveal proper objections and exceptions.

Seven. Appellant's final assignment of error is stated as follows: "The court erred in inviting the jury to let the court fix the punishment even before there was an indication the jury might disagree". The record, at Page 11, reveals that the court handed the jury three forms of verdict. One of these forms, which is the basis of appellant's objection here, reads as follows: "We, the jury, find the defendant, Curtis John Downs, guilty of the crime of robbery but are unable to agree on the punishment and leave the punishment to be fixed by the court". One of the verdict forms allowed the jury to find the defendant guilty and fix his punishment at ..... years in the penitentiary. The other form allowed the jury to find the defendant not guilty. The jury agreed to the form of verdict copied above. Arkansas Statutes Section 43-2306 reads as follows: "When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted or do not declare such punishment in their verdict, or if they assess a punishment not authorized by law, and in all cases of a judgment on confession, the court shall assess and

declare the punishment and render judgment accordingly". It is appellant's position that giving the form of verdict copied above amounted to an invitation to the jury to leave the amount of punishment to the court, thereby committing reversible error.

We fail to see how the statute has been violated in this case under the above facts. It appears, moreover, from our decision that the trial court in this instance followed not only the approved procedure but the only safe procedure. See: *Underwood* v. *State,* 205 Ark. 864 (at Page 874), 171 S. W. 2d 304, and *Knighten* v. *State,* 210 Ark. 248 (at Page 250), 195 S. W. 2d 47.

Finding no error the judgment of the trial court is affirmed.

JOHNSON and ROBINSON, JJ., dissent.

JIM JOHNSON, Associate Justice, dissenting. I dissent because the accused was denied his constitutional right to be confronted by the witnesses against him; in this case the doctors from the State Hospital.

This is the third of three decisions during the past few months holding that under Article 2, Section 10, of the Arkansas Constitution, it is not necessary that all the doctors who participated in the examination of the defendant be present at the trial for cross examination. The other two decisions are *Leggett* v. *State,* 228 Ark. 977, 311 S. W. 2d 521; and *Nail* v. *State,* 231 Ark. 70, 328 S. W. 2d 836.

Prior to these cases this Court had consistently held this lack of confrontation to be reversible error. Some of the cases holding it to be error are *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190; *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24; and *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173.

When a court decides to reverse its position 180 degrees, there should be sufficient reason for doing so. The majority opinion states this point was fully discussed in the *Nail* case, *supra,* and apparently defers thereto. The reasoning in the majority opinion in the *Nail* case seems to be one of logic and expediency. Quoting from that opinion:

"In the first place, only the defendant and his counsel know what defense will be relied on, and it may not be known until the day of the trial whether the defendant will plead insanity as a defense. Accordingly, it would seem most illogical, or unreasonable, to require all the doctors, who participated in any phase of the examination, to leave their varied duties and travel to some point in the state, perhaps a long distance away, solely on the possibility that the defendant might want to call them as witnesses."

Ark. Stats. 1947, § 43-1301, provides that if the defense of insanity is raised at the time of the trial, the trial judge *shall* postpone all other proceedings in the cause and commit the defendant to the State Hospital for observation. Numerically subsequent sections of the annotated statutes provide other safeguards against the problem envisioned by the *Nail* opinion.

The majority do not consider Dr. Shaw as having testified to anything done by any other doctor but only as to his personal recollections and observations. Dr. Shaw testified, under questioning by the prosecuting attorney, as to the different tests used to aid in deciding the question of sanity of this defendant. The number given and the names of these tests are very impressive and not all of them were given by Dr. Shaw. Since these were administered by different doctors, the defense should have had an opportunity to cross examine them as to the methods used. Under the reasoning used by the majority there is no error because Dr. Shaw told only what he observed, namely, that all the doctors concurred. Suppose I had been present at the consultation knowing nothing of these things. Could Dr. Shaw have not also said I concurred? That they all concurred and that this was within the personal knowledge of Dr. Shaw is not the point. The point is that they may not have known anything about what they were doing and this is the reason for the constitutional guarantee of confrontation which is actually only a guarantee that the witnesses will be subject to cross examination and under the influence of the sobering effect of the witness chair of the judiciary.

I agree that it is burdensome to require all the doctors participating in an examination to travel all over the state to testify.

I agree that it is inconvenient to the Court to have to stop the proceedings to send the defendant to the State Hospital if the defense pleads insanity on the day of the trial.

I agree that perhaps the moulders of our Constitution did not anticipate such a problem as the present one.

I also know that no law requires all the doctors at the State Hospital to participate in the examination and that they might, in order to circumvent my views, were they the majority views, just use one doctor on each examination and therefore not do as good a job as they are capable of doing.

All these things would be worthy of consideration if we were the legislative branch of government rather than the judicial.

Constituting, as we do, a Court of law, we should be bound by the express words of the constitution. Also, Ark. Stats. § 43-1302, shows that the legislature recognized the problem raised by the constitutional guarantee of confrontation:

"... Witnesses employed by the State Hospital shall be so summoned to appear as to require as little loss of time as possible from their other duties."

In this, and similar cases of late, the evidence has been heavy against the accused so one might ask what difference does it make whether we hold as we do, and one might answer as Justice Frank Smith did in *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748; "Twill be recorded for a precedent and many an error by the same example will rush into the State. It cannot be."

We are now feeling the adverse effects of the Uniform Post Conviction Procedure Act which has since been repealed. We should therefore move with more measured tread, lest the pendulum swing too far in the other direction.

For this and the other reasons heretofore set out, I respectfully dissent.

MODE *v.* STATE.

4955 330 S. W. 2d 88

Opinion delivered December 21, 1959.

Clay Brazil, Hardin, Barton, Hardin & Garner, for appellant.

Bruce Bennett, Atty. General by *Thorp Thomas,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Lee Mode, was charged with first degree murder. He appeals from a conviction of second degree murder.

One of the points argued by appellant is that the evidence is not sufficient to sustain the verdict. This point is not well taken. There was bad blood between Mode and the deceased, Russell. This grew out of Mode's alleged attentions to Mrs. Russell. It appears that on another occasion Russell had taken a pistol away from Mode. The State introduced direct and circumstantial evidence to the effect that Mode stepped from a doorway and shot Russell down. On the other hand, the defense introduced evidence to the effect that Russell made an attack on Mode and in the ensuing struggle Russell was shot; that Mode was acting in self-defense. Mode was carrying a pistol and from the evi-

dence it appears that he was carrying it for Russell. Russell was unarmed. The evidence is convincing that at the time of the killing Russell was returning from the bank where he had made a deposit for Charlie Simon. There is nothing to indicate that he anticipated seeing Mode, but the very fact that Mode was carrying a pistol indicates that he did anticipate seeing Russell. Mode contends that Russell was shot while the two were closely locked in a struggle, but there were no powder burns on Russell. He was shot in the left side of the head, and the doorway from which the State's witness, Calvin Tyler, testified that Mode stepped when Russell was shot, was to Russell's left.

Evidence of Mode's infatuation for Mrs. Russell; the fact that undoubtedly there was bad blood between the two men; that Mode was carrying a pistol and had been for some time; that Russell took one away from him on another occasion; the direct evidence to the effect that Mode was in the doorway when Russell was passing along the street; that Mode stepped from the doorway and the shooting followed; Russell's being unarmed — all taken together is amply sufficient to sustain the verdict.

The defendant pleaded not guilty, but during the trial the killing was not denied, defendant relying on the law of self-defense as justification for the slaying of Russell. Ark. Stat. § 41-2231 provides: "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony."

The jury did not accept Mode's version of the killing. Under the evidence in the case the jury could have convicted him of any degree of homicide. On the other hand, the jury could have acquitted him outright on their theory of self-defense. The court gave the jury 17 instructions on the law of homicide and self-defense. Instruction No. 9 is very long, taking up about three pages of the record. It is as follows:

"No. 9. The defendant, Lee Mode, contends that the killing of the deceased, D. L. Russell, was justifiable.

"Justifiable homicide under the law is defined as follows: 'Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise, to commit a known felony.'

"The defendant interposes a plea of self defense as a justification for the homicide charged.

"The Court has defined justifiable homicide and will now define the law of self defense and when it may be exercised.

"A bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable person and that the party killing really acted under their influence, and not in a spirit of revenge.

"In ordinary cases of one person killing another in self defense, it must appear that the danger was so urgent and pressing, that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also, that the person killed was the assailant, or, that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given.

"In ordinary cases of one person killing another in self defense, it must appear that the danger was so urgent and pressing, that in order to prevent his receiving great bodily harm, the killing of the other was necessary. But, to whom must it appear that the danger was urgent and pressing? It must so appear to the defendant. To be justified however, in acting upon the facts and circumstances as they appeared to him, he

must honestly believe without fault or carelessness on his part, that the danger was so urgent and pressing that it was necessary to kill the deceased in order to prevent his receiving some great bodily injury or harm.

"No one in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden encounter or in a combat, or from anger suddenly aroused at the time it is made or occurs, is justified in taking the life of an alleged assailant, unless he was so endangered by such assault as to make it necessary to kill his assailant to save his own life, or to prevent great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of the killing. The danger must apparently be imminent, irremedial and actual and he must exhaust all the means within his power consistent with his safety to exhaust all the means within his power consistent with his safety to protect himself and the killing must be necessary to avoid the danger. If however, the assault was so fierce as to make it apparently as dangerous for him to retreat as to stand, it is not his duty to retreat but he may stand his ground and if necessary to save his own life or prevent his receiving some great bodily injury, slay his assailant.

"The defendant, Lee Mode interposes a plea of self defense. That the killing of D. L. Russell under the circumstances, constituted justifiable homicide. The burden of proof is upon the defendant, Mode, to prove such defense by a preponderance of the evidence.

"If the jury finds from a preponderance of the evidence, that at the time and place of the alleged difficulty resulting in the death of D. L. Russell, the deceased, withot legal justification, made an assault upon the person of the defendant, Lee Mode, under such circumstances indicating an intention upon the part of the deceased to inflict upon the person of defendant, Mode, some great bodily injury or death, and that the circumstances of such alleged assault, if any, were such as to excite the fears of a reasonably prudent person, and that the defendant, without fault or carelessness upon

his part, in reaching a conclusion that danger was not only impending but so pressing and urgent as to render the killing of the deceased necessary, and having exhausted all the means within his power consistent with his safety, and without the use of more force than was necessary under the attending circumstances, as viewed by defendant, honestly and in good faith and not in a spirit of malice or revenge, and in his own necessary self defense, shot and killed the deceased, D. L. Russell, then, if the jury so finds, defendant Mode should be acquitted."

The defendant objected generally and specifically.

By Instruction No. 9 the jury were told that the burden was on the defendant to prove justifiable homicide by a preponderance of the evidence. Not only did the instruction tell the jury that the burden was on the defendant to prove justifiable homicide by a preponderance of the evidence, but the instruction went further and appears to tell the jury that the burden is on the defendant (1) to prove by a preponderance of the evidence that Russell, the deceased, without legal justification, made an assault upon Mode; (2) to prove by a preponderance of the evidence that the circumstances of such alleged assault, if any, were such as to excite the fears of a reasonably prudent person; (3) to prove by a preponderance of the evidence that the defendant was without fault or carelessness on his part in reaching a conclusion that danger was not only impending but so pressing and urgent as to render the killing of the deceased necessary; (4) to prove by a preponderance of the evidence that defendant had exhausted all the means within his power consistent with his safety; (5) to prove by a preponderance of the evidence that the defendant did not use more force than was necessary under the attending circumstances as viewed by the defendant; (6) to prove by a preponderance of the evidence that he, the defendant, acted honestly and in good faith and not in a spirit of malice or revenge; (7) to prove by a preponderance of the evidence that he acted in his own necessary self-defense.

It was error to instruct the jury that to justify the killing the burden was on defendant to prove self-defense or any element of self-defense by a preponderance of the evidence. Ark. Stat. § 41-2246 provides: "The killing being proved, the burden of proving circumstances of mitigation, that justify or excuse the homicide, shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest, that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide." Instruction No. 4 given by the court was in the words of the statute.

But the burden is not on the accused to prove justification by a preponderance of the evidence. It is sufficient if the evidence raises a reasonable doubt in the minds of the jurors as to whether the defendant was justified in committing the homicide. By Instruction No. 9 the jury were told in effect that notwithstanding they might have a reasonable doubt whether the defendant acted in necessary self-defense, they could not return a verdict of not guilty unless the defendant had proved self-defense by a preponderance of the evidence. Otherwise, according to Instruction No. 9, the jury could not acquit, although they may have had a reasonable doubt of guilt, if the defendant had not proved by a preponderance of the evidence that he acted in self-defense.

In a long line of cases this Court has held that it is error to instruct the jury in homicide cases where self-defense is asserted as justification for the killing, that the burden is on the defendant to prove the theory of self-defense by a preponderance of the evidence. *Cogburn* v. *State,* 76 Ark. 110, 88 S. W. 822, is directly in point. That case has been cited many times and the rule therein announced has never been impaired. There the court correctly instructed the jury in the first instance in the words of the statute, Ark. Stat. § 41-2231, above mentioned. But the prosecuting attorney incorrectly stated the law to the jury and then the court, over the defendant's objections, affirmed what the

prosecuting attorney had said. In the *Cogburn* case this Court said:

"In commenting on this instruction, the attorney for the State said:

" 'The court tells you, under this instruction, which I read to you, that, the killing being proved, the burden of proving circumstances of mitigation and justification devolves on the accused. Under this law, after we introduced Jim West, we could have rested our case, and the burden was upon them to establish justification; and if they fail to satisfy you by *a preponderance of evidence* that the killing was justifiable, then you should convict him.' To which the defendant objected, and the court said: 'While it is true that if, upon the whole case, they had a reasonable doubt, they must acquit, yet as to matters of mitigation he would be required to furnish *a preponderance of the evidence.*' Now, the argument of the prosecuting attorney, as shown in the record, was not in accordance with the law; for, while it is true, as our statute declares, that when the killing is proved the burden of showing circumstances that mitigate or excuse the crime devolves upon the accused, where there is nothing in the evidence on the part of the State that tends to mitigate, excuse or justify the killing, still the burden on the whole case is on the state; and when evidence is introduced, either on the part of the State or the defendant, which tends to justify or excuse the act of the defendant, then if such evidence, in connection with the other evidence in the case, raises in the minds of the jury a reasonable doubt as to the guilt of the defendant, the jury must acquit. This is settled in this State by the statute which declares that 'when there is a reasonable doubt of the defendant's guilt upon the testimony in the whole case, he is entitled to an acquittal.' Kirby's Dig. § 2387 (Ark. Stat. § 43-2159).

"But if this statement of the prosecuting attorney were correct — that when the killing is proved the defendant must show by a preponderance of the evidence that the killing was justifiable—the jury would have to

reject his defense whenever it was not supported by a preponderance of the evidence. This would limit the doctrine of a reasonable doubt to the fact of the killing, and when that was established beyond a reasonable doubt it would put the burden on the defendant of establishing justification by a preponderance of the evidence, and if he failed to do so the jury would be required to convict him, even though the evidence adduced by him was sufficient to raise a reasonable doubt as to his guilt. But it cannot be said that the defendant must make out his defense by a preponderance of the evidence, and also that he is entitled to an acquittal if on the whole case the jury have a reasonable doubt of his guilt, for the two propositions are to some extent inconsistent. Testimony not sufficient to establish a fact by a preponderance of the testimony may be sufficient to raise a reasonable doubt as to the existence of the fact. To tell the jury that they must convict unless the fact of self-defense is established by a preponderance of the testimony, and also that they must acquit if they have a reasonable doubt as to whether the defendant acted in self-defense, is telling them to follow two rules which may lead to very different results.

"The statute, it will be noticed, says nothing about the preponderance of evidence. It says that, the killing being shown, the burden is on the defendant to show facts that justify or excuse his homicide. When, however, he introduces his proof, the question, says Mr. Wharton, arises: 'Is it sufficient for him if he raises a reasonable doubt as to the defense he advances? Or must he establish this defense by a preponderance of proof, in order to entitle him to an acquittal?' He answers the question by saying that when the defense traverses some essential ingredient of the indictment, such as malice or premeditation, it is sufficient if the proof raises a reasonable doubt. If the defendant undertakes to show that the act was done in necessary self-defense, this tends to rebut the allegation of malice; and if the jury have a reasonable doubt on that point, they should acquit, for that is a reasonable doubt as to whether an essential charge in the indictment is true or not. It

is otherwise when the defense does not traverse any essential averment of the indictment; for instance, when former conviction or acquittal of the same offense is set up. Wharton's Crim. Neg. §§ 331-334." (Emphasis ours)

In *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96, it is said: ". . . though the burden the proving acts of mitigation may devolve on the accused, it is sufficient for him to show facts which raise in the minds of the jury a reasonable doubt as to his guilt."

In *Parsley* v. *State,* 148 Ark. 518, 230 S. W. 587, the Court held that although only a general objection was made to a like instruction, no specific objection was required.

In *Lovejoy* v. *State,* 62 Ark. 478, 36 S. W. 575, it was held that preponderance of the evidence and reasonable doubt are not synonymous. The Court said: " 'Preponderance' and 'reasonable doubt' are not synonymous terms. It is sufficient if the proof in the whole case raises a reasonable doubt as to whether the defendant took the cattle with a felonious intent. The state would not be justified in a conviction upon a preponderance of the evidence. Yet this instruction tells the jury, 'that, if they believe from a preponderance of the evidence that the defendant took the cattle under the honest belief that he was the owner,' they should acquit. The converse would be, 'If you do not believe from a preponderance of the evidence' that defendant took the cattle under the honest belief that he was the owner, *etc.,* you should convict. The instruction makes the question of intent, which is the very essence of the crime charged, depend upon the preponderance of the evidence to establish it, whereas it must be established by the state beyond a reasonable doubt. It must not be forgotten that in criminal cases, under the plea of not guilty, every element in the crime is controverted, and the state must affirmatively prove guilt.

" 'It would,' says Mr. Bishop, 'be a wide departure from the humanity of the criminal law to compel a jury,

by a technical rule, to convict one of whose guilt, upon the whole evidence, they had a reasonable doubt. And it would reverse the presumption of innocence to hold a defendant guilty unless, taking the burden on himself, he could affirmatively prove himself innocent. All evidence should be viewed in its entirety, not in detached parts. The whole of an alleged crime must be proved, just as the whole of it must have been committed. In reason, therefore, this whole and indivisible thing, the burden of proof, must be borne by the government throughout the trial.' 1 Bish. Cr. Pro., sec. 1051."

Appellant argues several other points, all of which we have examined, but we find no error other than the giving of Instruction No. 9.

Reversed and remanded.

HARRIS, C. J., and WARD and JOHNSON, JJ., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I agree that Instruction No. 9 was erroneous; however, I do not consider that the objection made was sufficient to properly challenge the instruction. In no part of his objection did appellant specifically object to the use of the word "preponderance". His objection was " * * * that the Court refused to add the provision to said Instruction, that if the evidence adduced by the defendant created a reasonable doubt in the mind of the jurors, then the defendant would be entitled to a reasonable doubt and should be acquitted, on the doctrine of reasonable doubt." The court then held that the general instructions on reasonable doubt "would not only reach self-defense and burden of proof, but also the evidence and all other issues in the case." No further objection was made to the instruction. In several cases before this Court, an instruction copying our statute (Ark. Stats., § 41-2246) has been given. Such section reads as follows:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the

accused was justified or excused in committing the homicide."

In *Tignor* v. *State,* 76 Ark. 489, 89 S. W. 96, and *Hogue* v. *State,* 194 Ark. 1089, 110 S. W. 2d 11, we held that this instruction is proper, if accompanied by an instruction that on the whole case the guilt of the defendant must be proved beyond a reasonable doubt. Except for the use of the word "preponderance", Instruction No. 9 says no more than we have approved on numerous occasions. In the instant case, the court, in Instruction No. 4, quoted § 41-2246, and then added the following:

"Notwithstanding the provisions of the preceding section of law as to burden of proof, the burden of proof in the whole case is upon the State of Arkansas, to prove from the evidence beyond a reasonable doubt the guilt of defendant, as charged and of any degree of crime or homicide included in the information."

Likewise, in Instruction No. 8, the court concluded by instructing the jury that appellant should be acquitted "if you find the defendant not guilty of any degree of murder or homicide, or *if you have a reasonable doubt of his guilt of any degree of homicide.*[1] * * * ". It accordingly appears to me that the court, in giving these two instructions, which properly stated the law as to reasonable doubt, adequately took care of any possible objectionable features in the instruction except for the word "preponderance" — and the use of this word was not objected to by appellant. I therefore do not agree that this case should be reversed because of the giving of Instruction No. 9, and I respectfully dissent to the ruling of the majority.

PAUL WARD, Associate Justice, dissenting. Although I agree with the majority that portions of Instruction No. 9, as pointed out by the majority, were not proper, and although I further agree with the majority that appellant's objection was sufficiently specific to call the court's attention to the erroneous part of the instruction, still it is my opinion that under the state of the record in this case the judgment of the trial court should be affirmed.

[1] Emphasis supplied.

One. Other instructions of the court contained what appellant asked for. Instruction No. 2 told the jury that the defendant is entitled to the benefit of a reasonable doubt. In Instruction No. 8 the court told the jury that if they had any reasonable doubt as to the guilt of appellant of any degree of homicide or manslaughter they should acquit him. In the same instruction the court also told the jury that in determining the guilt or innocence of appellant they should consider all instructions given by the court.

We have uniformly held that instructions need not be duplicated.

Two. Moreover, and most important in my judgment, it appears from the record that appellant waived any possible error that the court may have committed in the giving of the questioned instruction. When the court had finished giving Instruction No. 9, which consisted of some five or six separate paragraphs, appellant made the specific objection that the court refused to add that if the evidence adduced by the defendant created a reasonable doubt in the minds of the jurors then the defendant should be acquitted. Following this the court made this comment: "The court holds that the general instruction on reasonable doubt would not only reach self-defense and burden of proof but also the evidence and all other issues in this case". Apparently, appellant was satisfied with the court's statement because no other instruction was asked for and no further objection was made. In my judgment the court's statement removed all possibility of error. We assume that the statement of the court was made in the presence of the Jury and consequently amounted to a compliance with appellant's request. If it was not made in the presence of the jury, then appellant could have requested that it be reduced to writing and presented to the jury, but no such request was made by appellant. This silence on the part of appellant amounted to trapping the trial court into error. We have repeatedly refused to allow this to be done.

The situation in this case can easily be distinguished from that in the case of *Cogburn* v. *State,* 76 Ark. 110, 88 S. W. 822, which is relied on so heavily by the majority.

In the *Cogburn* case it appears that the reversible error consisted of the court allowing the Prosecuting Attorney to argue to the jury the preponderance rule even though the jury had been instructed to the contrary. If such argument was made by the Prosecuting Attorney in the case under consideration the defense attorneys had a ready and adequate remedy. They could have pointed out the other instructions of the court referred to above and they could have, in particular, referred to the explanation of the court copied above in which the court stated that the "reasonable doubt" rule applied to self-defense.

COLLIER *v.* CITIZENS COACH CO.

5-1977 330 S. W. 2d 74

Opinion delivered December 21, 1959.

J. Harrod Berry, for appellant.

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

JIM JOHNSON, Associate Justice. This case involves an action for personal injuries. Appellant, Ralph Collier, was a paid passenger on a bus owned and operated by appellee, Citizens Coach Company, in the City of Little Rock. Upon boarding the bus, appellant took his seat at an open window and rested his elbow on the window sill. The elbow protruded out of the bus window about 1½ inches. As the bus started off, appellant's elbow collided with a bus stop sign on a light pole on the street corner injuring appellant. Appellant alleged his injuries resulted from negligence of the bus driver. Appellee denied negligence and alleged contributory negligence which was denied by appellant.

On the trial of the case the jury found on interrogatory that the bus driver was not guilty of any negligence proximately causing injury and judgment for appellee was entered thereon, from which comes this appeal.

For reversal, appellant urges five points. We will only discuss point two since it is highly unlikely that the other alleged errors will occur again on retrial.

Point two is as follows:

"The Trial Court prejudicially erred as follows:

"II. He gave, after jury began deliberation, an instruction defining proximate cause which was erroneous in that (1) it was not accurate; (2) it conflicted with instructions previously given and was confusing and misleading; (3) it was so worded as to excuse defendant bus company from high degree of care imposed by law and previous instructions, while at same time tending to over-emphasize and enlarge upon care required of plaintiff in order to make the bus company's negligence proximate cause, and in effect placed on plaintiff burden of proving himself free of contributory negligence, which vices were magnified by giving this instruction as an isolated instruction."

The following is verbatim *ad literatim* from the record:

"After the jury had retired to the jury room for deliberation and had deliberated for some period of time, the foreman of the jury reported to the Court that the jury would like to have the term 'proximate cause' defined. The Court, without the hearing of the jury, asked counsel for the respective parties if it was all right for the Court to so define said term to the jury. After considerable discussion, counsel for the respective parties agreed upon a definition, except counsel for plaintiff objected to it as to form and content, as given, said definition being read to the jury by the Court, as follows:

" '*You are instructed that negligence is the proximate cause of an injury only when such injury is the natural and probable result of such negligence and when in the light of attending circumstances the injury ought to have been foreseen by a person of ordinary prudence.*' (Emphasis ours).

"Counsel for plaintiff then specifically objected to the giving of said definition of proximate cause, because it places undue emphasis on what would be expected of a person exercising ordinary care rather than also being adapted to the theory of the high degree of care of a cautious and prudent person being required and that this emphasis was more conspicuous by the fact that it was presented by itself."

Three of the four interrogatories submitted to the jury required the jury to know the meaning of proximate cause. The fourth interrogatory had reference to the other interrogatories. The jury, after receiving the solitary instruction on "proximate cause", again retired to the jury room for further deliberation. They returned a verdict for appellee by answering the following interrogatory No. 1 in the negative:

"Do you find from a preponderance of the evidence in the case that the bus driver was guilty of negligence in the operation of the bus and that such negligence, if any, contributed to proximately cause plaintiff's injury."

The question with which we are confronted is, was the Court's instruction on "proximate cause", which was given to the jury in this case, so erroneous as to constitute reversible error?

In attempting to define "proximate cause", the Court inadvertently added to the definition a partial definition of negligence when it was said:

". . . and when in the light of attending circumstances the injury ought to have been foreseen by a person of ordinary prudence . . ."

It should be remembered that while negligence must proximately cause a given result in order to justify a finding for the plaintiff on the allegations of the complaint; or a finding for the defendant on allegations of contributory negligence; negligence and proximate cause are two separate and independent things. Foreseeability is an element in the determination of whether a person is guilty of negligence and has nothing whatever to do with proximate cause.

Black's Law Dictionary defines "proximate cause" as:

"That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

Proximate cause is inherent in every personal injury without regard to whether the injury was caused by negligence, unavoidable accident or act of God. In other words, every end result has a proximate cause but every proximate cause is not induced by negligence. When a carpenter drives a nail into a board, the striking of the nail with the hammer is the proximate cause of the nail's entering the board but no negligence is involved. In other words, proximate cause is a rule of physics and not a criterion of negligence. Therefore, as a definition of proximate cause, the Court's instruction was inherently erroneous.

It is true that this court has said many times that even though an instruction is erroneous, if it affirmatively appears that it was not prejudicial there should not be a reversal. *St. Louis & San Francisco Ry. Co.* v. *Crabtree,* 69 Ark. 134, 62 S. W. 64. This general rule is stated in cases collected in West's Arkansas Digest, Volume 2, "Appeal and Error", Key 1031 (6). However, after a careful examination of the record, we cannot say here that it affirmatively appears that no prejudice results to appellant.

This instruction is also confusing and misleading because in its application to the case at bar, it conveys the impression that there could be no recovery unless a person of ordinary prudence could foresee, in the light of attending circumstances, that the injury complained of would result. This might have and probably did cause the jury to conclude that the bus driver was only bound to the exercise of ordinary care. This, of course, is incorrect since it was the bus driver's duty to exercise the highest degree of care as the Court had properly stated in giving the following instruction:

"Citizens Coach Company, being a passenger bus company, owes to the passengers on its buses the duty to exercise for the safety of the passengers the highest degree of skill and care which may reasonably be expected of cautious and prudent persons employed in the operation of buses for the purpose of carrying passengers in view of the instrumentalities employed and the dangers naturally to be apprehended."

A jury of laymen could hardly be expected to distinguish the difference between a person of ordinary prudence exercising the highest degree of care, and a person of highest prudence exercising ordinary care. It is confusing to say that the standard should be that of an ordinary prudent person unless it is further said that such ordinary prudent person was bound to exercise the highest degree of skill and care "in view of the instrumentalities employed and the dangers naturally to be apprehended."

As previously indicated, the jury requested a definition of "proximate cause" and the court intermingled definitions of proximate cause and negligence in response to this request. This amounted to giving an instruction on negligence when the jury had not requested such definition.

For the reasons stated above, the cause is accordingly reversed and remanded for a new trial.

Mr. Justice J. SEABORN HOLT dissents; Mr. Justice GEORGE ROSE SMITH not participating.

SKAGGS *v.* FLURRY.

5-2024 330 S. W. 2d 713

Opinion delivered January 11, 1960.

Virgil D. Willis, for appellant.

Robert W. Cummins, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a judgment entered by the Boone County Circuit Court in favor of Ira F. Flurry, appellee, against the appellant, A. I. Skaggs. The judgment was in the amount of $300, representing a commission claimed by Flurry for the sale of certain property in Boone County, for which appellee had instituted his complaint.[1] From such judgment comes this appeal. For reversal, appellant argues:

[1] Appellee joined in his complaint two causes of action, one for a commission amounting to $250, and the other, $375. Appellant admitted the $250 item, and tendered it below. The jury's verdict was based on the commission sought for $375.

"That under the undisputed testimony appellee did not earn half the commission for the sale of the Brown property to Nelson, because he did not procure a meeting of the minds of the seller and buyer that could be reduced to writing and did not procure a down payment," and the trial court erred in overruling appellant's motion for a directed verdict.

Flurry was employed as a real estate salesman by Skaggs, under an oral agreement, the provisions of which are in dispute. Appellee's version of the agreement was that he would handle a transaction with a prospective customer until such time as the customer tendered the payment of earnest money; that thereafter, appellant would take over and complete the transaction. Appellant's version of the contract was that Flurry and the customer were to reach an agreement on all terms of the sale, including the price to be paid, before he (Skaggs) would take over. Appellant testified that this was his understanding "so far as I was concerned. I don't know how he understood." It was agreed that compensation was to be one-half of five per cent of the selling price of the property. Actually, with this exception, neither party was too definite or emphatic in relating the terms of the contract.

The record reflects that Skaggs introduced Flurry to Herbert Nelson, and requested that Nelson be shown some property which was listed with Skaggs. Flurry took Nelson out to the property, known as the Brown farm, in February, 1957. The two looked at the barns, well, pump, springs, and other features of the property, and discussed price and terms, but no sale was made. Around the middle of July, Nelson returned and appellee again showed him the Brown property. On August 28th, Nelson wrote Skaggs from his home in Iowa, offering $12,000 for the place, and sending his check for $500 as earnest money. This offer was not accepted by the owner of the farm, and Skaggs notified Nelson of that fact. In September, Nelson returned to Harrison, and signed an agreement for the purchase of the farm with Skaggs. Appellee therefore contended that

he was entitled to his commission, while appellant, under his version of the agreement, contended that Flurry had not proceeded far enough with the transaction. In fact, Skaggs testified that Flurry was not employed by him "from about July on." However, appellant admitted that Flurry's license remained in the office, and the latter would come by occasionally. Flurry contended that he worked for Skaggs until the end of September, and testified that on the day the $500 check was received in the office, he (Flurry) asked Skaggs to let him take the purchase agreement to the property owner, Brown, get it signed, and place the papers in the mail. He testified Skaggs replied "* * * that he was overseeing some work over there and he said no need for both of us to drive over there, he said I am going right by his house, and he said one of us should be around in case some customers come in and he said if you will stay around I will get the thing signed." Whether Flurry was still an employee of Skaggs, is not, in itself, determinative of the outcome of the litigation, though this being in dispute, was, of course, a jury question.

There were really only two issues to be resolved, which were properly presented to the jury by the court in its instructions. First, what were the terms of the oral contract between the parties, and second, did appellee's action constitute performance on his part, and entitle him to a commission on the sale of the property. According to the undisputed evidence, there was no intervening act on the part of Skaggs between the time of the last showing of the property (in July) by Flurry, and the subsequent receipt of the check for $500. At any rate, there was sufficient evidence to support a verdict if the jury accepted appellee's version of the terms of the agreement. Appellant treats the negotiations with Nelson as separate transactions, pointing out that the seller would not accept Nelson's offer of $12,000,[2] but we do not agree with this interpretation, for under appellee's version, his duty under the contract was met

[2] The property sold for $15,000.

when the check for earnest money was received. The jury so found.

Affirmed.

MORROW *v.* MCCAA CHEVROLET CO.

5-2026 330 S. W. 2d 722

Opinion delivered January 11, 1960.

J. H. Spears, for appellant.

Nance & Nance; W. S. Hollis, for appellee.

J. SEABORN HOLT, Associate Justice. Appellant, R. H. Morrow, brought the present action against appellee, McCaa Chevrolet Company, to dissolve an alleged partnership with appellee and for an accounting. He alleged in his complaint that about "The first of July 1957 he entered into a partnership agreement with the defendant for the sale of used automobiles and trucks;

* * * that by the terms of the partnership, the defendant was to furnish the location for the operation of said used car lot and the capital; that the plaintiff was to devote his entire time to the operation of said business, and each was to share equally in the profits. * * * during the first part of November 1957 J. C. McCaa, Sr., President and principal stockholder of the defendant corporation, arbitrarily and without cause terminated the partnership and closed the business. * * * that the defendant has failed and refused to account to the plaintiff for his part of the profits and assets of said partnership; * * * and that an accounting be made" and prayed that a master be appointed for this purpose.

Appellee answered denying that any partnership existed between it and Morrow but alleged that about the 1st of July 1957, appellee employed "R. H. Morrow, and agreed to pay him as wages, 50 per cent of the operating profit of the used car department of the McCaa Chevrolet Company." Thereafter appellee filed an "Amended Answer And Counterclaim Of The Appellee" and appellant filed an "Answer To Amended Answer And Counterclaim". On a trial the court found upon the conclusions of appellant's testimony and proof "That no partnership existed between the plaintiff and cross-defendant, R H. Morrow, and the defendant and cross-complainant, McCaa Chevrolet Company, and that the complaint of the plaintiff be and the same is hereby dismissed and the defendant and cross-complainant, having admitted in open court that an employer and employee relationship existed between the parties, the court finds that an account should be stated between the parties on account of such relationship, and that a master should be appointed to state the account between the parties." The court then proceeded to appoint a master. From this decree comes this appeal.

For reversal appellant relies upon the following points: (1) The evidence introduced was sufficient to establish a partnership, and the court erred in not so finding. (2) The court erred in dismissing appellant's

complaint on its own motion prior to conclusion of all the evidence and in refusing to hear testimony of additional witnesses. (3) The court erred in failing to grant plaintiff's motion to inspect and examine the books and records of the appellee. (4) The court erred in dismissing appellant's complaint. (5) The court erred in dismissing appellant's amended answer and complaint.

After a careful review of the evidence, we have concluded that the decree should be affirmed.

Points (1) (2) and (4)

(We consider these together). We think appellant's evidence conclusively shows that there was no partnership agreement entered into between him and appellee. He testified: "Question. Otherwise, you had your own time in there and you were working for just half of the net profits of the operation here? Answer. I considered it that way. Just like I told you in the depositions, I considered myself like a sharecropper. Question. You just considered yourself as a sharecropper and not as a partner? Answer. That's right. Question. Then the agreement that you entered into was that you would work there and operate it for fifty per cent of the net profits? Answer. That I would operate the lot for half of the profits. Question. That was the agreement that you entered into? Answer. Yes, sir. Question. Was there any time a statement made about a partnership or was it just fifty per cent of the net profits? Answer. I don't understand the question — I would agree it's a partnership, it's got to be because I am working for half. Question. It's got to be a partnership if you are working for half? Answer. Yes, sir. Question. There was no particular mention made of the partnership was there? Answer. I wouldn't say there was or wasn't."

It appears that Morrow never claimed to be a co-owner of the business but that he only was to receive 50 percent of the profits for his services. In answer to a question concerning the operation of the business, he

testified: "A. That I would run * * * it would be McCaa Used Cars and Mr. J. C. Jr., would be sole owner of the property and I would run it for half the profit . . ." We have many times held that the sharing of profits alone does not make one a partner. In *Wilson* v. *Todhunter,* 137 Ark. 80, 207 S. W. 221, this court said: "Mere participation in the profits and losses of a business alone, would not make the participant a partner. Whether, in fact, a partnership exists, depends upon the intention of the parties, to be discovered from the contract into which they enter, construed in the light of all the facts and circumstances that obtain." In *Haycock* v. *Williams,* 54 Ark. 384, 16 S. W. 3, this court held that a sharecropper was not a partner. The record reflects that the trial court dismissed appellant's complaint insofar as his claim of partnership was concerned after appellant's counsel had stated to the court that appellant had no further evidence to present except corroborative testimony of two other witnesses. We find no error here. The record reflects the following: "The Court: Now, Mr. Spears, in your further witnesses I would like to know whether you are going to introduce some new evidence bearing on the formation of a partnership or is it going to be purely the nature of corroborating what Mr. Morrow says? Mr. Spears: It would be more or less the nature of corroborating his testimony. I have no new evidence. The Court: There will be nothing new that Mr. Morrow has not already testified to himself? Mr. Spears: That's right."

On this partnership issue, what we said in *Kent* v. *State,* 143 Ark. 439, 220 S. W. 814, is relevant here. We there said: "* * * if the contract was that Jones should furnish the capital and pay all the expenses and appellant was employed to work for Jones with the understanding that he was to receive as compensation for his services one-half the net profits, having no community interest, then appellant would be an employee for hire and not a partner. *Rector* v. *Robins,* 74 Ark. 437, 86 S. W. 667.

"It occurs to us that the undisputed testimony of Jones shows that the relationship between him and appellant with reference to the business and the funds derived therefrom was not that of partnership, but that appellant was an employee of Jones and was to receive compensation for his services out of the net profits of the business, provided there were any net profits. The court might have so told the jury as a matter of law. Such being the case, the court did not err to the prejudice of appellant in submitting to the jury the issue as to whether there was a partnership."

(3)

The court did not err in denying appellant's request to inspect and examine the books and records of appellee for the reason that before appellant would be entitled to such inspection, he must first show that a partnership existed. Since we are holding that appellant has failed to establish a partnership relationship, he was not entitled to inspect the books, Uniform Partnership Act (Sections 65-101—65-143).

(5)

Appellant says that the court erred in dismissing his answer to appellee's Amended Answer And Cross-Complaint. We do not agree. The record reflects, as indicated above, that Morrow filed his complaint seeking dissolution of an alleged partnership between him and appellee company, and for an accounting. Appellee first filed an Answer and later an Amended Answer, along with a Counterclaim. Appellant then filed a Reply to appellee's Counterclaim, in effect stating a new cause of action against appellee in which he prayed for $25,000.00 in damages for the wrongful dissolution of the alleged partnership. The appellee then filed its' Motion To Strike from appellant's Reply that part seeking damages. The court granted this Motion of Appellees and we think, correctly so. Sec. 27-1132 Ark. Stats., provides, in effect, that a reply shall set out allegations constituting a defense to a counter-claim or

set-off filed by the defendant in his answer. This section provides: "Contents Of Reply. — When the answer contains new matter constituting a counterclaim or set-off, the plaintiff may reply to such new matter, denying each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief, and may allege, in concise language, any new matter not inconsistent with the complaint, constituting a defense to the counterclaim or set-off." Morrow's claim for damages was not permitted by the above section and was properly stricken by the court. Appellant's contention that this pleading should be construed as an amendment to his original complaint and permitted, cannot be sustained for the reason that the duty rested on him first to obtain the permission of the trial court to file such an amendment. Sec. 27-1158, Ark. Stats. 1947 Anno., provides: "Amendment Of Complaint—Time.— The Plaintiff may amend his complaint without leave at any time before an answer is filed, and without prejudice to the proceedings already had." Here appellant made no attempt to amend his complaint until after appellee's answer was filed.

Accordingly, the decree is affirmed.

MOSELEY *v.* TEMPLE.

5-2013 330 S. W. 2d 719

Opinion delivered January 11, 1960.

Clint Huey, for appellant.

Williamson, Williamson and *Ball,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. Both the Trial Referee and the full Commission disallowed the claim of Mr. Moseley; the Circuit Court affirmed the Commission; and this appeal resulted. The real issue is whether there is substantial evidence to support the finding of the Commission; and we conclude that there is.

The appellee, J. L. Temple, owned and operated an automotive and supply business in Warren, Arkansas; and appellant, L. E. Moseley, was employed by Mr. Temple for several years. In the late afternoon of August 26, 1958 a disagreement arose between Moseley and Temple regarding an automobile jack; and Moseley quit work. The next day Temple paid Moseley in full, plus two weeks' vacation pay; and the employer-employee relationship was completely terminated. After two weeks, Moseley sought re-employment by Temple, but another man had already been employed. Later, Moseley applied to the Unemployment Compensation Agency for unemployment benefits, and represented himself as ready, willing, and able to work. Then, on October 7, 1958, Mr. Moseley consulted Dr. Murl E. Crow, because of low back pains; and was found *at that time* to be suffered from a "possible ruptured disc of the lumbar spine". On October 24, 1958, for the first time, Mr. Temple and his insurance carrier were notified that Moseley claimed to have suffered a back injury while working for Temple on August 26, 1958, and just a few minutes before termination of employment.

That Mr. Moseley was suffering from a back complaint on October 7, 1958 when he consulted Dr. Crow, was not denied; but Mr. Temple and his insurance carrier vigorously denied that any such injury occurred while Mr. Moseley was working for Mr. Temple. The Workmen's Compensation Act requires that injuries, to be compensable, must arise "out of and in the course of employment (§ 81-1305 Ark. Stats.). Did Mr. Moseley's injury that he had on October 7, 1958 arise "out of and in the course of employment" with Mr. Temple, which had terminated on August 26, 1958? That was

the factual question presented to the Referee and the Commission.

To sustain his claim for compensation, Mr. Moseley testified that on August 26, 1958 there were two cylinder heads to be loaded on an automobile to be taken to Little Rock: "I put the first one in by myself but the other one was underneath the truck in behind an old engine. I finally got it out on the floor and picked it up out on my hands and arms, like that, and carried it about three or four steps and felt a sharp pain in my back, and I laid it down and asked Mr. Hoyle to come help me put it on the truck, and Mr. Hoyle came over there and he carried it on over there and put it on the truck, . . ." It was this "sharp pain in my back" which Mr. Moseley said was the injury that he sustained in the course of his employment; and appellant relies, *inter alia,* on *Sparks Memorial Hospital* v. *Walton,* 229 Ark. 1014, 320 S. W. 2d 102, as a case supporting his contention of liability.

There were a number of facts and circumstances that shed light on whether Mr. Moseley's injury arose "out of and in the course of employment". We mention a few:

1. Mr. Moseley admitted that he never said anything to any of his fellow workers or to Mr. Temple on August 26th when he claimed he suffered with the sharp pain in his back; and he admitted that it was not until October 24th that he ever notified Mr. Temple or the insurance carrier that any injury was claimed because of work.

2. Mr. Moseley admitted that he applied to Mr. Temple for re-employment and never mentioned any back injury; and that he also applied for unemployment compensation insurance and never mentioned any back injury.

3. Mr. Moseley admitted that he never consulted a doctor until October 7, 1958; and that for years he had occasionally had a sore back for two or three days and had never thought anything about it.

4. Fellow employees of Mr. Moseley gave a history of the loading of the cylinder head into the automobile without any suggestion of any injury on the part of Mr. Moseley.

5. Dr. Crow, who examined Mr. Moseley on October 7th, said that the back injury which Mr. Moseley had on that date could have happened from a variety of causes. Dr. Crow testified:

"Q. Dr. Crow, is it possible that Mr. Moseley could have received his ruptured disc or spinal trouble in some manner other than by lifting a cylinder head?

"A. Yes.

"Q. Are there half a dozen other ways that he could?

"A. You can do it any way; even raising a window can cause it.

"Q. What physical reaction takes place that causes a condition of this sort?

"A. What actually takes place?

"Q. Yes, twisting or bending of the back?

"A. Well, yes, twisting or lifting, or I have seen a man just jump up in the air about a foot off the ground and sustain a ruptured disc. Anything that puts a strain on you."

Thus, from conflicting claims and circumstances, a conclusion had to be reached by the Commission. What we said in *Ward* v. *Nolen,* 229 Ark. 68, 313 S. W. 2d 240, is *apropos* here:

"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."

In *Wren* v. *D. F. Jones Const. Co.,* 210 Ark. 40, 194 S. W. 2d 896, we pointed out that the inferences to be drawn and the conclusion reached from the established facts were for the Commission, and we said:

"Under our Workmen's Compensation Law the Commission acts as a trier of the facts — *i.e.,* a jury — in drawing the inferences and reaching the conclusions from the facts. We have repeatedly held that the finding of the Commission is entitled to the same force and effect as a jury verdict."

From a study of the entire record, we conclude that the Commission had ample evidence and inferences from which it could find that Mr. Moseley failed to prove that his back condition of October 7, 1958 arose "out of and in the course of employment" by Mr. Temple, which employment ceased on August 26, 1958.

Affirmed.

McGuire *v.* Wallis.

5-2015 330 S. W. 2d 714

Opinion delivered January 11, 1960.

C. M. Carden, for appellant.

Maner & Stanley, Joe McCoy, for appellee.

GEORGE ROSE SMITH, J. The land in controversy, a farm of about 186 acres lying in Hot Spring and Saline counties, was owned by Louis Wallis at his death in 1937. Louis Wallis died intestate, survived by his widow, Martha Wallis, who died in 1955, and by eight grown children. In 1958 four of the children and the heirs of a fifth child brought this suit for partition of the property. The principal defendant, the appellee Clovis Wallis, who is a grandson of Louis Wallis, claims title by adverse possession. Clovis contends that his father, Allie Wallis, held the land adversely from 1937 until his death in 1945, and that since then Clovis himself has been in adverse possession. The chancellor sustained the plea of adverse possession, and this appeal is from a decree quieting title in Clovis Wallis.

Our study of the record convinces us that the decree is against the weight of the evidence, that Clovis failed to establish his claim of title by adverse possession. It must be remembered at the outset that the possession of one tenant in common is presumed to be the possession of all and, further, that in view of the family relation stronger evidence of adverse possession is required in this case than in one where no such relation exists. *Staggs* v. *Story,* 220 Ark. 823, 250 S. W. 2d 125; *Baxter* v. *Young,* 229 Ark. 1035, 320 S. W. 2d 640. Thus Clovis had a heavy burden of proof.

The testimony falls decidedly short of establishing hostile possession on the part of Allie Wallis. Soon after the death of Louis Wallis in 1937 Allie attempted to persuade his brothers and sisters to convey their interest to him in return for his promise to support their

mother, Martha, for the rest of her life. Two of the brothers, Ezra and Clarence, accepted Allie's proposal, and these two assert no claim to the property. But the clear weight of the evidence, if not the undisputed testimony, shows that the other children rejected Allie's offer and refused to execute the deeds he tendered. In 1938 the widow, Martha, who was entitled to dower and homestead rights in the land, conveyed her interest to Allie; but this deed was not recorded until 1944, and we are convinced that none of the appellants knew about the conveyance until shortly before this suit was filed. (It is indicated that Martha may have transferred her interest in order to qualify for monthly payments from the state welfare department.)

In 1937, after the death of Louis Wallis, Allie moved into the house that was on the land and occupied it, or another that he built, until his death in 1945. His possession, however, was not exclusive, for soon after Louis's death some of the children and neighbors had what they call a "working" and erected a house on the land for Louis's widow. Martha occupied that house until about 1947, after which she lived with one or another of her children or grandchildren until her death in 1955.

It is clear enough that Allie could not have successfully asserted a claim of adverse possession. True, he was in charge of the farm, managing it for his own benefit, paying taxes, and paying the installments upon the mortgage debt; but these facts are insufficient to support a claim of adverse possession against his cotenants. *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809. Moreover, the joint occupancy by Martha Wallis would in itself have been fatal to Allie's claim of exclusive hostile possession. Martha, by virtue of her homestead right and her unassigned dower, was entitled to be in possession; so the other children, knowing nothing of their mother's unrecorded deed to Allie, had no reason to suppose that Allie's dominion was other than permissive.

There remains to be considered Clovis's occupancy from 1945 until suit was brought in 1958. Clovis was ten years old when his grandfather died in 1937. In 1944 Allie undertook to convey some 51 or more acres of the land to Clovis, but it is not shown that the other cotenants knew of this deed or that it was followed by any significant visible change in the possession of the property. Until Clovis's grandmother left the land in about 1947 there is no basis for making any distinction between Clovis's occupancy and that of his father, for both apparently shared the widow's rightful possession.

After Martha's departure Clovis seems to have been in exclusive possession, but in order for that possession to be adverse it was incumbent upon Clovis to bring home to his cotenants knowledge of his hostile claim, either directly or by acts so notorious and unequivocal that notice must be presumed. *Smith* v. *Kappler, supra.* Upon this point Clovis's proof is fatally deficient. It is fair to say that his own testimony, when carefully read in its entirety, discloses that he never asserted a claim of exclusive ownership to a single one of his interested uncles, aunts, or cousins. His testimony implies that these relatives should have deduced from his occupancy that his position was hostile, but the law is otherwise.

Nor do we find in the record proof of any acts so notoriously and unequivocally hostile as to charge the appellants with knowledge of Clovis's adverse claim. Counsel list an imposing array of facts that are said to satisfy the appellee's burden of proof, but for the most part the various acts relied upon are merely subordinate aspects of conduct which, taken altogether, amounts simply to possession of the property. The most important acts going beyond normal occupancy were the construction of two barns, the drilling of a well, and the putting in of a stock pond. We are not persuaded that these additions to the property would satisfy the requirement of notorious, unequivocal action; but in any event, just as in the *Kappler* case, it is not shown that these improvements were made more than

seven years before suit was filed. Hence, as we held in the earlier case, these improvements do not satisfy the claimant's burden of proving adverse possession, though they may properly be taken into consideration in the division of the property.

Reversed.

TARHEEL DRILLING & EQUIPMENT CO. *v.* VALLEY STEEL PRODUCTS CO.

5-2025 330 S. W. 2d 717

Opinion delivered January 11, 1960.

[Rehearing denied February 8, 1960]

Gaughan & Laney, for appellant.

Spencer & Spencer, for appellee.

PAUL WARD, Associate Justice. The question is: Does Arkansas Statutes, Section 51-701 which creates a materialmen's lien on an oil and gas leasehold also create a lien on oil produced therefrom and delivered to a pipe line?

Briefly, the issue arose in this manner. Appellees, who had formerly obtained judgments against the owner of a certain oil and gas lease, brought action to impound funds in the hands of J. S. Brooks (a trustee of the owners) which funds were the proceeds of oil sold from a well on the leasehold and delivered to a pipe line. Appellant (Tarheel Drilling and Equipment Company, Incorporated) claimed a prior and superior right to the oil proceeds by virtue of a previously asserted lien against the leasehold owners under the statute

above mentioned. The parties hereto entered into the following stipulation: "It is stipulated by and between Tarheel Drilling and Equipment Company, defendant, and Valley Steel Products Company, and Lane-Wells Company, plaintiffs, that the only question involved as between them is entirely a question of law — that is: 'Whether a Labor and Material Lien filed under Section 51-701 Ark. Stats. 1947, covers oil produced and delivered to a pipe line after the lien has attached against the leasehold interest'. If this question is answered in the affirmative then Tarheel Drilling and Equipment Company is entitled to the sum of $703.24 held by J. S. Brooks, but if answered in the negative then the plaintiffs, Valley Steel Products Company, and Lane-Wells Company are entitled to said sum of money".

Upon a hearing the trial court found: "That a properly filed labor or material lien under Section 51-701 Arkansas Statutes 1947, does not extend to and cover the proceeds of oil runs from the oil and gas well and the leasehold estate covered by said lien".

Said Section 51-701 reads substantially as follows: "Any person . . . who shall under contract . . . with the owner or lessee of any land, mine, or quarry . . . or mineral leasehold interest in land . . . perform labor or furnish material . . . used in . . . drilling . . . operating . . . completing, maintaining or repairing any such oil or gas well . . . shall have a lien on the whole of such land or leasehold interest therein . . . or lease for oil and gas purposes . . . and upon said oil well, gas well . . . mine or quarry, for which same (labor or materials) were furnished".

We gather from the pleadings and the stipulations that Tarheel's alleged lien is based upon the sale of equipment to the leaseholders in connection with operation developments of the lease. Although said Section 51-701 does not specifically give a lien on the oil which comes from the well, appellants say such is implied. They also call attention to the fact that the statute pro-

vides for a lien "on the whole of such land", but a closer look reveals that such is the case only where the owner of the land produces the well which is, of course, not the case here. It is true that if the lien covered the land it would also cover the minerals under the land. We have examined the case of *Moran* v. *Johnson*, 91 Ohio App. 120, 107 N. E. 2d 401, relied on by appellants but do not find it persuasive here because the court did not attempt to distinguish between the oil and leasehold. Neither are we persuaded by the cases cited by appellants holding that an oil and gas lease conveys an interest in the land. The reason is that the statute does not create a lien (in this instance) on the land but creates a lien only on the leasehold. It is also argued by appellants that since oil becomes personal property when removed from the ground the lien would attach when that event happens, citing *Reavis* v. *Barnes,* 36 Ark. 575, and *Bank of Commerce* v. *Tubbs,* 156 Ark. 487, 247 S. W. 1079. The fallacy in that argument is that the statute does not create a lien on the land (in this instance), nor does it specifically create a lien on the oil produced therefrom.

Although the exact question here presented has never been settled in this State it has been settled contrary to appellants' contentions in other jurisdictions which have statutes essentially like said Section 51-701.

One of the leading cases is *Stanolind Crude Oil Purchasing Company* v. *Busey,* 90 P. 2d 876, 185 Okla. 200, in which the court, among other things, said: "It has been held by our court that an oil and gas lease conveys no interest whatever in the land itself and no title to the oil in place within the leased premises; that such lease is but a grant to explore; **a chattel real,** and personalty. Our lien statute contains an itemization of specific property affected by the lien; if there had been a purpose that oil as and when produced should be included surely it would have been listed as one of the items . . . It is true that oil and gas is the basis of value of the items, 'leasehold', 'lease for oil and gas purposes' and 'oil or gas wells', but oil and gas as pro-

duced is not mentioned in the lien statute and it is not one of the functions of the court to create a lien". The holding in the above cited cases was followed and applied in the case of *Young* v. *Mayfield,* 316 P. 2d 162.

To the same effect as above is the case of *Black* v. *Giarth,* 88 Kan. 338, 128 Pac. 183. In this case the court in construing a statute like our own, among other things, stated: "Under this statute, a lien may be acquired upon (1) the leasehold or lease, (2) the buildings and appurtenances, (3) the materials and supplies furnished, (4) the oil and gas well for which they were furnished, and (5) other wells, fixtures, and appliances used in operating upon the same leasehold. There is no mention of a lien upon the oil produced and it is obvious that this could not be included under any of the terms used, unless possibly a lien upon a well should be deemed a lien upon the oil flowing through it . . . But the oil is not a part of the well through which it flows . . . The statute makes no attempt to fasten the lien upon the lessor's real estate, or to extend it beyond the interest of the lessee. As he has no title to the oil so long as it remains in the earth . . . no lien can attach to it as his property until it is brought to the surface, and when that has been done, it is clearly no part of the well". A statute like ours was construed in the case of *Crowly* v. *Adams Bros. & Prince* (Texas), 262 S. W. 883, wherein the court stated: "A laborer's lien upon oil and gas wells, *etc.,* under the provisions of articles 5639a-5639h, Vernon's Ann. Civ. St. Supp. 1918, attaches only to such property as is specifically mentioned in the statute. The proceeds of the sales of oil produced from the well are not included in the statute. The Appellant, therefore, has no lien upon the money which the Magnolia Company owed for oil produced from these wells which it had purchased".

There is another circumstance which confirms our conclusion that said Section 51-701 does not and was not meant to create a lien on oil which comes from a well. Section 51-701 was enacted by the 1923 Legisla-

ture (Act 615). The same Legislature also passed Act 513. Section 1 of the latter Act is now Section 51-320 of the Arkansas Statutes and it does provide for a "lien upon the output and production" of an oil well. In view of this we cannot say that the Legislature did not recognize a distinction between a lien on a leasehold and a lien on the output, or that it negligently omitted the latter from the provisions of Section 51-701.

It is our conclusion, therefore, that the decree of the trial court should be, and it is hereby, affirmed.

Affirmed.

HILL *v.* GODWIN.

5-2027 331 S. W. 2d 34

Opinion delivered January 11, 1960.

Robert N. Maxey, for appellant.

Patrick O. Freeman, Thayer, Mo., *Oscar E. Ellis, D. Leonard Lingo, Harry L. Ponder,* for appellee.

SAM ROBINSON, Associate Justice. This action was filed by appellees, Norman E. Godwin and Gladys P. Godwin, to reform a deed from appellant, Lizzie W. Hill, to Chester Humphreys and subsequent deeds to the same property, including a deed to appellees. There is only one issue and that is whether Humphreys intended to buy and Mrs. Hill intended to sell all the property she owned on Goose Neck Island, which is a small tract of land consisting of a little less than 9 acres in Fulton County, immediately across Warm Fork Creek from the main part of the town of Mammoth Spring and now forming a part of that town.

The appellant, Lizzie W. Hill, owned 8.83 acres on the island. In 1949 she conveyed to Chester Humphreys 8.90 acres, "the said described land being commonly and locally known as 'Goose Neck Island' and forming a part of same." (There is a small portion of the island that did not belong to Mrs. Hill and appellees make no claim to such portion.) The description in the deed from Mrs. Hill to Humphreys is as follows: "Part of the East One-Half of the Southeast Fractional Quarter of the Northwest Fractional Quarter of Section Eight, (8) Township Twenty-one (21) North of Range Five (5) West of the Principal Meridian in Arkansas, in Fulton County; and, more particularly described as follows: All that acreage extending in a West and Northwesterly direction from the North-South Half Section Line of said Section Eight (8) and bounded by Warm-Fork Creek on the East and Northeast and by the Spring River as it now is flowing in the South and Southeasterly Direction, including any and all adjacent Riparian Rights in both Warm-Fork Creek and Spring River; and lying West of the present St. Louis & San Francisco Railroad Right-of-way, said acreage forming part of a peninsula or point of an irregular shape and containing Eight (8) and Ninety (90) Hundreths Acres, more or less, of land and water surface. SAVE AND EXCEPT, any and all right of way or other grant or easement heretofore made to the Mammoth Spring Electric Light and Power Company. The said described land being commonly and locally known as 'Goose-Neck Island' and forming a part of same."

It will be seen that the deed describes the land conveyed as being in the Southeast of the Northwest of Section 8, but actually 3.6 acres of the 8.83 acres Mrs. Hill has owned on the island is in the Northeast of the Northwest of Section 8. The chancellor found that it was the intention of the parties that Mrs. Hill was selling to Mr. Humphreys all the land she owned on the island.

It appears that Mr. Humphreys wanted to buy the land for Mr. Doyle Blackburn. Mr. Robert N. Maxey, who

lived at Mammoth Spring, was the agent of Mrs. Hill, looking after her property. Mrs. Hill, an elderly lady, lived in Memphis. Mr. Maxey testified that Humphreys asked him about "buying lands on Goose Neck Island. I told him I had *it* for sale." (Emphasis supplied) At that time Humphreys offered $800 for "the property" and Mr. Maxey told him he would communicate the offer to Mr. Napoleon Hill, who handled Mrs. Lizzie W. Hill's business. Later Mr. Hill called from Memphis and said Humphreys was there and had increased the offer to some extent and told Mr. Maxey "you go ahead and write the deed. We won't have it surveyed, but will furnish the abstract." Pursuant to this conversation Maxey wrote the deed conveying 8.90 acres more or less, which is all the land Mrs. Hill owned on Goose Neck Island. If Mrs. Hill was not selling all she owned on the Island, then Maxey would have had no way of knowing which part she was selling. None of the parties had suggested that Mrs. Hill was selling only a portion of the property she owned on the Island.

Appellant now contends she sold Humphreys only 3.83 acres, but there is no substantial evidence in the record to support that view. Practically all the evidence is to the contrary. Humphreys testified positively that he bought 8.90 acres, all the land Mrs. Hill had on Goose Neck, for the consideration of $890. Humphreys is corroborated in his testimony by the testimony of Doyle Blackburn. Mr. Maxey testified that the deed he wrote did not include all that Mrs. Hill owned on Goose Neck Island, but there is not a scintilla of evidence to the effect that it was not Mrs. Hill's intention to convey all she owned on Goose Neck Island.

The chancellor's decree reforming the deeds is fully sustained by the evidence. Of course, a deed may be reformed to carry out the intention of the parties. *Davidson* v. *Peyton,* 190 Ark. 573; 79 S. W. 2d 734; *Robertson* v. *Chronister,* 196 Ark. 141, 116 S. W. 2d 1048; *Hervey* v. *College of Ozarks,* 196 Ark. 481, 118 S. W. 2d 576.

Affirmed.

5-1975 331 S. W. 2d 265

Opinion delivered January 11, 1960.

[Rehearing denied February 22, 1960]

James R. Hale, for appellant.

Rex W. Perkins and *Charles Bass Trumbo,* for appellee.

JIM JOHNSON, Associate Justice. This is a suit involving an oral contract. In May 1957, appellant, Koolvent Aluminum Awning Company of Arkansas, Inc., made an oral contract with appellee, Zed O. Johnson, to install a fiberglas canopy in front of appellee's service station near the north edge of Fayetteville. The appellant informed appellee that the material used in the construction would be of the best grade and that the material would also be both leakproof and fireproof. Appellee agreed to pay $2,500 and sales tax of $75 for the job. Appellant undertook the installation and while the work progressed during the summer and fall appellee found fault with various aspects of the work.

When installation of the fiberglas began, appellee discovered from the labeling on the boxes that the appellant was using some "B" grade material instead of the more expensive "A" grade material. He complained to the workers about this fact but was told that only a small portion of the grade "B" material would be used, and such material would be used for the border work around the canopy. He permitted the work to continue. The evidence reflected that there is no practical difference between the two grades of fiberglas, and nobody other than a trained engineer can tell "A" grade from "B" grade.

After the work had progressed for some time, the appellee discovered that the material which had been used in the construction work was not leakproof as represented. He again complained to the employees of the appellant about this variation with the contract, whereupon they attempted to make repairs on the construction work, and patch up the leaks in the canopy. During the course of these repairs appellee told appellant's workmen to "tear it down and put it in the junk pile." They did not tear the canopy down. Later on, but before all of the fiberglas was put in, it came to the appellee's attention that the fiberglas material was not fireproof. Appellee did nothing to stop the work but instead permitted appellant to complete the job.

The work was completed around November 2, 1957. Under the agreement appellee was to pay the total price of $2,575 as soon as the job was completed. When appellant endeavored to collect, appellee complained that the canopy leaked and that the material was not fireproof as it had been represented to be, the evidence on this point being that the material met all of the requirements of the Fayetteville building code and that it is widely used in commercial construction. Upon Johnson's refusal to pay anything, appellant filed suit asked for judgment for $2,575 and costs and for foreclosure of its material and labor lien. This suit was filed within the statutory period of 90 days on January 21, 1958. Finally, more than one year after the work

was completed, on November 26, 1958, appellee filed an answer pleading: (1) a general denial; (2) the Statute of Frauds; (3) breach of warranty, with an allegation that he had rescinded the contract; and (4) alleging damages.

The case was tried on December 3, 1958, and the proof showed that appellee was at that time enjoying some of the benefits of the canopy. He offered no proof as to any specific amount of damages. At the conclusion of the trial, the trial court delivered an oral "opinion" finding, in substance, that appellant had substantially performed its contract. However, the decree, which was later filed, granted Johnson's prayer for rescission. This appeal followed.

All of the points relied upon by appellant for reversal pertain to the law of rescission and will be treated in this opinion as combined into one point.

Appellee contends that the oral contract executed between appellee and appellant contained at least three express warranties, concerning the quality and type of materials which were to be used in the construction of the fiberglas awning. First, the representation by the appellant that the material used for the awning would be "fireproof"; second, that the best or highest grade material would be used in the construction; and third, that the awning would be "leakproof."

He argues that it is well settled that where two parties contract and express warranties are made by the one, a breach of such warranties will give the other two alternative courses of action. He may either rescind the contract and relieve himself from liability thereon, or he may enforce the contract and sue for damages. Appellee in his answer elected not only to rescind but also elected to sue for damages.

[illegible] appellee chose to stand on the ground of rescission at the trial after the goods had been delivered to him, we are confronted with the question of whether or not he met the test required of him by the law with

reference to exercising his right to rescind within a reasonable time.

Did appellant know of the breach of warranty when he accepted the goods? The record reveals that he learned when the fiberglas was delivered that some of it was grade "B". Upon explanation of the intended use of the "B" grade material he permitted the workmen to use it.

Appellant learned that the fiberglas was not fireproof before all of it had been installed and he did not stop the installation. Appellant knew that the canopy leaked long before the job was completed, the last work being some months after the completion of the canopy and consisted of concrete repair made necessary by the installation of iron posts which supported the canopy.

In *Jones* v. *Gregg,* 226 Ark. 595, 293 S. W. 2d 545, we said of the right to rescind:

"While the law gave them the right to rescind the agreements upon the failure of the appellants to comply with their part of the contract, this was only one of their remedies and they were not required to exercise it. The law does require, however, that in order to rescind a contract, the rescission itself must be made within a reasonable time after the facts giving rise to the right of rescission arise or become known; and, unless such right to rescission is exercised within a reasonable time after the discovery of the facts justifying the rescission the party otherwise entitled to rescind will be deemed to have waived this right."

The only evidence in the record tending to indicate that appellee thought of rescinding the contract is his testimony that he told the workmen to "tear it down and put it in the junk pile." If this statement could be considered as notice to the seller of his election to rescind it must fail for the want of adhering to it since her permitted appellant to perform work on the contract after the statement without protest. The record reveals no affirmative act toward rescission was done by appellee until his answer was filed to the lawsuit which

was more than a year after the work was completed. We hold that failure to assert the right to rescind for this period was an unreasonable delay which amounted to a waiver of the right to rescind, hence, the trial court was in error in decreeing rescission.

Appellant has filed certain motions and affidavits stating in effect that appellee has destroyed a portion of the canopy since the decree of the trial court. The allegations in these pleadings have been controverted by the appellee. It is very doubtful that the motions and affidavits and response thereto were properly filed. In any event, these are matters which may be presented to and considered by the trial court upon a new trial.

Since this action is properly in Chancery Court on foreclosure of lien and since appellee has properly pleaded damages, in order that justice be done we have concluded that the cause should be reversed and remanded for further development of the action against appellee for damages for breach of warranty, consistent with this opinion. It is so ordered.

Reversed and remanded.

GEORGE ROSE SMITH, J., dissents.

COLEMAN *v.* GARDNER, ADMR.

5-2045 330 S. W. 2d 954

Opinion delivered January 18, 1960.

Claude F. Cooper, for appellant.

James M. Gardner and *Gene Bradley,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves the determination of parties entitled to receive the proceeds of a fire insurance policy. Prior to January 1, 1956, J. R. Coleman was the owner of a 54 acre farm in Mississippi County. Coleman and his wife, Willie Jane Goza Coleman, lived on the farm, occupying the premises as their homestead. In November, 1955, the Farm Bureau Mutual Insurance Company issued its fire loss policy in the name of J. R. Coleman and/or Willie Jane Coleman, such policy effective until November 20, 1956. Coleman died January 1, 1956, and left surviving, the widow, and five children by a previous marriage, all of age. Late in January, Mrs. Coleman went to the insurance agent and an endorsement was entered on the policy changing the name of the insured to Willie Jane Coleman. On December 31, 1956, an order was entered by the Probate Court awarding the widow the 54 acre farm as her homestead for and during the period of her natural life. An accounting by the personal representative was subsequently

filed, and the affairs of the estate duly completed.[1] On November 20, 1956, the insurance company issued a renewal of the policy for the period ending November 20, 1957, and a like renewal was procured by Mrs. Coleman in November of 1957. In the meantime, the widow had moved from the farm in February of 1957. For the year 1958, the property was rented to Denison Wolford, who was living in the house and paying $25 per month for same. In May of that year, the house was destroyed by fire. The insurance policy was for a sum not to exceed $3,000, and the premiums, following the death of Mr. Coleman, had all been paid by Mrs. Coleman. Mrs. Coleman made demand on the company for payment, and the latter admitted liability in the amount of $3,000,[2] but refused to pay because Mrs. Coleman's step-children (children of the deceased J. R. Coleman) objected, and were making claim to the proceeds.

On June 19, 1958, Mrs. Coleman died, and proceedings were commenced to probate her estate. James Gardner was named administrator, and under an order of the court, the insurance company paid the $3,000 over to such administrator. Claim was filed by the Coleman heirs, J. C. Coleman, Albert B. Coleman, Vera Belle Coleman Mosley, Emma Sue Coleman Scott, and Martha J. Woods, for $3,000 (proceeds of the insurance policy), which was disapproved by the administrator, and thereafter heard by the court. On May 22, 1959, the court disallowed this claim, and this appeal by J. C. Coleman follows.

For reversal, appellant contends first, that Mrs. Coleman did not meet the duty incumbent on a life tenant "to keep the premises in good repair and not to permit waste", second, that at the time of the fire which resulted in the loss of the farm dwelling, the life tenant had abandoned her homestead by virtue of moving away from said premises, and third, that her interest could not have been more than a dower interest

[1] A final accounting covering the period until April 20, 1959, was filed by the administrator, with a later amendment to the final account, both of which were subsequently approved.

[2] The company placed a value on the house of $5,000.

in the $3,000, "which could not have been greater than one-third of the $3,000, during her life, or life expectancy."

Relative to his first contention, appellant asserts in his brief:

"* * * that the life tenant in this case, occupied the premises in such a manner and conducted the affairs in such a manner, which permitted waste for which she, or her estate, certainly should be liable.

The destruction of the building on the aforesaid premises, and the taking of the entire amount of insurance, for which it was insured, leaving the remaindermen nothing whatsoever, with which to rebuild, would be waste."

This contention is based upon the assertion that Mrs. Coleman moved a party of questionable character onto the premises, and that this action constituted waste to an extent that the remaindermen were injured, and for such injury, should be compensated. We do not agree with this contention. No oral testimony was taken at the hearing, and the only evidence relating to the tenant Wolford is found in paragraph 5 of the Stipulation. This paragraph reads as follows:

"5. We further state for the record that for the year 1958, the land was rented to Denison Wolford and he was living in the house when it burned and paying $25.00 per month for the house, as well as other considerations for the rental of the farm; that the house that Mr. Wolford had lived in prior to his moving into the house in question, likewise, was destroyed by fire, on other property."

Certainly, we cannot say that the mere act, by a life tenant, of renting a house to one who has previously lived in a house destroyed by fire, is an act which constitutes waste. Bouvier's Law Dictionary, Vol. II, (3rd Revision), page 3433, defines "waste" as:

"Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the ten-

ant thereof to the prejudice of the heir or of him in reversion or remainder.

Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lessor interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance.

An unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in its substantial injury."

It is obvious that the simple act of renting the property to Wolford, under the record before us, cannot be classed as unreasonable, abuse, or mismanagement; nor can it be said that Mrs. Coleman was remiss in any duty to the remaindermen because of this act. While appellant asserts that a party of "questionable character" was moved onto the premises, the assertion is completely bare. We find no merit in this contention.

Nor do we agree that Mrs. Coleman abandoned her homestead simply because she moved away. The only evidence on this point is found in the stipulation, paragraph 1, which reads as follows:

"1. Mrs. Coleman moved from the farm in February of 1957 and was not living in the house when it burned in May of 1958."

The law is, of course, well settled to the effect that merely moving from a homestead does not, in itself, constitute abandonment. In *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63, this Court said:

"It is the rule of law in this State, announced by many decisions of this court, that the question of whether there has been an abandonment of a homestead once established, is almost entirely a question of intent on the part of the homestead owner so to do. In other words, in order to constitute an abandonment of a homestead, the owner must leave it with the intention of renouncing and forsaking it, or leaving it never to re-

turn. The law does not require continuous occupation of the homestead to continue it as such."

Further, in quoting from the case of *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205:

"Our Constitution gives the homestead to the widow for life, without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants."

In the case before us, there is no evidence reflecting why Mrs. Coleman moved, or whether she had the intention to forsake and abandon the homestead, or to return. It follows that appellant's argument is without merit.

Appellant's final argument is disposed of by our holding in *Jackson* v. *Jackson, Trustee,* 211 Ark. 547, 201 S. W. 2d 218. There this Court held that a life tenant, insuring her own interest in the premises, at her own expense, and under no obligation under a will to insure for the benefit of the remaindermen, and having made no agreement to do so, is entitled to the proceeds of the policy of insurance free from the claims of the remaindermen. Appellant admits that the *Jackson* case controls his third point, but argues that the rule is a harsh one, and should be overruled or modified. We see no reason to change this holding, which, as appellant admits, conforms to the view of an overwhelming number of jurisdictions. In the *Jackson* case, this Court, quoting from 33 American Jurisprudence, § 332, p. 838, said:

"It is clearly the general rule that where a legal life tenant insures the property in his own name and for his own benefit and pays the premiums from his own funds, he is, at least in the absence of a fiduciary relationship between him and the remaindermen existing apart from the nature and incidents of the tenancy itself, or of an agreement between him and the remainderman as to which of them shall procure and maintain insurance, entitled to the proceeds of the insurance upon

a loss; and the fact that the insurance was for the whole value of the fee is not generally regarded as affecting the right of the life tenant to the whole amount of the proceeds."

Further, quoting from 31 *Corpus Juris Secundum,* paragraph 46, page 59:

"It has been stated, as a general rule, that the life tenant is not bound to keep the premises insured for the benefit of the remainderman or reversioner, unless there is an agreement that he shall do so, or a provision to that effect in the instrument creating the estate; but that either may insure for his own benefit, the tenant for life and the remainderman paying insurance for their respective interests. Ordinarily this is what is done, and it has been held that neither the life tenant nor the remainderman will be benefited by the other's policy."

Still further, from the opinion:

"In Restatement of the Law of Property, Vol. 1, § 123, sub-sec. 2, the rule is thus stated: 'When a policy of insurance against the destruction of, or damage to, land or structures thereon, exists only for the protection of the interest of the owner of the estate for life, the owner of the estate for life has a privilege to retain, as against all claims of owners of future interests in the same land or structures, all moneys received by such owner as the proceeds of such policy of insurance.' "

As stated, this is clearly the majority rule. In fact, only a very few jurisdictions hold otherwise. In the case before us, Mrs. Coleman was the life tenant. Appellant was a remainderman. Each had an insurable interest, and the life tenant insured her interest, paying for such insurance from her own funds. The remaindermen did not insure their interest. No agreement was in effect relative to insurance. Clearly, under our holding, Mrs. Coleman was entitled to the entire proceeds of the policy.

Affirmed.

5-2029 331 S. W. 2d 97

Opinion delivered January 18, 1960.

[redacted]

Paul K. Roberts, for appellant.

L. B. Smead, for appellee.

J. SEABORN HOLT, Associate Justice. This is a contest between appellant, the mother, and appellee, the grandmother, over the custody of a minor child. From an order awarding its care and custody to the grandmother comes this appeal. The record reflects that in 1948 appellant (then Ernestine Martin) married Bob Foord and the child in question, Richard James Foord, was born to them February 19, 1952. While bringing his wife and child to Camden, Arkansas from Indiana on October 22, 1952, Foord's automobile struck the abutment of a bridge over the St. Francis River and he was killed, and the appellant and child were severely injured. Appellant was confined in a hospital for many weeks due to shock and injuries resulting in an operation of major abdominal surgery. After leaving the hospital, appellant went to the home of her parents to convalesce and appellee (her mother) was appointed guardian of appellant.

March 20, 1956 Ruby Mae Foord, the child's aunt, filed a petition in the Probate Court of Ouachita County praying that she be appointed guardian of the child, and without any notice of the hearing of the petition being furnished appellant, Ruby Mae Foord was appointed guardian on March 30, 1956. September 20, 1957 appellant married Graydon Edwards of Irwin, Ohio and they established a home there. September 16, 1958 appellant filed a motion in the Probate Court of Ouach-

ita County to quash the order of March 30, 1956 wherein Ruby Mae Foord was appointed guardian, and on October 10, 1958 the probate court quashed the previous order appointing Ruby Mae Foord guardian, and ordered that the child remain in the custody of appellee, its grandmother. On October 23, 1958, appellee filed her petition in the Probate Court of Ouachita County praying that she be appointed guardian of the child. Appellant resisted appellee's prayer to be appointed guardian of the child and asked the court to grant to her, appellant, permanent custody of the child. After hearing rather voluminous testimony, the probate court entered its order granting custody of the child to appellee, its grandmother, and denying appellant's request for custody. It thus appears that all of the above proceedings were had in probate which has the power and authority to appoint guardians, but it is without power or authority to determine a contest over the care and custody of a minor without invading the jurisdiction of chancery courts.

In the present case, the probate court undertook to determine who should have "care and custody" of the minor here, a power reserved to chancery courts only. We said in 178 Ark. 583, 12 S. W. 2d 879, *Kirk* v. *Jones,* "Minors are the wards of chancery courts, and it is the duty of such courts to make any orders that would properly safeguard their rights." See also *Richards* v. *Taylor,* 202 Ark. 183, 150 S. W. 2d 32.

This court, in the early case of *Myrick* v. *Jacks,* 33 Ark. 425, said: "The general jurisdiction over the persons and property of minors belongs to the Chancery Courts. It is a very high trust, involving the most delicate and important interests of a helpless class, which is peculiarly the subject of the jealous and watchful care of chancery, and which is peculiarly liable to injury from the greed of crafty men and the carelessness of relations. Courts of probate have, by the statute, been entrusted with some limited powers over the estates of minors in the hands of administrators and guardians, and within the scope of those statutory pow-

ers they are certainly entitled to all presumptions accorded to superior courts of record. But they had no such jurisdiction by common law, and beyond the limits given they have none now. * * * if they undertake to make an order not authorized under any circumstances, although they may have jurisdiction over the same property for other purposes, it is void." See also *Watson* v. *Henderson,* 98 Ark. 63, 135 S. W. 461 and *Crenshaw* v. *Crenshaw,* 203 Ark. 1086, 160 S. W. 2d 37.

Accordingly, the order of the probate court is reversed and the cause remanded with directions to transfer the case to the chancery court for further proceedings consistent with this opinion.

ST. PAUL-MERCURY INDEMNITY CO. *v.* CITY OF HUGHES.

5-2034 331 S. W. 2d 106

Opinion delivered January 18, 1960.

Norton & Norton, by *Robert H. Wright,* for appellant.

Knox Kinney, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal is another step in the persistent efforts of appellant to collect from the City of Hughes the amount of $1,050.00 which appellant paid to St. Francis County under a policy of insurance issued by appellant.[1] See *St. Paul-Mercury Indemnity Co.* v. *Taylor,* 229 Ark. 187, 313 S. W. 2d 799. We will refer to St. Paul-Mercury Indemnity Company as "appellant"; St. Francis County as "County"; and the City of Hughes as "City".

On July 9, 1954, for a premium of $53.00, appellant insured the County against any loss or damage in excess of $100.00 to a 2-ton Chevrolet dump truck owned by the County. The truck was loaned by the County to the City and was damaged while in possession of the City; and the appellant paid the County $1,050.00 under the said insurance policy which contained this subrogation clause: "In the event of any payment under this Policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights."

After making payment to the County the appellant undertook to recover the said $1,050.00 from the city on the theory that the City, as bailee of the truck, was liable in contract to the County, and that the appellant, as subrogee of the County, could hold the City liable in contract. To be maintained the action had to be in contract because in Arkansas a municipality may be liable

[1] Case No. 1598 in this Court was a motion for rule on the Clerk, which was denied. Case No. 1614 in this Court was a petition for writ of prohibition, which was denied by opinion in the cited case.

in contract,[2] but is not liable in *tort* in a case like this one.[3] The appellant filed action against the City in the Circuit Court in the name of the County, but the County Judge of St. Francis County dismissed the action on behalf of the County. The appellant then filed the present suit in the Chancery Court, which was transferred to the Circuit Court; and the Circuit Court sustained the City's demurrer to the complaint.[4] From the judgment dismissing the complaint this appeal resulted; and two questions are presented which we now discuss.

I. *Did The Complaint State a Cause Of Action In Contract?* In determining whether a demurrer to a complaint should be sustained every allegation made therein, together with every inference reasonably deducible therefrom, must be considered. *Sallee* v. *Bank of Corning,* 122 Ark. 502, 184 S. W. 44; and *Cline* v. *Smith,* 205 Ark. 136, 167 S. W. 2d 872. In addition to alleging the status of the parties, the issuance of the policy to the County, the payment of the loss by appellant to the County, and the right of subrogation, the complaint also alleged:

(a) That the County placed the truck in the exclusive possession of the City "for the purpose of hauling gravel for the streets of the said defendant city, and then to be returned to the possession of St. Francis County in good condition when such work was completed".

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[2] *City of Little Rock* v. *White,* 193 Ark. 837, 103 S. W. 2d 58.

[3] *Cabiness* v. *City of North Little Rock,* 228 Ark. 356, 307 S.W. 2d 529.

[4] The Circuit Court order sustaining the demurrer recited: "Now on this 17th day of August, 1959, comes on to be heard the Demurrer filed herein by Defendant City of Hughes, and the Court having heard and considered the argument and briefs of counsel for the respective parties, and being fully advised in the premises, finds and holds that Plaintiff by its Complaint is attempting to do indirectly what it cannot do directly, *i.e.* sue Defendant City of Hughes in tort, and Defendant's Demurrer should be sustained. It is, therefore, CONSIDERED, ORDERED AND ADJUDGED that Defendant's Demurrer to Plaintiff's complaint be and hereby is sustained; and Plaintiff having declined to plead further, it is CONSIDERED, ORDERED and ADJUDGED that Plaintiff's complaint be and hereby is dismissed, with costs to be borne by the Plaintiff."

(b) "That upon the return of the truck in question by the Defendant city to St. Francis County, said truck was in such a complete state of destruction that its salvage value was only $350.00."

(c) "That the delivery of the truck by the said St. Francis County to the Defendant city created the relationship of bailor-bailee between the County and Defendant (City), and imposed on the Defendant a contractual obligation properly to care for the vehicle."

That the complaint here involved (the one filed in the Chancery Court) alleged a bailment is almost beyond dispute because there was a delivery by the County (bailor) of personal property (the truck) to the City (bailee) to use safely and return in good condition. See *Sullivant* v. *Pennsylvania Fire Ins. Co.,* 223 Ark. 721, 268 S. W. 2d 372. The complaint alleged that the City failed to return the truck in good condition and thereby breached the contract of bailment. For such breach of contract of bailment the bailor had a cause of action *ex contractu* against the bailee. In *Ferrier* v. *Wood,* 9 Ark. 85, when common law forms of pleading still existed in Arkansas, this Court held that an action in assumpsit could be brought against the bailee for breach of the contract of bailment. The old common law action of assumpsit was an action *ex contractu* because the word "assumpsit" means "he promised". Our own case of *Bertig* v. *Norman,* 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913D 943, is frequently cited because of the scholarly opinion of Mr. Justice FRAUENTHAL. In that case a bale of cotton had been left by Norman's agent on the platform of Bertig Brothers, the bale of cotton had been lost, and Norman sued Bertig Brothers for damages. Norman was required to state whether he sued "on contract, in bailment, or conversion"; and he said that he sued in bailment. On this statement of bailment this Court held the action by Norman was on contract and not in *tort* and Mr. Justice FRAUENTHAL said:

"It is urged by counsel for Bertig Brothers that the action as originally brought was one sounding in *tort* for the conversion of the property, and that the complaint could not be amended so as to base the action upon a bailment. But we are of the opinion that the allegations of the complaint in the justice of the peace court, and as it was amended in the circuit court, were sufficient to make the action one of assumpsit. The action of assumpsit is one for the recovery of damages for the nonperformance of a simple contract. Such contract may be expressed or implied, and the action is based upon the breach thereof, and is therefore *ex contractu.* 2 Enc. Pl. & Prac. 988.

"Giving to the pleading that liberal construction accorded by our practice, the complaint as originally filed alleged that the defendants had obtained and converted the bale of cotton, and were liable to plaintiff upon an implied promise to pay for the value thereof thus received by them . . . Whether the breach of contract grew out of the failure to pay the proceeds of the bale upon an implied promise to do so by those who had obtained it, or out of the negligence of those who, as bailees, were entrusted with its care, the remedy was an action of assumpsit. *Ferrier* v. *Wood,* 9 Ark. 85; *Stanley* v. *Bracht,* 42 Ark. 210. The action instituted was therefore based, and recovery can only be had, upon a contract of bailment and the breach thereof by the defendants."

So we hold that the appellant as subrogee of the County could sue the City for breach of bailment contract by action *ex contractu* as entirely separate from a *tort* action. Of course, the appellant has a narrow opening through which to direct its efforts at recovery because the City is not liable in *tort,* as previously pointed out. But we must conclude that the demurrer of the City should have been overruled by the Circuit Court.

II. *Should The Case Be Transferred To Chancery Court?* Appellant insists that the present case against the City should be tried in Chancery Court; and we

agree with that contention which may now be properly urged. In *St. Paul-Mercury Indemnity Co.* v. *Taylor,* 229 Ark. 187, 313 S. W. 2d 799, the appellant sought a writ to prohibit the Circuit Court from entertaining jurisdiction of this case and we refused the prayed relief, saying:

"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."

But the present case is an appeal from a final judgment of the Circuit Court, so the ruling on the interlocutory order — *i.e.,* motion to transfer back to chancery — now be properly considered by us. *Hemphill* v. *Lewis,* 174 Ark. 224, 294 S. W. 1010; and *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13.

It must be remembered that appellant, as subrogee of the County, first proceeded against the City in the law court in the name of the County. This was proper. *St. Louis, A. & T. Ry. Co.* v. *Fire Assn.,* 60 Ark. 325, 30 S. W. 350. But the County Judge of St. Francis County dismissed the case in the law court notwithstanding the subrogation agreement in the insurance policy, as previously copied. The appellant then filed the present suit in equity in its own name as plaintiff against the City and also against the County Judge of St. Francis County; and alleged the law action and its dismissal by the County Judge, and prayed for judgment against the City and for a restraining order against the County Judge in this language:

". . . and that an order issue restraining M. D. Clark, as county judge of St. Francis County, from interfering in any capacity, assumed or otherwise, with the proceedings herein."

On June 20, 1957 the Chancery Court entered its order which in part said:

". . . that said Defendant M. D. Clark, as County Judge of St. Francis County, shall be without power to take any action in dismissing this cause, or interfering with its progress and he is restrained from doing so; and that all other issues herein are reserved for further consideration of the court."

Thus, equity took jurisdiction of the suit and granted part of the prayed relief; and the rule is thoroughly established that when equity acquires jurisdiction for one purpose under *bona fide* allegations, then all matters at issue will be adjudicated and complete relief awarded. *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399; and *Goodman* v. *Powell,* 210 Ark. 963, 198 S. W. 2d 199. In *Askew* v. *Murdock Acceptance Corp.,* 225 Ark. 68, 279 S. W. 2d 557, we said:

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

CONCLUSION. The judgment of the Circuit Court is reversed and the cause remanded with directions to overrule the demurrer to the complaint and to remand the cause to the Chancery Court for further proceedings.

Opinion delivered January 18, 1960.

Moses, McClellan, Arnold, Owen & McDermott, by *Jack Young,* for appellant.

McMillan & McMillan, for appellee.

GEORGE ROSE SMITH, J. In 1957 the plaintiff-appellant, Monroe Schwarzlose, was an established processor of turkeys, operating a processing plant in Cleveland county. He was also a retail dealer in poultry feed, selling an assortment of feeds made by Quaker Oats Company. To supply his plant with turkeys Schwarzlose raised birds himself and also offered a plan by which farmers in the area might raise turkeys for him under a contractual arrangement. The plan contemplated that each grower would establish his credit with Quaker, purchase turkey poults from Schwarzlose in the spring, raise the turkeys with Quaker feed, and resell the mature birds to Schwarzlose in the fall. It was expected, of course, that the market price prevail-

ing in the fall would provide a profit for the grower, who contributed his labor and the use of his premises to the venture.

This case, which represents a consolidation of two suits in the trial court, involves two instances in which the plan resulted in a net loss, the market price being less than the grower's outlay for poults, feed, and medicine. By the terms of the written contract the greater part of this loss was to be borne by the grower, and Schwarzlose accordingly sued each of the growers, Kingrey and Wilkins, upon the notes and chattel mortgage each had given in buying poults, brooders, and equipment from Schwarzlose. The defendants filed similar answers and cross-complaints, asserting that the written contracts did not truly express the agreement between the parties and that the growers were entitled to recover all their actual costs plus an amount equal to forty cents for each bird raised to maturity.

After an extended trial the chancellor upheld the defendants' contentions and granted a reformation of the contracts and a money judgment against Schwarzlose for the amount found to be due each grower. It being conceded that the proof to support a decree of reformation must be clear, unequivocal, and decisive, *Nicholson* v. *Hayes,* 166 Ark. 112, 265 S. W. 640, the principal question is whether the evidence in this record measures up to that standard.

The testimony shows that in February and March of 1957 Schwarzlose took the initiative in seeking to persuade farmers to raise turkeys for him. He called upon the two appellees, Kingrey and Wilkins, a number of times before they accepted his proposal and orally agreed to grow birds for his plant. We shall detail the facts with respect to Kingrey only, the two cases being similar.

The original agreement between Schwarzlose and Kingrey was admittedly oral and was probably made late in March. Schwarzlose sold brooders, feeders, and other equipment to Kingrey, for which Kingrey signed

a promissory note for $1,948.54, dated April 1. In April Kingrey bought 10,120 poults from Schwarzlose, at 75¢ each, and gave a promissory note, dated April 3, for the total purchase price of $7,590.00. Kingrey began raising the turkeys and eventually purchased $37,297.70 worth of feed from Schwarzlose.

It was not until the night of June 21 that Schwarzlose took a mimeographed form of contract to Kingrey's home and obtained his signature. Schwarzlose admits that he told Kingrey that the written contract was the same as the oral agreement made in the preceding March. The Chancellor was justified in finding that Kingrey relied upon this statement and signed the contract without reading it carefully. If there was really a material variance between the oral and written contracts it is sufficiently clear that Kingrey signed the latter under a mistaken belief as to its contents and that Schwarzlose either shared the mistake or was guilty of misrepresentation.

Paragraph 7 of the written instrument provides that Schwarzlose will repurchase the turkeys in the fall at the greater of the following prices:

"A. The prevailing market price for such turkeys in the State of Arkansas . . . as shown in the Federal-State Market News Service distributed by the University of Arkansas.

"B. A price equal to the cost of growing such turkeys, as herein defined, plus a sum equal to $.40 per mature turkey repurchased, *provided that the price as determined under this subsection shall never exceed the price as determined under Paragraph 7A plus a sum equal to $.40 per mature turkey repurchased.*" (Our italics.)

The pivotal question is whether the oral agreement contained the proviso we have italicized, by which the grower's recovery of his actual costs could never exceed the market price plus forty cents a bird. Schwarzlose testified that this limitation was included in his original proposal, but we think that his version of the mat-

ter is clearly and convincingly rebutted by the appellees' proof.

Kingrey and Wilkins both testified that during the negotiations Schwarzlose guaranteed them their costs plus forty cents a turkey, regardless of the market price. This testimony is corroborated by four other farmers and a banker, to whom Schwarzlose made the same explanation of his offer. Ordinarily the negotiations between Schwarzlose and third persons would be inadmissible, on the principle of *res inter alios acta,* but here Schwarzlose himself testified that his proposal to the others was identical with that made to the defendants. This admission distinguishes the case from ***Hight*** v. *Marshall,* 124 Ark. 512, 187 S. W. 433, cited by the appellant, and opens the way for proof of the other negotiations.

The attorney who prepared the written contract testified, after Schwarzlose had waived the attorney-client privilege, that the first draft of the agreement did not contain the proviso we have emphasized. It is clearly inferable from this lawyer's testimony that the proviso was suggested to him by Schwarzlose after the parties had entered upon the undertaking in March or early April. Finally, we observe that in the witness chair Schwarzlose was unable to state the substance of the proviso, despite repeated questions during his cross-examination. We think it reasonable to conclude that he did not have the limitations of the proviso firmly in mind when he first sought to induce the appellees to raise turkeys for him.

The appellant contends alternatively that in any event the chancellor erred in cancelling the appellees' notes for the purchase price of the brooders and other equipment, since this capital investment was not part of their recoverable costs of raising the turkeys. Even so, the notes were properly canceled. The net balance in favor of the appellees, without taking the purchase of equipment into account, was more than the face amount of the equipment notes, and consequently the chancellor was right in crediting the appellant with the

amount of the cancelled notes and giving the appellees a judgment only for the balance then remaining due.

Affirmed.

CHENEY, COMMR. *v.* STEPHENS.

5-2019 330 S. W. 2d 949

Opinion delivered January 18, 1960.

[Rehearing denied February 22, 1960]

Herrn Northcutt, for appellant.

Mehaffy, Smith & Williams, by *William H. Bowen,* for appellee.

PAUL WARD, Associate Justice. The issue presented on this appeal is whether a domestic corporation must pay State income taxes on earnings derived from without the State under the provisions of the State Income Tax Act, Act 118 of the Acts of 1929 and the amendments thereto (Ark. Stats. § 84-2001, *et. seq.*).

Appellee, Stephens, Inc., derived the subject income from the purchase and sale of a large number of shares of stock in the Arkansas Louisiana Gas Company (hereinafter called Arkla). Accordingly, appellee filed an income tax return for the fiscal year ending May 31, 1957, excluding therefrom the aforementioned extrastate gain but reporting an income tax liability in excess of $19,000.00. After a series of conferences between appellant and appellee relative to the taxability of said gain, appellant notified appellee by a letter dated April 9, 1958 of his determination that the gain was subject to Arkansas income tax. Based on that determination appellant made a computation of the additional income tax liability and appellee paid the determined amount under protest on or about April 15, 1958. Invoking jurisdiction of the Chancery Court pursuant to § 32 of Act 118 of the Acts of 1929 (Ark. Stats. § 84-2308) appellee filed a complaint containing substantially the allegations hereinafter set forth.

Stephens, Inc., formerly W. R. Stephens Investment Company, is an Arkansas corporation with its principal office in Little Rock, and the defendant is the duly appointed and acting Commissioner of Revenues for the State of Arkansas. The action is for the recovery and refund for State Income Tax illegally and erroneously collected by the defendant for the period June 1, 1956 to May 31, 1957. In 1954 plaintiff began negotiations for the purchase from the Cities Service Company (hereafter called Cities Service) of its entire stockholdings in Arkla consisting of 1,958,189 shares of $5.00 par common stock; and on October 15, 1954 a contract of purchase of said stock was executed at New York City subject to the approval of the Securities Exchange Commission. Plaintiff intended and warranted to Cities Service that it was purchasing said stock for its own account for investment, and the stock later acquired was so earmarked, accounted for and at all times held in plaintiff's investment account. Plaintiff's plan of purchase also involved an offer to purchase all shares of Arkla common stock which minority stockholders should tender for sale in New York City. In order to finance

the purchase of said stock plaintiff secured a loan commitment from the First National City Bank of New York obligating the bank to lend plaintiff all the money necessary to acquire said stock, with the understanding that the plaintiff should at all times maintain a cash margin in the bank in the sum of $5,000,000.00. Plaintiff's purchase agreement with Cities Service and also the minority stockholders required delivery of said stock to the said bank, properly endorsed for transfer and delivery. Cities Service sought and received from the Securities and Exchange Commission permission to make said sale. Pursuant to the above arrangements plaintiff purchased 1,958,189 shares of said stock from Cities Service on December 14, 1954 in the offices of said bank in New York City, and in like manner, plaintiff also purchased 1,966 shares of said stock from the minority stockholders. Promptly thereafter plaintiff clearly identified the Arkla stock so acquired by listing it in a separate account marked "Special Investment Account, Arkansas Louisiana Gas Company Common Stock", it being plaintiff's purpose and intention clearly to earmark said stock as security held for investment as distinguished from inventory within the meaning and purpose cited in the Internal Revenue Code, § 1236 and the Regulations and Rulings to that Code. At all times after acquiring said stock and at all times since that stock was sold plaintiff conducted its affairs in connection with the purchases and sales in the offices of the said bank in New York City, and the stock was at all times held by the bank. On November 16, 1956, plaintiff filed with the Securities and Exchange Commission a registration statement covering said stock proposed to be sold by an underwriting Group headed by Eastman-Dillon and Union Securities and Company in New York City. By a purchase contract dated December 10, 1956, entered into with plaintiff and the aforementioned underwriters, plaintiff contracted to sell 319,235 shares of said stock. The sale of said stock was consummated at the offices of the First National Bank of Jersey City, Jersey City, New Jersey, December 13, 1956.

The Complaint further stated that because the series of transactions involved in the acquisition and sale of the 319,235 shares of Arkla stock took place entirely without the State of Arkansas and because they were negotiated and concluded at the offices of the bank in New York City, the gain realized upon said sale was not subject to the Arkansas State Income Tax, the reasons being: (a) that such extrastate earnings are not taxable within the meaning and language of § 2 of Act 144 of the Acts of 1957 [Ark. Stats. § 84-2008(b), (i)]; (b) the extrastate gains are not covered by the definition of gross income as defined by § 8 of Act 118 of the Acts of 1929 (Ark. Stats. § 84-2008); and (c) the taxation of this extrastate income violates the due process clause and the equal protection clause of both the State and Federal Constitutions.

In the prayer the trial court was asked to declare the tax collection illegal and to order a refund to plaintiff.

On May 27, 1958, the Commissioner of Revenues filed a general denial to the above complaint.

On November 13, 1958, the parties hereto entered into a stipulation which, excluding many facts heretofore set out, reads substantially as follows: Stephens, Inc., acquired by purchase 1,950,155 shares of Arkla stock at a price of $24,501,937.50 plus dividend accruals thereon of $198,501.30 for a total of $24,700,438.80. Participating as principals with Stephens, Inc. in these purchases were two out-of-state parties referred to for convenience as the Dougherty and Union Securities Group. Stephens, Inc. acquired 1,053,085 shares of such stock and the rest of the shares were acquired by said Group. All aspects of the sales of said stocks were negotiated and handled from the offices of the First National City Bank of New York City with actual transfer of stock certificates made in the offices of the First Bank of Jersey City, Jersey City, New Jersey; all sales being consummated between November 20, 1956 and December 13, 1956. No other State income taxes have

been paid to any other than the State of Arkansas on the gain realized from said sales.

The correct amount of the certified tax exaction against appellee is not in dispute nor is it an issue in the case.

After a hearing on the pleadings and the stipulations the trial court held that the tax was wrongfully and illegally collected and ordered it to be refunded to Stephens, Inc., hence this appeal by the Commissioner of Revenues.

In an examination of the issue here involved we acknowledge the assistance received from the comprehensive findings of law and fact contained in the trial court's Memorandum Opinion and Order and from the excellent and exhaustive briefs filed by both parties. For an affirmance of the trial court's decree appellee relies on three separate and distinct grounds but two of them need not be discussed because we have concluded that the decree must be sustained on constitutional ground in conformity with former decisions of the United States Supreme Court and of this Court.

In the case of *F. S. Royster Guano Company* v. *Commonwealth of Virginia,* 253 U. S. 412, 64 L. Ed. 989, 40 S. Ct. 560, the same questions here involved were therein decided against the contention of the appellant. In that case appellant, which was a corporation domiciled in Virginia and doing business and receiving income not only from that State but from other States, returned for taxation purposes the income received only in the State of Virginia and omitted the income from the other States. The tax officials disagreed and assessed a tax against appellant based on the income received from all of the States. This determination was sustained by all of the intermediate courts and was finally appealed to the Supreme Court of the United States. The Virginia statute imposed income tax upon the aggregate amount of the income of each person or corporation including all profits from earnings received within or without the State of Virginia and also "all other gains and profits de-

rived from any source whatever". Virginia also had another statute (c. 495, Laws 1916 [p. 830]) which exempted from taxation a corporation which was domiciled in Virginia but derived all of its income from transactions and businesses without the State. (Note that this Act is in effect the same as § 2 of Act 304 of the 1953 General Assembly of Arkansas to which we will refer later). Regarding these two Acts the Court said: "Of course, these two statutes must be considered together as parts of one and the same law; and by their combined effect, if the judgment under review be affirmed, plaintiff in error will be required to pay a tax upon its income derived from business done without as well as from that done within the State, while other corporations owing existence to the same laws and simultaneously deriving income from business done without the State but none from business within it, are exempt from taxation". After the Supreme Court observed that corporations could be classified upon a reasonable basis, *etc.*, it held that the classification made by the two statutes was not reasonable but illusory and proceeded to give in detail its reasons for so concluding. The Supreme Court of the United States then reversed the case holding that the tax exaction against appellant was illegal and in violation of the 14th Amendment to the Constitution of the United States.

Essentially the question presented in the case under consideration was the question considered in the case of *McCarroll, Commissioner of Revenues* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, where the Court resolved the issue against the contention of appellant here. In the cited case appellee was essentially in the same position that appellee occupies in the case under consideration in that it was a corporation domiciled in Arkansas but derived a large portion of its income from without the State. The Commissioner of Revenues exacted the tax payment against the appellee based on extrastate gain under the Income Tax Act of 1929 which is the same Act here involved. At the same time the State had another statute, Act 220 of 1931, which was similar to the Virginia statute above re-

ferred to, exempting from taxation corporations domiciled in Arkansas but deriving all of its gain from without the State. The Court stated the issue as follows: "We come next to consider the constitutionality of the exaction by the State Revenue Commissioner of the tax in question. Is Act 118 of 1929 (Income Tax Act), as construed by appellant as applied to appellee in this case, when read in connection with Act 220 of 1931, which exempts domestic corporations, doing business wholly without the State, from all income taxes, unconstitutional, because a denial of the equal protection clause of the Fourteenth Amendment to the Federal Constitution? We think that it is". The Court in the cited case further states: "We are of the opinion that these two Acts taken together impose upon appellee a discriminatory and arbitrary exaction of the tax in question and to this extent is unconstitutional and unenforceable, being violative of appellee's rights under the Fourteenth Amendment to the Constitution of the United States and Art. II, § 8 of the Constitution of the State of Arkansas". "We think the identical question presented in this case has been definitely decided against appellant by the Supreme Court of the United States in the case of *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U. S. 412, . . . under a state of facts practically identical with those in the instant case". In the cited case, at the end of the opinion, the Court again summarized its holdings with these words: "We think it is clear that Act 220 of 1931, *supra,* relieves domestic corporations doing business entirely without the State of Arkansas from the payment of any income tax to this State, and that when this Act is read in connection with the general income tax act of 1929, *supra,* that under the decision of the United States Supreme Court in the *Royster* case, *supra,* the imposition of an income tax upon a domestic corporation, doing business both within and without this State, on income derived from sources outside Arkansas denies to such domestic corporation the equal protection of the laws and amounts to the taking of its property without due process in violation of the Fourteenth

Amendment to the Constitution of the United States and Art. II, § 8, of the Constitution of the State of Arkansas". Following the above decision, in the case of *Dunklin* v. *McCarroll, Commissioner of Revenues,* 199 Ark. 800, 136 S. W. 2d 675, the Court considered somewhat the same question here involved except that an individual and not a corporation was the taxpayer. In that case the Court considered together the 1929 Income Tax Act and Act 220 of the Acts of 1931 heretofore mentioned. Also the Court there made the distinction between the applications of the two Acts to individuals as opposed to a corporation. It affirmed there in very clear language the holding in the *Gregory* case, *supra,* stating: "It is, therefore, settled by the former decisions of this court that domestic corporations doing business both within and without the state are not required to pay income tax to the state of Arkansas on income derived from sources outside of Arkansas". The only difference between the factual situation and the applicable law in the two cases above decided and in the case under consideration is nominal and not substantive. In the cited cases the Court was dealing with Act 220 of 1931. Said Act has been repealed but exactly the same exemption provisions were re-enacted in § 2 of Act 304 of the Acts of 1953.

The holdings in the *Gregory* case, *supra,* and the *Dunklin* case, *supra,* have never been overturned and they appear to be decisive of the issue here involved against the contention of appellant. In fact appellant virtually concedes that these former holdings are decisive unless they can be distinguished. So indicating is the following statement contained in his brief: "It is this and the *Royster* cases which are the main supports of Stephens' position; and it would seem that the Commissioner of Revenues must show that these two cases (Referring to the *Gregory* case and the *Royster* case) have no application here . . ."

After making the above statement appellant cites numerous cases in an attempt to discredit or distinguish the former decisions of this Court and the deci-

sion of the United States Supreme Court above referred to. We have examined carefully all of these cases but failed to find them convincing. For example, the cases of *Wiseman* v. *Interstate Public Service Co.,* 191 Ark. 255, 85 S. W. 2d 700; *Wilson* v. *Monticello Cotton Mills,* 180 Ark. 1090, 24 S. W. 2d 324; *Kansas City, Memphis & Birmingham R.R. Co.* v. *Stiles,* 242 U. S. 111; *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54; and *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. 2d 1000; are among the citations but each of these decisions were rendered prior to the *Gregory* decision. The *Dunklin* case, *supra,* is cited, but as we have already pointed out, that case involved an individual and not a corporation. Appellant also cites two cases from other jurisdictions which he thinks discredits or are contrary to the *Gregory* case but we deem it unnecessary to discuss them since the decisions of our own Court, as heretofore pointed out, are in point and are decisive.

Appellant makes the argument that the holdings in the *Royster* case, the *Gregory* case, and the *Dunklin* case, *supra,* are not applicable to the situation here for the reason that Stephens, Inc. is merely a holding company, but we do not agree with this contention. Black's Law Dictionary defines a holding company as: "A super-corporation which owns or at least controls such a dominant interest in one or more corporations that it is enabled to dictate their policies through voting power; a corporation organized to hold the stock of other corporations; . . ." We find nothing in the record in this case which shows Stephens, Inc. to be such a company. On the other hand the Articles of Incorporation of the Stephens Company which are included in the record shows its purpose to be: "To buy, sell, lease, mortgage and exchange real estate, to buy, sell, mortgage and pledge notes, bonds, bills of exchange and other evidences of indebtedness, stocks and securities, to lend money, to build houses and other buildings and to generally conduct any such mercantile operations as may be incident and interdependent to the business'. We think it is obvious from the record in this case that

the activities of appellee in conducting the transactions and negotiations referred to in this case were not merely acts of holding stocks in other corporations.

It follows, therefore, from what has been heretofore said that the decree of the trial court must be, and it is hereby affirmed.

Affirmed.

HILL *v.* DAY.

5-1981 331 S. W. 2d 38

Opinion delivered January 18, 1960.

Frierson, Walker & Snellgrove, Barrett, Wheatley, Smith & Deacon, for appellant.

Rhine & Rhine, James M. Gardner, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Earl Day, filed this action asking that an instrument which appears on its face to be a deed be declared an equitable mortgage, and that under his alleged contract of pur-

chase with the mortgagor he be allowed to redeem from the mortgagee. The issues are whether the deed is in fact an equitable mortgage and if so whether Day has the right to redeem. Mary Brown owned 432 acres in Clay County; her son, Neal, owned 80 acres. They borrowed money from a gin company and as security gave a deed to all the property, retaining an option to repurchase. They were unable to pay their indebtedness to the gin company, and to secure money for this purpose they executed a deed to appellant, A. A. Hill, the husband of Naomi Brown Hill. Mary Brown was the mother of Neal Brown, Ruth Brownell and Naomi Brown Hill, all of whom, along with their mother, signed the conveyance to A. A. Hill. An option was retained giving Neal the right to repurchase the property within five years for $20,000 and interest.

The option provided that it is not assignable. Later Mary Brown died intestate, and it appears that Neal Brown and his sisters, Ruth Brownell and Naomi Hill, are her heirs. Neal and Ruth entered into a contract to sell the entire property to appellee, Earl Day, for the price of $40,000. Of course, in order to convey to Day they had to redeem from Hill, but instead of redeeming the land from Hill, for a consideration paid by Hill based on a valuation of $40,000, they cancelled the option to repurchase from him. At the time of this transaction, Hill had knowledge of Day's contract with Neal Brown and Ruth Brownell to purchase the property for a consideration of $40,000. Therefore, Hill is not an innocent purchaser. *Valley Planing Mill Co.* v. *Lena Lbr. Co.,* 168 Ark. 1133, 272 S. W. 860; *Collins* v. *Heitman,* 225 Ark. 666, 284 S. W. 2d 628.

The general doctrine prevails in this state that the grantor may show that a deed absolute on its face was intended only to be security for the payment of a debt and thus a mortgage. *Clark-McWilliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18; *Ehrlich* v. *Castleberry,* 227 Ark. 426, 299 S. W. 2d 38.

The Chancellor closely analyzed the facts and cited applicable law to the effect that the conveyance

by Mrs. Brown and Neal, Ruth and Naomi to Hill is an equitable mortgage. The chancellor said:

"The court is convinced that the evidence here is of that clear, cogent and convincing character to compel the conclusion that the deed and allied instruments were actually intended as a mortgage. It must be borne in mind that the court is not bound by the terms of the instruments alone, but may consider all of the circumstances in connection with the transaction and, any evidence, written or oral, otherwise competent, may be considered.

"In the first place, the parties here were closely related. The property originally belonged to Mary Brown, the mother of Naomi Brown Hill, Neal Brown and Ruth Brown Brownell. The principal defendant, A. A. Hill, is the son-in-law of Mary Brown and the husband of Naomi Brown Hill.

"The land originally, as indicated, belonged to Mary Brown but in her later years it was farmed by her son, Neal Brown. He became indebted, by reason of his farming operations and entered into an arrangement identical with the one later entered into with the defendant, A. A. Hill, by the terms of which the property was deeded to a Clay County concern that had made advances. This indebtedness was paid off by A. A. Hill and the property was deeded back to Neal Brown. Additional advances were made by Hill and a mortgage was executed on the property to secure that indebtedness. Then, most of the property was reconveyed by Neal Brown to his mother. When later on no progress was made toward payment of the debt due Hill, an arrangement was made between all the parties by which a deed, regular on its face, was executed by Mary Brown and Neal Brown conveying all of the property to Hill. Some doubt was expressed by the interested parties because of the advanced age of Mrs. Brown as to her capacity at the time to execute the deed and so in order to estop any of the heirs from questioning her capacity to execute the deed they were required to join in for that purpose and that purpose only.

"On the same day that the deed was executed, a purported option to purchase was executed and signed by A. A. Hill and his wife and by Ruth Brown Brownell and Neal Brown by the terms of which Neal Brown was given the right to repurchase the property and for the agreed price of $20,000.00. It is interesting here to note that the agreed price of $20,000.00 was less than $500.00 more than the amounts that Hill had actually advanced to Neal Brown, plus accrued interest at the time he took a mortgage on the property and subsequently advanced. Of course, in addition to the $19,553.44 that had actually been advanced Hill had put in a considerable amount of time assisting his brother-in-law in his financial difficulty. It is not unreasonable, therefore, to conclude that it was the intention of the parties at the time that the $20,000.00 should be considered as the amount of the debt and that it continued during the life of the five-year option.

"More persuasive, the court believes, was the fact that by the terms of the written option Hill agreed that he would keep an accurate account of his operations of the farm and after paying the farm manager, taxes, insurance, *etc.* and charging interest he would credit the net received from the farm operations against the agreed price of $20,000.00 in the event that Neal Brown should exercise his so-called option. This is diametrically opposed to the contention that the parties intended to make a contract for the purchase and sale of the land with an option to the grantor to repurchase. But on the contrary, it is entirely consistent with the fact that the instruments were intended as a mortgage and that Neal Brown would be considered as the owner of, and entitled to the rents from the farm operations for the five year period covered by the so-called option.

"As a matter of fact, after it was brought to the attention of Hill that Neal Brown desired to exercise his option and that he had listed the property with a real estate broker and the broker had obtained a purchaser, ready, willing and able to pay $40,000.00 for the property, Hill then agreed to pay $40,000.00 for the

property himself. However, it is significant to note that he did not deduct the $20,000.00 from the $40,000.00 and pay the difference, but he meticulously itemized the income and expenses from the operation of the farm and took these figures into consideration in arriving at his settlement with the parties.

"As indicated above, this is inconsistent with the contention of ownership on the part of Hill, but entirely consistent with the contention of the plaintiff that the instruments, taken together, constituted a mortgage and continuing debt."

We agree that the conveyance to Hill is an equitable mortgage, but the decree orders that Naomi Brown Hill execute a deed to Day. We fail to see how Mrs. Hill has parted with her interest in the property. By virtue of his contract with Ruth and Neal, Day stands in their shoes and has the right to redeem from Hill. *Driver* v. *J. T. Fargason Co.,* 174 Ark. 114, 295 S. W. 35. The mortgagor has the right to convey his equity of redemption. *Kitchens* v. *Jones,* 87 Ark. 502, 113 S. W. 29; *Vernon* v. *Lincoln National Life Ins. Co.,* 200 Ark. 47, 138 S. W. 2d 61. But if Day redeems from Hill, he takes subject to the interest of Naomi Brown Hill, who owns an interest in the property; she has made no contract with Day to dispose of her interest, and there is no evidence that Neal and Ruth were authorized to act for her. In the event of redemption by Day, Mrs. Hill would still own her interest subject to her proportionate share of the cost of redemption.

Hill, the appellant, contends that under the terms of the deed and option to repurchase, the grantors, whom we are holding to be mortgagors, do not have the right to assign the right to redeem. True, the option has such a provision, but when construed as part of an equitable mortgage it is against public policy and not enforceable. In 36 Am. Jur. 784, it is said: "A mortgagor cannot, by any agreement made contemporaneously with or as a part of the mortgage transaction, however explicit or forceful, bind himself not to assert his right or equity of redemption. This doctrine is ap-

plicable to an equitable mortgage." It also applies "*to a stipulation as to the person* or persons by whom the right of redemption may be exercised." (Emphasis supplied) See also Restatement "Property", § 415, illustration (1).

In *Clark* v. *Reyburn*, 8 Wall. 318, 19 L. Ed. 354, the United States Supreme Court said: "It (the equity of redemption) is descendible, devisable, and alienable like other interests in real property. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim 'once a mortgage always a mortgage', but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void."

Our conclusion is that the chancellor was correct in holding that the conveyance to Hill is an equitable mortgage, and that under his contract with Neal Brown and Ruth Brownell, Day has the right to redeem from Hill. But Mrs. Hill still owns her interest subject to payment of her *pro rata* cost of redemption. Therefore the decree must be reversed with directions to render a decree not inconsistent herewith. It is so ordered.

BRADHAM DRILLING CO. *v.* POWELL.

5-1998 331 S. W. 2d 35

Opinion delivered January 18, 1960

Mahony & Yocum, for appellant.

Brown & Compton, for appellee.

JIM JOHNSON, Associate Justice. This is an action for compensation under the Arkansas Workmen's Compensation Act by appellees Maydell Powell, widow, and Barbara Ann Powell, a minor daughter 16 years of age, against appellant, Bradham Drilling Company, et al, on account of the death of Gordon Ralph Powell, deceased, on the 10th day of July 1956. The Commission awarded maximum compensation. This decision of the Commission was affirmed by the Circuit Court, from which comes this appeal.

For reversal, appellant contends that there is not substantial evidence to support the Commission's findings.

The facts are substantially as follows:

The deceased, Gordon Ralph Powell, was 50 years of age, and had been regularly employed as an oil well driller by the Bradham Drilling Company for approximately twelve years. As a driller, Powell's duties were mainly supervisory and light, but approximately every forty-five days he would assist in tearing down (dismantling) the drilling rig, and then he did strenuous work. On July 2, 1956, Powell, along with other employees, was engaged in tearing down the rig. They were working in an open field and the temperature was in the 80's. The work that they were doing required the lifting of objects that weighed in excess of 100 pounds, and they had been working since about 6:00 o'clock a.m. At approximately 10:00 o'clock a.m., Powell said, "I like to have got too hot," and continued to work for 10 or 15 minutes after which Powell was seen stumbling and walking sideways, and fell down. He was pale and perspiring profusely and said, "I can't see." His face was colorless and perspiration stood on his face, and wouldn't run off. He looked like he was "burned out". Wet rags were applied and he was carried to the hospital in El Dorado, Arkansas, and during the trip he was pale and perspiration stood on his face and

wouldn't run off. He was described by his supervisor as being in "rough shape."

The deceased was first seen at the hospital by Dr. D. E. White. Dr. White completed a "Standard Form for Surgeon's Report" on July 2, 1956, and at the place marked for the patient to state in his own words where and how the accident occurred, there appears the following: "While working on a well near Village, Arkansas, I became too hot and felt as though I was about to faint." According to Dr. White's report, his findings were suspected heat prostration, arterial hypertension, possible coronary occlusion. Powell was given first aid, saline solution intravenously, stimulants, and an EKG was made shortly after his admission to the hospital. Dr. White stated that "In my opinion injured party became too hot while working, but also reveals evidence of some form of heart attack when first examined by me."

The hospital records reflect that the admitting diagnosis on July 2 was suspected heat prostration and arterial hypertension, and that the patient stated that he became too hot while working on a well. The deceased was allowed to go home on July 6, and at that time the final diagnosis was heat prostration, arterial hypertension, and suspected posterior myocardial infarction.

A few hours after his discharge deceased was readmitted to the hospital for further treatment; Dr. White's admitting diagnosis was again heat prostration, arterial hypertension, and suspected posterior myocardial infarction. On July 10, 1956, the deceased expired, and the final diagnosis was heat prostration, arterial hypertension, and massive coronary artery occlusion, with massive coronary artery occlusion being given as the cause of death.

Dr. White told Mrs. Powell and her sister that the deceased had had a heat stroke which caused a heart flurry.

Even though Dr. White, at the time of giving his oral testimony, made light of the heat prostration, this

diagnosis appears throughout the hospital records which were made by Dr. White. However, on cross-examination, even Dr. White admitted that undue effort would assist in bringing on a coronary occlusion. As stated by the Commission, "Dr. White's testimony appears to neutralize much of Dr. White's written reports and medical records."

Dr. Joe B. Wharton, Jr., after reviewing the entire record in this case, including all of the hospital records, stated that in his opinion the deceased's overweight and tendency to high blood pressure predisposed him to have a coronary artery thrombosis. Dr. Wharton further stated that in his opinion one got coronary thrombosis as a result of excessive physical strain or exertion and particularly if one is overheated or has exerted himself to the point where he is exhausting himself from strain and becoming too hot. Dr. Wharton's conclusion was that since the deceased was of the type to have coronary thrombosis and since the deceased was exerting himself strenuously at the time of the accident, there is a strong possibility that the heart attack was precipitated by his work at that time.

Under these facts we find that there is substantial evidence to support the Commission's findings that claimant suffered heat prostration as a result of the strenuous nature of his work, collapsed on the job, and subsequently died eight days later as a result of a heart attack. This chain of events, combined with the medical testimony and the hospital records, is sufficient to support an award of compensation in this case since it is clear that the deceased suffered an accidental injury in the course of his employment which resulted in his death under the meaning and intent of the Workmen's Compensation Statute as interpreted by this Court. See: *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *J. L. Williams & Sons, Inc.* v. *Moore,* 206 Ark. 766, 177 S. W. 2d 761; *Herron Lumber Company* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *Commercial Casualty Insurance Company* v. *Hoage,* 75 F. 2d

677; *E. P. Bettendorf & Co.* v. *Kelley,* 229 Ark. 672, 317 S. W. 2d 708; *Reynolds Metal Company* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489; *Safeway Stores, Inc., et al* v. *Mrs. Betty Ruth Harrison, et al,* 231 Ark. 10, 328 S. W. 2d 131.

Therefore, following our rule that the findings of the Workmen's Compensation Commission will be affirmed if there is any substantial evidence to support them, and that in testing the sufficiency of evidence the testimony must be weighed in its strongest light in favor of the Commission's findings; *Starrett* v. *Namour,* 219 Ark. 463, 242 S. W. 2d 963; *Sherwin Williams Co.* v. *Yeager,* 219 Ark. 20, 239 S. W. 2d 1019; the award of the Commission is affirmed.

ARK. POWER & LIGHT CO. *v.* MURRY.

5-2011 331 S. W. 2d 98

Opinion delivered January 25, 1960.

Joe W. McCoy and *House, Holmes, Butler & Jewell,* for appellant.

William C. Gilliam, for appellee.

CARLETON HARRIS, Chief Justice. In August, 1922, Arkansas Power and Light Company,[1] appellant herein, obtained a right-of-way permit from W. H. Woodall and wife, owners of a certain 40 acres in Hot Spring County. The right-of-way covered 72 feet in width over the Woodall lands, giving the company the right to construct and maintain a line across same. In 1952, appellant found it desirable to enlarge and improve the transmission line across this property, and in contemplation of this improvement, obtained from the owner a new permit, which granted a similar right-of-way across the lands, with the right to clear a right-of-way 100 feet in width. In 1954, Orvall and Helen Murry, appellees herein, acquired title to the above 40 acres, with full knowledge of the existence of the two permits. In January, 1957, appellant company went onto the lands, clearing the right-of-way to a width of 100 feet, and also cutting additional trees outside the right-of-way, which the company considered a hazard to the line. Suit was instituted by the Murrys against appellant company, seeking damages for trees cut outside of the right-of-way, and also seeking damages for alleged damage caused to the land by the company, through the use of heavy clearing equipment. The jury awarded damages in the sum of $800,[2] and from such judgment comes this appeal. For reversal, appellant argues two points, as follows, to-wit:

"I.

The Court Erred in Submitting Over Defendant's Objections, Plaintiffs' Instruction No. 2 as Modified.

[1] Then known as Arkansas Light and Power Company.

[2] This amount represented only timber damage. Testimony had been introduced showing that $100 damage had been done to the land by the use of the equipment, but the only instruction sought by appellees on this point was refused by the court. This issue, therefore, was not submitted to the jury, and appellees have filed no cross-appeal on this point.

II.

The Verdict of the Jury and Judgment Thereon Was Not Based on the Evidence and Was Excessive—The Court Erred in Denying the Motions for New Trial."

I.

Appellant contends that under the provisions of the right-of-way permit, it was permitted to remove timber not only from the 100 foot width, but also to remove timber outside the right-of-way which might be considered a hazard to the line. The permit cites a consideration of "thirty dollars and other good and valuable considerations, to us cash in hand paid, * * *" and the provisions pertinent to this litigation are as follows:

> "The rights hereby conferred provide for the privilege and authority to enter upon said lands for the purpose of constructing and building said pole line, maintenance and operation thereof, with the right to clear and keep clear a right of way *one hundred*[3] feet in width, and to remove all other timber and obstructions that may interfere with the use of said line or that may or might be a hazard to the use of the same, and for the repairing, reconstructing, operating and the removing of same at any and all times."

Further:

> "The following items are included in this settlement: *The right to change from a single pole line to a double pole line. Value of use of right of way and timber damage.*[3a] Said Grantee agrees that it will pay other damages not included in above settlement inflicted by it in the construction and maintenance of said line."

Appellant emphasizes the word "other" in the permit, and argues that the cutting of trees considered hazardous to the line was included under the consideration paid by

[3] *and* [3a] The form is printed, but the italicized portions were filled in by hand.

the company. Of course, appellees in opposing this contention, quickly calls attention to the fact that such a construction is most illogical; *i. e.,* it is not logical that a landowner would give a company a right to perhaps cut any number of valuable trees, outside the right-of-way, over an unlimited length of time[4], for a consideration of only $30. Appellant points out that the instrument also recites "other good and valuable considerations", but, were the consideration actually a greater amount, it would appear that appellant would have placed in evidence the amount of the actual and true consideration, particularly since the small consideration, among other things, is one of the points relied upon by appellees in their contention for a different interpretation of the contract. If appellant's interpretation is correct, the power company is not limited to a 100 foot right-of-way, for if it is entitled to cut hazardous trees outside this 100 feet area without paying additional compensation—then it actually, in effect, has a right-of-way wider than that granted by the 100 feet, since but few, if any, trees in the immediate adjacent area would be permitted to grow to maturity. It is, of course, admitted that the company had the right to cut trees within the right-of-way without payment of further compensation; appellees, while not conceding that apellant had the right to cut trees beyond the 100 foot right-of-way, do state "that the most the 1952 permit could have done by the clause set out earlier was the right to cut 'danger trees' off of the 100 foot right-of-way, and then pay for the damage to the land and trees at a later date." This view was apparently taken by the Murrys in their interpretation of the contract, for in bringing suit, they did not seek double or treble damages. We think, without question, that the language in the permit is subject to more than one construction, *i. e.,* is ambiguous, and we have held many times that in case of doubt, or ambiguity, a contract or agreement shall be interpreted against the party who prepared the instrument. See *American Insurance Company* v. *Rowland,* 177 Ark. 875, 8 S. W. 2d 452.

[4] The right-of-way permit remains in effect unless permanently abandoned by the grantee.

Likewise, it is well settled that in construing a contract, the intention of the parties is to be gathered, not from some particular phrase, but from the whole context of the agreement. This agreement was prepared by the appellant company, and consists of a printed form containing several blank spaces to be filled in by hand. Following the first pertinent clause, heretofore set out, relied on by appellant, we particularly observe the language in the second clause set out herein, as follows: "* * * said grantee agrees that it will pay other damages not included in above settlement inflicted by it in the construction and maintenance of said line." Considering that the language of the instrument leaves doubt as to the intention of the parties, and noting the other factors, previously mentioned, we have reached the conclusion that the power company, under the permit, is given the right and authority to cut trees beyond the area included in the right-of-way, and which may be considered hazardous to the maintenance of its line—but it must pay for the value of the trees. This clause, so construed, has the value to the company of permitting it to cut these trees without being subject to double or treble damages, and we think the instrument makes manifest that intention.

The trial court instructed the jury as follows:

> "You are instructed that the measure of damages for the destruction of growing trees is the difference in the value of the land outside the one hundred foot right-of-way with and without the trees. Therefore, if you find that defendant destroyed growing trees on land owned by plaintiffs and not subject to defendants' right-of-way easement, you will set his damages at the difference in the value of the land outside the one hundred foot right-of-way with the trees growing and without the trees growing."

Since we have concluded that the right-of-way permit did not give the company authority to cut beyond the 100 feet without payment of additional compensation, it follows that the court's instruction was correct. As we

stated in *Kyle* v. *Zellner,* 215 Ark. 349, 220 S. W. 2d 806 (1949):

> "The measure of damages for the destruction of young growing trees is the difference in the value of the land with and without the trees. * * * If that rule is applicable the decree is without support evidence, for there was no testimony as to land values.
>
> The rule is evidently intended to compensate the landowner when his timber is so immature that its value in the market is materially less than its potential worth through continued growth."

Appellant's contention is held to be without merit.

II.

Testimony on behalf of appellees was presented by Orvall Murry, his wife, and Murry's father, Ralph Murry, and all testified that the value of the entire 40 acres was $2,000 before the cutting, and $1,200 after the cutting. The witnesses stated that trees were cut for an additional width of 25 feet on each side along the entire 100 foot right-of-way. Mrs. Murry testified that 88 pine trees were cut on either side of the original 72 foot right-of-way. None of these witnesses measured or scaled any of the timber cut. Appellant states that the testimony of appellees, relative to the $800 damage, includes trees cut within the right-of-way, as well as those outside the right-of-way, and that there was no evidence to support the amount of damage claimed by the Murrys. The testimony offered by the company reflected that 770 feet of pine, 1,150 feet of hardwood, one cord of pine billets, and half a cord of oak or gum billets were cut. Its evidence showed the market value of the timber to be $40 per thousand for pine, $15 per thousand for hardwood, about $5 per cord for pine pulpwood, and $1 to $2 per cord for gum or hardwood billets. This evidence accordingly indicated that less than $55 worth of timber was cut, including that cut both within and outside the 100 foot right-of-way.

Of course, we give the appellees' evidence its strongest probative force, but even so, the award is obviously excessive. True, the Murrys stated that the difference in the value of the land before the cutting and after the cutting was $800, but this figure is not borne out by an analyzation of their own testimony. The value of the forty acres prior to the timber cutting, was placed by appellees at $2,000, which sets a value of $50 per acre. Testimony on behalf of appellees showed the right-of-way to be about 1,320 feet long, and that trees were cut approximately 25 feet on either side of this right-of-way. It follows that the total acreage (outside the right-of-way) from which trees were cut, amounted to something less than two acres. This fixes the value of the land beyond the right-of-way from which the trees were cut at less than $100. The only evidence contrary to this compilation was offered by Ralph Murry, but even his testimony is completely in conflict. From his testimony:

"Q. Well, now, what part of that Eight Hundred Dollars would you say was done off of the right-of-way?

A. Well, I'd say at least a hundred dollars of it was done outside of the right-of-way.

Q. How much of it was done on the right-of-way then?

A. Seven Hundred.

Q. Seven Hundred?

A. Yeah.

Q. Now, how much—Now, that's damage to the land you are talking about?

A. No, the land and timber."

Subsequently, however, he testified as follows:

"Q. How much damage do you attribute to the timber cut outside the right-of-way?

A. I would say the damage to the timber was Six Hundred Dollars ($600.00), and about Two Hun-

> dred Dollars ($200.00) to the right-of-way and to the land, that damage would be my judgment on it."

However, the testimony on the part of appellees reflected that a large number of the pine trees cut were seed trees, and Mrs. Murry testified that these were "cleared out". There was also testimony to the effect that the timber at the right-of-way grows faster than timber located in the woods because it grows along the edge and can get more air and sunlight. We think, from the record before us, that an award of $300 would be liberal compensation for the damage suffered.[5] Appellees, of course, if they feel aggrieved at the reduction, have the privilege of re-trying the case, and offering more detailed proof in support of the alleged damage.

The judgment is affirmed on the condition that remittitur is entered as indicated within seventeen calendar days; otherwise the judgment will be reversed and the cause remanded for a new trial.

JOHNSON, J., dissents as to the remittitur.

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[5] Even if the evidence justified the amount of damages awarded, the judgment would have to be reduced, for appellees, in filing complaint, only sought $750 for alleged damage to the timber.

REYNOLDS *v.* SMITH.

5-2002 331 S. W. 2d 112

Opinion delivered January 25, 1960.

[redacted]

Homer T. Rogers, Wright, Harrison, Lindsey & Upton, for appellant.

Tompkins, McKenzie & McRae, for appellee.

J. Seaborn Holt, Associate Justice. This is an action in which appellants sought to cancel a portion (120 acres only) of an oil and gas lease covering 200 acres of land, consisting of five contiguous 40-acre tracts. The lease was executed in March 1953, for the primary term of six months and as long thereafter as oil and gas is produced, and contained a special drilling provision that the lessee would, within thirty days, drill a well to a depth of 3,500 feet unless production in commercial quantities was found at a lesser depth. The lessee complied with this drilling provision and obtained production in the Travis Peak formation in the first well drilled at a depth of approximately 3,000 feet. This well proved to be the discovery well in this formation in the area. Jones-O'Brien, appellee Smith's predecessor, had drilled seven wells upon this leased land and had contributed to the cost of drilling a test well on the adjoining lands to the north, which proved to be dry. These wells were all drilled to the Travis Peak formation, the deepest known horizon in the area and through October 1, 1958, the lessee had expended $239,623.97 in drilling and completing these wells, plus operating expenses of $130,024.95, making a total of $369,648.92 on the leased premises. Three of these wells are now producing commercially from the Travis Peak. The Reynolds family, appellants, own practically all of the royalty under the leased premises and have received $41,429.41 in royalties. Appellant, J. D. Reynolds, wrote three letters to Jones-O'Brien; the first on March 13, 1956, the second October 4, 1956 and the third on December 3, 1957, requesting a release of the

non-producing acreage included in the lease. None of these letters contained a request or demand for additional drilling. It is undisputed that there is no production deeper than the Travis Peak in Nevada County, and the nearest deeper production is from the Smackover Lime at Stephens, Arkansas, nine miles southeast of the lands involved, and in the Midway field of Lafayette County which is sixteen miles southwest of the lands involved. A large number of dry Smackover Lime wells have been drilled in Nevada County, one immediately adjacent to the lands involved, and the testimony is in agreement that the drilling of such a well upon the leased premises would be a wildcat operation; that the drilling of such a well through testing point to the Smackover Lime would cost from $40,000.00 to $70,000.00, and to warrant drilling, 500 acres of land, as a minimum, would be required.

Appellants brought the present suit December 16, 1958, in which they sought to cancel the lease in question as to all the lands included therein except the 80 acres on which the three producing wells are located, alleging that appellees "— have failed to comply with the implied covenants of said oil and gas lease, have drilled and completed all the wells they intend to drill and complete on said land and merely would like to hold the same to speculate on same and should be required to release all portions of this lease except —" the 80 acres. When the case was tried below, the appellants conceded that the entire 200 acres included in the lease had been fully and adequately developed as to all known producing horizons in the area which includes formations through the Travis Peak. No drainage or offset obligations are involved.

Trial resulted in a decree in favor of appellees and this appeal followed. On this appeal, appellants argue that the lease should be cancelled as to all levels, all formations under the three 40-acre tracts below the Travis Peak (3,500 foot level) in which there is no present production, and rely on the following points for reversal: "(1) The appellees have breached their covenant to

explore and develop the premises (2) The deeper horizons constitute separate estates that have never vested in the appellees (3) The appellees are holding the deep rights for purposes of speculation."

After reviewing the testimony presented in this record, we think the preponderance of the evidence supports the chancellor's findings of facts and conclusions of law which contains these recitals: "This lawsuit poses the interesting and somewhat new question as to whether or not defendant, Guy Smith, as the present owner and operator of this lease, by reason of a somewhat stripper operation on one 80 acres only is justified in continuing to hold the remainder of the leased premise longer without definite plans to test the deeper strata under the lease which has favorable possibilities.

"This exact question has not been passed upon by the Arkansas Supreme Court, but previous opinions of that Court do assist in answering it. In *Poindexter* v. *Lion Oil Refining Co.*, 205 Ark. 978 (at page 984), the Court . . . stated: 'So it may be taken, as the well settled rule in this State, that there is an implied covenant on the part of the lessee in all oil and gas leases to proceed with reasonable diligence in the search for oil and gas, and also to continue the search with reasonable diligence, to the end that oil and gas may be produced in paying quantities throughout the whole of the leased premises.' . . .

"The implied covenants or conditions also require the exploration and development of the entire lease and are continuing obligations upon the lessee and his assignees which are not satisfied by the development of a portion only of the leased property. . . .

"In the recent case of *Nolan* v. *Thomas,* opinion delivered on January 22, 1958, 228 Ark. 572, 309 S. W. 2d 727, the Arkansas Supreme Court stated the law to be, and the principles of equity to be, as . . . follows: 'The production of oil and gas on a small portion of the leased tract cannot justify the lessees in holding the balance indefinitely and depriving the lessor not only of the

expected royalty from production pursuant to the lease, but of the privilege of making some other arrangement for availing himself of the mineral content of the land.'

"It is admitted that the defendant, Guy Smith, and his assignors, have complied with the implied covenants and conditions of the lease with reference to the exploration and development of the leases to and in the Travis Peak formation. Underlying the Travis Peak you may encounter production from the Smackover lime formation.

"As applied to the type of case at bar, the law may be stated to be that the production of oil on a small portion of the leased premises from shallow horizons, even though the lease is fully developed as to such sands, cannot justify the lessee in holding the balance of the nonproducing acreage indefinitely and depriving the lessors of any possible royalty from production pursuant to the lease at greater depths, and of the privilege of making some other arrangement for availing themselves of the mineral content, if any, of the land at lower levels.

"In determining whether plaintiffs here are entitled to relief sought, consideration must be given to the circumstances and conditions existing now and at the time the lease was executed. The question is what would be reasonably expected of an operator of ordinary prudence, having regard to the interest of both lessors and lessees. The lessees cannot act arbitrarily. They must use sound judgment and must deal with the leased premises (in regards to the deeper formations and in all other respects) so as to promote the interests of both parties.

". . . Each case of this kind, therefore, has to be decided on its particular facts. The question here then is for the most part one of fact. Has the failure to date of Jones-O'Brien, Inc. and/or Guy Smith to test the deeper strata been such a breach of the implied covenant to develop as to entitle plaintiffs under the law to a cancellation of the lease? Or, to pose the question another way, is defendant, Guy Smith, as the owner and

operator of this lease justified, under the circumstances here, in continuing to hold the same, except for the 80 acres?

"At the time this lease was executed the parties were thinking of production at or above 3,500 feet. The drilling contract which is a part of the lease so shows. The parties evidently had the Travis Peak formation in mind at that time. Since that time information has been obtained which indicates that this lease may produce oil in paying quantities from greater depth. However, caution must be exercised in drilling deep oil wells. The cost is very great and each well drilled must be protected with ample acreage. The testimony of witnesses introduced by both parties agree that a prudent operator would not be justified in drilling wells to deeper formations in the area of this lease without ample acreage to protect him. It would be folly for the defendant, Guy Smith, (or for plaintiffs, for that matter, if the lease is returned to them) to even consider drilling a deep test on one of these three forties alone, without other sufficient acreage to protect such an operation. No new lessee could be found by the lessors who would do that.

". . . Ample acreage would be necessary to justify a prudent operator in spending a large sum of money in drilling a deep test well. The evidence does not disclose that the defendant Guy Smith, or his assignors, have in any way, as yet, failed to cooperate in such an effort or have delayed, hindered or prevented the formation of such a block necessary for a deep test.

"The plaintiffs allege that they could sell the lease on the 120 acres in question, and have the deeper formations tested, but there is no proof that other operators are willing to drill this or other leases in the vicinity thereof to deeper sands or formations without a large block of acreage. On the other hand, the testimony is undisputed that a prudent operator would not be justified in attempting to make a deep test at this time on this 120 acres alone.

"Therefore, the Court holds that defendants have not abandoned any of the tracts up to this time. The pro-

duction of oil from this lease is gradually diminishing, but in the absence of proof of facts that would justify a reasonably prudent operator to make additional tests on this particular lease in the deeper strata, the defendant, Guy Smith, is entitled to retain possession of the lease *in toto.*

"If at any time in the future, in the opinion of the plaintiffs, the wells are not producing oil in paying quantities, or if they are able to produce testimony to show that a reasonably prudent operator would be justified in making the expenditure of money necessary for a deep test, plaintiffs may make demand on the defendants to do so, and in the event of the failure of the defendants to take such action, then the plaintiffs will be at liberty to take such action as may be necessary to protect their interest.

"Therefore, a decree dismissing plaintiffs' complaint for want of equity will be entered, but without prejudice to their rights to take such further action as future developments may justify."

In *Saulsberry* v. *Siegel,* 221 Ark. 152, 252 S. W. 2d 834, where the facts were similar, in effect, we said: "It is settled that the lessee: must act for the mutual advantage of both the lessor and lessee; must perform the contract so as to further the original purpose and intention of the parties; must use sound judgment in the matter and cannot act arbitrarily. Whether the lessee has acted in such manner is to be determined from all the facts and circumstances in the case. Here, after considering such facts and circumstances, the chancellor found in favor of the lessee; and we cannot say the decree is contrary to the preponderance of the evidence."

The primary and decisive question, therefore, is: did the lessee here exercise that degree of prudence as an operator reasonably expected of him in the circumstances? We hold that he had done so to date of trial. *Wood* v. *Arkansas Fuel Oil Co.,* 40 F. Supp. 42 (1941).

In affirming this decree, we do so without prejudicing appellants' right to take further action as future developments might justify.

Affirmed.

ROBERTSON *v.* ROBERTSON.

5-2032 331 S. W. 2d 102

Opinion delivered January 25, 1960.

Kenneth Coffelt, for appellant.

Ben M. McCray and *John L. Hughes,* for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant was the plaintiff in the Trial Court and we will so refer to him in this opinion. He sued the administrator of his father's estate seeking to foreclose a mortgage for an alleged balance due on a note. When the plaintiff rested, the Trial Court dismissed the case on motion of the defendant; and from such dismissal there is this appeal. The case of *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, is applicable here; so we give the plaintiff's evidence its strongest probative force.

Plaintiff filed suit in 1959 seeking to foreclose a real estate mortgage. He testified that on December 7, 1936 his parents, Mr. and Mrs. J. B. Roberton, executed to him their negotiable promissory note for $1,435.00 due on or before five years after date and bearing interest at the rate of 8% per annum; and that said note was secured by a mortgage executed by Mr. and Mrs. Robertson on certain real estate in Saline County. The mortgage was duly recorded on the same date it was executed. Plaintiff also testified that *he* borrowed $200.00 from

Mrs. Earl Diemer and transferred the note and mortgage to her as security; that Mrs. Diemer later transferred the note and mortgage to plaintiff's brother, Hugh Robertson; that plaintiff had offered to repay Hugh Robertson the $200.00 and interest that plaintiff owed Mrs. Diemer, but that Hugh Robertson was somewhere in South America and had never received the money and never transferred or delivered the note and mortgage to the plaintiff. Plaintiff also testified that for many years he had been collecting rent from the tenant on the mortgaged land. The plaintiff offered to pay into the Court the amount of principal and interest that he said he might owe Hugh Robertson on plaintiff's indebtedness to Mrs. Diemer. Neither the original note nor the mortgage, from J. B. Robertson and wife to plaintiff, was ever introduced in evidence; but the certified copy of the record, where the mortgage was recorded, was duly introduced; and on the margin of the record of the mortgage there appeared these—and only these—endorsements:

> "12/7/36 Assigned to Mrs. Earl Diemer without recourse for valuable consideration. C. B. Robertson."

> "The within mortgage and notes contained herein is this 10th day of November, 1937 assigned to Hugh Robertson without recourse, and all my right, title, and interest that I have in the within mortgage. Mrs. Earl Diemer."

Did all of the plaintiff's evidence, given its strongest probative force, make a case that would support a foreclosure decree in his favor? The Trial Court answered this question in the negative, and we agree with the Trial Court. Plaintiff, on December 7, 1936, received a note and mortgage from his parents, but the same day he assigned the note and mortgage to Mrs. Earl Diemer "without recourse for valuable consideration". The transfer of the note carried with it the security—*i. e.*, the mortgage lien. *Lehman* v. *First National Bank,* 189 Ark. 604, 74 S. W. 2d 773; *Purcell* v. *Vincent,* 211 Ark. 486, 200 S. W. 2d 970. Thus plaintiff divested himself of ownership of the note and mortgage; and until he

reacquired ownership he had no title on which to base a suit for foreclosure of the mortgage under the facts shown in this case.

In the early case of *Purdy* v. *Brown,* 4 Ark. 535, this Court said: ". . . when an assignor assigns a note, all the legal interest vests in the assignee, and he alone is entitled to sue, unless the assignor is again invested with the legal interest by a new assignment or otherwise". In 8 Am. Jur. p. 541, the holdings are summarized in this language:

> "A person not in actual possession of a bill or note cannot maintain an action thereon as 'holder' under § 51 of the Uniform Act, in view of § 191 of that act, which defines the holder as the payee or indorsee of a bill or note who is in possession of it, or the bearer, and defines the bearer as the person in possession of a bill or note which is payable to bearer. The acquisition of possession of the instrument by one after he had commenced an action upon it does not give him the right to maintain the action as holder. This, of course, is aside from the question of the right to bring an action upon a bill or note which has been lost."

There are instances where proof may be made that the assignment was made to an agent for collection, *etc.,*[1] and in such instances the assignor may still have right of action; but no such showing was made in this case. There was a complete assignment without recourse and the plaintiff herein has never redeemed the note in any way. Plaintiff's offer, to pay into Court whatever he said he might owe Hugh Robertson, was without effect, because neither Mrs. Earl Diemer nor Hugh Robertson was a party to this case. Plaintiff, by showing the assignment of the note and mortgage, clearly established that he had no standing to foreclose because he had never reacquired the note and mortgage.

Affirmed.

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[1] In *McNeil* v. *Rowland,* 198 Ark. 1094, 132 S. W. 2d 370, we had a situation wherein the assignor made proof of a *conditional* assignment. But the situation in that case is entirely different from the situation in the case at bar.

LEGGETT *v.* KIRBY, JUDGE.

5-2100 331 S. W. 2d 267

Opinion delivered January 25, 1960.

[Rehearing denied February 22, 1960]

[redacted]

Kenneth C. Coffelt, for petitioner.

Bruce Bennett, Atty. General, By: *Thorp Thomas,* Asst. Atty. General, for respondent.

GEORGE ROSE SMITH, J. On January 25, 1956, three informations against the petitioner were filed, one charging murder in the first degree and the other two charging separate offenses of rape. The murder case was tried in June, 1956. The jury found the defendant guilty and imposed the death sentence. *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59. Since then the petitioner has been confined to the death cell in the state penitentiary, his execution having been stayed by a series of legal proceedings by which he has sought to escape the punishment fixed by the jury. *Leggett* v. *State,* 228 Ark. 977, 311 S. W. 2d 521; *Leggett* v. *Henslee,* 230 Ark. 183, 321 S. W. 2d 764; *Leggett* v. *State,* 231 Ark. 13, 328 S. W. 2d 252.

In the two rape cases there was no activity by either side until July 14, 1959. On that date Leggett moved for a dismissal of the charges on the ground that more than two terms of court had elapsed without the cases having been brought to trial. Ark. Stats. 1947, § 43-1708. We upheld the trial court's refusal to dismiss the informations, the statute being inapplicable to charges pending against a prisoner awaiting execution. *Leggett* v. *State,* 231 Ark. 7, 328 S. W. 2d 250.

Following our decision in the case just mentioned the petitioner filed in the circuit court a request that the rape cases be brought to trial. In this pleading Leggett asserts "that he is entitled to an immediate trial in these cases, and to have a jury pass upon his guilt or innocence and the question of whether or not he is insane." The circuit judge denied the request for trial, and Leggett then filed the present petition in this court for a writ of mandamus to compel the circuit court to bring the cases to trial. For our jurisdiction in the matter see *Rodgers* v. *Howard,* 215 Ark. 43, 219 S. W. 2d 240.

In demanding that the rape cases be heard the petitioner relies upon the federal and state constitutional guaranties of a speedy trial in criminal cases. U. S. Const., Amendment 6; Ark. Const., Art. 2, § 10. It may be doubted whether this provision in the federal bill of rights applies to proceedings in a state court, *Gaines* v. *Washington,* 277 U. S. 81, but since the two constitutions contain identical guaranties we find it unnecessary to distinguish between the two.

The petitioner is clearly in error in contending that the constitutional command is inflexibly mandatory, leaving the courts with no discretion in determining what satisfies the requirement of a speedy trial. It is settled by decisions too numerous to cite that such a provision in a bill of rights does not apply rigidly to every instance of delay in a criminal case. What the constitution prohibits, as we observed in *Stewart* v. *State,* 13 Ark. 720, is "vexatious, capricious, and oppressive delays, manufactured by the ministers of justice."

The point was well put in *Beavers* v. *Haubert,* 198 U. S. 77, where the court said: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." The same thought was expressed in *State ex rel, Orcutt* v. *Simpson,* 125 Wash. 665, 216 P. 874: "While it is the duty of the courts to give full force and effect to the spirit of this constitutional guaranty, it seems plain that what is a speedy trial must be determined in the light of the circumstances of each particular case as a matter of judicial discretion." See also *People* v. *Romero,* 13 Calif. App. 2d 667, 57 P. 2d 557; *People* v. *Maniatis,* 297 Ill. 72, 130 N. E. 323.

The mere fact that Leggett is confined to the penitentiary does not, of course, deprive him of the protection afforded by the constitution. *Fulton* v. *State,* 178 Ark. 841, 12 S. W. 2d 777. Nevertheless we are firmly of the opinion that the bill of rights does not guarantee to a condemned prisoner the right to be tried upon pending charges while he is an occupant of the death cell, awaiting electrocution. It is not to be presumed, as the court observed in *Mitchell* v. *Lowden,* 288 Ill. 327, 123 N. E. 566, that the constitution was intended to produce a result "inconsistent with the judgment of men of common sense guided by reason." Yet that would demonstrably be the consequence of granting the writ sought in the case at bar.

The judgment finding Leggett guilty of murder and sentencing him to death is conclusive of all questions within the issues in that proceeding. *West Twelfth St. Rd. Imp. Dist. No. 30* v. *Kinstley,* 189 Ark. 126, 70 S. W. 2d 555. That judgment, therefore, conclusively settles every question pertaining to Leggett's guilt and conclusively determines that justice requires the imposition of the death penalty. The execution of the sentence has been delayed, but it goes almost without saying that we, as members of the judiciary, must act upon the assumption that the solemn judgment of the court will in due course be put into effect. The judicial department of

the government obviously cannot entertain any doubt whatever as to the ultimate effectiveness of its own judgments.

Our consideration of the present petition must thus rest upon the unconditional premise that Leggett is to be executed for the murder of Joe King. In these circumstances does the constitutional guaranty of a speedy trial entitle Leggett to demand that the rape cases be heard at once? We think it plain that this inquiry must be answered in the negative.

It is a familiar maxim, recognized by the common law for centuries, that the law never requires the performance of a vain and useless act. Broom's Legal Maxims (9th Ed.), p. 178. It is difficult to imagine a proceeding more futile than that of bringing to trial charges against a person already condemned to death. The purpose of a criminal trial is to determine the guilt or innocence of the accused and to impose punishment in the event of a conviction, but no useful purpose could be accomplished by a trial of the rape charges against Leggett. A finding of guilt or of innocence would be wholly without legal effect, a matter of academic interest only.

We are all aware that the proceedings against Leggett have been widely publicized. Judging by the record in the original case it might well be necessary to call hundreds of veniremen before an impartial jury could be impaneled. The proceedings could easily continue for days or even weeks, involving great expense to the county and serious inconvenience to many witnesses and prospective jurors. Yet the entire prosecution would really be a mock trial, a parody of justice, accomplishing nothing and indeed being continuously subject to termination by the electrocution of the defendant.

We can find no case holding that the guaranty of a speedy trial requires that the judicial system be exposed to ridicule as a result of a vain proceeding such as that now demanded by the petitioner. The case principally relied upon, *State* v. *Stalnaker,* 2 Brevard (S. C.) 44, does not decide the point now before us. There Stalnaker

was indicted upon two capital offenses. Although he demanded a trial upon both indictments the state elected to try only one case, in which Stalnaker was sentenced to be hanged. He was later pardoned, however, and it was then held in the case cited that under the Habeas Corpus Act he was entitled to be discharged from the second indictment. The Habeas Corpus Act was an English statute, adopted by many states as part of the common law, which required a prisoner to be tried within two terms of court. See Cooley's Constitutional Limitations (8th Ed.), p. 646. Thus the Act was a forerunner of, and similar to, our own statute on the subject. Ark. Stats., § 43-1708. We have already held that Leggett is not entitled to a dismissal of the rape charges by reason of this statute, *Leggett* v. *State,* 231 Ark. 7, 328 S. W. 2d 250, and consequently we have rejected the position adopted by the South Carolina court in the *Stalnaker* case.

It is our conclusion that the guaranty of a speedy trial cannot reasonably be construed to entitle the petitioner to a hearing upon the rape charges as long as he is under a sentence to death upon the conviction for murder.

Writ denied.

McFaddin and Johnson, JJ., dissent.

Ed. F. McFaddin, Associate Justice, (dissenting). Two separate informations were filed on January 25, 1956 in the Pulaski Circuit Court, each charging the appellant Leggett with the crimes of rape (§ 41-3401 Ark. Stats.). He has been in custody ever since and has never been tried on the rape charges because he was tried and convicted on a first degree murder charge and is now awaiting execution on the murder charge. In *Leggett* v. *State,* 231 Ark. 7, 328 S. W. 2d 250 (decided on October 19, 1959), we held that Leggett was not entitled to the benefit of § 43-1708 Ark. Stats. as regards the rape charges.

Leggett filed, on July 14, 1959, his pleading in the Pulaski Circuit Court entitled, "Request for Trial", on the rape charges. When the Circuit Court refused to pro-

ceed with the trial of either of the rape cases, Leggett filed in this Court a petition for writ of mandamus to require the Circuit Court to proceed with the trial of the rape cases. It is clear that we have jurisdiction of such a petition, even though Leggett has mis-styled his pleading. In *Pellegreni* v. *Wolf,* 225 Ark. 459, 283 S. W. 2d 162, we issued a writ of *procedendo ad judicum* directing a Circuit Judge to proceed with the trial of a prisoner who was then incarcerated in another State. I maintain that if a prisoner incarcerated in another State is entitled to a trial on pending charges in Arkansas, then a man incarcerated in the death house in Arkansas is entitled to a trial on any pending charge in this State.

Article 2, Section 10 of the Arkansas Constitution says, "In all criminal prosecutions the accused shall enjoy a speedy and public trial. . . ." I emphasize that the Constitution says "in *all* criminal prosecutions". The Constitution does not make any exception as regards a man in the death house awaiting execution; and when one Court starts whittling away the Constitutional rights of one man, then another Court may come along in later years and extend the whittling away process to destroy the Constitutional rights of some other person in some other situation. It is a dangerous precedent for a court to create judge-made exceptions to Constitutional protections; and that is what the majority is doing in this case. We are embarking the Court on a career of "exceptions" to Constitutional protections. I think that the man in the death house is entitled to just as much Constitutional protection as the man incarcerated in the Texas penitentiary in the Pellegreni case.

By refusing to issue the *writ of procedendo* in the case at bar, the majority is bringing about a situation wherein the execution of the murder sentence will be further delayed. Leggett has raised a federal question in his petition in this case. He will undoubtedly carry this case to the United States Supreme Court; and further delay will result. If this Court now granted the *writ of procedendo* the Trial Court could require the Prosecuting Attorney to either proceed with the trial or dismiss the pending infor-

mations. The Prosecuting Attorney could safely dismiss both of the rape informations, because limitation does not run against a capital case (§ 43-1601 Ark. Stats.) and rape is a capital case (§ 41-3403 Ark. Stats.). So, should anything happen to prevent Leggett's execution on the murder charge, the State could still refile the rape charges. Leggett could not plead former jeopardy against the refiling of the rape charges, because jeopardy does not attach until the trial jury is sworn in the case. See *Jones* v. *State,* 230 Ark. 18, 320 S. W. 2d 645.

It is self-evident that what Leggett's attorney is trying to do is to get him tried on the rape charges so the attorney can have another trial jury before which to argue evidence about Leggett's alleged insanity. Even if Leggett were tried on the rape charges and the jury should find that he was insane at the time of committing the rapes, such finding would have no bearing on the murder charge: because the rapes and the murder were different offenses, committed at different times, and the mental status of Leggett would be decided by different juries; and there does not have to be any consistency between verdicts of different juries. In *Brown* v. *Parker,* 217 Ark. 700, 233 S. W. 2d 64, we said:

"The answer to this argument must be that the law imposes no requirement of consistency upon jurors hearing separate cases which are consolidated for purposes of trial. If such separate cases were being tried separately, by different juries, there would be no assurance of consistency in the verdicts, and no greater assurance of consistency is insisted upon when one jury tries both cases together."

So I earnestly submit that in order to keep our jurisprudence straight, we should issue the *writ of procedendo* in this case and thereby hold that the Constitutional guaranty of a speedy trial applies to all persons - convicted felons awaiting death sentence, as well as any other felon. We should not embark on a career of engrafting exceptions onto Constitutional guaranties.

For these reasons I respectfully dissent.

JOHNSON, J., joins in this dissent.

5-2037 331 S. W. 2d 104

Opinion delivered January 25, 1960.

Charles W. Wade, for appellant.

Lasley & Lovett, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Boyd Ashmore, filed this action against appellant, Farmers Union Mutual Insurance Company and Peoples Indemnity Insurance Company, alleging that Farmers had issued to Ashmore a fire insurance policy insuring a dwelling in the sum of $3,500 and $1,000 additional insurance on the furniture; that the Peoples Company had issued a policy in the sum of $3,500 on the same dwelling. Ashmore prayed for judgment on a pro rata basis, $1,750 against each insurance company, for loss of the house, and asked for judgment in the additional sum of $1,000 against Farmers for loss of the furniture, and further prayed that if for any reason the policy issued by Peoples was held to be invalid, that he be given judgment against Farmers for $3,500 for loss of the dwelling, the full amount of the policy issued by Farmers, plus 12% penalty and attorney's fee. Farmers admitted liability for one-half the loss on the house, admitted the loss on the furniture, and deposited $2,750 in court. Peoples denied that it had any policy in force with Ashmore.

There was a judgment for Ashmore against Farmers for the full amount of $3,500 on the house, $1,000 on the

furniture, 12% penalty thereon and a $500 attorney's fee. Farmers has appealed from that judgment. There was a judgment in favor of Peoples, the court finding that Ashmore had no valid policy with that company.

Ashmore bought the dwelling from a Mr. Wynne. At that time Wynne had the property insured with Peoples. Ashmore had been doing business with Farmers and told Farmers' agent that when the Peoples policy expired in April he would insure the property with Farmers. When that time arrived, a policy was issued to Ashmore by Farmers, but the Peoples Company was not notified, and its agent, Mr. W. W. Kelly, on his own initiative issued a renewal policy to Ashmore and placed it in the mail. However, Ashmore states that at the time of the fire he had not received this policy and had no knowledge that such a policy had been issued. In fact, he did not think he had a policy with Peoples. However, a neighbor informed him that such a policy had been issued and Mr. Ashmore went by to see Mr. Kelly, the Peoples' agent, about the matter. Mr. Ashmore testified: "I started up here to report the fire and met Mr. Harper and he flagged me down, so I stopped, and he said he was sorry to hear of my house burning up but that he was glad I had a little insurance on it. Well, I just wondered how come him to know I had any and I said, 'Yes, I got a little insurance with Farmers Union,' and he said, 'Well, you have some with Mr. Kelly too.' I said, 'Well, I am not supposed to have—if I have I don't know it.' So then, I went by Mr. Kelly's office and sho' enough he said he had paid it. Well, I gave him back his $35.00 but I have never asked for but the one policy. I figured his intent was good by paying it and I just gave him back his money."

A jury was waived and the case was tried before the court. The evidence is that Ashmore did not apply for the Peoples policy and did not know that one had been issued. Whether he ratified the issuance of the policy was a question of fact. The court sitting as a jury could have found from the evidence in this case that

Ashmore had no intention of ratifying the policy issued by Peoples. Certainly Ashmore would not be bound by a contract of insurance for which he had not applied and had no intention of ratifying. *Pacific National Fire Ins. Co.* v. *Suit,* 201 Ark. 767, 147 S. W. 2d 346.

Ashmore obtained judgment against Farmers for the full amount asked in the complaint. He is therefore entitled to recover attorney's fee and penalty. We do not think the amount of the attorney's fee fixed by the court is excessive, but we do think it is sufficient to take care of the appeal.

Affirmed.

DUTY *v.* GUNTER.

5-2009 331 S. W. 2d 111

Opinion delivered January 26, 1960.

Russell & Hurley, for appellant.

Ben McCray, for appellee.

JIM JOHNSON, Associate Justice. This case involves an action for damages arising out of a truck and automobile collision.

Appellee, G. E. Gunter, brought suit in Circuit Court alleging that as he was driving his 1959 pickup truck in an easterly direction along U. S. Highway 64 between Russellville and Morrilton in a careful and prudent manner and at a reasonable rate of speed, the appellant, while trying to pass him traveling in the same direction, drove his automobile into appellee's truck demolishing the truck and injuring appellee.

Appellant, W. B. Duty, and Mrs. Duty filed counterclaims alleging that Mr. Duty was proceeding along the highway in a careful and prudent manner and that appellee drove his truck from a side road or driveway onto said highway and into the appellant's car, damaging the car and injuring both counter-claimants.

The usual allegations of negligence were alleged on complaint and counterclaims.

The cause was submitted to the jury upon two completely opposing theories of how the collision occurred: appellee's theory that apepllant struck his truck while attempting to pass, and appellant's theory that appellee came into the highway from a side road or driveway and struck his car. The jury returned a verdict in favor of appellee Gunter in the sum of $2,000 for injuries and property damage. From this judgment comes this appeal.

For reversal, appellant relies on two points, the first of which is: "That the verdict of the jury is against the clear preponderance of the evidence." From a careful review of the record we concede that point one is well taken. However, in passing on cases on appeal from a jury verdict in Circuit Court, the test is not whether the verdict is against the preponderance of the evidence but whether there is any substantial evidence to support the verdict. See: West's Arkansas Digest, Appeal & Error, Key, 989, Vol. 2, page 653. It is true that the legal sufficiency of evidence to support a jury finding is a question of law. *Pine Bluff Heading Co.* v. *Bock,* 163 Ark. 237, 259 S. W. 408. Even so, the facts presented in the case at bar relative to any negligence of appellant are so close that we are not here passing on this question since this case is being decided on other grounds.

Appellant's second point relied on for reversal is: "That the court erred in allowing the introduction of photographs without first requiring the appellee to lay the foundation for the introduction of such photographs by showing that they were correct representations or

reproductions of the conditions of the *locus in quo* at the time of the alleged injury and damage."

The record reveals that the trial court allowed into evidence, over the proper objections of appellant, certain photographs taken by Warren Gunter, son of appellee. This witness admitted that the pictures of the locality which he introduced into evidence as pictures of the scene of the accident were taken upon information he had received from another person and not from his own knowledge and that his only knowledge concerning the location of the accident was from hearsay; the party from whom he had obtained his information not being present when the pictures were made. This witness was unable to testify that the pictures were correct representations or reproductions of the conditions at the scene of the accident at the time of the alleged injury and damage. Therefore, following our rule set out in *Ford* v. *Missouri Pacific Railroad Co.*, 168 Ark. 884, 271 S. W. 967, wherein this Court said: "The admission of photographs of the alleged locality was improper in the absence of a showing that they were correct representations or reproductions of the locality at the time of the alleged injury," the case will be reversed and the cause remanded for a new trial.

The Chief Justice and Justice GEORGE ROSE SMITH would reverse and dismiss.

MAY *v.* NATIONAL BANK OF EASTERN ARK.

5-1994 331 S. W. 2d 697

Opinion delivered February 1, 1960.

[Rehearing denied February 29, 1960]

Brockman & Brockman, for appellant.

E. J. Butler, for Appellee, National Bank of Eastern Ark.; *James R. Howard,* for Appellees, John Collins, *et al.*

J. SEABORN HOLT, Associate Justice. This is a foreclosure suit. We shall refer to appellants as May, and the appellee, National Bank of Eastern Arkansas, as Bank.

Appellee, Bank, filed suit against appellants, W. D. and Dorothy May, his wife, and others, to foreclose a chattel mortgage on certain saw mill and planer mill equipment, which mortgage May and wife had executed to secure payment of a note in the aggregate amount of $29,662.36 executed by them on June 23, 1954. This note of the Mays was a collateral note which was pledged as additional security along with certain invoices for lumber milled by May, and the proceeds of a life insurance policy. The note also provided that additional security would be given to the Bank at a later date and for "attorney's fees as authorized by law if not paid when due and if placed in attorney's hand for collection." January 19, 1955, May assigned to Bank a note in the amount of $29,649.05 of American Radio and Television, Inc., to take the place of, and to be substituted for, the invoices (some 15 in number) set out in the above collateral note of June 23, 1954. The Bank also held a separate Guarantee Agreement signed by John Collins, Paul M. Leird, H. G. Galloway and C. Hamilton Moses, to the effect that these four guarantors would guarantee the payment of the May note above to Bank on condition that before any liability should attach to them on said guaranty, that Bank would first exhaust its security under the chattel mortgage from May to Bank and all other security that the Bank held on said note. On September 11, 1958, a default decree was rendered against May for $19,127.70, on constructive service. The Mays were residents of Dallas, Texas at the time.

Thereafter, May filed a motion asking for retrial, alleging fraud and collusion on the part of Bank and the four guarantors above and a general denial of any liability, and asked for $15,000 damages. It appears that the trial court granted May's motion and the case was retried on December 19, 1958 and later, on February 9, 1959, a decree was entered in favor of the Bank for the balance of the principal sum due on the note remaining unpaid, along with six percent (6%) interest thereon in the total sum of $17,363.82, and if not paid within ten (10) days from date of the decree, that said

chattel mortgage be first foreclosed and if the proceeds therefrom be insufficient to pay the balance due, then that said American Radio and Television, Inc., note above be sold to apply on, or to satisfy, any deficiency, and that May was entitled to no damages. The record shows that sales were had in accordance with the decree and that there remained a deficiency left unpaid on the mortgage note and attorney's fees of $1,616.23 were also allowed. Following this decree the Mays appealed therefrom to this court and executed and filed a *supersedeas* bond in the amount of $22,156.18 on March 12, 1959 which the court approved on May 19, 1959, and ordered the clerk to issue a *supersedeas* staying all other proceedings relative to the sale of chattels and pledged note pending this appeal.

(1)

For reversal, May first contends that "The decree of September 11, 1958, and the decree of February 9, 1959, are void for lack of jurisdiction of the defendants." We hold that this contention is clearly untenable for two reasons: (1) The record in this case shows that at the first trial, September 11, 1958, summons was served on the Mays by constructive service in the manner provided by our statutes, § 27-354 and § 27-355 Ark. Stats. A warning order was properly issued and published, an attorney *ad litem* appointed who properly wrote separate letters to May and Dorothy May to their last known address in Dallas, Texas notifying each of the pending suit against them. His letter to May was returned but the letter to Dorothy May was not returned. The court found, and we hold correctly so, in its decree of September 11, 1958, (the first trial) that proper constructive service was had on the Mays. That decree recites: "That the Defendants, W. D. May, Dorothy May, * * * were served either personally or constructively for the time and in the manner required by law, and this Court has jurisdiction of the parties and the subject matter." (2) We also hold that the Mays entered their appearance in the retrial action when they voluntarily filed their motion for re-

trial on the issues on October 15, 1958, in which they interposed their defenses. This motion of the Mays was granted and a retrial on the merits was had. Certainly we think, in the circumstances, as indicated, that they entered their appearance for all purposes. The court so found. The decree of February 9, 1959, on the retrial, recites: "That the Defendants, W. D. May, d/b/a W. D. May Lumber Company, and Dorothy May, were first served constructively for the time and in the manner required by law, and have since entered their appearance on said Motion to Retry, and this Court has jurisdiction of them under personal entry of appearance and the subject matter of this litigation."

We find no evidence in this record of any fraud or collusion between Bank and the four above guarantors. The court so found: "* * * there was no collusion between the Plaintiff Bank and the American Radio and Television, Inc., nor with any of its officers, trustees, or directors, to deprive defendant W. D. May of anything."

(2)

May next argues that: "Plaintiff Bank demanded attorney's fees, by reason of the note sued on, in a sum in excess of 10 percent of the principal sum plus accrued interest, and said demand is void: (1) Because it is an usurious demand; (2) there is no indemnity agreement expressed in the note sued on." We do not agree. The collateral note here, which May executed in favor of the Bank on June 23, 1954, provides on its face for interest at six percent (6%) and also contains a provision for "* * * attorney's fees as authorized by law if not paid when due and placed in the hands of an attorney for collection,". It is undisputed that the chancellor allowed an attorney fee of ten percent (10%) in accordance with the maximum permitted under Act 350 of 1951 (Ark. Stats. § 68-910) which provides: "A provision in a promissory note for the payment of reasonable attorneys' fees, not to exceed ten per cent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in ac-

cordance with its terms is enforceable as a contract of indemnity."

The Bank produced evidence that, "As of November 18, 1957, the balance of principal and interest due the National Bank of Eastern Arkansas on the W. D. May note, without compounding interest, as permitted in the note, from year to year was $17,363.82. Ten percent (10%) of that amount equals $1,736.38 which was requested as attorney's fees." If, therefore, Act 350 of 1951 is constitutional and enforceable, appellants' plea of usury must fall. We held this Act constitutional in the recent case of *Holloway* v. *Pocahontas Federal Savings and Loan Association,* 230 Ark. 310, 323 S. W. 2d 204. We there said: "It is true that for many years such a stipulation in a promissory note (that is, a stipulation that 10% may be added to the face of the note as an attorney fee) was held to be against public policy and therefore, unenforceable, *Boozer* v. *Anderson,* 42 Ark. 167, *Arden Lbr. Co.* v. *Henderson, etc., Co.,* 83 Ark. 240, 103 S. W. 185; but in 1951 the legislature changed the rule by permitting the parties to a note to agree upon a reasonable attorney's fee for the creditor. Ark. Stats. 1947, § 68-910. We have upheld other statutes authorizing the recovery of attorney's fees, such as the act applicable to insurance cases, *Ark. Ins. Co.* v. *McManus,* 86 Ark. 115, 110 S. W. 797, and there is even less reason for saying that the constitution prohibits the legislature from authorizing the parties to make a voluntary agreement for such a fee."

(3)

May next contends: "There was a conspiracy or collusive agreement carried on among the plaintiff bank, American Radio and Television, Inc., and Paul M. Leird, John Collins, H. G. Galloway, and C. Hamilton Moses, to sell W. D. May's pledged note, in the sum of $29,649.05 illegally and for an inadequate price." We also hold this contention to be without merit. This note of $29,649.05, which it is conceded American Radio and Television, Inc., had given to May in payment of the above invoices for materials sold by May to it, was, as

indicated, part of the pledged collateral held by Bank and which it had a right to sell and did sell to the highest bidder at a public sale under the second decree above of February 9, 1959, and applied the proceeds of said sale on May's note to the Bank. All of this was entirely proper. Without attempting to detail the testimony, it suffices to say that we find no evidence whatever of a conspiracy or collusion between Bank, the four guarantors above, the American Radio and Television, Inc., or any other party or parties to this suit.

(4)

May's fourth contention is: "It was error to refuse to grant defendants' motion to make Paul M. Leird, John Collins, H. G. Galloway, and C. Hamilton Moses parties to this action to retry." The court did not err in denying May's request to make Leird, Collins, Galloway and Moses parties to the action to retry. Simply stated, this suit was a suit by the Bank against May to collect on the note which May had given the Bank. When the note became due and May failed to pay, obviously the Bank was entitled to foreclose the chattel mortgage on May's property, sell the property secured thereby and any other pledged security that might be necessary to discharge the obligation. The Bank was not concerned with May's dealings or disagreements with other parties over questions completely foreign to the issues in the Bank's foreclosure suit against May. Obviously then these four individuals were not necessary parties and should not have been made parties.

We have not overlooked other contentions made by appellants, but after careful consideration, we find all to be without merit.

In conclusion we point out that following the second decree of February 9, 1959, and before confirmation thereof, May appealed to this court and on March 12, 1959, executed a *supersedeas* bond in the amount of $22,156.18 and all proceedings were stayed pending decision on the appeal here. We hold, therefore, that the Bank is entitled to, and should have its relief out of

the *supersedeas* bond, and when so relieved, by receiving the amount due it on the May note, then May's saw mill, equipment and all other collateral held by the Bank in security of his note, including said American Radio and Television, Inc., note in the amount of $29,649.05, we order returned to him.

Accordingly, the decree is affirmed, the cause is remanded and the trial court reinvested with jurisdiction for further proceedings consistent with this opinion.

JOHNSON, J., dissents.

WASHINGTON STANDARD LIFE INSURANCE CO. *v.* AGEE.

5-2046 331 S. W. 2d 261

Opinion delivered February 1, 1960.

Pope, Pratt & Shamburger, by *Richard L. Pratt,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

George Rose Smith, J. The principal question is whether the circuit court erred in denying the motion of the appellant, the defendant below, to transfer this case to the chancery court.

In 1958 the appellant issued to the appellee a "Nine-payment Twenty-Five Year Endowment Policy" by which the life of the appellee's infant daughter was insured for $5,000. The child died a month later, at the age of less than three months, and this action at law was brought by the appellee to recover the face amount of the policy.

By its combined answer and motion to transfer the defendant admitted the issuance of the policy, the death of the insured, and the plaintiff's identity as the beneficiary. As its defense the insurer asserted that by mutual mistake the contract failed to provide that the face amount of the policy would be only $1,250 during the first year. The defendant admitted its liability in that amount and asked that the case be transferred to equity for a reformation of the contract. The plaintiff filed a response to the motion to transfer, denying that the mistake, if one occurred, was common to both parties.

The insurance contract contains at least an ambiguity, if not some indication of the asserted mistake. The face amount of the policy is plainly declared to be $5,000, but farther on, beneath a statement that premiums are payable for nine years, there is this typewritten insertion: "($1,250.00 First year)." Inasmuch as the first annual premium was only $442.50, instead of $1,250.00, the appellant insists that the typewritten notation was put in the wrong place and should have been inserted as a limitation upon the face amount of the policy.

At the hearing upon the motion to transfer to equity the defendant contended that the circuit court should grant the motion upon the pleadings alone, without taking proof. Having thus preserved its objection to the evidence the defendant stipulated with the plain-

tiff what the testimony, if competent, would have been. The circuit court considered the stipulated evidence to be admissible and upon that basis denied the motion to transfer. The defendant in effect refused to proceed further, and the court awarded the plaintiff a judgment for $5,000, together with the statutory penalty and attorney's fee.

The stipulated testimony is, very briefly, to this effect: Both the plaintiff and the insurance salesman with whom he dealt would testify that in their negotiations the matter of reducing the amount of protection during the first year was not mentioned. It is evident that neither of them understood that such a provision would be in the policy. When the contract was delivered the plaintiff inquired about the typewritten notation, and the salesman said it meant that Mr. Agee would receive $1,250 at the end of the first year after the nine-year premium paying period. Officers of the insurance company would testify that most life insurers reduce the coverage to one fourth of the face amount during the first year of a child's life, that the defendant intended to insert such a limitation in this policy, and that the premium was actuarially computed on that basis.

Counsel for the appellee suggest (and the circuit court apparently believed) that had the stipulated facts been presented to a court of equity a reformation of the contract would not have been justified; consequently the motion for a transfer was properly denied. This reasoning rests upon a mistaken conception of the circuit court's function in a case of this kind. If the motion alleges facts which, if proved, entitle the movant to relief obtainable only in chancery, it is not the province of the circuit court to explore the equitable issue in its entirety with a view to transferring the case only if a preponderance of the evidence establishes the right to an equitable remedy. Such a holding would mean that many equitable issues would actually be heard in a court of law, that a transfer could be won only if the applicant was fairly certain to eventually obtain

equitable relief, and that even in the event of a transfer the equitable issue would be tried in both courts, needlessly.

The power to reform a contract lies exclusively in the chancery court. *Soderman* v. *Bell,* 102 Ark. 83, 143 S. W. 595. Here the appellant's assertion of equitable jurisdiction is not frivolous or fraudulent. In that situation our statement in *Merchants Bank of Vandervoort* v. *Affholter,* 140 Ark. 480, 215 S. W. 648, would be apropos: "The test of jurisdiction must be found in the allegations of the complaint [motion to transfer], but if those allegations are made merely for the purpose of giving jurisdiction in fraud of the rights of the parties, it may be reached by a special plea setting up the fraud." Nor is the case at bar like *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703, where the jurisdiction of equity hinged upon the single, narrow, essential question of fact, disputed in the pleadings, of whether the plaintiff was in possession of the property. Here the right to reformation is a mixed question of law and fact, to be fully developed and finally decided only in a court of equity.

The appellee does not, as we read his brief, seriously contend that the circuit court's procedure was theoretically sound. Instead, the argument for an affirmance is largely a practical one, that it would be useless to remand the case merely to enable the chancellor to reach the same result that was attained in the law court. The merits of the case, as far as they can be determined from the stipulation alone, are fully argued in the briefs, and it is true that a mutual mistake has not been established by the quantum of proof necessary for a reformation. *McGuigan* v. *Gaines,* 71 Ark. 614, 77 S. W. 52; *Cherry* v. *Brizzolara,* 89 Ark. 309, 116 S. W. 668, 21 L. R. A. N. S. 508. But there are two sufficient answers to the appellee's contention. First, to sustain the circuit court merely because its decision is not against the weight of the evidence would establish a precedent approving the very thing the law seeks to prevent —

the trial of equitable issues in a court of law. Secondly, the stipulation of fact is not a complete development of the issue, for it recites that it is entered into solely for the hearing upon the motion and for no other purpose. There is thus the possibility that the appellant may adduce additional evidence when the case is heard on its merits in the chancery court.

Reversed and remanded with instructions that the cause be transferred to equity.

McFaddin, Ward, and Johnson, JJ., dissent.

Paul Ward, Associate Justice, dissenting. Set out hereafter are my reasons for dissenting to the majority opinion.

Very briefly stated, the issue here presented arose in the following manner. Appellee filed suit in the Circuit Court to recover $5,000.00, the face amount of the policy issued to him by the Washington Standard Life Insurance Company. Appellant, the insurance company, filed a motion to transfer to a court of equity, the essential portion of which reads as follows: "Said contract of insurance on its face does not clearly reflect the true agreement of the parties because of said scrivener's error which is a *mutual mistake between the parties*". (Emphasis supplied). Appellant thereupon prayed that the cause should be transferred to a court of equity for a reformation of the insurance policy. To the above motion appellee filed a response in which it was stated in effect that if any mistake was made it was not a *mutual mistake* between the parties.

This court has held, and I take it the majority admit, that the mere allegation of a legal conclusion is non-effective. (See *Mott* v. *First National Bank,* 171 Ark. 7, 283 S. W. 3). Consequently, it must be conceded that the trial court was under no duty to transfer this cause of action to the Chancery Court merely on the allegation of the insurance company that a *mutual mistake* had been made.

It must follow, therefore, that the only way the insurance company could hope to have the case transferred was

by introducing testimony showing that grounds for reformation existed, that is, that a *mutual* mistake was made. This fact was evidently recognized by the court and both parties because the parties entered into a Stipulation of Facts.

It is conceded by the majority, however, that the Stipulation reveals no *mutual* mistake was made. The last page of the majority opinion contains this statement: ". . . it is true that a mutual mistake has not been established by the quantum of proof necessary for a reformation".

The available authorities seem to support the view I take. In the case of *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703, the plaintiff filed a suit in Chancery Court alleging that they were the owners and in possession of said lands. Appellees filed a motion to transfer the cause to the law court alleging that *they* were in possession of the land. The Court, as in the case under consideration, took proof on the motion and made its finding thereon to the effect that plaintiffs were not in possession of the land and proceeded to transfer the cause to the Circuit Court. We can certainly take it for granted that if the trial court had found otherwise it would have ruled otherwise. It seems that the cited case is exactly in point with the case under consideration except that in the former the motion was made in the Chancery Court and in the latter it was made in the Circuit Court. I have never understood that the Chancery Court has wider jurisdiction to pass on motions than the Circuit Court has. On the propriety of taking proof on a motion to transfer it was said in the cited case that ". . . it was necessary for proof to be taken and presented to the Court upon that issue".

A similar situation arose and a like result was reached in the case of *Wade* v. *Goza,* 78 Ark. 7, 96 S. W. 388. There appellee made a motion in the Chancery Court to transfer to the law court on the ground that the appellant was not in possession of the land. Again proof was taken on the issue showing the allegation to be true and this Court approved the Chancery Court's action in transferring it to the Circuit Court.

Any other view than the one I have tried to express would seem to lead to some ridiculous situations. As pointed out this Court has repeatedly said that it was proper to take testimony on a motion to transfer. It would be an idle and useless thing for the Court to take testimony and then not be bound to act upon what the testimony showed. It seems unreasonable for this Court to hold that a Chancery Court can hear testimony and decide whether to retain jurisdiction or transfer it to the Circuit Court while at the same time holding that the Circuit Court can hear testimony but has no choice but to grant a transfer. Such a process of reasoning seems to point to this anomalous situation: The Trial Judge was right in refusing to transfer solely on the allegations made in the Motion. He was right in hearing the testimony on the Motion. The testimony did not sustain the Motion, but he was powerless to deny the Motion.

I have read the holding in the *Merchants Bank of Vandervoort* v. *Affholter,* 140 Ark. 480, 215 S. W. 648, relied on by the majority, but I find nothing to support the conclusion reached. In that case appellee brought suit in the Circuit Court to recover a bond alleged to be of the value of $100.00. It is obvious, of course, that the Circuit Court would not have jurisdiction if the bond was not valued at $100.00. Appellant offered a demurrer but no proof was offered to show that the bond was worth less than $100.00. The trial court and this Court held that under the allegation of the complaint the Circuit Court had jurisdiction. Any relevancy of the cited case to the question under consideration entirely escapes me.

Judges McFaddin and Johnson join in this dissent.

LAZENBY *v.* ARK. STATE HIGHWAY COMMISSION.

5-2063 331 S. W. 2d 705

Opinion delivered February 1, 1960.

[Rehearing denied February 29, 1960]

Dinning & Dinning, for appellant.

Dowell Anders, William H. Donham & George O. Green, for appellee.

PAUL WARD, Associate Justice. This is an eminent domain proceeding by the Arkansas State Highway Commission to condemn an easement for a right-of-way to cross appellant's lands, and the principal question involved relates to the competency of evidence.

The appellant-defendant, Emma Louise Lazenby, owned 14.2 acres of land adjacent to the corporate limits of the Town of Marvell. The Arkansas State High-

way Commission, appellee, filed suit to condemn an easement for right-of-way purposes in 1.94 acres of land running in a curve across appellant's lands in such a way as to leave approximately 9 acres on one side and approximately 3 acres on the other side of the right-of-way. Appellee's appraisers had fixed the value of subject land at $950.00, which amount was accordingly deposited in the Court. Mr. Lazenby, husband of appellant, was the only witness who testified regarding the value of the condemned land. At the conclusion of his testimony appellee moved for a directed verdict. Thereupon the court, in sustaining the Motion, made substantially the following statement: "The court is of the opinion that no substantial testimony was offered by the landowner upon which you could base a verdict and fix damages in excess of $950.00 . . ." Under the instructions of the court the jury returned a verdict in that amount in favor of appellant. From such verdict and judgment appellant prosecutes this appeal.

Mr. Lazenby testified substantially as hereafter set out. Appellant owned 14.2 acres of land on Highway No. 20 adjacent to the Town of Marvell and suited particularly for industrial use; the Highway Department took a strip 120 feet wide through the property in a curved shape leaving 2.7 acres on one side and about 9 acres on the other side—the Highway Department figures show that 1.94 acres were taken. The witness testified that 20 years ago they sold 2 acres to a gin company for $1,000.00 per acre and that the value of the land had since increased more than 20% recently the Federal Compress Company bought twenty acres within 100 yards of the subject land and paid $1,000.00 per acre for it and in addition paid $5,280.00 to build up the ground where they could use it; subject lands are higher than the land purchased by the Federal Compress Company; there is a railroad track along the side of subject land but there was no track on the above mentioned Compress land. The witness further testified that he was familiar with the value of lands in that community; that he had tried to buy land but was unable to do so; that he and his

wife had had opportunities to sell their land but wanted to hold it for industrial purposes; that in his opinion he could sell subject land for more than $1,000.00 per acre; and in his opinion the land was worth more than $1,000.00 per acre.

"Q. What do you value your land, that is, what do you value this land?"

In response to an objection by the Highway Department the Court made this statement: "The court will permit him to say what value he puts on the land, for whatever that is worth. The jury will be told that he has not yet qualified as an expert".

It is our conclusion that the trial court was in error in directing a verdict for appellant in the sum of $950.00. In fact, we are unable to harmonize the action of the trial court directing the verdict with its previous statement, as shown above, that "The court will permit him to say what value he puts on the land (referring to the witness) for whatever that is worth". Likewise the trial court, in directing the verdict, stated: "The court is of the opinion that no substantial evidence has been offered by the landowner upon which you could base a verdict and fix damages in excess of $950.00".

It appears to us that appellee, and perhaps the trial court erroneously thought the proper way to fix the value of the condemned land was to show the market value of the entire tract of land before the taking and the market value of the remaining land after the taking. This rule would be correct if appellant was seeking severance damages to the remainder of the land because of having been divided by the right-of-way. It will be noted, however, that the witness did not attempt to establish this kind of damages but was only seeking to show the value of the land that was actually taken.

Mr. Lazenby, the husband of appellant, had a right to testify as to the value of the land even though he did not qualify as an expert witness in the matter of appraising lands. In numerous cases we have allowed non-expert witnesses, and even the owners of the land,

to testify regarding the market value of land if the testimony shows that they are familiar with such matters. In the recent case of *Arkansas State Highway Commission* v. *Muswick Cigar and Beverage Company, Inc.*, 231 Ark. 265, 329 S. W. 2d 173, this Court allowed a part-owner to testify regarding the market value of land condemned and there was no contention that the witness was an expert. In this case there is no question but that the witness, as shown by his testimony heretofore set out, was familiar with the market value of land in that immediate vicinity. Therefore, the trial court was correct in saying that it should go to the jury for what it was worth. See also *Fort Smith & Van Buren District* v. *Scott,* 103 Ark. 405 (at P. 409-410), 147 S. W. 441.

Neither do we agree with appellee's contention, heretofore mentioned, that it was necessary for the witness to testify as to the value of the land before and after the taking. Since appellant was only seeking to recover the value of the land actually taken it was proper to show the market value per acre. This having been done it was only necessary to multiply that amount by the number of acres taken. There is a long line of cases in support of this rule.

In the case of *Little Rock-Fort Smith Railway Company* v. *McGehee,* 41 Ark. 202, appellee owned "the river front for a quarter of a mile on the eastern or northern bank of the river". Appellant sought to take only three or four acres of this land, and the question was "the amount of compensation which the owner of the land condemned is entitled to receive". There the Court approved testimony establishing the value of land actually taken, and no mention was made of the before and after rule. In the case of *Little Rock Junction Railway* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, appellant sought "to condemn a site for the landing and approaches of a railroad bridge across the Arkansas River". It appears that this was a partial taking of appellee's land. The Court there said: "The market value of the property is the true criterion of damages in these cases". Again no mention was made of the before

and after rule. In the case of *Fort Smith and Van Buren District* v. *Scott, supra,* appellant sought to condemn 10 acres of land belonging to appellees for a bridge site. The complaint shows that appellees owned other lands which were not taken. One of the questions involved was the value of the 10 acres taken. The opinion states that: "The only issue was as to the value of the property taken". In the opinion it is further stated that: "The estimates of the witnesses ranged all the way from $750.00 to $100,000.00". The jury returned a verdict for $10,000.00. In affirming the case this Court, disregarding entirely the before and after rule, among other things, stated: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking. . ." "The sole question here was the market value of the land and the witnesses gave their opinions as to that value, basing them on different facts and reasons in support thereof". In the case of *Drainage District No.* 11 v. *Stacey,* 127 Ark. 549, 192 S. W. 904, appellee, instituted suit to recover for land taken by appellant for a drainage ditch *across* his lands. The jury returned a verdict in favor of appellee in the sum of $1,000.00 and appellant appealed. In affirming the case this Court approved the following instructions: "You will take into consideration the fair and reasonable market value of the lands actually appropriated by the defendant for drainage purposes, and in determining such value you will be guided by the same consideration which would be regarded in the sale of property between private persons and what the land included in the drainage district and any additional land appropriated for the purpose of receiving the dirt excavated from the line of the ditch was worth in the market at the time of its taking . . ." The Court also approved this statement: "The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes . . ." Again no reference was made to the before and after rule. To the same effect is the case of *Baucum* v. *Arkansas Power*

and Light Company, 179 Ark. 154, 15 S. W. 2d 399, where appellee sought "to condemn a right-of-way for an electric power transmission line across lands belonging to appellants". There the Court did apply the before and after rule with reference only to the damage to other lands, saying: "If you find from the testimony that the construction of the line along the 80-foot right-of-way has damaged other lands of defendants, then you will determine from the testimony the difference, if any, between the fair market value of such other lands before the construction and the fair cash market value after the construction . . ." As to the value of the land actually taken the Court in that case said: "In determining what is full compensation for property, or right-of-way through property, this Court has several times defined the term 'market value' . . . the market value is what the land would be reasonably worth on the market for a cash price, allowing a reasonable time within which to effect a sale". Likewise in the case of *Yonts* v. *Public Service Company of Arkansas,* 179 Ark. 695, 17 S. W. 2d 886, where appellee condemned a portion of appellant's land for a dam site and reservoir, the opinion shows that several witnesses testified to the fair market value of the land and placed varying figures as a price per acre, and the jury returned a verdict "for $30.00 per acre for the land owned by Mrs. Bentley, and $25.00 per acre for the land owned by Mrs. Yonts". The jury, however, allowed appellees nothing for the land taken for a pipe line across the property and for this reason the case was reversed. Otherwise the Court put its approval upon testimony showing the market value per acre of the land taken and also the jury's verdict based thereon.

Although not argued by appellee it has been suggested that the action of the trial court could be affirmed on the ground that even though the testimony tended to show the subject land to be valued at approximately $2,000.00, the court had the right to deduct from that amount benefits which accrued to appellant by reason of bordering on a good highway. We see no merit

in such a contention for two very good reasons. First, there is no testimony in the record to show that the rest of appellant's land was in any way benefited either generally or especially. In the second place, although it may be considered common knowledge that a good highway increases the value of the adjoining land yet the benefits which are deductible are the benefits which are peculiar and special to the land involved. Many decisions of this court sustain that view as shown below.

In the case of *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707, the Court considers this very question, stating: "The view which seems to us to accord with reason, and which is supported by high authority, is that where the public use for which a portion of a man's land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits. And the benefits which will be thus considered must be those which are *local, peculiar,* and *special* to the owner's land, who has been required to yield a portion *pro bono publico*" (Emphasis supplied). The above and exact quotation was approved in the case of *City of Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78; *Ross* v. *Clark County,* 185 Ark. 1, 45 S. W. 2d 31; and *Washington County* v. *Day,* 196 Ark. 147, 116 S. W. 2d 1051. Also in the case of *Washa* v. *Prairie County,* 186 Ark. 530, 54 S. W. 2d 686, the Court in this case stated: "It is true also that, before the owner can be said to have been compensated by benefits derived from the appropriation of his property, such benefits must be, not those enjoyed by the public generally, but must be special benefits accruing to the particular owner of the land from which a part had been taken".

Nor are we convinced by appellee's argument that the trial court had the discretion to find Mr. Lazenby was not a competent witness. True he was not an expert witness but he did show that he was familiar with land values in that vicinity.

In view of the foregoing it is our conclusion that the judgment of the trial court must be, and it is hereby, reversed and the cause remanded.

Reversed and remanded.

McFaddin, J., dissents.

McGuire *v.* Benton State Bank.

5-2005 331 S. W. 2d 258

Opinion delivered February 1, 1960.

J. B. Milham, for appellant.

Fred E. Briner, for appellee.

Sam Robinson, Associate Justice. Appellant, J. W. McGuire, filed this suit against the Benton State Bank, alleging that he had $6,075 in the bank as a joint account with his wife; that he had attempted to withdraw the money and the bank would not permit such withdrawal. McGuire prayed judgment against the bank for the amount of the deposit. The bank answered, alleging that the money was in a savings account in the name of Mr. and Mrs. J. W. McGuire; that at the time said deposit was made a savings book was issued to the depositors, in which book it is provided that same must be presented when money is deposited or withdrawn from said account; that said book also provides that

"payments may be made without production of the pass book, if the depositor shall prove to the satisfaction of the bank that his book has been lost, stolen, or destroyed." The bank further alleged in its answer that it had reason to believe that "Mrs. J. W. McGuire holds the said pass book and under the terms of such account, would be a necessary party to this suit before any action could be taken", and asked that Mrs. McGuire be made a party defendant. Mrs. McGuire filed an answer in which she admitted there was a joint account with her husband in the bank in the sum of $6,075 and alleged she has the deposit book in her possession. She further alleged that she has not requested the Benton State Bank to pay over the said funds. She denied all the other allegations of the complaint.

Upon trial of the cause it appeared that there was $6,075 in the bank in the joint account of Mr. and Mrs. McGuire; that the bank had refused to cash Mr. McGuire's check for the money; that Mrs. McGuire has the bank book, and that she and Mr. McGuire have separated. The bank book itself was not introduced in evidence; McGuire attempted to require Mrs. McGuire to put it in evidence, but the court overruled his motion to that effect. It does appear that there are photostatic copies of portions of the bank book in the record, and there is printed on the base of the bank book: "This book must be presented when money is deposited or withdrawn." The bank offered to deposit the money in the registry of the court, but McGuire would not consent to this. He was contending that he should have judgment against the bank for the amount of the deposit and his costs. After McGuire had proved the deposit and the bank's refusal to let him withdraw the money, he rested his case. Neither the bank nor Mrs. McGuire put on any evidence whatever. The bank demurred to the evidence. The court sustained the demurrer and dismissed the cause with prejudice.

Obviously the bank did not feel that it could safely pay the money to Mr. McGuire, knowing there was a controversy between him and Mrs. McGuire as to the own-

ership of the money, and that under the agreement between the parties when the deposit was made the bank could insist on the bank book being presented when a withdrawal was made, or that good reason be shown why the book could not be presented. It is self-evident that there is a controversy between Mr. and Mrs. McGuire as to the ownership of the money. All parties were in court, and the bank offered to deposit the money in court. The ownership of the money will have to be determined sometime, and there is no good reason why it cannot be done in this litigation. The decree is therefore reversed with directions to overrule the demurrer and proceed to a full development of the cause.

Reversed.

McFaddin, J., concurs; Harris, C. J., dissents.

Ed. F. McFaddin, Associate Justice, (Concurring). At the close of the plaintiff's case the Court sustained the Bank's demurrer to Mr. McGuire's evidence and dismissed the case *insofar as concerned* Mr. McGuire. If there had been only the two parties to the suit (*i.e.*, Mr. McGuire and the Bank), then the Court's decision would have been correct, as I see the law and the facts. But a demurrer to the evidence should be sustained only when the court may "dismiss the cause of action"; and that means the entire cause of action of all the parties and not merely one angle to the controversy.

There was another party to this case of Mr. McGuire versus the Bank; and that third party was Mrs. McGuire. The Bank had, by its answer, caused Mrs. McGuire to be brought in as a defendant;[1] Mrs. McGuire had answered;[2]

[1] The Bank's answer contained this language: "Defendant further states that it has reason to believe that Mrs. J. W. McGuire holds the said pass books and under the terms of such account, would be a necessary party for this suit before any action could be taken upon. That under Ark. Stat. 27-814, the Court should require that Mrs. J. W. McGuire be made a party defendant in this cause."

[2] She admitted that she had the deposit book and denied every allegation in Mr. McGuire's complaint.

and Mr. McGuire had filed a response[3] to Mrs. McGuire's answer. The Bank had offered to deposit the fund in Court, but had not done so. With all of the above in the record, the Court should not have sustained the Bank's demurrer to Mr. McGuire's evidence because there still remained the dispute and controversy between Mr. McGuire and Mrs. McGuire as to who was entitled to the money.

A demurrer to the plaintiff's evidence should not be sustained unless the sustaining of the demurrer permits the court to "dismiss the cause of action". Those are the words contained in Act No. 470 of 1949 (§ 27-1729 Ark. Stats.). They mean the entire case and not merely part of it. In the case at bar, the sustaining of the Bank's demurrer to Mr. McGuire's evidence only disposed of one angle of the controversy, and, therefore, the demurrer should not have been sustained.

CARLETON HARRIS, Chief Justice, dissenting. Admittedly, appellant did not comply with regulations for withdrawing money from a joint savings account. Printed on the book is the requirement "this book must be presented when money is deposited or withdrawn." Of course, such a requirement is not absolute, for one might show that he had actually lost a book, or for other *bona fide* reason could not present same, and no one would dispute that in such event, he would be entitled to receive his money. Here, as cited by the majority, "obviously the bank did not feel that it could safely pay the money to Mr. McGuire, knowing there was a controversy between him and Mrs. McGuire as to the ownership of the money, and that under the agreement between the parties when the deposit was made the bank could insist on the bank book being presented when a withdrawal was made, or that good reason be shown why the book could not be presented. It is self-evident that there is a controversy between Mr. and Mrs. McGuire as to the ownership of the money." To my way of thinking,

[3] He set up in the response that she had obtained an order against him for separate maintenance and that the money in the bank was his. We know from statements made in the oral argument of this cause before this Court that the separate maintenance suit is the same one that is now before us as Case No. 2006, with an opinion this day delivered.

the bank would have been foolish under those circumstances to have honored Mr. McGuire's check, for Mrs. McGuire might have presented the book anytime thereafter, and demanded the money.

The bank was only interested in protecting itself from liability. In open court, counsel for the bank stated:

"***Of course, the Bank has no desire to become involved in any litigation among two depositors and for that reason we are holding the money down there until the Court orders to whom the money goes to and for that reason I would like to request this Court to permit the Bank to deposit this money into the registry of the Court until the Court decides to whom the money goes and that the Bank be released from any further duty or obligations in this case, and let me add one other thing. I don't think either Attorney would have any objections to this because it will make both cases more simple."

Counsel for Mr. McGuire strenuously objected to this being done. It seems to me, that as a result of this reversal, in which a further hearing is directed, the bank is being subjected to possible liability,[1] though it has acted in good faith at all times. Certainly the bank showed that good faith by offering to pay the money into the registry of the court.

At the conclusion of the testimony introduced by appellant, the bank, by written motion, moved for a verdict because of the insufficiency of the evidence against it. I find no evidence in the record that would justify a judgment against the bank, and am accordingly of the opinion that the court was correct in granting this motion.

I therefore respectfully dissent.

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[1] Depending on disposition of the money subsequent to the court's decree.

5-2006 331 S. W. 2d 257

Opinion delivered February 1, 1960.

J. B. Milham, for appellant.

C. M. Carden, for appellee.

Jim Johnson, Associate Justice. This appeal comes to us from a Chancery Court's award of temporary support and attorney's fee.

Appellant, J. W. McGuire, and appellee, Katie McGuire, are husband and wife. They have been married for the past 23 years. The parties were separated in April 1959 and on June 9, 1959, appellee filed a separate maintenance suit. Upon a hearing of the cause, appellant was ordered to pay $100 per month temporary support and $75 attorney's fee, from which order comes this appeal.

The law relative to temporary support is well settled. Section 34-1210, Ark. Stats. provides:

"During the pendency of an action for divorce or alimony, the court may allow the wife maintenance and a reasonable fee for her attorneys, . . ."

This Court has said many times that the granting of support and attorney's fee are within the sound dis-

cretion of the trial court and will not be disturbed on appeal unless there has been an abuse of this discretion. *Lewis* v. *Lewis,* 222 Ark. 743, 262 S. W. 2d 456; *Aucoin* v. *Aucoin,* 211 Ark. 205, 200 S. W. 2d 316.

On trial *de novo* we find that appellant is a war veteran and a retired railroad man; that from these sources he receives a monthly income of $210.36. Appellant left appellee in possession of the family home. There was no testimony in the record as to appellee's need for current living expenses; on the other hand there was ample testimony as to appellant's needs. His room, rent, food, insurance and other expenses total an amount in excess of $140 per month. Based on this testimony and the existence of other benefits enjoyed by the wife, we are of the opinion that the decree of the Chancellor should be modified to the extent of allowing the wife $75 per month as temporary support; that the attorney's fee in the amount of $75 is reasonable. However, the prayer for an additional fee, made necessary in the prosecution of this appeal, is passed to be considered by the trial court when the case is heard on its merits.

Modified and affirmed.

MICHIGAN LIFE INSURANCE CO. *v.* HAYES.

5-1914 332 S. W. 2d 593

Opinion delivered February 8, 1960.

[Rehearing denied March 21, 1960]

Barber, Henry, Thurman & McCaskill, for appellant.

Osborne W. Garvin and *Wright, Harrison, Lindsey & Upton,* for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves the construction of the "Confinement Clause" of an insurance policy issued to Dr. J. Donald Hayes of Little Rock by the Michigan Life Insurance Company. In May of 1952, Huntington & Homer, Inc., General Agents for the company, mailed, from their Chicago office, to a large number of professional men in Little Rock, descriptive literature of a new policy which the company was issuing to attorneys, dentists, and physicians. An application and a specimen policy of the company were enclosed. During the same month, Dr. Hayes executed the application and mailed same to the agency, which in turn forwarded the application on to the company's office in Detroit. The application was accepted, policy was issued on May 27th, effective June 1, 1952, and returned to the agency, which in turn forwarded it on to Dr. Hayes in Little Rock. Statement for the premium due ($190.00) was also enclosed, and Dr. Hayes mailed his check on May 29, 1952. Subsequently, the doctor also paid the 1953 and 1954 premiums. The policy, styled "Professional Disability Policy", which is a health and accident policy, provides, *inter alia,* as follows:

"Article 2.

If such injuries, sickness or disease shall wholly, continuously and necessarily disable the Insured, and prevent him from performing every duty of his occupation, the Company will pay at the rate of the Monthly Indemnity specified in the Schedule on page four hereof, for the period of such disability, not to exceed three years commencing with the eighth day of such disability.

If under the preceding paragraph of this Article such disability shall necessarily confine the Insured within a hospital during the first seven days of disability,

said Monthly Indemnity shall then be payable commencing with the first day of such hospital confinement.

After the payment of the Monthly Indemnity for three years as aforesaid, the Company will continue the payment of Monthly Indemnity at the same rate thereafter so long as the Insured shall live and be wholly, continuously and necessarily:

A. Disabled by such injuries from engaging in any occupation or employment for wage or profit;

B. Confined in the manner as required in the next paragraph, as the result of sickness or disease and regularly visited and treated by a legally qualified physician or surgeon other than himself;

'Confined' means that the Insured is absolutely unable to leave the house and the yard situated immediately around the house, and in order to receive the Monthly Indemnity, the Insured must at all times remain within such confines without any exception but one, namely, the Insured, when deemed necessary and prescribed by the physician or surgeon, may be transported to and from the office of the physician or surgeon or to and from the hospital or sanitarium. If at any time the Insured shall leave such confines, except to be transported to and from the office of the physician or surgeon or to and from the hospital or sanitarium as provided above, payment of the Monthly Indemnity shall terminate."

On May 5, 1954, Dr. Hayes suffered a heart attack, and under the schedule of benefits provided in the policy, was paid, under the total disability coverage, the sum of $300 per month for three years, or a total amount of $10,800. Thereafter, appellee contended that he was due $300 per month under the confinement clause of the policy, but appellant refused to pay on the ground that Hayes was not confined to the house in conformity with the definition of "confinement" set out in the policy. On August 29, 1957, appellee instituted suit for recovery, amending his complaint in December, 1958, to include amounts which he contended had ac-

crued during that period. The cause was heard by the court, sitting as a jury. On January 8, 1959, judgment was entered for Dr. Hayes in the amount of $6,671.85, which included interest and 12% penalty. An amended judgment was entered to include attorneys' fee, in the sum of $1,250, making the total judgment $7,921.85, together with interest thereof at 6% per annum. From such judgment comes this appeal. Appellant relies upon two points for reversal, but under the conclusion we have reached, it is only necessary to discuss point two, which simply poses the question of whether Dr. Hayes was confined, as the term is used and defined in Article 2, of the policy.

Let it first be pointed out that the "total disability" of Dr. Hayes is not in issue, and appellant admits that Hayes became totally disabled in May, 1954, and is still so disabled, and unable to practice his profession. As previously mentioned, the company paid appellee for the full three years total disability as provided in Article 2. We are therefore only concerned with whether Dr. Hayes is now entitled to further payments under provision *B* of the contract. The record reflects the following activities on the part of appellee in 1957 and 1958. He went deer hunting to the Old Dixie Hunting Club,[1] located in Chicot County, during the 1957 deer season, and attended the opening deer season at the Club in the fall of 1958, which started on November 10th. Dr. Hayes stayed the full week, from Monday until Saturday. He also went to the opening in December, staying Monday and Tuesday, returning on Tuesday night.[2] Appellee likewise hunted deer in Mississippi during the seasons, which follow immediately upon the Arkansas seasons. His testimony reflected that he stays in town at the motel, and a friend drives him back and forth to the camp. He has a choice of

[1] Now called North Little Rock Hunting Club.

[2] It appears that the doctor returned for the trial, which commenced on December 12, 1958. From the testimony: "Now, did you go down at the opening of the season, December 8th, 1958? A. I was there Monday and Tuesday and came back Tuesday night. Q. Are you going back? A. You have got me tied up here with this thing now. I won't get to hunt any more."

stands and sits in a chair by a tree hidden by brush . . . upon getting tired, he gets in his car and goes back to town. The distance from the motel to the camp is ten or twelve miles. Dr. Hayes testified that he would go on the deer stand early, getting up at 4 or 4:30, and eating breakfast, "we have breakfast early in order to drive out to the deer stand before daylight"; that he would stay on the deer stand "from a few minutes to a few hours. Of course, you don't always do like you want to do. If you come along and kill your deer the first thirty minutes, that pretty well ends the hunting, then you are visiting your friends, getting the deer taken care of, and if the dogs are running around, you have to sit there three or four hours. Q. Did you ever kill a deer the first thirty minutes? A. I have lots of times. I am a pretty good deer killer. Q. Do you sometimes have to stay three or four hours? A. Yes, I have stayed three or four days and not kill a deer. Q. I mean when you go out in the morning you may stay three or four hours or thirty minutes? A. According to how I feel. I have my car with me. My jeep or car. If I feel tired I get in the car and rest. If the sun comes up and gets warm, I may take a nap. I was asleep down there and a deer woke me up and killed him last year." The testimony further reflected that Dr. Hayes has made a number of trips to Hempstead County. He testified that he sometimes does his own driving and other times has a boy who acts as chauffeur . . . that he drives the car more frequently than when first becoming ill. He testified that he particularly drives the car on Sundays, since he does not employ the chauffeur at that time. He frequently goes to the Elks Club and plays dominoes, and sometimes drives in the evening; when he plays dominoes late, he drives the car home himself. From the testimony: "You stay at the Elks Club from about noon until 5 in the evening? A. Sometimes later than that. Sometimes I get there before they even open up." He further testified that he had frequently attended meetings of the North Little Rock Elks Club after May 5, 1957, would

sometimes go in the afternoons to play dominoes, and would stay until the meeting adjourned about nine o'clock. "In fact, in the last two or three years, I have gone to more meetings than I ever did before except the year I was exalted ruler. I had to go then. I didn't go before I got sick much, I didn't care anything about it then. Q. What time do the meetings convene? A. Eight o'clock. They have supper about seven and the meeting about eight. Q. Do you go to the suppers? A. Yes, sir. Q. What time does the lodge adjourn? A. About nine o'clock." The evidence given by appellee reflected that his brother still maintains the same office in the Donaghey Building (formerly occupied by the two), and appellee goes by each morning and evening to get his mail, visit with the employees, and take care of business interests (not referring to medical practice, which the doctor has not engaged in since his heart attack). He stated that he sometimes stays as much as two hours, and has stayed as long as three hours. In the summer of 1957, he took the baths at the Majestic Hotel in Hot Springs, and while at that city, would fish on Lake Ouachita. Appellee has mainly fished at Indian Bay, which is about 100 miles from Little Rock, and has also done some fishing at Bearskin Lake, sometimes two or three times a week. On some occasions, the chauffeur drove, and at other times, he operated the automobile. The doctor testified that he keeps a boat at Old River,[3] and that he would go there each weekend during the summer, and sometimes two or three times during the week, and that he has operated the boat while members of the family were water skiing. Dr. Hayes visited one of his friends in Little Rock who operated a filling station so frequently that, according to his testimony, "I visited so much down there, that it got out that I owned the oil company."

The above activities were all related by Dr. Hayes, and obviously cannot be construed as literal compliance with the provisions of Section *B*, but for affirmance, ap-

[3] Part of the old Arkansas River cut-off below Scott, beyond Willow Beach.

pellee relies upon *Occidental Life Insurance Company of California* v. *Sammons,* 224 Ark. 31, 271 S. W. 2d 922, and cases cited therein. In that case, and each of the cases mentioned therein, the insured was allowed to recover under a "confinement clause" substantially like the one presently before the Court, though the evidence reflected that the insured had not remained in the home. In the *Sammons* case, testimony showed that the insured would leave the house and yard for the purpose of taking rides, walking for recreation, and that some part-time work as a clothing salesman was engaged in by Sammons. The transcript in that cause reflects that the insured would go to the corner drug store, or to the service station, and would sometimes go uptown to visit the other employees of the store where he had been employed. He testified, however, that "I rest practically all day, get up around 7:30, be back in bed by 8:30, and usually, most of the time, get up around noon, eat dinner, fool around the house a little bit, and maybe stay a couple of hours and sometimes go down town or to the service station or drug store and go back home, maybe lay down until my wife comes home. That is almost routine work with me, I don't do it every day, almost every day." Relative to the work that he had done, he testified that he had not worked more than one day at a time, that he occasionally would go to a picture show, that he had gone to one baseball game, but though a football fan, would not go to games. According to his evidence, the occasional work that he had done had been on the advice of his physician, Dr. J. N. Compton. "I told him I sat around the house, sometimes got pretty nervous. He said it might not hurt to work a little."

In the case before us, appellee apparently largely relies on the fact that these activities were authorized by his physician, Dr. R. E. McLochlin of Little Rock.[4] From the doctor's deposition:

"I have spent a lot more time, so far as time is concerned, directing Dr. Hayes' activities than I have

[4] Now deceased.

in directing any medication. The medication boils down to rather simplified routine. Dr. Hayes' mental attitude regarding this illness was such it created quite a problem for several months and it took a lot of time, both in my office and at his home and visiting with him to try to get him convinced that he can live and that life can be enjoyable even though his activities are curtailed. I have given him a lot of directions on how to live. . . . I recall one of the first things I specifically told him to do other than generalities. I had been talking to him in general terms for weeks, like going fishing, going riding in the car perhaps with a chauffeur, he had one available, those were generalities. I told him to lay in the hammock in the sun and rest and lay out where he could see traffic go by the house, visit with relatives, I mean with friends, and then I have been aware of his interesting in hunting, deer hunting, for a number of years. I know many of the members of his deer hunting club and those hunting trips became almost an obsession with him. He liked it so well that I directed him and urged that he go on a hunting trip with his same group; that he go to the hunting lodge and spend a big part of the time there doing the social affairs of the hunting trip, perhaps rest while the others were riding their horses or that he be put on a stand in a comfortable chair and preferably with somebody to visit with and that he could actually hunt but was not allowed to ride a horse. That was the first time I can specifically recall directing that he do something. I was aware of these trips in previous years. * * * I directed he go fishing provided he have someone do all the heavy work, managing the boat if any rowing was to be done or carrying the motor, someone do that, and he to sit in the boat and not even help drag the boat on the bank. Preferably have a chauffeur to drive him to and from, and in that way he can take some recreation.

Q. Doctor, do I understand correctly that visiting friends, riding about in the car, these hunting and fishing trips and carrying on the activities for recrea-

tion were all considered by you to be part of his treatment?

A. They were the important part of the treatment in his specific case because it was obvious his house wasn't big enough for him to live long confined in it. He wasn't constituted that way and it was necessary that he have recreational outlets and even go to the Elks Club and play dominoes and visit with folks and recreations that require very little physical exertion but would build his morale."

This advice was concurred in by Dr. H. F. Gray, and Dr. Walter H. O'Neal. According to Dr. McLochlin, Dr. William D. Stroud of Philadelphia stated that "Dr. Hayes has got to get out, he has got to travel. He recommended that Dr. Hayes book passage on lots of ships and travel the world over. He thought that would keep him busy. Well, he carried it a little too far, but those were the instructions, that he had to keep occupied."

We have reached the conclusion that this judgment must be reversed. In doing so, we are not unmindful of the fact that the literal language of the confinement clause in the *Sammons* case, and other cases cited in that opinion, was violated by each respective insured, and yet recovery was allowed. Arkansas has consistently given a liberal construction to confinement clauses, but we think even liberality has its limits. Of course, it would be ridiculous to hold an insured to the very letter of the clause, for, as has been pointed out by other jurisdictions, such an interpretation would prevent his leaving the house during danger of flood, fire, or destruction. So, it is apparent that a reasonable construction should, and must be given, rather than interpreting the contract from a strict, literal view. Certainly it is reasonable for one to go outdoors for fresh air —to visit with friends — to walk for exercise — to pick up mail — to sometimes engage in other activities for pleasure, and to even engage in occasional work. We think the evidence in this case goes far beyond such activities, for the activities of Dr. Hayes

seem to be regular and systematic; in fact, one would almost gain the impression that the doctor is away from his home as much as he remains in it. *In fact, we do not see a great deal of difference in his routine and that of one who has retired because of age or length of service.*

To affirm this judgment would actually mean that there can be no such contract in Arkansas as provided in the confinement clause, and that a confinement clause has the exact and identical meaning as total disability, *i.e.,* if an individual is unable to perform all the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner, he is totally disabled — *and confined.* Not only would such a construction be completely unfair to an insurance company, but it could also have the result of preventing this coverage from being available for persons who would qualify, for a company might well withdraw this provision from contracts sold in states giving so liberal a construction. Further, to affirm this judgment would be to empower any doctor to reform any similar contract entered into by a company and its insured. The Courts are not permitted to rewrite contracts between parties. Logic dictates that this prohibition should apply likewise to members of the medical profession.

To state our position, we simply say that this Court is unwilling to further extend or further liberalize the interpretation given the confinement clause in the *Sammons* case, *i.e.,* that case represents the ultimate peak of liberal construction which we have approved — or will approve in future cases. Of course, appellee asserts that this case calls for no more liberal construction than the *Sammons* case. As stated, we disagree with this assertion; but if it be correct — then we are modifying our previous interpretation.

Reversed and dismissed.

George Rose Smith and Robinson, JJ., dissent.

SAM ROBINSON, Associate Justice, dissenting. Whether the insured is totally disabled is a question of fact. Likewise, it is a question of fact whether the insured leaves the yard and house on the advice of his physician to improve the condition of his health. And if the jury finds that he leaves the house for such reason, then according to a long line of decisions by this Court and the great weight of authority in general the policyholder is entitled to recover on a policy of sick and accident insurance, notwithstanding there is a house or bed confinement clause in the policy. This Court has held repeatedly that it is a question of fact for the jury as to whether a policyholder has been confined to the house within the meaning of a house or bed confinement clause in a policy of insurance, although the undisputed evidence may show that actually the policyholder has not been confined to the house. If the question of whether there has been confinement within the meaning of an insurance policy is no longer a question of fact for a jury, this Court should say so and expressly overrule the numerous cases to the contrary. Such cases should not be overruled by implication.

It is admitted that Dr. Hayes is totally disabled due to a very serious heart condition. The fact that acting on the advice of his doctor on rare occasions he went fishing and deer hunting and made a trip or two to Prescott to see his mother did not render him any less disabled. Incidentally, as I see it, the majority opinion leaves the impression that Dr. Hayes hunts practically all the time. The record shows that he only goes deer hunting; the deer season is open only two weeks out of the year; and the record clearly shows that the way he hunts entails no physical hardship or exertion, and the undisputed evidence is that he was at all times acting on the advice of his physician.

The majority goes to great length in an attempt to distinguish the case at bar from the case of *Occidental Life Ins. Co. of California* v. *Sammons,* 224 Ark. 31, 271 S. W. 2d 922, but there is no valid distinction. The provision of the policy in issue in the case at bar is practically identical with the provision of the policy in the *Sammons* case and other cases decided by this Court, and there is no material

distinction between the facts in the *Sammons* case and the case here involved. For convenient comparison, we show the undisputed facts in the *Sammons* case along with the undisputed facts in the case at bar:

Sammons Case	*Hayes Case*
1. Sammons' disability was due to a heart condition.	1. Dr. Hayes' disability is due to a heart condition.
2. During the entire period for which Sammons sought recovery he followed the practice of leaving his house and the yard frequently for the purpose of taking rides and frequently for walking and recreation.	2. Dr. Hayes left the house and yard frequently for taking rides, but did no walking for recreation purposes.
3. Sammons visited with friends at various places of business.	3. Dr. Hayes visits with friends at various places of business.
4. Beginning with the year 1950, about two years before the suit was filed in the Sammons case, he began work on Saturdays as a clothing salesman. During the period from November 11, 1950 to December 30, 1950, Sammons earned $180 working as a clothing salesman, and from that time up to the time of the trial, which was on March 20, 1953, three years later, he worked as an extra salesman.	4. Since Dr. Hayes became disabled with heart disease he has done no work whatever, and according to the undisputed testimony he is unable to do any kind of work.
5. The work that Sammons did was on the advice of his physician.	5. Dr. Hayes did no work, but he did some hunting and fishing on the advice of his physician.

If there is any distinction between the two cases it is to the effect that Dr. Hayes is more disabled than was Sammons. Dr. Hayes is unable to do any work, while Sammons worked over a period of years as a clothing salesman, where it was necessary to be on his feet all day. And, moreover, the majority fails to point out wherein Dr. Hayes left the house and yard any more than did Sammons. After all, the only issue involved in the case at bar is whether Dr. Hayes is precluded from recovering under the terms of the policy because he left the house and yard. There is no question about his disability; the insurance company admits he is totally disabled. The majority mentions directly only the *Sammons* case, but we have other cases to the same effect as that case and just as strong. In fact, we have a long line of cases where the issues were whether the insured was confined to the house and yard within the meaning of that kind of provision in a policy of insurance. In all of those cases it was held that the question was one for the jury, and it is not shown in the case at bar that Dr. Hayes left the house and yard any more often than did the policyholders in the cases heretofore decided by this Court. It must be borne in mind that there is no question about Dr. Hayes' total disability.

According to all the cases heretofore decided by this Court, without an exception, it was held to be a question of fact to be determined by a jury whether the insured left the yard and house on the advice of his physician to improve the condition of his health. And if the jury finds that he leaves the house for such reason, then according to the long line of decisions by this Court and the great weight of authority in general he is entitled to recover. This Court first dealt with a house confinement clause in an insurance policy in the year 1911, in the case of *Great Eastern Casualty Co.* v. *Robins,* 111 Ark. 607, 164 S. W. 750. There it was held that the policyholder could recover although he was not confined to the house.

Later, in the case of *Interstate Business Men's Accident Assn.* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51, this Court approved what had been said in the Robins case and further held that it is a question of fact for the jury to

determine whether the policyholder is disabled within the meaning of the house confinement clause in a policy of disability insurance. The Court specifically held that whether the policyholder's disease and his state of health at the time required continuous confinement in the house within the meaning of the policy, notwithstanding his trips out of the house, was a question for the jury. *And the Court held it was a question for the jury although there was no dispute as to the facts. Only the insured introduced testimony, the same as in the case at bar.*

In *Massachusetts Protective Assn.* v. *Oden,* 186 Ark. 844, 56 S. W. 2d 425, a clause the same as the one involved here was in issue; the insured had heart disease, the same as Dr. Hayes. Oden, the policyholder, took frequent automobile rides, including a trip to Monticello, and a train trip to Corpus Christi, Texas. The Court cited with approval the *Robins* and *Sanderson* cases and said that the activity of the insured did not bar him from recovery as a matter of law. The case of *Mutual Benefit Health & Accident Assn.* v. *Murphy,* 209 Ark. 945, 193 S. W. 2d 305, involved a house confinement clause in a disability policy. During the time the insured claimed benefits under the terms of the policy, he became engaged in the insurance business. There the Court said: "It is undisputed that about a year prior to the date of trial, appellee procured a contract with a life insurance company to sell insurance and opened an office in Fort Smith, across the hall from that occupied by Dr. Rose. It also appears in the testimony of H. R. Parker, representative of appellant, that appellee, Murphy, sold insurance for appellant while being paid by appellant $80 per month for total disability. . . . Appellee's territory with the Life Insurance Company covered thirteen counties and he managed to sell a number of policies, substantially supplementing his income over the monthly payments from appellant. . . . The Supreme Court of Arkansas has consistently given a liberal construction to the provisions of these policies which require that the insured be confined to the house." A judgment for the insured was affirmed. Bear in mind that in the *Murphy* case at the time the policyholder was claiming benefits under a policy having a house confinement

clause, he went down town, rented an office, began to sell insurance and did sell insurance over an area embracing 13 counties.

The *Sammons* case, decided by this Court, has been heretofore mentioned. It is the one that the majority attempts to distinguish from the case at bar, but in my opinion the *Sammons* case is no stronger than the other cases in point decided by this Court in support of the proposition that it is a question of fact for the jury to say whether a policyholder, conceded to be totally disabled, is confined to the house within the terms of the policy of insurance. In fact, I have not been able to find a single case where the policyholder was totally disabled and the house confinement clause was in issue and this Court has not said such issue was a question of fact for the jury. And the majority has cited none to that effect. In fact, the majority has not cited any authority from any source sustaining the views therein expressed.

The case of *Colorado Life Co.* v. *Steele,* 101 F. 2d 448, involved a health and accident policy issued in Arkansas. The Arkansas law applied. Judge Gardner of the Eighth Circuit Court of Appeals wrote the opinion. The policy had a house confinement clause and the issue before the court was whether the policyholder had been confined to his home within the meaning of the policy. There the court said: "It appears from the undisputed evidence that plaintiff transacted more or less business during the period for which recovery is sought, and that he traveled by automobile a great deal, and it is claimed that he was not totally disabled, as that term is used in the policy, and that he was not necessarily and continuously confined within the house, nor prevented from engaging in his occupation. . . . In considering the question of the sufficiency of the evidence, it is our province to determine whether or not there was substantial evidence to sustain the verdict. . . . As the jury has resolved the issues in favor of plaintiff, we must accept the testimony in his favor as true, and he is entitled to such reasonable favorable inferences as may fairly be drawn therefrom. . . . The Supreme Court of Arkansas has consistently given a

liberal construction to the provisions of these policies which require that the insured be confined to the house and that he be there treated regularly by a physician." The court sustained a judgment in favor of the insured. In the case at bar a jury was waived; the cause was tried before the court sitting as a jury; and the court's finding of fact is as conclusive on appeal as a jury verdict. *Pate* v. *Fears,* 223 Ark. 365, 265 S. W. 2d 954.

In my opinion according to all the law ever announced by this Court on this subject up to this time, it was a question of fact for the trial court, since a jury was waived, to determine whether the policyholder was confined to his house within the terms of the policy as such terms have heretofore been construed by this Court.

The finding of fact by the trial court was in favor of the insured, and the judgment should be affirmed. For the reasons set out herein, I respectfully dissent.

JAMES *v.* BOWMAN.

5-2012 331 S. W. 2d 866

Opinion delivered February 8, 1960.

[Rehearing denied March 7, 1960]

W. B. Putman and *Shaw, Jones & Shaw,* for appellant.

Rex W. Perkins and *James R. Hale,* for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Johnnie James, brings this appeal from a judgment on a jury verdict in favor of appellee, Roy Bowman for $17,000.00. In his complaint, Bowman alleged that he was severely injured from an electric shock caused by the negligence of James in operating a crane so as to cause its cable to come in contact with a high power electric wire which carried 7,200 volts. James answered with a general denial and specifically pleaded assumption of risk and contributory negligence of Bowman such as to constitute a complete bar to any recovery.

For reversal James says, in effect, that the trial court erred, (a) in denying his request for an instructed verdict at the close of all the testimony, (b) in giving instruction 15 as follows: "Before any recovery can be had for permanent injury, or any future pain or suffering connected therewith, it must appear with reasonable certainty that the injuries are permanent and that future pain and suffering is inevitable. Where future pain or suffering appear to be only probable or uncertain, recovery cannot be given therefor. * * *", (c) that the verdict was excessive and (d) that the court erred in "permitting appellee's counsel to make certain remarks in his closing argument."

(a and b)

The testimony shows that at the time Bowman received his injury he was employed by Tyson Feed and Hatchery Company at Springdale, Arkansas as an elec-

tric welder. He had had some twelve years experience as such welder and at the time of his injury, he (Bowman) was assisting another Tyson employee, Graves, in handling and installing some 8 by 12 feet steel panels in constructing a feed bin. James was an independent contractor and owned and operated a crane equipped with a boom and wire cable. Tyson Feed and Hatchery Company was engaged in constructing a metal feed bin on the east side of a building located adjacent to an alley which was 45 feet wide and running north and south. Tyson also owned a warehouse building directly across the alley to the east. Running parallel to the warehouse and at a height of 32 feet 5 inches from the ground and from four to six feet from the eave of the warehouse building, was the electric wire in question. The steel panels used in constructing the feed bin were stacked alongside the warehouse building on the east side of the alley.

Tyson Feed Company had engaged James to bring his crane and hoist the metal panels, carry them one at a time as needed from the east side of the alley to the side of the building on the west side thereof and up to a point where they were to be installed on the feed bin. James determined where his crane would be located, how it would be operated and had sole control and operation of it. The crew engaged in construction of the feed bin consisted of the independent contractor, James (appellant), Bowman, Mr. Graves, Robert Bowers, and Dick Kendrick. As indicated, it was James duty to hoist the steel panels and in order to do this, he had stationed his crane 12 to 15 feet west of the wall of the warehouse building. The crane was equipped with a moving boom extending 47 feet and 3 inches above the ground. The crane was equipped with a cable which was used in hoisting the material. There was a hook on the lower end of the cable from which was attached two short lengths of cable to be attached to the panels to move them. Before attaching the cable to the panels, they were moved outward from the warehouse building and laid in the alley. Kendrick took no part in this part of the work but remained up on the side of the building

where the feed bin was being constructed. Bowers assisted in installing the panels on the feed bin. On the day that appellee received his injury, and Graves was killed, the crew had moved and installed two or three panels and Bowers was up on the side of the feed bin. James, Bowers and the other three employees all knew and realized the dangerous situation confronting them. James testified: "I knew — he told me what he wanted to do and I knew the condition over there. I knew there was a power line over there. * * * So I moved on over to the location and I saw the conditions there and I parked my machine and I got out and I said, 'Boys, we've got a dangerous condition here.' "

It is undisputed that the cable attached to the crane came in contact with the electric wire above mentioned while Bowman and Graves were attaching the cable wires to one of the 8 by 12 feet panels, and the electric shock killed Graves instantly and severely injured Bowman. The cable had contacted the power line 32 feet and 5 inches above the ground, or about 14 feet and 10 inches below the boom. As to the location of the metal panels to which Bowman and Graves were attaching the wire cable, Bowman testified: "Well, we come down to pick up the third or fourth piece of metal which was leaning up against the building on the east side, me and Mr. Graves, him at one corner and me at the other. We picked a piece of metal up and laid it down. At the same time we laid it down, we pulled it out about two or three foot, like we'd been doing. We got our cable and walked over and was hunkered down, both of us, bolting angle irons to the corner of the section of metal that we was picking up. The first thing I knew, I was froze. I couldn't move. Couldn't move a finger. Next thing I knew, I was laying on the piece of metal and it was burning my arm, which I have a scar, and it burnt me across my back, and I rolled off the piece of metal I was laying on to get free from the electricity. * * * Q. Did you ever, at any time, pull that cable into the highline? A. No, sir."

James testified that he depended upon Bowers who was to signal him when to move the boom or crane. He testified: "Q. From your position on the crane, Mr. James, could you keep these people in view in the process of attaching this sling? A. Yes, I could keep them in view, had I been watching. But after I swung back and put my machine in position, my work was done until I had a signal to lift away. * * * Q. In other words, you didn't pay any attention to Bowman and Graves. A. No. Q. To see whether they were ready, or not? A. No. Q. Or to see where the cable was? A. That's right." James further testified that immediately after he saw that Graves and Bowman had received a shock, "Immediately, I just reached back and I started out of the door, I remember, I hit the throttle, and shut the machine off and then I jumped off the machine."

Our rule is well established that in testing the sufficiency of the evidence to support the verdict of a jury, we must view the evidence, with every reasonable inference arising therefrom, in the light most favorable to the appellee. *Missouri Pacific Transportation Co.* v. *Jones,* 197 Ark. 79, 122 S. W. 2d 613. We hold that there was substantial evidence to support the jury's verdict and the judgment rendered thereon. It appears undisputed that someone was negligent in this case and it was the province of the jury to say whose negligence was the approximate cause of Bowman's injury. After hearing the evidence and viewing the premises, the jury composed of twelve representative citizens, unanimously held appellant, who had absolute control of the crane and its movements, to be the negligent party. Under the testimony, as we view it, the jury could, and evidently did, find that while Bowman and Graves were attaching the short wires to the metal panel, appellant, James, moved the boom in an easterly direction, causing the cable to contact the power line, which resulted in the instantaneous death of Graves and severe injuries to Bowman.

(c)

We do not agree that the verdict was excessive and unsupported by substantial evidence. Bowman was 37 years of age and had followed the trade of "welder" for twelve years. He was earning $80.00 to $85.00 per week before his injury, and has suffered a loss of $20.00 per week in wages, or approximately $1,000.00 a year in salary, since his injury. He was in fine health before the injury but after he was injured, he testified, "got so nervous I just couldn't stay around the electric welding. The electric welding sounded just like it did whenever the accident happened." He has been forced to give up welding and has gone to truck driving. Following his injury he was treated for more than two months by his family doctor and then admitted to the Veterans Hospital where he remained for seven weeks, receiving little or no benefit therefrom. He has developed heart trouble since the injury, his eyes were permanently injured and certain functions of his brain impaired by the electric shock. We have no definite yardstick with which to measure damages. In the recent case of *Williamson* v. *Garrigus,* 228 Ark. 705, 310 S. W. 2d 8, we said: "In cases of this nature we are afforded no definite yardstick by which to measure damages and the amount awarded must, therefore, be left to the sound discretion and judgment of the jury, or the court sitting as a jury, based upon the evidence in the case. The amount so awarded cannot be disturbed by this court as excessive if we find any substantial evidence to support it." See also *Rudolph* v. *Mundy,* 226 Ark. 95, 288 S. W. 2d 602.

(d)

Appellant next contends that the court erred in permitting appellee's counsel to use the following language in his closing argument: "I'm telling you when they knew death was hovering over and above them, that if a line touched that line, and they put that drag line into a position where it could touch that highline, I'm telling you that that's negligence. And you know it." The court, in answer to objection to this statement, stated:

"You can comment on my instructions." Trial courts have some discretion in allowing statements of counsel in closing arguments. We find no abuse of such discretion here. It appears to us that counsel was only arguing what would constitute a failure of appellant, James, to use ordinary care as had been clearly defined by the court in one of its instructions in which this language was used: "a. Negligence is the failure to use ordinary care, and ordinary care is that degree of care which is used by ordinary persons under the same or similar circumstances."

We have carefully considered other alleged errors and find them to be without merit. Accordingly, the judgment is affirmed.

PARKER *v.* PARKER.

5-2018 331 S. W. 2d 694

Opinion delivered February 8, 1960.

J. H. Evans and *Robert J. White,* for appellant.

Richard Mobley, for appellee.

ED. F. MCFADDIN, Associate Justice. The question here is what is best for the welfare of Mrs. Laura E. Parker, a lady past 83 years of age, and the widow of John M. Parker, a long-time lawyer of Arkansas. She has lived in Dardanelle many years and she has both real and personal property: her home, a number of rent houses, several farms, and both checking accounts and savings accounts.

On September 30, 1959 Mrs. Laura Parker accompanied her son, to the office of the Probate Judge; and her son was duly appointed[1] guardian of her estate. The son, Parker Parker, made a surety bond, entered into the discharge of his duties as such guardian of the estate, and filed his inventory on December 5, 1957, showing fourteen items of realty valued at a total of $20,000.00 and nine items of personalty valued at a total of $9,836.88. The only liability was a note to a bank for $2,586.70.

Mrs. Laura E. Parker has three children, being two daughters and a son: Mrs. Johnnie Parker Walrath,

[1] The probate order contained these factual recitals: "On this the 30th day of September 1957, the petition of Mrs. Laura E. Parker and Parker Parker requesting that Parker Parker be appointed guardian of the estate only of Mrs. Laura E. Parker, was held in Booneville, Arkansas, Parker Parker appearing as attorney for Mrs. Laura E. Parker and the Court having examined sworn statement of Dr. Lewis A. Webb stating that Mrs. Parker is not physically able to manage her real and personal property and that a guardian should be appointed by this Court to manage said property.

"It was submitted to the Court also a sworn statement by Mrs. Laura E. Parker which is attached to the petition.

"Testimony was taken of Mrs. Laura E. Parker, Parker Parker, Mrs. Mima Buford and Sam Turner in support of said petition.

"The Court finds that Mrs. Laura E. Parker, age 83, is suffering from hypertension, arteriosclerosis and cardio-vascular disease which prevents her from being able to personally manage her farm and city property.

"The Court further heard evidence of dissipation of assets of the said Mrs. Laura E. Parker and other evidence from which the Court finds that Mrs. Parker is not physically able to see after her large number of rent houses and farm property.

"The Court finds that Parker Parker deals in real estate and is quite familiar with his mother's affairs and that he can best conserve her assets."

Mrs. Laura Parker Gray, and Mr. Parker Parker, an attorney. On March 25, 1958 Mrs. Parker, joined with her two daughters as next friends, filed a petition to dissolve the guardianship of her estate on the basis that Mrs. Parker was thoroughly competent to handle her own affairs. Mr. Parker Parker resisted this and filed a counter-petition asking that his guardianship of the estate be extended also to the person of his mother. The Probate Court has been most patient in the entire proceedings. Testimony was taken on four different occasions in 1958: May 7th, October 15th, October 24th, and October 30th. Serious efforts were made to accomplish an agreement between the children so that some disinterested third person or bank could be appointed guardian of the estate; and Mr. Parker even offered to do all the "leg work" if such an arrangement could be accomplished. It was all to no avail. The insistence was that Mrs. Laura Parker should be released from all guardianship.

At the conclusion of the hearings the Probate Court took the case under advisement; and on February 12, 1959 rendered judgment. That judgment (1) refused to discharge Parker Parker as guardian of the estate of his mother; (2) refused to appoint Parker Parker as guardian of the person of his mother; and (3) taxed all costs against Mrs. Johnnie Walrath. From that judgment[2] there is this appeal. The appellant in this

[2] The judgment is concise, and we copy its findings: "On this 12th day of February 1959 comes on for final determination the matter of two petitions pending in this cause, one for the termination of the guardianship and the other to extend the guardianship to include a guardianship of the person of Mrs. Laura E. Parker. The petitioners asking termination of guardianship appear by their attorneys, Robert J. White and J. H. Evans. The Guardian appears in person and by his attorney, Richard Mobley. Testimony has been taken at various times and the matters taken under advisement and the entire matter on the two petitions now comes on for final determination.

"The Court, being advised in the premises finds that on September 30, 1957 this court appointed a Guardian for the estate of Mrs. Laura E. Parker and that such proceeding was valid in every respect and that there is a need for the continuation of such a guardianship. The Court further finds that at this time the physical needs of Mrs. Laura E. Parker are being taken care of, and that there is no necessity for a Guardian of her person.

"Wherefore, premises considered, it is by the court considered, ordered, adjudged, and decreed that each petition be and the same is here-

Court is Mrs. Laura E. Parker, by her next friend (daughter), Mrs. Johnnie P. Walrath. The appellee is Parker Parker, Guardian. The appellant lists four points, being:

I. The court was without authority to make original appointment for physical disability, and without authority to continue guardianship so appointed.

II. The evidence of incompetency is not sufficient to warrant a guardianship.

III. If a guardianship is justified, then it is to the best interest of the incompetent that an independent, unbiased and unrelated guardian be appointed.

IV. That the costs of these proceedings should be borne by the guardianship estate.

The appellee cross-appeals from the refusal of the Court to extend the guardianship to the person of Mrs. Parker.

I and II

Points I and II of the direct appeal raise the question of the necessity of any guardianship and the sufficiency of the proof to support the order appointing a guardian. A careful study of the record convinces us that the Probate Court has been entirely correct at all times in appointing a guardian of the estate of Mrs. Laura Parker. It is very apparent that she is dominated by whichever of her children happens to be last with her; and there seems to be a tug-of-war between the children to see who can control Mrs. Parker's property and its ultimate disposition. Serious friction developed between Mr. Parker Parker and his sister, Mrs. Walrath; and all sorts of charges and counter-charges are contained in the record. At the hearings it was shown that instruments had been executed by Mrs. Laura Parker in favor of one or the other of the daughters. that checks for large amounts had been given; and all

by denied; that the Guardianship of the estate continue as it now exists without any prejudice to the rights of any petitioner seeking other relief or to other pending matters relative to exceptions to current accounts."

this was done by Mrs. Parker while Parker Parker was guardian of her estate.

Appellant says that Mrs. Laura Parker's trouble was physical and not mental, and that guardianship does not extend to cases of physical disability, citing the Committee comment following § 57-601 Ark. Stats. and also our case of *Powers* v. *Chisman,* 217 Ark. 508, 231 S. W. 2d 598. Physical incapacity (old age in the case at bar) has caused the lessening of mental facilities to such an extent that the lady is unable to understand the nature of her property and how to protect it. Our statute, § 57-601 Ark. Stats., says: "All incompetent is any person who is . . . incapable, by reason of . . . senility . . . of managing his property . . ." Senility is defined by Webster's Dictionary as, ". . . old age or its physical and mental infirmities". The statement, "once a man and twice a child", applies to many people who live past four score of years. Dr. Lewis A. Webb gave the statement to the Probate Court at the original hearing that Mrs. Parker was suffering from "hypertensive and arteriosclerotic cardio-vascular disease". Mrs. Laura Parker testified before the Probate Court in the original hearing and also on two of the other hearings as previously mentioned; and the Court had ample opportunity to see that this splendid lady had returned to childhood. So the Probate Court was entirely correct in having a guardian of the estate of Mrs. Laura E. Parker.

III.

On direct appeal we are asked to have an independent, unbiased, and unrelated person appointed as guardian of the estate. This has given us most serious concern. The same argument was made to the Probate Court; and, as previously mentioned, serious efforts were made to settle the differences on such a basis. But the Probate Court, seeing the parties, reached the conclusion that the present guardianship should be continued just as it is; and we are unable to say from this record that the Probate Court was in error. So we

leave the Guardianship just as the Probate Court left it. The patience and care that the Probate Court gave to this matter convinces us that it would be quite unwise for us to substitute our own opinion for that of the Probate Court on the record before us. And what we are saying in this regard also disposes of the cross-appeal. The Court, in refusing to appoint Parker Parker guardian of the person of his mother, was evidently of the opinion that the two daughters can look after their mother far better than a daughter-in-law or a granddaughter; and we are unwilling to substitute our opinion for that of the Probate Court on the record now before us. So the case is affirmed on cross-appeal.

IV.

The fourth point on the direct appeal relates to the matter of the costs of these proceedings. The question is whether the costs should be individually paid by the daughters, or whether the costs of the entire proceedings should be paid from the estate of Mrs. Laura Parker. We reach the conclusion that for the best interest of all parties concerned, the costs of this appeal[3] should be paid from the estate of Mrs. Laura E. Parker. To this extent only do we modify the judgment of the Probate Court. In all other respects the judgment is affirmed.

[3] We are not referring to costs in other matters of the estate.

5-1978 331 S. W. 2d 701

Opinion delivered February 8, 1960.

[Rehearing denied February 29, 1960]

Edwin E. Dunaway, for appellant.

Bruce Bennett, Atty. General, by *Bill J. Davis,* Asst. Atty. General and *Mehaffy, Smith & Williams,* for appellee.

GEORGE ROSE SMITH, J. This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute.

Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a superintendent or principal in any elementary or secondary school without having first filed with the employing authority an affidavit giving the names and addresses of all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

We do not find Act 10 to be invalid on its face. By § 1 of the act the legislature declared its belief that the public school system would be benefited as a result of the school authorities having the required informa-

tion about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N. E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice HOLMES: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. . . . the city may impose any reasonable condition upon holding offices within its control."

The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The *prima facie* validity of Act 10 is pretty well settled by the holding in *Adler* v. *Board of Education of New York,* 342 U. S. 485, where the court sustained

a state statute forbidding the employment in the public school system of persons belonging to organizations found to be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

We conclude, as did the three-judge district court in *Shelton* v. *McKinley*, D. C. Ark., 174 F. Supp. 351,

that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considerations of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitutional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislative intention, *Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S. W. 2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

We do not think this testimony sufficient to show that the act will be applied by the state and its agen-

cies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand." *Yick Wo* v. *Hopkins,* 118 U. S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at least some members of the Citizens Councils are so ill-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

Moreover, even if secrecy should not be observed in every instance it still cannot be surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the *Adler* case, *supra,* which mandatorily forbade the employment of persons belonging to subversive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guaranties. We

are aware of no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

[redacted]

BRACEY *v.* STATE.

4967 331 S. W. 2d 870

Opinion delivered February 8, 1960.

[Rehearing denied March 7, 1960]

[redacted]

Thomas L. Cashion, for appellant.

Bruce Bennett, Atty. General, by *Thorp Thomas,* Asst. Atty. General, for appellee.

PAUL WARD, Associate Justice. The appellant, John Bracey, is a negro male, 26 years of age. He is here appealing from a judgment of the court sentencing him to die in the electric chair for the slaying of Alberta Miles, a negro female, on January 30, 1959.

Alberta Miles was killed in her home in Eudora on January 30, 1959 but her body was not discovered until the morning of February 3, 1959 when neighbors having noticed her absence, requested the Chief of Police of Eudora to make an investigation. This investigation revealed that the deceased's body was in a partially clothed condition lying on the bed. There was a hole in the left side of her chest apparently caused by a small caliber bullet.

On the next morning after the slaying, appellant, who lived in a house owed by Jack Harrison, left Eudora and went to Vicksburg, Mississippi where he remained for sometime. A search was made of appellant's room where articles of his clothing were found with bloodstains on them which led to the suspicion that he was connected in some way with the slaying. On April 11, 1959, appellant was arrested in McGehee, Arkansas by two members of the McGehee Police Department who knew appellant and had previously learned that he was under suspicion. After his arrest appellant admitted his identity and admitted that he had slain Alberta Miles. His confession was given in detail and reduced to writing and signed by him.

The Prosecuting Attorney filed an Information against appellant charging him with the crime of murder in the first degree for the slaying of Alberta Miles. He was tried on July 15, 1959 and found guilty of murder in the first degree by a jury which fixed his punishment to be death by electrocution. The trial court pronounced judgment in accordance with the jury's verdict.

In due time a Motion for a new trial was filed on the following grounds:

1. The verdict and judgment is contrary to the law.

2. The verdict and judgment is contrary to the evidence.

3. The verdict and judgment is contrary to the law and the evidence.

4. The court erred in permitting the State of Arkansas to introduce into evidence the alleged confession of the defendant over the specific objection of the defendant.

5. The court erred in permitting the State of Arkansas to introduce into the evidence the alleged clothing of the defendant under the specific objection of the defendant.

6. The court erred in not granting the defendant's motion for an instructed verdict at the conclusion of plaintiff's testimony.

The evidence, which we think is sufficient to support the verdict and the judgment, is substantially as hereafter set out.

Clarence Bethune, a witness for the State and a licensed embalmer and undertaker at Eudora stated that he knew Alberta Miles during her lifetime and was called to her home on February 3, 1959. Upon entering her home he found her body sitting on the bed with her head in her lap and also found a slopjar which seemed to be filled with bloody water. The room was torn up and portions of her clothing were torn off. There was a bullet hole in her breast on the left side which was apparently caused by a small caliber bullet. *Louella Crawford,* 65 years of age, a resident of Eudora, testified that she was acquainted with Alberta Miles during her lifetime and lived three or four blocks from her. On February 3rd she went to Alberta's house to take a check. Upon arriving at her house she called but no one answered, then she started around to the back where she saw a window broken out although she didn't go into the house. *Jack Harrison,* of Eudora, a witness for the State stated that he knew Alberta Miles for a few years and that he lived about two or three hundred yards from her; that appellant was boarding at his house at the time Alberta Miles was killed; that he went to her house on the 3rd of February and found her dead; and that blood was all over the place and on the bed and that the room appeared to have been ran-

sacked. He further stated that he didn't see appellant on the morning of January 30th but heard him when he came to his room; that after appellant had left he later went to appellant's room and found some of his clothes bloody from top to bottom behind the bed; and that he also found a rubber boot, a pair of pants, and a jacket belonging to appellant which were bloodstained. *Brady Bledsoe,* who lives at Eudora, testified that he also had a room at Jack Harrison's house where appellant lived; that on Saturday morning of January 31, 1959, he saw an empty pistol cartridge behind the toilet outside of Harrison's house and that he showed the empty cartridge to Emmett Davis on February 7th. *Emmett Davis,* a witness for the State, testified that he was acquainted with Alberta Miles and the appellant and that he lived in the back of a store in the vicinity of Alberta Miles' house; that having been advised about appellant's clothes he told Mr. Harrison not to let anyone in the room; that acting upon the information given him by Brady Bledsoe he found the empty cartridge behind the house and that he took it up and gave it to Mr. Mathis, the City Marshal and Deputy Sheriff.

Mr. Mathis, a witness for the State, testified substantially as follows: For the past forty years I have been a law enforcement officer in Eudora and for 46 years in Chicot County. I am acquainted with Jack Harrison, John Bracey (appellant) and Alberta Miles; having been advised that Alberta Miles was missing and that there was a window broken on the west side of her house I went to her house in the company of Jack Harrison and Mr. Davis, we entered the two-room house through the window and found the body which was slumped over on the bed; there was a bullet hole in the left side of her chest apparently from a small caliber bullet; appellant resided in the home of Jack Harrison which is about 70 feet from the home of Alberta Miles; the room in which we found the body had papers scattered around and was in a state of disorder; we checked for the bullet hole which has been mentioned heretofore, and there were no other wounds or appearance

of powder burns on the deceased's body; I took several items of clothing from appellant's room and I took a bedspread and a pair of pajamas from the home of Alberta Miles; later I described the clothes to appellant and he told me they were his and also told me that the bloodstains on the articles of clothing in his room came from Alberta Miles. On the day after appellant was arrested in McGehee he confessed the killing of Alberta Miles to the McGehee officers and the following day, in the presence of the Prosecuting Attorney, the Sheriff of Chicot County, and myself, appellant without duress or compulsion gave and signed a full confession.

The confession was introduced in evidence at the trial in connection with Mr. Mathis' testimony.

The appellant John Bracey, testified in his own behalf substantially as follows: I was born December 6, 1933, at Vicksburg, Mississippi; since I was 17 I have been engaged in sawmill work having finished the 4th grade in school; I am married but have been separated from my wife for about four years; while in Eudora I worked for the Breece-White Manufacturing Company, and made from $70.00 to $90.00 a week but saved no money. After I got off from work on January 30th I went to town and cashed my check at the liquor store and bought a pint of wine; I drank this right away and then went to the cafe where I drank a quart of beer; then I bought a pint of Old Taylor whiskey which I drank with some beer; then I drank another pint of wine with some beer — spending all that was left of my salary. On my way home from the cafe I passed the home of Alberta Miles with whom I was well acquainted; I turned into the yard and went up to the door but nobody answered, and then I went to the window and called and when she asked who I was I told her; I went into the house through the window where she was sitting in a chair and I told her I didn't want to hurt her but wanted to borrow two or three dollars but she told me she didn't have any money; I didn't believe this so she told me that she had some money in the top drawer of

her dresser but I didn't find anything there; I looked in the drawer again and she came at me and I believe I hit her; I laid down on the bed and went to sleep and when I woke up I put on my pants which were on the chifforobe drawer. I didn't mean to shoot her but meant to shoot over her head to scare her; after I shot her she said I had no business to shoot her and I told her she had no business to hit me; all I got from Alberta's house was $9.00. After I left Alberta's house I went to my room and laid down on the bed and got up early; I was supposed to go to work but when I woke up and saw the blood on my clothes I couldn't figure out where it came from; but I changed my clothes and went down to the bus station. After I left Eudora I sold the pistol for $12.00 and used the money for something to drink. I admitted the killing to the McGehee officers just to get some rest, but when Mr. Mathis came the next day I told him that it was not so — I really don't know what happened; I figured if I was the only one in the house that night it must have been me so I admitted the killing. What I am telling now is the truth.

Sufficiency of the Evidence. We have already indicated that we think the evidence is sufficient to sustain a conviction for first degree murder. However, since the confession of appellant was made out of court and later introduced in evidence it was incumbent upon the State to introduce corroborating evidence. It would be a useless repetition to set out again what we have stated heretofore, but suffice to say there is an abundance of this kind of testimony. Appellant in his testimony admitted that he was in the room with the deceased, that he robbed her, and that he actually fired at her. He admitted that he left the State the next morning, that the bloodstained clothes were his and that he sold the pistol with which he fired the fatal blow. In the case of *Ezell* v. *State,* 217 Ark. 94, 229 S. W. 2d 32, there is this statement: "We have held that the extrajudicial confession of the defendant accompanied by proof that the offense was actually committed

by someone will warrant his conviction". There is, of course, much more than this kind of proof in the case under consideration.

The Confession. One of the appellant's principal contentions for a reversal is that the court allowed the State to introduce the confession without hearing testimony in chambers relative to whether said confession was voluntary or the result of pressure of some nature. It is true that in several cases, including the case of *Brown* v. *State,* 198 Ark. 920, 132 S. W. 2d 15, this court, in this kind of situation, has stated that the practice approved by us is for the court to hear the testimony in the absence of the jury regarding the circumstances under which the confession was given. However, under the facts and circumstances of this case, appellant's contention is refuted by our holding in the case of *House* v. *State,* 230 Ark. 622, 324 S. W. 2d 112, where we said: "One contention is that the court erred in permitting the introduction of this document (referring to a confession) without first conducting a preliminary hearing in chambers to determine whether the confession was voluntary . . . but the reason for the rule is to avoid the possibility of the jury's being prejudiced if the court rules the confession inadmissible, and hence the accused has no basis for complaint if the confession is actually admitted in evidence". Of course, here, the confession of appellant was admitted and we think properly so. While the State's witness, Mathis, was testifying he was asked if appellant admitted to him that he killed Alberta Miles. At this point appellant made the following objection: "Your Honor, he was laying the ground work to put that confession on the record and I wanted to make my specific objection. I object to the introduction of this alleged confession on the ground that it was involuntarily given and specifically object to its introduction as violating the defendant's right under the Fifth Amendment to the Constitution of the United States". After the court had overruled the above objection the witness, without further objection, testified at length about the circumstances under which the confession was

made and signed, showing that no pressure or influence of any kind was used, that the confession was read over to appellant, that he had an opportunity to change it if he so desired, and that he signed the same voluntarily. Thereupon and without any further objection by the appellant, the confession was introduced in evidence. Appellant, at no time, during the cross-examination of Mathis or during his own testimony, contended that any force or promise was used to obtain the confession, nor did he deny giving and signing the same. Furthermore, appellant at no time intimated to the court that he desired to have a hearing in chambers. Under these circumstances and under the holding in the *House* case, *supra,* we must conclude that it was not reversible error for the court to permit the introduction of appellant's confession.

The Clothing as Exhibits. It is next insisted that the trial court erred in permitting the exhibition of certain bloodstained articles of clothing belonging to appellant and a sheet or bedspread belonging to the deceased. We see no merit in this contention. The introduction of these articles was in the sound discretion of the court and we cannot say the court abused this discretion. In a long line of cases this court has approved the introduction of certain articles of clothing in a trial of this kind. See: *Hankins* v. *State,* 103 Ark. 28, 145 S. W. 524; *Deatherage* v. *State,* 194 Ark. 513, 108 S. W. 2d 904; *Cross* v. *State,* 200 Ark. 1165, 143 S. W. 2d 530; *Bartley and Jones* v. *State,* 210 Ark. 1061, 199 S. W. 2d 965; *Brown* v. *State,* 219 Ark. 647, 243 S. W. 2d 938; and *Atkinson* v. *State,* 223 Ark. 538, 267 S. W. 2d 304. There is in this case an additional reason for the introduction of the articles of clothing above mentioned. As pointed out before it was necessary for the State to introduce evidence corroborating appellant's extrajudicial confession.

Instructions. We have carefully examined the numerous instructions given by the trial court and find in them no reversible error. Moreover, appellant made no specific objection to any particular instruction but did

make a general objection to all of them. In the case of *Tiner* v. *State,* 109 Ark. 138, 158 S. W. 1087, which was a first degree murder case in which a general objection was made to several instructions, this court in refusing to recognize the validity of such objection said: "It has been uniformly held by this court that a general exception to certain instructions will not be entertained on appeal, if any of them be good", citing numerous cases. Since that decision this court has many times re-affirmed the announced rule. See: *Massey* v. *State,* 207 Ark. 675, 182 S. W. 2d 671; *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; and *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17.

We have also examined the entire record in this case independently of any points relied on by appellant and find no reversible error. Therefore, the judgment of the trial court must be, and it is hereby, affirmed.

Affirmed.

WARD *v.* BOONE.

5-2078 331 S. W. 2d 875

Opinion delivered February 8, 1960.

[Rehearing denied March 7, 1960]

Ike Murry and *John F. Park,* for appellant.

Odell Pollard and *Robert C. Downie,* for appellee.

SAM ROBINSON, Associate Justice. Involved in this appeal are the issues of whether the county court has jurisdiction to hear and determine the outcome of a local option election on the question of the manufacture and sale of intoxicating liquors in White County and whether the complaint contesting the election held in accordance with Act No. 1 of 1942 as amended by Act No. 15 of 1955 states a cause of action. The election in issue was held on November 4, 1958. The county election commissioners certified that 3,811 votes were cast for the manufacture and sale of intoxicating liquors and 3,770 votes against the measure. Later the complaint herein was filed in the county court, alleging that the returns as certified were incorrect and that actually a majority of the votes cast were against the manufacture and sale of intoxicating liquors. The appellants demurred to the complaint, contending that the county court does not have jurisdiction of the subject matter and that the complaint does not state a cause of action. The county court overruled the demurrer, and appellants petitioned the circuit court for a writ of prohibition. The petition was denied and petitioners have appealed to this court.

We have held that the county court has jurisdiction in contests of local option elections on the liquor question. *Craig* v. *Barron,* 225 Ark. 433, 283 S. W. 2d 127; *Yarbrough* v. *Beardon,* 206 Ark. 553, 177 S. W. 2d 38. But appellants say that the decisions in that respect are not now applicable because of Act No. 15 of 1955, which provides:

"SECTION 1. Local option elections, to determine the legality or illegality of the manufacture, sale, bartering, loaning, or giving away of intoxicating liquors,

shall hereafter be held only on the regular biennial November general election days.

"SECTION 2. Every petition for a local option election shall be prepared in accordance with Initiated Act No. 1 of 1942, and it shall be filed, and the subsequent proceedings thereupon shall be had and conducted, in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto.

"SECTION 3. All laws and parts of laws in conflict herewith are hereby repealed.

"SECTION 4. Whereas, under the present laws local option elections can be called and held at special elections; and, whereas these elections can be held on regular biennial general election days and thereby save the counties the expense of these elections; now, therefore it is determined by the General Assembly that an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Subsequent to the adoption of Amendment No. 7 to the Constitution of Arkansas — the Initiative and Referendum Amendment — the General Assembly adopted Act No. 4 of 1935, an enabling act to the Amendment. It consists of 16 sections. Section 13 (Ark. Stat. § 2-314) provides: "The right to contest the returns and certification of the vote cast upon any proposed county act or measure is hereby expressly conferred upon any ten qualified electors and taxpayers of the county. Said contest shall be brought in the chancery court and shall be conducted under statutes and procedure for contesting the election of county officers, except that the complaint shall be filed within sixty days after the certification of said vote and no bond shall be required of the contestants."

The same session of the General Assembly for the year 1935 adopted Act No. 108, legalizing the manu-

facture and sale of intoxicating liquors. The act is very comprehensive and provides for local option elections on the question and for the contest of such elections. Article 7, § 14, par. 1 (Ark. Stat. § 48-820) provides: "Any election held under this law may be contested as provided for in this section: 1. The contest shall be heard and determined by the same board which, by law, is authorized and empowered to hear and determine a contest of an election for county officers; and the same provisions of the statutes shall apply to the contest of any election held under this law as are provided for the contest of any election for county officers, except as hereinafter provided."

Ark. Stat. § 3-1205 (Act No. 34 of 1875) provides: "When the election of any clerk of the circuit court, sheriff, coroner, county surveyor, county treasurer, county assessor, justice of the peace, constable, or any other county or township office, the contest of which is not otherwise provided for, shall be contested, it shall be before the county court, . . ."

Thus it will be seen that Act No. 108 of 1935 providing for local option elections on the liquor question, when construed along with Ark. Stat. § 3-1205, as it must be, gives the county court jurisdiction to hear and determine election contests in local option elections on the liquor question. But the question here is, does § 2 of Act No. 15 of 1955 change the law in that respect? The 1955 act provides: "Every petition for a local option election shall be prepared in accordance with Initiated Act No. 1 of 1942, and it shall be filed, and the subsequent proceedings thereupon shall be had and conducted, in the manner provided for county initiative measures by Initiative and Referendum Amendment No. 7 to the Constitution of Arkansas and enabling acts pertaining thereto."

Appellants argue that according to this provision of the statutes a contest of a local option election must be held in the court having jurisdiction to hear contests of county initiative measures as provided by Act No. 4 of 1935, the enabling act to Amendment No. 7.

It will be noted, however, that § 2 of Act No. 15 of 1955 makes no reference to an election contest. It deals only with the *petition* for a local option election and provides how it must be prepared and that subsequent proceedings thereon must be conducted in accordance with Amendment No. 7 and the enabling acts pertaining thereto. Act No. 15 fixes the date for holding a local option election, provides how the petition for such an election must be prepared, and fixes the jurisdiction for "subsequent proceedings *thereon*" — *on the petition for the election* — and nothing more. The Act does not mention an election contest, either directly or by reference. It is hard to believe that the General Assembly intended that the Act should apply to all the ramifications of an election contest and completely change the law fixing the jurisdiction in a contest of local option elections without even mentioning an election contest.

Since the adoption of Act No. 15 of 1955, two cases have been before this Court that involve the application of that Act. Both cases came from chancery courts. Both involved the validity of a *petition* for local option elections. In neither case is anything said that would indicate that the chancery court has jurisdiction of a local option election contest. *Brown* v. *Davis,* 226 Ark. 843, 294 S. W. 2d 481; *McCurry* v. *Wilson,* 226 Ark. 860, 294 S. W. 2d 485.

In reaching a conclusion as to the intent of the Legislature, another thing to be considered is Article VII, § 28 of the Constitution, which provides: "The county court shall have exclusive original jurisdiction in all matters relating to county taxes, roads, . . . and in every other case that may be necessary to the internal improvement and local concerns of the respective counties."

In *Freeman* v. *Lazarus,* 61 Ark. 247, 32 S. W. 680, it is said: "The issuance of license to sell liquors is a matter of local concern, as much so as the removal of a county seat; and the circuit court correctly held that the jurisdiction to determine a contest of the vote upon the question of liquor license is in the county court." (cit-

ing Article VII, § 21 of the Constitution). Obviously there is a typographical error. It is clear that the court was referring to § 28 of Article VII. And in referring to Article VII, § 28 of the Constitution, the Court said in *Yarbrough* v. *Beardon,* 206 Ark. 553, 177 S. W. 2d 38: "Under this provision it has many times been held by this Court that the county courts may perform many ministerial duties, many of them of the kind here in question, such as county seat removals and elections . . . and contests over liquor elections."

In the recent case of *Jones* v. *Dixon,* 227 Ark. 955, 302 S. W. 2d 529, we held that the county court had jurisdiction in an action to contest an election held on the question of constructing a county hospital. That decision was based on Article VII, § 28 of the Constitution, giving the county court exclusive jurisdiction in all matters relating to internal improvement and local concerns of the respective counties. As heretofore pointed out, *Freeman* v. *Lazarus* (61 Ark. 247, 32 S. W. 680) held that Article VII, § 28 of the constitution gives county courts jurisdiction to determine a contest of the vote on the liquor question. In view of the constitutional provision, the existing statutes and decisions of this Court, and the wording of Act No. 15 of 1955, it cannot be said that it was the intention of the General Assembly to change from the county court to the chancery court the jurisdiction to hear and determine the contest of local option elections on the liquor question.

The next question is whether the complaint filed in the county court states a cause of action. The complaint contains 29 numbered paragraphs, in which appellees complain of the method of holding the election and the results thereof. The complaint alleges that the returns as certified show there was a majority of only 41 votes in favor of the manufacture and sale of intoxicating liquors. It is also alleged that the certificates of the officials reflected that 58 wet and 52 dry votes were cast in Garner Township; that the returns as canvassed and certified by the election commissioners show 68 wet votes

and 42 dry votes; that the change in the total of said votes was made after certification by the officials of Garner Township. The complaint further alleges the returns as certified by the county election commissioners show that in Gum Springs Township there were 42 wet and 27 dry votes, but as a matter of fact 36 ballots were cast in favor of the drys, and names the 36 electors voting dry. Moreover, the complaint alleges that in Denmark Township the election commissioners showed only 13 dry votes; that actually more than 19 votes were cast against the manufacture and sale of intoxicating liquors, naming those that voted dry. In addition, it is alleged that the returns show 66 wet and 27 dry votes in Higginson Township, and that there were in fact more than 40 votes cast as dry in that township. We think the allegations mentioned state a cause of action without considering the other allegations in the complaint. Neither do we take into consideration the allegations contained in an amended complaint brought up by *certiorari*. It is our conclusion that the county court has jurisdiction and that the complaint states a cause of action.

Affirmed.

WAKEFIELD *v.* WHEELER.

5-1993 332 S. W. 2d 245

Opinion delivered February 8, 1960.

[Rehearing denied March 7, 1960]

Wiley A. Branton, for appellant.

David Solomon, Jr., for appellee.

JIM JOHNSON, Associate Justice. This is a case involving a boundary dispute. The appellant is the owner of 80 acres of land situated in the West half of the West half of Section 9, Township 2 South, Range 4 East, Phillips County, Arkansas. She acquired title to this property in 1932 from her former husband who had owned the property since 1917. Appellee, J. O. Wheeler, owns lands lying to the West in the Southeast Quarter of Section 8 which he acquired in 1951. Appellee, Wheatley Cooke, owns land immediately North of the Wheeler farm and West of the appellant's farm in the Southeast Quarter of the Northeast Quarter of Section 8, which he acquired in 1955.

A county road runs North and South between the appellant's land in Section 9 and appellees' land in Section 8. As the road runs South along the Section line it veers Westerly from the line and runs at an angle of approximately South, one degree West, thereby encroaching on Section 8 and the land claimed by appellees. The ownership of the strip of land lying between the Section line and the county road is in dispute and furnishes the basis for this suit.

Appellant brought suit alleging *inter alia* that she and her husband before her had always considered this county road to be their western boundary and had been in adverse possession of the land involved and cultivated it since 1917.

Appellees contend the section line and not the county road has been the recognized boundary line for many years, and deny that the appellant has cultivated or been in possession of any land lying West of the Section line and East of the county road, and further that the land involved has been wild unimproved land until cleared by appellee Wheeler in 1955.

The Chancellor decreed the East boundary of the appellees' lands to be the Section line common to Sec-

tions 8 and 9 and not the county road, and also enjoined the appellant from interfering with the possession of the appellees of the land lying West of the Section line.

The appellant introduced evidence that they had cultivated the strip in question for many years and exercised acts of ownership over it. On the other hand, the appellees introduced evidence that the strip in question was wild and unimproved with small trees growing on it until appellee Wheeler cleared it in 1955.

The evidence is conflicting but the finding of the Chancellor upon the conflicting evidence is most persuasive with us. We are of the opinion that his finding of fact was not against the clear preponderance of the testimony, and it is a well settled rule of this Court not to reverse unless the finding of the Chancery Court is clearly against the weight of the evidence. *Hinkle* v. *Broadwater,* 73 Ark. 489, 84 S. W. 510; *England* v. *Scott,* 205 Ark. 52, 166 S. W. 2d 1014.

The attorneys are to be commended for their excellent briefs and the parties for their efforts to resolve this dispute. Both parties expressed a willingness to move the road back to the Section line thereby giving the appellant access to the road and allowing appellees to cultivate up to the property line. This is a problem left to the parties themselves.

Finding no error, the decree is affirmed.

George Rose Smith, J., dissents.

McCrory School District *v.* Brogden.

5-2039 333 S. W. 2d 246

Opinion delivered February 15, 1960.

[Opinion amended March 28, 1960]

W. J. Dungan, for appellant.

Lloyd A. Henry and *Victor L. Nutt,* for appellee.

CARLETON HARRIS, Chief Justice. This case was originally filed in the Woodruff Chancery Court as an action to quiet title in appellees, but was subequently transferred to Circuit Court, where appellees amended their complaint to ask ejectment. Appellees, trustees of the Harmony Baptist Church, received a quitclaim deed from Ethel L. Patterson, and the heirs of M. H. Patterson, deceased, on July 8, 1958, to the property here in litigation. Appellants, McCrory School District of Woodruff County, and its directors, likewise claim title. The property involved consists of something less than two acres, which was acquired in 1916 or 1917 by the public school district of Patterson, in Woodruff County, as a site for the erection and maintenance of a public school building in which to conduct a public school for the Patterson community. The district, which was known as Patterson School District No. 16, took possession of the land, erected a school building on same, and operated it as a school until this district was consolidated with appellant district.[1] Appellants contend that the district, and its predecessor in title, have held the property adversely since before 1918, and have long since acquired title by adverse possession. Appellees' claim is based upon the contention that the Patterson School District received the 1916 or '17 deed to the premises from Mrs. Ethel Patterson and her husband, and that said deed contained a reversionary clause, which provided that the property would revert to the heirs of the Patterson estate if its use as school property be discontinued. Appellees further contend that the property was no longer being used for the purpose for which it was conveyed, and accordingly had reverted to the Pattersons. Having received a deed from Mrs. Patterson, who held power of attorney to act for the heirs, they assert ownership of the property. The Circuit Court, sitting as a jury, after hearing the evidence, held that the School District was entitled to possession for only so long as the property

[1] Classes were held in the school until sometime in 1955.

was used for school purposes, and that such use had been discontinued. Judgment was entered placing appellees in possession of the premises, and vesting them with title in fee simple. From such judgment comes this appeal, and we are called upon to determine whether there was any substantial evidence upon which the judgment could be rendered.

For reversal, several points are urged, but these will be mainly covered in our discussion of appellants' first contention, *viz.,* that there is not sufficient proof of title in the record to sustain the judgment in ejectment. Of course, it is well established that in ejectment, a plaintiff must recover on the strength of his own title and not on the weakness of the title of his adversary. See *Jackson* v. *Gregory,* 208 Ark. 768, 187 S. W. 2d 547. Nonetheless, we do not agree with appellants' contention. This litigation probably results from the fact that the original deed to the Patterson School District was lost, and, if placed of record, such record destroyed. The present directors of the School District were unable to state the original source of title, nor was any evidence offered to show the authority for constructing the school building (in 1917) on the land involved herein, though it is obvious that a deed, or permission, must have been obtained from someone, *i. e.,* the board did not just select a location and start building. However, there is potent evidence that the Pattersons owned this land at that time. Tom Chaney identified a certified copy of a warranty deed dated July 15, 1918, wherein Mr. and Mrs. Patterson conveyed property adjacent to the school building to him. The description excepted certain footage, and Mr. Chaney testified that the school building was located on this excepted portion. Mrs. Patterson testified that she and her husband had already deeded the excepted portion to the School District. Roy Coleman, an abstractor of Augusta, testified that the 1917 taxes were assessed in Mr. Patterson's name. Be that as it may, the record clearly reflects that the School Board, in 1935, recognized the Pattersons as its original grantors. At that time, the district desired to build a new school building with the help of the Works Progress Administration. Accord-

ing to Wallace Law of Patterson, who was secretary of the School Board in 1935, the old school building had been condemned, and the Works Progress Administration[2] agreed to help on a new building; the WPA officials desired to examine the deed, which had been lost, and would not construct the building until another deed was obtained. Mrs. Patterson was approached by board members, and agreed to give a second deed to the property, which deed was executed on September 3, 1935, and filed for record on May 16, 1946. The pertinent provisions of the deed are as follows:

"That Ethel L. Patterson, widow of M. H. Patterson, and Ethel L. Patterson, by Power of Attorney for the heirs of the Patterson estate, for and in consideration of the sum of One ($1.00) Dollar in hand paid by the Patterson Special School District, do hereby grant, bargain, sell and convey unto the said Patterson Special School District for use as for a School (said property to revert to the heirs of the Patterson Estate if discontinued as School property) the following lands lying in the County of Woodruff, and State of Arkansas, to-wit:

That part of the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section Seven (7), Township Seven (7) North Range Two (2) West, now occupied by the building and premises of the Patterson Special School District.

Note this Deed is given in lieu of a former deed given by M. H. Patterson and Ethel L. Patterson, said deed having been lost or misplaced and record destroyed.

To have and to hold the same unto the said Patterson Special School District, so long as this property is used for school purposes."

Of course, as pointed out by appellees in their brief, there was no reason to go to Mrs. Patterson for a second conveyance if the Pattersons had not been the earlier grantors.

[2] It is not clear whether the government authority was the Works Progress Administration or the Public Works Administration, since the latter designation is also used during the trial.

Appellants contend that the 1935 deed was void because the description, cited above, was indefinite. In the first place, it would appear that the property could be located from the description given. The testimony reflected that the fence enclosing the school property had been in the same location for as far back as 1918. The fence was certainly a part of the premises. In fact, a surveyor who testified for appellants, when testifying about what property he was surveying, answered, "The School property, around the school house, the part of land that was enclosed by fence." The deed recites the correct quarter - quarter - quarter, section, correct county, and limits the quantity to that occupied "by the building and premises of the Patterson Special School District." As stated in American Jurisprudence, Vol. 16, § 262, p. 585:

"The courts are extremely liberal in construing descriptions of premises conveyed by deed with the view of determining whether those descriptions are sufficiently definite and certain to identify land and make the instrument operative as a conveyance. The purpose of a description of the land, which is the subject matter of a deed of conveyance, is to identify such subject matter; and it may be laid down as a broad general principle that a deed will not be declared void for uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. It is sufficient if the description in the deed or conveyance furnishes a means of identification of the land or by which the property conveyed can be located." A more compelling reason why appellants cannot prevail upon this point is that the board was satisfied with, and accepted the deed; the WPA was apparently satisfied, for it continued with the construction, and the Patterson School District *derived the benefits which were afforded by the execution of the deed.* Having accepted the benefits, the district cannot now be heard to complain that the deed was inadequate or void.

Appellants further call attention to the fact that the reversionary language in the granting clause reads "said property to revert to the heirs of the Patterson estate if discontinued as school *property*", and point out that the building is still being used to store desks and other school furniture.[3] Here again, appellants' contention is not well taken. It is clear from both the granting clause and the *habendum* clause that there was a clear intention of the grantors to create the possibility of reverter, or determinable fee, but we think it immaterial in this instance whether the above phrase controls, or the phrase which appears in the *habendum* clause, "to have and to hold the same unto the said Patterson School District so long as this property is used for school purposes", for the evidence makes manifest that there was no intent by the district to continue to use the building for either purpose. It was stipulated that the School District caused the following notice to be printed in the Arkansas Central Leader on June 26, 1958:

"*NOTICE OF SALE*

The McCrory School District No. 12 offers for sale the Patterson School building (does not include land) to be bid on by sealed bids.

All bids must be in the superintendent's office not later than noon, July 9.

The School Board reserves the right to reject any and all bids.

J. L. HOLDER, Pres.
PAUL BRONTE, Sec."

In fact, it appears from the testimony of T. C. Bull, one of the school directors, that the only reason the building had not been sold was because no bid was received.[4]

[3] According to Mrs. Patterson, the furniture had been moved out, but school equipment was taken back in when she asserted her claim.

[4] Mr. Bull admitted that discussions had been held with Mrs. Patterson to try and reach an agreement whereby the Board, the church, and Mrs. Patterson would all get some benefit.

Appellants urge that the judgment should be reversed because the power of attorney, relied upon by Mrs. Patterson to execute the 1935 deed to the district, and also the deed to appellees in July, 1958, was not placed in the record. The latter deed recited the date of the power of attorney, and the record book in which it was recorded. Mrs. Patterson, in her testimony, claimed the authority to sign for the five living heirs of her deceased husband, but appellants rightly assert that this was not the best evidence. However, as to the 1935 deed, we have already pointed out that appellants accepted the benefits afforded by that deed, and therefore cannot presently assert its invalidity. Likewise, even if Mrs. Patterson was without authority to execute the 1958 deed on behalf of the heirs, appellants cannot prevail. By the acceptance of the 1935 deed, appellants recognized that Mrs. Patterson held an interest in the property at that time (which is binding on them, even if she held no interest). Here, though the deed provides that the property shall revert to the heirs of the Patterson estate, no interest being expressly reserved by Mrs. Patterson, these words are clearly properly construed as words of purchase, rather than words of limitation, since the condition could (and in fact, did) happen during the lifetime of Mrs. Patterson. The common law rule against perpetuities is applicable in Arkansas, Article II, Section 19, Constitution of 1874. In *Simes and Smith Future Interests,* page 330, paragraph 282, with respect to the possibilities of reverter, it is stated:

"The possibility of reverter differs from the remainder and from the executory interest in that it arises only in the transferor or his heirs, whereas such other interests are always created in persons other than the transferor. Thus, where a person owning land in fee simple absolute conveys an estate in fee simple determinable and also shall pass to some third person, the interest of such third person would be called an executory interest. . . . Many executory interests which follow determinable fees are void under the rule against perpetuities while the possibility of reverter in the transferor is usually held to be not subject to that rule."

In 1 *Property A.L.I.*, § 44, p. 131, under the heading "Interest limited to person other than the conveyor", it is stated:

"When a limitation is otherwise sufficient to create an estate in fee simple determinable, the presence of a further provision that upon the expiration of such estate, the land is to pass to some person other than the conveyor or his heirs, does not prevent the created estate from being an estate in fee simple determinable. Such further provision is often ineffective. When such further provision is ineffective, the limitation has the same effect as if no interest had been attempted in favor of a person other than the conveyee."

Therefore, the creation of the determinable fee was valid, but the gift over to the heirs of the Patterson estate, insofar as Mrs. Patterson's interest was concerned, constituted an executory interest and was void as violative of the rule against perpetuities. Upon the occurrence of the condition set out in the deed (discontinuance of the property for school purposes), Mrs. Patterson became entitled to possession (as against the district). Accordingly, in 1958, Mrs. Patterson had an interest to convey, and she certainly had authority to execute the instrument in her own behalf. A rather interesting discussion of the law relating to "Perpetuities" and "Determinable fees" is found in *Brown* v. *Independent Baptist Church of Woburn, et al,* 325 Mass. 645, 91 N. E. 2d 922.

To summarize, in seeking the deed from Mrs. Patterson, the Board indicated its belief that its original title to the property had been obtained from the Pattersons, and in fact, the instrument recited that it was given in lieu of an earlier deed. In accepting the deed, the Board was bound by its provisions. The provisions included the reversionary clause.[5] As stated in American Jurisprudence, Vol. 19, § 21, P. 619:

"Estoppel of the grantee of a deed, viewed generally, is of the nature of equitable estoppel rather than

[5] Mrs. Patterson testified that in giving the deed in 1935, she was requested by the board members to give such deed minus the reversionary clause, but refused to do so.

technical estoppel by deed, since the estoppel is not predicated primarily on the execution of a formal written instrument which cannot be denied or rebutted, but rather on the inability of a person, in the eyes of the law, to acquiesce in, and enjoy the benefits of, a transaction and at the same time reject the accompanying burdens. A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favor, and at the same time repudiate or contradict another which is counter or adverse to it."

Appellants could only have acquired the property by adverse possession by holding same adversely for more than seven years *after* the holders of the reversionary interest had acquired the right of entry, *i. e.,* for the statutory period *after* the property was no longer used for school purposes.

Judgment affirmed.

MOORE *v.* STATE.

4963 331 S. W. 2d 841

Opinion delivered February 15, 1960.

R. Dale Hopper, for appellant.

Bruce Bennett, Atty. General, By: *Bill J. Davis,* for appellee.

J. Seaborn Holt, Associate Justice. Appellant, Lawrence Gene Moore, was found guilty by a jury of the crime of murder in the first degree while attempting burglary, and his punishment fixed at death in the electric chair. From the judgment comes this appeal. For reversal the appellant contends that the evidence was not sufficient to support the verdict and the verdict is "contrary to the law and the evidence."

The charge against appellant was based on § 41-2205 Ark. Stats. which provides: "All murder which shall be perpetrated by means of poison, . . . or which shall be committed in the perpetration of or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree." The court appointed able counsel to represent appellant. At his trial, he first entered a plea of not guilty, but this plea was later changed to a plea of guilty and appellant submitted himself to the mercy of the court. A jury was then impaneled to assess Moore's punishment and after hearing all the testimony, returned a verdict of guilty of murder in the first degree as charged and fixed his punishment at death by electrocution. Moore took the witness stand and freely admitted his guilt. He testified, in effect,—and his testimony was corroborated,—that together with an accomplice, Robert Cuttler, with the intent to rob the coin box of a soft drink machine, he broke in the Dabbs School house near West Memphis, Arkansas, in the night-time of September 20, 1958. Appellant carried a pistol. While in the building, the night custodian (Ross Nichols), who lived on the premises

and had a bedroom in the building, apparently became disturbed and decided to investigate. Moore and his companion heard noises, became frightened and fled. As they were leaving the building, Moore fired a shot from his pistol down the hallway, which shot, he admitted, killed the deceased, Nichols. The bullet went through Nichols' bedroom door, struck him just above the abdomen, inflicting a wound from which he died shortly thereafter.

Moore testified: "Q. Tell the Court how you got into the building. A. I broke a window on the lefthand side and me and Robert entered through the window, entered the school, went down through the hall. Intersection, hall running that way, and one that way. It was dark in there. I couldn't see nothing. We had to feel our way. As I got in I could see a door. Robert told me—it was raining—he heard some kind of noise. About that time a train was coming. I told him he didn't hear nothing, it was the train. I took the pistol out. By that time he ran around the steps. After he ran out, I don't know if he ran out or not, but I fired a shot as he was running, I fired a shot toward the noise. * * * That next day I got back home, I was about the barn and heard the boss man say he heard a man got killed in the school house. He asked what did I do. I told him I fired a shot in the school. * * * Q. You specifically intended to steal money when you broke the window and went in the school house? A. Yes, sir."

Appellant was 19 years old, with only a fifth grade education. He admitted, and it was shown, that he had been convicted of eleven burglaries before his conviction in the present case.

Following the murder, Moore gave his half brother (James Mallory) a package which contained the pistol used and told him to throw it away. Following instructions, Mallory threw the package in the Ten Mile Bayou, right back of his house. A police officer, following Mallory's directions, found the pistol that Moore had used

in killing Nichols, where it had been thrown. We hold the evidence amply sufficient to support the verdict.

Appellant also contends, for reversal, that "after the appellant entered his plea of guilty to the charge set out in the information, and threw himself upon the mercy of the Court and Jury, it was error to allow the coroner also the mortician to testify as to the probing of bullet wounds in the body of the deceased, and other evidence as to blood stains on the floor. The calculated effect of all this testimony was to inflame the passions of the Jury to the prejudice of the appellant's plea for mercy." This contention was decided adversely to appellant in the recent case of *Smith* v. *State,* (Opinion delivered May 25, 1959) 230 Ark. 634, 324 S. W. 2d 341. We there said: "During the trial, various objects were introduced into evidence relating to the crime, including pictures of the victims in wicker baskets, burned beyond recognition, Rorie's bloodstained shirt, and the hammer used in the murder. Appellant objected to the introduction of several different objects introduced as evidence. This Court held such objections to be without merit, and stated: 'The cause was tried to the jury just as though the defendant had pleaded not guilty. Every essential fact of the crime was established. The jury was instructed on the degrees of murder and the discretion as to the punishment.' It would certainly appear that the exhibits here introduced, together with the evidence objected to, were plainly relevant to assist the jury in determining the degree of the crime."

Finally, the appellant argues that "The Statement of the Court as to the power of clemency of the Executive Department of the State Government tended to influence and inflame the minds of the Jury against arriving at a sentence of life imprisonment." The records reflects that during the course of the jury's deliberation, on request of one of the jurors to see the judge, the court directed the jury to return into open court and in appellant's presence, the following colloquy occurred. "COURT: Gentlemen, all proceedings in criminal cases must be in the presence of the defendant. Did you have

some question? JUROR: Yes, sir, as foreman of the jury, we want to know, can we give him life imprisonment with the understanding he is there for life? What is the minimum number of years he could serve? COURT: Gentlemen, I am unable to answer that question. The sole power of clemency lies within the executive branch of the government, which is the Governor of the State of Arkansas. I cannot answer your question with reference to that. JUROR: He can be paroled from life? COURT: I cannot say he can be paroled, gentlemen. I say the clemency power is in the hands of the Governor of the State of Arkansas. JUROR: Even if the jury would make a recommendation, it wouldn't be respected? COURT: It is within the discretion of the Governor of the State of Arkansas. He may exercise it regardless of any recommendation the jury makes. It is entirely within his discretion. JUROR: Thank you." We find no error here. In the recent case of *Boone* v. *State,* (Opinion delivered September 14, 1959) Law Reporter Vol. 105, No. 9, Page 366, where, in effect, the same type of occurrence was presented, we held a similar contention to be without merit. Our statute, which applies to a situation such as this, Ark. Stats. 43-2139, provides: "After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties." We think the trial court here carefully followed this statute and in appellant's presence, gave proper information to the jury in line with our holding in the Boone case above.

Finding no error, the judgment is affirmed.

Opinion delivered February 15, 1960.

Charles E. Scales, for appellant.

Bruce Bennett, Attorney General, By: *Russell J. Wools,* Asst. Attorney General, for appellee.

ED. F. MCFADDIN, Associate Justice. On legal information appellant, Danny French, was tried on charges of burglary (§ 41-1004 Ark. Stats.) and grand larceny (§ 41-3901 *et seq.* Ark. Stats.); and from a conviction of burglary and petit larceny (§ 41-3907 Ark. Stats.), he prosecutes this appeal. The motion for new trial contains seven assignments.

I. *Sufficiency Of The Evidence.* This embraces Assignments 1, 2, and 3 in the motion for new trial. Mr. and Mrs. Loyd House operate a grocery store in Little Rock and have living quarters connected to the store. On a Sunday evening in November 1958, while the Houses were in the living quarters, one of the children reported that someone was in the store. Mr. House went through a hall in the rear and observed a man in the store. There was a reflector light shining toward the front door and the man was trying to open the door from the inside. Mr. House observed the intruder for several minutes; and when the latter saw Mr. House some ten or eleven feet away, he threw some cigarettes at Mr.

House and said: "You'd better not come up here or I'll kill you". Mrs. House had followed Mr. House into the store and she likewise observed the intruder. When Mr. House told her to go get his gun, the intruder kicked out the glass in the front door and escaped. Law enforcement officers were immediately called, and the investigation disclosed: that the intruder had gained entrance into the store by prizing open a window in a storage room; that cigarettes were scattered all over the floor of the store room; that the cash register had been rifled, and that approximately $24.00 in currency had been taken. The police decided that the description of the intruder, as given by Mr. and Mrs. House, fitted the defendant, Danny French; and he was apprehended about ten days later.

At the trial Mr. and Mrs. House both positively identified the defendant as the intruder they saw in the store. There was evidence offered on behalf of the defendant contradicting the identification, and the defendant stoutly denied the crime; but from what we have detailed it is readily apparent that there was ample evidence to take the case to the jury and to support the verdict rendered on each of the offenses. *Barrett* v. *State,* 188 Ark. 510, 67 S. W. 2d 202; *Thompson* v. *State,* 177 Ark. 1, 5 S. W. 2d 355.

II. *Objection To Testimony.* This is Assignment No. 4 in the motion for new trial, and reads:

"That the Court erred in overruling defendant's objection to the witness, Lloyd House, testifying that he identified the defendant outside of the room where the defendant was in a line-up; . . ."

When the defendant was apprehended about ten days after the crime, Mr. House went to the police station and viewed a line-up of seven or eight persons, including French; and then told the officers that French was the man. At the trial when Mr. House was testifying, the following occurred:

"A. I walked up and faced the group of men lined up there and I started to my right and looked each one

over and this gentleman (indicating the defendant) was standing there, the last one, and I said, 'I have seen all I want to see'.

Q. Which one was 'this gentleman'?

A. Danny French.

Q. What did you tell the detectives?

A. I told them I had seen all I wanted to see and after I came out of the building—

MR. SCALES: Your Honor, I want to object to anything he said after he left the building or to any conversation that took place out of the presence of the defendant.

THE COURT: Just ask him if he identified the defendant.

Q. (By Mr. Robinson) Did you identify the defendant outside the room?

A. Yes, sir.

MR. SCALES: I object to that.

THE COURT: Overruled.

The defendant objected to the above ruling of the Court and at the time asked that his exceptions be noted of record, which was accordingly done.

Q. You got outside and told the detectives?

A. I told them that was the man, the last man on the left.

Q. Why didn't you identify him inside the room?

A. I couldn't see any need of pointing a finger at him.

Q. You didn't want to point your finger at him?

A. That's right.

Q. Did you have any doubt about that person being the one you picked out?

A. Not at all.

Q. Was that the same person you saw on the night of the 16th of November?

A. Yes, it was.

Q. Do you have any doubt about that?

A. None at all."

There was no further objection or exception to this line of testimony. The appellant urges that the ruling of the Court was in error, since Mr. House did not announce his identification of the defendant in so many words in the presence of the accused; and the appellant cites these cases: *Gill* v. *State,* 194 Ark. 521, 108 S. W. 2d 785; *Warren* v. *State,* 103 Ark. 165, 146 S. W. 477; *Burks* v. *State,* 78 Ark. 271, 93 S. W. 983. There are several answers to appellant's insistence. In the first place, the objection was: ". . . I want to object to anything he said after he left the building or to any conversation that took place out of the presence of the defendant". The Court, in effect, sustained that objection, because the Court instructed the State's Attorney: "Just ask him if he identified the defendant". The question was then framed: "Did you identify the defendant outside the room?" The answer was, "Yes, sir"; and to that answer there was an objection and exception. Certainly it was proper for the witness to answer that question and state when and where he identified the defendant.

Secondly, after the exception was saved, the State had the witness explain the identification; and as to that testimony there was *no objection or exception.*

And finally, the identification of the accused by the witness was not an attempt to support or bolster the previous testimony of the witness (as was the situation in *Burks* v. *State, supra*), or to have the testimony substantiated by others (as in *Warren* v. *State, supra*), or to show what other witnesses said (as in *Gill* v. *State, supra*). Rather, in the case at bar the witness House was giving a mere background account of events at the

time he identified the defendant at the police headquarters.

The fact remains that Mr. House positively and unequivocally identified the defendant and "pointed the finger" at him before the jury and in the course of the trial from whence comes this appeal. The identification at the trial complied with all rules of confrontation (Art. 2, § 10 of the Arkansas Constitution); because there was actual confrontation, and also cross examination of the witness at the trial. *Hickinbotham* v. *Williams,* 228 Ark. 46, 305 S. W. 2d 841.

III. *Instructions.* Assignments 5, 6, and 7 challenge the rulings of the Court in regard to instructions. We find no error committed. Instruction No. 1 was on the presumption of innocence; No. 2 on reasonable doubt; No. 3 on credibility of the witnesses; No. 4 was a cautionary instruction; No. 5 contained a definition of the offenses for which the accused was being tried; and No. 6 related to the various possible verdicts the jury might render. These instructions were all proper and correct. The defendant requested, and the Court refused to give, the defendant's requested Instruction No. 1, which read:

"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."

The Court committed no error in refusing this instruction because it was abstract. *Ferguson* v. *State,* 218 Ark. 100, 234 S. W. 2d 990. If there had been any evidence to introduce a confession, then an instruction like, or somewhat resembling, the one requested might have been proper; but in this case there was not the slightest indication of any attempt to show anything the defendant might have said while he was under arrest. The requested instruction was as foreign to the issues of this trial as would have been an instruction on the law of speeding or the right of an elector to vote. Instruc-

tions must be germane to the issues before the refusal can be claimed as error. *Pleasant* v. *State*, 15 Ark. 624; *Gallaher* v. *State*, 78 Ark. 299, 95 S. W. 463.

Finding no error, the judgment is affirmed.

UPCHURCH *v.* ADELSBERGER.

5-2041 332 S. W. 2d 242

Opinion delivered February 15, 1960.

[Rehearing denied March 7, 1960]

McMath, Leatherman & Woods and *James E. Youngdahl,* for appellant.

Moses, McClellan, Arnold, Owen & McDermott; By: *Wayne W. Owen,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellees, a husband and wife doing business as Comet Printing Company, to enjoin the city of North Little Rock from enforcing its Ordinance No. 21, adopted in 1904, which requires that all printed matter, blank books, and stationery used by the city bear the union label of the Allied Printing Trades Council. The complaint alleges that Comet has a contract with a recognized labor union, the Amalgamated Lithographers of America, but Comet is not entitled to use the union label specified in the ordinance and so is excluded from the opportunity to sell any printed matter to the city. The city made no defense

to the case, but the appellants, as officers of the Allied Printing Trades Council, were permitted to intervene and defend, and they have appealed from a decree finding the ordinance to be invalid and enjoining its enforcement.

The proof shows that the Allied Printing Trades Council is made up of four AFL-CIO unions, being the Typographers, the Printing Pressmen, the Bookbinders, and the Stereotypers. The Allied label may be used by any printing shop that has contracts with at least two of these four unions. Of thirty-seven printers who are listed in the Greater Little Rock telephone directory eight are entitled to use the Allied label. Only one of the eight is situated in North Little Rock, and that one company has received substantially all the city's printing business for at least the past twenty-two years. The Amalgamated Lithographers is, according to the exhibits in evidence, an independent union that was organized in 1882 and has some 36,000 members. It has contracts with at least two printing shops in Little Rock.

The appellants offered testimony to show that printed matter bearing the Allied label is uniformly of high quality and that the members of Allied's four component unions receive retirement benefits and other advantages accruing from their union membership. We do not detail this testimony, which is not disputed, as it does not control the outcome of the case.

Preliminarily, the appellants question the appellees' right to attack the ordinance, as the appellees did not offer proof of their contract with the Amalgamated Lithographers. It is stipulated, however, that the appellees are citizens and taxpayers of North Little Rock, and this gives them sufficient standing to challenge an assertedly wrongful expenditure of public funds. *Townes* v. *McCollum,* 221 Ark. 920, 256 S. W. 2d 716; Garner, Sloan, and Haley, Taxpayers' Suits to Prevent Illegal Exactions in Arkansas, 8 Ark. L. Rev. 129.

On the merits the chancellor was right in holding the ordinance invalid. As far as we can discover the authorities are unanimous in declaring discriminatory

and void any municipal ordinance which attempts to confine the award of public contracts to persons privileged to use a certain union label. Ordinances involving the particular label now before us, that of the Allied Trades Council, were declared invalid in *City of Atlanta* v. *Stein,* 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335, and *Marshall & Bruce Co.* v. *City of Nashville,* 109 Tenn. 495, 71 S. W. 815. See also *Amalithone Realty Co.* v. *City of New York,* 162 Misc. 715, 295 N. Y. S. 423, where, as here, the rival unions were the Allied Printing Trades Council and the Amalgamated Lithographers of America.

McQuillin accurately summarizes the reasoning that underlies the uniform holding of the courts: "On principle it would seem that, as the primary duty of the public officers is to secure the most advantageous contract possible for accomplishing the work under their direction, any regulation which prevents the attainment of this end is invalid. A law demanding competition in the letting of public work is intended to secure unrestricted competition among bidders, and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work, it manifestly violates such law and is void, as are all proceedings had thereunder. It may be further observed that, according to the judicial view so far declared, all such ordinances are void on the constitutional ground of discrimination." McQuillin, Municipal Corporations (3d Ed.), § 29.48.

Monopolies are forbidden by the Arkansas constitution, Art. 2, § 19; and by statute purchases involving more than $300 can be made by cities of the first class only after competitive bidding. Ark. Stats, 1947, § 19-1022. Ordinance No. 21, which has created a virtual monopoly in the city's printing business for many years, cannot be reconciled with the controlling provisions of the constitution and statutes. The city is free to designate the kind of printing that it desires and to assure itself of good quality by the adoption of appropriate specifications, but it cannot follow a course by which all

public contracts are channeled into the hands of favored bidders.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. The record in this case, in my opinion, does not justify the conclusion reached by the majority. Had the case been fully developed my final conclusion possibly would be different. However, based solely on the record before us, I am unwilling to say that Ordinance No. 21, adopted by North Little Rock in 1904, is unconstitutional on its face.

Fundamental to challenge of an enactment of any governmental body is the presumption of constitutionality. This presumption is necessary to prevent litigious chaos and has been recognized at every level of judicial decision. Appellants offered evidence which was not refuted: that printing establishments bearing the mark of the Allied Printing Trades Council were required to meet certain standards; that the members of the organizations making up the Council were required to serve certain apprenticeships and receive the benefit of continued education in their craft; that their methods of operation were completely different from those of appellees. There was nothing in the record to show that other printing establishments were prohibited from meeting the standards required by the ordinance.

The presumption of constitutionality is a fundamental rule of construction announced and adhered to throughout the history of this Court: *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9; and for the many modes and manner of expressing this rule and the heavy burden placed on the party alleging unconstitutionality see: Comment 2, Ark. Law Review, 203; similarly, see: *Lindsey* v. *Natural Carbonic Gas Company,* 220 U. S. 61, a federal case holding that a substantial difference in method of operation justifies a classification and that the burden is on attacking party to prove it unreasonable. A careful review of this record reveals that appellee

offered practically no testimony that can be considered as meeting this burden.

The established presumption is important in all phases of the instant case. It is based, of course, on the reluctance of the courts to interfere with the enactments of a coordinate branch of the government: the legislatures. As Chief Justice McCulloch stated in a leading Arkansas case on constitutional principles, *Ex Parte Byles,* 93 Ark. 612, 126 S. W. 94 (1910):

"The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power."

For the reasons stated above, I respectfully dissent.

HILGER *v.* HARDING COLLEGE.

5-2014 331 S. W. 2d 851

Opinion delivered February 15, 1960.

C. E. Yingling, Lloyd Henry, for appellant.

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

PAUL WARD, Associate Justice. On this appeal we are called upon to decide whether certain personal property and certain real property belonging to Harding College are exempt from taxation under Article 16, Section 5, of the Constitution of the State of Arkansas. Harding College (hereafter referred to as "College") is a non-profit corporation organized under the laws of the State of Arkansas and is operating a school under the name first above mentioned in the City of Searcy, Arkansas. The College campus and all buildings erected thereon are not being assessed for taxation. On the campus the College maintains and operates a printing shop and a laundry. The College also owns, in addition to the above, approximately 19 separately described parcels of land consisting of more than 400 acres. On a portion of this acreage the College owns and operates a dairy.

The equipment used in connection with the printing shop and the laundry and all of the real estate last above described were assessed for taxes for the year 1957. The County Clerk had extended the taxes on the tax record for said year against the said equipment and the real estate acreage; the Collector is demanding that said taxes be paid; and, unless the taxes are paid the equipment and land will be sold.

This litigation was instituted by the College against the Tax Collector, the Assessor and the County Clerk of White County asking the Chancery Court to cancel the 1957 assessments; to restrain the Assessor from assess-

ing and extending future taxes against said equipment and land, and to restrain the Collector from selling said equipment and lands for non-payment of taxes assessed for the year 1957. All the relief prayed for by the College was granted by the trial court, and this appeal follows.

The decision in this case rests within the interpretation given to Article 16, Section 5, of the Constitution of this State. This section, after first asserting that all property shall be taxed uniformly and according to its value, provides that the following mentioned property shall be *exempt* from taxation: "Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; *school buildings and apparatus;* libraries and *grounds used exclusively for school purposes;* and buildings and grounds and materials used exclusively for public charity". (Emphasis Supplied). It is here noted that Section 6 of the Article above mentioned provides that "All laws exempting property from taxation other than as provided in this Constitution shall be void".

A copy of the Articles and Agreement of Incorporation of the College were introduced in evidence and are a part of the record on this appeal. The first paragraph states in effect that the incorporators were acting on and in pursuance of the laws of the State of Arkansas for "incorporation of an educational institution". It is clear, we think, that the "laws of the State" mentioned above refer to Ark. Stats. 64-1401. This statute relates to the establishment and maintenance of "any institution of learning", etc. The section immediately following the above section provides that "the purpose for which every such corporation shall be established shall be directly specified in said articles of incorporation and it shall not be lawful for said corporation to divert or appropriate its funds or property for any other purpose", etc. Article 4 of the Articles of Incorporation sets forth the purpose for which Harding College was incorporated. In all essential parts said Article 4 reads as follows: "The purpose of said incorporation is to establish, maintain and operate a collegiate institution of learning under

the said name of Harding College, for the instruction and education of men, women and children, in which said institution shall be maintained a standard four-year course of study leading to the baccalaureate degrees". Said Article 4 further states that the College may own and operate a laundry, own farm land and engage in farming, own and operate a print shop or shops, and engage in any other business incident to the maintenance and operation of an educational institution provided that the revenue derived therefrom shall be used for no other purpose.

Ark. Stats. 64-1405, among other things, provides that the corporation (school) is empowered "to buy and to sell real and personal property . . . and to hold the same".

It is important, therefore, to a decision in this case to examine the record to find out the nature, extent and usage of the personal property used in connection with the printing press and the laundry located on the campus of the College, and to find out the extent and usage of the off-campus real estate holdings of the College with a view to determining whether the property is being used "exclusively for school purposes". It is necessary also to consider these properties and usages in relation to the aims and purposes of the College.

The evidence contained in the record consists of the deposition of Dr. George S. Benson, President of the College, and certain exhibits attached thereto. From these sources we find the evidence to be substantially as hereafter set out.

Printing Press. The College operates a printing press for two purposes: It provides jobs for certain students and it provides an immediate and accurate service for college printing. About 10% of the total volume of work comes from outside of the College. The print shop shows a profit of 2% over the past nine years and it is not operated for profit. The print shop has never done any advertising. No one connected with the print shop is listed with the College faculty, and no scholastic credits are given for such work.

Laundry. One purpose for operating the laundry is to provide jobs to enable young people to attend college. The second is to provide convenient service to the institution, the faculty and student body. A third purpose is to provide practical business experience for students employed there. The laundry accepts work from the residents of Searcy who wish to bring their work there. Over the past nine years the outside work has amounted to about 37% of the total. The laundry is not operated for profit. There is no prescribed course for which credit is given in connection with the operation of the laundry. On one or two occasions the laundry has advertised for business from the general public. No one in connection with the laundry is listed on the College faculty.

The Dairy is operated for two fundamental purposes: One is to provide employment for the students and the other is to provide milk and meat products to the students at the lowest possible cost. Beginning with the present semester the College has commenced a course in animal husbandry to be followed by a course in poultry and a course in dairying. From time to time portions of the dairy cattle are sold when advisable to increase herd efficiency and the money goes into the operational fund. Over the past nine years the dairy has operated at an average 3% loss. Making a profit is not the chief concern of the College. The dairy began selling products to the general public in 1957 when the Searcy dairy ceased to operate and now the College dairy is the only Grade A dairy operating in that County. All of the dairy's work is done by students except for one full-time operator. No one connected with the dairy is listed with the College faculty, but may be in the near future. No part of the dairy is located on the College campus.

Lands. The lands heretofore described, consisting of more than 400 acres, are not part of the campus and are used for cattle grazing. Some of the lands are several miles in distance from the College campus.

In addition to the above Dr. Benson testified, generally, to substantially the following: It is our purpose

to train young people for effective living and good citizenship; we try to combine practical training with scholastic training; especially the College is interested in the introduction of more livestock instead of the old one-crop method of farming, and in teaching young people to understand America's private enterprise economy; we have a course this semester in animal husbandry for the first time for which credit will be given; we have on the farm a herd of registered White-Faced cattle, a herd of registered Holstein cattle, and a herd of registered Jersey cattle, all used in connection with the course given in dairying and animal husbandry; in keeping with good breeding practices we sort out and sell certain groups of animals when the herd becomes larger than we wish to keep; and the proceeds go to the College. Judging cattle is a part of our instruction. We do make a profit by taking smaller cattle and raising them and bringing them up to marketable conditions and selling them, the profit going into the College funds. There is a general delivery service in the operation and sale of dairy products to the general public. The Print Shop has been in operation for more than 20 years. It not only provides jobs for students who need the money but it serves to correctly and quickly do our own printing for the College, and only 10% of the work comes from the outside. The Laundry aids about 40 students each year to earn their college expenses, it provides convenient service for the institution, the faculty and the student body, and it provides practical business experience for the student employees. Over the past nine years about 37% of the laundry business comes from the City of Searcy, and during that time it has operated at a 6% loss. "I did not intend to make the impression that all three of them (Press, Laundry, and Dairy) are a part of the academic instruction" but they are related to it. "There are no prescribed courses for which credit is given with reference to the operation of the laundry". It has been in operation since 1934. It would be possible but not desirable from an economical standpoint to operate the laundry and the dairy without making sales to outsiders.

We recognize the urgent demand and need for more educational institutions and also the wisdom of encouraging the satisfaction of those demands and needs in every legitimate way, but we are also mindful of our duty to protect the tax-paying public in every way required by the State Constitution. Notwithstanding the far reaching implications of the questions here involved there are only a few decisions of this Court to which we can look for guidance. The issues here presented for solution being peculiarly constitutional questions we deem it proper to rely as far as possible on our own Constitution and our own decisions. In the case of *School District of Fort Smith* v. *Howe,* 62 Ark. 481, 37 S. W. 717, the court said: "As the decision of this case turns on the construction of our own constitution, we have not felt it necessary to discuss the cases from other states".

In the *Howe* case, *supra,* the School District owned certain vacant lots not used for school grounds which were kept for rent and for sale, the proceeds being used exclusively for school purposes. In the cited case it was conceded that the vacant lots were "public property" which is not true in the case under consideration. Therefore, the Court was considering that portion of Article 16, Section 5, which exempts from taxation "public property used exclusively for public purposes". What the Court had to say should be pertinent in this case because we are here considering that portion of the same section which exempts "grounds used exclusively for school purposes". In holding that the vacant lots were not exempt from taxation the court made, among others, the following announcements: "The proceeds arising therefrom, when sold or rented, are to be used for the benefit of the public schools of said District, yet this does not justify us in holding that the land itself is now used exclusively for public purposes within the meaning of our constitution". "It is necessary that a school district shall have a school building and grounds. If such property was taxed and sold for the non-payment of taxes the public would have to pay other taxes in order to replace the same, for it is absolutely essential that a school district should own a school house. For that reason school build-

ings and grounds are exempt from taxation. But it is not essential that a school district should hold land for the purpose of sale or rent, and as an investment for profit. When land is thus held by a school district it is deemed to be held by such corporation in 'its commercial capacity as a private corporation', and the reasons for exempting such property from taxation are slight as compared with those which exist in favor of exempting buildings and grounds *actually* and *exclusively* used for public purposes''. (Emphasis supplied).

This court was dealing with that portion of Article 16, Section 5, exempting from taxation ''buildings and grounds and materials used exclusively for public property'' in the case of *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29. The subject property consisted of rent houses and a mill, the revenues from which were used exclusively for the maintenance of a charity hospital. In that case the court quoted with approval: '' 'Taxation is an act of sovereignty to be performed, so far as conveniently can be, with justice and equality to all, and exemptions, no matter how meritorious, are acts of grace, and must be *strictly construed,* and *every reasonable intendment* must be made that it was not the design to surrender the power of taxation or to exempt any property from its due proportion of the burden of taxation. *As taxation is the rule and exemption the exception,* the intention to make an exemption ought to be expressed in *clear and unambiguous terms;* and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. The fact that the rents and revenues of a property owned by a charitable corporation are devoted to the purpose for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is *actually* and *directly* used for charitable purposes that the law exempts it from taxation' ''. (Emphasis supplied). In that case the court also stated: ''The guarded language of the constitution describing the property to be exempted as 'buildings and grounds and materials used exclusively for public charity' leaves no room for doubt that it was not the intention to exempt any other

property from taxation, save such as is used *exclusively* for public charity, and that *exemption cannot be extended to property leased or rented and from which revenue is derived,* though the same be applied solely to support the charity". (Emphasis supplied). In the case of *Hot Springs School District* v. *Sisters of Mercy,* 84 Ark. 496, 106 S. W. 954, this court again considered the matter of exempting property for charitable purposes. It was there stated: "It is well settled that no one can exempt his property from taxation simply by the *exclusive use of the income* for public charity; for that is a matter which appeals to his own individual spirit of benevolence. It may be given today and withheld tomorrow. But a different rule prevails where the property is *directly* and *exclusively* used for that purpose." (Emphasis supplied). In the case of *Robinson* v. *Indiana & Arkansas Lumber and Manufacturing Company,* 128 Ark. 550, 194 S. W. 870, at Page 557 of the Arkansas reports, the court stated: "There is a material difference between the use of property exclusively for public purposes and renting it out and then applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the *actual use* of the property and the *use of the income.* So it will be seen that in our own cases last referred to, the property itself was not *directly occupied* or made use of for public purposes, but only the income derived therefrom and for this reason the court held that the property was not exempt from taxation under our Constitution". (Emphasis supplied).

Because of the similarity of the language used in Article 16, Section 5, of the Constitution exempting from taxation property used for school purposes, for public purposes, and for charity, the principles and rules applying to one category will apply with force to the other categories.

When we apply the rules and principles set forth in the cases cited above to the facts and circumstances of

the case under consideration the following conclusions are pursuasively suggested. The laundry equipment and the dairy equipment together with the land acreage upon which the dairy is situated were not, in 1957, being used *directly and exclusively* for school purposes and therefore were not exempt from taxation at that time. In 1957 no course was taught, no teacher employed, and no credits given and it would be unrealistic to say that any of these facilities were being used for school purposes. No doubt certain benefits accrued to the College and the students from these operations, otherwise they would not have been maintained, but, as we have pointed out above, it does not follow that the sources from which these benefits come are exempt from taxation. To hold otherwise would be to give a liberal interpretation to the exemption clauses in Article 16, Section 5, that this court has already rejected. If a school can own and operate a laundry and a dairy tax-free then we know of no logical or legal reason why it could not likewise own and operate a hat factory, a shoe factory, a clothes factory or any other kind of a factory.

We note that a sizeable percentage of the business done by both of these College enterprises is in competition with like businesses in the town of Searcy. Not only does this circumstance show that said enterprises are not operated *exclusively* for the College but it is contrary to the avowed purpose of the College to teach the benefits of "America's private enterprise economy".

We do want to point out however that the College now proposes to inaugurate a course in animal husbandry and dairying and perhaps other courses in which instructors will be employed and credits given. If and when that is done a different situation will be presented relative to the exemption from taxation of such equipment and lands as are necessary to implement such course or courses and as are used directly and exclusively therefor.

We have also concluded that the Print Shop was subject to taxation in 1957, but for somewhat different reasons. It is not denied that the shop is maintained for two purposes—to provide jobs for certain students

and to provide immediate and accurate service for school printing. Assuming, as we understand the case to be, that the printing is done for legitimate school purposes we think the equipment would be exempt under Article 16, Section 5, provided it was used *exclusively* for that purpose. We do not think, however, that it was so used in 1957 since it is conceded that 10% of the work was not for the College. We recognize that a casual or incidental outside usage might not always be inconsistent with the constitutional requirement of exclusiveness but we are unwilling to say that the outside work in this instance was casual or incidental. The press has been in operation for many years and during all this time the outside work has been accepted. If we now arbitrarily hold that 10% is incidental and inconsequential and that it does not violate the constitutional injunction of exclusiveness, then we would open a Pandora box of borderline questions to plague the courts in the future. We are not inclined to endorse a procedure that could result in whittling away the intent of the Constitution. Again we point out that a different situation would be presented if all the printing work hereafter is done for the College.

In view of what we have heretofore said it follows that the decree of the trial court must be, and it is hereby, reversed.

Reversed.

George Rose Smith, J., not participating.

Johnson and Robinson, JJ., dissent.

Jim Johnson, Associate Justice, dissenting. After a careful study of the case at bar, I find it impossible to agree with the majority view. Harding College is a private school. This Court held unequivocally in *Phillips County* v. *Sister Estelle,* 42 Ark. 536, that private and public schools are on a parity insofar as tax exemption is concerned.

My research reveals that not only are the public colleges of this State granted the tax exemptions here asked for by Harding, but in addition more than $600 per stu-

dent is provided from State funds to support these public institutions. The question that comes to my mind is, if the majority opinion is allowed to stand, where will the line be drawn? Will it be contended in the future that the mere fact that a college provides housing for the faculty and dormitories for the students that it is in competition with the hotels, motels, rooming and apartment houses, with the real estate companies, etc., and should be taxable? Will it be contended that the fact that the college operates a cafeteria that it is in competition with the public restaurants and cafeterias and therefore should be taxable for this activity? Will it be contended that the college athletic program, the stadiums and gymnasiums, which are built to provide the general public, along with the students, proper seating facilities; and the concession stands which are used to provide the general public and the students refreshments, all of which services must be paid for by the public or the students, are in such competition with public recreational facilities such as pool halls and bowling alleys, that they too should be taxable? Just where will the line be drawn?

In my view, the majority opinion is saying, in effect, that the above enumerated examples, in addition to the printing press, dairy and laundry apparatus, claimed by Harding as tax exempt, do not fall within Article 16, Section 5 of the Arkansas Constitution, as school buildings and apparatus, libraries and grounds used exclusively for school purposes.

My research reveals that there are no Arkansas cases directly touching the question now before the Court, but there are cases involving the "public purpose" and the "public charity" exemptions which are pertinent. With respect to properties devoted to "public purposes" and "public charity," the language of Article 16, Section 5 of the Constitution is as follows:

"Public property used exclusively for public purposes, and

"Buildings and grounds used exclusively for public charity."

It will be observed that in all three exemptions the phrase "used exclusively" appears, so necessarily the interpretation of that phrase as applied to public purpose and charitable property should be controlling in this case.

The case of *Hot Springs School District* v. *Sisters of Mercy,* 84 Ark. 497, 106 S. W. 954, is in point. The hospital was maintained by the Sisters of Mercy as a charitable institution. It contained rooms used exclusively by charitable patients, but it also had some rooms which were occupied by paying patients. A drug store was maintained in the hospital, and those who were able to pay were charged for their prescriptions. The hospital also maintained a school for nurses, employed a teacher, and employed girls who gave nursing services to patients while taking nurse's training. All moneys received went to the hospital and no funds were diverted to any other institution. From the opinion:

"The judgment appealed from exempts only the ground upon which the hospital building is situate and the building thereon; and the sole question in the case is, whether or not they are used exclusively for public charity.

". . . It is not denied that the whole object of the institution of appellee is one of public charity but appellant claims that it is not exclusively so used because pay patients are received, and because those able to pay are charged for prescriptions.

". . . The fact of receiving money from some of the patients does not, we think, at all impair the character of the charity, so long as the money thus received is devoted altogether to the charitable object which the institution is intended to further.

"In the case of *County of Henepin* v. *Brotherhood of Gethsemane,* 27 Minn. 460, the court said: 'A hospital with the necessary grounds, free to all who are not pecuniarily able, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely public charity.'

"In the case of *Penn. Hospital of Delaware Co.*, 169 Pa. St. 305, the court said: 'Property which is used directly for the purpose and in the operation of the charity is exempt, though it may also be used in a manner to yield some return and thereby reduce the expenses.'

* * *

"We think the property meets the constitution requirement of being 'buildings and grounds and materials used exclusively for public charity.' "

In *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29, it appeared that the Sisters of Charity and Mercy who operated a public charity also owned real property which was rented for income purposes. Taxes were levied against this rental property. It was contended that as the rental ultimately was used for charitable purposes, the property was exempt. This contention was rejected, this Court saying:

"Under our constitution the rule stated by 1 Desty on Taxation, p. 119, applies. It is as follows: 'The fact that the rents and revenues of a property owned by a charitable corporation are devoted to the purposes for which the corporation was organized, will not exempt such property from taxation. It is only when the property itself is actually and directly used for charitable purposes that the law exempts it from taxation.' "

This case is without application here for the simple reason that Harding College does not rent any of its properties for rental income. It actually and directly uses all of the property it owns for educational purposes. The operation of the press, the laundry and the dairy are carried on primarily for educational purposes and the receipt of revenue from a few outside customers is just as incidental as was the receipt by the Sisters of Mercy of payments from those patients who could afford to pay for the use of the hospital's facilities.

In pointing out why the rental property was held to be taxable in *Brodie* v. *Fitzgerald, supra,* this Court in *Robinson* v. *Indiana & Ark. Lumber & Manufacturing Co.*, 128 Ark. 550, 194 S. W. 870 remarked:

"The reason is that under our constitution it is only when the property itself is actually and directly used for public charity that the law exempts it from taxation."

Yoes v. *City of Fort Smith,* 207 Ark. 694, 182 S. W. 2d 683, involved a "public purpose" exemption. The City of Fort Smith issued revenue bonds and constructed a waterworks system. A reservoir was constructed in Crawford County some twenty-five miles from Fort Smith. The tax officials of Crawford County levied taxes against this property. They contended that all of appellee's property in Crawford County was not being used "exclusively for public purposes," and in their brief said:

" 'In order to secure its water supply, appellee constructed its dam and plant in the northern part of Crawford County, more than twenty-five miles from the city. This, we concede, it had a right to do, but only for one purpose, and that was supplying its citizens water within the corporate limits. When it went beyond this, it was no longer using the property exclusively for the public purpose for which the waterworks was designed. True, this and other courts have held that in connection with this purpose, mere surplus water may be disposed of, but it has never been held that the municipality can spread out into the general utility field and then escape liability . . .' (*i.e.,* liability of taxation on the property). Appellants thus concede, in this section of their argument, that appellee's property would be exempt from the taxation here sought to be imposed except for the contracts to furnish water to (a) Alma, (b) Van Buren, and (c) Camp Chaffee."

This Court answered:

"A city may sell surplus water without losing its right to tax exemption as public property used exclusively for public use. In 3 A. L. R. 1445, there is an annotation on whether public property is taxable where income is received incidental to public use; and the rule is stated: 'As a general rule, it may be said that where the primary and principal use to which the property is put is public,

the mere fact that income is incidentally derived from its use does not affect its character as property devoted to public use.' The annotation is supplemented in 129 A. L. R. 485, and also in 101 A. L. R. 790, where the case of *Hope* v. *Dodson,* 166 Ark. 236, 266 S. W. 68 is cited to sustain the above quoted rule."

* * *

"Appellants say in their brief: 'After the construction of the dam, under a WPA grant, a large swimming pool and large bath house were constructed upon a tract of land which appellee had acquired wholly below the dam; admission fees were charged to swim in the pool, and other charges were made in connection with the use of the bath house, towels, etc.; cold drinks, sandwiches, and such articles, were sold at the bath house and about the swimming pool; a coin-operated music machine was operated. It is apparent that all of these things were separate and apart from, and had no relation to, the supplying of water. In addition to these things, a number of cottages have been erected upon the land below the dam, and title thereto is in Fort Smith . . .'

"All the area below the dam was placed under the control of the Parks Board of the City of Fort Smith and has all the time been handled as a public park. The facilities are open to the public at large, and are patronized by the people of Crawford County, as well as by people from elsewhere. A small admission charge is made for the use of the swimming pool, in order to defray towel expense, etc.; cold drinks and sandwiches are sold by a concession; but from all of the admission charges and concession money, the City of Ft. Smith has never made any profit; in fact, it still lacks several hundred dollars of receiving back its original outlay for towels. If any profit should ever be received, it will go back into maintenance, etc."

The Court quoted this from *Hannon* v. *Waterbury,* 106 Conn. 13, 136 A. 876:

"The charge of a small fee covering a part of the cost of the maintenance of the pool in paying a super-

visor, instructors, janitors, and the like, while the municipality furnished the buildings, the swimming pool, the apparatus and equipment in connection therewith, the coal, electricity, water chemicals, and other necessaries for the maintenance of the pool from the rule of governmental immunity. The city was not deriving a profit from this small fee, the charge was a mere incident to the public service rendered in the performance of a governmental duty."

And then added:

"Without lengthening this opinion by the citation of other authorities, we conclude that the use of the property below the dam, as a swimming pool, bath house, and public park, did not destroy the status as tax-exempt property under Article 16, Section 5, of our Constitution."

If an incidental charging for swimming, towels, cold drinks, sandwiches, coin machines, and the rental of cottages does not impair the "exclusive use" for public purposes, it follows that school property is used "exclusively for school purposes," even though a small amount of surplus products and services may incidentally be sold to outsiders who are not solicited.

The above case certainly should be controlling in the case at bar. I can think of no excuse to give a different meaning to the same words used in the same section of the Constitution simply because in one instance the property of one of the finest private schools in this Nation is involved. If the majority is compelled to deviate from the rule set out in *Hot Springs School District* v. *Sisters of Mercy,* and *Yoes* v. *City of Fort Smith, supra,* it seems to me the least this Court could do would be to take the equitable approach to this situation by allowing a pro-rata tax exemption for that amount of the property here involved which is admitted to be used in the strictest sense exclusively for the school.

For the reasons stated above, I respectfully dissent.

5-2010 331 S. W. 2d 861

Opinion delivered February 15, 1960.

James E. Evans, for appellant.

Jameson & Jameson, for appellee.

SAM ROBINSON, Associate Justice. Appellee, First National Bank, Fayetteville, filed this suit to recover from appellant, Owen C. Glass, $300 which the bank had paid on a check drawn on the bank by Glass, there being no money in Glass' account at the time the check was cashed.

On the 22nd day of January, 1958, appellant gave a check in the sum of $300 to Lloyd McWater, the check being drawn on the appellee bank. The check was sent to the bank the next day and payment was refused because of insufficient funds, there being only 42¢ in Glass' account. Later Glass notified the bank to stop payment on the check. Glass contends that the stop payment order was given on January 23, 1958, and the bank claims such order was received on February 24, 1958. In any event, the stop order was made out and put in the files of the bank not later than February 24, 1958. Nothing further was heard from the check until September 16, 1958. At

that time McWater, the payee named in the check, appeared at the bank and presented the check for payment. The bank teller, Mr. Leon Campbell, communicated with the bookkeeping department and upon being told the check was good, paid the amount of the check, $300, to McWater. Immediately thereafter employees of the bank discovered that they had made a mistake; that there were no funds in the account of Owen C. Glass. The mistake was due to confusing Owen C. Glass' account with that of another depositor, Orin Glass.

Mr. Everett Skelton, a vice-president of the bank, testified that a charge had been made against the account of appellant Glass which absorbed the 42¢, leaving nothing in that account, and that the account was closed on February 25, 1958. It may be inferred, however, from Mr. Skelton's testimony that he did not mean that the account was closed to the point that it would have been necessary for Glass to make any further arrangements such as signing a signature card or otherwise, before he could deposit money in the bank. It merely appears that there was no money left in the account, but the account still appeared on the books of the bank.

The bank filed this suit in chancery against McWater and appellant Glass, seeking to recover the $300 paid on the check. Both defendants demurred. The McWater demurrer was sustained, but the Glass demurrer was overruled and the case was transferred to circuit court. A trial before a jury resulted in a verdict in favor of the bank against Glass for the amount of the check, $300.

Appellant Glass first argues that his demurrer should have been sustained, but we do not agree. The complaint alleges that Glass drew a check on the bank which was paid by mistake. Certainly under certain circumstances a depositor is liable to the bank for the amount of an overdraft paid for the depositor, and the mere fact that the overdraft was paid by mistake does not as a matter of law preclude the bank from recovering. 7 Am. Jur. 442. But on the other, it cannot be said that the bank is entitled to recover against a depositor in such circumstances merely because a mistake was made.

In some cases the facts may be such that as a matter of law the bank would be entitled to recover from a depositor for whom it had paid an overdraft. In other cases the facts may be such that as a matter of law the bank cannot recover. But here we think it was a question for the jury to determine whether in view of all the facts and circumstances of the case the bank is entitled to recover from Glass. If, in addition to Glass having no funds in the bank—which is not in itself controlling—many banks pay overdrafts for their depositors — and aside from the mistake of confusing the two Glass accounts in the first instance, there are other facts and circumstances from which a jury could reach the conclusion that an ordinarily prudent person would not have cashed the check without at least communicating with Glass, then Glass should not have to stand the loss occasioned by the bank's acting in such an unreasonable and imprudent manner. But, if on the other hand it can be said that in cashing the overdraft, and aside from confusing the two Glass accounts, the bank did nothing other than what an ordinarily prudent person would have done in the circumstances, then Glass, the one who wrote the overdraft in the first instance, ought to have to stand the loss, if any.

There are certain facts favorable to the bank's position. In the first place, Owen C. Glass did have an account at the bank, although there was no money in it at the time the check was cashed. There is nothing to indicate that Glass could not have made a deposit that would have been accepted by the bank at any time without making any further arrangements for opening an account. Next, Glass drew a check on the bank, in which he directed the bank to pay to McWater the $300. In paying McWater the $300 on the check, the bank made a mistake, but by drawing the check in the first place Glass had started the course of events that gave rise to the mistake. Likewise, there are circumstances from which a jury could find that if acting as an ordinarily prudent person in the circumstances the bank would not have cashed the check. The check was dated January 22, 1958. The bank cashed it on September 16, 1958.

At the time the check was cashed it may not have been a negotiable instrument. Ark. Stat. § 68-153 provides: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." In addition, the bank still had the stop order that had been issued in February, and although the bank was not absolutely bound by it, in view of the fact that more than 90 days had expired since it was issued (Ark. Stat. § 67-532), it was something that could be taken into consideration in determining whether there was negligence on the part of the bank that precluded recovery from the depositor.

Over the specific objection of appellant, the court gave instruction No. 6, as follows: "If you find from a preponderance of the evidence that defendant, Owen C. Glass, gave a check for $300.00 payable to Lloyd McWater, drawn on the First National Bank, and that said check was presented to the First National Bank for payment; and if you further find that the First National Bank paid said check, by mistake, and charged same to another account through error, and that Owen C. Glass received $300.00 benefit therefrom, or any benefit therefrom, then you are instructed that the First National Bank should recover from the defendant, Owen C. Glass." Instruction No. 7 is to the same effect.

According to those instructions, the jury was erroneously told that if Glass received any benefit, however small, by reason of the bank's having cashed his check by mistake, then the jury would have to find for the bank. But, as heretofore pointed out, at the time the check was cashed it may not have been a negotiable instrument, and if the jury had found that it was not a negotiable instrument, but that Glass was nevertheless liable to the bank, he would be liable only for the amount he owed the payee, if anything (Ark. Stat. § 68-158). Glass contended that he actually owed the payee nothing; that under agreement with the payee the check was not to be presented

for payment until the happening of a subsequent event and that such an event never occurred.

Reversed and remanded.

WARREN *v.* WHEATLEY.

5-2038 331 S. W. 2d 843

Opinion delivered February 15, 1960.

Richard W. Hobbs, for appellant.

R. Julian Glover, Wooton, Land & Matthews, Earl J. Lane and *Wood, Chesnutt & Smith,* for appellee.

JIM JOHNSON, Associate Justice. This is a taxpayer's suit. The action was brought by appellant, H. C. (Dusty) Warren, County Judge of Garland County, in his individual capacity as taxpayer of Garland County, against the Board of Governors of the Ouachita General Hospital, an institution owned and operated by Garland County, and against Dr. George C. Coffey, to rescind the purchase by Ouachita General Hospital of a lot adjoining the hospital from Dr. George C. Coffey.

It was stipulated by the parties that there was no fraud or collusion in the purchase of the lot for the use of the hospital and that the lot was worth the $15,000 purchase price, or more.

Appellant alleged that the Ouachita General Hospital was not a legal entity and could not purchase real property; that Garland County could not legally purchase this property in the manner in which it was purchased; that the County Court did not approve the purchase of the property; that a specific appropriation of the Garland County Quorum Court was required for this purpose and that none was made; and that a portion of the funds expended for the purchase of the property was procured from monies specifically appropriated by the Quorum Court of Garland County for care of charity patients and for operation and maintenance of the hospital in violation of law.

As a separate cause of action against appellee, Hill A. Wheatley, Chairman of the Board of Governors of

Ouachita General Hospital, appellant alleged that appellee, Hill A. Wheatley, had taken assignment from the seller, appellee, Dr. George C. Coffey, of a $10,000 note for the balance of the purchase price and had profited to the extent of $100 interest on the said note at the time it was paid, in violation of his duties as a member of the Board of Governors of the hospital.

Trial of the action in the Garland Chancery Court, in conjunction with another case involving this appellant and one of the appellees, resulted in dismissal of appellant's complaint for want of equity and this appeal followed.

Appellees alleged that the purchase of the lot for the use of the hospital was necessary for the efficient operation of the hospital; that the funds for the purchase of the lot where procured from cash revenues of the hospital from paying patients not subject to appropriation by the Quorum Court of Garland County; that the conveyance of the lot to the Ouachita General Hospital was, in effect, a conveyance to Garland County because the hospital was wholly owned by Garland County; that the purchase of the lot was approved by J. M. Lowery, County Judge of Garland County, at the time of the purchase; and that the purchase of the hospital's note for value by appellee, Hill A. Wheatley, and his receipt of the sum of $100 interest on the note was not a violation of his duties and obligations as a member of the Board of Governors of the hospital.

From the record on trial *de novo* we find that it is undisputed that the purchase of the lot for the use of the hospital was necessary for the efficient operation of the hospital. The Board should be commended for its interest in the welfare of the people of Garland County as evidenced by providing them this additional necessary facility at no expense to the taxpayer. The record reflects that the funds for the purchase of the lot were procured from cash revenues of the hospital from paying patients and therefore not subject to appropriation by the Quorum Court of the county. It is true that tax funds and funds from paying patients are mingled in the

same bank account and that all payments are made from this common account. Even though we believe the better practice to be the establishment of a separate bank account for the public and private funds, we cannot say from this record that tax money was used in the purchase of the lot. The evidence is undisputed that the hospital's expenses for authorized purposes regularly exceed the Quorum Court's appropriation.

The proof shows that from the inception of the hospital the expenditures of the hospital for care of charity patients consistently exceeded the appropriations for the care of charity patients both from Garland County and from the City of Hot Springs, and that during the six month period ending December 31, 1958, the total receipts from the city and county for charity patients were $17,000 and the expenditures for charity patients were $27,859.63. Unrestricted cash funds of the hospital made up this deficit. The proof further shows that during this six month period the hospital received $13,500 from the one mill maintenance and operation tax and that total operating expenses were $222,202.54, exclusive of the purchase of the lot. This deficit was also made up from unrestricted cash funds of the hospital received from paying patients and other sources.

It is obvious, therefore, that the funds for the purchase of the lot did not come from monies appropriated for other specific purposes by the Quorum Court of Garland County.

Appellant's argument on this point is primarily based on the fact that all monies from every source, including the restricted tax monies, were placed in one general bank account for convenience in accounting and administration of the affairs of the hospital. The hospital's accountant testified that separate ledger sheets were kept for the various funds, including the charity appropriations and the one mill maintenance tax, and that these funds were segregated on the books of the hospital. The hospital Administrator testified that on the day before the final payment for the lot was made, the hospital bank account amounted to $35,832.32, and

that on the day the final payment of $10,000 was made, the balance in the bank account after this payment and after deposit of a check for $13,500 for one mill maintenance tax monies was $26,127. The records clearly reflect, therefore, that no part of the one mill maintenance tax or the charity appropriations was used by the hospital in the purchase of the lot.

Since the members of the Board of Governors are trustees of the funds appropriated for the Ouachita General Hospital, and since the record reveals that at no time here involved did the common bank account fall below the amount contributed to the hospital from public sources, the money remaining will be deemed to have included the tax money. See: *Chambers, Adm.* v. *Williams, Adm.,* 199 Ark. 40, 132 S. W. 2d 654; *Powell* v. *Missouri & Ark. Land & Mining Co.,* 99 Ark. 553, 139 S. W. 299; Restatement Trusts 2d, Section 202 J, pages 451 and 452.

Appellant argues, and very forcefully so, that the Chancery Court erred in holding that the Ouachita General Hospital was a legal entity and could take title to real property. It was admitted by the pleadings and stipulations entered into between counsel that the Ouachita General Hospital was not a legal entity. Of course, we agree with appellant that the rule that before a grantee can take title to real property the grantee must be a legal entity is so basic that no citations are necessary. However, in this case the record reveals that the Ouachita General Hospital is wholly owned and operated by Garland County. That appellee, Dr. Coffey, did not prepare the deed to the Ouachita General Hospital. He did not have it prepared or have his attorney approve it. He relied solely upon the Board of Governors and the then County Judge J. M. Lowery as to the manner in which the conveyance was made and the transaction handled and as to the validity thereof. That twice during the course of the trial a correction deed from Dr. Coffey to Garland County was offered to appellant, H. C. Warren, County Judge of Garland County, and these offers were refused. Based upon this state of the record rela-

tive to the title to the property here in question, we are of the view that the offer of the correction deed should have been accepted and now should be accepted by the County Judge on behalf of the county. There can be no doubt from this record that the county, from the date of the purchase of this property, has held the equitable title while the legal title remained in Dr. Coffey in trust for the county. This transaction created an implied trust. Such trusts are those which are deducible from the transaction as a matter of clear intention but not found in the words of the parties or which are superinduced upon the transaction by operation of law as a matter of equity, independent of parties' particular intention. *Hunt* v. *Hunt,* 202 Ark. 130, 149 S. W. 2d 930.

The remaining question is whether the appellee, Hill A. Wheatley, indirectly transacted business for profit with the Ouachita General Hospital while acting as a public officer and chairman of the hospital's Board of Governors. The appellant argues that Wheatley violated his duties and obligations as a member of the Board of Governors of the hospital because he took an assignment of the hospital's note to Dr. George C. Coffey for the balance of the purchase price of the lot and received payment in full of the note plus $100 interest due thereon.

The proof shows that Hill A. Wheatley did not enter into a contract with the hospital Board in connection with the purchase of the lot. Mr. Wheatley, in his private capacity, purchased a note bearing interest at 6 per cent per annum secured by a lien on real property. The note was paid and he received the interest called for under the note. Mr. Wheatley's contractual relations were with Dr. Coffey and not with the hospital Board.

There can be no question but that Mr. Wheatley's transaction with Dr. Coffey placed him in a position of doing indirectly that which he could not do directly, *i. e.,* do business with the hospital. He assumed a position in which his personal interest, as the holder of the note, might conflict with his fiduciary duty as a member of the Board of Governors. There was, therefore, a breach of trust. The exact situation is discussed in Restatement

of Trusts 2d, § 170, comment *i*: "If the trust estate includes property which is subject to an encumbrance, the trustee violates his duty to the beneficiary if he purchases the encumbrance for himself individually."

In these circumstances the fiduciary cannot make a profit from the transaction. If, for example, he has bought the encumbrance at a discount he cannot recover its face value from the trust estate, for by doing so he would realize a profit. But the receipt of simple interest, at a rate not shown to be excessive, is not regarded as a profit to the fiduciary. The rule is stated in the Restatement, *supra,* § 206, comment *h*: "If he [a trustee] purchases the encumbrance for less than its face value he cannot enforce it against the trust estate for its full face value, but he is entitled only to receive the amount which he paid for it *with interest thereon*" (our italics).

The rule was applied in *Trimble* v. *James,* 40 Ark. 393, where an administrator had saved the estate by purchasing claims at a discount, though he was compelled to borrow money at ruinous rates of interest in order to do so. We held that he was entitled to recover his actual outlay only, with interest, saying: "The administrator is entitled only to actual advances, with simple interest at six per cent till repayment, without intervening rests." It follows that Mr. Wheatley is entitled to retain the $100 which he received as interest, as it represents only simple interest at a rate not shown or suggested to be excessive.

From what we have said above, the decree of the Chancellor is modified only to the extent indicated and affirmed, and the cause is remanded with directions to enter orders consistent with this opinion.

Opinion delivered February 15, 1960.

[redacted]

Richard W. Hobbs, for appellant.

R. Julian Glover, Wootton, Land & Matthews, Earl J. Lane and *Wood, Chesnutt & Smith,* for appellee.

JIM JOHNSON, Associate Justice. This is a taxpayer's suit. The action was brought by appellant, Herman C. (Dusty) Warren, County Judge of Garland County, in his capacity as a taxpayer and resident of Garland County, against appellee, James M. Reed, a member of the Board of Governors of the Ouachita General Hospital. Appellant alleged that appellee had entered into a laundry contract with the Board of Governors while appellee was a member of the Board and asked the court to declare such contract null and void and against public policy and further asked the court to require appellee to make a strict accounting of all profits he had made under such contract.

After hearing this case in conjunction with another case involving this appellant and this appellee, et al, the Chancellor found for appellee holding that the complaint

should be dismissed for want of equity. From such holding comes this appeal.

For reversal appellant contends that the trial court erred in dismissing the complaint of the plaintiff for want of equity in that under the law of the State of Arkansas, a public officer, as a member of a board or commission, is forbidden from entering into a contract with such board or commission whereby the public officer receives any moneys or profits.

And, that the trial court erred in refusing to declare the contract in question null and void and against public policy and in refusing to prohibit and enjoin appellee, James M. Reed, from receiving further moneys under and by virtue of the contract in question.

The facts are briefly as follows: Appellee, James M. Reed, was the operator of the Craighead Laundry in Hot Springs. The building which housed the laundry was owned by Mr. Hill A. Wheatley, who was chairman of the Board of Governors of the Ouachita General Hospital. Appellee was also a member of the Board of Governors of the hospital and served as Treasurer of the Board. Bids for the laundry of the hospital were called for and Reed bid upon the laundry contract while a member of the Board, resulting in the Board awarding an exclusive contract to Mr. Reed to handle all of the laundry for the hospital.

The record reflects that a contract was advertised for, that several bids were received, and that the bid of appellee was the lowest bid. There was no evidence introduced on the part of appellant that appellee had any advance information that any other bidder did not have or could not have had upon reasonable inspection. Mr. Albert Guice of the Howlett Linen Service, a competitor of appellee, submitted one of the rejected bids. Mr. Guice testified as follows relative to Reed's bid:

"Q. Mr. Guice, I hand you herewith a bid, about which it has been testified that the Board of Governors accepted, and I'll ask you to read the bid and the price contained therein for services rendered to the Ouachita

General Hospital. Are the prices shown on that bid for laundry service to the Ouachita General Hospital reasonable or not?

"A. They're below average, yes.

"Q. Would you be able to take a contract for the Ouachita General Hospital laundry under the same prices as shown there?

"A. I would not."

Appellee testified that the laundry contract provided him with a "filler" by keeping his employees at work for certain hours when otherwise they would be laid off, thereby keeping them employed full time instead of part time and thus more happily employed. At the conclusion of the testimony the chancellor found, and we think properly so, that there was no fraud on the part of appellee in his dealings in connection with the laundry contract, and further that he had no special knowledge that was not at the command of the other bidders. With these points thus determined, the balance of the case evolves into purely a question of law as to whether or not a public officer, such as appellee in this case, could enter into a contract with the Board of Governors of the Ouachita General Hospital while acting in his capacity as a public officer and treasurer of the board.

In 43 Am. Jur., Section 266, at page 81, we find the following:

"A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interest of the public. One of the most familiar applications of this doctrine is the rule which prevents an officer from having an adverse interest in any contract which he executes on behalf of the public."

In 43 Am. Jur., Section 294, at page 103, the following rule is set forth:

"A contract made by a public officer is against public policy and unenforceable if it interferes with the unbiased discharge of his duty to the public in the exercise of his office, or if it places him in a position inconsistent with his duty as trustee for the public or even if it has a tendency to induce him to violate such duty. Such contracts are invalid, although there may have been no actual loss or detriment to the public or fraudulent intent in entering into the contract, since the rule invalidating the contract is based on public policy."

In 43 Am. Jur., at page 105:

"A contract entered into by a public officer in his individual capacity, the effect of which is to create a personal interest which may conflict with the officer's public duty, is contrary to public policy."

In 43 Am. Jur., Section 299, page 206:

"A contract entered into by a board with one of its own members is void, or at least voidable, and this, even in the absence of a statutory prohibition. The reason is that in such cases, the member's public duty and his private interests are directly antagonistic. It matters not if he did, in fact, make his private interests subservient to his public duties."

Our research reveals that Arkansas has always followed the rules hereinbefore quoted from Am. Jur. and in the case of *McLain* v. *Miller County,* 180 Ark. 828, 23 S. W. 2d 264, this Court cited and quoted the following rule:

"As the efficiency of the public service is a matter of vital concern to the public, it is not surprising that agreements tending to injure such service should be regarded as being contrary to public policy. It is not necessary that actual fraud should be shown, for a contract which tends to the injury of the public service is void, although the parties entered into it honestly, and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not but

stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was, in fact, done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit."

This Court went on in the foregoing cited case to state further:

"It is, of course, clear that a contract which induces a public officer to violate his duties to the public is against public policy. It is not necessary that there should be an express agreement to that effect. The acceptance of private employment, which conflicts with his public duties may be sufficient. An officer's duty is to give to the public service the full benefit of a disinterested judgment, and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. The law will not permit public servants to place themselves in a situation where they may be tempted to do wrong, and this it accomplishes by holding all such employment, whether made directly or indirectly, utterly void."

This Court, in the cited case, went on to state that the rule which prevented public officers from being interested in public contracts is embodied in the statutes of some states, but that this rule is not dependent on statute and according to the great weight of authority a contract with a member of a board of public body or in which a member thereof is interested, is unenforceable, even though there is no statute directly prohibiting such a contract. A public officer cannot lawfully make a contract either with himself, or with himself as agent for others.

In the case of *Smith* v. *Dandridge,* 98 Ark. 38, 135 S. W. 800, this Court again laid down the rule that it was unlawful for a director of a school district to enter into a contract with the school district where he had a personal and individual interest in the contract and that public policy of the state would forbid the director from

making such a contract and that such a contract would not be enforceable but that such a contract was not absolutely void but it would not be a binding agreement and could be voided. This Court, in that particular case, allowed payment to the director on a *quantum meruit* basis because of the fact the school district had received and retained the benefits of his services but held that payment would not be allowed on the basis of the contract because the contract was unenforceable and not binding.

Following the rules set out in the *McLain* and *Smith* cases, *supra,* we find that the contract existing between appellee and Ouachita General Hospital must be cancelled and appellee restrained from further contracting with the Board so long as he remains a member thereof. We further find that in the absence of a specific prohibition in the Statutes of Arkansas providing for the purchase, maintenance and operation of county hospitals,[1] against the members of a board of governors from contracting with the board, and since the hospital did receive and retain the benefits of the services performed by appellee, he must be allowed payment for same on a *quantum meruit* basis. In determining the *quantum meruit* we find from the testimony of the appellee's competitor, Mr. Albert Guice, that appellee received no more than he deserved for his services performed; in fact, he received less than the witness would have charged for the performance of the same service and less than any of the bidders on the contracts would have charged. Therefore, the decree of the Chancellor is reversed and the cause is remanded with directions to enter orders consistent with this opinion.

Reversed.

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[1] Act No. 481 of the Acts of Arkansas, 1949, and as amended by Act No. 83 of the Acts of Arkansas, 1953.

5-2068 332 S. W. 2d 238

Opinion delivered February 22, 1960.

[redacted]

Lyman L. Mikel, for appellant.

Gean, Gean & Gean, for appellee.

CARLETON HARRIS, Chief Justice. Suit was instituted in the Chancery Court, Fort Smith District, Sebastian County, Arkansas, to enjoin the collection of taxes on the personal property of appellees. Appellees, in April, 1958, assessed their personal property at an assessed value of $15,000. The assessor of Sebastian County made his own assessment in the amount of $49,575. After receiving notice of the raise in assessment, appel-

lees filed a petition with the Board of Equalization to reduce the assessment. According to appellee, Carl Corley, one of the partners of Crouch Equipment Company, he called the Board twice, but was advised that personal property petitions were not being heard at that time, and that he would be subsequently notified.[1] Corley further testified that he again called on December 10th, and talked with Jess Hall, a member of the Equalization Board, who advised Corley that the Board was then in the process of making up its final report. Appellee stated that Hall asked him if he could come down on that day for a hearing, and he (Corley) advised that he was due to catch a train that afternoon for an appointment out of the city, and also that he would need a little time to get his information and witnesses together. Hall then told him to hold the phone until he could talk with other members of the Board. Upon resuming his conversation with Corley, Hall stated that hearings had been completed, and he would "have to wait until next year to get a hearing." This testimony was not too far different from that of Mr. Hall, who testified that Corley told him he wanted the hearing that day. The witness testified that R. B. Hudson, chairman of the Board, stated that the petition could not be heard that day, but could be heard the next day. According to Hall, Corley replied that he was leaving town at noon, and could not be present. After further talking with Hudson, Hall told Corley that if he could not be present the next day, the matter would have to wait until next year. On January 6, 1959, appellees instituted suit in the Chancery Court, alleging that the assessment was illegal and excessive; that they were never given a hearing by the Equalization Board, and accordingly had been deprived of their constitutional rights, and asked that the collector be restrained and enjoined from collecting or attempting to collect any tax based on said appraisement. On hearing, the court found "that all the material allegations of Plaintiffs' Complaint and Amendment to Complaint are true"; that the assessment for the year 1958 was

[1] Corley also sought a reduction in his real estate assessment, which was heard in September.

illegal, unconstitutional and void, and enjoined the county clerk, assessor, and collector, from collecting or attempting to collect any taxes on the personal property belonging to appellees on any valuation in excess of the valuation of $15,000 for the year 1958. From such decree comes this appeal.

Before specifically discussing the issues in this case, we think it well to set out the law relating to assessments, which has been, to some degree, changed by recent legislative sessions. The statute in effect at the time of this litigation (§ 84-416, Ark. Stats. (1947) Anno.) provided that the assessor should appraise and assess all personal property between the first Monday in January and third Monday in August.[2] § 84-437 (Ark. Stats. (1947) Anno.) provides that the assessor shall

"* * * in each instance where he raises the valuation of any property which has been listed with him as by law required, shall deliver to the property owner or his agent a duplicate copy of such adjusted assessment list, or he shall notify such property owner or his agent by first class mail, which notice shall state separately the total valuation of real and personal property as listed by the property owner and as fixed by the assessor, and shall advise that such owner may, by petition or letter, apply to the equalization board for the adjustment of the assessment as fixed by the Assessor, provided all applications shall be made to said board on or before the third Monday in August."

Section 84-706 provides that the regular session of the Board shall be held beginning the third Monday in August and up to the third Monday in September.[3] The General Assembly of 1951, in extraordinary session, through Act 9 (§ 84-717 through § 84-719, 1957 Supplement), provided that the Equalization Board of any county, on petition of the county judge or on its own motion, could, at any time after adjournment of its regular meeting, and before

[2] Act 246 of the General Assembly of 1959 changed this statute to read "between the first Monday in January and the first day of August."

[3] Act 246 or 1959 changed the time to the first day of August through the first day of September.

the first Monday in October next following such adjournment, convene in special session

"* * * for the purpose (1) of completing its work of equalization of property assessments or (2) for the purpose of reviewing or extending its work of equalization of property assessments; and, for that purpose, said Board shall be vested and charged with all the powers and duties with which such Board is vested and charged when meeting in regular session and, in addition, said Board shall be empowered to employ qualified appraisers, abstractors or other persons needed, to appraise properties which the board may need in the discharge of its duties.

The petition to said Equalization Board shall specify the date on which the Board shall convene and such Board may thereafter exercise its functions but not later than the third Monday in November next following."

Section 84-708 (1957 Supplement) provides that any property owner may petition the Equalization Board for an adjustment, and further provides that if he feels aggrieved at the action of the Equalization Board, he may appeal to the county court "provided, no appeal to the county court shall be taken except by those who have first exhausted their remedy before the Equalization Board, excepting however, all cases where the petitioner shall have had no opportunity to appear before said Board." The section further provides that all appeals from regular sessions of the Board shall be filed before the second Monday in October, and shall be heard by the county court before the first Monday in November. Section 84-718 (1957 Supplement), relating to appeals from special sessions, provides:

"Appeals from the action of the Board when in special session shall be to the County Court in the manner as now provided by law, except that any such appeal shall be filed within ten (10) days from date of notice of action by said Board, and shall be heard and order made by the County Court not later than forty-five (45) days prior to the date on which the tax books for the

year are required to be delivered to the County Collector.''[4]

We disagree with the Court's finding that the assessment made by the assessor was illegal, unconstitutional, and void. While this assessment was based upon an appraisal submitted by E. T. Wilkins and Associates,[5] the assessor had full authority to assess the property at whatever figure, based on his information or investigation, he deemed to be right and proper. In fact, that is the very duty of the assessor. Here, an assessment was made, and appellees notified, following which they filed their petition with the county Equalization Board. According to the evidence, they were heard as far as a reduction in the real estate assessment was concerned, but were told that hearings, relative to a reduction of personal property assessments, were not being conducted at that time. According to Corley, he contacted the Board twice before the December 10th date, but no hearing was set. On December 10th, he again called, and the conversation took place as heretofore related.

Let it first be pointed out that the Board actually had no authority on that date to reduce—or for that matter, raise—anybody's assessment. The statute very definitely provides that the Board cannot exercise such a function after the third Monday in November. Accordingly, any equalization action taken at that time would have been without force and effect if it had been questioned. Appellees seem to be of the opinion, that having filed their petition with the Board, it forthwith became mandatory that a hearing be granted. Of course, Corley admitted that he was told he could appear before the Board that day (December 10th), but we hardly think

[4] The clerk is required to deliver these books to the collector by the third Monday in February. While not involved in this appeal in any way, § 84-721 authorizes the Equalization Board to meet at any time for the purpose of planning its work of equalization, and empowers the Board to employ qualified appraisers, abstractors, or other persons needed for appraisal work. This section relates only to the planning of the work.

[5] E. T. Wilkins and Associates, in pursuance of Act 351 of 1949 as amended in 1957, were employed by the Fort Smith District of Sebastian County, Arkansas, to appraise the property of appellees and other taxpayers in the district and county.

that would have been sufficient time for appellees to get ready to present their case. However, we do not agree that a hearing was mandatory. A large enough number of petitions could be filed that it would be a physical impossibility to hear all in the length of time allotted. The statute itself makes clear that a hearing is not mandatory, for it provides that an applicant must exhaust his remedy before the Equalization Board except in those cases "where the petitioner shall have had no opportunity to appear before said Board." Of course, it is contemplated that a petitioner will have a hearing before the Board; otherwise, there would have been no occasion to set up such a Board, but the failure of the Board to hold such a hearing certainly does not invalidate the assessment already made, nor does the failure to obtain a hearing result in taking the petitioner's property without due process of law, for a remedy is still provided. That remedy is an appeal to the county court, and such appeal must be taken within ten days from the date petitioner receives notice from the Board. Appellees argue that they received no notice of any action by the Board; further, that no action whatsoever was taken relative to the petition, and there was accordingly nothing to appeal from. It is true that no written notice was sent, but Mr. Corley certainly was notified that the petition was not going to be heard. Whether the statement that Corley would "have to wait until next year to get a hearing" be construed as turning down the petition for reduction, or be construed to the effect that the Board was taking no action at all, is of no concern. The fact remains that appellees *knew they were not obtaining any relief.* With this certain knowledge, it only remained for them to appeal to the county court. In other words, if it be considered that appellees' petition had been denied by the Equalization Board, then their remedy had been exhausted before such Board. On the other hand, if they had no opportunity to appear before the Board, the right of appeal to the county court still remained. The Board's action—or inaction—did not preclude appellees from pursuing their statutory remedy for a hearing. Actually, though the Board had no authority in December to grant

any relief, if an appeal had been taken, the county court could, had it so desired, have reduced the assessment. In fact, testimony reflects that the county court heard two cases where petitioners had not been previously heard by the Equalization Board.

We certainly would readily say that, if at all possible, the Board should hear a taxpayers' petition. We are likewise of the opinion that in the interest of efficiency, and to avoid misunderstanding, a better practice would call for Boards to send written notices to all petitioners advising definite hearing dates, or informing that his or her petition could not be heard. We agree that appellees were diligent in trying to obtain a hearing before the Board. Having said this, the fact remains, however, that the statutory remedy for an aggrieved property owner was not followed. To affirm this decree would simply be to disregard the plain statutory requirements.

In summary, we find that the assessment made by the assessor of appellees' personal property for the year 1958 was not illegal, or unconstitutional; there is no absolute right to a hearing before the Equalization Board, and the failure to obtain such hearing did not amount to depriving appellees of their property without due process of law. Finally, the court was in error in holding that appellees had possessed no adequate remedy at law, for the right of appeal accrued on December 10th. It follows that the injunction was erroneously granted.

Reversed.

Opinion delivered February 22, 1960.

Wiley A. Branton, for appellant.

Bruce Bennett, Attorney General, By: *Thorp Thomas,* Asst. Attorney General, for appellee.

J. SEABORN HOLT, Associate Justice. On a charge of murder in the first degree, appellant, Frank Andrew Payne, was, on January 11, 1956, tried, found guilty as charged and his punishment fixed by the jury at death by electrocution. We affirmed, *Payne* v. *State,* 226 Ark. 910, 295 S. W. 2d 312. On appeal to the Supreme Court of the United States, the judgment was reversed for error in introducing in evidence a coerced confession of appellant, *Payne* v. *Arkansas,* 356 U. S. 560, 2 L. Ed. (2d) 975, 78 S. Ct. 844. Thereafter, in April 1959, appellant was again tried and a jury again found him guilty of murder in the first degree and fixed his punishment at death in the electric chair. The present appeal followed.

For reversal, appellant assigns eight alleged errors. After reviewing them all, we find merit in but one of appellant's assignments and that is number five which

is: "That the Court erred in admitting into evidence the actions of the appellant in connection with an alleged re-enactment of the crime immediately following the giving of an involuntary confession."

Appellant, a Negro 19 years of age, brutally murdered his employer on the night of October 4, 1955 in the office of his victim's lumber yard in Pine Bluff, Arkansas. (Reference is made to the first appeal for a more complete statement of the facts.) Appellant's first confession, as indicated, was held to be coerced by the Supreme Court of the United States on the undisputed facts which are recited in that opinion as follows: "The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police 'that there would be 30 or 40 people there in a few minutes that wanted to get him,' which statement created such fear in the petitioner as immediately produced the 'confession'. It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice', and that its use before the jury, over petitioner's objection, deprived him of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment."

The facts in the present case show that appellant, after he made and signed the above confession at about three o'clock in the afternoon in the presence of the chief of police, police officers and others, including a newspaper reporter, was later on the same afternoon, at

about five o'clock, removed in the car of the chief of police to the scene of the crime and in the presence of the same officers and others who had witnessed his confession, and without being allowed to consult counsel or anyone, was directed to re-enact the crime which he proceeded to do. In re-enacting the crime, he went through actions essentially and, in effect, what he had said in the confession less than two hours before. He demonstrated where he had picked up an iron bar from behind the door, how he had walked over to the desk where his employer was and struck him, then going behind the counter and striking decedent several more times, finally taking the wallet from decedent's body, some money from the cash drawer, and then fleeing.

It seems to us, and we hold, that this re-enactment amounted to but a part of his coerced confession, and was also coerced and unlawfully obtained. Our rule in this state on the admissibility of confessions was announced in the early case of *Love* v. *The State,* 22 Ark. 336, where we held: "Confessions are not admissible against a party charged with crime, unless freely and voluntarily made, and the onus is upon the State to prove them of this character. When the original confession has been made under illegal influence, such influence will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown", and in 50 Ark. 305, 7 S. W. 255, *Corley* v. *State,* we said: "The rule is established in this state, in accord with the unvarying current of authority elsewhere, that a confession of guilt, to be admissible, must be free from the taint of official inducement, proceeding either 'from the flattery of hope or the torture of fear' ", citing *Bullen* v. *State,* 156 Ark. 148, 245 S. W. 493. We also held in *Turner* v. *State,* 109 Ark. 332, 158 S. W. 1072: "Where improper influences have been exerted to obtain a confession from one accused of a crime, the presumption arises that a subsequent confession of the same crime flows from that improper influence; but such presumption may be overcome by positive evidence that the subsequent confession was given free from undue influence."

The general rule regarding the admissibility of a subsequent confession following an involuntary and coerced confession is stated in 20 Am. Jur., Evidence § 487, in this language: "If one confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influences are also involuntary. It is immaterial, in this connection, what length of time may have elapsed between the two confessions, if there has been no change in the circumstances or situation of the prisoner. Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. However, a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences if it is shown that these influences are not operating when the later confession is made. * * * The evidence to rebut the presumption that the subsequent confession, like the original confession, is involuntary must be presented by the prosecution and must be given at the time the subsequent confession is offered in evidence, provided the court is then cognizant that the accused has made a prior involuntary confession. The evidence to rebut the presumption must be clear and convincing, however."

A review of this record convinces us that the fear and coercion that tainted the first confession were present in the re-enactment which, as indicated, we characterize and hold to be, in effect, a second coerced confession and hence evidence adduced at the re-enactment is also inadmissible and prejudicial to appellant.

Accordingly, the judgment is reversed and the cause remanded.

ROBINSON, J., concurs.

HARRIS, C. J., MCFADDIN and WARD, JJ., dissent.

SAM ROBINSON, Associate Justice, concurring. I concur for the purpose of pointing out that this Court does

not of its own volition find that the confession made by the appellant was involuntary. In fact, we have specifically held that the confession was voluntary; *Payne* v. *State*, 226 Ark. 910; but the Supreme Court of the United States overruled this Court on that point. *Payne* v. *Arkansas*, 356 U. S. 560, 2 Law Ed. 2d, 78 Sup. Ct. 844.

The United States Supreme Court decision that the confession was involuntary is the law of the case. Since it has been thusly decided that the confession was not voluntary, it must be considered as involuntary by this Court in reaching a conclusion as to whether the re-enactment of the crime by the defendant was, therefore, also involuntary. As pointed out in the majority opinion, the re-enactment was so closely connected with the confession as to form a part of the same transaction and is, therefore, inadmissible.

CARLETON HARRIS, Chief Justice, dissenting. The only question, as I view it, is whether the re-enactment of the crime by Payne was voluntarily done, or under duress and compulsion. The first Payne case was reversed by the United States Supreme Court under the holding that a confession of the defendant, admitted into evidence, was obtained by coercion. At no place in that Opinion is mentioned the re-enactment of the crime. I do not agree that Payne was acting under the operation of the same influences present when the confession was made. Evidence was offered in the first case that at the time the confession was made, Payne was told that thirty or forty people were outside the jail wanting in to get the defendant. According to Payne, the Chief of Police had told him "if I wanted to make a confession, he would try to keep them out." No such threat occurred during the re-enactment, which took place at the building where Robertson was killed, a considerable distance from the jail. The testimony reflects that appellant's actions on the premises were entirely voluntary, and that he demonstrated the manner in which the crime was committed without "prodding" or suggestions from the police. For instance, relative to the murder weapon, a piece of iron, Payne, in relating from the witness stand his actions at the lumber company building, stated:

"Q. Where did you go first when you came in the rear of the building, where did you stop, did you stop?

A. We stopped at the door if I am not mistaken.

Q. How far down from Mr. Robertson's desk?

A. I wouldn't know to be exact.

Q. Is it further than an arm's reach away from the desk where you stopped?

A. Yes, sir, it is.

Q. Did you indicate at that point anything?

A. Yes, sir.

Q. What did you indicate there?

A. At the door?

Q. That is at the door.

A. I indicated that I picked up an iron, I was picking up something there.

Q. You picked up something there - you said an iron what?

A. I said I was indicating where I picked up something.

Q. You indicated you picked up something — who lead you to that spot, Frank?

A. Who lead me to that spot?

Q. That's right — who told you that was the spot where you picked up something?

A. *No one.* (my emphasis)

Q. No one did that, but you stopped at that point, didn't you?

A. I did.

Q. And you indicated that you picked up something there. Then where did you go next?

A. To Mr. Robertson's desk."

He subsequently pointed out the place where he had thrown the weapon, which, according to the evidence, was within inches of the spot where it was found by a radio newsman. Appellant does not claim that he was forced to re-enact the crime, or that anybody told him what actions to perform. There is no claim that he was threatened or abused. Certainly, he had no reason to fear mob action at the time. The most that he said was that he was "scared." This certainly was not unusual, for most anyone who is arrested has a feeling of fear, and this is probably even true where people are stopped by officers and given traffic tickets. The point is that the officers did nothing to cause that fear. As stated, the sole question is whether this re-enactment was voluntary and free from any improper influence, and not traceable to any prohibited influence previously exerted either by promise made by way of previous inducement, or by threats or violence. *Smith* v. *State,* 74 Ark. 397. The sheriff and police officers all testified that Payne received no promises, nor was he mistreated in any way in order to obtain the re-enactment, and Bill Miles, city editor of the Pine Bluff Commercial, testified that following the re-enactment, he walked over to Payne and asked if he had been mistreated in any way, and that the defendant replied that he had not.

I am fully cognizant of the rights given a defendant under our Constitution, and I am entirely persuaded that Payne received every safeguard afforded by these guarantees. At the trial itself, the jury was instructed, *at the request of defendant,* as follows:

"Before any statements or acts made by the defendant to the officers or other persons can be considered by you as evidence in the case you must believe from the testimony that such statements or acts were freely and voluntarily made and done without any threat or fear of punishment and without any promise or hope of reward. If you believe from the evidence in this case that any statements or acts that were made or done by the defendant were freely and voluntarily made by him you should consider such statements and acts along with all the testimony in the case in

determining the guilt or innocence of the defendant. If you believe that said statements and acts were not free and voluntary, that they were induced by fear of punishment or promise of reward, you should not consider such statements and acts for any purpose whatsoever."

Certainly it is proper to assume that jurors consider all of the instructions given by the court. The jury (which incidentally, included two members of appellant's race), by its verdict, if it considered the evidence of re-enactment at all, apparently found that these acts of the defendant were not coerced, and there being no evidence to the contrary, the jury's verdict should be allowed to stand.

I strongly feel that the judgment should be affirmed.

Justices McFaddin and Ward join in this dissent.

Stevens *v.* State.

4973 332 S. W. 2d 482

Opinion delivered February 22, 1960.

[Rehearing denied March 21, 1960]

A. C. Hervey, for appellant.

Bruce Bennett, Attorney General, By: *Ben J. Harrison,* Asst. Attorney General, for appellee.

Ed. F. McFaddin, Associate Justice. Appellant was tried and convicted of the rape (§ 41-3401 Ark. Stats.) of his eleven-year-old granddaughter, and sentenced to life imprisonment (§ 41-3403 Ark. Stats.). His motion for new trial contains seven assignments.

I. *Sufficiency Of The Evidence.* This embraces assignments 1 to 5 in the motion for new trial. The testimony is revolting. Appellant, aged 67, lived in Chicago; but on two occasions he visited in the home of his daughter in Arkansas. On these visits the crimes were committed. The little girl testified that appellant commenced by putting his finger in her private parts; and later, on repeated occasions, put his private parts in hers, sometimes getting on top of her. Something caused the parents of the little girl to become suspicious, and they took her to a doctor for a physical examination. He testified that someone had definitely engaged in sexual intercourse with the child. Even though her tender age made consent legally impossible,[1] nevertheless she stated the acts were against her will. Even though her testimony did not have to be corroborated,[2] nevertheless there was testimony that the appellant admitted "playing" with the little girl and "fingering" her. The appellant stoutly denied the crime, and character witnesses testified on his behalf; but a study of the record discloses that there was ample evidence to take the case to the jury and to sustain the verdict rendered.

II. *Instructions.* Assignments 6 and 7 relate to this topic. The Trial Court correctly instructed the jury as to rape, carnal abuse, burden of proof, reasonable doubt, credibility of witnesses, presumption of innocence, and forms of verdict; and the Court was correct in refusing the defendant's requested instructions of not guilty. On appeal the appellant insists that the greatest crime for which he could be convicted is "fondling", as proscribed by Act No. 94 of 1953 (§ 41-1126 *et seq.* Ark. Stats.); but the defendant requested no correct instruction about "fondling", and, as we have already stated, the evidence was sufficient to support the verdict of rape. Therefore, there is no necessity for us to consider the Act No. 94 of 1953.

Affirmed.

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[1] *Fields* v. *State*, 203 Ark. 1046, 159 S. W. 2d 745; and *Dawson* v. *State*, 29 Ark. 116.

[2] *Bradshaw* v. *State*, 211 Ark. 189, 199 S. W. 2d 747; and cases there cited.

4965 332 S. W. 2d 614

Opinion delivered February 22, 1960.

[Rehearing denied March 28, 1960]

[redacted]

Bruce Bennett, Attorney General, By: *Clyde Calliotte,* for appellant.

Switzer & Switzer, for appellee.

GEORGE ROSE SMITH, J. The appellee was arrested for speeding on a highway in Egypt township, Ashley county, and was given a traffic ticket directing him to appear in the Hamburg municipal court in the adjoining township of Carter. He contested the jurisdiction of the municipal court, contending that the arresting officer should have ordered him to appear before a justice of the peace in Egypt township. The municipal court rejected this plea, but on appeal the circuit court reversed the municipal court's decision and remanded the case with directions that it be transferred to a justice of the peace in Egypt township. From that order the State has undertaken to appeal.

The appeal must be dismissed for want of a final order. "A judgment, to be final, must dismiss the parties from the Court, discharge them from the action, or

conclude their rights to the subject matter in controversy." *Bank of the State* v. *Bates,* 10 Ark. 631. The circuit court in substance ordered that the venue be changed to Egypt township. An order granting or denying a change of venue is not final, for the cause still stands for trial. *Griffith* v. *State,* 36 Ala. App. 638, 61 So. 2d 870; *State* v. *Woodruff,* 77 Ohio App. 278, 62 N. E. 2d 926.

The State is in error in contending that it is permitted by statute to appeal from an interlocutory order. The statute relied upon, Ark. Stats. 1947, § 43-2706, was part of Title 9, Article 1, of the Criminal Code, which is applicable only to felonies. There is no similar provision in Article 2 of Title 9, which applies to misdemeanors and therefore governs this case.

Appeal dismissed.

POWELL *v.* STATE.

4958 332 S. W. 2d 483

Opinion delivered February 22, 1960.

[Rehearing denied March 21, 1960]

Virgil Roach Moncrief and *John W. Moncrief,* for appellant.

Bruce Bennett, Attorney General, By: *Bill J. Davis,* Asst. Attorney General, for appellee.

PAUL WARD, Associate Justice. John Powell, Jr., the appellant, Odell Jackson and Bernard Smith were charged by Information with having carnal knowledge of one Arlester Darragh, age 14, on March 23, 1959. They were tried on April 16, 1959, convicted of carnal abuse and sentenced to one year in the penitentiary. From that judgment John Powell, Jr. prosecutes this appeal.

On March 23, 1959 the three persons above mentioned attacked Arlester Darragh, a negro girl 14 years of age. Appellant drew a razor and threatened Arlester in order to force her to carnally know one of the other boys. Appellant preserved numerous assignments of error in his Motion for a new trial including insufficiency of the evidence.

Sufficiency of the Evidence. Arlester and her father testified that she was only 14 years of age when she was attacked. She said the three assailants came to the door of her home and asked for a drink of water;

that Jackson started wrestling with her when appellant pulled a razor and threatened her, thereby forcing her to carnally know Jackson without her consent; that she promptly called her father and they went to the police and reported the incident. The Chief of Police stated that he apprehended the three assailants who admitted to being in the house with Arlester but denied the specific charge; that appellant admitted to having the razor in front of Arlester and that he attempted to force her to carnally know one of them. The razor was later recovered on information given by appellant. The doctor testified that he examined Arlester and detailed certain evidence to support the charge of carnal knowledge.

Arkansas Statutes § 41-3406 provides: "Every person convicted of carnally knowing, or abusing unlawfully, any female person under the age of sixteen years, shall be imprisoned in the penitentiary for a period of not less than (1) year nor more than twenty-one (21) years." Also there is other testimony, as indicated above to corroborate Arlester's story, however, since she was not an accomplice, no such corroboration was necessary. See *Bond* v. *State,* 63 Ark. 504, 39 S. W. 554; *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813; and *Clack* v. *State,* 213 Ark. 652, 212 S. W. 2d 20. Arkansas Statutes § 41-118 provides that: "The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such."

It is apparent from the above, therefore, that there is substantial evidence in the record to support the jury verdict. Especially is this true since it is our duty to view the evidence in the light most favorable to the State. See *Daniels* v. *State,* 182 Ark. 564, 32 S. W. 2d 169; *West* v. *State,* 196 Ark. 763, 120 S. W. 2d 26; *Brown* v. *State,* 203 Ark. 109, 155 S. W. 2d 722; and *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400.

Appellant argues several assignments of error based on certain statements made by the trial judge concerning the credibility of witnesses; on the Judge's action in sustaining the State's objection to a question asked the

prosecuting witness by appellant and on the admission of answers to several questions. We will not, however, consider the merits of these assignments for the reason that no proper objections and exceptions were made in these particular instances. See: *McKinley* v. *Broom,* 94 Ark. 147, 126 S. W. 391 and *Hicks* v. *State,* 225 Ark. 916, 287 S. W. 2d 12.

On cross-examination of the prosecuting witness the defendant asked her this question: "Did you have any trouble with your sisters because they were objecting to you running around and leaving home and having the police to look you up?" The objection by the State was sustained by the Court and this is assigned as error. Clearly the Court was right. Not only did this question call for a conclusion but it was immaterial because of the age of Arlester. On direct examination the State asked one of its witnesses this question: "Q. In your conversation with the prosecutrix did you learn the identity of anybody you later picked up?" In response to appellant's objection to the question the Court stated: "He (the witness) can say whether or not she described some people and whether or not he made an investigation." This did not constitute reversible error. See *Trotter* v. *State,* 215 Ark. 121, 219 S. W. 2d 636, where the Court in a similar situation stated: "The statement merely serves to explain why the policeman went to Mitchell's truck." The evidence elicited from the witness was not only not prejudicial to the rights of appellant but merely sought an explanation of the officer's actions, as was sanctioned in *Amos* v. *State,* 209 Ark. 55, 189 S. W. 2d 611. For the same reasons it was not error for the trial court to admit into evidence the following question and answer: "Q. From the conversation with the little girl did you (the officer) later pick up somebody based on what she had told you? A. Yes, sir, I did." Upon objection the Court said: "He can state what information he got from her (prosecutrix) and whether or not he acted on that information and what he did." This was not error.

The officer, Lammers, was allowed over the objections of the defendant to testify that appellant told him that he told the prosecuting witness she was going to have intercourse with one of them and that he had a razor and had it up in front of her. This was admissible as an admission tending to connect appellant with the crime for which he was charged. See *Dearen* v. *State,* 177 Ark. 448, 9 S. W. 2d 30.

After the State and the defense had closed their case and after each had so announced, appellant moved for a mistrial because of certain questions asked by the Prosecuting Attorney on the previous day during the trial. We have examined the questions complained of and find nothing in them to call for a mistrial. Moreover, an objection to be effective must be made at the first opportunity to do so, or appellant must move for exclusion. See *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46. At any rate, because of the delayed objection, the matter of granting a mistrial was in the sound discretion of the trial court and its action will not be reversed unless an abuse of that discretion is shown. See *Warren* v. *State,* 103 Ark. 165, 146 S. W. 477.

Appellant objected to several remarks made by the State's attorney in his closing argument, but we think any possible error was cured by the court's cautionary instructions to the jury. The Court instructed the jury not to consider certain statements the State's attorney had made. In the case of *Hicks* v. *State,* 193 Ark. 46, 97 S. W. 2d 900, where a similar situation arose this Court said: ". . . the Court excluded the statement of the Prosecuting Attorney made in argument and told the jury not to consider the other case in any manner whatsoever. No error was committed in refusing to declare a mistrial, as we are of the opinion that, assuming the remark made in argument was improper, the instruction of the court that jury was not to consider it in any manner whatsoever had the effect of removing any prejudice that might otherwise have been caused thereby."

We have carefully examined the statements made in this case by the State's attorney and we think any possible error was cured by the Court's instructions.

Finally, appellant argues that the cause should be reversed because of the alleged error committed by the trial court in refusing to give appellant's Requested Instruction No. 1 which reads as follows: "Even if you should find one of the defendants had, on some prior occasion to that mentioned in the information as having occurred March 23, 1959, had intercourse with the prosecutrix and that she was under 16 years of age, you would still not be justified in convicting for carnal abuse on any such prior occasion." We think this instruction was properly refused because our search of the record fails to reveal any basis for the giving of such instruction, and appellant has not called our attention to any. This Court has uniformly held that where the evidence does not support an instruction it should be refused. See *Sims* v. *State,* 171 Ark. 799, 286 S. W. 981; *Withem* v. *State,* 175 Ark. 453, 299 S. W. 739; *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1; and *Smith* v. *State,* 213 Ark. 463, 210 S. W. 2d 913.

Therefore, finding no reversible error the judgment of the trial court should be, and it is hereby, affirmed.

Affirmed.

NUTRENA MILLS, INC. *v.* MILLSAP.

5-2044 332 S. W. 2d 232

Opinion delivered February 22, 1960.

Jameson & Jameson, for appellant.

Crouch, Jones & Blair, for appellee.

SAM ROBINSON, Associate Justice. This suit was filed by appellant, Nutrena Mills, for $13,135.64, the alleged balance due on promissory notes in the sum of $39,136.05, given by appellees, Harold and Velma Millsap. Appellees filed a general denial and by way of cross-complaint alleged that Nutrena had breached an oral contract to furnish to appellees money to purchase feed for turkeys during the year 1959 and asked for judgment in the sum of $20,000 for the alleged breach of contract. The court directed a judgment for appellant (plaintiff) in the amount sued for, $13,135.64. The counterclaim alleged in the cross-complaint was submitted to the jury and there was a jury verdict thereon in the sum of $13,135.64, the exact amount of the judgment directed by the court on the complaint. In addition, Nutrena's motion for a reasonable attorney's fee was granted and appellant was allowed an attorney's fee of $1,209.91.

On direct appeal the principal point argued is that the court erred in not admitting in evidence a written contract between the parties dated *March 5, 1957.* The appellees' notes were executed in pursuance to a written contract between the parties of that date, whereby Nutrena agreed to furnish not exceeding $40,000 to the Millsaps with which to purchase feed for 10,000 turkeys

during the turkey growing season of 1957. Later, in December, 1957, the Millsaps applied to Nutrena for a loan of $87,960 to buy feed for 20,000 turkeys during the 1958 season. Nutrena refused to make the loan for the 1958 season. When this suit was filed the Millsaps' December, 1957, application was inadvertently attached as an exhibit to the complaint instead of the contract of *March 5, 1957*.

During the trial of the case Nutrena attempted to introduce as evidence the *March 5, 1957* contract. Appellees pleaded surprise and objected on the ground that the December, 1957 application was attached to the complaint and made a part thereof as constituting the written contract supporting the promissory notes. Over appellant's protest the court sustained appellees' objection to the introduction of the *March 5, 1957* contract.

Appellant contends that the March 5, 1957 contract is very material to the issues involved here, maintaining, among other things, that certain provisions of that contract go to show that no contemporaneous oral contract of any kind was entered into between the parties, and that the court's action in not admitting the *March, 1957* agreement in evidence constitutes reversible error. It does appear that the defendants were confused by the December, 1957 application of the Millsaps being attached to the complaint as the agreement sued on. Harold Millsap testified to the effect that agents for Nutrena, in prevailing upon him to enter into the *March 5, 1957* agreement, had contracted with him orally to the effect that if he suffered a loss the company would finance him for the following year. Thus, it can be seen that when Nutrena attached the December, 1957 application to the complaint as being the contract forming the basis of the suit, such application being for feed to be furnished in 1958, one could very easily be confused as to which year the alleged oral contract applied. On the other hand, the notes sued on were listed in an exhibit to the complaint and they are all dated during the 1957 growing season.

In the circumstances, we believe that the *March 5, 1957* contract should have been admitted in evidence,

The cause must therefore be reversed and upon a new trial the pleadings can be straightened out and the true issues resolved. *American National Ins. Co.* v. *Laird,* 228 Ark. 812, 311 S. W. 2d 313. Other issues are raised by direct and cross appeal, but they are not likely to appear in a new trial.

Reversed and remanded.

RAYBURN *v.* RAYBURN.

5-1995 332 S. W. 2d 230

Opinion delivered February 22, 1960.

George F. Edwardes, for appellant.

Shaver, Tackett & Jones, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from an award of custody of a minor child. Appellant, Harvey Elmo Rayburn, Jr., originally instituted this suit against appellee, Barbara Rayburn in Chancery Court seeking a divorce and the custody of his infant daughter.

At the time the complaint was filed appellant was serving in the armed forces of the United States and a portion of the case was tried while he was still in the service. The divorce feature of the case was eliminated because the parties became reconciled for a brief interlude. Appellant proceeded with the child custody feature of the case. It was developed that he had been honorably discharged from the Military Service and had a practical and adequate plan worked out whereby he could take care of, nurture and rear his infant child with the aid of an aunt, Mrs. Guy Benton, who is a highly respectable woman.

It was further developed by the uncontradicted evidence that the mother of this child had neglected it during illness; that her careless indifference toward the child had resulted in maternal criticism from her own family. She admitted that she had been arrested and confined in jail, and the entire record reflects that this mother was not only an indifferent and capricious mother but an incompetent one and totally unworthy of being placed in the custody and control of an infant daughter.

After the issues were so resolved a plea of intervention was filed by Ellis Wayne Lummus and Patsy Ruth Lummus, childless cousins of appellee. After a lengthy hearing, the Court awarded intervenors custody of the child. From such award comes this appeal.

On trial *de novo* we find the record reflects that on September 22, 1958, the Chancellor awarded temporary custody of the child to intervenors-appellees after finding the child was being neglected in the home of its grandmother (mother of appellee). This temporary placement was made while appellant was still in the armed forces of his country. Before the final hearing appellant was honorably discharged from the military service and had a practical and adequate plan worked out whereby he could take care of, nurture and rear his infant child with the aid of an aunt with whom he lived and who had been almost a mother to him. Her age is less than 50 and according to voluminous undisputed testimony she is a highly respectable Christian lady who

owns a fine home and is desirous of assisting appellant and his little daughter in any way she can.

Intervenors-appellees retained temporary custody of the child until the latter part of January 1959 at which time the Court awarded them permanent custody, stating:

"The Court chose to place the child in the care and custody of these intervenors because there was ample, wholesome evidence showing to the Court that the Lummus home was a good Christian home, that they regularly attend church, that they are a young married couple and have no children in their home, that they have built them a modern, suitable home in which to keep the child and rear her, and that Mr. Lummus has had a good job with the Red River Arsenal for several years; that it is a well-established home, that the child is adjusted and has shown marked improvement in her growth and health since she has been staying in said home, and that it is highly advantageous and to the best interests and welfare of the child that she be kept in this home permanently . . ."

It is true that intervenors-appellees performed their duties as temporary foster parents of this little girl in a commendable manner. From the record there can be no doubt but that they are a good, kind, young couple and more than deserving of the confidence the Chancellor placed in them. However, the record reflects that there is nothing to prevent this fine couple from having a family of their own in the future and they have demonstrated in this case that they are deserving of all the wonderful blessings that may come their way. They will make exceptional parents. Possibly for the immediate present this young couple can do more for the child involved in this litigation than her natural father, assisted by his blood aunt; and possibly the removal of this young child from their loving care may result in temporary adversity to both the child and the foster parents. If so, we can only conclude that the longer the separation is put off the harder it will be for all concerned. Certainly reasonable visitation will be extended by the father. The test as to custody between a natural parent and a third

person has never been based solely upon who can do the most for the child. If this were the rule, there would be nothing to prevent a wealthy couple from selecting from among the children of the poor a child and demanding custody based on the rule. Fortunately, for the sake of a harmonious society, such is not the law.

The record reflects that appellant is a clean, honorable young man devoted to his child, accustomed to labor and dedicated to duty. He doesn't drink or smoke and attends church regularly. Certainly there is nothing uncontradicted in the record to indicate that he is not a fit and proper person to have the custody of his child, his own flesh and blood. A natural parent's right to custody of a child is paramount to all others unless the parent is proved to be incompetent or unfit. See: *Cook* v. *Haynie,* 230 Ark. 174, 321 S. W. 2d 201; *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726; *Baker* v. *Durham,* 95 Ark. 355, 129 S. W. 789.

Therefore, the decree is reversed and the cause is remanded with directions to enter an order awarding the custody of Debbie Ann Rayburn to her father, the appellant herein.

DONAGHEY FOUNDATION *v.* LITTLE ROCK UNIVERSITY.

5-2105 332 S. W. 2d 497

Opinion delivered February 29, 1960.

Barber, Henry, Thurman & McCaskill, for Little Rock University; *Mehaffy, Smith & Williams,* By: *Robert V. Light,* for Little Rock School District, for appellant.

Moore, Chowning, Mitchell, Hamilton & Burrow, for appellee.

Carleton Harris, Chief Justice. This suit involves the construction of certain provisions of a deed in trust, executed by George W. Donaghey and his wife, on July 1, 1929, and marks the third time that an interpretation of the instrument has been before us. In *The Little Rock Junior College* v. *The Geo. W. Donaghey Foundation,* 224 Ark. 895, 277 S. W. 2d 79, we held that Little Rock Junior College, by expanding into a four year college, would not lose its identity as a beneficiary under the trust. The deed conveyed the property to certain individuals, as trustees, and provided:

"It is the object and purpose of this deed to convey the property herein described to said Trustees, their successors and assigns for the purpose of creating a fund or foundation to be used for the sole and exclusive benefit of the present Little Rock Junior College, an institution of learning in said city, at the present time operated under the management of the Board of School Directors of the Special School District of Little Rock, Arkansas, investing said Trustees with full discretion to select some other public school or schools in said city, operated by or under the management or supervision of the Board of School Directors of the said Special School District of Little Rock, and their successors in charge of the public schools in the said City of Little Rock, in the event the present Little Rock Junior College or its successors, should at any time cease to be operated by or under the supervision of the public school authorities in said city." In 1957, the school directors of the Little Rock School District decided upon a plan to surrender their directorship of the college corporation to a private board, which would have the duty of serving the college only. In *Greene* v. *Thompson*,[1] 227 Ark. 1089, 305 S. W. 2d 136, we held that the plan, as proposed, was a violation of the deed in trust, but further added, "Should the School Directors of the Little Rock School District for any reason refuse to operate or supervise the Little Rock Junior College, then the power of equity to prevent the loss to the innocent beneficiary might be brought into play; but that situation is not here presented." The situation referred to by this language has now come into existence. In the latter part of July, 1959, Articles 4-7 of the Constitution and Charter of Little Rock University were amended to provide that the management and administration of the affairs of the corporation would be vested in the directors of the Little Rock School District "so long as said Directors are willing to serve, and so long as the Directors collectively do actually undertake the duties of supervising and operating the corporation." A Board of Trustees, composed

[1] The proposed plan is set out fully in that opinion.

of nine members, was created, whose duties are defined as follows: "So long as the Board of Directors supervises and operates the affairs of the corporation, the sole function and authority of the Board of Trustees shall be to advise and counsel with the Board of Directors in all matters pertinent to the operation of the corporation." Further: "In the event that the Board of Directors should ever refuse to operate or supervise the corporation, then upon the Board of Trustees being notified of such refusal, or upon the Board of Trustees making a finding of the fact of such refusal, the Board of Trustees shall, and are hereby fully empowered to, assume all of the duties and powers of the governing Board of the corporation heretofore held and exercised by the Board of Directors." The instrument further provides that the Board of Trustees, under those circumstances, shall continue to exercise the powers previously performed by the Board of Directors until such time as the Board of Directors notify the Trustees that they are willing to resume the operation and supervision. Finally, if the Board of Directors shall refuse to operate and supervise the corporation for an uninterrupted period of twelve consecutive months "then the Board of Trustees shall be thereafter the permanent governing board of the Little Rock University. * * *" The Board of Trustees of the University were advised by the six members of the Little Rock School Board that "due to the heavy demands on our time made by the problems of school management of the Little Rock School District, we find it necessary to notify you that we now refuse to operate or supervise the Little Rock University." On August 10, 1959, a like notice was sent to the Board of Trustees of the George W. Donaghey Foundation. The Foundation, on August 14, 1959, directed a letter to Richard C. Butler, Chairman of the Board of Trustees of Little Rock University, stating as follows:

"Being mindful of our obligations as Trustees and the duties and responsibilities imposed upon us by law, and in view of the decision of the Supreme Court of Arkansas in the case of *Greene* v. *Thompson,* we have

decided that the only safe course for us to follow is to decline to pay Little Rock University the income derived from the properties owned by the George W. Donaghey Foundation."

Thereafter, suit was instituted by Little Rock University, and its Board of Trustees, seeking a declaratory judgment defining and clarifying powers, duties, obligations, and rights of respective parties. The Chancellor, *inter alia,* found:

"23. The Board of Directors of the Little Rock Special School District have acted in good faith in refusing to operate Little Rock University, but it would be highly inequitable and would violate the purpose and intent of the trustors to permit, as a result of their refusal, a diversion of Donaghey Trust funds from Little Rock University to a public school or schools operated, managed or supervised by said Board.

24. Little Rock University has ceased to be supervised and operated by the public school authorities of the Little Rock School District through the unilateral refusal of the members of the Board of said District to supervise or operate said University and the equitable powers of this Court should be exercised to prevent the loss and damage that will be sustained by Little Rock University, its faculty, and its student body through the deprivation of said income.

And in answer to the questions upon which the plaintiffs and the defendants seek a declaratory judgment, it is by the Court CONSIDERED, ORDERED, ADJUDGED AND DECREED THAT:

"(a) The George W. Donaghey Foundation and its Trustees may not withhold from Little Rock University the income from The George W. Donaghey Trust because of the refusal of the Board of Directors of Little Rock School District to supervise or operate Little Rock University.

(b) The Board of Directors of the Little Rock School District by refusing to supervise or operate Little Rock

University cannot force The George W. Donaghey Foundation and its Trustees to pay over the future income from said Trust to some public school or public schools of the City of Little Rock.

(c) No public school or public schools in the City of Little Rock have a paramount right to the income from The George W. Donaghey Trust over the claim of Little Rock University thereto, because of the refusal of the Board of Directors of the Little Rock School District to supervise or operate said University, but on the contrary the Little Rock University has a paramount right to such income."

From such decree, the Foundation brings this appeal, and the Little Rock School District appeals from the finding of subsection (c).

Unquestionably, and this is admitted by all parties, Governor Donaghey's prime objective in creating the trust was to aid the cause of higher education in Greater Little Rock. This is well shown in his *Autobiography* and *Homespun Philosophy,* which are discussed in *Little Rock Junior College* v. *The Geo. W. Donaghey Foundation, supra.* A detailed discussion of his intent is therefore unnecessary, but we quote a few excerpts as a means of emphasizing the Governor's strong views. From *Homespun Philosophy*:

"I wonder how many of our citizens have made an estimate of what higher education has cost Greater Little Rock during the last fifty years. That is to say, how much actual cash has been sent out of the city to pay for it, leaving out the questions of the thousands of poor boys and girls who are unable to foot the expense of going away from home to college. Suppose that we say that Little Rock has, during the past fifty years, sent an average of 200 boys and girls a year away to college, which would seem to be a reasonable approximate. Then suppose we estimate that the cash outlay has been an average of a thousand dollars per annum. It is then but a simple calculation to find that the cost would

amount to the stupendous sum of 10 millions of dollars, ten millions of dollars wasted on the winds of negligence; for the neglect of not building an institution of higher education at home and thereby having ten millions of dollars now invested in Little Rock in one of the best universities in all of the South. * * *

Boys and girls educated at home not only are in the majority and stand together in molding the opinions of the State, but also are just about as well equipped for the affairs of life as those sent away to school. In other words, sending a child to Yale or Harvard or any other college does little more to educate him than sending him to a home institution. Textbooks and lectures by trained instructors can be studied and heard at one place as well as another."

From the *Autobiography*:

"After frequent consultations with the school authorities and trustees I was convinced that no greater field for educational development exists anywhere than can be found right here in Little Rock where hundreds of boys and girls after graduating from high school are unable to advance further through a course in college."

Originally, the Little Rock Junior College used the Little Rock Public School buildings at a time when those buildings were not being used for common school education. Teachers of the Little Rock public schools were used by the college. In other words, the operation of the college was a part-time operation, and it is understandable that the Governor foresaw no future difficulty in the college being operated by the School Directors of the Special School District of Little Rock, who were operating the school at the time of the conveyance. In the meantime, however, the situation has undergone drastic change. For instance, in 1929, there were twenty-seven schools in the Little Rock Public School System. By 1959, this number had increased to thirty-six. The faculty more than doubled, and the budget was nearly six times greater. In addition, divers problems have

arisen in recent years, not present in 1929, such problems requiring a large expenditure of time by the School Directors. The college itself has likewise steadily grown. From 421 students in 1929, the enrollment has increased to 1,485. Compared to a 1929-30 budget of $36,874.33, we find that the present budget calls for $543,276, of which the University is dependent upon the Foundation for $90,000. It is apparent that Governor Donaghey could not, in 1929, have foreseen the conditions that make it almost impossible for the Little Rock School Board to operate the college. It is likewise apparent from his writings, that the growth of Little Rock University would have filled his heart and mind with pride and happiness—the happiness that comes to one when a dream is fulfilled. It is inconceivable that Governor Donaghey would have abandoned his fond expectations for a fine institution of higher learning in Little Rock simply because the school, without any fault of its personnel, could no longer be operated under public authority. Will equity permit an innocent beneficiary to suffer under such circumstances? The answer has been given many times. In *1 Restatement of Trusts* 2d, § 167, this power is discussed under "Change of Circumstances", at page 351:

"(1) The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust."

In 89 *C. J. S. Trust,* § 87e (2), it is stated at page 895:

"In an emergency, or in circumstances not anticipated by the settlor, an equity court may, in order to preserve the trust or effectuate its purpose, authorize the trustee to deviate from its terms. * * * A court of equity will put itself in the trustor's place and en-

deavor to authorize the trustee to deviate from the terms of the trust in a manner which the court believes the trustor would himself have authorized if he could have anticipated a necessity for subsequent alteration of his plan."

One of the best known cases dealing with the power of a court to alter administrative provisions in order to carry out the intent and purposes of the trustor in making the gift is *Girard College Trusteeship*,[2] 391 Pa. State Reports 434, 138 A. 2d 844. There, Stephen Girard of Philadelphia, in his will, provided for the devise and bequest of his entire residuary estate to "the Mayor, Aldermen, and Citizens of Philadelphia",[3] their successors and assigns, in trust, to erect a college for the benefit of certain orphan children. Certain conditions were then set forth, after which the instrument provided that if the city should knowingly and wilfully violate any of the conditions in the will, the remainder of the residue (except the income from certain real estate in Philadelphia) was to be given to the Commonwealth of Pennsylvania for purposes of internal navigation, and further, that if the Commonwealth failed to apply the bequest to the purposes mentioned, the said remainder was given to the United States of America for purposes of internal navigation. Following the decision of the United States Supreme Court, mentioned in footnote 2, the Orphans' Court of Philadelphia County entered decrees removing the Board of Directors of City Trusts as trustee of Girard College, and substituted for that purpose thirteen private citizens, since the original board was unable to comply with the directives contained in the trust provisions. This action

[2] This is the second case involving the same subject matter. In the first case, found in 386 Pa. 548, the judgment of the Supreme Court of Pennsylvania was reversed by the Supreme Court of the United States. See *Commonwealth of Pa.* v. *City of Phila.*, 353 U.S. 230.

[3] This was the corporate name of the city under Act of March 11, 1789. Subsequently, the title was changed to "The City of Philadelphia". Actually, the college had been administered by the Board of Directors of City Trusts of Philadelphia, statutorily created by an act of June 30, 1869, which empowered the Board to accept and execute charitable trusts bequeathed to the city of Philadelphia as trustee.

was upheld by the Pennsylvania Supreme Court, which, *inter alia,* stated:

"In all gifts for charitable uses the law makes a very clear distinction between those parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration. And this distinction is quite inevitable, for it is founded in the nature of things. We must observe this distinction in studying Mr. Girard's will, otherwise we run the risk of inverting the natural order of things by subordinating principles to form, the purpose to its means, the actual and executed gift for a known purpose to the prescribed or vaticinated modes of administering it, that are intended for adaptation to an unknown future, and of thus making the chief purpose of the gift dependent on the very often unwise directions prescribed for its future security and efficiency."

We agree with this logic; otherwise, the "tail would be wagging the dog."

A study of that Court's opinion, together with a vigorous dissent by Mr. Justice MUSMANNO, reveals that the Pennsylvania legislature, long years ago, enacted legislation authorizing the city of Philadelphia to provide for "the election or appointment of such officers and agents as they deem essential to the due execution of the duties and trusts enjoined and created by the will of Stephen Girard," and further passed an act constituting Philadelphia the guardian of the person and property of every child admitted to Girard College. Forty-eight ordinances dealing with the college were passed by the City Council, and other legislation was enacted relative to the institution. Legislators visited and inspected the college; its accounts were open at all times to state inspection; the city of Philadelphia was required to submit reports on the college to the legislature; the treasurer of the city of Philadelphia handled the funds of the Girard estate; and the city controller audited the accounts. From the Court's action in affirming the decree, an appeal was taken to the Supreme Court of the

United States, which, on June 30, 1958, issued the following *Per Curiam*: "The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereupon the appeal was taken as a petition for writ of certiorari, certiorari is denied." 357 U. S. 570, 2 L. ed. 2d 1546, 78 S. Ct. 1383.

At once, a marked difference in the *Girard* case, and the case presently before us is noted. There, public officials of the City of Philadelphia were named as the actual trustees, and were charged with the duty of administering the trust. Here, only private citizens, or at least citizens acting in their private capacities, were named as trustees. Also, the *Girard* trustees were removed by court order, while in the case before us, the Board charged with operating the college has refused to perform that function. These facts, of course, make the position of Little Rock University even stronger in this litigation. Moreover, no legislative supervision has been afforded; nor has any public money been expended. Little Rock University is entirely a private institution, as that term is generally used.

In the *Girard* case, contingent beneficiaries existed, but the courts did not permit the primary beneficiary to suffer, even though this was true. We are likewise of the view that Governor Donaghey's primary beneficiary should not suffer loss, even though contingent beneficiaries are provided.

Governor Donaghey's writings made clear that he and his wife were interested in aiding the establishment of an institution of higher learning in this locality, designed primarily to accommodate prospective students from this area. Little Rock University presently qualifies to receive this aid. The trustees of the Donaghey Foundation, through counsel, have already stated, in open Court, their desire and intention to continue the payments to the University if such be approved by this Court. This course being adopted, the college is entitled to continue to receive the income until such time as there is a change of circumstances which would require the

trustees to withdraw financial support from the University, *i.e.,* the trustees cannot capriciously or abritrarily withdraw this aid. We do not define the term, "change of circumstances", for many unforeseen situations might arise, *viz.,* a permanent closing of the college—the relocation of the college some distance away, or other change of similar moment. In such event, the trustees, in their discretion, could properly designate another beneficiary, eligible under the terms of the instrument. Since there is a possibility that such contingencies could arise, we modify the holding of the Chancery Court, wherein the court held that "Little Rock University has a paramount right to such income." With such modification, subsection (c) of the decree reads:

"No public school or public schools in the City of Little Rock have a paramount right to the income from The George Donaghey Trust over the claim of Little Rock University thereto, because of the refusal of the Board of Directors of the Little Rock School District to supervise or operate said University."

So modified, the decree is affirmed.

SOUTHERN FARM BUREAU CASUALTY INSURANCE CO. *v.* REED.

5-2047 332 S. W. 2d 615

Opinion delivered February 29, 1960.

[Rehearing denied March 28, 1960]

Hardin, Barton, Hardin & Garner, for appellant.

John Wm. Murphy and *Hubert L. Burch,* for appellee.

J. Seaborn Holt, Associate Justice. On or about June 2, 1956, appellant, Southern Farm Bureau Casualty Insurance Company, issued to Dennis Reed its policy of automobile insurance on Reed's 1951 Chevrolet automobile. The term of the policy was from June 2, 1956 to December 2, 1956, and for additional six calendar month periods thereafter as agreed to. This policy, says appellant, "Insured a 1951 Chevrolet for everything except what is commonly known as collision coverage." July 2, 1956, what is called a serviceman's endorsement was attached to the policy and this endorsement was accepted by Reed on July 23, 1956, and contained the following provision: "As a part of the consideration for the issuance or continuance of this policy, in addition to the premium charged, it is hereby understood and agreed that the policy to which this endorsement is attached shall not be in force and effect while any motor vehicle which would be covered by this policy is being operated by any driver other than the named insured or member of his family.

This endorsement shall not in any way penalize or affect the interest of a lienholder under any mortgage or lien on the motor vehicle described in the policy providing the company has prior notice of such interest.

All provisions of said policy in conflict with this endorsement are hereby modified to conform to this endorsement. All other provisions shall remain the same. ACCEPTED /s/ Dennis F. Reed"

About March 22, 1957, Reed traded his 1951 automobile for a 1957 model Chevrolet, and on being informed that he had traded automobiles and wanted collision and comprehensive coverage, appellant sent him another endorsement which was made a part of the policy, was accepted by Reed and for which he paid $2.85 in addition to his original premium. The record reflects that Reed, in order to finance the balance due on the 1957 Chevrolet, executed on March 22, 1957, his note for $600.00 to the Bank of Lincoln (Arkansas) and as security, executed a chattel mortgage to the Bank on the 1957 model automobile. The Bank was shown on the insurance policy as a lienholder. This note and mortgage were assigned to appellant on January 15, 1958. September 4, 1957, appellee, Reed, while a member of the U. S. Air Force and stationed at George Air Force Base in California, was seriously injured in an accident and the automobile was almost completely wrecked. Thereafter, Reed demanded payment for his automobile damages from appellant, insurance company, which was refused. Reed then filed the present suit alleging that the policy had been issued and delivered to him before his loss on September 4, 1957; that he had fully complied with all the terms of the policy and prayed for damages in the amount of $2,650.00, together with a reasonable attorney's fee. Appellant answered with a general denial and in a cross complaint, after setting out the assignment of the note and mortgage by the Bank of Lincoln to appellant, alleged that appellant succeeded to all the rights of said Bank and therefore was entitled to a judgment of $650.15.

On a trial before the court sitting as a jury, there was a judgment in favor of appellee on a finding by the court that the endorsement on the policy, which modified the original terms of the policy, was without consideration and void. The judgment further recites that: "The Court finds that the value of the vehicle immediately before the collision, as stipulated by the parties, was $2,075.00, and that the plaintiff received $250.00 as salvage from the sale of the vehicle after the collision. The Court finds that the defendant paid a mortgage of plaintiff on said vehicle to the Bank of Lincoln in the sum of $650.12 and that the defendant should receive credit for $650.12 paid to the Bank of Lincoln, $250.00 received for salvage of the vehicle, and $50.00 deductible under the provisions of said policy, and that plaintiff should recover from the defendant the sum of $1,124.85."

While the trial court may have erroneously based its finding and judgment on the ground that the endorsement was void, we hold that the judgment, nevertheless, should be affirmed for the reason that the facts would support a finding that appellee, Reed, was in fact driving his automobile at the time of the mishap or accident and therefore the endorsement could not affect his claim for damages. Our rule of long standing in this State is that we will not disturb a correct decision and judgment of a trial court though based on a wrong or insufficient ground. *Hays* v. *Pope County,* 7 Ark. 238,—"In revising the judgments of inferior tribunals, this court will not regard the particular reasons upon which the judgment below may have been based, but will inspect the entire face of the proceedings as presented by the transcript, and quash or affirm according to the circumstances of the case." *Reese* v. *Cannon,* 73 Ark. 604, 84 S. W. 793: "A judgment may be correct, though based on mistaken reasoning; and, if there be no error in the finding of facts, such a judgment may well stand. * * * The appellate court looks to the correctness of the judgment in review, and not to the reasons given for the judgment." *Carolus* v. *Arkansas Light & Power Company,* 164 Ark.

507, 262 S. W. 330: "This court will not reverse a correct ruling of the trial court, although an erroneous reason may be given for such ruling," and again in *State, Ex Rel. Attorney General,* v. *Gus Blass Company,* 193 Ark. 1159, 105 S. W. 2d 853, we said: "Moreover, where the decision of the trial court is correct, it will be sustained when supported by principles of law thought by the trial court not to obtain."

Reed testified that he was driving his car the last time he remembered anything about the evening on which the wreck occurred: "Q. At the last you remember, who was driving your vehicle? A. I was." As we read the record before us, appellant offered no competent evidence to rebut Reed's tetimony. Appellant offered the testimony of California State Trooper Sanders who did not see the accident and had not discussed it with anyone in the presence of Reed due to Reed's physical condition. Appellant further offered a police report made by Sanders, who, as indicated, did not see the accident. Appellant also offered the testimony of Lt. Osborne in which he stated: "1. From your own observation, could you state on oath who was driving the automobile at the time of the accident? A. No" There was also offered a report of certain Air Police at the Air Base who were not witnesses and, therefore, could not be cross examined. All of this testimony was hearsay and inadmissible. While the burden of proof was on appellee, Reed, to make out his case by preponderance of the testimony, he has done so by what amounts to undisputed testimony. Reed made a *prima facie* case against the insurance company (appellant) when he proved his insurance contract with appellant and the damages to his automobile. The burden then shifted to appellant to present proof in rebuttal which it has totally failed to do. *Life & Casualty Insurance Company of Tennessee* v. *Barefield,* 187 Ark. 676, 61 S. W. 2d 698: "The rule appears to be that, when proof is made of damage apparently within a policy of insurance, the burden is on the insurer to show that the injury or damage

was caused by an event from the occurrence of which the insured had exempted itself from liability." When, as here, the case is submitted to the trial judge, his finding of fact is as conclusive as the finding of a jury.

The trial court properly disallowed an attorney's fee under § 66-514 Ark. Stats., for the reason that appellee failed to recover the amount for which he sued. We held in *Service Fire Insurance Company* v. *Horn,* 202 Ark. 300, 150 S. W. 2d 53, "Where the plaintiff, in an action on an insurance policy, demands more than he recovers, he is not entitled to recover penalty and attorney's fee."

Finding no error, the judgment is affirmed.

RIVERSIDE INSURANCE CO. OF AMERICA *v.* MCGLOTHIN.

5-2093 332 S. W. 2d 486

Opinion delivered February 29, 1960.

Pope, Pratt & Shamburger, By: Richard L. Pratt, for appellant.

Griffin Smith, for appellee.

ED. F. MCFADDIN, Associate Justice. The question presented is, whether the insurance company, pleading an exception clause, has proved facts, in support of the exception, with such sufficiency as to entitle the insurance company to an instructed verdict. The Lower

Court answered the question in the negative and rendered judgment in favor of the insured, McGlothin (plaintiff below), against the insurer, Riverside Insurance Company (defendant below), for $300.00 plus interest, penalty, and attorneys' fees. Such judgment is challenged by this appeal.

Riverside[1] issued to McGlothin an insurance policy which insured the automobile and welding unit of McGlothin against loss or damage by fire. In the exclusion clause the policy provided: "This policy does not apply . . . (under fire coverage) . . . to any damage to the automobile which is due and confined to . . . mechanical or electrical breakdown or failure, . . . unless such damage is the result of other loss covered by this policy." The automobile was equipped with a welding unit, which had a gasoline driven machine and generator. While the policy was in force, the insured discovered flames coming from the welding unit. Prompt action extinguished the fire; but there was damage, which occasioned this litigation. The insured testified that he did not know what caused the fire. The welding unit and generator was taken to an electrical company for purposes of repair, and the owner of the electrical company testified for the plaintiff that the inner poles of the generator were burned. On cross examination this occurred:

"Q. Mr. Brown, you say the poles were burned. Actually in this motor, constituting the motor are four magnetic fields setting around the generator proper?

A. Right . . .

Q. What was the cause of this fire?

A. Well, the only cause I could find would be a short in the winding.

Q. Electrical short in the wiring and setting of the fire. If the electrical short had occurred in the generator proper you know where the short was?

[1] There was a floating policy issued by another insurance company, but that policy was only for damages in excess of the Riverside coverage and the liability of the other insurance company passed out of the case.

A. Not exactly because I never tore it down to check it . . .

Q. Now you don't know whether the short might have been in the armature or in the fields?

A. I wouldn't know until I tore into it and find out . . .

Q. The electrical short caused the main part of the damage?

A. Right."

Riverside called no witnesses; and the Court rendered judgment for the plaintiff. On appeal, Riverside urges one point: "The judgment is contrary to the law and the facts". The case was tried before the Court, sitting as a jury, so the point urged by Riverside is equivalent to saying that an instructed verdict should have been declared for the defendant.

The rule is well established in this jurisdiction that when an insurance company claims that it is not liable on its policy because of some exception or exclusion against coverage, then the burden is on the insurance company, not only to plead the exception, but also to prove facts that bring it within the exception. In *U. S. Fire Ins. Co.* v. *Universal Broadcasting Corp.,* 205 Ark. 115, 168 S. W. 2d 191, we quoted from *Life & Cas. Ins. Co.* v. *Barefield,* 187 Ark. 676, 61 S. W. 2d 698:

" 'The rule appears to be that, when proof is made of damage apparently within a policy of insurance, the burden is on the insurer to show that the injury or damage was caused by an event from the occurrence of which the insurer had exempted itself from liability.' "

In the case at bar, Riverside pleaded the exception as previously copied; and enough testimony was introduced to make a fact question as to whether the fire loss was within the exception. But the insurance company, in claiming that it was entitled to a directed verdict—as it here does—had the additional burden of establishing facts within the exception with such complete

definiteness that there was no fact question for decision. The insured proved the fire and testified that he did not know what caused it. The witness Brown stated that he did not dismantle the generator to check for the cause of the fire; and no testimony was offered to show that a fire did not cause the generator to develop a short.

To summarize, the exception was not proved by the insurance company with sufficient certainty to require a fact finding in its favor. Therefore, the Circuit Judge, sitting as a jury, had the right to find that the insurance company had failed to sufficiently prove the pleaded exception.

Affirmed.

ISING *v.* WARD.

5-2042

Opinion delivered February 29, 1960

Sexton, Holland & Morgan and *White & Martin,* for appellant.

Warner, Warner & Ragon, Ralph W. Robinson, for appellee.

George Rose Smith, J. The appellant, Lois Ward Ising, and the appellee, Harry Ward, were formerly husband and wife and are the parents of a three-year-old daughter, whose custody was awarded to the mother. This is an application by Mrs. Ising for permission to take the child to Oklahoma, where Mr. and Mrs. Ising wish to establish their home. The chancellor denied the application upon the sole ground that the Isings' new home, which is situated on a steep hill overlooking a lake, would not be physically safe for a small child. We have concluded that the application should have been granted.

At the outset we recognize, as did the chancellor, that the parent having custody of a child is ordinarily entitled to move to another state and to take the child to the new domicile. As we said in a similar case: "We do not think that the Chancellor erred in refusing to require appellee [the mother] to remain somewhat a prisoner in Arkansas because of the unfortunate divorce proceeding." *Antonacci* v. *Antonacci,* 222 Ark. 881, 263 S. W. 2d 484; see also *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8; *Nutt* v. *Nutt,* 214 Ark. 24, 214 S. W. 2d 366; *Langston* v. *Horton,* 229 Ark. 708, 317 S. W. 2d 821. In our earlier cases the objection to an application of this kind has usually sprung from the loss of visitation rights that the protesting parent would suffer upon the child's departure. That point is not involved here, for the proposed home in Oklahoma is not so far from Fort Smith as to interfere with the appellee's decreed right to have his daughter with him every other week end.

After having been married about eight years the Wards were divorced on March 27, 1959. Ward was then 67 years old; his wife was 27. Mrs. Ward received a property settlement and was awarded the custody of her infant daughter. There does not seem to have ever

been any serious question about this mother's fitness to have the care of her child. On this issue the record is replete with evidence indicating that the award of custody was correct; indeed, Ward candidly admits that his former wife is a devoted mother who takes excellent care of the little girl.

On June 12, some two and a half months after the entry of the divorce decree, Mrs. Ward married Orman Ising, aged 32, who was then living in Fort Smith. Ising testified that he and a partner had invested about $60,000 in the purchase of a boating and fishing dock on Lake Tenkiller in Tenkiller State Park, Oklahoma, which is about fifty miles from Fort Smith. Ising and his partner devote their time to the enterprise, which is said to be profitable.

On June 23 Mrs. Ising filed a petition asking that she be permitted to take her child to a home that her husband had rented in Sallisaw, Oklahoma. At the first hearing upon this petition the chancellor found, with justification, that the Sallisaw rental arrangement had not been made in good faith and was actually a subterfuge. Upon this finding the court refused to approve the petition, but the matter was continued to allow the Isings to show that a suitable home would be provided in Oklahoma.

At the two subsequent hearings Mrs. Ising abandoned the Sallisaw proposal and sought the court's permission to move to a trailer located near the dock at Tenkiller Lake. This mobile home, which Ising bought new for $4,675, comprises a living room, kitchen, bathroom, and three bedrooms. It is equipped with electricity and running water. A social worker in the child welfare division of Sebastian county inspected the trailer and, after describing it in detail, testified that it was a fit, proper, and safe place for a three-year-old child. We find no reason to doubt that the trailer itself would be a suitable, comfortable home for the Isings and the child.

The chancellor's disapproval was based solely upon the trailer's location. It sits on a hill or ridge, from

fifty to a hundred yards from the edge of the lake. Interested witnesses describe the descent to the water as a bluff or precipice, but we regard this as an exaggeration. Mabry, the park superintendent who lives within a hundred yards, testified that there is a drop of six or seven feet at the top and then a gradual slope down to the lake. This witness, who has children aged five and two, says that the slope in front of his own home is steeper than that in front of the Ising trailer and that he has not erected a fence along the edge, as Ising has done.

We are unable to agree with the appellee's insistence that the slope of the ridge and the nearness of the deep lake present such hazards to a three-year-old child that the appellant's petition should be denied. If one is inclined to be fearful the threat of danger can be discovered everywhere, in the crowded streets of the city or, as here, in the comparative seclusion of the countryside. We know, however, that in Arkansas and throughout America thousands and thousands of children, representing many generations, have grown up from infancy next to rivers, to lakes, to mountain slopes, and to countless other natural conditions fully as hazardous as those existing near Tenkiller Lake. An attempt to shelter a growing child from every possible danger is manifestly futile, and it is certain that complete security cannot be achieved by means of a court decree. In practice the responsibility for choosing a child's environment must ordinarily rest upon the parent having custody of the child. The normal love of a parent, especially of a mother, for her child provides the best possible assurance that the infant will not be needlessly exposed to danger. We find in this record no proof to persuade us that the appellant cannot be relied upon to look after her daughter in the new home that she and her husband wish to occupy.

The decree is reversed and the cause remanded for the entry of a decree granting the appellant's petition. It will be appropriate for the chancellor to require a bond from the appellant, within her means, to protect the appellee's rights of visitation, and the burden of pro-

viding the child's transportation to and from her visits to Fort Smith should be fixed by the court's decree.

HARRIS, C. J., and MCFADDIN and JOHNSON, JJ., dissent.

ED. F. MCFADDIN, Associate Justice, (Dissenting). In deciding the present case the Chancellor remarked that these child custody cases are "the toughest cases we have to decide"; and I thoroughly agree with that remark. At the conclusion of the evidence, the Chancellor delivered an oral opinion, which occupies six pages in the transcript, and shows rather clearly how the appearance of the witnesses had impressed the Chancellor. I am unwilling to reverse his opinion in a close case like this one, when I see only the printed page.

Remember: no one is trying to take the custody of the child from the mother. The father of the child had made a substantial settlement on the mother so she could have a nice home in Fort Smith and have the child reared in a good community, with access to churches, schools, playmates, and doctors. But the mother married a younger man, and now wants to be with the new husband, which necessitates taking the child to live in a trailer on the banks of a lake, miles from churches, schools, playmates, or doctors.

The mother's first duty is to her child. The mother should stay in Fort Smith and raise her child under proper surroundings, and cease living in a trailer on the banks of a lake in order to be near her new husband. The obligations of her parenthood should be held to impose a superior duty on the mother. I would affirm the Chancery decree, which prevented the mother from removing the child from Arkansas.

5-1937 332 S. W. 2d 488

Opinion delivered February 29, 1960.

[redacted]

Norton & Norton, for appellant.

Bruce Bennett, Atty. General, By: *Bill J. Davis,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. One John Puckett was charged in the St. Francis Circuit Court with the crimes of forgery and uttering. On January 27, 1958, appellant herein made Puckett's bond. On February 11th the felony information was amended charging additional offenses to bring the case within the Habitual Criminal Act. The case was set to be tried on February 24th.

On February 19th Hood wrote to T. E. Christopher, Circuit Clerk at Forrest City, as follows: "As per our conversation of thirty minutes ago, I am enclosing a letter from the State Hospital stating that Johnny Puckett is a patient at this time. Enclosed is a stamped, addressed envelope which I would appreciate very much if you would use and advise me the date to which his trial is passed." Enclosed with Hood's letter was a letter from the State Hospital stating that Puckett was admitted on February 18th under a voluntary committment under the provisions of Act 411 and was at that time a patient in the hospital.

On February 20th Fletcher Long, Deputy Prosecuting Attorney, wrote to Hood:

"Your letter and enclosure, mailed to Mr. T. E. Christopher, Clerk, has been referred to me.

"You are informed that from the State's point of view, there is nothing for the Court to consider at the present time but the question of forfeiting your bond on Monday, February 24th.

"If a motion for continuance is framed and presented because of the contents of the letter from the State Hospital, the State will perhaps concede the point. I suggest that you consult your attorney or Puckett's Little Rock attorney in this matter, inasmuch as we are informed that Mr. West, local counsel for Puckett, has relieved himself of further responsibility in the matter.

"In the event that the motion is properly presented, and is granted, you are hereby informed that we will make application for a much larger bond, on the basis of Puckett's past record, and the more severe punishment which could result from our amendment to bring this case under the habitual criminal statute."

Evidently no formal application was made to the court for a continuance, and on February 28th the court entered an order forfeiting the bond. Later Hood stated that he thought the case had been passed and it was not until April that he learned that the bond had been forfeited.

On April 18, 1958, Hood filed a petition to set aside the bond forfeiture, which was overruled by the court on the same date.

On April 21, 1958, summons was issued for Hood directing him to appear on April 28th and show cause why judgment should not be rendered on the bond forfeiture.

On August 16th and prior thereto, motions to quash and demurrers previously filed by Hood were overruled.

On August 16th Hood filed an answer to the summons to show cause why judgment should not be rendered. Among other things the answer alleges:

That on February 24th when the case was to be tried, Puckett was insane and confined in the Arkansas State Hospital and was unable to come to court.

That Puckett is insane and is still confined to the State Hospital and has been committed to the hospital by the Pulaski Circuit Court.

That an alias warrant was issued by the St. Francis County Circuit Court on February 24th at the time Puckett failed to appear for trial; that this warrant is in the hands of the Sheriff of Pulaski County and will be executed promptly in the event Puckett is released from the State Hospital and he will be brought to St. Francis County for trial.

Appellant asked for a jury trial, but his motion was overruled, and on February 6, 1959, without hearing any evidence, there was entered a summary judgment against Hood. In his objections to the rendition of the judgment, Hood's attorneys clearly stated that on the date set for trial, February 24, 1958, Puckett was confined in the State Hospital for Nervous Diseases and since that time he has been adjudged insane and duly committed by the Pulaski Circuit Court; that a warrant has been issued by the St. Francis Circuit Court and that such warrant is in the hands of the Sheriff of Pulaski County and will be executed if Puckett is released from the State Hospital and that Puckett will be returned to St. Francis County.

The great weight of authority is to the effect that the bondsman will be exonerated from liability on the bail bond where the principal is confined because of insanity. "The general rule in criminal cases is that the sureties may be exonerated from liability for failure to produce the principal at the trial, or a forfeiture may be set aside, where such failure is due to the fact that the principal is in confinement because of his insanity." 6 Am. Jur. Rev. p. 135.

"Ordinarily, insanity of the principal is a good defense for nonperformance of the obligation of the bond." 2 R. C. L. p. 55, par. 67.

There is an annotation on the subject in 7 A. L. R. p. 394. There the annotator says: "In criminal cases, it seems to be well established that bail will be exonerated from liability for failure to produce the principal at the trial when such failure is due to the fact that the principal is in confinement because of his insanity" (citing cases).

In *Briggs* v. *Com.* (1919), 185 Ky. 340, 214 S. W. 975, the court said: "In this state, where the principal is actually confined in an insane asylum, being thus in the custody of the state, and beyond the power of the sureties to produce him, the latter is discharged."

In our cases of *Adler* v. *State,* 35 Ark. 517, the defendant had been taken out of the state and confined in a mental institution in New York. It was held that the bondsmen were liable, but that case is clearly distinguishable from the case at bar. In the *Adler* case there was no offer to ever produce Kahn at any term of court, and furthermore, it appeared that the bondsmen deliberately sent the principal to New York out of the jurisdiction of the courts of this state, and this Court said: "The inference from the plea is, that they [the bondsmen] assumed the responsibility of sending him there, without consulting the court, or permitted others to do so. If, by the law and regulations of the asylum, he was detained there, as alleged, and out of the process of the court, it was not the fault of the state, but the result of their sending him there, or permitting him to be sent. . . . It would be unsafe to the public to permit the bail of a person charged with murder to take it upon themselves to send him out of the state, or permit him to be sent, to be treated for insanity, or any other disease, and then plead his absence in discharge of the bail-bond."

In referring to the *Adler* case the annotator in 7 A. L. R. p. 395 says: "It was held no defense to the sureties on the bond that the accused was confined in an insane asylum in another state, and so was unable to attend his trial, *where it appeared that the sureties themselves had assumed the responsibility of sending the*

accused there, without consulting the court or permitting others to do so.''

In the case at bar it does not appear that Hood had anything whatever to do with Puckett's being admitted to the State Hospital. There is no indication that Hood sent him to the State Hospital or approved of his being admitted to the State Hospital, and, furthermore, at no time has Puckett been beyond the process of the St. Francis Circuit Court. An alias warrant was isued by the court on February 24, 1958, and yet up until the time the judgment was rendered on the bond the warrant had not been served, although Puckett was still confined in the State Hospital. The trial was set for February 24th and Puckett did not appear; that is when the alias warrant was issued. Both the Clerk of the Court and the Prosecuting Attorney knew that Puckett was in the State Hospital. A warrant of arrest could have been executed and Puckett actually produced in court before the bond was ever ordered forfeited on February 28th; but this was not done.

The character of the plea of the bondsman in this case raises a question of fact that should be decided by a jury. In *Washington* v. *State of Mississippi,* 98 Miss. 150, 53 So. 416, the defense to the bond forfeiture was that the principal was dead. It was held that this was a question of fact that should be submitted to a jury. To the same effect is *Short, et al* v. *State,* 16 Tex. 44. See also *Bank of Eau Claire* v. *Reed,* 232 Ill. 238, 122 Am. St. Rep. 66, 108, and *Hollister* v. *U. S.,* 145 F. 773. In *State* v. *Sanders,* 153 N. C. 624, 69 S. W. 272, the court said: ''When the forfeiture of a recognizance is moved for, if all the matters are of record, the judge decides without the intervention of a jury. But when the answer raises an issue of fact, the defendant is entitled to have the matter passed upon by a jury'' (citing cases). Whether the nature of Puckett's confinement in the State Hospital was such as to relieve the bondsman from the bond forfeiture is a jury question.

Reversed and remanded.

CARLETON HARRIS, C. J., and ED. F. MCFADDIN and GEORGE ROSE SMITH, JJ., dissent.

CARLETON HARRIS, Chief Justice, dissenting. In my view, the judgment against Hood was properly rendered because the "offer of proof" submitted by appellant prior to the rendition of judgment, contained nothing that constituted a defense. Appellant offered to prove that "on or about February 18, 1958, Johnny Puckett was admitted to the State Hospital under the provisions of Section 13, Act 411, of 1955 (Ark. Stats. 83-713, supplement), and on the appearance day, February 24, 1958, he was still being held under the statute referred to at the State Hospital, and no written notice had been given by him or his counsel of his desire to leave." This section, *inter alia,* provides:

"Under such rules as it may prescribe the Commission or its authorized representative may receive as a patient for treatment, any alcoholic resident of this State against whom no criminal charges are pending, and who shall voluntarily apply for treatment, and may retain for not more than ninety (90) days and treat and restrain such person in the same manner as if committed by order of court, provided, however, that such person must be released within ten (10) days after receipt in writing of notice from such person (or counsel for such person) of his intention or desire to leave."

Puckett was admitted under this section, *not as an insane person,* and, of course, was not properly admitted because criminal charges were pending against him at the time (though this was unknown to the hospital authorities).

In the next paragraph (b), of his offer of proof, appellant states:

"On February 19, 1958, defendant Hood informed the Clerk of St. Francis County, that Puckett was in the State Hospital, and that for that reason Defendant Hood would not be able to produce him in Court on the appearance day, February 24, 1958; and Defendant Hood was then told by the Clerk that the case would be continued if Defendant Hood would furnish the Clerk with a letter from the State Hospital authorities stating that Puckett was a

patient at the State Hospital. Such a letter was furnished to the Clerk by Defendant Hood on February 20th, 1958, and Defendant Hood had no reason to suppose, until some time in April, 1958, that the case had not been continued in accordance with the Clerk's assurances to him."

The letter referred to simply certified that "Johnny D. Puckett was admitted to the State Hospital on February 18, 1958, on a voluntary commitment under the provisions of Act 411, and at the present time is still a patient in this hospital." It is therefore apparent that Hood, one day after Puckett voluntarily went to the hospital, knew the whereabouts of the latter. He is presumed to have also known that this admission was contrary to the statute, and the hospital, in all probability, would have released Puckett immediately upon receiving notice. There was no offer to prove that Hood made such an effort. Relative to appellant's statement, "Defendant Hood had no reason to suppose until sometime in April, 1958, that the case had not been continued in accordance with the Clerk's assurances", the record reflects otherwise, for on February 20th, the day following Hood's notice to the clerk, Fletcher Long, deputy prosecuting attorney for St. Francis County, advised Hood as follows:

"Your letter and enclosure, mailed to Mr. T. E. Christopher, Clerk, has been referred to me.

You are informed that from the State's point of view, there is nothing for the court to consider at the present time but the question of forfeiting your bond on Monday, February 24th. *If a motion for continuance is framed and presented*[1] because of the contents of the letter from the State Hospital, the State will perhaps concede the point. I suggest that you consult your attorney or Puckett's Little Rock attorney in this matter, inasmuch as we are informed that Mr. West, local counsel for Puckett has relieved himself of further responsibility in the matter."

Hood therefore had notice that the State would not accept the letter to the Clerk, and was further notified that Puckett's attorney was probably no longer connected with

[1] My emphasis.

the case. Despite this knowledge, no further effort was made to have Puckett present in Court, and the forfeiture on the bond was taken — and in my opinion, rightly so. The purpose of a bond is to insure that a defendant will be present when his case is set, and Hood, by merely writing to the Clerk, did not excuse himself from any further obligation to have Puckett present.

Let it be pointed out that *there is nothing in the record to indicate that Puckett was insane on February 24, 1958.* To the contrary, the doctor's report shows that he was voluntarily admitted for alcoholism. Further, *there is not even an allegation* in appellant's offer of proof that Puckett was insane on February 24th.

I do not reach the question of whether appellant is entitled to a jury trial, for under the above statement of facts, I am firmly of the opinion that the trial court's judgment should be affirmed.

Mr. Justices McFaddin and George Rose Smith join in this dissent.

Kansas City Southern Transport Co., Inc. *v.* Ark.-Best Freight System.

5-2036 332 S. W. 2d 493

Opinion delivered February 29, 1960.

Hardin, Barton, Hardin & Garner, for appellant.

Thomas Harper, for appellee.

JIM JOHNSON, Associate Justice. This case involves a controversy between two common carriers of freight by motor vehicle.

On the 13th day of September 1955, appellant, Kansas City Southern Transport Company, Inc., hereinafter referred to as KCS, and appellee, Arkansas-Best Freight System, Inc., hereinafter referred to as ABF, entered into what is commonly referred to as a "trailer interchange contract", which contract described certain rights, duties and obligations pertaining to the interchange of trailers.

On January 17, 1956, while one of appellant's trailers was in appellee's possession, by virtue of an earlier interchange of trailers, appellant's trailer was destroyed by fire.

On November 29, 1956, complaint was filed by ABF against KCS charging that the parties had interchanged trailers admitting the destruction of KCS's trailer while in ABF's possession, alleging that ABF had tendered to KCS a trailer of equal value to KCS's destroyed trailer; that KCS had refused to accept said trailer in satisfaction of its claim against ABF; that KCS had refused to return to ABF the trailer that it had received in exchange at the time ABF received KCS's trailer, which was destroyed; that ABF was liable to KCS for the market value of the trailer which did not have a market value exceeding $1,500 at the time of the destruction and that from and after the 24th of February 1956, KCS was liable to ABF under the terms of the interchange agreement, which was attached to the complaint and made a part thereof, in the amount of $8.00 per day until KCS delivered into the possession of ABF the trailer that it had received in exchange.

Demurrer was filed by KCS, defendant below, supported by memorandum, on the ground that the Circuit Court would not have jurisdiction to determine the rights of the parties, as alleged in the complaint, and that by reason thereof the Chancery Court was the court

that would have jurisdiction over the cause. The demurrer was overruled. Since the value of trailers fell within a specialized field, the parties agreed to arbitrate the value of KCS's destroyed trailer and of ABF's trailer offer in settlement, though KCS contended that the value of the latter had no bearing on the issues since it was entitled to recover the value of its trailer at the time of destruction. Arbitration resulted in the fixing of the value of both trailers at $2,100. Thereafter, Answer and Cross-Complaint was filed by KCS denying all material allegations of the Complaint and alleging that ABF was indebted to it for $2,100, the value of KCS's destroyed trailer as found by arbitration, and further alleging that ABF was indebted to it on a rental basis from and after July 19, 1956, on another trailer that had been received by ABF on a rental basis rather than by interchange. KCS specifically denied being indebted to ABF for any rental as complained of in the Complaint.

ABF filed answer to KCS's Cross-Complaint denying any indebtedness to it as set forth in the Cross-Complaint.

Finally on the 25th day of June 1959, the Court entered a judgment which interpreted the interchange contract and made a determination as to the rights of the parties. The adjudging portion of said judgment is as follows:

"It is, therefore, considered, ordered and adjudged that the sole remaining issue in this case, to-wit the determination of the correctness of plaintiff's contention as to the excess possession of trailers, be transferred to equity for the purpose of an accounting between the parties and upon the making of such determination, defendant shall be adjudged liable for trailer rental at the rate of $8.00 per day per trailer for any such excess, as aforesaid, and plaintiff shall be adjudged liable to defendant for $2,100, as aforesaid, to which findings, judgment and order of the Court, the defendant excepts and causes its exceptions to be noted of record."

For reversal appellant relies on three points. The only one we reach in this opinion is as follows:

"The Court erred in entering judgment and acted in excess of its jurisdiction."

We agree with the Circuit Judge that since an accounting is involved the cause should be transferred to Equity. *Goodrum* v. *Merchants & Planters Bank of England,* 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511; and when Equity takes jurisdiction it does so for all purposes, *Jarett* v. *Langston,* 99 Ark. 438, 138 S. W. 1003. The judgment is therefore reversed and remanded to Circuit Court with directions to transfer the whole cause to Equity.

VESPER *v.* WOOLSEY.

5-2089 332 S. W. 2d 602

Opinion delivered March 7, 1960.

[redacted]

Jack Yates, Douglas O. Smith, Jr., Warner, Warner & Ragon, for appellant.

Jeta Taylor, Shaw, Jones & Shaw, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a decree of the Franklin Chancery Court which found that appellants and appellees hold certain lands in Franklin County as tenants in common. The court, in its decree, found that appellees, Harold Woolsey and Elmer Childers, each own an undivided one-fourth interest, and appellants, Jack Vesper and Beatrice Vesper, own an undivided one-half interest as tenants by the entirety. The court found that the lands were not subject to division in kind without material prejudice to the rights of the parties (this fact was stipulated), and further held that appellants were entitled to reimbursement for certain expenditures made for improvements in the amount of $627.38. The property was ordered sold, and the net proceeds (after cost of action and sale, and reimbursement) ordered divided according to the respective interests of the parties, heretofore set out. From such decree, appellants bring this appeal.

The record reflects that Ernest Locke purchased the property in question on October 27, 1917, and he and his wife, Pearl, lived on the premises until Mr. Locke's death in April, 1925. He died without issue, leaving as his heirs two brothers, Cecil and Tom Locke, and one sister, Susie Locke Childers. Sometime after the death of her husband, Pearl Locke moved from the premises and lived with her parents for two or three years, renting the property during this period. In 1929, Pearl Locke married R. E. Protheroe. The evidence at this point is slightly in conflict relative to where Pearl and Protheroe lived for the first few months following their marriage. However, it is established that within three to six months, they were living on the property in question, and continued to live there for the balance of their lives. In 1934, the lands were forfeited for nonpay-

ment of taxes, and the Protheroes obtained a tax deed from the State in 1938. In 1939, these lands again forfeited for nonpayment of taxes, and a redemption deed was issued by the State to R. E. Protheroe and Pearl Protheroe. During the period of their occupancy, the Protheroes executed a right-of-way to the Arkansas Western Gas Company, giving the latter the right-of-way to lay a pipe line and to construct telegraph and telephone lines over the property, and executed three different oil and gas leases (two to the same company and one to Alfred McLane). These leases ran for a period of five and ten years, and all contained a clause to the effect that "if said lessor owns a less interest in the above described land than the entire undivided fee simple mineral estate therein, then the royalties and rentals herein provided shall be paid the lessor only in proportion which lessor's fee simple mineral interest therein bears to the whole and undivided mineral estate in the lands."

In November, 1954, Pearl Protheroe died without issue, leaving as her heirs a sister, Maude Benson, and the children of two deceased brothers. Protheroe continued to live on the premises, and executed two more oil and gas leases to the gas company, similar to the ones theretofore executed. In April, 1958, Protheroe died. Under the terms of his will, the property was devised to appellants. Taxes on the lands, after the death of Locke, were paid by Pearl until the tax deed was obtained in 1938, following which, they were paid in the name of R. E. Protheroe. Following Pearl's death, Protheroe continued to pay the taxes until his death. In May, 1958, Cecil and Tom Locke[1] and Susie Locke Childers (brothers and sister of Ernest Locke), conveyed, by quit-claim deed, their interest in the property to appellees. In October, 1958, appellees instituted suit praying partition of the lands. Appellants, in their pleadings, denied that appellees held any interest, and

[1] These brothers had been non-residents of the state for a long number of years.

contended that they (the Vespers) were the sole owners of the property in question.[2]

For reversal of the court's decree, appellants assert that "Appellees' claim is barred by both the two year and seven year statute of limitations (Ark. Stats. 1947, § 37-101 and Ark. Stats. 1947, § 34-1419). Appellees' claim is barred by the doctrine of laches." We proceed to a discussion of these contentions.

Relative to the first point, appellants argue that the proof reflects that the claim of Pearl and R. E. Protheroe was adverse to the claim of appellees and their assignors for more than the statutory seven year period. In so contending, appellants rely upon the tax deed, tax payments, right-of-way grant, and the oil and gas leases executed by the Protheroes, asserting that these acts were evidence of the intention to exclude the cotenants. It is further argued that the claim of appellees is barred by the two year tax statute of limitations.

Upon the death of Ernest Locke, Pearl Locke became endowed with an undivided one-half interest in the estate, the heirs of Locke becoming the owners of the other undivided one-half interest, the latter interest, however, subject to the homestead right of Pearl Locke. Pearl, therefore, in addition to holding as tenant in common, also held the privilege of possession because of her homestead right in the property. It is asserted that Pearl abandoned the property as a homestead, and that this interest passed out of the picture, but we do not agree. The record reflects that she stayed away from the property two or three years, living with her parents, but there is no evidence that she intended, in moving away, to abandon the Locke property as her homestead. Following her marriage to Protheroe, she returned to the premises within a few months. Of course, intention to abandon is an issue of fact, and in such a situation, evidence is rarely clear; nor, in the case before us, does the evidence clearly reveal Pearl's intention. However, the legal presumption is

[2] Subsequent to the filing of the suit, appellants obtained conveyances from the heirs of Pearl Locke Protheroe.

that the homestead right continues until it is clearly shown that it has been abandoned. In *City National Bank* v. *Johnson,* 192 Ark. 945, 96 S. W. 2d 482 (1936), the appellee was absent from her homestead for four years, during which time she lived in Oklahoma. This Court held that the homestead was not abandoned, and stated:

"All presumptions are in favor of the preservation and retention of the homestead. When property has been impressed with the homestead character, it will be presumed to continue so until its use as such has been shown to have terminated. 29 C. J. 961.

As we have said, the exemption laws are to be construed liberally. The Constitution provides for the homestead, and, when once established, the presumption is that it continues until it is shown by the evidence that it has been abandoned. The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the chancellor's finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence." See also *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499 (1913). The widow is permitted to rent the homestead, as was done in this instance by Mrs. Protheroe. *Garibaldi* v. *Jones,* 48 Ark. 230, 2 S. W. 844. *Coleman* v. *Gardner, Admr.,* 231 Ark. 521, 330 S. W. 2d 954. There is no requirement of continuous occupation of a homestead to continue it as such. *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63. Furthermore, the homestead right acquired from Locke was not forfeited by her remarriage to Protheroe. *Stone* v. *Stone,* 185 Ark. 390, 47 S. W. 2d 50.

Nor do we agree that appellants' claim is strengthened by the tax deed obtained from the state by the Protheroes, the tax payments, or the execution of the various leases heretofore referred to. With respect to the deed, aside from the fact that it contains only a part description, we have repeatedly held that the acquirement of a tax title by a tenant in common operates as a redemption for the benefit of all the tenants. *Sanders* v. *Sanders,* 145 Ark. 188, 224 S. W. 732. *Spikes*

v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579, and cases cited therein. In order for the possession of a tenant in common to be adverse to his co-tenants, knowledge of such claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. *Hildreth* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353. We think the evidence insufficient to establish this notice.

Be that as it may, there is even a stronger reason why the deed and tax payments did not enhance the title of Pearl and R. E. Protheroe, or serve as the basis for a claim of adverse possession. We have already pointed out that Pearl Protheroe did not lose her homestead right in the property, but rather maintained same until her death. Accordingly, even without her status as a tenant in common, she had the absolute right to possession of the premises for life, and appellees and their assignors were without authority to demand, or to enter onto, the premises, until her death. In *Ingram* v. *Seaman,* 223 Ark. 414, 267 S. W. 2d 6 (1954), we said:

"But Mr. Ingram claims that the deeds he received from the State and the Improvement Districts set in motion the Statute of Limitations against the remaindermen. A widow, having what is similar to a life estate in the homestead, has the duty to pay the taxes, and she cannot remain in possession and acquire a tax title adverse to the remaindermen. See *Inman* v. *Quirey,* 128 Ark. 605, 194 S. W. 858. Thus Mrs. Paralee Seaman Ingram could not have acquired a tax title adverse to the plaintiffs."

Further, in the Opinion:

"In 41 C. J. S. 765, the rule is stated:

'The purchase by a husband of an adverse claim to his wife's land inures primarily to the benefit of her title, and to his benefit only so far as his marital interests are concerned. Thus a husband cannot acquire a tax title to his wife's lands, * * *.'"

Summarizing our views relative to appellants' primary contention, we find that Pearl Protheroe not only held as a tenant in common, but also held the property as a homestead, and was entitled to its possession for her natural life; further, that since the tax title acquired by the Protheroes amounted to a redemption, the two year statute of limitations on tax sales has no application, *Sanders* v. *Sanders, supra*; nor could a claim of adverse possession for the seven year period be anchored on the tax title. The execution of the instruments did not constitute "such notorious acts of unequivocal character" that notice might be presumed, and there is no evidence that a claim of adverse ownership was "brought home" to the Locke heirs directly. The possession of the land by Pearl Protheroe was entirely consistent and in conformity with the rights and interest that she held.

In *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, we said:

"The testimony adduced upon the trial of the case proved that Rachel Watson retained possession of the land after the death of Steve Watson solely by reason of the fact that she was his widow. Her claim to the land was derived from Steve Watson, and was in recognition of his right and title thereto. Her claim was therefore in recognition also of the interest of the heir of Steve Watson, if he had an heir. In its inception her claim of possession of the land was not hostile to the right or interest of the heir of Steve Watson, but was perfectly consistent and in conformity with such right and interest. It is true that her claim and possession might have been of such a nature as to amount to an entire disseizion of the heir and an entire denial of his rights, so as to result in an acquisition of title by adverse possession; but, before her possession could become adverse, it was necessary for her to first repudiate the title of Steve Watson and to disavow any claim thereto as his widow; and it was also essential that notice of such disavowal by heir of title as widow should be brought home to the heir. If Rachel Watson acquired possession of the land as widow of Steve Watson, and therefore in conformity with the right and interest of

his heir and not in opposition to such interest, then, in order to constitute possession that would be adverse, it was incumbent upon appellee to prove that she disclaimed title in Steve Watson, under whom she acquired the possession, and that she claimed actual possession thereof hostile to that title and to the heir, of which he had notice; * * *."

Let it be remembered that the Locke heirs *had no right of action for possession of the premises in controversy until a termination of the homestead estate held by Pearl Protheroe. Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278.

In view of the italicized language in the preceding paragraph, there was no reason for appellees to assert a claim, and they are not affected by the doctrine of laches. Mr. Protheroe lived on the premises four years following his wife's death. The fact that no suit was instituted during that period does not call for an application of the doctrine. In *Walker* v. *Ellis,* 212 Ark. 498, 207 S. W. 2d 39 (1948), this Court said:

"Where there is no intervening equity which of itself requires application of doctrine of laches, a court of equity ordinarily will not divest the owner of his title to land for laches unless he fails to assert such title for a period at least equal to that fixed by the statute of limitations."

Here, Protheroe suffered no loss because suit was not instituted; to the contrary, he was privileged to live on the property. Appellants received reimbursement for improvements made by him. In addition, Protheroe was a co-tenant, and in *Inman* v. *Quirey* (cited in the quotation from *Ingram* v. *Seaman, supra*), we held that the possession of one co-tenant is the possession of all, and laches cannot bar the right of entry to a co-tenant until the latter's disseizin has been effected by some notorious act of ouster brought home to his knowledge.

No reversible error appearing, the decree is affirmed.

JOHNSON, J., dissents.

FT. SMITH COUCH AND BEDDING CO. *v.* JONES.

5-2057 332 S. W. 2d 817

Opinion delivered March 7, 1960.

[Rehearing denied April 4, 1960]

[redacted]

Shaw, Jones & Shaw, for appellant.

David T. Westmoreland, Warren O. Kimbrough, for appellee.

J. SEABORN HOLT, Associate Justice. This is a Workmen's Compensation case. Appellee, Mrs. William Adolph Jones, sought compensation for an alleged accidental injury to her husband on November 19, 1957, which she claimed occurred in Colorado Springs, Colorado, while he was in the employment of appellant, Fort Smith Couch and Bedding Company, and handling and unloading furniture for appellant. She further alleged that while so performing his work he "bumped his side or stomach," causing an aggravation to a pre-existing disease, a gangrenous appendix, which caused said appendix to rupture and later resulted in his death. Appellants denied that any accidental injury arose out of the course of Jones' employment and denied that his death came from any cause relating to his employment. A hearing before the referee of the Workmen's Compensation Commission resulted in a finding in favor of appellant, employer, and a denial of appellee's claim.

Upon a review of her claim before the full Commission, the findings of the referee were affirmed and compensation denied appellee. On appeal to the Sebastian County Circuit Court, Fort Smith District, the findings of the Commission were reversed and judgment was entered directing the Commission to allow appellee's claim for compensation.

For reversal, appellant stoutly insists that the lower court erred in overruling the decision of the Commission. We have concluded that appellant's contention must be sustained.

In these compensation cases, we have consistently held that when we find any substantial evidence to support the Commission's findings we must affirm those findings. We said in *Springdale Monument Company* v. *Allen,* 216 Ark. 426, 226 S. W. 2d 42: "The rule is firmly established that the findings of the Commission, which is the trier of facts, will not be disturbed on appeal to the Circuit Court if supported by substantial testimony. Act 319 of 1939, § 25b; (Citing many cases) . . . In a long line of decisions since the passage of the act here in question, the rule has been clearly established that the finding of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court sitting as a jury, and when supported by substantial evidence, such findings will not be disturbed by the circuit court on appeal to that court or on appeal to this court. . . . The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness"; and quite recently, on October 5, 1959, in *White* v. *First Electric Cooperative Corporation,* 230 Ark. 925, 327 S. W. 2d 720, we said: "Under our long established rule, if we find any substantial evidence in the record to support the findings and order of the Commission and the judgment of the trial court, we must affirm. Under our Workmen's Compensation Law the Commission acts as a trier of the facts—*i.e.,* a jury—in drawing the inferences and reaching the conclusions from the facts. We have repeatedly held that the finding of the

Commission is entitled to the same force and effect as a jury verdict", and again on November 9, 1959, we said: "But there is even a stronger rule, namely, our oft repeated holding that if there is any substantial evidence to support the findings of the Commission, we will not disturb such findings. This is the strongest rule in Compensation cases, and the one carrying the greatest weight." *Reynolds Metal Company* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489.

The facts here disclose that deceased, employee Jones, was employed by appellant as a cross-country driver — helper — on a furniture delivery van. He left Fort Smith with a companion driver on November 17, 1957, in a "sleeper van", with a trailer loaded with furniture for delivery at various points west. Their first stop was at Rocky Ford, Colorado, where a part of their load was delivered at one stop; then on the 18th they made deliveries at three or four stops in Pueblo, then on to Colorado Springs where they spent the night and unloaded furniture there the next morning. During the night in Colorado Springs, Jones seemed restless and complained about a stomachache. They then went to Denver and after unloading, proceeded to Warner, Oklahoma where they met another company truck which had broken down and they took its trailer for delivery to Perryton, Texas, returning to Fort Smith on the 23rd. It appears that Jones complained intermittently of a stomachache but nothing to show any serious or disabling condition until the 21st. Ed Huggins, the other driver, testified, in effect, that Jones did his work with very little complaint through the 20th and "that Jones made no complaint to him that he had strained or hit himself and never told him about hitting his stomach." Their work consisted of taking shifts with each other in driving and assisting each other in unloading the furniture at the various stops. The furniture consisted of divans, couches, and chairs, the heaviest weighing not more than 120 pounds, and they would never lift more than 50 or 60 pounds apiece, Jones taking one end and he the other. Jones, according to Huggins testimony, did not work from the 21st until

the 23rd when they returned to Fort Smith, Arkansas. When they reached Fort Smith on the afternoon of Saturday, the 23rd, Jones was in such pain that Dr. Hawkins, a local surgeon, was called. He diagnosed appendicitis and operated, finding that the lower two-thirds of the appendix was gangrenous with a hole in it about one-half inch in diameter, and walled off a localized abscess. Following the operation, on November 28th, Jones died. The causes of death were given as pneumonia, wound evisceration, ruptured appendix and obesity. It was Dr. Hawkins firm opinion that the rupture of the appendix occurred sometime within the twenty-four hour period just before he operated. He testified: ". . . From the findings of the localized peritonitis and the amount that he had, it was assumed and I think correctly so, that the perforation of rupture had occurred within a twenty-four hour period." Dr. Olson, in effect, corroborated Dr. Hawkins, testimony. He testified: "Q. In other words, Doctor, in the instance described it is your opinion that the perforation or rupture occurred within a twenty-four hour period prior to the operation or prior to the examination by the physician the first time? A. Yes." Thus it appears from substantial evidence that the perforation or rupture of the gangrenous appendix must have occurred from the inroads of disease and natural causes. It occurred at a time during the twenty-four hour period when Jones was performing no work for appellant whatever.

We conclude, therefore, that there was ample substantial evidence to support the Commission's finding that appellee failed to show that Jones had sustained any accidental injury arising out of and in the course of his employment. The judgment is reversed and the findings of the Commission affirmed.

Reversed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. As I understand the Workmen's Compensation Law, it was

passed as a social measure providing that any workman, except in some enumerated circumstances, who suffers an accidental injury during the course of his employment shall receive compensation therefor. This law was supposed to have removed the necessity of proving that the injury was caused by some act or omission constituting negligence on the part of the employer.

As is true in most social legislation, certain of the employee's rights were taken from him when he was given the right to collect for his injuries without proving negligence. The most notable of these rights relinquished was the right to sue an employer in a court of law for damages suffered by an injured employee. Another right relinquished was the right of the employee to have his case tried before a jury of his peers and of course the greatest right relinquished was the right to sue for an unlimited sum commensurate with the injury. The Act limits the liability of the employer. In order to justify in some measure the rights taken away from the employee, the courts from the beginning have adopted the rule that the Act will be broadly and liberally construed in the light most favorable to the claimant and that doubtful cases should be resolved in favor of the claimant. *Boyd Excelsior Fuel Co.* v. *Mckown,* 226 Ark. 174, 288 S. W. 2d 614; *Arkansas National Bank of Hot Springs* v. *Colbert,* 209 Ark. 1070, 193 S. W. 2d 806; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380; *Peerless Coal Co.* v. *Jones,* 219 Ark. 181, 240 S. W. 2d 647. This, in my opinion, not only *is,* but by all rules of fairness and justice, should be the strongest rule in compensation cases. By the very nature of the law itself this rule deserves to carry the greatest weight of any rule in compensation cases.

The majority opinion restates the language used by this Court in *Reynolds Metal Co.* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489, as follows: "But there is even a stronger rule, namely, our oft repeated holding that if there is any substantial evidence to support the find-

ings of the Commission, we will not disturb such findings. This is the strongest rule in compensation cases and the one carrying the greatest weight." I was a member of this Court on November 9, 1959, when the *Reynolds Metal Company* opinion, *supra,* was handed down. I agreed wholeheartedly with the results reached in that case. Belatedly, let me confess that I completely overlooked the attempt in that opinion to strenghen the "substantial evidence" rule. It was never my intention then nor is it my intention now to ever become a party to the making of such a rule. If this strengthened rule is allowed to stand, the right to appeal in compensation cases might just as well be abolished. I can think of only one step further in that direction that this Court can be asked to take and that is to contend that if a claim is controverted the mere denial of the claim would amount to such substantial evidence as to justify this Court in affirming the Commission. I cannot escape the feeling that there is something wrong with a rule of this Court that gives a politically appointed Commission's findings so much greater weight than the findings of our learned Chancellors, equal weight with the circuit court and in the case at bar even greater weight than the verdict of a jury. I have been unable to find in the Workmen's Compensation Law a single sentence relative to the construction of the law by this Court. I do find in Section 81-1325(B) the rules set out by which the Circuit Courts must abide. The pertinent parts of that section are as follows:

"The Court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:

"1. That the Commission acted without or in excess of its powers.

"2. That the order or award was procured by fraud.

"3. That the facts found by the Commission do not support the order or award.

"4. That there was not sufficient competent evidence in the record to warrant the making of the order or award."

With the authority thus given The Honorable Circuit Judge in the case at bar after a careful review of the record reversed the Commission. Certainly, he was not only justified but duty bound to reach the conclusion which resulted in his order as follows:

"I overruled the Commission in this case for the following reasons:

It was the claimant's position that exertions of the deceased contributed to the rupture of his appendix and both the claimant's doctor and respondent's doctor agreed that exertion could contribute to cause a rupture. In line with this, our Supreme Court has recognized that *the rupture of an appendix may constitute a compensable injury.* (*Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147 at page 152.) In its opinion the commission disposed of claimant's contention that exertion was the cause of the rupture by stating that 'We fail to find any testimony that would indicate that decedent was called upon to exert any unusual strain.' (Underscoring supplied.) The view that unusual exertion is required is not the law. *(Bryant Stave & Heading Co.* v. *White, supra.)* And the statement in the opinion of the commission that they searched the record to find testimony that would indicate an unusual strain evidences that they placed upon the claimant an undue burden in this regard and that their opinion should therefore be set aside.

"Furthermore, the commission seemed to place the burden on claimant of proving that the rupture was due to lifting not less than a certain number of pounds and of establishing with precision the hour of this event both with relation to the time of the rupture and the time the deceased left his job to go home. *It is my understanding that the law does not require the claimant to establish his case with mathematical certainty.* (*Herron Lumber Company* v. *Neal,* 205 Ark. 1093, and *Williams* v. *Gifford-Hill & Co., Inc.,* 227 Ark. 340). *Nor*

does he have to collapse on the job before being entitled to benefits. (*Gunn Distributing Co.* v. *Talbert,* the Law Reporter, 230 Ark. 442, 323 S. W. 2d 435)."

It is not necessary to review this case in the light most favorable to the claimant in order to reach the conclusion that the commission was justifiably reversed by the Circuit Court. I have not only been unable to find any substantial evidence to support the commission's findings, I have been unable to find a scintilla of competent evidence to sustain the findings. It is undisputed that the deceased employee Jones left Ft. Smith with a companion driver on November 17, 1957, in a "sleeper van" trailer truck loaded with heavy furniture, that they were on company business and subject to call to duty constantly from the time they left Ft. Smith until they returned on November 23, 1957. That they spent most of this entire seven days in the truck either driving, riding or sleeping in the cab bunk. It is true that Ed Huggins, the companion of the deceased on this fateful trip, testified that the deceased was in such bad shape from his injury that he did no work from November 21st until they returned to Fort Smith on the 23rd. However, the "Log" kept by Huggins and turned in to the company reflected that on November 21, 1957, deceased was off duty only 3½ hours out of 24 hours and drove 10½ hours that day. On November 22, 1957, the "Log" reflected that deceased was off duty only 4½ hours and on November 23rd, the day they returned to Fort Smith, deceased drove 1½ hours and was on duty another ½ hour. These reports made by Huggins, therefore, appeared to neutralize Huggins' oral testimony. See: *Bradham Drilling Company* v. *Powell,* 231 Ark. 555, 331 S. W. 2d 35. Even if Huggins' oral testimony could be accepted as true, can it be said that a man riding in the cab bunk of a jarring truck owned by his employer subject to call to duty while on a mission in the course of his employment and suffers a ruptured appendix, is not entitled to compensation. The majority opinion says yes. To the contrary, see: *Ark. Power & Light Co.* v. *Cox,* 229 Ark. 20, 313 S. W. 2d 91. Also see: Larson's Workmen's Compensation Law, Sections 12.20 and 38.20.

Dr. Hawkins testified that the deceased's case history revealed that on the morning of November 23rd the deceased's right side hurt to walk and it hurt to ride. The Company's records reflect that the big truck on which deceased was working left Ponca City, Oklahoma at 9:00 a.m. and didn't arrive in Fort Smith until 4:30 p.m. The testimony is undisputed that deceased was in great pain when he arrived at Fort Smith; he was operated on and died. On the day deceased was operated on he was on the job in or about his employers' truck subject to duty some 7½ hours and according to the company's own "Log" he performed his usual duties that day. It is undisputed that deceased's regular work included some heavy lifting. The employers' doctor agreed with deceased's doctor that "no one can refute that heavy lifting would increase the intra-abdominal pressure and, if gangrenous appendix was present and about ready to rupture, that such lifting would certainly, in all probability, aid in rupture of that organ." There was absolutely no testimony that riding in a large jarring truck, driving, shifting, breaking and double-clutching such truck, in addition to the lifting required to unload such truck, would not hasten the rupture of this admittedly gangrenous appendix. Certainly common sense dictates that it would. For a case almost on all fours with the case at bar, see: *Clark* v. *Ottenheimer Brothers,* 229 Ark. 383, 314 S. W. 2d 497. This case contains a masterful discussion of the law applicable to cases such as this. Following the law as set out in the *Clark* case, *supra,* is is impossible for me to see how it can be said that the circuit judge erred in reversing the commission. I cannot agree with the theory that our circuit judges are to be treated as mere rubber stamps in compensation cases. To completely ignore their conscientious efforts to correct wrongs of the commission is to ignore the clear language of the law itself. In the present case the Commission clearly erred as a matter of law by demanding of the claimant a greater burden than our law requires. Surely it cannot be said that the

"substantial evidence" rule is now so strong as to erase errors of law.

For the reasons stated above, I respectfully dissent.

WATT *v.* BRYAN.

5-2091 332 S. W. 2d 609

Opinion delivered March 7, 1960.

Switzer & Switzer, for appellant.

Joe P. Melton, Chas. A. Walls, Jr., for appellee.

SAM ROBINSON, Associate Justice. The issue here is whether the Probate Court of Lonoke County, or the Probate Court of Ashley County, has the jurisdiction to determine the domicile of Larry, Donna Gail, and David Richard Watt, minors. Both parents of the minors are deceased; appellants, R. M. and Maud Watt, the paternal grandparents, live in Ashley County; and Maude Bryan, the maternal grandmother, lives in Lonoke County. On July 24, 1959 the paternal grandparents filed a petition in the Ashley Probate Court, asking that they be appointed guardians of the minors. On August 29, 1959 the maternal grandmother, Mrs. Bryan, filed in the Lonoke Probate Court a petition asking that she be appointed guardian of the children. The Watts filed in the Lonoke Probate Court a response, in which they allege that they were appointed guardians of the minors by the Ashley Probate Court on September 5, 1959. On September 25, 1959 the Lonoke Probate Court made a finding to the effect that the domicile of the minors is in Lonoke County.

The procedure for the appointment of a guardian in a case of this kind is regulated by statute. Ark. Stats. § 57-606 provides:

"The venue for the appointment of a guardian shall be:

(1) In the county of this state which is the domicile of the incompetent; or

(2) If the incompetent is not domiciled in this state but resides in this state, then the county of his residence; or

(3) If the incompetent is neither domiciled nor resides in this state, then in the county in this state in which his property, or the greater part thereof in value, is situated . . .

"If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced, until final determination of venue by the Probate Court of the county where first commenced. If the proper venue is finally determined to be in another county, the court shall transmit the original file to the proper county. The proceeding shall be deemed commenced by the filing of a petition; and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incompetent in this state . . ."

The Statute provides that "the proceeding shall be deemed commenced by the filing of a petition". Here, the proceedings were commenced first in Ashley County by the filing of a petition in the Probate Court of that County on July 24, 1959. Hence, the proceedings should be stayed in Lonoke County until final determination of venue by the Probate Court of Ashley County. From the response filed in the Lonoke Probate Court by appellants, it appears that the Ashley Probate Court has already appointed them guardians, but that order may be vulnerable to attack by appellee herein.

Reversed.

SKELTON MOTOR CO., INC. *v.* BROWN.

5-2043 332 S. W. 2d 607

Opinion delivered March 7, 1960.

John H. Joyce, E. J. Ball, Charles Bass Trumbo, for appellant.

Dickson, Putman & Millwee, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant upon an installment note executed by the appellees in payment for motor vehicle equipment. The defendants demurred to the complaint on the ground that the note appears on its face to be usurious. The trial court sustained the demurrer and dismissed the complaint.

It is conceded that the appellees' original principal debt was $3,000.00. To evidence this obligation the seller prepared a note for $3,322.08, dated February 23, 1957, payable in monthly installments of $138.42 beginning on April 1, 1957, and reciting that the interest was prepaid until maturity. The court's finding of usury was based upon a statement by counsel that the matter had been submitted to an accounting firm "to determine whether or not $322.08 exceeded interest on $3,000.00 at the rate of 10 per cent per annum for a period of 24 months, interest and principal to be repaid in 24 equal installments of $138.42 each." The accountants reported that the charge exceeded 10 per cent per annum, though their computations are not in the record.

It is readily demonstrable that the accountants' conclusion was incorrect, for the note is not usurious. A standard work on interest tables states that at 10 per cent interest the monthly installments upon a loan of

$3,000.00, payable in 24 months, should be $138.43. Lake's Monthly Installment and Interest Tables (5th Ed.), p. 145. Here the amount of each payment was a cent less than the permissible maximum.

Furthermore, the fact that the first installment upon the note in controversy was not due until 37 days after the date of the note increases the margin by which the interest falls below the legal limit. If this installment note had been for $3,000.00, with interest at 10 per cent per annum, the payments called for would have been applied as follows:

Date of Payment	Amount of Payment	Interest Period	Amount to Interest	Amount to Principal	Balance Forward
					$3.000.00
4-1-57	$ 138.42	37 days	$ 30.41	$ 108.01	2,891.99
5-1-57	138.42	30 days	23.77	114.65	2,777.34
6-1-57	138.42	31 days	23.59	114.83	2,662.51
7-1-57	138.42	30 days	21.88	116.54	2,545.97
8-1-57	138.42	31 days	21.62	116.80	2,429.17
9-1-57	138.42	31 days	20.63	117.79	2,311.38
10-1-57	138.42	30 days	19.00	119.42	2,191.96
11-1-57	138.42	31 days	18.62	119.80	2,072.16
12-1-57	138.42	30 days	17.03	121.39	1,950.77
1-1-58	138.42	31 days	16.57	121.85	1,828.92
2-1-58	138.42	31 days	15.53	122.89	1,706.03
3-1-58	138.42	28 days	13.09	125.33	1,580.70
4-1-58	138.42	31 days	13.42	125.00	1,455.70
5-1-58	138.42	30 days	11.96	126.46	1,329.24
6-1-58	138.42	31 days	11.29	127.13	1,202.11
7-1-58	138.42	30 days	9.88	128.54	1,073.57
8-1-58	138.42	31 days	9.12	129.30	944.27
9-1-58	138.42	31 days	8.02	130.40	813.87
10-1-58	138.42	30 days	6.69	131.73	682.14
11-1-58	138.42	31 days	5.79	132.63	549.51
12-1-58	138.42	30 days	4.51	133.91	415.60
1-1-59	138.42	31 days	3.53	134.89	280.71
2-1-59	138.42	31 days	2.38	136.04	144.67
3-1-59	138.42	28 days	1.11	137.31	7.36
4-1-59	7.42	31 days	.06	7.36	.00
	$3,329.50		$329.50	$3,000.00	

It will be observed that an interest charge of $329.50 might have been made; hence the actual exaction of $322.08 was not excessive.

Reversed, the demurrer to be overruled.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice, (Concurring). I concur in the reversal of the judgment. It has always been my understanding that usury must be both pleaded and proved. *Commercial Credit Co.* v. *Chandler,* 218 Ark. 966, 239 S. W. 2d 1009; and *Cox* v. *Darragh,* 227 Ark. 399, 299 S. W. 2d 193. Usury is a question of fact; and, like limitations, cannot be claimed by demurrer unless the fact of usury clearly appears on the face of the complaint. 55 Am. Jur. 435, "Usury" § 162. In the case at bar, usury did not appear on the face of the complaint; and yet the defendant attempted to urge usury by demurrer. I think it was improper to sustain such demurrer. Court proceedings should not be "short-circuited".

The majority opinion compounds the "short-circuiting" by finding, as a fact, that there was no usury. The majority may be correct on such fact question; but I never reach that issue because I think the demurrer should have been overruled and the defendant allowed to plead further.

ANDERSON *v.* CRESWELL-KEITH, INC.

5-2049 332 S. W. 2d 610

Opinion delivered March 7, 1960.

[redacted]

Shackleford and *Shackleford,* for appellant.

Spencer & Spencer, for appellee.

JIM JOHNSON, Associate Justice. This case involves an oil property transaction. It is primarily a suit in equity to recover $4,000 under the terms of a written instrument.

On November 27, 1956, appellant, W. S. Anderson, and appellee, Creswell-Keith, Inc., entered into the following agreement:

"AGREEMENT BETWEEN CRESWELL-KEITH MINING TRUST and Mr. W. S. Anderson on his purchase of an undivided one-eighth (1/8) interest in the Moody Estate No. 1, we will hold his check in the amount of $4,000.00 in Creswell-Keith, Inc., office until Moody No. 1 is fractured and producing oil into tank, at such time Mr. Anderson will say if he wants to keep his interest or sign back to Creswell-Keith.

"Mr. Anderson will also have option to participate, at same price, at any time we decide to drill Moody Estate No. 2.

"Witness our hands this November 27, 1956."

On the same date the assignment of an undivided one-eighth interest in the Moody No. 1 well and the lease on which it was located was executed, acknowledged and delivered to W. S. Anderson.

On December 3, 1956, the $4,000 check was cleared through the Commercial National Bank of Little Rock. The Moody No. 1 well, according to the undisputed evidence, was fractured and producing oil into the tanks on December 10, 1956.

On December 19, 1956, nine days after the well was fractured and producing into the tanks, the assignment which had been delivered to the appellant, W. S. Anderson, on the 27th day of November was filed for record in the office of the recorder for Union County, Arkansas.

On January 15, 1957, the appellant, W. S. Anderson, exercised his option to participate in the Moody No. 2 well to be drilled on the same lease, purchased a one-half interest and paid to Creswell-Keith, Inc., the sum of $18,000, which consisted of a check for $6,000; a promissory note from appellant to Creswell-Keith, Inc., for $2,000; and the assignment of a note of $10,000 held by the appellant.

The record reflects that appellant, W. S. Anderson, has never assigned back to Creswell-Keith, Inc., the one-eighth interest in the Moody No. 1 well, has never tendered such an assignment and did not offer to assign this interest back in his intervention filed to recover the money paid for this interest.

Based on the agreement set forth above, the appellant, W. S. Anderson, filed his intervention in which he alleged that the Moody No. 1 well had never been fractured and produced oil into the tanks, and that he had demanded his money back.

His testimony at the trial was to the effect that on January 15, 1957, 26 days after the time when he had the option to assign back his interest, and 17 days after his assignment had been recorded, he demanded his money back.

On January 18, 1958, appellant filed his intervention for the $4,000 in other litigation not pertinent to the issues herein. A general denial was filed by appellee. Meanwhile, appellee filed a separate proceeding to recover for operating expenses on the Moody No. 1 and other wells not involved herein. These causes were consolidated for trial on November 7, 1958. The court took the matter under advisement and on March 19, 1959, entered its order and finding that appellant was the owner of a 1/8 interest in the Moody No. 1, that he was liable for operating expenses thereon to appellee, and dismissed appellant's intervention for want of equity. From that decree comes this appeal.

For reversal appellant relies on the following points:

1. Findings of Chancellor that appellant is owner of undivided 1/8 interest in Moody No. 1 is against preponderance of the evidence.

A. Undisputed evidence reflects appellee breached agreement when check was deposited.

B. Preponderance of evidence reflects appellant exercised option.

2. In the alternative, appellee did not prove certain items charged to be operating expenses and judgment of $400.69 is error.

In considering the first point urged for reversal we must agree with appellant that the cashing of the $4,000 check by appellee prior to the time the Moody No. 1 oil well was 'fractured and producing oil into tank' was a variance from the written agreement entered into by the parties on November 27, 1956. There can be no doubt but that if appellant had exercised his option to reassign the lease to appellee at the proper

time, he would be entitled to have the check returned, or a refund of the money since the check had been cashed. Looking at this instrument in its entirety and viewing the record for testimony relative to the intention of the parties, we find the following testimony of Mr. Neville Keith concerning the January 15, 1957, meeting:

"Q. At that time did he make any demand for return of his money from Moody No. 1?

"A. No, sir, he sure didn't.

"Q. What did he do at that time?

"A. He wanted to participate with us in the drilling of the Moody No. 2 which we were preparing to drill. He stated he wanted a bigger interest because he thought it should be a bigger well than Moody No. 1.

"Q. How much interest did he have in the No. 1?

"A. An eighth.

"Q. How much did he want in Moody No. 2?

"A. He wanted a half interest."

This testimony of Neville Keith is completely consistent with the deal that was made on the 15th of January 1957.

At that time the appellant admits he purchased a one-half interest in the Moody No. 2 well, which was to be drilled on the same lease by the same operator, Creswell-Keith, for the sum of $18,000.

To pay this $18,000 he gave his personal check for $6,000; his personal promissory note for $2,000; and assigned to Creswell-Keith another note for $10,000. From this series of events we cannot escape the conclusion that appellant would not have done this had he been there demanding the return of his $4,000. At the very least he would have deducted the $4,000 from the cost of the new venture.

Appellant testified under examination by his own attorney:

"Q. Mr. Anderson, are you the owner of a 1/8 interest in Moody No. 1?

"A. I am."

From what we have said above and other matters contained in the record we cannot say that the decree of the Chancellor on the first point urged by appellant was against the weight of the evidence. See: *Zachery* v. *Warmack,* 213 Ark. 808, 212 S. W. 2d 706; and *High* v. *Bailey,* 203 Ark. 461, 157 S. W. 2d 203.

The second point urged for reversal presents an entirely different question. Since it is established that appellant is the owner of a 1/8 interest in Moody No. 1 well it must follow that the terms of the assignment instrument by which title to this interest was obtained controls.

The assignment contained the following clause:

"That if the said well proves to be a producer of oil or gas, same shall be operated by assignors for the benefit of themselves and assignees, and in such event, assignee agrees after completion and equipping by assignors as hereinabove stated, that he will reimburse assignee for the 1/8 interest . . ."

Following the clear terms of this assignment on trial *de novo,* without setting out in detail the testimony relative to all the expenses incurred in the operation of the well, we conclude that the judgment of the trial court for operating expenses in the amount of $400.69 should be reduced to the extent hereinafter indicated:

SWITCHER SERVICE

Testimony on July 15, 1959, taken by agreement of the parties, reflects that switcher service for the Moody No. 1 was charged at the rate of $75 per month between January 1957, and September 1957. Yet, thereafter, only $50 per month was charged. The testimony revealed that $50 was the standard price for switcher service. However, appellee attempted to reconcile this difference on the basis that the $75 per month included

and was to cover administrative costs. We noted that on the statement of the period January 1957, to September 1957, the line following "Switcher Service" is "Administrative costs" at $15 per month. We find that the switcher service costs is excessive for this period and the item of Switcher Service should be reduced from $525 to $350, making total due on this statement of $163.32.

ELECTRICAL MOTOR

The testimony of July 15, 1959, reflects that the appellee changed from a gas-driven motor to an electrical motor. It did so without consulting any of the interested parties, and particularly without mentioning this to appellant. Further, it was shown by the testimony that this was an extravagant effort on the part of appellee, wholly without economic outlook, particularly when it was known the well would not produce. Figuring the costs of setting up the electric motor as reflected on Plaintiff's Exhibit D, there was a charge of $472.35, composed of the following: Industrial Elec. Co., $343.71 and $90; Williamson Tool & Die Co., $29.06; and Arkansas Power & Light Company, $9.58. This statement should be reduced by $59.04, or a charge of $43.06.

COSTS OF LITIGATION IN HARRIS MATTER

This litigation involved an expense of $800 and was charged as an operating expense of the Moody No. 1. Even the appellee admits that this is not an operating expense of the well.

"Q. Is that an expense for operating the well itself?

"A. No, I wouldn't think so."

Further testimony was to the effect that the damage done, if any, to the Harris property was even before the well was drilled and while moving the rig in. We find that the statement with these charges is excessive by $100 and that expense should be eliminated.

As a result of the excessive charges hereinabove set out, the judgment for operating costs is reduced to $219.77.

From what we have said above, the decree of the Chancellor is modified only to the extent indicated and affirmed, and the cause is remanded with directions to enter an order consistent with this opinion.

Modified and affirmed.

POOLE *v.* JAMES.

5-2087 333 S. W. 2d 833

Opinion delivered March 14, 1960.

[Rehearing denied April 4, 1960]

Bon McCourtney & Associates, for appellant.

Frierson, Walker & Snellgrove, for appellee.

J. Seaborn Holt, Associate Justice. This appeal arises out of a traffic accident under our commonly called "Guest Statute," 75-913—15 Ark. Stats., and comes from a judgment entered on a verdict by the trial court, at the close of all the testimony, in favor of Orville James, appellee.

At about 12:15 A.M. on the morning of March 1, 1959, appellee, James, while intoxicated, was driving his automobile west along Highway 140 in Mississippi County, Arkansas. Thelma Boat was in the front seat with James and appellant, Lorraine Poole, and K. O. Smith were in the back seat. It appears undisputed that appellant, Thelma Boat and Smith were all guests of James and that all had, since about 9 P.M., been visiting a round of taverns drinking beer, dancing, and having a "good time". The evidence shows that two officers, Sharpe and Amos, had stopped another automobile to check its occupants a short distance west of West Ridge on said highway and parked their car on the highway shoulder. When appellee, James, reached this point, he brought his car to a stop behind officer Sharpe's car and in the right traffic lane of the highway, without leaving 20 feet [75-647 Ark. Stats.] of the paved part unobstructed. Appellee had his headlights on. Officer Amos took James from his car, asked him to walk a straight line, then put him (James) in Sharpe's car. Later, Sharpe put K. O. Smith in his car also. After James' car had been stopped on the highway as indicated, for about two and one-half minutes, a car driven by Troy Kennedy, who was also intoxicated, collided with the rear of James' car, injuring appellant, Lorraine Poole, who had remained in the car.

Our Guest Statute provides: "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 ground, 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 wilfully and wantonly operated in disregard of the rights of the others." Ark. Stats. 75-913. Therefore, before appellant, Lorraine Poole, could recover, the burden was on her to prove that her injuries were caused by James operating his automobile in a willful and wanton manner in disregard of appellant's rights, and this we hold she has failed to do. "* * * Willful misconduct, or to operate an automobile in willful and wanton disregard of the rights of others, means something more than gross negligence", and "* * * willful negligence is greater in degree than gross negligence; to be wilfully negligent one must be conscious of his conduct—that is, he must, in the light of surrounding circumstances, comprehend that his act will naturally or probably result in injury. Differently expressed, willful negligence 'involves the element of conduct equivalent to a so-called constructive intent'." *Steward, Administrator* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901.

Appellant, Lorraine Poole, testified, in effect, that she was not intoxicated at any time while in James' car: "Q. * * * I believe you said you found nothing at all wrong in the operation of Orville's car and he parked his car in the same manner you would have? A. Yes." Thelma Boat testified that she and Lorraine Poole drank some whiskey before they met up with appellee, James, and K. O. Smith; that they all, including appellant, drank beer at the Three-Way Inn and that each one had several drinks of beer. Appellee, James, testified: "Q. When you would drink one, Lorraine would drink one, Thelma would drink one and K. O. drink one? A. Yes. Q. And then order another round? A. Another round. Q. You kept that up until about 12:15? A. Yes. Q. Were you feeling pretty good when you left? A. Yes, all right. Q. Everybody else was feeling pretty good when you left? A. That's right. Q. You all had that in mind, having a good time, when you left for Three-Way Inn? A. That's right."

Here the preponderance of the evidence, as indicated, shows that appellee, James, was drunk when he stopped his car on the highway. In *Sparks* v. *Chitwood Motor Company,* 192 Ark. 743, 94 S. W. 2d 359, in somewhat similar circumstances in which the court directed a verdict at the close of the testimony, we said: "* * * when a crowd of people go out together and all of them participate in drinking whiskey, and each one acquiesces in what the others are doing, all of them are guilty of negligence, and neither of them can recover against the other."

The degree of care required not only of the driver of the car, but also the occupants, is such care as a prudent person would exercise under the circumstances. Blashfield Cyclopedia of Automobile Law, § 631. * * * "The driver of the automobile was under no greater obligation to exercise care than the appellant was. Every one is under the duty to exercise ordinary care for his own safety," and in *Lewis* v. *Chitwood Motor Company,* 196 Ark. 86, 115 S. W. 2d 1072, we held: "A guest who is injured while riding with an intoxicated driver is precluded from recovery because of driver's intoxication when it is established that the driver was intoxicated or under the influence of liquor to such an extent as to make him a careless or incompetent driver, that the guest knew or should have known that the driver was under the influence of liquor, but nevertheless rode with him, and that the intoxicated condition of the driver caused or at least contributed to the injury."

Appellant testified and admitted that after appellee, James, had parked his car in a negligent manner, or in a dangerous position on the highway in question, and had gone with the officer, she, nevertheless, remained in the car for at least two and one-half minutes without attempting to remove herself from it before it was struck by Kennedy's car. In the circumstances, we hold that it was her duty, as appellee's guest, in the exercise of ordinary care for her own safety to have left the car during this two and one-half minute interval. We said in *Beason* v. *Withington,* 189 Ark. 211, 71 S. W. 2d 461,

"* * * The circumstances may be such as to charge the occupant with negligence as a matter of law, where he unreasonably remains in the machine after adequate opportunity is offered for alighting, or, at least, where he fails to insist on leaving the car. But this duty is not absolute, the question whether a failure to leave the vehicle is a want of ordinary care being dependent on the circumstances of the particular case." In Blashfield Cyclopedia of Automobile Law and Practice, No. 4, Part 1, § 2415, we find this statement of the law: "Where the road becomes dangerous, or the speed of the machine in which a passenger or guest is riding becomes excessive or unlawful, or the driver is otherwise careless or reckless in his conduct, and this is or ought to be known to the passenger, he is under the duty, in the exercise of ordinary care, to protect himself from injury, to caution the driver of the danger, remonstrate against it, and, unless the dangerous character of the surrounding conditions or the dangerous manner of operation is altered in such a way as to lessen the grave potentiality of harm, to quit the car if that may be safely done, or to request the driver to stop the vehicle, and, when it has stopped, to get out of the car."

In the present case, we hold that while the evidence might be sufficient to establish gross negligence on the part of James, it falls far short of being of that willful and wanton character, as above defined, to warrant a recovery against him by appellant under our Guest Statute *supra*.

Affirmed.

McFaddin, George Rose Smith & Robinson, JJ., concur.

George Rose Smith, J., concurring. I agree that the judgment should be affirmed, for want of any substantial evidence to show willful and wanton misconduct on the part of the appellee. He merely stopped his car on the traveled portion of the highway and left it there while obeying the instructions of the police. This conduct does not seem to me to involve anything more than simple

negligence, and consequently the court properly directed a verdict for the defendant.

The majority opinion, however, does not stop at this point. It goes on to charge the appellant with an insurmountable degree of contributory negligence, for the reason that she rode with an intoxicated driver and failed to leave the car promptly when it was stopped on the highway. Both these points involve issues of fact upon which the evidence is in conflict. Since it is our duty, in reviewing a directed verdict, to consider the proof in the light most favorable to the appellant, I am unwilling even to intimate that these two considerations tend to support the action of the trial court; for upon those questions I think it would have been proper to submit the case to the jury, if any willful and wanton misconduct had been shown.

McFaddin and Robinson, JJ., join in this opinion.

Board of Directors, St. Francis Levee District *v.* Morledge.

5-1949—1954 332 S. W. 2d 822

Opinion delivered March 14, 1960.

F. N. Burke, Jr., Daggett & Daggett, for appellant.

Carroll C. Cannon, for Appellee *Gatling, Shaver & Shaver,* for Appellee *Morledge, et al., Giles Dearing* for Appellee Thomas.

ED. F. MCFADDIN, Associate Justice. These appeals stem from condemnation proceedings instituted by the Board of Directors of the St. Francis Levee District against the appellee landowners in Cross County and St. Francis County. The Levee District is condemning a right of way approximately 1,400 feet wide for a new river channel. The cut for the new river will be 400 feet wide at the top and 180 feet at the bottom, and will be constructed on a 3 to 1 slope. The depth of the cut for the river will vary from 24 feet to 45 feet.

When the Levee District filed the condemnation cases, its appraisers, proceeding under Act No. 177 of 1945 (§ 35-1102 *et seq.* Ark. Stats.) and Act No. 249 of 1949 (§ 21-805 Ark. Stats.), proceeded to make appraisals. The landowners excepted to the appraisals, claimed that all elements of damages had not been considered, and asked much larger damages. As a result of the trial in the Chancery Court, the landowners received larger damages; and it is from these decrees that there are these

appeals. Below we tabulate the name of the landowner, the amount fixed by the appraisers, and the amount as finally awarded each landowner by the Chancery Court:

Landowner	Appraiser's Figures	Amount Awarded by Chancery Court
Morledge	$16,126.50	$102,450.00
Thomas	9,651.63	57,700.00
Edgar	4,755.00	45,085.00
Dillon	12,629.75	36,705.00
Gatling	20,161.88	32,089.00

The trial in the Chancery Court consumed more than nine days, and the Chancellor made six visits of inspection to the premises. The cases of Morledge, Thomas, Edgar, and Dillon were tried on the same theory of damages; but the District and Gatling stipulated for a trial on a different theory of damages. So it became necessary for the Chancellor to make separate findings in the Gatling cases. We consider first the cases of Morledge, Thomas, Edgar, and Dillon.

The learned Chancellor reduced his findings to writing; and they are so clear that we copy excerpts:

CHANCELLOR'S FINDINGS IN THE CASES OF MORLEDGE, THOMAS, EDGAR, AND DILLON.

"These causes originated in the Circuit Courts of Cross and St. Francis Counties and were transferred to this court when the defendant landowners raised the question as to the right of the District to condemn their lands under the power of eminent domain. This court having thus obtained jurisdiction and having found that the District had the legal right to condemn and acquire the lands as a right of way for levee purposes must needs retain jurisdiction for any and all purposes. The Chancellor must now constitute himself a jury for the purpose of assessing damages, if any be due, for the taking of private property for a public purpose. These cases were consolidated by agreement for the purpose of trial. The

factual background in each case is practically and basically the same though there are some differences in the pleadings in the case of the *District* v. *Thomas Gatling, et al.,* which necessitate separate findings in that case.

"All of the lands involved are located in what is called 'Clark Corner Cutoff'. This is one of the segments of the District's plan of levee and drainage improvements in the St. Francis and Mississippi River area. The District has proceeded in the condemnation proceedings under the provision of Act 249 of the Acts of the Legislature for the year 1949. The Chancellor has previously held that there had been a substantial compliance with the provisions of this Act on the part of the District and that it had by appropriate action become the sponsor of the project known as 'THE ST. FRANCIS RIVER VALLEY PROJECT', which is now being constructed by the U. S. Government pursuant to the authority of the Acts of Congress. The full details of the plan or project are contained and set forth in House Document No. 132, 81st Congress, First Session. A copy of said document forms a part of the record in the cases. * * *

"The overall purpose of the project is to provide facilities to carry off and contain all surface waters falling within an area including Southeast Missouri and Northeast Arkansas within the St. Francis and Mississippi watershed. The main purpose of the plan is to prevent any flood waters (either head water or back water) from the Mississippi River or the St. Francis River from reaching any part of the vast area in Missouri and Arkansas lying east of Crowley's Ridge on the west and the Mississippi River on the East except within a narrow floodway along the east side of Crowley's Ridge. When the project is completed and the improvements made it will protect from flood waters from either river all of the State of Missouri and Arkansas which lie in the St. Francis River watershed, except for the narrow floodway. The project plans contemplate that the lands belonging to defendants will be located within this narrow floodway * * * This floodway will be contained

on the west by Crowley's Ridge and on the east by a levee to be constructed under the plans. The effect of the project will be to provide for two distinct drainage districts in the valley where only one has existed previously * * *

"Construction, according to the plan, began several years ago and the new levee to form the east boundary of the floodway has been completed from the Mississippi to Madison, Arkansas, some few miles to the south of Clark's Corner Cutoff. This levee will be built to grade through the Clark Corner Cutoff area though the exact location in the area has not been definitely determined at this time. The new river through the area is now under construction.

"In the Clark Corner Cutoff segment with which we are concerned St. Francis River makes a wide bend of some nine miles and flows to the east of all the lands involved in the action. Under the plans which are now in the process of being carried out a new river will be cut almost straight across this bend and through the lands of defendants. This new river will be 400 feet or more wide at the top and 180 feet or more at the bottom and will be constructed on a 3 to 1 slope. The depth of the cut for the river will vary from 45 feet to 24 feet toward the south end. The district will utilize Sand Slough and Horse Shoe Lake as a part of the cut for the new river and the distance around the bend will be shortened some four miles or more.

"The new levee will be built across the river so as to create a dam at the north end of the area and also at the south end of the area and will cut off the flow of water through the old channel of the river and force the flow into the new river. The new river will bisect the lands of the defendants so that some of the farms will be divided by the new river. While the exact location of the levee to form the floodway has not been definitely determined at the time of trial, it must necessarily be located between the old river and the new river and most, if not all, of

the lands of the parties will be placed in the floodway to be created between Crowley's Ridge and the new levee and the lands must bear this additional servitude. From the maps and plats filed with the testimony, it appears that at this point this floodway will be from two to three miles wide.

"In each case the District filed its petition for condemnation and in each case the appraisers made and filed their award of damages. In each instance the appraisers made the award of damages for the value of the lands actually taken for agricultural purposes only and made no award for any other damage of any kind which might result from the condemnation. Exceptions were duly filed to the awards made by the appraisers and in the pleadings the defendants alleged and set forth in detail their claims for damages for the taking and damaging of their lands.

"The record in the case discloses that defendant Morledge operates his farm as one unit consisting of 1,018 acres of cultivated land and 458 acres of woodland. The farm is well improved and the improvements include a cotton gin, warehouse, store building, two large residence buildings, and many barns and tenant houses. A large lake of approximately 26 acres of water is located on the right of way taken and it has been used to irrigate some 300 acres or more of crop land and furnish water for a valuable irrigation system. The new river will destroy the lake and will divide this farm into almost equal parts some parts of which will be isolated by the new river. The headquarters (gin, store, etc.) will be located on the west side of the new river. The actual land condemned consists of 56.11 acres of cultivated farm land and 88.48 acres of woodland including the lake.

"The Dillon farm consists of 310 acres of crop land and 161 acres of woodland and pasture. The new river will divide the farm so as to isolate approximately 27 acres from the other lands in the farm. The action con-

demns 54.86 acres of crop land and 30.70 acres of woodland and pasture land.

"The Edgars farm consists of 441 acres of cultivated land and 334 acres of woodland. The District by this action condemns 21.39 acres of crop land and 12.72 acres of woodland. These lands are located toward the south part of the area and the lands which remain after the condemnation will all lie east and south of the new river.

"The Thomas farm consists of approximately 800 acres of land of which approximately 600 acres are productive crop land and 200 acres are wooded lands and pasture lands. The Thomas lands lie in the West and southernmost part of the bend and the outlet for the new river is located on his land. The District condemns 37.87 acres of crop land, 3.98 acres of pasture land and 44.79 acres of wooded land. Practically all the remaining land in the farm lies between the new river and Crowley's Ridge.

"All of these farms lie in the area which will comprise the floodway to be constructed. The District will have constructed two bridges across the new river, one at the north end of the area and one near the south end.

"Nine full days were consumed in the actual trial of the causes and many witnesses have testified at great length. The record with the testimony and exhibits is quite voluminous. There are many conflicts in the testimony which cannot be reconciled. The Engineers who appear as witnesses for both sides of the litigation are truthful men of excellent training and long years of experience in their field, yet there is much of their testimony which is conflicting. The experts called by defendants say that the effect of the project when completed will be of great benefit to those lands in the watershed which lie to the east of the new levee to be constructed, but that the lands belonging to the defendants which are involved in this action will be greatly damaged and the value of defendants' land lying along the new river and

within the floodway to be constructed will be greatly diminished if not destroyed. The engineers for the District testify that little if any damage will result to defendants' lands and that any such damage at this time and stage of construction could not be ascertained and would, therefore, be a mere speculation. There is much testimony as to the value of the lands actually taken, as well as to the value of the lands which remain after the taking.

"The testimony of defendants and their witnesses points out many elements of damage which will result from the taking that have not been taken into consideration by the appraisers and for which no compensation has been allowed by them. To enumerate these alleged elements of damage in these findings would extend the length unreasonably. The testimony is to the effect that the market value of the lands which remain to defendants has been diminished by from one-third to one-half of its value by reason of the action brought by the District. There is testimony to the effect that the lands themselves, as well as the crops to be planted thereon, have lost their value as security for loan purposes because of plaintiff's condemnation proceedings.

"In addition to the record testimony the Chancellor, at the request of the parties, has inspected the premises and lands affected on six different occasions during the pendency of the action. The Chancellor has covered the entire area on foot and has inspected that part of the construction of the ditch or new river which has been affected, as well as to note the type and condition of the land and the improvements thereon. The information and knowledge acquired by these visitations has been valuable in weighing the testimony and in arriving at a conclusion on the facts in the case.

"The court has concluded that in addition to the value of the lands taken and the damages thus sustained, the defendants have been and will be damaged by reason of the levee works constructed and to be constructed to

the remaining part of their farms and that the awards of damages made by the appraisers will not adequately compensate these defendants for the value of the lands actually taken and for the damages they have sustained.

"The Constitution of our State provides that no private property shall be taken, appropriated, or damaged for public use without just compensation therefor. It appears to the Chancellor to be the law in cases of this kind that when a part of a tract of land be taken for public use with no damage to the remainder, the market value of that part actually taken is the measure of damages. When a part of a tract of land be taken and damages result to the remainder, then the measure of damages is the difference in market value of the entire tract before and after the taking or damaging. Since the Chancellor has found that there are substantial damages resulting to the remainder of defendants' lands after the taking, it becomes the duty of the court to ascertain the market value of the whole land or farms in each instance before the taking and to ascertain the market value of that portion remaining after the taking and the difference would be the amount of damages suffered by the defendants in this case.

"The District insists that the defendants should be limited in the award of damage to the market value of the lands actually taken and that any other damage, if any, would be speculative at this time and would be until the project or plan has been fully completed. The District points at Act 177 of the Legislature for the year 1945 and Act 249 for the year 1949, and to the recoverable damages therein enumerated as a limitation of damages which the courts can allow compensation for damages sustained in condemnation proceedings for levee purposes. However, the Chancellor finds, under the facts and circumstances attendant in this case the damages awarded by the appraisers who were supposedly proceeding under the above cited acts would not meet the Constitutional requirement, the provisions of said Acts,

or adequately afford these defendants just compensation for the damages they have sustained.

"In the case of *District* v. *George B. Morledge, et ux,* the Chancellor finds that the farm before the taking had a market value of $421,800.00 and immediately after the taking the remaining portion of the farm had a market value of $319,350.00, a difference of $102,450.00, for which said defendants should have judgment.

"In the case of *District* v. *Fred Thomas, et al.,* the court finds that immediately before the taking this farm had a value of $160,000.00 and after the taking the remaining portion had a value of $102,300.00, a difference of $57,-700.00, for which said defendants should have judgment.

"In the case of James T. Edgar, *et ux,* the farm immediately before the taking had a market value of $120,925.00 and after the taking the remaining portion had a market value of $75,840.00, a difference of $45,-085.00, for which said defendants should have judgment.

"In the case of John Dillon, *et al.,* the Chancellor finds that the value of this farm before the taking had a market value of $85,550.00 and after the taking the remaining portion had a market value of $48,845.00, a difference of $36,705.00, for which said defendants should have judgment.

"The said judgments shall bear interest from the date of the filing of the petition for condemnation in each case at the rate of 6% per annum, and the costs of the proceedings shall go against the plaintiff District.

"The attorneys representing said defendants shall prepare a proper precedent in accordance with these findings and submit the same to counsel for approval as to form. * * *

"Dated 8/2/58 /s/ Ford Smith, Chancellor."

OPINION OF THIS COURT

Chancery decrees were entered in each case in accordance with the findings of fact, as previously copied; and from such decrees the District brings this appeal, presenting a total of thirteen points,[1] insofar as involve

[1] These points are:

(1) The Court erred in admitting testimony concerning the effect of the proposed plan of improvement, the threat of the construction of the proposed levee, and in considering these matters as elements of damage.

(2) The Court erred in considering and awarding judgment for any element of damage other than those elements set out in Ark. Stats. 35-1103.

(3) The Court erred in awarding judgment for the damages caused by the proposed construction of a levee, since the cause of action therefor, if any, does not arise until the levee is constructed and the damage accrues.

(4) The damages awarded by the Chancellor are not supported by substantial evidence, are unauthorized by law, and are excessive.

(5) The Court erred in admitting testimony concerning the damage arising from the construction of the ditch to the lands of the defendants other than the lands actually taken, in considering this as an element of damage in these cases, and in awarding judgment therefor.

(6) The Court erred in admitting testimony concerning the damage arising from the proposed construction of the levee to the lands of the defendants other than the lands actually taken, in considering this as an element of damage in these cases, and in awarding judgment therefor.

(7) The Court erred in considering as an element of damage in this case the damages which might result in the future from the construction of the ditch.

(8) The Court erred in considering evidence tending to establish damages accruing to the defendants by reason of destroying their right to irrigate from the waters of Sand Slough and Horseshoe Lake for the reason that, as a matter of law, this proceeding would in no wise affect their right to such use of the water.

(9) The Court erred in finding that the new river would divide the Morledge farm into two equal parts.

(10) There is no substantial evidence to support the Court's finding that the Morledge farm before the taking had a market value of $421,800.00, and immediately after the taking the remaining portion of the farm had a market value of $319,350.00, a difference of $102,450.00, and in rendering judgment against the appellant for said amount.

(11) There is no substantial evidence to support the Court's finding that the James T. Edgar farm before the taking had a market value of $102,925.00, and immediately after the taking the remaining portion of the farm had a market value of $75,840.00, a difference of $45,085.00, and in rendering judgment against the appellant for said amount.

(12) There is no substantial evidence to support the Court's finding that the John Dillon farm before the taking had a market value of $85.550.00 and immediately after the taking the remaining portion of the

the claims of Morledge, Thomas, Edgar, and Dillon. We combine and discuss these points in three topic headings.

I. *Constitutional Protection Afforded The Landowner.* Article 2 § 22 of the Arkansas Constitution says: "* * * private property shall not be taken, appropriated or damaged for public use, without just compensation therefor". When the State, or any of its subdivisions, or any public utility, exercises the power of eminent domain, then the owner of private property so taken, appropriated, or damaged for the public use, must receive just compensation therefor. The market value of property taken for public use is to be determined by its availability for all valuable purposes. *Gurdon & Ft. Smith Rd. Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019. The recovery is not only for the land taken, but also for the damages to the balance of the appellee's land, if any, caused by the taking. *Ft. Smith L. & T. Co.* v. *Schulte,* 109 Ark. 575, 160 S. W. 855.

By a long line of decisions we have established that the determination of the damage, in cases like these, is to be measured by what the property was reasonably worth before the taking, and what the remainder of the property is worth after the taking. As early as *Little Rock Miss. River & Tex. Ry.* v. *Allen,* 41 Ark. 431 (decided in 1883), we approved this statement of the law: "The correct rule for measuring damages is to determine the value of the whole land without the railway at the time the same was built, then find the value of the portion remaining after the railway is built, and the difference between the two estimates will be the true compensation to which the party owning the land is entitled". There are many cases to like effect. We cite only a few: *Newport Levee Dist.* v. *Price,* 148 Ark. 122, 229 S. W. 12; *Herndon* v. *Pulaski*

farm had a market value of $48,845.00, a difference of $36,705.00, and rendering judgment against the appellant for said amount.

(13) There is no substantial evidence to support the Court's finding that the Fred Thomas farm before the taking had a market value of $160,000.00 and immediately after the taking the remaining portion of the farm had a market value of $102,300.00, a difference of $57,700.00, and in rendering judgment against the appellant for said amount.

County, 196 Ark. 284, 117 S. W. 2d 1051; *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Ark. State Highway Comm.* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81. Tested by the language of the Constitution and our holdings in pursuance of it, it necessarily follows that the landowner is entitled to all the damages sustained because of the taking, and the Legislature has no power to specify a few items of damage and deprive the landowner of the other damages that he has sustained.

The appellant insists that the Legislature, by Act No. 177 of 1945 (§ 35-1101 Ark. Stats.), and by Act No. 249 of 1949 (§ 21-805 Ark. Stats.), has named five items of damage, in condemnation cases like those here involved, and that the landowner is limited to those five items of damage. The first four are stated in Act No. 177 of 1945 and are: (1) "fair market value of the land appropriated"; (2) "damage which the construction of the levee will cause by the obstruction of natural drainage"; (3) "inconvenience of passing over the levee, ditch, drain, or canal"; and (4) "the value of crop and houses on the right of way injured or destroyed". The fifth element of damage is set out in Section 2 of Act No. 249 of 1949, and is: "* * * damages shall be paid for any easement or flowage right or increased use or servitude. * * *"

We hold that the Legislature had the right to call the attention of the condemnor to these five elements of damage as particularly worthy of consideration; but that it was beyond the power of the Legislature to limit the landowner to these five elements of damage as mentioned in the two Acts. This holding has already been indicated in the case of *Staub* v. *Mud Slough Drainage Dist.,* 216 Ark. 706, 227 S. W. 2d 140; and there is nothing in *Gladish* v. *Drainage Dist.,* 217 Ark. 411, 230 S. W. 2d 490, or *Person* v. *Miller Levee Dist.,* 218 Ark. 86, 237 S. W. 2d 38, which indicates to the contrary.[2] The landowner is en-

[2] In the Gladish case no elements of damages were claimed except those listed in the Statute; and in the Person case, the question was whether the jury verdict was sustained by the evidence.

titled to all the damages which may reasonably flow from the taking of his property; and the Chancery Court acted properly in ascertaining the total value of the landowners' property before the taking and the total value after the taking, in order to determine the damages.

II. *Floodway Damages.* This is the point that has given us the most serious concern. In offering evidence of the damages, the landowners (Morledge, Thomas, Edgar, and Dillon) showed by the plans of the Engineers, by the Congressional reports, and by various other matters of evidence, that the total overall plan of the St. Francis River Basin was: (a) to construct this new river channel through the lands of these parties; (b) to use Crowley's Ridge as the west levee of the new channel; (c) to construct a new levee several miles east of the new channel; and (d) to have all of the lands in between Crowley's Ridge and the new levee as the floodway of the St. Francis River Basin. The landowners insist that the all-over plan for the St. Francis River Basin is the construction of a floodway, and that the taking of the landowners' property for the new channel of the St. Francis River is the condemnation proceeding, at which time they must obtain all of the damages that will result, because the making of the new channel is the first step in the floodway damage which will inevitably follow.

The appellant Levee District insists that neither the location nor the height of the east levee has been determined. Furthermore, the District contends that the new channel may be so satisfactory that no east levee will ever be built. Based on these and other contentions, the Levee District insists that the matter of floodway damages cannot be determined in this litigation because floodway damages will arise when, as, and if, the east levee is constructed; and to support its contentions the District cites the following cases and texts; *Sain* v. *Cypress Creek Drainage Dist.,* 161 Ark. 529, 258 S. W. 637; *Watson* v. *Harris,* 214 Ark. 349, 216 S. W. 2d 784; *Sponenbarger* v. *U. S.,* 21 F. Supp. 28, 101 F. 2d 506, 308 U. S. 256, 84 L.

Ed. 230, 60 S. Ct. 225; *Danforth* v. *U. S.*, 308 U. S. 271, 84 L. Ed. 240, 60 S. Ct. 231; *Willink* v. *U. S.*, 240 U. S. 572, 60 L. Ed. 808, 36 S. Ct. 422; *U. S.* v. *Dickinson*, 152 F. 2d 865; *Hempstead Warehouse* v. *U. S.*, 98 F. Supp. 572; 18 Am. Jur. p. 772 "Eminent Domain" § 144.

The Chancery Court agreed with the landowners and the award to each of them included floodway damages. Such ruling of the Chancery Court is challenged by the appellant. The opinion of the learned Chancellor, as heretofore copied, completely answers the contentions of the District:

> "Construction, according to the plan, began several years ago and the new levee to form the east boundary of the floodway has been completed from the Mississippi to Madison, Arkansas, some few miles to the south of Clark's Corner Cutoff. This levee will be built to grade through the Clark Corner Cutoff area though the exact location in the area has not been definitely determined at this time. The new river through the area is now under construction. * * * From the maps and plats filed with the testimony, it appears at this point this floodway will be from two to three miles wide."

The foregoing excerpts from the Chancellor's opinion show most clearly why the cases and authorities relied on by the appellant (as previously listed) are distinguishable, on the facts, from the case at bar. For instance, in the case of *Sponenbarger* v. *U. S. (supra)*, the lands were along the Mississippi River and were inundated in excess of fifteen feet in the 1927 flood. Thereafter, Congress adopted the so-called Jadwin Plan, whereby existing levees protecting the Sponenbarger lands were left at existing heights, but levees across the river were raised so that in case of flood the Sponenbarger land would, in effect, be a floodway; and the adoption of such plan was claimed to be a "taking" of the Sponenbarger land so as to subject the United States to liability for damages. The District Court held that there was no liability; the

Court of Appeals reversed; and the United States Supreme Court agreed with the District Court that there was no liability. But in the *Sponenbarger* case the United States Supreme Court listed and adopted two findings of the District Court which clearly differentiate the *Sponenbarger* case from the case at bar: (1) "The United States has not caused any excessive flood waters to be diverted from the Mississippi through the proposed Boeuf fuse plug (at Cypress Creek), or floodway, and respondent's property has not been subjected to any servitude from excessive flood waters which did not already exist before 1928"; and (2) "no work was ever commenced or done within the area of the proposed Boeuf flood-way; and the fuse plug heading into it was never established. This floodway as a whole has been abandoned, * * *" In the case at bar: (1) the basic plan is a diversion of water by a new channel through the lands of these landowners; and (2) the channel is constructed and the east levee has been built a short distance downstream from the lands herein. It would unduly prolong this opinion to discuss each case and textbook cited by appellant; we conclude that none is in point to the case at bar.

There is detailed and voluminous testimony in this record about how many feet of water will move down the new channel and why reservoir basins will be needed to take care of the overflow, and just how the backwater of the Mississippi River will cover some lands. One of the most essential points in the whole plan is the floodway. That floodway damages were within legislative contemplation is shown by Section 2 of Act 249 of 1949: "* * * and provided further damages shall be paid for any easement or flowage right, or increased use or servitude, on any lands by reason of increasing the amount or depth of water on same, regardless of whether said lands are protected or unprotected by levees, and these damages shall be in addition to damages set out in said Act 177 of 1945". See also *Garland Levee Dist.* v.

Hutt, 207 Ark. 784, 183 S. W. 2d 296; and *Watson* v. *Harris,* 214 Ark. 349, 216 S. W. 2d 784.

In *Drainage Dist.* v. *Haverstick,* 186 Ark. 374, 53 S. W. 2d 589, we held that a drainage district which dammed two rivers and diverted their waters from their natural flow into an artificial floodway, thereby precipitating water upon the plaintiff's land in increased volume, was liable for the damages caused thereby. In *Little Rock & Ft. Smith Ry. Co.* v. *Greer,* 77 Ark. 387, 96 S. W. 129, Chief Justice McCulloch said on rehearing: "The principle is made clear in the original opinion that where a railroad corporation lawfully acquires a right of way over land either by grant, prescription or condemnation, such acquisition covers all damages, present and prospective, resulting to the owner whose land is invaded. This is upon the theory that full compensation is allowed at the time and can be recovered only once." In *Baucum* v. *Ark. P. & L. Co.,* 179 Ark. 154, 15 S. W. 2d 399, in discussing damages in an eminent domain case, we said: "The court should also have charged the jury that full compensation for the market value and damages should be assessed in this suit, as future damages could be recovered only for the negligent use of the right-of-way condemned." In 18 Am. Jur. p. 887 (Eminent Domain § 249), in discussing prospective damage from use ultimately[3] contemplated by the condemnor, the general rules are stated as follows:

> "All loss occurring by the taking is to be assessed in one proceeding. The damages to be recovered must cover all future uses of the condemned property that are or should be within the contemplation of the parties at the time of the taking, irrespectively of the extent of the present needs * * * The land having been taken and appropriated, the right of the landowner to sue for his damages is complete, and he may recover the entire damages that may be

[3] There is an annotation in 75 ALR 855, entitled: "Right to compensation in eminent domain on basis of entire extent of property or complete use ultimately contemplated in excess of present requirements."

caused by the location and by the subsequent construction."

We, therefore, hold that the Trial Court was correct in awarding floodway damages to the landowners, Morledge, Thomas, Edgar, and Dillon.

III. *The Amount of the Chancery Awards to the Landowners, Morledge, Thomas, Edgar, and Dillon.* In its Points 10 to 13, inclusive, the appellant claims that the damages were excessive that were awarded by the Chancery Court to these four landowners; and by cross appeals each of the landowners claims that the Trial Court failed to award sufficient damages. In Point I we held that the landowners were entitled to all elements of damages shown to result from the taking; and in Point II, we held that floodway damages come within such purview. These two holdings support the Chancery Court in its basic determination of the elements of damages. A review of the voluminous testimony on the damages to each landowner would serve no useful purpose. The Chancery decree is affirmed on both direct appeal and cross appeal insofar as concerns the landowners, Morledge, Thomas, Edgar, and Dillon.

IV. *The Gatling Cases.* The Gatling lands are in both Cross and St. Francis Counties but both of the eminent domain cases are involved on this appeal. The Gatling cases were tried on a theory of damages entirely different from the theory on which were tried the cases of Morledge, Thomas, Edgar, and Dillon; and thus the Gatling cases necessitate this separate topic. Gatling did not seek floodway damages in these cases, and reserved until a later date right to claim floodway damages.[4] The Court decree in the Gatling case contains

[4] The Gatling brief in this Court contains this language: (Gatling) ". . . sought only damages for the lands actually taken and other damages occasioned by the construction of the ditch; and the decree reserved to the appellee Gatling the right to recover for damages to his adjoining lands at any time within five years after the damage occurs, as provided in Act 249 of the Acts of 1949". The reason that Gatling desired to reserve his claim for flood damages was—as stated by his attorney in the oral argument before this Court — because the Gatling

this language, which was stated to us in the oral argument to have been the result of a stipulation between the parties: "That no consideration has been taken of any possible damage which may accrue to the defendants in the future because of any claim for damages to other lands of the defendants for any easement or flowage right or increased use or servitude of said lands by reason of increasing the amount or depth of water on same, whether the lands are protected or unprotected by levees".

Of the Gatling lands, the District condemned for the right of way of the new channel 60.02 acres of cultivated lands (which the appraisers valued at a total of $17,-665.50), and 66.57 acres of woodlands (which the appraisers valued at a total of $2,496.38). The total allowed by the appraisers was $20,161.88. The Chancery Court allowed Gatling $300.00 an acre for his cultivated land, and $50.00 an acre for his woodlands, or a total of $21,339.00 for the lands actually taken; and as to this figure the appellant raises no objection. But the Chancery Court also allowed Gatling the following items of damages, which the appellant challenges: $5,000.00 for the taking of Sand Slough; $5,000.00 for damages because of the inconvenience of crossing the new river and the isolation of certain lands because of the new river; and $750.00 damages to buildings on the right of way. It is only as to these three items, totalling $10,750.00, that the appellant raises any claim in the Gatling appeal; and a careful study of the record convinces us that the appellant's contentions are without merit, in view of our holdings in Points I and II in the cases involving the other landowners herein. Sand Slough was a body of water useful for irrigation, recreation, and other purposes, and the channel of the new river is to take this waterway; and the landowner is entitled to recover damages for all property taken or damaged. Part of the Gatling lands will be on one side of the river and part on the other, and one tract will be prac-

lands are on high ground and have never been flooded, even in 1927, and Gatling doubted his ability to prove floodway damages unless the top of the east levee is higher than the Gatling lands.

tically isolated because of road conditions. Furthermore, some of the Gatlings' houses on or touching the right of way have not been moved. We, therefore, conclude that the Chancery decree should be affirmed in the Gatling cases.

BUTLER *v.* CITY OF LITTLE ROCK.

5-2070 332 S. W. 2d 812

Opinion delivered March 14, 1960.

Langston & Walker, Frank Holt, Prosecuting Attorney, By: *H. Clay Robinson,* Deputy Prosecuting Attorney, for appellant.

Joseph C. Kemp and *William M. Stocks,* for appellee.

James L. Sloan, Brief Amicus Curiae for Ark. County Judges Assoc.

Glenn G. Zimmerman, William G. Fleming, Brief Amicus Curiae for Ark. Municipal League.

PAUL WARD, Associate Justice. The sole question presented by this appeal is a constitutional one involving

the validity of the extra-territorial provisions of Act 186 of 1957, which Act provides for the creation of City Planning Commissions in cities of the first and second class. The question arose in the manner and under the circumstances hereinafter presently set out.

The appellants on this appeal, Perry L. Butler and Horace Edward Meeks, each owned a parallel and adjoining strip of land containing 5 acres, each approximately 150 feet wide east and west and 1,320 feet long north and south lying in the Southwest Quarter of the Southeast Quarter of Section 35, Township 1 North, Range 13 West in Pulaski County, situated less than five miles from the corporate limits of Little Rock. Desiring to develop and sell said property for residential building purposes they had an engineer to prepare a Plat showing the said land divided into 22 lots with set-back lines and a street 50 feet wide running north and south between the two parcels. They also prepared and executed a writing called a "Bill of Assurance" which described the aforesaid property and which prescribed rules and regulations for the location and construction of residences. The document was also signed and approved by the Peoples Building and Loan Association as the holder of a lien on the above mentioned property.

When appellants presented the Bill of Assurance and the Plat to the Circuit Clerk of Pulaski County, together with the proper fees, for the purpose of having the same recorded in the proper record, the Clerk refused to accept them. The sole and only reason assigned by the Clerk for not accepting the papers for recordation was that they did not bear the approval of the City Planning Commission of the City of Little Rock.

Thereon appellants filed a petition in the Pulaski County Circuit Court praying that a Writ of Mandamus be issued against the Circuit Clerk commanding and directing him to record the Plat and Bill of Assurance. The Clerk answered the above petition stating, in effect, that there was an apparent conflict in the law regarding his duty to accept the said papers for recordation; that Act

186 of 1957 appears to provide that he should not file them for record if they were not approved by the City Planning Commission, while on the other hand Act 202 of the Acts of 1957 apparently gave the Pulaski County Planning Board certain jurisdiction over the development of land outside the corporate limits of Little Rock. Because of the above apparent conflict the Clerk asked the Court to declare his rights, duties, and responsibilities. The City of Little Rock responded to appellants' petition to the effect that the Clerk had no right under Act 186 of 1957 to record the Plat without its having been approved by the City Planning Commission. The County Judge of Pulaski County intervened and took the position that since the lands involved were county lands and not within any corporate limits their development is controlled by Act 202 of 1957 which provides for County Planning Boards and he wanted the Court to say to what extent, if any, said Act 202 of 1957 and Act 186 of 1957 were unconstitutional.

After a hearing the trial court refused to issue the Writ of Mandamus and thereby refused to direct the Circuit Clerk to record the Plat and Bill of Assurance. In doing so it made a written statement of its "Finding of Facts" and "Memorandum Opinion" which, in a very thorough and lucid manner, assigned reasons and authorities to sustain its holding and which have been very helpful to this Court. In addition to briefs by the parties above mentioned the Court has been favored with briefs, *amicus curiae,* by the Arkansas County Judges Association and by the Arkansas Municipal League.

Act 186, Section 5c (the last paragraph), says that "the County Recorder shall not accept any Plat for record without approval of the Planning Commission". It is conceded that the Little Rock Planning Commission did not give its approval in this instance. Therefore, it is perfectly obvious that the trial court, in refusing to require the County Clerk to record the Plat and Bill of Assurance, must be affirmed, UNLESS, of course, said Act 186 is for some reason void and ineffective. Appellants

take the position that the Act is ineffective for the reason that it is unconstitutional. The principal reason, they say, the Act is unconstitutional is because it conflicts with Article 7, Section 28 of our Constitution. The conflict, say appellants, lies in the fact that the Act deprives the County Court of its original and exclusive jurisdiction over roads and necessary internal improvements in unincorporated territory.

Article 7, Section 28 of the Constitution reads, in all parts material herein, as follows:

> "The County Courts shall have exclusive original jurisdiction in all matters relating to County taxes, *roads,* bridges . . ., and in every other case that may be *necessary to the internal improvement and local concerns* of the respective counties". (Emphasis Supplied)

Act 186 of 1957, which provides for the creation of City Planning Commissions in cities of the first and second class, contains a comprehensive enumeration of the powers and duties of the Commission relative to making and recording Planning Area Maps, Public Improvement Programs, Land Use Plans, Community Facilities Plans, Zoning, Ordinances and a Master Street Plan. The portion of the Act objectionable to appellants is found in Section 3.1 which in all material parts reads as follows:

> "The territorial jurisdiction of the legislative body of the city having a Planning Commission for the purpose of this Act shall include all land lying within five (5) miles of the corporate limits".

It appears to us that the language used in Article 7, Section 28, above quoted, is so clear that it admits of only one interpretation and that is this: Where there is a conflict over the exercise of jurisdiction (over matters mentioned in said Section 28) between the County Court and any creature of the Legislature the latter must give way. We are here concerned primarily, though not necessarily exclusively, with jurisdiction over roads in an unincorporated portion of the County. In the case of *Road Im-*

provement District No. 1 v. *Glover*, 89 Ark. 513, 117 S. W. 544, this Court clearly affirmed the plain language in the Constitution relative to the exclusive jurisdiction of the County Court over roads.

What we have above said does not mean, however, that the trial court must be reversed, because we are not here presented with a conflict between the County and the City. Certainly the County and the City are not attempting to exercise control or jurisdiction over the same thing or the same subject matter, and they may never do so insofar as this record shows. It is not pointed out, and we do not understand, that the matter of recording or not recording a Plat in any way affects the jurisdiction of the County Court over county roads or internal improvements.

Every intendment of the law is in favor of the constitutionality of Act 186 and also Act 202 of 1957. The benefits to be derived by the general public are too obvious and far reaching to be lost if they, or a major portion thereof, can be retained within the framework of our Constitution, and we think they can. The overall principle of Zoning and Planning laws, even to the extent of extra-territorial jurisdiction, is generally approved by this and other courts. See *Newton Circuit Clerk* v. *American Security Company*, 201 Ark. 943, 148 S. W. 2d 311 and *Prudential Co-op Realty Co.* v. *City of Youngstown*, 118 Ohio St. 204, 160 N. E. 695. The apparent attitude taken by the courts relative to zoning in general is concisely stated in *58 Am. Jur. P. 947, Zoning, Validity of Laws and Regulations, § 14,* this way: "There is no fundamental objection to zoning laws and ordinances so long as they apply without unnecessary discrimination and are reasonable in their scope and operation; within these limits they are a justifiable exercise of the police power and are not open to objections upon the ground of privileges and immunities of citizens, interference with vested rights, or the taking of property without due process of law".

This State has a moderately long history of Planning legislation, unsuccessfully challenged so far in its

major aspect. See Act 108 of 1929, Act 295 of 1937, and Act 186 of 1957 pertaining to Planning by cities of the first and second classes; and Act 246 of 1937, Act 353 of 1953, and Act 202 of 1957 pertaining to County Planning. In addition to the above we have Act 56 of 1945, Act 164 of 1945, and Act 289 of 1959, which all deal with surveys and plats outside incorporation boundaries. Running through all of these Acts are ambiguities and conflicts which we are not called upon, nor are we able at this time, to reconcile.

By this opinion we are in effect holding that Act 186 of 1957 is not, as to the issue here raised, unconstitutional, and much good may be realized by cities and counties by working in cooperation under the provisions of said Act 186 and Act 202 of 1957. To put it another way, as we see it, the City can follow one of two courses in implementing Act 186. *One.* The City can secure the approval of the County Court to its projected plans. In such event it seems that all questions of jurisdictional encroachment would be eliminated. *Two.* It can, as it appears to be doing now, proceed without the County Court's approval. In this event it is possible of course that the County Court will never attempt to exert any jurisdiction it may have in the matter of roads or other internal improvement matters in conflict with City plans. On the other hand, as we have pointed out, the City would be taking the calculated risk. Because of the alternatives set out, we can appreciate the wisdom of the Legislature in not *requiring* the approval of the County Court to any City plans.

Again, we reaffirm the narrow ground upon which we affirm the trial court, and make it clear that we are not hereby approving, as reasonable, plans and ordinances of which we have no knowledge.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. When the present case reached this Court, my first thought was

that in all fairness I should disqualify myself from hearing the matter. This thought was based upon the fact that the small farm on which I live is located in a rural area within five miles of two municipalities which could possess City Planning Commissions. I was personally concerned with the denial of the right to vote for or against the officials authorized to dictate to me the conditions under which I could use and develop my property under the terms of Act 202 of 1957, and Act 186 of 1957.

It has been argued that in this modern day, planning commissions are necessary for progress. Certainly there is a great deal of merit to this argument. However, the validity of the argument depends upon what is considered to be progress. It has been my observation that most rural people in this state live in the country by choice and a great number of them such as myself live in the country principally to escape the mass regimentation that the Acts here in question are calculated to contribute to. Yes, it can be said that in the absence of regulation some people might build a pig pen. The truth of the matter is that some of us country people might have every intention of building a pig pen. If so, we feel that we have every right to choose to do so. Freedom of choice is the greatest freedom we in this nation enjoy, or did enjoy until the United States Supreme Court by judicial fiat set out to destroy that right.

The present laws of Arkansas, whether they are fair or unfair, are ample to allow a municipality the right to annex property contiguous with their boundaries. I don't think it would be an unreasonable burden to require that such property which the city seeks to control be incorporated into the city before control is assumed. With the strong feelings I have on this matter, I probably should have disqualified but in the absence of an offer to disqualify by the other members of the Court who, with the exception of one, all reside within the corporate limits of the appellee, I chose to remain.

Article 7, Section 28 of the Constitution reads, in all parts material herein, as follows:

"The County Courts shall have exclusive original jurisdiction in all matters relating to County taxes, roads, bridges . . ., and in every other case that may be necessary to the internal improvement and local concerns of the respective counties."

It is fundamental in the law that municipal corporations have no extra-territorial powers but their jurisdiction ends at the municipal boundaries. 37 Am. Jur. Municipal Corporations, § 122, p. 736; 62 C.J.S., Municipal Corporations, § 141, p. 283; McQuillin, Municipal Corporations, § 10.07. The legislature may, and in many instances has, authorized the exercise of municipal authority outside the legal limits of the municipality, but such must be within and subject to the state's constitutional limitations.

With these fundamental principles in mind, it must be determined what constitutional limitations, if any, are imposed on the state legislature.

It must be admitted by all concerned that Art. 7, § 28 of the Arkansas Constitution, grants to the county courts exclusive original jurisdiction over county roads. *Sanderson* v. *Texarkana,* 103 Ark. 529, 146 S. W. 105; *Parkview Land Co.* v. *Road Improvement Dist. No.* 1, 92 Ark. 93, 122 S. W. 241; *Road Improvement Dist. No.* 1 v. *Glover,* 89 Ark. 513, 117 S. W. 544. This does not mean city streets nor state highways, but merely county roads. As a result, then, the county court must have the power, and, therefore, has the duty to plan, construct, maintain, alter, relocate, and abandon county roads.

How could the county courts execute this constitutional power if Act 186 is law? Under the act, municipalities could pass ordinances adopting a street plan for streets outside the city in the five-mile area. § 4 (c). The planning commission would be empowered to make regulations to enforce this plan. § 5 (c) and 5 (d) and (e). The development and use of the land in the five-mile area could be controlled by the city. § 4 (a). No plat for the dedication of land in the five-mile area could be accepted for recording unless passed on by the city. § 5 (c). Under these sections it would be possible for the city to locate,

plan, and abandon streets, roads and highways; it could determine the width, points of entry, types of construction and types of use of streets, roads and highways. It is well settled that the legislature may impose upon political subdivisions other than counties the responsibility of maintaining streets and roads. *Parkview Land Co.* v. *Road Improvement District No.* 1, *supra; Sanderson* v. *Texarkana, supra.* But here, although the city is purportedly empowered to determine the location, type of construction and all other details of roads in what has always been thought to be the county's jurisdictional area, the city is not made responsible for their upkeep and maintenance after construction.

The proponents of the act may say this is an extreme interpretation of its provisions, but it is an inescapable conclusion. What better ways is there to impose the city's will on the development of county roads in the five-mile area than by refusing to approve plats for recordation or by "denial of building permits and use permits." The county would also be hamstrung by the provisions of § 3 (f): "no public way, . . . building or structure . . . shall be acquired, constructed or authorized unless . . . . submitted to the planning commission for . . . approval . . . " Can the majority say the things here set out do not constitute the internal improvements specifically reserved to the county court under the Constitution?

The question here is not one of good intentions, or what responsible commissions and city councils or boards might do, but whether this act infringes upon the powers of county courts under the Arkansas Constitution. Exclusive original jurisdiction can only mean what the words say. Any encroachment on this jurisdiction by a municipality is unconstitutional.

I reach this conclusion based not on my personal feelings in this matter but upon the clear and unmistakable language of the Constitution as it is written.

For the reasons stated above, I respectfully dissent.

Opinion delivered March 14, 1960.

William I. Purifoy, for appellant.

Bruce Bennett, Atty. General, By: *Thorp Thomas,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant was convicted on a charge of robbing a filling station. After he was arrested he gave the officers a written confession of his guilt. The confession included the admission of guilt of other crimes not connected with the filling station robbery.

During the trial the prosecution introduced that part of the confession pertaining to the crime for which the defendant was then being tried. When the confession was offered in evidence, defendant objected because the State did not offer the entire confession instead of just the relevant parts of it. In ruling that the State could introduce only the relevant parts of the confession the trial court stated that the defendant could introduce the other parts of the confession if he so desired, but the defendant did not choose to introduce in evidence the other parts. It is hard to see how the defendant was prejudiced in any manner by the court's ruling on the point. *Whitten* v. *State,* 222 Ark. 426, was reversed because the entire confession was not put in evidence, but there certain parts of the confession that may have been beneficial to the de-

fendant were deleted. In the case at bar, however, it cannot be said that the parts of the confession not introduced in evidence were in any way helpful to the defendant.

Affirmed.

ROME *v.* AHLERT.

5-2075 332 S. W. 2d 809

Opinion delivered March 14, 1960.

G. W. Lookadoo and *Lookadoo, Gooch & Lookadoo,* for appellant.

Huie & Huie and *Wootton, Land & Matthews,* for appellee.

JIM JOHNSON, Associate Justice. This suit arises out of a collision that occurred on Highway 67 in the early morning of June 13, 1959, at about 1:30 o'clock on the bridge that crosses Bayou De Roche which separates Clark and Hot Spring Counties. It is admitted that the

center of the channel of the creek or bayou is the line between Clark County and Hot Spring County. The appellant, Myrtline Rome, filed suit in the Clark County Circuit Court on September 2, 1959; and appellant, Gertrude Arnold, individually, and as administratrix of the estate of Virgil James Arnold, Jr., filed suit on September 22, 1959. Both suits alleged certain damages done to the appellants and also alleged that the causes of action occurred in Clark County, Arkansas.

In due time appellees, Joseph F. Ahlert, et al., filed motions to dismiss in each case alleging that the causes of action occurred in Hot Spring County. The two suits were consolidated for the purpose of hearing the Motions to Dismiss and the Court, after hearing various witnesses, found in his opinion that by a preponderance of the evidence the causes of action occurred in Hot Spring County, but also found that there was ample evidence to go to the jury on the question of where the accident occurred. The Court held that it was his duty as the Court and not for a jury to pass upon the question of venue, and that the Circuit Court of Clark County was without jurisdiction to hear and determine the causes. The Court's ruling was based upon the further finding that the plaintiffs in each of the two suits were non-residents of the State of Arkansas and that the venue for the trial of the cases was controlled by the provisions of Act 314 of the General Assembly of the State of Arkansas for the year 1939, as amended. The Court granted the Motions to Dismiss the appellants' complaints. From that action of the Court comes this appeal.

For reversal, appellants rely upon the following two points:

1. The venue was strictly a jury question and should have been submitted to jury on proper instructions.

2. The court erred in finding that the preponderance of the evidence was that the cause of action occurred in Hot Spring County.

In support of the first point urged for reversal, appellants rely upon Section 23 of Article 7, and Amendment No. 16, Article 2, Section 7, of the Constitution of Arkansas, to sustain their position. It has always been the rule of appellate courts under our system of jurisprudence that constitutional questions will not be determined unless their determination is essential to the disposition of a case. *Commissioner of Labor, C. R. Thornbrough* v. *Danco Construction Company,* 226 Ark. 797, 294 S. W. 2d 336; *Duncan* v. *Kirby, Judge,* 228 Ark. 917, 311 S. W. 2d 157; *The Yellow Cab Co. of Texarkana, Inc.* v. *Texarkana Municipal Airport,* 230 Ark. 401, 322 S. W. 2d 688. A careful review of the record before us fails to reveal a request for a jury trial. The trial court's Memorandum Opinion does disclose that after the conclusion of the hearing on the Motion to Dismiss, and after the announcement of the court's findings, the attorneys were asked to enlighten the court on the controlling law. Briefs were filed by both sides in which the question of entitlement to a jury trial in cases such as is here presented was argued both pro and con. The discussion of the theories of learned counsel is interesting but since there was no request made in the record for a jury trial we do not find it necessary for the disposition of this case to reach the point raised.

While we think it is doubtful that appellants in this case had a constitutional right to a trial by jury of an issue of fact on a question of venue, it is sufficient to say that they waived it by voluntarily submitting to a trial of the issues by the court sitting as a jury without making an effort to obtain a jury trial until the findings of the trial court had been announced. *Chapline* v. *Robertson,* 44 Ark. 202.

Point two urged for reversal questions the preponderance of the evidence. A number of credible witnesses were produced by each side. The testimony as to the place where the collision occurred is in hopeless conflict. However, a careful review of the record does reveal that it is undisputed that the center of the bridge on

which the collision occurred was also the approximate center of the De Roche Creek or bayou which was stipulated to be the line between Hot Spring and Clark Counties. It is further undisputed that after the collision occurred, both vehicles involved came to rest at points north of the center of the bridge and that the north side was the Hot Spring County side of the bridge. From all of the testimony adduced it is possible that had we been sitting as the trial court in this case we would have found to the contrary of his ruling. Even so, from the undisputed evidence contained in the record here presented we cannot say that there was no substantial evidence to support the trial court's findings.

It has long been the rule that when the trial judge decides a fact question, either interlocutory or preliminary to the trial, such decision will be sustained on appeal if there is any substantial evidence to support it. *Blass* v. *Lee,* 55 Ark. 329, 18 S. W. 186; *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. 462; *Mosley* v. *Mohawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187; *Shephard* v. *Hopson;* 191 Ark. 284, 86 S. W. 2d 30; *Halliday* v. *Fenton,* 164 Ark. 11, 260 S. W. 961; *Scroggin & Co.* v. *Merrick,* 176 Ark. 1205, 5 S. W. 2d 344; *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368.

Affirmed.

5-2076 333 S. W. 2d 236

Opinion delivered March 21, 1960.

[redacted]

Griffin Smith, for appellant.

Joseph C. Kemp and *William M. Stocks,* for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a decree of the Pulaski County Chancery Court,

which found that "a thirty (30) foot strip of land was dedicated to the public for a right-of-way for West Markham Street along the south side of Midland Hills Addition at the time of filing of record the plats for said addition; and that the proposed widening of West Markham south of Midland Hills Addition * * * will be entirely within the dedicated right-of-way * * *." Petition for injunction against the city of Little Rock was denied.

Appellants are property owners in the addition adjoining the north side of the street between the intersection of Kavanaugh and West Markham to the east, and just beyond Crystal Avenue to the west. They alleged that no dedication for public use exists north of the present curb line, and a widening of the right-of-way would constitute a taking of private property for public use without just compensation. They further alleged that unless the construction was enjoined, irreparable damage would result, and that they had no adequate remedy at law. Answering, the City asserted that it owned all of the right-of-way which it proposed to utilize; also, that the appellants had an adequate remedy at law for damages. For reversal, appellants argue three points, as follows:

"I.

Dedication of property for use as a public street must be accomplished in such manner that the record of the dedication puts abutting landowners on notice of the boundaries. The intent must be manifested in such fashion that a competent surveyor can establish the boundaries with absolute certainty. A survey which carries on its face notice of its own inaccuracy cannot, after lapse of half a century, during which improvements have been made by abutting landowners, sufficiently meet these standards.

II.

Ark. Stats. Sec. 19-3802 require acceptance of a dedication by passage of an ordinance specifically designed for such purpose. No such ordinance accepted the dedication claimed here, hence it is incomplete.

III.

By requiring improvements by abutting landowners, which could only be done if the property was private, the city is now estopped to claim it is public."

We proceed to a discussion of each point in the order named.

I.

From evidence presented at the trial, it appears that the Midland Hills addition was platted in two parts within an approximate two months period. The eastern section, platted in August, 1910, contains a dedication along the southern boundary for Markham Street (designated as such on the plat), with the figure "30" indicating the width of the street right-of-way. The following statement appears on the face of the plat:

"Because of the many curves and angles and irregular boundaries on this Plat the exact dimensions of lots or subdivisions may not be accurately designated on this plat, therefore, dimensions shown hereon are subject to variations and errors and in such cases, the monuments and iron pins as originally placed by Theo. Hartman C. E. shall govern."

The western section, platted on October 9, 1910, contains a dedication along the southern boundary for Markham Street in the same scale (which is indicated to be 1″=100′ on both plats), but without any written figure indicating the width of the right-of-way. These plats were recorded in Plat Book No. 1 on pages 132 and 150 respectively. The evidence reflects a conflict between the plats of the addition and the original government survey, and many of the figures on the plats, given by the original surveyor of the addition, cannot be verified. This evidence was primarily directed to the lengths of the eastern and southern boundaries of the addition, and not to specific lots along the northern side of Markham Street. Mr. Chris Wright, a civil engineer, testified that, in his opinion, there was "such utter confusion in the pins, you cannot accept them"; however, he admitted that he could not give any figures for overage or shortage in

the lots along the street. Jan Carter, Director of Public Works for Little Rock, conceded that some of the figures given by the original surveyor of Midland Hills could not be verified. The city, to substantiate its contention that the width of the dedicated right-of-way was thirty feet, relied upon the testimony of Mr. Carter and John P. Powers, a registered professional engineer. Carter stated that the scale on the two plats was the same, and that he concluded that the right-of-way on the plat of the western division was a continuation of the thirty foot right-of-way on the eastern part, since both "scaled out" approximately the same. He further testified that the proposed widening will vary from 3½ feet to 4 or 4½ feet back of the present curb, and that at no place will the street and sidewalks encroach upon the property beyond the alleged thirty foot right-of-way.[1]

Mr. Powers testified that according to his computations and figures, the minimum right-of-way through the addition is twenty-nine and one-half feet, this determination being based upon measurements he made from the streets in the addition north of Markham Street along the property lines south to the right-of-way line as claimed by the city. The witness further stated that along the east side of Midland (the first street intersecting Markham in the disputed area) the measured distance to the right-of-way is one-half foot "shy" of the platted distance on the original plat (this is the point which establishes the minimum width of the right-of-way at twenty-nine and one-half feet); that on the west side of Midland there is an overage of 2.4 feet; that along the east side of Ridgeway Avenue (the second street) there is an overage of .45 feet; that along the east side of Crystal Avenue there is an overage of 2.35 feet, and that along the western boundary of the addition, he found an overage of 2.35 feet over the equivalent of eight fifty foot lots. Based upon these measurements, he concluded that the city had a thirty foot right-of-way through the

[1] According to Mr. Carter, the overall width of the right-of-way is sixty feet, but we are here only concerned with the north half of such right-of-way (that portion dedicated by Midland Hills Company). The street has been enlarged from thirty to forty-five feet, and seven and one-half feet is left on each side for sidewalks and utilities.

addition. From his testimony, it is also apparent that pins were found near the alleged right-of-way line in each instance, although in many instances more than one was found at a particular location.

Appellants contend that the surveys made in the area are so patently erroneous that the boundaries of the dedication cannot be established beyond the existing curb line, and that the property owners cannot be charged with notice of a dedication of the alleged width.

We think the evidence supports the finding of the Chancellor that the dedicator intended to dedicate a right-of-way thirty feet in width. Relative to the statement appearing on the face of the plat, original pins or monuments were not determinable, and it was therefore not possible to establish exact dimensions, but appellants offered no proof to show that the findings of the city engineers were incorrect. Further, we note that appellants introduced no evidence showing that as a result of the widening, their lots are made smaller, *i.e.,* that they have less footage, than entitled to under the plat. Appellants only rely upon testimony that the general dimensions of the entire addition are not susceptible to confirmation by survey, and that the dedication, if any, beyond the existing curb line is void. This same contention was made in the case of *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379 (1908), and was rejected by this Court, which stated:

"The principal contention of appellees in support of the decree in their favor is that the dedication was void for the reason that the plat of the addition did not sufficiently locate and identify the land, but we think this contention is not well founded. The surveyor's certificate or note indorsed on the plat shows that the land platted lies within a certain quarter section, and the center of the quarter section is approximately indicated on the plat. Cumberland Street was one of the established streets running through the city, and the designation of the street on the plat by that name and of the same width is sufficient to identify it as a continuation of that street. We are only concerned in this case about the

identification of the street; but when it thus identified as a continuation of the street of that name in the city, the uncertainty as to the location of other property on the plat disappears.

It is not essential that the description be so precise that the location and identity of the land embraced are apparent from the description alone, but extraneous circumstances may be considered to show the application of the description. *Dorr* v. *School District,* 40 Ark. 237; *Tippins* v. *Phillips,* 123 Ga. 415. According to this rule, it was competent, by parol testimony of extraneous circumstances, to fit the plat to the adjoining parts of the city, so that Cumberland Street would be what it was obviously intended, a continuation of the street of that name and width in the old part of the city."

Here, the location of Markham Street is not in dispute, and the city has shown that the width of the street according to the scale of the plat of the western part of the addition, is the same as the width of the street in the plat of the eastern portion where street width is indicated. It might also be pointed out that the plat of the western portion shows the boundaries of Block 13 (half of Block 13 being shown on plat 132), and portrays an extension of Markham Street east, which ties in with plat 132, or the eastern portion. This extension appears to be of the same width as the rest of the street shown on the plat. These facts in themselves denote an intention by the dedicator to dedicate a continuous thirty foot right-of-way along the entire southern boundary, and constitute notice to a person contemplating purchase of land within the addition.

As previously stated, appellants offer no proof that they have record title to the disputed area. Without a showing of actual title of record, or by the monuments referred to on the plats, appellants can only rely upon adverse possession, or laches, neither of which is applicable in this case. As to adverse possession, the pertinent portion of Ark. Stats. Anno. (1947), § 19-3831, provides as follows:

"Hereafter no title or right of possession to any alley, street, or public park, or any portion thereof, in any city or incorporated town in this State shall or can be acquired by adverse possession or adverse occupancy thereof, and the right of the public or of any city or incorporated town . . . to open or have opened any alley, street or public part, or parts thereof, shall not be defeated in any action or proceeding by reason or because of adverse possession or adverse occupancy of any such alley, street or public park or any portion thereof where such adverse possession or occupancy commenced or begun after the passage of this act, * * *."

There is no question of abandonment, for it is undisputed that the public has used a part of the alleged right-of-way from the beginning, and has continued to so use it.

Nor can appellants prevail upon the theory of laches or estoppel, for in *Paragould* v. *Lawson, supra,* this Court stated:

"The equitable doctrine of laches can not be successfully invoked to defeat the right of the city to open the street which was dedicated to that use. The city is not asking any equitable relief, and appellees are therefore not in position to take advantage of a doctrine which is sometimes afforded by courts of equity purely as a matter of defense where the party guilty of laches is asking the court for relief. In such case the court simply remains passive and refuses to grant the relief. *Chatfield* v. *Iowa & Ark. Land Co., ante* p. 395.

Nor is the city estopped, on account of the inaction of its officers for a long period of time, to proceed to open the street. The city had no power to vacate the street (*Texarkana* v. *Leach,* 66 Ark. 40), and could not do indirectly through mere inaction on the part of its officers that which it was without power to do directly. *Beebe* v. *Little Rock,* 68 Ark. 39. The owners of lots abutting on the platted street had notice of the dedication, and are presumed to have had knowledge of the city's right to proceed in its own time to open the street. *Brewer* v. *City of Pine Bluff, supra.* They could there-

fore, build up no right to continued occupancy of the dedicated strip on account of delay in opening the street to public use."

II.

Relative to this point, appellants rely upon § 19-3802, which provides that streets and alleys, dedicated to public use, shall be accepted by the city through ordinance. The record does not reflect that the dedication, here in question, has been accepted by city ordinance. The same argument was made in *Brewer* v. *City of Pine Bluff,* 80 Ark. 489, 97 S. W. 1034 (1906). As previously pointed out, this land was platted, the streets dedicated, lots sold by reference to the plats, and the public has used the street for many years. In the *Brewer* case, it was shown that the dedication was never accepted by city ordinance, but this Court said:

"But the question is not important in this case, for, as before stated, the dedication of it as a public way has now become irrevocable, and the city can accept it at any time. Meanwhile the public has the right to use it, and the plaintiff has no right to obstruct it."

III.

According to the testimony of Mrs. George Smith, one of the appellants, she received a letter from some city official directing her to put up a retaining wall on a portion of the property that the city now claims is in the right-of-way, under the penalty of having the city do it for her, and sending her the bill.[2] She was unable to identify the sender of the letter. Mrs. Smith built the wall and paid for it in 1945. Appellants assert that by this positive act, the city recognized the property as private property; that it cannot, on the one hand, require property owners to make improvements on the theory that the property was private, compelling the owner to pay for such improvements,[3] and then later insist that the

[2] Mrs. Smith first stated that she received the letter from the Chamber of Commerce, but subsequently testified that the letter came from the city.

[3] Ark. Stats., §19-3806, 3807.

property is not private, but in a right-of-way; in other words, the city is estopped from disputing Mrs. Smith's ownership. While the testimony on this point was somewhat vague, since Mrs. Smith did not recall who ordered her to build the wall, and appellants have presented no source of authority for such action by the city, a similar contention was held to be without merit in the case of *Hankins* v. *City of Pine Bluff,* 217 Ark. 226, 229 S. W. 2d 231 (1950). There, this Court said:

"Hankins also contends that the city is estopped to question the location of the curbing, for the reason that the city engineer approved it. The city, however, brought suit soon after construction was begun, and in any event the city engineer's erroneous approval could not create an estoppel. It is not suggested that this officer is authorized to give away part of the public thoroughfare, and we have often held that a public officer cannot bind the State or its subdivisions beyond the extent of his actual authority. 'All who deal with a public agent must at their peril inquire into his real power to bind his principal.' "

On the whole case, we are unable to say that the Chancellor's findings were against the preponderance of the evidence.

Affirmed.

Justice McFaddin not participating.

Johnson, J., dissents.

Jim Johnson, Associate Justice, dissenting. I understand the law relative to the validity of dedication to be as follows:

"To constitute a good common law dedication, a definite and certain description of that which is proposed to be dedicated is necessary. The instrument relied on as dedicating property should show on its face at least enough to enable a competent surveyor to find with absolute certainty that which is assumed to be conveyed. However, an insufficient description may be cured by reference to

a map accurately fixing the location." 26 C.J.S. Dedication Section 14.

One of the plats here in question contains on its face the following statement:

"Because of the many curves and angles and irregular boundaries on this Plat the exact dimensions of lots or subdivisions may not be accurately designated on this plat, therefore, dimensions shown hereon are subject to variations and errors and in such cases, the monuments and iron pins as originally placed by Theo. Hartman C. E. shall govern."

The other plat in question contains absolutely no indication of the width of the right-of-way which was supposed to have been dedicated.

The plats were so defective that not a single engineer or surveyor could testify that the right-of-way could be found with absolute certainty. No map was introduced accurately fixing the location. In fact, it is undisputed that for the past 30 years the measurements on the plats have not been reliable. As I see it, the record was devoid of practical considerations by the aid of surrounding circumstances which could be made to supply the lack of definiteness in the maps. See: 16 Am. Jur. Dedication, Sec. 25, page 371. Therefore, since the appellee failed to meet the test required of it by the law, I respectfully dissent.

5-2090 333 S. W. 2d 494

Opinion delivered March 21, 1960.

[Rehearing denied April 18, 1960]

[redacted]

Claude Brinton and *Bon McCourtney,* for appellant.

E. D. McGowan, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit to annul a marriage because of alleged fraudulent representations. The Chancellor denied the prayed relief; and this appeal ensued.

We refer to the young people by their given names. Harry was in the military service, and returned to Jonesboro for a 15-day leave about the first of November, 1958. He had a date with Genevive, and coition occurred between them on several occasions between No-

vember 3rd and 14th. In December 1958 Genevive wrote Harry that she was pregnant and that he was the father of the expected child. Harry came home at the end of his military service in February 1959; and on March 1, 1959 he and Genevive were married and lived together until the birth of the baby on May 16, 1959. Then Harry's mother concluded that it was a full 9-months baby and that Harry could not have been the father of the baby. Thereupon, Harry filed the present suit for annulment, alleging that he had married Genevive because she had represented to him that he was the father of her unborn child, and that such representation was known by her to be false.[1] In her answer to the complaint, Genevive insisted that Harry was the father of the child; and also that he had entered into the marriage of his own free will and accord.

Appellant claims the Trial Court was in error in refusing the testimony of a doctor and a nurse. But even admitting, for the sake of argument, the testimony of the doctor and the nurse to have been competent and considered by us on the trial *de novo,* we nevertheless conclude that the Chancery Court was correct in refusing to annul the marriage. On the direct examination of Harry this occurred:

"Q. Did this statement of hers that you were the father of the unborn child, did that have anything to do with you deciding to marry her?

A. Yes, sir.

Q. Then, I'll ask you this, would you have married her had it not been for that statement?

A. I don't know that, sir.

[1] The complaint said: "That the representations made by Defendant that the Plaintiff was the father of the unborn child were false and at the time known to the Defendant to be false. That these representations were made to the Plaintiff with the intent and purpose then and there to cause his marriage with the Defendant and that this was the sole reason of the representations. This Plaintiff had no knowledge of the falsity of these representations at that time and believed the Defendant was speaking the truth and because of his belief in these false representations and for no other reason, he entered into the marirage and permitted the performance of the ceremony."

Q. You don't know whether you would or not?

A. No, sir."

Later, the Trial Court asked Harry these questions:

"Q. Now, Harry, Mr. Brinton asked you why you married Jean and will you tell me again why you married her?

A. Well, I thought—

Q. What he really asked you was: Would you have married Jean at all if she had not told you that she was pregnant by you?

A. I said I didn't know.

Q. You really don't know whether you would or not, is that what you are saying?

A. I might have but I really don't think I would have, no, I'm pretty sure I wouldn't have.

THE COURT: That's all."

Then, finally, on re-direct examination Harry's attorney asked him:

"Q. Would you have married her at that time had you not believed the child to be yours?

A. I would not have.

MR. BRINTON: That's all."

The point we are making is, that Harry did not sufficiently establish that he married Genevive *in reliance on her representation to him that he was the father of the expected child,* even if it be conceded that the representation was false. In a suit to set aside an ordinary business contract on account of false representations, the person who seeks to set aside the contract has the burden of establishing: (a) that the representation was false; (b) that the person making the representation knew it was false; (c) that it was made for the purpose of inducing the contract; (d) that the person to whom the representation was made relied on the false representa-

tion; and also (e) *that he would not have entered into the contract except for the false representation.* Some of our cases on general contract law holding in accordance with the italicized language are: *Arkadelphia Lbr. Co.* v. *Thornton,* 83 Ark. 403, 104 S. W. 169; *Ryan* v. *Batchelor,* 95 Ark. 375, 129 S. W. 787; *Jarratt* v. *Langston,* 99 Ark. 438, 138 S. W. 1003; *Brown* v. *LeMay,* 101 Ark. 95, 141 S. W. 759; *Troyer* v. *Cameron,* 160 Ark. 421, 254 S. W. 688; and *Gregory* v. *Consolidated Utilities,* 186 Ark. 406, 53 S. W. 2d 854.

In *Shatford* v. *Shatford,* 214 Ark. 612, 217 S. W. 2d 917, annulment of a marriage contract was sought on grounds similar to those here alleged; and we held that the burden was on the party seeking the annulment to establish the alleged fraud by clear and convincing evidence:

"The burden of proof was on Shannon, as plaintiff, to establish the alleged fraud by clear and convincing evidence. In 55 C. J. S. 938, in discussing proceedings seeking to annul a marriage, this is stated as the general rule: 'The courts will not grant a decree of nullity except on the production of clear, satisfactory and convincing evidence.' Indeed, since marriage is a solemn contract, entered into by license from the State, it is clear that the same *quantum* of evidence is required to set aside a marriage contract for fraud as is required to set aside any other written contract. In *Green* v. *Bush,* 203 Ark. 883, 159 S. W. 2d 458, we said: 'This is a suit to cancel a deed upon the grounds that its execution was procured by fraud; which is never presumed, but must be affirmatively proved by testimony which is clear and convincing. *Kincaid* v. *Price,* 82 Ark. 20, 100 S. W. 76; *English* v. *North,* 112 Ark. 489, 166 S. W. 577; *Norsworthy* v. *Hicks,* 170 Ark. 877, 281 S. W. 660.' The same rule applies in a suit to annul a marriage contract —*i.e.,* the testimony must be clear and convincing. The question now to be considered is whether plaintiff's evidence satisfies that requirement."

Applying the law, announced in the foregoing quotation, to the case at bar, we conclude that, even if the

representation of Genevive to Harry, that he was the father of the unborn child, was false, still Harry did not establish by the necessary *quantum* of evidence that he relied on such representation. The Chancery Court found that Harry did not rely on the representation as to paternity, and therefore could not obtain annulment. We cannot say that such finding is contrary to the preponderance of the evidence: so we affirm the decree.

The Trial Court reserved for future determination the question of the amount of the hospital bills and doctor bills that Harry should pay, and also the amount of maintenance that Harry should pay for the child. The evidence was not developed as to Harry's ability to make such payments. We, therefore, remand the case to the Chancery Court to reinvest it with jurisdiction for further orders, except we tax the costs against appellant and allow the attorney for the appellee a fee of $100.00 for his services in this Court.

Affirmed.

JOHNSON, J., dissents.

ALLISON *v.* STROH.

5-2071 333 S. W. 2d 737

Opinion delivered March 21, 1960.

[Rehearing denied April 25, 1960]

Festus O. Butt, for appellant.

C. A. Fuller, Virgil Roach Moncrief and *John W. Moncrief,* for appellee.

GEORGE ROSE SMITH, J. This is a will contest. The testator, Perry O. Bellville, a resident of Eureka Springs, died February 24, 1958, at the age of 87. His will had been executed four years earlier, on March 27, 1954. Bellville was survived by two daughters, the appellant Vera Allison and the appellee Wanda Stroh. Mrs. Stroh contested her father's will on the ground of undue influence. The probate judge set the will aside, and the only question is whether his decision is against the preponderance of the evidence. *Evans* v. *Sawyer,* 228 Ark. 551, 309 S. W. 2d 25.

Many years ago Bellville came to Arkansas from Illinois and settled near Stuttgart, purchasing a 220-acre farm in Prairie county. Sometime in the 1930's Bellville and his wife moved to Eureka Springs, but the two daughters, who were both grown and married, continued to live in Arkansas county, at Stuttgart and DeWitt. Mrs. Allison, the younger sister, owned and operated a women's clothing store at Stuttgart for twelve years or more. In the early 1950's she and Mrs. Stroh ran a similar store together in DeWitt for about two years, but the venture was not profitable. After that Mrs. Stroh either bought or was given a half interest in her sister's store at Stuttgart, but again their joint enterprise was unsuccessful. The partnership was dissolved, apparently without hard feelings on either side, by a written agreement dated January 1, 1954. Mrs. Stroh received about $4,000 in the liquidation of the enterprise, but Mrs. Allison testified that the business was really insolvent and that she was compelled to pay a substantial outstanding indebtedness.

The partnership between the sisters ended on January 1, 1954. Word that the venture had resulted in a loss undoubtedly reached Bellville at his home in Eureka Springs. He executed a new will, the one now in question, on March 27, 1954. This will is decidedly favorable to Mrs. Allison. She receives her father's personal property, inventoried at about $10,000, and a life estate in certain Illinois and Eureka Springs real estate, with remainder to her children. The other parcel of land, the Prairie county rice farm, is left equally to the testator's two daughters for life, with remainder to their children.

The contestant, Mrs. Stroh, had the burden of proving undue influence. *Miller* v. *Carr,* 94 Ark. 176, 126 S. W. 1068. We are of the opinion that the weight of the evidence fails to establish the essential elements of undue influence, as defined in this often-quoted language from *McCulloch* v. *Campbell,* 49 Ark. 367 5 S. W. 590: "As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property. *And the influence must be specifically directed toward the object of procuring a will in favor of particular parties.*" (Emphasis added.) To the same effect is *Davault* v. *Parks,* 190 Ark. 370, 79 S. W. 2d 68, where we said: "Before a will can be invalidated upon the ground of undue influence, there must be testimony proving or tending to prove that the influence was of such character as to destroy the testator's free agency, in effect substituting another's will in the place of his own, and the influence must be directed toward the object of procuring a will in favor of particular parties."

Here the charge of undue influence rests upon only two circumstances: first, the testator's unequal division of his estate, and, secondly, the assertion that Mrs. Allison had falsely represented to her father that her sister

Wanda had defrauded her of about $30,000 in their mercantile ventures. Lumping these two circumstances together, we think it fair to say that the weight of the evidence indicates that Bellville executed a will favoring his daughter Vera because he believed that she had suffered a substantial loss in her dealings with her sister, and we think it probable that Bellville also was convinced that Wanda had acted dishonestly or at least unfairly.

Even so, the proof of undue influence does not meet the test laid down in the *McCulloch* case, *supra*. The appellee had the burden of proving that Vera's wrongful domination of her father destroyed his free will and that her false statements, if any were made, were specifically directed toward the procurement of a will in her favor. Neither point is sufficiently established. Bellville, despite his age, was mentally alert. He was living at Eureka Springs, 200 miles or more from Vera's home at Stuttgart. The partnership was liquidated as of January 1, the will was executed on March 27, but there is no contradiction of Vera's testimony that she did not visit her father until Easter, which fell on April 18 that year. The will was witnessed by F. O. Butt, an attorney, and we assume that it was prepared by him. It is impossible to believe that Vera was able to dominate her father from more than halfway across the state, and at a time when he was being guided by his own attorney. Moreover, the testator lived for almost four more years without changing the will, thus having ample opportunity to satisfy himself about the supposed charges against his older daughter.

Nor is there any direct proof whatever that Vera Allison maligned her sister for the particular purpose of inducing her father to execute a will in her favor. Whether she made the asserted misrepresentations at all is a sharply disputed issue of fact; but if we assume that she was guilty of slandering her sister there is simply no positive proof to show that her wrongdoing was designed to bring about a favorable testamentary disposition of her father's estate. That the will was actually favorable to her does not supply this gap in the proof;

for in that event any will favoring one of the testator's children would be subject to being set aside upon a showing that false statements had been made by the principal beneficiary about other members of the family.

Reversed.

WARD and JOHNSON, JJ., dissent.

PAUL WARD, Associate Justice, dissenting. The facts and circumstances in this case, as disclosed by the record, present such a close pivotal question that I cannot confidently say the trial judge reached the wrong decision.

It must be conceded that the trial Judge would have been justified by the record in making the following findings: [a] The testator was rather old (age 83) and in poor health when the subject will was executed; [b] He *changed* his will, giving appellant some $30,000.00 more than appellee; [c] He made the *change* because *someone* told him appellee had cheated appellant out of a large sum of money; [d] There appears no other reason for him to discriminate between his two daughters; and [e] If appellant had anything to do with informing her father of the alleged misdeeds of appellee, her action was unwarranted and done with a malign intent.

The only close question is the one posed in the last clause above. The correct answer must be gleaned from the testimony and circumstances disclosed from the record and from an appraisal of the weight given to the testimony of each witness based upon that witness' appearance and demeanor. Since the trial judge had so much better opportunity to evaluate all these elements than I have, I am unwilling to substitute my judgment for his, and, therefore, respectfully dissent to the majority opinion.

JIM JOHNSON, Associate Justice, dissenting. The majority opinion cites the rule set out in *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590, and *Devault* v. *Parks,* 190 Ark. 370, 79 S. W. 2d 68, in support of their conclusion that the decision of the Probate Judge setting aside the will in question is against the preponderance of the evidence. The *McCulloch* case, *supra,* states that "the in-

fluence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion *or any other cause that deprives the testator of his free agency in the disposition of his property.* And the influence must be specifically directed toward the object of procuring a will in favor of particular parties." (Emphasis added.) This rule was substantially restated in the *Devault* case, *supra.* There can be no question but that the rule set forth in these cases is the law in Arkansas. From a careful reading of the record in its entirety, I cannot say that the probate judge deviated from this rule in setting aside the 1954 will of Perry O. Bellville.

Mr. L. D. Spangler, a close personal friend and neighbor of the testator, a friend who was so close that he was remembered in the testator's will, was called by the contestees as their witness. Mr. Spangler testified that the testator was sane. However, on cross-examination this friend and confidante testified as follows concerning an event that occurred just prior to the changing of the former will by the testator:

"He (the testator) came over to my home and he was almost crying and he said one of his daughters had, in her business transaction in a store down, I believe in Stuttgart, in settling up, one daughter had beat the other daughter out of something. If I remember right, it was something quite a bit over $4,000.00, now I just forget the amount. And he said, 'I didn't raise my daughters that way.' And he said, 'my will is going to be changed.' And he said, 'The daughter that lost the money will get it back with good interest.' The one that had to pay the other daughter . . ."

The record is silent as to how the testator obtained the information that caused him to change his will. The contestee, whom the record reflects had been schooled in dramatic arts, attempts to imply that the contestant herself gave this information to her father. The record does not reflect that the contestant ever dealt with the contestee unfairly, dishonestly or that she ever beat her out of a thin dime. It is true that the parties were associated in a partnership and that the partnership was dissolved with-

out any hard feelings on either side. In fact, the actions of the parties indicate that they continued to have the utmost confidence in each other. The record reveals that after having entered into a business venture in DeWitt, which was dissolved, the contestee prevailed upon the contestant to leave her farm near DeWitt for the purpose of entering into a partnership with her in Stuttgart; that contestant did enter into the partnership, was given the full management of the Stuttgart business and it is undisputed that the volume of sales improved considerably under her management.

The majority opinion says that "it is impossible to believe that contestee was able to dominate her father from more than half way across the state." I assume that the telephone lines between Stuttgart and Eureka Springs are still in operation and were during the time in question. Apparently the Probate Judge believed while listening to the parties testify in person that the contestee gave this information to her father either through the mail, by telephone, or by some other means of communication for the sole purpose of causing him to change his will; that she sold her father upon the unfounded belief that contestant had committed a great wrong to contestee. I agree with the conclusion of the Probate Judge. It is undisputed that this information caused the testator to revoke his former will and execute a new will in 1954 and by this changed will the father reimbursed with "good interest" the $30,000 he was made to believe the offending daughter "beat" the cheated daughter out of, thereby reimbursing the victimized daughter and at the same time punishing the wrongdoer because "I didn't raise my daughter that way."

It is not my understanding of the *McCulloch* and *Devault* rule, *supra,* that the undue influence spoken of therein must reach the point where it is necessary for the influencer to actually have to hold the hand of the testator as he signs his name to a will. The question is, did the contestant by foul practice "beat" the contestee out of $30,000 in such a way as to break the heart and torment the soul of this father of 83 years and then tell her father of

this mischief she had done her sister? Did the contestant inflict this anguish and misery on her aged father to the point where he was impelled to seek relief by opening his bosom and revealing his secret and exposing the wrong of his offending daughter to a neighbor? The contestant testified to the trial court that the first she ever heard of the claimed $30,000 loss was when contestee, at the reading of the will, boldly and brazenly charged that she, the contestant, had told this story against herself to her father. The trial judge who for two days heard every word of 212 pages of conflicting testimony, noted every inflection, observed the deportment of all parties and witnesses, believed the contestant and so do I. It is undisputed that the contestee knew the contents of the will and attempted to prevail upon the son of the contestor to prevent contestor's presence at the reading of the will. It is further undisputed that contestee had discussed with the testator the value of the Eureka Springs property and also the value of property owned in Illinois relative to the reimbursement of the claimed $30,000 "beat."

From this and an abundance of other testimony, the trial court, in effect, found that the author of the 1954 changed will was not Perry O. Bellville, the testator, but that the author of the $30,000 story was the author of the will the trial court set aside. Certainly, I cannot say that his findings were against the preponderance of the evidence.

For the reasons stated above, I respectfully dissent.

5-2059 333 S. W. 2d 242

Opinion delivered March 21, 1960.

[redacted]

James R. Hale, Tom Pearson, Ulys A. Lovell, W. B. Putman, for appellant.

Little & Enfield, Thomas Harper, for appellee.

PAUL WARD, Associate Justice. On August 26, 1958, J. Hal Jones and four other residents and taxpayers of Washington County filed a Complaint in Circuit Court for the use and benefit of themselves and all other taxpayers in said County against A. B. Capers, d/b/a A. B. Capers Co., Inc., and Hartford Accident and Indemnity Company. (For the purposes of this opinion we may and will consider A. B. Capers as the sole defendant and hereafter so refer to him as such). The essential allegations set out in the several numbered paragraphs were substantially as follows:

2. On December 26, 1956, the defendant entered into and signed a written contract with Washington County. Herein the defendant undertook and agreed to appraise all real property and all business, professional, commercial, and industrial property located in said County for the total sum of $85,000.00 to be paid to him by Washington County—the work to be completed by December 31, 1957 (a photostatic copy of the contract being attached, marked Exhibit A).

5. The defendant made and filed claims against Washington County for work allegedly completed and performed under and pursuant to said contract on the following dates and for the following amounts (it is shown that payments of $6,181.82 were made on each of the following dates: February 2, February 28, April 2, May 1, June 4, July 2, August 2, September 3, October 1, November 1 and November 30 — all in the year 1957). All of said claims were paid by Washington County on or about the dates above mentioned.

6. On March 19, 1958, the defendant made a claim under said contract in the total sum of $15,900.00 for appraisal work allegedly performed under the contract, and said claim was paid by said Washington County on or shortly after March 19, 1958. The total amount paid by Washington County to the defendant was $83,900.02.

7. The defendant has wholly and completely failed, neglected, and refused to keep and perform any of his promises, covenants, and agreements, as set forth in said contract and wholly, fully and completely breached each and every condition, promise, agreement and covenant set forth and contained in said contract; and by reason thereof Washington County and the taxpayers have thereof been damaged in the sum of $93,000.02.

The prayer was for judgment in the amount of $93,-000.02.

On December 20, 1958 appellants filed an amendment to the above Complaint which purports to set out in detail the way and manner in which the defendant failed to comply with the contract. It refers to several para-

graphs in the contract setting out how each separate paragraph had not been complied with. It would serve no useful purpose to set out the amendment in detail but the following is sufficiently descriptive: The defendant breached Paragraph 2 of the contract in that the appraisal work was not performed by competent, trained and experienced appraisers; Paragraph 3 of the contract was not complied with in that the defendant failed to determine the description and ownership of each lot and parcel of land; Paragraph 7 of the contract was violated in that the defendant failed to furnish separate record cards for each unit of real estate, etc.; Paragraph 10 of the contract was violated in that defendant failed to make a careful investigation of the fair value of all types of land, failed to ask the owners what price they paid, etc.; and Paragraph 12 of the contract was violated in that the defendant failed to procure and furnish competent professional appraisers as witnesses during all hearings before the Board of Equalization, etc. To the above Complaint and Amendment the defendant filed a demurrer. The trial court, after giving appellants time in which to file other pleadings found that no other pleadings had been filed by appellants and thereon sustained the demurrer and dismissed the complaint as amended, entering judgment accordingly. From this action and judgment appellants prosecute this appeal.

For a reversal appellants rely upon two grounds: (a) They have a right as taxpayers to maintain this action; and (b) The Complaint states a valid cause of action.

(a) In support of the first ground appellants cite and rely on Article 16 § 13 of the State Constitution and on *Revis* v. *Harris,* 217 Ark. 25, 228 S. W. 2d 624. We agree with appellants that the Constitution and the *Revis* case are both authority for the proposition that any citizen of any County may institute a suit in behalf of himself and all others likewise interested to recover money illegally exacted. It goes without argument, however, that before such suit can be maintained to a successful conclusion it must be based upon a complaint or

petition that states a cause of action. The real question in this case then is whether appellants' Complaint states a cause of action, and it is the one which we now discuss.

(b) We gather from appellants' argument and the decisions cited therein they are emphasizing the fact that the trial court could not sustain a demurrer to their Complaint without relying on facts which are not referred to in the Complaint. Stated another way, appellants' argument is that the trial court applied to the Complaint what is known as a "speaking demurrer" which has been condemned by this Court, citing as authority *Rider* v. *McElroy,* 194 Ark. 1106, 110 S. W. 2d 492; *Lawhon* v. *American Cyanamid and Chemical Company, et al,* 216 Ark. 23, 223 S. W. 2d 806. We agree with the principle announced by these cases which is to the effect that a demurrer which, to be sustained must depend on facts not alleged in the complaint, is bad. Therefore, we can narrow the question down to this point: Did the trial court, in order to sustain the demurrer in this case, have to rely on facts which are not disclosed by the Complaint?

A careful reading of appellants' Complaint reveals that it no where alleges the contract between the County and appellees was improperly entered into or that it was not legally binding upon Washington County; nor does it contain any allegation of fraud practiced by appellee upon the County Judge, the County Court or anyone else. Neither does the Complaint allege that the several claims filed by appellee and paid by the County were in any way illegal. The allegations upon which appellants apparently rely most strongly to state a cause of action are found in Paragraphs 5 and 6 of the Complaint. In Paragraph 5 it is alleged that the defendant (appellee) made and filed claims against Washington County for work allegedly completed and performed under and pursuant to said contract, in the amount and on the dates heretofore set out, totalling $68,000.02. It is further alleged that these amounts were paid by Washington County. In Paragraph 6 similar allegations are contained with reference to a claim for $15,900.00 which was paid by Wash-

ington County. It is appellee's contention that appellants are making a collateral attack on the order and judgments of the County Court, and such an attack cannot legally be made, the contention being that the allowance of the County Court of said claims amounted to and was in fact an order of the County Clerk. In support of this appellee cites *Monroe County* v. *Brown,* 118 Ark. 525, 177 S. W. 40, where this Court said: "The County Court in allowing claims against the County acts judicially, and its judgment is not open to collateral attack except for fraud or lack of jurisdiction . . ." It is not contended in the case under consideration that the County Court of Washington County lacked jurisdiction to execute the contract with appellee or that the contract was procured by fraud. In the case of *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508, we held that the County Court had the constitutional jurisdiction to enter into a contract such as the one here involved and in that case we also said: "A county court acting within the powers conferred by the Constitution and statutes is a court of superior jurisdiction, and, where by statute special powers have been conferred and such special powers exercised judicially, its judgment cannot be impeached collaterally except for want of jurisdiction or errors apparent on its face".

There can be no doubt, we think, that appellants here had a right to appeal not only from the order of the County Court approving the contract with appellee but also the right to appeal from the order of the County Court allowing and paying any one of these several claims presented by appellee. This was made clear in the case of *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555, where the court construed the case of *Armstrong* v. *Truitt,* 53 Ark. 287, 13 S. W. 934 and said: "The effect of that decision is to hold that § 50, Art. 7, of our Constitution, gives a resident citizen or taxpayer the right to appeal from an order of allowance against the county, whether he intervenes before or after the allowance was made".

The argument of appellants is that the Complaint here does not show that the County Court approved the several claims of appellee and that, therefore, the demurrer should not have been sustained. The argument being further that since the trial court had to go out of the record in finding the County Court had approved the claims, that amounted to approving a speaking demurrer. We cannot agree that this argument is sound. It is our idea that under our system of liberally construing the pleadings, as was announced in *Stroud* v. *Barksdale Lumber Company,* 229 Ark. 111, 313 S. W. 2d 376, the Complaint in this instance should be construed as asserting that the several claims presented by appellee were approved by the County Court. While the Complaint did not make that specific statement it does allege that the several claims were paid by the County Court which is tantamount to saying that the claims were allowed. Arkansas Statutes 17-701 provides that no moneys derived from taxes shall be paid except on an order duly made by the County Court while in session and entered upon the record. Section 17-702 provides that all persons having demands against a County shall present the same, duly verified according to law, to the County Court for allowance or rejection. Section 17-703 states that before any claim shall be allowed by the County Court it shall be supported by an affidavit stating that it is correct, etc. Section 17-801 provides that whenever an allowance has been made by the County Court in accordance with the sections heretofore mentioned the County Clerk would be authorized to issue his warrant on the County Treasurer, etc. It appears very obvious to us then that if, as is alleged by appellants, appellee's claims against the County were paid it must be presumed that said claims were properly allowed by the County Court. There is a legal presumption that officers act in accordance with the law. In the case of *West 12th Street Improvement District No. 30* v. *Kinstley,* 188 Ark. 77, 63 S. W. 2d 980, it was contended that no appropriation had been made for the formation of an Improvement District. In answer to this contention the Court used language which we think is applicable here, it said: "The

county court is a court of superior jurisdiction, and, in making the orders, was dealing with a subject matter over which it was given jurisdiction by the Constitution, and it must be presumed that all necessary steps were taken in the absence of a showing to the contrary, and, if it was necessary that an appropriation be first made by the levying court, that this was done". Applying that principle to the facts here we must conclude that since the law required a claim to be approved before it was paid, the allegation (in the Complaint) of payment carries with it the legal presumption that it had been approved. This principle applies particularly in this case where there was no allegation in the Complaint to the contrary. The above conclusion is confirmed by the holding in *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d 26, where, at Page 953 of the Arkansas Report, the Court said: ". . . that when any duty is required of a public officer, unless there is something to indicate the contrary, it will be presumed that he performed the duty according to law. The presumption is also that the officer will perform his official duty".

It is our conclusion, therefore, from what we have heretofore said that appellants' complaint did not state a cause of action and that the trial court was correct in sustaining appellee's demurrer.

Affirmed.

HUGHES *v.* FIREMEN'S RELIEF AND PENSION FUND.

5-2060 333 S. W. 2d 716

Opinion delivered March 21, 1960.

[Rehearing denied April 25, 1960]

Joe Holmes, for appellant.

Henry W. Gregory, Jr., and *H. Murray Claycomb,* for appellee.

SAM ROBINSON, Associate Justice. In the year 1952 the appellant, David C. Hughes, began working as a fireman for the City of Pine Bluff Fire Department. On May 15, 1956, while not on duty, he received serious injuries which render him unable to perform the work of a fireman. He applied to the Board of Trustees of the Firemen's Relief and Pension Fund for the City of Pine Bluff, hereinafter called the Board, for a pension under the provisions of Ark. Stat. § 19-2205. The Board refused to award the pension on the ground that the injuries were the result of Hughes' own misconduct and that because of such misconduct he had been discharged from the Department. Hughes appealed to the circuit court. There the court granted the pension and the Board appealed to this Court. *Firemen's Relief* v. *Hughes,* 229 Ark. 730, 318 S. W. 2d 145. In that appeal this Court reversed the judgment because Hughes had not complied with Ark. Stat. § 19-2206, which requires that an applicant for a pension based on disability must file with the Board certificates of such disability. In that case, however, this Court pointed out that the Pension Board was still at

liberty to prove its contention that Hughes is not entitled to receive a pension because of alleged misconduct resulting in the disabling injuries and his discharge from the fire department. Subsequently Hughes filed certificates of disability and the Board for the second time refused to grant the pension. Hughes again appealed to the circuit court. There the action of the Board was sustained and the appeal was dismissed. Hughes then appealed the case at bar to this Court.

The record shows that Hughes was injured on May 15, 1956. On the 28th day of June he was suspended by the chief of the fire department because of his conduct in making an unprovoked attack upon a citizen of the community. The Civil Service Commission sustained the suspension and discharged him permanently. Hughes appealed to the circuit court the order of the Commission discharging him. There, after a hearing on the merits, the order was sustained and the appeal was dismissed.

The original act providing for pensions for city firemen is Act No. 491 of 1921 (Ark. Stat. § 19-2201, et seq.). As originally adopted, the Act provided for a pension for disability only in the event the injury was sustained "while in, and in consequence of, performance of his duty as such fireman". By Act No. 76 of 1955 the original Act was amended by deleting the words "while in, and in consequence of, performance of his duty as such fireman" and substituting therefor "except while actually performing work in gainful employment outside of the Fire Department". Section 10 of the 1921 Act (Ark. Stats. § 19-2210) provides: ". . . In the event the Chief or any member of the Fire Department shall be removed or discharged without just cause, such removal or discharge shall not in any way affect the right of such person to the benefits of this act, and at the time of the discharge or removal of any such person, the board hereby created shall investigate and determine whether such removal or discharge was without just cause or not, and shall make a report of its findings, and any person feeling himself aggrieved by the decision of such board

shall have the right to appeal therefrom to the circuit court of the county in the method now provided for appealing from decisions of the justices of the peace in civil cases. . . ." Of course, it will be noticed that the Act provides that no member of the fire department may be removed or discharged without just cause, but the Act does *not* provide that such a member may not be discharged *with* just cause.

Hughes appealed to the circuit court from the order of the Civil Service Commission discharging him, and after a hearing on the merits the order was sustained and the appeal dismissed with prejudice. There was no appeal to this Court from the action of the circuit court in sustaining the action of the Civil Service Commission discharging Hughes. It necessarily follows that there has been a final determination by a court of competent jurisdiction that Hughes was discharged with just cause. He was never awarded a pension by the Pension Board. If Hughes had been awarded a pension and later committed some act that would constitute just cause for his discharge, perhaps he or his family still could collect the pension. Ark. Stats. § 19-2210. But he was discharged with just cause, as has been determined by the circuit court, for doing the act which caused his disability, and he did not appeal from that judgment.

The right to a pension is purely statutory. Hughes contends that according to the wording of Act No. 491 of 1921 as amended by Act No. 76 of 1955 he is entitled to a pension because at the time he was injured he was not working at some gainful employment outside of the fire department. According to his theory, a fireman would be entitled to a pension if injured while committing some very serious felony and he was then discharged with just cause by the Commission because of such an act. We do not think the statute is subject to that construction.

Affirmed.

Opinion delivered March 21, 1960.

Lightle and *Tedder, Eldridge* and *Eldridge,* for appellant.

Bruce Bennett, Attorney General, by *Ancil M. Reed,* Asst. Attorney General, for appellee.

JIM JOHNSON, Associate Justice. This is a criminal case. The appellant, C. E. "Doc" Everett, was arrested December 17, 1958, and charged with first degree murder of one, Troy Lee Burks.

Everett was, at the time, the owner and operator of "Doc's Club", a beer tavern located on Front Street, Bald Knob, Arkansas.

Burks, a member of the U. S. Air Force, stationed at Jacksonville Air Base, was with two civilian companions, John Barger and Milton Brady. They had met at North Little Rock the afternoon of Burks' death and after a few beers proceeded North on Highway No. 67, making numerous stops for additional drinking.

Both Barger and Brady had felony records and by the time of trial Barger was again in the State Penitentiary. Brady had a long record of drunkenness and fighting. All three were on a drunken spree the night of the trouble.

They arrived at Doc's Club just after 9:00 p.m. They were loud and boisterous and began causing trouble. The cashier at the counter first tried to find the police but being unsuccessful called Everett who was asleep in his bedroom in the rear.

Appellant came out front and tried to reason with the three. Brady, the most drunken and rowdy, reached across the counter for Everett, who then shoved him from the stool upon which he had been sitting.

From that point events moved swiftly and just what happened varied with the testimony of the witnesses. Except for the testimony of convict Barger, all other eyewitnesses generally agreed that Everett moved to his right to the open end of the counter and that he and Burks met at that end of the building. They engaged in a short scuffle, Burks either hitting or choking Everett who in turn was hitting Burks.

Everett, thinking that he "was about to be attacked by all three drunks" had taken his gun from behind the counter and was using it to club Burks. In some unknown manner it fired, shooting Burks in the neck just below the left ear. None of the witnesses (except Barger) saw the gun prior to the shot. None saw appellant shoot the pistol. All agree he hit at Burks more than once. He thought he "hit him two or three times before the gun went off." Everett's testimony was to the effect that the shot was entirely accidental.

Following on the heels of a bitterly contested "Wet-Dry" election, feeling ran high in the community. Everett petitioned the court for a change of venue, which was denied. The case was then tried in the White Circuit Court in July 1959.

The State used only one eyewitness, the convict Barger, to prove their *prima facie* case. They then were permitted to use numerous officers to prove the finding of a knife near the body of the deceased, and a set of similar knives in the "block". No witness testified that the deceased used a knife, nor did the defendant ever claim such as a defense. The trial resulted in a verdict and judgment of second degree murder and a sentence of eighteen years. From such judgment comes this appeal.

In addition to eight assignments of error contained in the Motion for a New Trial, appellant argues the court erred in refusing to grant a change of venue. This latter argument was the closest question presented for our consideration. We will not here discuss this and other assignments raised by appellant except those upon which this opinion rests.

Assignments numbered 1, 2, and 3 in the Motion for a New Trial pertain to the same general legal principles and will be here discussed in the order in which they were made. The assignments are as follows:

1. The court erred in permitting the State of Arkansas to offer incompetent and immaterial evidence relative to a certain knife and other instruments upon presentation of the State's case. That the only evidence otherwise offered by the State revealed no connection with the incompetent evidence. That the only purpose of such evidence was to inflame the jury and induue in their minds a belief that the defendant was trying to frame a defense which in truth and in fact the defendant at no time presented.

2. The court erred in permitting the State to attempt to impeach the defendant's witnesses Gene Blount and Billie Hughes, upon matters concerning which they were not interrogated upon direct examination, but about

which the State inquired upon cross-examination, and for such purposes made them witnesses for the State — namely, relative to the finding of a knife near the body of the deceased.

3. The court erred in permitting the State to offer as rebuttal evidence transcribed records in a purported effort to impeach the testimony of the defendant's witness Gene Blount concerning the matters mentioned in paragraph 2 above and which were brought out wholly by the State on cross examination.

Relative to the first assignment, the record reveals that there were numerous eyewitnesses to this homicide. The State, after introducing the testimony of only one of these eyewitnesses, on its own case in chief called officers Bolin, Mitchum, Price, Varnell, Clayton and Neighbors, whose testimony was used chiefly to introduce a butcher knife, a set of steak knives and a purported finger print of appellant on a fork similar to those on the steak set. The butcher knife was first introduced by the evidence of officer Bolen who testified: "A lady said something about a knife, and she gave me a knife." This officer had previously investigated and inquired about weapons. He had examined the body but had not seen or noticed a knife.

The appellant throughout the trial made timely objections and exceptions to the testimony relative to these items being admitted in evidence. At one point in the case, the court ruled:

"There was some testimony by the officer down there that night that the knife was given to him that was supposed to have been involved in the fracas, that is the reason this testimony has now been permitted for whatever it is worth, if it is not connected, then you may renew your motion."

At no point in the case was the knife, the steak knife set, or the fork in any way identified as having been used by either the defendant, or the deceased, or to have any connection with the affray, yet by the close of

the State's testimony the court was ruling that they were admissible in evidence.

In 20 Am. Jur. § 247, Evidence, we find the following:

"Relevancy has been defined as that which conduces to the proof of an hypothesis which, if sustained, would logically influence the issue."

Footnote 3 at page 241 of the same volume cites *Tyrrell* v. *Prudential Insurance Company,* 109 Vt. 6, 192 A. 184:

"The test of admissibility of evidence is whether the fact offered in proof affords a basis for rational inference of the fact to be proved."

The fact to be proved by the prosecution in the case of C. E. "Doc" Everett was that he, the appellant, committed murder in the second degree, second degree murder requiring a proof by the prosecution that said killing was done with malice aforethought.

When considered with the other evidence presented by the prosecution, we find the introduction of the mass of testimony relating to the "knife" would have no bearing on the proof required by the State to support a conviction of second degree murder. Therefore, it was incompetent evidence.

In *McCabe* v. *State,* 210 Ark. 1076, 199 S. W. 2d 945, this Court said again:

"As has been said so often, prejudice or non-prejudice may result from the nature of testimony offered, the manner in which it is presented, the circumstances which give rise to questions or answers, the emphasis placed by witnesses upon collateral issues not intended by the trial judge to go before the jury, and incidental phases of many kinds."

And in *Elder* v. *State,* 69 Ark. 648, 65 S. W. 938, we said:

"There may or may not be more reason for doubt as to whether this evidence was prejudicial or not. But

the rule is that evidence improperly admitted must be treated as prejudicial unless there is something to show that it was not."

Of course, if the appellant in this case had based his defense on an attack by the deceased upon his person with a knife, then the introduction of this evidence by the State would have had some relevancy but such was not the case. Therefore, the evidence about the knife was inadmissible because of its lack of relevancy.

Assignments Nos. 2 and 3 raise the same legal questions. Therefore, they are discussed together. For brevity, only the questions raised relative to the testimony of witness Gene Blount will be treated here.

The record reveals that on cross examination of defendant's witness, Blount, the State asked questions concerning the "knife" and then attempted to impeach or discredit the witness by reading from a purported statement and asking him if he had not made statements contrary to those being made in court.

In rebuttal, the State was permitted by the court to play to the jury an alleged recording of an examination of the witness Blount concerning the knife by the prosecuting attorney the night of the affray. Timely objections were made by the defendant.

In considering the question here presented, this Court has said, in effect, many times that while it is proper to permit a witness to be asked as to specific acts affecting his credibility, yet if such matters are collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question. See: *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684.

The rule that one may not impeach his own witness is too well known to require citation.

A well-known exception, however, is that where the testimony surprises the one offering it — as in this case the State — they may then offer prior contradictory statements if a proper basis of surprise is claimed. In the instant case the State claimed no surprise. On col-

lateral matters, however, the exception to the main rule does not exist. In the case at bar we find that these were wholly collateral matters that had no place in the trial. See: *Eddington* v. *State*, 225 Ark. 929, 286 S. W. 2d 473; and *Hawkins* v. *State*, 223 Ark. 519, 267 S. W. 2d 1.

For the errors indicated, the judgment is reversed and the cause remanded for a new trial.

HARRIS, C. J., and MCFADDIN, J., dissent.

ROBERTS *v.* LOVE.

5-2072 333 S. W. 2d 897

Opinion delivered March 28, 1960.

[Rehearing denied May 2, 1960]

B. Ball, for appellant.

Philip E. Dixon, Duval L. Purkins, for appellee.

CARLETON HARRIS, Chief Justice. On March 3, 1959, appellant, a practicing attorney of Warren, Arkansas, was notified by a deputy sheriff of Bradley County that Circuit Judge G. B. Colvin, Jr., had requested Roberts to appear at the court house. Upon arriving at the court house, appellant found that the Circuit Court was in session, and that A. C. Duncan, a Negro, was charged by Information with the crime of assault with intent to rape, the charge relating to the alleged attempt to rape a white high school girl. Judge Colvin appointed appellant to defend the Negro. After talking to the defendant in a private consultation room, appellant returned to the courtroom, and observed that a representative of the local newspaper, "The Eagle Democrat", had obtained permission from the court to take pictures. Appellant objected to the taking of pictures, and the court withdrew its permission. Upon being asked to enter a plea, Roberts moved that the court commit the defendant to the State Hospital for thirty days observation.[1] Following remarks, hereinafter set out, by the prosecuting attorney and judge, the motion was granted.

[1] Under the provisions of Initiated Act No. 3, adopted at the general election of 1936.

On March 5th, in its regular weekly edition, the following story (one column width) relative to the proceedings in the courtroom, appeared in the Eagle Democrat:

"ATTACKER SENT TO HOSPITAL FOR OBSERVATION

Through a legal technicality, Judge G. B. Colvin, Jr., Tuesday, was forced to send A. C. Duncan, admitted culprit in an attempted rape case here, to the State Hospital for 30 days of observation.

Duncan's hearing before Judge Colvin was held Tuesday evening, and Paul K. Roberts, Warren attorney, was appointed as the Negro's lawyer.

When Duncan was asked to make a plea of guilty or not guilty, Attorney Roberts arose and made a motion that he be sent to the State Hospital for observation. Roberts said he thought the Negro might be insane.

Prosecuting Attorney A. James Linder of Hamburg asked Roberts if he really thought that or if he was 'grasping for straws'. Roberts assured the Court that he felt the Negro might be insane.

Judge Colvin deliberated about the matter for several minutes before granting Roberts' motion, but he told those present that under the law, he was forced to do it.

At the start of the hearing, a representative of this newspaper received the permission of Judge Colvin to take candid camera pictures while the hearing was going on. After court started, however, Attorney Roberts raised an objection to the photographer's being allowed to take pictures. No more were taken.

Duncan admitted to Chief of Police Tommy Dunaway and to the Editor of The Eagle Democrat Wednesday that he raised the window of an East Central Street home here, went in the window, and attempted to attack a high school senior girl. He said he wasn't being forced or coerced into making the statement, but that he was making it of his own free will."

On September 12th, appellant instituted suit against appellees for libel, alleging that the story was libelous, being partly false, and the true portions "slanted" to convey the impression that he was insincere in his defense, and had endeavored to defeat justice by trickery; that the publication was maliciously made in an effort to damage appellant's professional standing, and that he had been damaged in his reputation, and had suffered great loss of business by reason of said publication. Compensatory damages were sought in the amount of $250,000, and a like amount was asked for punitive damages.

Appellees demurred to the complaint, and subsequently moved that certain paragraphs of the complaint be stricken for the reason that said paragraphs were irrelevant, redundant, argumentative, and prejudicial. This motion was granted, the demurrer sustained, and the suit dismissed. From such judgment comes this appeal.

Appellant first asserts that the Circuit Judge should have disqualified himself. Ark. Stats. Anno., § 28-604 (1947), provides:

"The judge or juror may be called as a witness by either party, but, in such cases, it is in the discretion of the court to suspend the trial and order it to take place before another judge or jury; and where a party knows, at the time the jury are impaneled that a juror is to be called by him as a witness, he shall then disclose it, and the juror shall be excluded from the jury."

We have held that a judge cannot testify for the state in a criminal case pending before him, *Rogers* v. *State,* 60 Ark. 76, 29 S. W. 894, but whether a chancellor is disqualified to hear a case in which he is called to testify, is a matter within his discretion. *Fidelity & Deposit Co.* v. *Cunningham,* 181 Ark. 954, 28 S. W. 2d 715. Dean Ralph C. Barnhart of the University of Arkansas Law School, in an article, "Theory of Testimonial Competency and Privilege", 4 Ark. Law Review, 377 (1950), discusses the matter of determining whether a judge should disqualify himself in situations where he will be called to testify. At page 389 of the article, it is stated:

"The arguments that counsel will hesitate to make objections to the judge's testimony, or that if counsel does object, it may lead to unseemly conflicts between the judge and the counsel, that testimony by the judge tends to give undue advantage to the party in whose favor he testifies, plus the procedural difficulties of the judge's making the necessary rulings while he is on the stand, are not without weight. These considerations naturally are taken into account by the judge in the exercise of his discretion in continuing to sit or suspending trial and ordering it to take place before another judge after he has testified, and it is to be assumed that a proper exercise of discretion will avoid any real cause for objection."

In the case before us, such a situation does not actually arise, for here the judge was not called to testify, nor was any jury impaneled; rather, the litigation was disposed of by demurrer, and we find no abuse of discretion in the trial judge passing upon the pleadings.

While we think it immaterial in this litigation, we agree with appellant that the court erred in striking paragraphs 4A, B, C, D, and E. The article, obviously, cannot be classed as libelous *per se*. Any alleged libel, therefore, required innuendo denoting the libelous sense in which the words were intended. As stated in 53 C. J. S., *Libel and Slander*, § 162b 2(a), at page 249:

"Where the publication is defamatory on its face, or the meaning of the publication is plain and unambiguous, no innuendo, or explanation of the words published or spoken, is required. If, however, the words are not *per se* actionable, there must be an innuendo showing, by reference to facts stated in the inducement, the injurious sense imported by the charge. So, where the words used are susceptible of two meanings, one defamatory and the other harmless, plaintiff must by innuendo ascribe to them their defamatory meaning. * * *

An innuendo, when necessarily pleaded, forms an essential portion of the statement of a cause of action for defamation which must be considered in determining the legal sufficiency of the complaint."

We therefore, in reaching our determination of whether the article was libelous, consider each averment in appellant's complaint.

Appellant only alleges one statement in the article to be actually false; *i.e.*, the opening phrase, "Through a legal technicality * * *." Appellant alleges as follows:

"A. 'Through a legal technicality Judge G. B. Colvin, Jr., Tuesday was forced to send A. C. Duncan, admitted culprit in an attempted rape case here, to the State Hospital for 30 days for observation.' That the above paragraph was false in that a 30 day observation period for any person accused of crime is a substantive right rather than a legal technicality; that the above paragraph was false and was known to be false when written and said paragraph was designed to leave the impression with all who read said article and did leave the impression with all who read said article that the action on the part of the attorney in moving the court for a 30 day observation period was an unwarranted and improper act of the attorney and that it was not properly a part of the attorney's duty toward his client; that the above quoted paragraph was designed to leave the impression and did leave the impression with all who read same that Judge G. B. Colvin, Jr., was forced to commit the said A. C. Duncan for 30 days observation through chicanery practiced by the attorney and that the court was being forced to do something unusual and out of the ordinary; that the above quoted paragraph was designed to leave the impression that the court was forced to commit the accused to 30 days observation by a technical, legal loophole in which there was no merit whatever, which again was false."

Appellant states that because of the use of the term "legal technicality", which he alleges to be false, the complexion of the entire content of the article was changed. Appellant contends that the motion to send Duncan to the State Hospital for observation was a substantive right rather than a legal technicality. Webster's New International Dictionary, 2nd edition, defines the

word "legal" as "of or pertaining to law; arising out of, or by virtue of, or included in law; based upon or governed by". Technicality is defined as "a particular which is technical, or peculiar to any trade, profession, sect, or the like, especially in terminology or method of procedure; as, medical and legal 'technicalities'." It would therefore appear that a dictionary definition of "legal technicality" is simply "legal procedure." Appellant asserts, however, that the actual meaning of the term is not controlling, to which we agree, and that the applicable rule is found in *Jackson* v. *Williams,* 92 Ark. 486, 123 S. W. 751, wherein we said:

"* * * the rule now is that the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adopted to convey to those who heard or read them."

Under this rule, appellant argues that the term legal technicality denotes to the public mind "chicanery"; implies that one prevails, not because of right, but rather through trickery; in other words, in the matter before us, that justice was thwarted by unfair methods.

We do not agree with appellant that these words have that meaning to the general public. We are of the opinion that the term "legal technicality" connotes, to those unfamiliar with legal terms, the impression that the matter, or question passed on, was decided on grounds *other than the merits of the case.* By no stretch of the imagination can we visualize the words being understood to mean "to prevail by trickery or chicanery." Such a construction would, in our view, be unreasonable, and far removed from the plain and natural meaning of the term. Actually, it would appear that the motion made could properly be considered a legal technicality, inasmuch as the motion arose out of law, was governed by law, was peculiar to the legal profession, and is provided for under our procedure. In *Words and Phrases,* Vol. 40, page 524, as relating to criminal law, substantive law is defined as "that which declares what acts are crimes and

prescribes punishment therefor." Procedural law is "that which provides or regulates the steps by which one who violates a criminal statute is punished." Substantive law is "that part of the law which creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion." Here, the two terms rather merge, for the right to an examination is included in substantive law, and the motion to obtain that right is a matter of procedure. Be that as it may, we find no merit in the contention, for even though the term be literally incorrect, we cannot agree that it carried with it the implications set out in appellant's complaint.

It is not contended that paragraphs B, C, D, and E are false (in fact, appellant admitted in oral argument that all of the rest of the events reported in the article are correctly stated); it is only contended that the story was slanted and maliciously designed to defame appellant's reputation. Appellant's allegations from paragraph B through E, in full, are as follows:

"B. 'Duncan's hearing before Judge Colvin was held Tuesday evening, and Paul K. Roberts, Warren attorney, was appointed as the Negro's lawyer.' The above quoted paragraph was maliciously designed to associate and did associate the name of the attorney and the 'Negro's Lawyer' together in an attempt to invoke public hatred, contempt and in an attempt to damage plaintiff's reputation and was an attempt to infer that the Attorney's character was similar to the alleged character of the Negro; that the above quoted paragraph was designed to conceal and did conceal the fact that the court appointed the attorney to the duty he entered upon and into and that the attorney could not refuse the appointment.

C. 'Prosecuting Attorney A. James Linder of Hamburg asked Roberts if he really thought (that the defendant might be insane) that or if he was "grasping at straws". Roberts assured the Court that he felt the Negro might be insane.' The above quoted paragraph was designed to leave the impression and did leave the im-

pression with all who read said article that the attorney was insincere in making the said motion; that said motion on the part of the plaintiff was just a 'legal technicality' and could have no possible merit thereto.

D. 'Judge Colvin deliberated about the motion for several minutes before granting Roberts' motion, but he told those present that under the law he was forced to do it.' The above quoted paragraph was designed to leave the impression upon all who read said article and did leave the impression upon all who read same that the alleged 'legal technicality' spoken of heretofore was so obnoxious to the court that the court reluctantly granted the said motion; that the above quoted paragraph proves that the above paragraph was written with evil design for the reason that the paragraph states 'but under the law he (the court) told all present that under the law, he was forced to do it'; That the above quoted paragraph was designed to leave the impression and did leave the impression with all who read same that the attorney had through trickery, chicanery, and the use of a legal loophole been able to defeat justice; that the above quoted paragraph was designed to mislead all who read same into the belief that the motion was improper when in fact said 30 day examination is generally accepted as a prerequisite to the final hearing of a case of the same nature as the one with which A. C. Duncan was charged.

E. 'At the start of the hearing, a representative of this newspaper received the permission of Judge Colvin to take candid camera pictures while the hearing was going on. After court started, however, Attorney Roberts raised an objection to the photographer's being allowed to take pictures. No more were taken.' The above quoted paragraph was designed to leave the impression and did leave the impression with all those who read said article that through the 'legal technicality' of the attorney the photographer was deprived of a right to take pictures; the above quoted paragraph was designed to conceal the fact that photographers are barred from courtrooms by law and said paragraph was a deliberate

attempt on the defendants' part to damage and defame plaintiff's reputation."

If the allegations in paragraph B constitute a cause of action, then libel is committed any time a newspaper reports that a white attorney represents a Negro in a criminal action. The assertion that the phrase stating that Roberts was appointed as the Negro's lawyer "was an attempt to infer that the attorney's character was similar to the alleged character of the Negro" transcends any reasonable interpretation that could be given the words, and the article plainly stated that Roberts was appointed.

In quoting the remark of the prosecuting attorney in open court, the newspaper demonstrated its good faith by stating "Roberts assured the Court that he felt the Negro might be insane." Paragraphs D and E relate to a factual report of the proceedings, and we are unable to ascribe to this report the meaning, impression, or interpretation given it by appellant. Incidentally, photographers are not barred from courtrooms by law in this state; the prohibition arises under the Judicial Code of Ethics promulgated by the American Bar Association.[2]

There are several defenses to a suit for libel, among them the conditional privilege accorded to newspaper reports of judicial proceedings. However, since we are of the view that the publication herein involved is not susceptible of a defamatory meaning, it is irrelevant whether the conditional privilege attaches, and we see no reason to discuss this defense. Likewise, though the factual report appearing in the article was admittedly true (except that appellant alleged the term "legal technicality" to be false), our conclusions are not based upon that

[2] The Code of Judicial Ethics was adopted by the State Judicial Council of Arkansas in September, 1958, and Section 35, pertinent hereto, reads as follows: "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. * * *"

premise, for we do not say unequivocally or dogmatically that one can never be libeled by a statement, even though true. Rather, we determine this litigation on the basis of the fact that when this article is construed as a whole, considering the words in their plain and natural meaning, according to the sense in which they appear to have been used, and the ideas such words would convey to those who read them — the article is not libelous. In other words, the article is not susceptible of a defamatory meaning.

We think the public is generally cognizant of the fact that attorneys are appointed to represent indigent prisoners. The story plainly states in the second paragraph that appellant was appointed as the Negro's lawyer. There is nothing in the article which even remotely indicates that Roberts sought this appointment or desired to represent the defendant. In view of public sentiment and the probable outraged feelings of the community toward a crime of this nature, we can readily understand appellant's sensitivity to the article; we daresay that numerous instances have arisen wherein people have been embarrassed by seeing their name in print, though no wrongful act had been committed, but under our system of government and its democratic processes, a free press is assured. Certainly, this is as it should be. As stated in Article II, Section 6, of the Constitution of the State of Arkansas:

"The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right."

The article in question is not an abuse of this right.

We deem it proper, in view of appellant's sincere feelings, to point out that in representing this defendant, he was only carrying out a duty imposed upon him by virtue of his profession, and as a member of the Bar of Arkansas. Canon IV of the Canons of Professional Ethics provides:

"A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, *and should always exert his best efforts in his behalf.*[3]"

We commend this attorney, as indeed any attorney should merit commendation, for his compliance with this Canon, which assures diligent representation to any prisoner, irrespective of the crime charged. The right of representation is fundamental to the American concept of justice. Here, Mr. Roberts, though apparently finding his duty distasteful, did not equivocate, nor seek to escape, from the responsibility assigned to him.

No cause of action having been stated by the complaint, the judgment is affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice, dissenting. This case comes up after a demurrer to the complaint was sustained. It is the rule in Arkansas that allegations of a complaint are accepted as true on demurrer. *Glenn* v. *Union Bank & Trust Company,* 150 Ark. 38, 233 S. W. 798. This being so, I am convinced the appellant raised a *prima facie* case and the evidence should have gone to the jury. After all, there is only one basic question here and that is the effect of the article on the plaintiff's reputation in the community. There are two ways to find this effect. One is from the evidence the plaintiff would have produced. The other is by giving certain meaning to words used in context as the majority has here. This second method is inexact, to say the least.

I do not agree with the majority statement that this article could obviously not be libelous *per se.* If the article is false and tends to injure the plaintiff's reputation and thereby expose him to public hatred, contempt, or shame, it is libelous *per se. Hall* v. *Binghampton Press Co.,* 29 N. Y. S. 760.

The question of falsity in this case revolves around the use of the term "legal technicality". In arriving at

[3] Emphasis supplied.

a conclusion as to whether the defendants' use of the term was true or false under the circumstances I don't believe we should substitute a dictionary definition of the term for a jury finding. The plaintiff should have the benefit of any meaning ascribed to the phrase by his neighbors, and possible clients, in his community. *Jackson* v. *Williams,* 92 Ark. 486, 123 S. W. 751. The cause should be tried on its merits, not by this court as an Appellate jury.

For the reasons stated above, I respectfully dissent.

DAVIS *v.* BULLARD.

5-2081 333 S. W. 2d 481

Opinion delivered March 28, 1960.

Charles F. Cole, for appellant.

Caldwell T. Bennett, for appellee.

J. SEABORN HOLT, Associate Justice. This is a suit for personal injuries and property damage growing out of a collision between an automobile owned and operated by appellee, Clarence J. Bullard, plaintiff in the trial court, and a heavily loaded trailer-truck owned by appellant, W. D. Bowers, and driven by his employee, Hu-

bert Davis. Appellee's complaint alleged the following specific acts of negligence personal to W. D. Bowers: "The defendant employer W. D. Bowers in stopping his tractor-trailer upon the traveled portion of the State Highway No. 69, without leaving sufficient room for safe passage of the plaintiff's vehicle upon the traveled portion of the highway; * * * in stopping his tractor-trailer upon the traveled portion of the State Highway No. 69, without leave (sic) a free and unobstructed view for a distance of 300 feet from the direction of the plaintiff's approach. * * * in allowing his headlights to remain on bright, while blocking the entire traveled portion of State Highway No. 69, with his vehicle, and that of his employee-defendant Hubert Davis." On proper instructions, including one under our comparative negligence statute [27-1730.2 Ark. Stats.] directing the jury to determine in its verdict the degree of negligence attributable to each of the two defendants, the jury found: "(A) That Clarence J. Bullard, the plaintiff had been damaged in the following amounts: A. Property damage $672.20 B. Personal Injury $36,000.00 (B) That the degrees of negligence found in the various parties are as follows: a. Hubert Davis-0- b. W. D. Bowers 65% c. Clarence J. Bullard 35%." In accordance with the verdict the court entered judgment for appellee, Bullard, against appellant, Bowers, in the amount of $23,-836.90.

For reversal, appellant, Bowers, contends: "* * * that his liability, if any, is based upon the employer-employee relationship which existed between him and Mr. Davis. That since the jury found that Mr. Davis, appellant's employee, was not guilty of any negligence, the lower court erred in rendering judgment against Mr. Bowers, the employer and appellant here." Appellant's contention would be correct if no independent acts of negligence personal to Bowers were established. We announced this rule in the recent case of *Elmore, Admr.* v. *Dillard,* 227 Ark. 260, 298 S. W. 2d 338, where we said: "* * * a jury's verdict could not stand because of inconsistency where it found that a truck driver was not

negligent and at the same time returned a verdict against the driver's employer or principal where, as here, no independent acts of negligence have been established." In the present case, after a careful review of the record, we have concluded that there is some substantial evidence to warrant the finding of the jury that appellee had established independent acts of negligence on the part of Bowers apart from the employer-employee relationship between him and Davis.

Appellee, Bullard, a single man 25 years of age, testified, in effect, that he was driving his automobile on highway No. 69 westerly on his way to Batesville, Arkansas, from Newark, Arkansas, at about 6:30 P.M. The sun was down and his headlights were on; that he was going up a hill approaching a left curve at the crest of a hill and that as he drove his car over the crest, the headlights on a truck driven east by appellant, Bowers, blinded him and he drove into the rear of a westbound truck-trailer loaded with approximately 35,000 pounds of grain driven by appellant, Davis. Davis had stopped his truck just over the crest of the hill on the highway in the lane in which appellee was driving. Appellant, Bowers (Davis' employer), had stopped his truck almost opposite Davis' truck on the highway. Bullard was seriously injured by the collision and completely lost the sight of one eye. Appellee presented two eyewitnesses to the mishap. C. S. Sweet testified that he saw the collision, — that it was dusky dark. He saw the Davis truck come up the hill toward Batesville, westbound. Appellant, Bowers, was meeting him (Davis) eastbound and stopped his truck in the eastbound lane, opposite the Davis truck which was in the westbound lane. The headlights on Bowers truck were burning brightly — neither truck was on the shoulder of the road. There were no taillights on the eastbound (Davis) truck, — there was nothing to obstruct his view. Both trucks were completely stopped four or five minutes on the hard-surface portion of the highway. He saw Mr. Bowers out of his truck and at the side of the Davis truck. He saw only one man in the Davis truck. E. E. Dry tended to corrob-

orate Sweet. He testified that appellant, Bowers, was driving his truck eastbound and as he neared the crest of the hill and curve, he stopped his truck and another truck (the Davis truck) meeting him westbound. They were both stopped three, four or five minutes. The drivers got out. Bowers was stopped there on the road. A westbound car came over the hill from the east and hit the rear of the westbound truck (the Davis truck). Patrolman Wallace testified that Davis told him there was no one with him (Davis) at the time of the collision.

From the above evidence we hold that the jury was warranted in finding that Bowers, who was personally operating his own truck, was personally negligent in stopping it on the highway short of the crest of the hill as he did and in causing his employee, Davis, to bring his truck to a stop opposite Bowers' truck in such a manner as to partially block the highway at that point from three to five minutes, with his (Bowers) headlights burning and projecting so as to blind momentarily appellee as he drove his car west over the crest of the hill and into the rear of the Davis truck.

Under our long established rule, we must affirm the verdict of the jury when we find any substantial evidence to support it and, — "In testing the sufficiency of the evidence to support the verdict of a jury this court must view the evidence with every reasonable inference arising therefrom in the light most favorable to the appellee, and this court is bound by the most favorable conclusion that may be arrived at in support of the verdict rendered by the jury, and can only determine whether or not there was substantial evidence to support the verdict.

We have many times held that this court, on appeal, in determining the sufficiency of the evidence, will consider the evidence in the light most favorable to appellee and will indulge all reasonable inferences in favor of the judgment," *Missouri Pacific Transportation Co.* v. *Jones,* 197 Ark. 79, 122 S. W. 2d 613.

Accordingly, the judgment is affirmed.

Opinion delivered March 28, 1960.

[redacted]

Jeptha H. Evans, Rose & Kizer, Douglas O. Smith, Jr., Warner, Warner & Ragon, for appellant.

Pettus A. Kincannon, Lawrence S. Morgan, for appellee.

ED. F. MCFADDIN, Associate Justice. The validity of the will of Mrs. Mattie Edwards is the question for decision. The appellee, Ross Edwards (surviving son of Mrs. Mattie Edwards), obtained probate of the will; within six months thereafter the appellants (two daughters of a deceased son of Mrs. Mattie Edwards) attacked the instrument as a forgery; the Probate Court found the will to be valid; and this appeal ensued, in which the appellants present two points:

I. The finding of the Probate Court was wholly contrary to the preponderance of the evidence.

II. The conduct of the Lower Court and its findings of fact constitute an abuse of discretion highly prejudicial to contestants herein.

Mrs. Mattie Edwards died on January 21, 1957 at the age of 87. She had been a widow for a number of years, and had only three sons:

1. James Edwards, who died in 1919, survived by two daughters who are appellants herein, Mrs. Marjorie Edwards Ross and Mrs. Claudine Edwards Lynch.

2. Keith Edwards, who died in 1944 without issue.

3. Ross Edwards, the appellee herein.

On June 24, 1957 appellee petitioned for the probate of the will[1] of Mrs. Mattie Edwards. Both of the at-

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[1] This instrument, in its entirety, reads:

"Will of Mattie Edwards—Booneville, Arkansas.

"KNOW ALL MEN BY THESE PRESENTS—

"That I, Mattie Edwards, of Booneville, Arkansas, being of sound mind and disposing memory do make and publish this my last Will and Testament revoking all former wills by me at any time made.

"I. I hereby direct and constitute and appoint my beloved son, Ross Edwards, Booneville, Arkansas, sole Executor of this my last Will and Testament without being required to give or make bond or inventory and request that he keep my estate out of the Courts excepting for the probation of this Will.

"II. I direct my Executor collect all insurance, notes, money or any choses in action due me—that he pay all my just debts, doctors bill and funeral expense and place a suitable but not expensive marker at my grave at a convenient time.

"III. I give, bequeath and devise to my son, Ross Edwards, my entire Estate, both personal and real—all my choses in action, moneys, insurance, bank account, notes and every article that I die seized with and of excepting as hereinafter set out and mentioned:

"I give and bequeath to my granddaughter, Marjorie Edwards Ross, $100.00 in cash.

"I give and bequeath to my granddaughter, Claudine Edwards Lynch, $100.00 in cash.

"I give and bequeath to my beloved sister, Laura Keith McInturf, $500.00 in cash should she survive me but this bequest shall be void should she precede me.

"My granddaughters hereinabove will understand my love for them inasmuch as a prior settlement was heretofore consummated with them following the death of my beloved son, James Edwards, their father.

"IV. In the event my son, Ross Edwards, precedes me and/or I should become incapacitated, then his son, James Ross Edwards, in that event shall ascend to the executorship of this my Last Will and Testament with like direction imposed upon Ross Edwards herein.

"V. I direct my Executor to comply with my wishes as herein set out just as soon as he can conveniently do so following my demise. Signed, published and declared by the said Mattie Edwards as and for her last Will and Testament in the presence of each other at her request and we hereto subscribed our names after she has signed this Will immediately hereunder.

/s/ Mattie Edwards

"We, Chas. X. Williams and Long John Williams, do hereby certify that Mattie Edwards, the Testator in the above and foregoing last Will and Testament signed the same in our presence.

/s/ Long John Williams
/s/ Chas. X. Williams"

testing witnesses to Mrs. Edwards' purported will were dead at the time the will was offered for probate: Chas. X. Williams having died in 1951, and Long John Williams having died on April 10, 1957. Because of the death of both of the attesting witnesses, the probate of the will was accomplished by proof of three witnesses, each of whom stated under oath personal knowledge of each of the three signatures on the alleged will, and also stated that each of the said signatures (*i.e.,* the testatrix and the two attesting witnesses) was valid. § 62-2117 Ark. Stats. These three affiants were Abe Williams, Elizabeth Walker, and R. A. Sadler.

The will was admitted to probate and letters testamentary were issued to Ross Edwards on July 15, 1957. Due notice of probate was given; and on December 27, 1957 the appellants, Marjorie Edwards Ross and Claudine Edwards Lynch, being the two granddaughters mentioned in the will, filed their contest of the will. § 62-2115 Ark. Stats. The ground for contest now relied on[2] is, that the purported will was a forgery. The trial before the Chancellor on exchange extended over several days. The case was as thoroughly tried as any will contest on forgery that we have ever studied. Since the testatrix and both attesting witnesses were dead, all the contestants had to do was to prove that *any one* of the three signatures (testatrix or either attesting witness) was a forgery, in order to defeat probate, since, in Arkansas, a valid will, other than holographic, must have two witnesses. § 60-403 Ark. Stats.

An enormous record of testimony and exhibits is before us; and because the appellants claim, in their second point, that the Trial Judge was impatient with their expert witness, we have carefully gone over every ex-

[2] The three grounds for contest, as stated in the original pleading and the amended objections to the probate of the will were: (1) That said purported will was not made and executed as required by law and is not the lawful will of said decedent. (2) That said decedent was without legal capacity to make said purported will and that the said will is void and without force or effect. (3) That said purported will was procured by fraud and undue influence and is therefore illegal and void. The second and third grounds were finally abandoned, and the forgery question raised in the first ground became the sole attack.

hibit and word of testimony in this trial *de novo*. Probate appeals receive such a trial here. *Walsh* v. *Fairhead,* 215 Ark. 218, 219 S. W. 2d 941; *Lockett* v. *Adams,* 212 Ark. 899, 208 S. W. 2d 428; and *Brown* v. *Emerson,* 205 Ark. 735, 170 S. W. 2d 1019. After a painstaking study of the record, we have concluded that the appellants have not sustained the burden of proving any signature on the will to have been a forgery. So we affirm the probate of the will. When Ross Edwards offered the will for probate he had the burden of proving the genuineness of the signatures; he made such proof; and the will was admitted to probate on July 15, 1957. When the appellants sought to contest the will within the 6-months period (§ 62-2114), they had the burden of sustaining the contest. *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936; and *Walsh* v. *Fairchild, supra.*

Mrs. Mattie Edwards was a remarkable woman: left a widow when her three sons were young, she managed her property most efficiently, and was president for many years of the Citizens Bank in Booneville. Mr. Chas. X. Williams was an officer of the bank, being its attorney, and also personal attorney for Mrs. Edwards. Long John Williams, son of Chas. X. Williams, was likewise engaged in the operation of the bank. These two gentlemen were the attesting witnesses of Mrs. Edwards' will, which was shown to have been executed in 1945. The contestants (appellants) called a distinguished handwriting expert of worldwide experience. He testified: that each of the three signatures was a forgery; that the paper on which the will was written was bonded between 1940 and 1945; that with age the paper fades to ashen gray or yellow; that in 1945 this paper would have been white and if ink had been placed on it in 1945 the paper would still be white under the ink; that the paper was faded under the ink, therefore, establishing that the ink was not placed on the paper in 1945; that the kind of ink used in the signatures of Long John Williams and Chas. X. Williams was not in manufacture until 1952, seven years after the alleged signatures; and that the signature, particularly of Chas. X.

Williams, bore clear evidence of tracing. This expert also made a study of the typewriter used in typing the will.

There were introduced into evidence scores and scores of admittedly genuine signatures of Mrs. Edwards and the two attesting witnesses. Records, documents, and instruments were put in evidence containing signatures of all three parties, dating from the 1930's to the 1940's. Many of these signatures were "blown up", or enlarged by photographic processes; and a letter by letter comparison of the signature of each person on the will was checked against admittedly genuine signatures. All this testimony was designed to show that appellant, Ross Edwards, or someone for him, was responsible for the claimed forgery of Mrs. Edwards' will.

For the appellee there were two nationally known handwriting experts, each testifying to the genuineness of each of the three signatures on the questioned will; and their expert opinions were based on equally as many comparisons as those of the expert for the appellants. Also, there were friends and business associates who knew all three parties and their signatures (*i.e.,* Mrs. Edwards and the two witnesses); and these friends and associates all testified that each signature was genuine. The expert witnesses for the appellee testified in great detail, just as did the expert witness for the appellants. In fact, all of the experts had a "field day", and showed great study in their chosen professions. The record is voluminous and the exhibits number into the scores. On the genuineness versus the forgery of the questioned will there was no real dispute as to the applicable rules of law: the issue was one of fact.

As aforesaid, we have reviewed *de novo* the entire record; and we conclude that the appellants have not established, with the *quantum* of necessary evidence, that the questioned will was a forgery.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* UNION PLANTERS NATL. BANK.

5-2004 333 S. W. 2d 904

Opinion delivered March 28, 1960.

[Rehearing denied May 2, 1960]

W. R. Thrasher, Bill B. Demmer, for appellant.

Hale & Fogleman, for appellee.

George Rose Smith, J. This is an eminent domain proceeding by which the State Highway Commission seeks to condemn the necessary property rights to enable it to convert an existing highway across the appellees' farm lands into a controlled-access facility. See Act 383 of 1953; Ark. Stats. 1947, Title 76, Ch. 22. In asking the jury for an award of substantial damages the landowners relied mainly upon the fact that their plantation will be effectively cut in two, lengthwise, by the new thoroughfare, since they will be prohibited from crossing it at any point along its three-mile passage over their property. The jury fixed the appellees' compensation at $75,250. In seeking a reversal the Commission's principal contention is that the landowners' right to cross the public right of way had already been taken and consequently the loss of that right is not a compensable element of damage in this case.

The background facts are not in dispute. The appellees' land may be referred to as the Woollard plantation. It contains 2,800 acres and is an irregularly shaped tract whose greatest dimension is its length north and south. Prior to 1952 the land was not traversed by any national highway. In that year the State Highway Commission relocated a portion of U. S. Highway 61 and for that purpose condemned an easement, 250 feet wide, running the length of the Woollard property. The landowners protested that the easement was unnecessarily wide, but we upheld the Commission. *Woollard* v. *Ark. State Highway Comm.,* 220 Ark. 731, 249 S. W. 2d 564. That case was later settled without a trial, and that is the taking now relied upon by the Commission to defeat the principal factor in the appellees' damages.

A controlled-access facility may be broadly described as a superhighway which motorists can enter and leave

only at designated interchanges, usually some miles apart. The 1952 condemnation proceeding was not instituted for the purpose of acquiring a right of way for a controlled-access highway; indeed, Arkansas then had no statute authorizing the creation of such a facility. At that time the Commission planned to construct, and later did construct, a conventional two-lane highway upon the easement it was acquiring. The unusually wide right of way was meant to allow the Commission to add another two lanes sometime in the future, thus providing the customary type of divided thoroughfare with two lanes for northbound traffic and two for southbound traffic.

The proof shows that the original construction pursuant to the 1952 taking did not seriously interfere with the operation of the Woollard plantation. Within the limits of the property the new highway, U. S. No. 61, was crossed at grade by four county roads and by at least four private farm roads. The owners continued to conduct their enterprise as a unit. There is ample proof that the relocation of Highway 61 did not in itself substantially lower the value of the Woollard lands.

Later on, however, this part of Highway 61 was taken into the new interstate highway system. The Highway Commission then filed the present proceeding against the Woollards and others, to the end that the existing highway may be converted into a controlled-access facility. The Commission seeks, first, to acquire the fee simple title that underlies its existing easement, because the statute requires that the State own a limited-access facility in fee. Ark. Stats., § 76-2205. Secondly, the Commission is condemning a little more of the Woollard land, about an acre, which the jury valued at $250. Finally, it was stipulated that the Commission's declaration of taking is "for the acquisition and control of access rights of land adjacent and contiguous to the original highway right of way."

The controlled-access facility, when completed, will consist of four parallel two-lane paved highways. The two double highways in the middle will be one-way routes,

one carrying northbound through traffic and the other carrying southbound through traffic. The outer highways will be two-way service roads, carrying local traffic and affording access to the inner lanes only at the interchanges.

No interchange is to be built within the limits of the Woollard lands. For these landowners and their employees to cross from one side of the plantation to the other they must travel the service roads to and from the nearest interchanges, one being an overpass about half a mile north of the Woollard property and the other being an overpass about equally far south. This bisecting of the plantation will prevent its being operated in the future as a single unit. Additional headquarters must be built, additional machinery must be purchased, and other additional expense must be incurred in operating as two farms what was formerly one undertaking. There is an abundance of substantial testimony, given by qualified expert witnesses, that the Woollards' total severance damages will materially exceed the jury's verdict. Indeed, we emphasize the fact that nowhere in the Highway Commission's brief does it question the amount of the award if the landowners' inability to cross the highway is a compensable element of damage. What the Commission contends is that the jury should not have been permitted to take this severance damage into account at all.

The Commission's argument may conveniently be considered in two separate aspects. First, was the Woollards' right to cross from one side of their property to the other taken *by eminent domain* in 1952? Secondly, if not, can that right be taken in the present proceeding through an exercise of the police power, without compensation to the landowners?

On the first point we think it clear that the Woollards' right to cross the public easement was not within the issues of the 1952 condemnation. If that proceeding had been intended to bisect the Woollard plantation as effectively as if a high stone wall had been erected

down the center of the property it cannot be doubted that the landowners would have been entitled to commensurate severance damages. *St. Louis, Ark. & T. Railroad* v. *Anderson,* 39 Ark. 167; *Ashley, Drew & N. Ry. Co.* v. *Gulledge,* 121 Ark. 143, 180 S. W. 222; *Ark. State Highway Comm.* v. *Speck,* 230 Ark. 712, 324 S. W. 2d 796.

In 1952, however, the Woollards had no reason to anticipate that their commonplace privilege of crossing the State's easement might someday be destroyed by the installation of a controlled-access facility. Our legislature had not then adopted a statute permitting the creation of limited-access highways. We doubt if in 1952 there was anywhere in the entire state a stretch of rural public road as much as a quarter of a mile long, much less three miles long, upon which crossings were prohibited.

The Highway Commission itself has often recognized that after a condemnation an abutting owner whose land has been cut in two still has a right to cross the road. This recognition is quite apparent in those cases in which the Commission has sought to mitigate its liability for severance damages by voluntarily providing the landowner with a means of crossing the new highway. For example, in *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, where a relocation of Highway 64 divided the land into two tracts, the opinion observed: "The Highway Department . . . agrees to build an underpass under the right-of-way whereby livestock can be moved from the severed 55 acres south of new 64." In a similar situation we remarked in *Ark. State Highway Comm.* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791: "According to the undisputed evidence the Highway Commission will provide a grade crossing."

It is plain enough that in the *Byars* case the Commission would not have been permitted to reduce its liability by providing an underpass and then later on contend that it had already acquired by eminent domain (as distinguished from the police power) the right to close

that underpass. So in the Woollard case. In 1952 the Woollards could not have successfully asserted their present claim, for there were available after the taking four public crossings and at least that many private crossings. In negotiating with the Woollards the Highway Commission was entitled to rely upon those crossings to reduce its liability to the landowners. It cannot now take the inconsistent position that the Woollards' right to cross the highway was bought and paid for in 1952.

We may add the observation that, had the present claim been asserted in the 1952 proceeding, the claim not only *would* have been disallowed but also *should* have been disallowed. There was then no substantial basis for supposing that the Woollards' right to cross the public easement would ever be disputed. If they had been entitled to recover compensation upon the theory that their plantation was being effectively cut in two by a conventional highway, the judgment in their favor would have been a precedent exposing the State to similar speculative and even fictitious claims in every case in which the Commission condemned a right of way across a tract of land. It seems clear that such a holding would be neither legally sound nor in the public interest.

The second aspect of the Commission's argument is more perplexing. Here it is contended that after the State has acquired a highway easement, and especially one 250 feet wide, it is entitled to put into effect, without compensating an owner whose land bestrides the highway, a traffic regulation which prevents any person from crossing the public right of way except at specified interchanges.

For the most part the authorities cited by the Commission do not reach the present situation, for they involve land lying entirely on one side of the street or highway. It is settled that in that situation the public authorities may erect a median strip down the center of the thoroughfare or may in some other manner prohibit left turns or two-way traffic without compensating the

abutting landowner for his inconvenience or for the loss of business that results from the change in the flow of traffic. *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187; *Holman* v. *State,* 97 Cal. App. 2d 237, 217 P. 2d 448; *People* v. *Sayig,* 101 Cal. App. 2d 890, 226 P. 2d 702; *Dougherty County* v. *Hornsby,* 213 Ga. 114, 97 S. E. 2d 300; *Langley Shopping Center* v. *State Roads Comm.,* 213 Md. 230, 131 Atl. 2d 690; *Turner* v. *State Roads Comm.,* 213 Md. 428, 132 Atl. 2d 455; *Muse* v. *Miss. State Highway Comm.,* 233 Miss. 694, 103 So. 2d 839; *Brady* v. *Smith,* 139 W. Va. 259, 79 S. E. 2d 851. This general principle is also being applied by us in another case decided today, *Ark. State Highway Comm.* v. *Bingham,* 231 Ark. 934, 333 S. W. 2d 728, wherein we are holding that a loss attributable merely to the diversion of traffic is not compensable. We find three cases involving tracts on opposite sides of the highway, but these decisions are readily distinguishable on the facts and need not be discussed. *Iowa State Highway Comm.* v. *Smith,* 248 Iowa 869, 82 N. W. 2d 755; *Warren* v. *Iowa State Highway Comm.,* 250 Iowa 473, 93 N. W. 2d 60; *Carazalla* v. *State,* 269 Wis. 593, 70 N. W. 2d 208, rehearing granted, 270 Wis. 593, 71 N. W. 2d 279.

It is quite apparent that the doctrine of the cases cited, involving land on only one side of the highway, would have to be materially extended to reach the situation now before us. In that event it would be necessary to determine whether the exercise of the police power was being carried so far as to amount to a taking of private property. As the court pointed out in the leading case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

We do not reach this question, however, for we are convinced that in the case at bar the State is actually exerting its power of eminent domain. It thus becomes unnecessary for us to decide whether the same result might constitutionally be attained through the exercise of the police power alone, without payment to the landowner.

To begin with, the controlled-access highway statute contemplates a taking, for it specifically provides that the State's right of way must be owned in fee simple. Ark. Stats., § 76-2205. Of course the legislature knew that an existing easement could not be enlarged to a fee by means of a mere police regulation, and there is no good reason to suppose that the legislature meant to divide the transaction into two steps, one involving the police power and the other the power of eminent domain.

The particular situation now before us will evidently arise very infrequently in Arkansas, for only in rare instances will the State own a highway easement that is sufficiently wide to accommodate a controlled-access facility and that is also so located as to be suitable for that use. In the usual case the Highway Commission will be compelled to condemn a new right of way for this type of highway, and in such an original proceeding it goes without saying that a landowner whose land is cut in two will be entitled to compensation for his loss. The fact that the legislature did not authorize the Highway Commission to convert an existing easement into a controlled-access facility even when that could be accomplished demonstrates that some importance was attached to the acquisition of the fee simple.

In the second place, when the arguments on each side are fairly well balanced considerations of equity and justice are entitled to great weight. Here the equities undeniably lie with the landowners. It is nowhere denied that they have suffered an actual pecuniary loss at least equal to the jury's award. As we have seen, they could not have asserted their present claim in 1952, for the division of their property was not then contemplated. If

their cause of action is denied they will have been deprived of any opportunity to assert a just claim. Yet all that has happened in the meantime has been the passage of federal laws creating an interstate system of limited-access highways. Public Law 627, June 29, 1956, 70 Stat. at Large 374; 23 U. S. C. A. § 111. If the Woollards' land had been taken after the adoption of the federal law instead of before its passage their damages would unquestionably have been paid. In the absence of a clear expression of the legislative intent we are unwilling to read into our controlled-access highway statute a requirement that these particular appellees must bear a unique burden, a burden that other landowners will escape simply because their property happened to be taken at a more favorable moment.

The Commission's remaining points do not require extended discussion. We see no real objection to testimony by which an expert witness gave his "personal" opinion about land values; the opinion of any expert is of course personal to that witness. Nor do we think the Commission was prejudiced by the fact that Mr. Woollard mentioned in the course of his testimony that the county had discontinued its maintenance of a bridge.

There is merit, however, in the appellant's contention that the fees of the appellees' expert witnesses, amounting to $1,280.00, should not have been taxed as costs in the case. The allowance of costs is purely statutory, and in the absence of a statute the fees of expert witnesses cannot be charged against the losing party. *Ark. Game & Fish Comm.* v. *Kizer*, 222 Ark. 673, 262 S. W. 2d 265; 38 A. L. R. 2d 1372. This modification of the judgment amounts to a substantial recovery and thus entitles the appellant to recover its costs of appeal. Supreme Court Rule 24.

Modified and affirmed.

McFaddin and Johnson, JJ., concur.

Holt and Robinson, JJ., dissent.

SAM ROBINSON, Associate Justice, dissenting. The majority does not cite a single authority that sustains the view expressed, although there is an abundance of literature and cases on the subject involved, including splendid Law Review articles such as: Cunnyngham, The Limited-Access Highway from a Lawyer's Viewpoint, 13 Mo. L. Rev. 19; Controlled Access Highways in Iowa, 43 Iowa L. Rev. 258; Covey, Control of Highway Access, 38 Nebr. L. Rev. 407; Clarke, The Limited-Access Highway, 27 Wash. L. Rev. 111; Covey, Highway Protection Through Control of Access and Roadside Development, 1959 Wisc. L. Rev. 367. None of the Law Review articles supports the position taken by the majority, and there are no cases sustaining that view.

In my opinion the only thing acquired by the State in this action, in addition to the one acre valued at $250, is the fee in the right of way, in which the State already had a right of way easement. In a case of this kind the fee has a nominal value only. *People* v. *Sayig,* 101 Cal. App. 2d 890, 226 P. 2d 702. In 1952 Woollard was paid for the 250-foot right of way across his property. *Woollard* v. *State of Ark. Highway Dept.,* 220 Ark. 731, 249 S. W. 2d 564. It will be seen from the decision in that case that there was taken into consideration, among other things, the fact that the Highway Department contemplated building a modern highway of such dimensions and character that Woollard would be precluded from crossing it at any place except the points designated and prepared by the Highway Department for that purpose. When the right of way was taken by the State, Woollard lost all interest in the land embraced within the right of way except the fee, which is of no practical value, and the right of access, and he still has access to the right of way. In the first *Woollard* case, this Court said: "Even though the Commission's existing commitment is to construct only a 24-foot two-lane highway, its plan for the future, when justified by available funds, is to build a second two-lane road, separated from the first by a parkway that will provide earth for the necessary fills and also promote the public safety by dividing the two arteries of traffic. By

acquiring a sufficiently broad right-of-way in the first instance the Commission expects to avoid the expense that is incident to any attempt to enlarge a roadbed that has been hemmed in by the various commercial establishments that tend to spring up along the border of a public highway."

Woollard should not be compensated more than once for the taking of the right of way. In the case of *Arkansas State Highway Commission* v. *Fox,* decided March 23, 1959, 230 Ark. 287, 322 S. W. 2d 81, this Court said: "Unquestionably a landowner is entitled to be fully compensated for his loss under the processes of eminent domain. However, we have established methods by which a determination of 'just compensation' is to be made. In a situation as the case at bar where there is a partial taking of a landowner's property we have established the rule that the measure of damages is the difference between the value of the whole land before the appropriation and the value of the portion remaining after the appropriation. *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706 (1955); *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051 (1938); *Newport Levee District* v. *Price,* 148 Ark. 122, 229 S. W. 12 (1921).

"In spelling out this rule we said in *Little Rock, Mississippi River and Texas Railway Co.* v. *Allen,* 41 Ark. 431 (1883): 'The correct rule for measuring damages is to determine the value of the whole land without the railway at the time same was built, then find the value of the portion remaining after the railway is built, and the difference between the two estimates will be the true compensation to which the party owning the land is entitled.' "

In the case of *Keith* v. *Drainage Dist. No. 7 of Poinsett County,* 183 Ark. 384, 36 S. W. 2d 59, the Court quoted with approval the rule laid down in *Newgass* v. *Railway Co.,* 54 Ark. 140, 15 S. W. 188, that the value of private property taken for public use must be determined as of the date a petition for condemnation is filed. In the case at bar the petition was filed and the right of way was taken back in 1952. Every element that can fairly enter into the

question of market value and which a business man of ordinary prudence would consider before purchasing property should also be considered by the jury in arriving at the value of the property before and after the taking. *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706. And in *Little Rock, Mississippi River and Texas Railway Co.* v. *Allen,* 41 Ark. 431, this Court said that the measure of damages for the right of way taken by a railroad company across a city or town lot is the difference between the value of the whole land without the road at the time it was built and the value of the portion remaining after it was built; and in estimating this value the jury should consider *all present and prospective* actual damages resulting to the owner from the prudent construction and operation of the road, the effect the road would have in decreasing the value of the land for gardening purposes, as well as *inconveniences caused by embankment, excavations, ditches and obstruction to the free egress and ingress of the premises.*

And in *Little Rock and Ft. Smith Railroad Co.* v. *Greer,* 77 Ark. 387, 96 S. W. 129, the Court said: "It is a well-established rule of law that the owner of land taken for railroad purposes is entitled, before or at the time of the taking, to compensation for all damages, *present and prospective,* which he sustains by reason of the construction of the railroad . . . Such damages include the value of that part of the land which is taken, as well as the damages consequent upon such taking to the residue. *The doctrine invoked by appellant has its rationale in the presumption that, in the absence of proof to the contrary, the owner who is entitled to such compensation received same before or at the time his land was charged with the servitude; that this was considered and settled when the owner conveyed the land to the railroad or when the railroad acquired its title by condemnation; . . .* " [Emphasis supplied] On rehearing Judge McCulloch said: "The principle is made clear in the original opinion that where a railroad corporation lawfully acquires a right of way over land, either by grant, prescription or condemnation, such acquisition *covers all damages, present and prospective, resulting to the owner whose land is invaded.*

This upon the theory that full compensation is allowed at the time, and can be recovered only once.'' [Emphasis supplied] Thus, according to the law of this State, as heretofore announced by this Court, the presumption is that Woollard, the landowner, was paid full value for the right of way in 1952.

Of course, Woollard was damaged by the severance of his place, but that damage was paid for in 1952. In the case at bar the landowners are being allowed compensation on the theory that their plantation is being effectively cut in two. The answer to that theory is that it was cut in two by the first taking in 1952, when 98 acres were taken. The one acre taken at this time certainly does not cut the 2,800 acre plantation in two. In 1952 it was known that the highway would sever the plantation, and witnesses so testified in the first case, and it was shown that the kind of road to be constructed would prevent the crossing of the right of way except at points designated by the Highway Department. The fact that such a right of way would be constructed is pointed out in the first *Woollard* case above mentioned.

To sustain its view, the majority cites *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, and *Arkansas State Highway Commission* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791. But those two cases do not support the majority's contention. It is clearly recognized in those cases that the property owner had the right to recover damages for the severance of his property, and the question was whether the damages allowed in the trial court were excessive. It was pointed out in those two cases that the fact that the Highway Department was providing facilities for the property owners to cross the right of way had a tendency to mitigate the damages at that time, the time of the taking. There is nothing in either of those cases which indicates that the property owner can come into court several years after the taking and recover damages because he is unable to cross the highway at any place he might wish to cross it. The majority mentions that county roads crossing the right of way will be closed.

But this Court has held time and again that a property owner cannot recover damages because a right of way has been changed or closed. See *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949, and cases cited therein.

By purchasing the 250-foot right of way across the Woollard land in 1952, the State acquired the valid right to construct four strips of concrete pavement, or any other number of such strips, on such right of way. In the case of *Muse* v. *Mississippi State Highway Commission,* 233 Miss. 694, 103 So. 2d 839, 847, the court said: "Land condemned for highway purposes without limitation as to surface use is at all times under the control of the highway authorities, which may make such use of the land as may be required; and the abutting landowner's right of access and user are subject to the right of the state under the police power to regulate and control the traffic on the highway in the interest of safety, and to restrict in a reasonable manner entrances from abutting property." In *Jones Beach Blvd. Estate* v. *Moses,* 268 N. Y. 362, 197 N. E. 313, 315, the court, in discussing the rights of an abutting landowner to an easement of access in a public highway and the right of the state to regulate and control traffic on the public highways, said: "The rights of an abutter are subject to the right of the state to regulate and control the public highways for the benefit of the traveling public. *Sauer* v. *City of New York,* 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717; *Ryan* v. *Preston,* 59 App. Div. 97, 69 N. Y. S. 100. See *Perlmutter* v. *Greene,* 259 N. Y. 327, 182 N. E. 5 [81 A. L. R. 1543]; *Kane* v. *New York El. R. Co.,* 125 N. Y. 164, 176, 26 N. E. 278, 11 L. R. A. 640. Cf. *Miller* v. *State,* 229 App. Div. 423, 243 N. Y. S. 212; *Farrell* v. *Rose,* 253 N. Y. 73, 170 N. E. 498, 68 A. L. R. 1505. Although the abutting owner may be inconvenienced by a regulation, if it is reasonably adapted to benefit the traveling public, he has no remedy unless given one by some express statute."

The State has the authority to regulate the traffic and prevent Woollard or anyone else from moving automobiles, trucks and heavy farm implements across the

right of way except at certain places where the access is controlled in order to protect the traveling public from the hazards that would be present if such equipment were permitted to cross at just any place, day or night. The abutter's right of access is subject to the superior public interest. In the Wisconsin case of *Neenah* v. *Krueger,* 206 Wis. 473, 240 N. W. 402, the court said: "However, this right [the abutter's right of access] is, in common with most other rights, subject to reasonable regulations in the public interest and for the promotion of public convenience and safety."

The State has the right under the easement obtained in 1952 to build a modern highway and control the traffic thereon and did not acquire any additional rights in that respect by virtue of acquiring the fee in 1959. Ark. Stat. § 76-201.5 provides: "The Commission [Highway Commission] shall be vested with the following powers and shall have the following duties: . . . (m) To adopt reasonable rules and regulations from time to time for the protection of, and covering, traffic on and in the use of the State Highway System and in controlling use of, and access to, the highways . . ." Under this statute the Commission can certainly adopt rules against left-hand turns, U-turns, and crossing the highway except at designated points. In addition, by virtue of its police power the State has such authority. *Carazalla* v. *State of Wisconsin,* 270 Wis. 593, 71 N. W. 2d 276. In *Muse* v. *Mississippi State Highway Commission,* 233 Miss. 694, 103 So. 2d 839, 847, the court said: "As the problem of regulating motor vehicle traffic on the highways has become more and more complex, new standards of design for highway construction have been adopted by the highway authorities to reduce the hazards of travel and expedite the flow of traffic. . . . Multiple lane highways have been constructed in all parts of the country; and median strips or neutral zones between lanes of traffic on multiple lane highways, with interchanges or crossovers at reasonable intervals to enable motorists to pass from one traffic lane to another, have been authorized and provided for in the standards of design adopted for the construction of

such highways. Such median strips or neutral zones provide for a complete separation of traffic moving in opposite directions, and reduce the hazards incident to motor vehicle travel; and the establishment of such median strips or neutral zones have been recognized as a proper exercise of the police power. *Rand* v. *Mississippi State Highway Commission,* 191 Miss. 230, 199 So. 374; *Commonwealth* v. *Nolan,* 189 Ky. 34, 224 S. W. 506, 11 A. L. R. 202; *Jones Beach Blvd. Estate* v. *Moses, supra* [268 N. Y. 362, 197 N. E. 313, 100 A. L. R. 487]; *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187; *Impagliazzo* v. *Nassau County, Sup.,* 123 N. Y. S. 2d 819."

It will be recalled that in the first Woollard case a 250-foot right of way was taken by the State. Among other things, Woollard contended that a right of way of that width was not needed. In pointing out that a 250-foot right of way was not of an excessive width, this Court said: "It is evident that the present undertaking would not be necessary had the State taken a sufficiently wide easement when the road from Marion to Turrell was originally laid out. In these circumstances it is certainly permissible to look ahead in its planning." *Woollard* v. *State, supra* [220 Ark. 731, 249 S. W. 2d 564].

There are four concrete strips on the right of way. Woollard has complete and full access to the two outside strips. He may move his vehicles onto these two strips at any point he so desires, and travel in either direction to controlled points, where he can cross the two center concrete strips with safety to himself and others. I don't see how anyone can read the first *Woollard* case and say it was contemplated that the landowner would have the right to cross the two center strips, when constructed, at any place other than controlled points. The opinion clearly states that it was planned to build a parkway down the middle of the two strips from which dirt would be taken to be used as fills for the concrete strips. There is nothing to indicate that a vehicle would be able to cross this parkway. It was to be put there to separate the lanes of traffic and make the highway safe.

According to the great weight of authority, and the majority has cited no authority to the contrary, *Woollard* has not been denied access to the system of highways, and he is entitled to nothing more. *Department of Highways* v. *Jackson,* 302 S. W. 2d 373. He does not have the right to cross the highway with his equipment at any point he may choose. *Turner* v. *State Roads Commission,* 213 Md. 428, 132 A. 2d 455; *Dougherty County* v. *Hornsby,* 213 Ga. 114, 97 S. E. 2d 300; *Brady* v. *Smith,* 139 W. Va. 259, 79 S. E. 2d 851. In the last cited cases the highways were divided into traffic lanes with a physical barrier between them, which allows the abutter to travel in only one direction when leaving his property. Our own case of *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187, is to the same effect. When once on the highway an abutter's rights are no more nor less than any other user of the highway. *Jones Beach Blvd. Estate* v. *Moses,* 197 N. E. 313; *Dougherty County* v. *Hornsby,* 97 S. E. 2d 300.

In the case of *Turner* v. *State Roads Commission,* 213 Md. 428, 132 A. 2d 455, the court quoted from *Langley Shopping Center, Inc.* v. *State Roads Commission,* 213 Md. 230, 131 A. 2d 690, 693, as follows: " 'It seems to us entirely reasonable that if the State could divert traffic entirely away from the plaintiffs' corners without being liable for damages for doing so, it may, in the interest of safety, and without incurring liability for damages, interpose an obstacle which may render access to the plaintiffs' properties less easy but which does not actually or virtually destroy the plaintiffs' access to the highway. *An opposite view would require the State to pay through the nose for the privilege of further improving and adding to the safety of highways which it has built . . .* ' " [Emphasis supplied]

In *Warren* v. *Iowa State Highway Commission,* 250 Iowa 473, 93 N. W. 2d 60, it was held that where a farmer's home place and a 40-acre tract on a secondary road were located to the east of a national interstate and defense highway and her slightly larger tract used as a part of the same farming operation was located west of said highway

on the same secondary road, and the closing of the secondary road on either side of the highway required the farmer to travel a circuitous route over three miles in length to go from her home place to the other tract instead of a direct one-quarter mile route over the secondary road, and the farmer's right of access to the secondary road was not affected and she had the same means of ingress and egress thereto as she had prior to the closing, farmer had no special damages and her injury, though greater in degree, was the same in kind as that suffered by the general public and was not compensable.

In *Carazalla* v. *State of Wisconsin,* 270 Wis. 593, 71 N. W. 2d 276, the court said, in discussing limited access highways and their effect upon abutting property owners: "If the abutting landowner's access to the highway is merely made more circuitous, no compensation should be paid." To the same effect is the case of *Holman* v. *State,* 97 Cal. App. 2d 237, 217 P. 2d 448, where the court said: "The facts pleaded herein show that the highway upon which plaintiffs' property abuts is not closed and that plaintiffs, once on the highway to which they have free access, are in the same position and subject to the same police power regulations as every other member of the traveling public. Because of a police power regulation for the safety of traffic, they are, like all other travelers, subject to traffic regulations. They are liable to some circuity of travel in going from their property in a northerly direction. They are not inconvenienced whatever when traveling in a southerly direction from their property. The re-routing or diversion of traffic is a police power regulation and the incidental result of a lawful act and not the taking or damaging of a property right. . . .

"If the contention of the plaintiffs herein is sustained, the right of the State to control the traffic as a safety regulation would be definitely curtailed and traffic islands or double lines in the highway to separate through traffic would be prohibited. The damage of which plaintiffs complain would be the same if no division strip had been constructed on the highway in question but that double white

lines had been painted on the highway and a 'no left turn' sign had been erected, or if the entire highway had been designated as a one-way street."

In accord is *People* v. *Sayig, supra* [226 P. 2d 702].

Mere circuity of travel is not cause for damages. *State* v. *Linzell,* 126 N. E. 2d 53; *People* v. *Schultz Co.,* 268 P. 2d 117; *Blumenstein* v. *City,* 299 P. 2d 347; *State* v. *Fox,* 332 P. 2d 943.

For all practical purposes, *Iowa State Highway Commission* v. *Smith,* 248 Iowa 869, 82 N. W. 2d 755, is directly in point with the case at bar. The Smiths owned property on both sides of Hubbell Avenue; their business was on one side of the street and their home was on the other. A controlled access highway was constructed and the property owners could no longer cross directly from their home to the place of business. The court said (p. 758): "Heretofore defendants could cross Hubbell Avenue by motor vehicle between their home and business properties by driving from 500 to 600 feet. When the contemplated highway improvement is made they may cross only at East 38th or 42d Street. The increased distance in traveling from their home to place of business and back again will approximate a mile. In the future the residence property may be entered from the highway only when going east and upon leaving one must drive east as far as 42d Street. West bound travelers desiring to enter the residence property will be required to go west to 38th Street, make a U turn there and go back east to the driveway." In holding that the property owners suffered no compensable damages, the court said (p. 761): "We have no difficulty in disposing of defendants' appeal from the part of the judgment holding the prohibition of crossing the highway, left turns and U turns except at designated points where there are no raised 'jiggle' bars does not constitute a taking of defendants' property within the law of eminent domain. The law on this phase of the controversy seems to be thoroughly settled by many recent decisions and the judgment must be affirmed on defendants' appeal." Among the many cases cited by the court in support of its

conclusion is *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187.

And finally we come to our case of *Arkansas State Highway Commission* v. *Bingham,* which is being handed down the same day as the case at bar. In my opinion the two cases are in hopeless conflict. Mrs. Bingham owned valuable property. By reason of the construction of controlled access facilities, the value of the property was greatly depreciated. In that case this Court is holding that according to the great weight of authority, including decisions of this Court, Mrs. Bingham and her tenants have suffered no compensable damages. The decision in the Bingham case is sound and is supported by practically all of the authority on the subject. But in the case at bar, where *Woollard* has suffered damages because of the construction of controlled access facilities, he is permitted to recover a large sum as damages. (Woollard has suffered small damages compared to those suffered by Mrs. Bingham and her tenants.) There is no valid distinction between the two cases. Woollard is damaged because he cannot cross the center strip of the highway except at controlled points. Mrs. Bingham is damaged because people who would ordinarily patronize her service station cannot leave the center strip except at controlled points. In fact, there is a great deal more merit to Mrs. Bingham's claim for damages than there is to the claim of Woollard. Woollard was actually paid for the damages he sustained by reason of the severance of his place. The law presumes that he was paid in full for all damages sustained. Mrs. Bingham has been paid nothing for the loss she has sustained by reason of the access facilities preventing the traveling public from conveniently reaching her property.

In the *Bingham* case to sustain the conclusion reached there are cited the cases of *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187; *Muse* v. *Mississippi State Highway Commission,* 103 So. 2d 839; *State* v. *Linzell,* 126 N. E. 2d 53; *State* v. *Fox,* 332 P. 2d 943; and *Blumenstein* v. *City,* 299 P. 2d 347. I submit that all of those cases support the view I have expressed in this

dissent and do not sustain the finding of the majority in the case at bar.

In referring to what it would mean to sustain the same kind of contention that Woollard, the landowner, makes in the case at bar, Clarke on The Limited-Access Highway, *supra* [27 Wash. L. Rev. 111], says: "It would mean in effect that every abutter could demand an opening through the central median or dividing strip both between the outer highway and the through-traffic lanes, and through the center dividing strip of the through lanes. It is obvious that such concession to abutters would defeat the underlying purpose of the limited-access facility. Yet the only alternative under such a rule of law is payment of . . . tribute by the public to adjacent owners. This tribute could be so great in the aggregate that the cost of freeways would, in fact, be prohibitive." And Covey on Highway Protection Through Control of Access and Roadside Development, *supra* [1959 Wisc. L. Rev. 567, 581], has this to say: "Further, as a matter of practice, if the state must build a service road and compensate the abutter for being placed on it, the highway commission will not build such auxiliary facilities." As it now stands, the Highway Department can hardly hope to build a modern highway system because of the large damages it will have to pay to every property owner who has had his property severed and is prevented from crossing the right of way at just any point he may choose, and it is fairly certain that in other cases the cost will be heavy, as it is in the case at bar.

For the reasons set out herein, I respectfully dissent.

5-2085 333 S. W. 2d 490

Opinion delivered March 28, 1960.

[redacted]

John L. Hughes, for appellant.

Joe E. Purcell, for appellee.

GEORGE ROSE SMITH, J. This is a boundary line dispute. A. C. Tull, who owns 26 acres west of the disputed line, brought suit to quiet his title in accordance with a fence that existed for about 35 years. The defendants, Orville Ashcraft and his wife, who own six acres east of the line, contended that the fence did not represent the boundary and that the true line, according to the Government survey, was 35 feet west of the fence. The chancellor found that the fence had not been recognized as a division fence, and upon that finding he fixed the line in conformity with the Government survey. Tull has appealed.

We have concluded that the decree is against the weight of the evidence, for in our opinion the long-continued existence of the fence is decisive of the case.

Both tracts were formerly owned by the appellant's father, John M. Tull. In 1922 the elder Tull sold the

east six-acre tract to his son-in-law, W. H. Ashcraft, whose son is the appellee Orville Ashcraft. W. H. Ashcraft took possession of his land, and in 1922 or 1923 he erected the fence in question. He testified that in placing the fence he started at his neighbor's line to the east and stepped off what he thought to be 110 yards, which was the width of his own property. Although he erected the fence and evidently tried to put it on the line W. H. testified that he did not recognize it as the line: "I figured all the time I was short." He does not say, however, that he communicated his doubts to anyone at all, and he admits that the fence remained in place for about 35 years, being kept up by the succeeding landowners. W. H. was not asked how long he lived on the property, but we infer that he moved away long ago, as his son Orville testified that he was brought up in a different part of the county. It was not until 1955 that Orville bought the land from Vada Hawkins and returned to his father's former home. At the trial there was no testimony from anyone whose ownership intervened between that of the two Ashcrafts.

On the other side of the fence the appellant, who is Orville's uncle, has been in possession of his tract ever since he purchased it from his father in 1926. Tull testified without contradiction that he was in undisturbed possession for 33 years, that the fence was always considered to be the line, and that the fence was maintained by the adjoining owners until part of it was taken down a year or so before the trial. Not only is there no contradiction of Tull's testimony; it is corroborated by his brother and to some extent by W. H. Ashcraft, an adverse witness, who, as we have seen, admits that the fence remained in its original place for about 35 years.

Upon this testimony it cannot be doubted that Tull has acquired title to the disputed strip by adverse possession. We have frequently held that when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Deidrech* v.

Simmons, 75 Ark. 400, 87 S. W. 649; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W. 2d 710; *Seidenstricker* v. *Holtzendorff,* 214 Ark. 644, 217 S. W. 2d 836. As we said in a very similar case, *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18: "It is true that in this case the original rail fence line was established without a prior dispute as to boundary; but the recognition of that line for the many intervening years (34 in this case) shows a quietude and acquiescence for so many years that the law will presume an agreement concerning the boundary."

In deciding the case as he did the chancellor evidently relied upon the appellees' testimony, which was largely directed to showing that Tull, after the present dispute arose, at first conceded the surveyed line to be the boundary. It is shown that Tull did not object to the line's being surveyed and that when the line was found to be west of the fence Tull recognized his nephew's rights by removing some young fruit trees he had planted on the strip in controversy. On the witness stand Tull candidly admitted that when he understood that Orville wasn't getting the acreage that the elder Tull had sold many years ago he (the appellant) at first thought that he was supposed to defend the old title, "but since that time it was called to my attention the 7 year law would hold in this case; therefore I ceased to be interested."

Tull's conduct did not affect his title, for it had vested many years before by adverse possession. We stated the rule in *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444: "This continuous possession for the statutory period, if adverse, divested plaintiff and his grantor of the title, and gave it to defendant, and the mere fact that the defendant afterwards in conversation with plaintiff recognized the justness of his claim to the land did not divest the title from defendant or estop him from asserting such title." Later cases to the same effect include *Stroud* v. *Snow,* 186 Ark. 550, 54 S. W. 2d 693, and *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475.

Reversed.

HARRIS, C. J., and MCFADDIN, J., dissent.

ED. F. MCFADDIN, Associate Justice, (Dissenting). This is a boundary line case between adjoining landowners and relatives. In dispute is a strip 35 feet wide east and west, and 1320 feet long north and south. The appellee (defendant below) claims to the legal survey line; and the appellant (plaintiff below) claims to a fence line by (a) adverse possession, and (b) by long established boundary.

J. A. Tull, father of the appellant, was the common source of title. In 1922 J. A. Tull conveyed to the appellee's grantor the east one-fourth of a certain 40-acre tract;[1] and in 1926 J. A. Tull conveyed to the appellant the west three-fourths of the same 40-acre tract.[2] The boundary line between the said east one-quarter and the west three-quarters of the 40-acre tract is the line in dispute.

Appellant claims that he has all the time been in possession up to a certain fence, which he claims is the long established boundary; and also that a maple tree on that line was a recognized landmarker. The man who erected the fence testified that he began where he thought the east line of the 40 acres was, and stepped off 110 yards to the west, and then erected the fence in question. He testified that it was never recognized by anyone as being a real boundary line fence, but was only a fence for convenience. The same witness, and others, testified that appellant never claimed the said fence was the line until just a short time before this litigation; that appellant went to see appellee just before the litigation and suggested that a survey be made to determine the true boundary; that when the survey was made it was discovered that the true boundary was 35 feet west of the fence; that appellant then asked appellee's permission to remove — and did remove — some young peach trees from the 35-foot strip; and that appellant then told appellee that the other peach trees on the 35-foot strip belonged to the appellee.

[1] There was a 4-acre square in the northeast corner that was reserved, but the 4-acre tract is immaterial to this litigation.

[2] There was a reservation of a 4-acre tract in the northwest corner, but this reservation is immaterial.

All of the foregoing testimony had a direct and pertinent bearing on whether the defendant had the intention to hold adversely up to the fence line. The testimony certainly showed that there had never been the essentials of an agreed boundary. When the appellant was examined about these matters, the following occurred:

"Q. You never have claimed that the fence was on the line have you?

A. I am claiming it now.

Q. You are claiming it now?

A. Always claimed it.

Q. Did you offer to pay for a part of the cost for surveying that property?

A. Yes, sir.

Q. Have you paid for a part of the cost?

A. No, sir.

Q. Did you have some reason for changing your mind?

A. Yes, sir.

Q. What was the reason?

A. Well, I started to tell you a while ago. At that time I understood Orville felt like he wasn't getting ten acres that his father had sold him and that he didn't have ten acres in the beginning. The measurements might have been in error I knew and I felt that I was supposed to defend the old title made that he was to get ten acres but since that time it was called to my attention the 7 year law would hold in this case therefore I ceased to be interested.

Q. Who told you about the seven year law?

A. I found out."

The appellant's testimony, as copied, shows that appellant originally thought that he would have to defend appellee's title to the true line (since appellant's father had conveyed the land to the appellee's grantor); and it was not until after the survey that appellant learned of the

"7-year law" (which clearly means seven years adverse possession under the Statute of Limitations), and that after learning of the "7-year law" appellant then decided to claim adversely up to the fence. This shows that appellant did not have for seven years the intention to claim adversely. In *Collins* v. *Bluff City Lbr. Co.,* 86 Ark. 202, 110 S. W. 806, this Court held that title to land could not be acquired by possession for the statutory period, unless the possession be adverse. In *Vittitow* v. *Burnett,* 112 Ark. 277, 165 S. W. 625, a party in possession of land wrote to another, acknowledging the latter as the owner; and this Court held that the title of the party in possession was not adverse, since it was not of a hostile character. In *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830, the plaintiff's husband encroached on the defendant's land by permission and the plaintiff did not notify the defendant that she was holding adversely, so she acquired no adverse possession. In *Fulcher* v. *Dierks Lbr. Co.,* 164 Ark. 261, 261 S. W. 645, this Court held that if the holding of land began by permission, such holding did not ripen into adverse or hostile right until notice was brought home to the owner, and then the adverse holding had to be continued thereafter for the statutory period. In view of these, and many other cases, I maintain that Mr. Tull did not establish adverse possession or a long established boundary. It is my view that the Chancery decree should be affirmed.

Therefore, I respectfully dissent to the reversal by this Court; and the Chief Justice joins in this dissent.

ARK. STATE HIGHWAY COMM. *v.* BINGHAM.

5-2016 333 S. W. 2d 728

Opinion delivered March 28, 1960.

[Rehearing denied April 25, 1960]

William H. Donham, for appellant.

Ben M. McCray, Catlett & Henderson, for appellee.

PAUL WARD, Associate Justice. This appeal presents to this Court for solution an important and far-reaching question. Briefly stated the question is: Is the loss to an owner of land abutting a public highway occasioned by a diversion of traffic a compensable loss? The essential and undisputed facts posing the above question and presenting the background out of which it arose are substantially as hereinafter set out.

Sometime prior to 1954 the Arkansas State Highway Commission (hereinafter referred to as the "Commission") acquired a right-of-way from Little Rock to Benton for the purpose of reconstructing and relocating Highway 67-70 between those two cities. Said right-of-

way was 200 feet wide in front of the property which is the subject of this litigation. It appears that the objective of the Commission was to construct along the entire length of said right-of-way two separate concrete strips — one strip to carry traffic from Little Rock to Benton and the other strip to carry traffic from Benton to Little Rock. At first only one such concrete strip was constructed and opened to traffic, and this strip was used to carry traffic both ways pending the construction of the other strip. The above mentioned concrete strip was located on the north portion of the right-of-way and for convenience will hereinafter be referred to as Strip No. 1 — this strip is the one that was designed to eventually carry one-way traffic from Little Rock to Benton.

On November 22, 1954 appellee, Mrs. Sallie Harvey Bingham, purchased 5.6 acres of land abutting Strip No. 1 on the north for which it appears that she paid approximately $5,500.00. On May 13, 1957 Mrs. Bingham leased the entire 5.6 acres to the Ark-La-Tex Oil Company, a corporation owned wholly by her two sons, for a period of ten years beginning October 1, 1955 with the Lessee having the option to renew for two successive five-year periods. Under the lease Ark-La-Tex Oil Company was to pay $100.00 per month net rent. Although, as set out above, the lease was actually dated May 13, 1957, we gather from the record that the lease arrangement was actually made in 1955 because the record shows that the Oil Company had already expended approximately $17,000.00 in the erection of a filling station which was opened for business in October 1955. The Ark-La-Tex Oil Company, also one of the appellees herein, has at all times since the last mentioned date operated the said filling station principally for the sale of oil and gas. Hereinafter we will refer to Mrs. Bingham as the Lessor and to the oil company as the Lessee. When Lessee constructed the filling station it also constructed four concrete driveways connecting the filling station with Strip No. 1.

After the erection of the filling station the Commission designated Highway 67-70 as Interstate Route No.

30 pursuant to a plan to construct a limited access highway from Little Rock to Benton as a part of an interstate highway system. It was therefore deemed necessary, and the Commission did, condemn and acquire, by eminent domain, a strip of ground 50 feet wide on both sides of the original right-of-way in order to provide access roads necessary to such a highway. These access roads (now completed) are hard-surfaced and carry traffic both ways, and they parallel both sides of the main highway its entire length with entrances to the main highway at numerous points. At the present time Interstate Route No. 30 is completed from Little Rock to Benton, with Strip No. 1 open to traffic from Little Rock to Benton, and a similar parallel strip carrying traffic from Benton to Little Rock.

When the Commission filed this suit in February of 1958 to condemn and acquire the 50-foot strip of land off of the south side of Lessor's property it was apparent that it would include four concrete driveways which Lessee had constructed to connect its filling station with Strip No. 1, and it was also apparent that the north line of the new highway right-of-way would come within a few feet of appellee's pump stations. Although Lessee would have ready access to the access road which was to be built on the 50-foot strip of land for traffic in both directions, yet it was apparent he would not have ready access to entrance upon Strip No. 1 (carrying through traffic from Little Rock to Benton) since the said access road's nearest connection with Strip No. 1 was somewhat more than a mile from the filling station. The apparent result was that the Lessee would not be able to sell gasoline to as many people traveling Strip No. 1 as he was able to do previously. The land actually taken from the Lessor amounted to .945 acres.

In response to appellant's condemnation petition both Lessor and Lessee claimed damages by reason of the last taking by the Commission. After a hearing the jury returned a verdict in favor of Lessee in the amount of $30,000.00 and in favor of the Lessor in the amount of $9,000.00, and judgment was rendered accordingly, from

which judgments come this appeal. For a reversal appellant relies on five separate points, of which three relate to instructions given to the jury by the trial court, one is related to the introduction of certain testimony to prove the extent of damages, and the other (closely related to the latter point) is stated as follows: "The court erred in allowing the introduction of estimates of damages based solely on diversion of traffic away from the premises". Our discussion will be limited primarily to the last mentioned point because we have concluded it contains merit, and because we feel our determination of that issue largely eliminates the necessity of considering the other points.

For the purpose of this opinion and for the sake of brevity, many of appellees' contentions may be conceded. It is not disputed that Lessee spent approximately $17,000.00 in erecting and equipping the filling station; that it was selling well over 30,000 gallons of gasoline per month to persons traveling Strip No. 1 prior to the time of the new taking; that it had a profitable business and that practically all of this business was lost after the new taking; and that, in fact this loss equalled the amount of the judgment obtained. In other words, it may be conceded that this judgment in favor of Lessee should be affirmed if the Commission is liable for the loss occasioned by diversions of traffic in this particular case.

The importance of the issue here presented and the far-reaching effect of its determination commands careful consideration of the excellent briefs by both sides and the authorities and reasoning presented therein. A definite determination of the involved issue is all the more important because numerous situations of like nature will in all probability hereafter arise because of the growing public demand for access-controlled highways.

An examination of all the available authorities convincingly suggests the conclusion that the Commission is not liable for Lessee's loss of business resulting from a diversion of traffic. Although there is no decision of this Court precisely in point, there are several decisions

of this Court and of other courts that lead unerringly to the conclusion theretofore mentioned.

In the case of *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. 2d 300, there was presented an issue somewhat similar to the one under consideration here. The County Court laid out a new highway through appellee's lands which changed the location of the old road which had run close to his residence, and appellee sought to recover "for damages to land, crops, timber and fences by reason of the relocation and construction" of the new highway. The claim was disallowed by the County Court and an appeal was taken to the Circuit Court where the trial resulted in a judgment in favor of appellee. This judgment was reversed upon appeal to this Court because of the Circuit Court's error in giving a certain instruction which allowed appellee to recover for damages resulting from the relocation. The specific objection to the instruction was that it permitted the jury to consider "as an element of damages the relocation of the road so as to leave the main residence of the appellee off the road . . ." This Court in condemning the instruction said: "We think the instruction is open to the objection made against it, especially when taken in connection with the evidence. Appellee was permitted to testify over appellant's objections to the measure of his damages, which included the fact that the old road ran by his residence and that the new road did not". The Court further pointed out that other witnesses testified to damages by reason of the relocation of the road so that it did not run immediately in front of appellee's residence, and then made this statement: "We are of the opinion that this was not a proper element of damage to be considered by the jury, and that the court erred in giving Instruction No. A . . . No person has a vested right in the maintenance of a public highway in any particular place, as the power is in the State to relocate the road at any time in the public interest. Therefore, the change in the road so as to leave appellee's residence off the new road did not constitute an element of damage in this case". We do not agree with appellee's attempt to discount the relevancy of this Court's decision in the

Huddleston case, *supra.* It occurs to us that while the issue there was not expressed in the exact words that it is expressed in the case under consideration, yet we think the same principle is involved.

In the case of *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S. W. 2d 1004, appellant insisted that the effect of changing Highway 71 was to destroy his property or at least depreciate its value because he no longer had the same convenient access to the highway. He was denied damages in the trial court and on appeal this Court affirmed the trial court and in doing so it said among other things: "Appellant has not been deprived of his means of ingress and egress, as Dudley Avenue, on which his property is located, remains unaffected by the proposed change. Unaffected also is Jackson Street running into Dudley Avenue at appellant's corner. Appellant's damage, as found by the court below, results from the *diversion of the traffic*; but this was not a recoverable element of damage", citing among other cases the *Huddleston* case, *supra.* (Emphasis supplied). In that case the Court also cited with approval the case of *Tuggle* v. *Tribble,* 177 Ark. 296, 6 S. W. 2d 312. In the cited case Tuggle lived on Harlan Boulevard, designed as a public road, near Hot Springs. The County Court ordered a relocation some 56 feet from Tuggle's residence and he sought to enjoin the County. In denying relief this Court announced certain principles which we think are applicable to the case under consideration. Among other things this Court said: "It is next contended that the County Court had no right to vacate a suburban highway which had been dedicated to the public, and that D. M. Tuggle and other abutting landowners had a vested interest in the matter because they had bought property relying upon the fact that the road in front of their property would always be a public road. If this were true, there could never be any change in an existing highway, because doubtless all abutting property owners would claim that they bought their property relying upon the fact that it was abutting upon a public easement, and that the road could never be discontinued or changed". "In this

connection it may be said that there can be no change of an existing highway that does not cause some private inconvenience, and, in that sense, injury to the abutting property owners, who have adapted themselves to the existing order of things and have purchased property on a highway which they believed would never be changed." It seems to us that there is a significant parallel between the position in which Tuggle found himself and the position appellees now find themselves in the case under consideration. In the *Tuggle* case the Court also said: "Of course, the County Court should not change or alter the public highway unless the public convenience or necessity requires such change." The same thing might be said in connection with the case under consideration, but appellees make no contention that the Commission, in constructing Interstate Highway No. 30, or in providing access road connections, acted unreasonably.

Another case which clearly pronounces the well established principle that private enterprise must yield to the public welfare and convenience is the *City of Fort Smith* v. *Van Zandt,* 197 Ark. 91, 122 S. W. 2d 187. There appellee owned a tourist and trailer camp near the middle of a block 597 feet long on Midland Avenue in the City of Fort Smith. The avenue was being widened and otherwise altered by the City Commissioners in such a way that, concededly, it would hurt appellee's business and also lessen the value of his property. On that ground he successfully sought the aid of the Chancery Court to enjoin the City. The City appealed and this Court, in reversing the trial court, among other things said: "We think the learned trial court erred in so holding . . . it may be true that appellee's property will be adversely affected, but no more so than any other property similarly situated . . ." "There can be no doubt that the city has the power and the duty to make reasonable provision for the safety of persons and property using its streets by the enactment of ordinances, resolutions or by-laws looking to that end, and the city council or commission, or other municipal authorities have a wide discretion on such matters."

There are many decisions from other jurisdictions, while not exactly in point with the issue and facts presented in the case under consideration which announce certain applicable principles sustaining the conclusions heretofore announced. We will now examine a few of these decisions.

In the case of *Muse* v. *Mississippi State Highway Commission,* 233 Miss. 694, 103 So. 2d 839, the facts are very similar to the facts in this case. There the State Highway Commission condemned a strip of land owned by Mrs. Muse lying along the west side of U. S. Highway 51, North, consisting of .61 acres. Previously the Commission had already acquired a right-of-way and was in the process of constructing a four-lane highway. One strip of the pavement carried the southbound traffic and the other strip carried the northbound traffic being divided by a neutral zone or median strip, 30 to 40 feet side. If the highway had been completed under that plan, with no outside access roads added, the owners of appellant's property would have had direct access to the southbound lane but would have been required to drive southwardly a short distance before they could have entered the northbound traffic lane. When a strip in front of appellant's house was condemned for the purpose of constructing an access road a claim was made for damages not only for the land taken but because the right of access had been destroyed or greatly impaired. The trial court refused to allow damages for the loss or impairment of access and appellant appealed. In affirming the trial court the Supreme Court held, among other things, that appellant had not been damaged by the taking of the right of direct access to the inside lane or main traveled portion of said highway by the construction of the outside lanes to said highway to which the appellant had access. The court quoted with approval the following: "Private rights relative to highways may be regulated in many ways under the police power and that without compensation." The Court also said: "It is undoubtedly true that the abutting landowner on a conventional public highway has a special right of access and user in the highway; and that right is a property right which can-

not be damaged or taken from him without due compensation. The right of access is appurtenant to his land, and to destroy that right is to damage his property . . . But there is also a *coexistent right belonging to the public,* to use and improve the highway for the purpose of travel; *and the owner of the abutting land has no absolute right, as against the public,* to insist that the adjacent highway always remains available for his use in the same manner and to the same extent as when it was constructed . . . As the problem of regulating motor vehicle traffic on the highways has become more and more complex, new standards of design for highway construction have been adopted by the highway authorities to reduce the hazards of travel and expedite the flow of traffic . . . Such rules and regulations have been recognized by all of the authorities as a valid exercise of the police power." (Emphasis supplied).

In the case of *Iowa State Highway Commission* v. *Smith,* 248 Iowa 869, 82 N. W. 2d 755, the highway was changed so as to affect adversely the use of a residence and a filling station owned by Smith. The result of the change was that less traffic would patronize the filling station. The Supreme Court in disallowing certain elements of damage claimed by Smith had this to say: "Insofar as the regulations may divert some traffic (mainly eastbound) from defendant's filling station they have no legal cause for complaint. *They have no vested right to the continuance of existing traffic past their establishment."* (Emphasis supplied).

In the case of *The State ex rel Merritt et al* v. *Linzell, Dir., Department of Highways of Ohio,* 163 Ohio St. 97, 126 N. E. 2d 53, the question for decision as stated by the Court was: Where property abuts on an existing state highway and such highway is relocated so that the property does not abut on the new highway but continues to abut on the old original highway which connects with the new highway, is there a taking of any property rights of such property owner? Before answering that question the Court said: "The facts in the instant case do not show the impairment of the use of the highway on which rela-

tors' property abuts but only the opening of the new highway which diverts public travel from the old highway." Then, the Court, in answering the above question in the negative made this statement: "It is now an established doctrine in most jurisdictions that such an owner has no right to the *continuation or maintenance of the flow of traffic past his property.* The diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of *one's premises is noncompensable* . . . citing cases . . . The change in traffic flow in such a case is the result of a lawful act, and is not *the taking or damaging of a property right.*" (Emphasis supplied). In this same case the Court quoted with approval the following: " 'Before a party is entitled to recover, it must be determined that the thing taken for the public use, for which he asks compensation, is his private property.' "

The case of *The State of Washington* v. *Helene M. Fox, et al,* 53 Wash. 2d 216, 332 P. 2d 943, strongly supports the views above expressed and, to our minds, refutes appellee's contention that the theory of police regulation has no part in the case under consideration because there was an actual taking of land. In the cited case appellee's damages were predicated on an actual taking of land and also upon the diminution of accessibility. The Court, in stating appellee's position said: "The crux of respondents' argument is: The State cannot extract one feature of an overall plan and label it an exercise of the police power in order to reduce the compensation payable to the property owner in a condemnation proceeding." Since the Court did not go along with the above argument we take it to mean that there was no inconsistency in allowing the State to take a parcel of land by eminent domain and at the same time apply the doctrine of the police power in regulating traffic upon the highway after it is constructed. It is significant here also that the Court in this case made the following statement after first approving the introduction of testimony regarding the limited access facility: "This does not mean, however, that respondents have a property right in the continuance or

maintenance of a flow of traffic past their property, . . ."

In the case of *Cecil W. Blumenstein* v. *City of Long Beach,* 143 Cal. App. 2d 264, 299 P. 2d 347, appellant sought "to recover compensation for damage suffered by lot due to street reconstruction which separated lot from street." The trial court gave appellee damages based on diversion of traffic, although appellant had moved that such testimony should not be considered. In speaking of this motion the Court said: "The Motion was based on the admission by the witness under cross-examination that he had let factors influence his determination of the decline in market value such as a presumed future loss of vehicular parking in front of subject property . . . and a diminution, diversion and rearrangement of traffic in front of subject property because of the construction of the improvement." The Court, in disapproving the admissibility of that kind of testimony, stated: "Appellate decisions of this state have made it clear that damages resulting from mere diversion of traffic or inconvenience resulting from circuity of travel in reaching the subject property are noncompensable."

Applying the principles so clearly announced in the preceding cases, the only logical deduction is that a loss occasioned by the diversion of traffic is not compensable. It is not denied in this case that Lessee's major loss of business was the result of a diversion of through traffic on Strip No. 1 from its filling station after the limited access highway was completed. For us to hold that such loss by Lessee is compensable would amount to erecting an almost intolerable barrier in the way of further construction of super-highways. The right here claimed by Lessee is not to be confused with its right of ingress and egress. The latter right, as heretofore pointed out in previous citations, is a property right which is compensable, but Lessee has that right undiminished by virtue of the access road in front of its station.

We have carefully considered the numerous decisions cited by appellees and find that they deal with the right

of ingress and egress and not with losses resulting from a diversion of traffic. We think it would serve no useful purpose to discuss those cases separately, but would only unduly extend this opinion.

What we have heretofore said does not mean, however, that Lessor and Lessee are not entitled to damages in some amount. Since practically all of appellees' testimony to show damages was directed to the amount of loss occasioned by the diversion of traffic and since, as previously pointed out, such testimony was incompetent, the result is that there is no substantial evidence to support the judgment in favor of Lessor in the amount of $9,000.00 or the judgment in favor of Lessee in the amount of $30,000.00. There is, however, in the record testimony by the Commission's *own* witness, Hamilton, to sustain a judgment in the amount of $6,159.00 for Lessor and a judgment in the amount of $8,790.00 for Lessee. We find no evidence in the record to support a judgment in favor of either Lessor or Lessee in excess of the amounts last mentioned.

Since appellees do not contend that the trial court committed any error against their interest in the trial below, and since the cause appears to have been fully developed, the judgments must be modified as heretofore mentioned, and, as so modified, they are affirmed.

Modified and affirmed.

JOHNSON, J., dissents.

MCFADDIN, J., concurs.

JIM JOHNSON, Associate Justice, dissenting. On November 22, 1954, the appellee, Sallie Harvey Bingham, purchased 5.6 acres having a frontage of 823 feet on Highway 67-70, which served both east and west bound traffic between Little Rock and Benton. She leased the property to appellee, Ark-La-Tex Oil Company, at a monthly rental of $100 for a primary term of ten years commencing October 1, 1955, with an option on the part of the lessee to renew for two additional periods of five years each. Ark-La-Tex secured a permit from appellant to con-

struct a service station on 1½ acres of the leased land and completed such construction on October 5, 1955, at a cost of $17,171.52. Construction of a restaurant or motel was contemplated by the lessee on the remainder of the leased premises. The service station of Ark-La-Tex sold an average of 37,000 gallons of gasoline a month. On April 11, 1958, under the power of eminent domain, appellant took a strip of land 50 feet wide and 823 feet long across the front of appellees' property where it bordered on Highway 67-70, and also took the access the remainder of such property had enjoyed to the highway. The taking of the land is authorized by Act 419 of 1953, and the taking of the right of access or ingress and egress to, from or across the highway to and from the remainder of the appellees' land is authorized by Act 383 of 1953.

Witnesses called by the appellee, Sallie Harvey Bingham, testified that she, as the owner of the fee, was entitled to recover damages in a sum varying between $10,000 and $17,250, and witnesses called by the appellee, Ark-La-Tex, testified that it, as the holder of the leasehold, was entitled to recover damages from $55,000 to $77,700. On the other hand, the witnesses called by the appellant estimated that the damages to the interest of appellee, Sallie Harvey Bingham, ranged from a low of $2,300 to a high of $6,159, and the damages to the interest of the appellee, Ark-La-Tex ranged from a minimum of $5,200 to a maximum of $8,790. A jury question therefore was presented and the jury returned a verdict in the sum of $9,000 for the appellee, Sallie Harvey Bingham, and in the sum of $30,000 for the appellee, Ark-La-Tex. At the time of taking the appellant deposited $6,500 for the benefit of appellee, Sallie Harvey Bingham.

The disparity between the estimates of damages to which the witnesses for the respective parties testified springs from the fact that the witnesses for appellant specifically excluded from their estimate any amount of damage attributable to the deprivation of the access which the property of the appellees possessed to and from the existing highway prior to the taking.

The question posed is: Is the taking from property abutting a highway the right of access to such highway compensable?

Section 22, Article II of the Constitution of this State specifically and unequivocally states that private property shall not be *taken, appropriated* or *damaged* for public use without just compensation therefor. An easement of access is a valuable property right and when such easement is destroyed or damaged for public use, the Constitution directs that payment be made therefor.

The easement of access which the owner of property has is not the mere right of going out from his place of business onto the highway and returning therefrom to his own land, but is the convenience in the use of his property with respect to the rest of the world. If the landowner is a merchant, a hotel keeper or a restaurant owner, his easement of access is commensurate with the uses to which his property is devoted. The right of access includes the opportunity for a man's customers to come to his place of business without unreasonable hindrance or interruption. A property devoted to business is of little value when business is turned away by obstructions or barriers or denial of ingress and egress. *Reining* v. *New York, L. & W. Ry. Co.,* 13 N. Y. S. 238, 240; 10 *McQuillin Municipal Corporations* 671, Third Edition.

In *Campbell* v. *Arkansas State Highway Commission,* 183 Ark. 780, 38 S. W. 2d 753, this Court readily held:

"Under our decisions, *the owner of property abutting upon a* street or *highway has an easement in such* street or *highway for the purpose of ingress and egress* which attaches to his property, and *in which he has a right of property* as fully as in the lot itself; *and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage* to the lot itself *within the meaning of the constitutional provision for which the owner is entitled to compensation.* The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by

destruction or impairment, is a damage to the property owner and independent of any damage sustained by the public generally." (Emphasis supplied).

That decision has never been overturned; indeed, it cannot be cast aside without emasculating one of the most important, inviolate and fundamental provisions of the Constitution.

The logic of the *Campbell* decision, *supra,* was approved by the Court in *Arkansas State Highway Commission* v. *Kincannon,* 193 Ark. 450, 100 S. W. 2d 969, when it said:

"When property is damaged, its value is reduced, and this reduction in value is, to the extent thereof, the taking of the property. So that *the owner whose property has been damaged, but not physically taken, has the same right to demand compensation for his damages as has the owner whose property has been occupied and taken from his possession.*" (Emphasis supplied).

This Court in various eminent domain cases has approved damages for the taking of the fee simple title to property, *Arkansas State Highway Comm.* v. *Carder,* 228 Ark. 8, 305 S. W. 2d 330; has endorsed compensation for severance damages, *Arkansas State Highway Comm.* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791; has affirmed awards for diminution in value due to a change in grade of a highway, *Hot Spring County* v. *Bowman,* The Law Reporter, Vol. 104, No. 12, page 400; and has approved as an element of damage "*the added inconvenience* and hazard, if any, of *occupying and using said lands* or any part thereof *caused by the construction of the new highway*", *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051. (Emphasis supplied). It is hardly debatable that the right of access, which we have held to be a property right, can be taken by eminent domain without the payment of damages.

It has always been the rule that the measure of damages, if any, is the difference between the fair market value of the lands immediately before the construction of the highway and the fair market value thereof imme-

diately after such construction. *Herndon* v. *Pulaski County, supra.* Further, every element that can fairly enter into the question of market value and which a business man of ordinary prudence would consider before purchasing the property should be considered by the jury in arriving at the difference between the value of the property before and after the taking *or damage to it. Kirk* v. *Pulaski Road Imp. Dist. No. 10,* 172 Ark. 1031, 291 S. W. 793; *Arkansas State Highway Comm.* v. *Speck,* The Law Reporter, Vol. 105, No. 7, page 272, 281. No one could say that a private individual would ignore the right of access or lack of it in reaching a decision as to whether or not he would buy or would pay a certain sum for the property of the appellees. The kind and extent of access or the lack of it is always considered by a man of ordinary prudence in deciding whether or not he will purchase residential, commercial or rural real estate. The appellant erred in directing its witnesses to exclude right of access or lack of it as an element in valuing appellees' property immediately before and immediately after the taking, and in such regard attempted to take property of the appellees without compensation in violation of the Constitution. That flagrant abuse cannot and will not be tolerated. If in the construction of the interstate highway system grades are changed, property is severed, inconvenience is imposed, hazard is created, or access is diminished or destroyed, the owner of the property so affected is entitled to compensation. To do less would undermine the right of ownership of property and destroy the very foundation of our government. To say that the cost of compensating for such property right would be an excessive burden on the appellant is beside the point. If this property right can be taken without compensation, then all property rights can be taken without compensation, and private property rights no longer exist. The appellant without any reservation or condition whatever definitely took all right of access which the property of the appellees enjoyed to the public way. Appellant stated in its brief and in oral argument that the appellees had access to the public way by a circuitous route over a surface road, but the record does

not substantiate these statements, and we must be guided by what the appellant actually did and how such action affected the property rights of the appellees. The Declaration of Taking reads:

". . . the estate to be taken for public use is the full fee simple absolute title together with any and all rights or easements of existing, future, or potential common law or statutory rights of access, or ingress and egress to, from or across this facility to or from abutting and adjoining land."

Since the Declaration of Taking sets forth that all rights of ingress and egress are taken, and since this Court has consistently held that the right of ingress and egress is a property right, and since the Constitution directs that private property shall not be taken or damaged without the payment of compensation therefor, the judgment of the court below should be affirmed.

Numerous cases from various foreign jurisdictions were cited in the respective briefs of opposing counsel. I have carefully examined these decisions but in view of our own Constitution and our own prior holdings I deem it unnecessary to extend this opinion further by commenting upon them.

For the reasons stated above, I respectfully dissent.

GODWIN *v.* GODWIN.

5-2094 333 S. W. 2d 493

Opinion delivered March 28, 1960.

David B. Whittington, Thomas, Phillips & Wright, for appellant.

Walter J. Hebert, C. A. Stanfield, for appellee.

SAM ROBINSON, Associate Justice. Appellee, J. A. Godwin, filed suit for divorce January 13, 1959, in Garland Chancery Court, alleging general indignities. Appellant answered by general denial and by way of cross complaint asked that she be granted a divorce and also for dower in appellee's property, for alimony, attorneys' fees and suit money. In his answer to the cross complaint appellee alleged that the parties had entered into a property settlement.

The court granted appellant a divorce and dower in appellee's personal property but denied her claim for dower in or reconveyance of certain real property owned by appellee. The court found that there had been a property settlement as to the real property and that appellee had advanced and furnished to appellant money and material and had performed services in connection with payment for certain real property owned solely by appellant, the value of which exceeded any dower interest appellant might have in any property owned by appellee.

The question presented on appeal is whether the chancellor's findings as to the property settlement and dower rights of appellant are correct.

The parties were married in 1936. They built a house in Hot Springs on a lot owned by appellant. Appellee testified he contributed over $2,000 to improvements made on this property. Later this property was exchanged for a 79 acre tract located outside Hot Springs, title to which was taken solely in appellant's name. Appellee showed he contributed money, materials and services to improvements on this property, and that he made a contribution of $350 toward appellant's purchase of an additional tract of land.

In 1954 appellant deeded 16.63 acres of the 79 acre tract to appellee. It was this transaction which the chancellor found to be a settlement of the property rights of the parties. Appellee testified this deed was made by appellant voluntarily and that he understood it constituted a settlement of their rights. Unless it is shown there was a fraudulent inducement to the making of this agreement, it should not be modified by judicial action. *Tennison* v. *Tennison,* 216 Ark. 748, 227 S. W. 2d 138.

We cannot say that the chancellor's findings are not supported by a preponderance of the evidence.

Affirmed.

SMITH *v.* TIPPS ENGINEERING & SUPPLY CO.

5-2053 333 S. W. 2d 483

Opinion delivered March 28, 1960.

Boyce R. Love, for appellant.

E. J. Butler, Jack P. West, for appellee.

JIM JOHNSON, Associate Justice. This is a case of first impression in Arkansas. It involves an interpretation of part of Act 315 of 1941, "The Uniform Contribution Among Tortfeasors Act."

In the summer of 1956, The Tipps Engineering & Supply Company, appellee, constructed a grain elevator near Dumas, Arkansas, for T. F. Shea, Jr. and George Cousins, d/b/a Shea and Cousins Grain Elevator. In the course of the construction, appellee installed an overhead truck hoist in the elevator which was for the purpose of lifting the front ends of trucks to facilitate unloading.

In December 1957, Dan Davis, a negro farmhand who worked for one of the customers of the elevator was standing near the hoist. As a truck which was being unloaded at the time drove away from the hoist, the hoist fell and struck Dan Davis, killing him almost instantly.

Thereafter, Clay Smith, Jr., appellant, was appointed Administrator of the estate of Dan Davis, and entered into a settlement with the Shea and Cousins Elevator and their insurer for the sum of $12,500, executing to them a release of liability. Also, a "friendly suit" was entered into and a judgment placed of record.

This action was then filed by the appellant against The Tipps Engineering & Supply Company alleging that faulty installation of the hoist was the cause of the death and asking for damages in the amount of $39,100. Appellee then filed an Answer and Motion to Dismiss, relying on the "friendly suit" as a bar to any further action based on the death of Dan Davis. After hearing argument from counsel, the Judge granted the motion and dismissed the Complaint.

For reversal, appellant relies upon the following point: "That, as a matter of law, the trial court erred in dismissing the Complaint of appellant."

The sole question in this case appears to be whether the "friendly suit" between Clay Smith, Jr., Administrator of the Estate of Dan Davis, appellant herein, and the Shea and Cousins Grain Elevator, is a bar to this action by appellant against The Tipps Engineering & Supply Company for damages arising out of the same cause of action. Appellant contends that the "friendly suit" was only a settlement of the claim against Shea and Cousins and that any claim the Administrator ever had against other parties for these damages is still valid and actionable.

The intention of the parties to the "friendly suit" must be ascertained by looking to the language contained in the Release and Subrogation Agreement executed by them which states:

"We hereby covenant that no release has been or will be given to or settlement or compromise made with any third party who may be liable for any damages to us and we in consideration of the above payment made by Thomas Shea and George Cousins doing business as Shea & Cousins Grain Elevator and the General Accident Fire & Life Assurance Corporation, their Insurance Carrier, hereby subrogate to them all rights and causes of action we may have against any person, persons, or corporations whomsoever for damages arising out of the above accident and we authorize Thomas Shea and George Cousins d/b/a Shea & Cousins Grain Elevator and the General Accident Fire & Life Assurance Corporation to sue in our names but at the cost of Thomas Shea and George Cousins d/b/a Shea & Cousins Grain Elevator and the General Accident Fire & Life Assurance Corporation and we hereby pledge full cooperation in such action."

That the suit filed by appellant against Shea & Cousins was only a "friendly suit" is evident from the wording of the judgment rendered therein which states:

"The defendants have offered and the plaintiff has agreed to accept the sum of $12,500, and this matter is submitted to the court for final approval and rendering of a judgment. The court, being well and sufficiently advised, finds that said settlement is fair and reasonable, and that the said judgment is to be paid in full settlement and satisfaction of any and all claims growing out of the death of the said Dan Davis."

After exhaustive research we were able to find only two cases in point. *Allbright Bros., Contractors, Inc., and for the Use and Benefit of National Surety Corporation* v. *Hull-Dobbs Co., et al,* 209 Fed. 2d 103 (1953), was a Sixth Circuit case where an Arkansas tortfeasor settled with an injured party, entered a "friendly suit" in the state court that recited that the judgment was in full settlement of all claims accruing to the injured party, paid the judgment and then went into Federal Court in Tennessee to recover contribution against joint tortfeasors. The parties agreed that the Arkansas Joint Tortfeasor statutes controlled, and the alleged joint tortfeasors moved to dismiss the complaint on the ground that since the "friendly suit" did not mention joint tortfeasors, their common liability has not been discharged and, therefore, there was no right of contribution. The district court dismissed and the Court of Appeals affirmed, stating:

"It is the contention of appellant that since the settlements and judgments were in full and complete settlement and satisfaction of any and all claims of the injured parties and all damages of every kind and description arising out of the accident, such settlements and judgments extinguished the liability of appellees, as joint tortfeasors, to the injured parties. The district court declared, however, that the settlements and judgments did not purport to be for the benefit of appellees, and did not release them from a liability with which they were not charged in the suit. The Arkansas Joint Tortfeasor Statute, in so far as here applicable, provides:

" 'A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged

the common liability or has paid more than his *pro rata* share thereof.

" 'A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

* * *

" 'Nothing in this act shall be construed to affect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury; but the recovery of a judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasor.

* * *

" 'A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides . . . Sections 34-1002, 1003, and 1004 of the Arkansas Statutes of 1947, Annotated.'

"The release of appellant by the injured parties did not, under the foregoing statutory provisions, discharge appellees, since it did not therein provide for their release. They were not named in the release and settlement agreements or in the judgments entered thereon; and a release of one joint tortfeasor does not discharge another tortfeasor not named therein. See *Raughley* v. *Delaware Coach Co.,* Del. Super., 91 A. 2d 245."

After careful consideration, we agree with the holding in the *Allbright* case, *supra,* that appellee's liability to appellant could not have been released by the "friendly suit" against Shea & Cousins as it did not mention joint tortfeasors.

Since the applicable provisions of the Arkansas statutes are set out above in the quote from the *Allbright* case, they will not be set out again. However, it seems appropriate to point out the last phrase in Sec. 34-1003 of Ark. Stats. Ann. (1947): "but the recovery of a

judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasor." This phrase would appear, on its face, to be sufficient to provide a basis for a rendition of judgment in this case for the appellant. We find that this identical language has been construed in its broadest sense in *Hackett* v. *Hyson,* 72 R. I. 132, 48 A. 2d 353, 166 A. L. R. 1096, where the Rhode Island Court said that this provision intended the inclusion of an actual recovery, payment, and satisfaction of a judgment. In other words, neither or all of these things would discharge a joint tortfeasor. That Court, with which we agree, said that this provision of the Uniform Contribution Among Tortfeasors Act was intended to reverse the common-law rule which discharged all tortfeasors jointly liable for the same tort, upon the satisfaction of a judgment by one of their number.

In the *Hackett* case there was a contested suit, and the Rhode Island Court decided that the judgment rendered therein did not discharge joint tortfeasors who were not parties. In the case at bar there is not a contested suit. Here, there was only an out of court settlement which was placed on the court records for the sole purpose of making the settlement more binding. There were minors involved, and, of course, all possible precautions must be taken in settling with minors if the settlement is to be safe from attack. The same situation was before the Court of Appeals in the *Allbright* case, *supra,* and they said that the settlement judgment there did not discharge joint tortfeasors.

The statutory provisions quoted above are all part of the Uniform Contribution Among Tortfeasors Act, which Arkansas adopted in 1941 as Act No. 315, and, as do all uniform acts, the Act contains a provision calling for uniformity of interpretation and construction.

Following this rule, the order of the trial court dismissing the complaint is reversed and the cause is remanded for trial on its merits. We do point out, however, that if judgment is obtained against appellee, appellee will be entitled to credit thereon in an amount

equal to that amount heretofore recovered by appellant from other tortfeasors. See: *Giem* v. *Williams, Administratrix,* 215 Ark. 705, 222 S. W. 2d 800.

Reversed and remanded.

ROBINSON, J., concurs.

WILKINS *v.* ENTERPRISE TV, INC.

5-2021 333 S. W. 2d 718

Opinion delivered April 4, 1960.

Jeff Duty, Charles Gocio, for appellant.

Charles Bass Trumbo, E. J. Ball, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a $10,000 judgment awarded to Enterprise TV, Inc., appellee, against Gilbert M. Wilkins and Gilbert and Company, appellants, in the Benton Circuit Court.

The facts are as follows: On March 21, 1955, Wilkins sold his coin machine business, called Ace Novelty, to appellee. The sales agreement contained this proviso:

"The Seller promises and agrees that he will not operate in competition with the Buyers or their assigns at any time any coin machine route in Crawford, Washington, Benton and Madison Counties, Arkansas, or within a radius of fifty miles of Fayetteville, Arkansas, either directly or indirectly as an individual, partnership, corporation, employee, or through any other type of business organization, it being understood that the Seller will refrain from competing in any way or manner with the business enterprises which are now owned directly or indirectly by the Buyers or either of them or which may be hereafter acquired by said Buyers or either of them."

On June 8, 1955, appellee instituted suit in the Chancery Court of Benton County against Major Industries, Inc., Eugene Meese, Gilbert M. Wilkins, and J. Marcus Hedrick, alleging that the defendants had breached the sales contract with appellee, said breach consisting of competing routes and locations in violation of the agreement. On January 30, 1957,* the Benton Chancery Court entered its decree, pertinent portions hereto providing as follows:

". . . after hearing the evidence introduced by the parties and at the conclusion of the testimony, the plaintiff moved the court to dismiss the complaint

* Entered nunc pro tunc as of January 3, 1957.

against the defendants Major Industries, Inc., and Eugene Meese and said defendants moved the court to dismiss the cross complaint against plaintiff.

Whereupon the court dismissed the plaintiff's complaint against the defendants Major Industries, Inc., and Eugene Meese, with prejudice, and dismissed the cross complaint of the defendants, Major Industries, Inc., and Eugene Meese as against the plaintiff, with prejudice, and on motion of the plaintiff, non-suit was taken by plaintiff as to the defendants, Gilbert M. Wilkins, all at the cost of the plaintiff.

IT IS, THEREFORE, considered, ordered and adjudged by the court that the plaintiff's complaint as against the defendants, Major Industries, Inc., and Eugene Meese, be and is dismissed, with prejudice, and that the cross-complaint of the said defendants as against the plaintiff be and is dismissed with prejudice, and that the plaintiff's complaint as against the defendant, Gilbert M. Wilkins, is dismissed, without prejudice, all at the cost of the plaintiff."

Thereafter, on January 9, 1958, Enterprise TV, Inc., filed the instant suit in the Benton Circuit Court against Wilkins, alleging the breach of the sales agreement, and further alleging the fraudulent conveyance of real estate owned by Wilkins to Gilbert and Company as a means of defrauding appellee. Evidence of appellee was directed to the fact that Wilkins was actually the sole owner of Major Industries, and was in competition with appellee contrary to the terms of the agreement. Appellant's proof was to the effect that he held no interest in the corporation, and had violated no agreement.

For reversal, appellant urges two points, as follows:

"I.

The Findings and Decree of the Chancery Court on January 3rd, 1957, Constituted an Adjudication of the Controversy Between the Parties and is *Res Adjudicata* in the Instant Suit.

II.

The Court was in Error in the Admission of Hearsay Testimony by the Witness Effie Meese on Behalf of the Plaintiff, Prejudicial to the Defendants."

We proceed to a discussion of these contentions in the order listed.

I.

Appellants argue that the Chancery Court, in dismissing the complaint with prejudice against Major Industries and Meese, necessarily found that they were guilty of no wrong doing toward appellee, and that this finding inures to the benefit of Wilkins, since the complaint alleged that Major Industries, Inc., was an *alter ego* of Wilkins. We do not agree. This action was based upon breach of contract, and only Wilkins was a party to the agreement. Accordingly, there was no privity of contract between any of the other defendants in the original suit and Wilkins relative to this agreement. The relevant portion of § 27-1405, Ark. Stats. Anno. (1947), provides:

"An Action may be dismissed without prejudice to a future action:

First. By the plaintiff before the final submission of the case to the jury, or the court, where the trial is by the court."

Appellee had every right to take the non-suit, and there being no privity between Wilkins and the other defendants in the sales agreement, the Chancery decree could not be a bar to the present action.

II.

Effie Meese is the widow of Eugene Meese, who died March 7, 1957. According to her testimony, for the period that Major Industries, Inc., was engaged in business, her husband was president, she was vice-president, and their oldest daughter, secretary. She stated that

at the outset, her husband was working in Bentonville;[1] that he came home from work one afternoon and told her about the organization that was planned, "He said they were going to start up a route down here to be known as the Major Industries or Gene's Amusements, and he explained that they had to have three officers and that he was one, and I was one and Reba, that's my daughter, was the other one, and he made it out that way and brought the papers home. He didn't ask me about it, he just did it. I didn't know it, I went ahead and signed it and let it go at that. * * * He said he was going to get $70.00 a week, and he said Mr. Wilkins told him he would give him 5% of the profit, or the income, however he stated it, that's what he meant, of what the route made in a year. Q. Do you know, Mrs. Meese, who paid your husband for services that were rendered in getting this route started for Major Industries, Incorporated? A. Well, at the time—between the time, the route was sold once and started again, he was paid a weekly salary by Mr. Wilkins. Q. Did you see the checks that were given him? A. I always took them to the grocery store and got groceries every week. Q. Do you know what they were for? A. They were for $60.00 and at the time the route started, they were raised to $70.00 a week. Q. Did you notice who signed the checks, who they were drawn on, if you remember? A. Well, all the time, up until the time Major Industries started, it was Ace Novelty." This testimony was objected to by appellants as hearsay evidence and inadmissible. Mrs. Meese further testified that she heard several telephone conversations between Wilkins and her husband relating to the business; that following the death of her husband, she took all papers (stock certificates) to Wilkins' office in Joplin, Missouri, and "signed" them, and also signed over the title to a truck, which had been purchased by Mr. Meese as an officer of Major Industries. Further,

"Q. Do you recall any other incidents or time or places your husband told you anything concerning the

[1] Meese had worked for Wilkins for four or five years prior to the establishment of Major Industries, Inc.

agreement of Gilbert Wilkins not to compete with this Enterprise TV? A. Yes, many a time he talked about that, that he wasn't supposed to, and when they started Major Industries, he told me how it was, he was going to do the work but it belonged to Gilbert, and of course he kept that from the customers, kept them from knowing it, none of them knew it."[2]

According to her evidence, she received no compensation when the properties were turned over at the office.

Appellants argue that in admitting the evidence of what Meese was supposed to have told his wife, the court admitted evidence that was entirely incompetent, and highly prejudicial to Mr. Wilkins.

Of course, the evidence was hearsay, and the only question is whether it comes within one of the exceptions to the hearsay rule. A rather thorough discussion is found in an article by Dr. Robert A. Leflar, "Theory of Evidential Admissibility—Statements Made Out of Court", found in 2 Ark. L. R., 26, 41 (1947-48). Under the sub-heading, "Declarations Against Interest", Dr. Leflar states:

"Another exception dating from the early days of the Hearsay Rule is that which admits declarations made against the interest of the declarant. It is well settled that to be admissible under this exception the statement must have been against the declarant's interest when he made it. That fact being present, a high degree of reliability in the statement made is obviously assured. People do not deliberately make statements contrary to their own interests unless truth impels them to do so. The guaranty of trustworthiness for such extrajudicial statements is about the same as if the declarant were

[2] Mrs. Meese admitted that her husband had testified in the Chancery action that Wilkins had no interest in the business, but she stated that the testimony was false, and that her husband had told her of his testimony before the court . . . "he was for Gilbert, he was working for Gilbert and expecting to get the pay, the 5% profit. * * * He was going on with him through the deal he started with, I guess you'd say. He started in the beginning to make wages to support us, like any other man." The testimony of Meese in the Chancery case was introduced into evidence.

present in court for cross-examination. The degree of reliability being as high as it is, it would seem that such declarations should be admitted in evidence whenever necessity is established by the declarant being for any reason unavailable. Actually, the cases have not gone that far; death or absence from the jurisdiction is usually required."

Again, in "Wigmore on Evidence", Vol. 5, 3rd Edition, paragraph 1465, page 271, it is stated:

"Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to *every fact contained in the same statement.*"

In C. J. S., Vol. 31, § 217, page 959, we find the requirements that render a declaration against interest admissible:

"(1) Declarant must be unavailable as a witness. (2) The declaration must have related a fact against the apparent pecuniary or proprietary interest of declarant when his statement was made. (3) The declaration must have concerned a fact personally cognizable by declarant. (4) The circumstances must render it improbable that a motive to falsify existed."

The testimony in the instant case meets the requirements of admissibility. Without passing on the matter of what constitutes "unavailability", it is certainly apparent in this case that the declarant was unavailable, for he was dead. The declaration admitted, related to a fact against the apparent pecuniary or proprietary interest of Mr. Meese when the statement was made, for, ostensibly, and on the record, he was the president and principal stockholder of the corporation, while, under his declaration, he was only a salaried employee, without any control of the business. The declaration certainly concerned facts personally cognizable to declarant,

and no motive for Mr. Meese to make a false statement to his wife appears in the record.

Finding no merit in appellants' contentions for reversal, the judgment is affirmed.

McFaddin, J., dissents.

North Ark. Milling Co., Inc. *v.* Lipari.

5-2064 333 S. W. 2d 713

Opinion delivered April 4, 1960.

Thomas B. Tinnon, for appellant.

Danuser and *Pierce,* for appellee.

J. Seaborn Holt, Associate Justice. Leon and Pearl Lipari, husband and wife, appellees (and cross appellants), filed their complaint against appellant, North Arkansas Milling Company, Inc., and Archer-Daniels-Midland Company, alleging: "That the appellee, Leon Lipari, 'was employed by an officer of the defendant, North Arkansas Milling Company, Inc., which is the agent for Archer-Daniels-Midland Company, defendant, on or about March 10, 1957, to brood turkeys and said defendant agreed to pay said plaintiffs the sum of twenty cents (20¢) per turkey brooded. Pursuant to said contract of employment, the plaintiffs brooded 4,713

turkeys over a period of eight weeks . . . for which said defendant is indebted to said plaintiffs in the sum of $942.60. After said turkeys were brooded, the said officer, employee, or agent of North Arkansas Milling Company, Inc., employed said plaintiff, Leon Lipari, to care for said turkeys, including feeding and raising same, it being agreed and understood by the said parties that the plaintiffs would be paid a reasonable sum for said services rendered' . . .'' and: ''The said defendant, Archer-Daniels-Midland Company, by fraudulent misrepresentations and willful misconduct induced the plaintiffs to execute a chattel mortgage dated March 13, 1957, and other documents the nature of which is not known by the plaintiffs for the fraudulent purpose of attempting to create an indebtedness and obligation to said defendant against said plaintiffs by reason of said instruments; the said defendant, Archer-Daniels-Midland Company, by reason of said fraudulent instruments has made a demand against these plaintiffs to pay an alleged indebtedness claimed in the sum of approximately $1,600.00. The plaintiffs deny that they are indebted to said defendant in any sum and pray that said fraudulent mortgage and any other fraudulently secured instruments be canceled, set aside and forever held for naught.'' They prayed for judgment against both Archer-Daniels-Midland Company and North Arkansas Milling Company, Inc., in the total amount of $2,356.60, and that said chattel mortgage be canceled. Appellant, North Arkansas Milling Company, Inc., answered with a general denial and specifically denied that the Liparis were ever employed by it for any purpose. Archer-Daniels-Midland Company also answered with a general denial and in addition, filed a cross complaint against Leo and Perarl Lipari, praying for a decree based on some 53 notes and for a foreclosure of a chattel mortgage given by the Liparis to it in the amount of $1,680.91 plus attorney's fee. The Liparis answered with a general denial. A trial resulted in a decree which contained these recitals: ''As between plaintiffs and the defendant, North Arkansas Milling Company, Inc., upon plaintiffs' claim for the brooding

of the turkeys by plaintiffs, Leon Lipari and Pearl Lipari (they should have a decree), and against the defendant, North Arkansas Milling Company, Inc., in the amount of $942.60. The court further finds in favor of the plaintiffs against the defendant, North Arkansas Milling Company, Inc., for the reasonable value of services rendered by plaintiffs in caring for the turkeys for a period of approximately 80 days beyond the brooding period in the amount of $250.00, making the aggregate amount of the judgment to be entered in favor of the plaintiffs against the North Arkansas Milling Company, Inc., in the sum of $1,192.60.

"On the issue as between the plaintiffs involving the notes and chattel mortgage executed by the Liparis in favor of the defendant, Archer-Daniels-Midland Company, the Court finds that the evidence does not warrant the cancellation of said instruments. The Court further finds that after a sale of the turkeys by the mutual consent of both the mortgagor and mortgagee, and the application of the proceeds of the sale upon the indebtedness evidenced by the notes and mortgage, there remained an unpaid balance due Archer-Daniels-Midland Company in the amount of $1,331.73, and there is further due said company the sum of $105.00 representing interest upon the $3,500.00 note dated May 6, 1957, until November 4, 1957, on which date the Court finds that the principal of this note was paid in full, when the credit of $7,944.89 was made. The Court finds that on the unpaid balance of $1,331.73, evidenced by the delivery receipt notes, interest is due only from December 31, 1957, to the present date, in the amount of $126.40, making the aggregate judgment for principal and interest to be entered in favor of Archer-Daniels-Midland Company against Liparis, in the amount of $1,563.13, plus the further sum of $150.00 for attorney fees which the court allows for the plaintiffs attorney, as authorized by the notes. The decree shall assess one-half of the court cost herein against North Arkansas Milling Company, Inc., and one-half against the plaintiffs, Leon Lipari and Pearl Lipari." This appeal followed.

For reversal, appellant relies on two points: "I. That the trial court's findings as between the plaintiffs, Leon Lipari and Pearl Lipari, and the defendant, North Arkansas Milling Company, (appellant) upon plaintiffs' claim for the brooding of the turkeys and against the defendant, North Arkansas Milling Company, Inc., (appellant) in the amount of $942.60 is contrary to the evidence and law. II. That the trial court's findings in favor of the plaintiffs, (appellees), Leon Lipari and Pearl Lipari, as against the defendant, North Arkansas Milling Company, Inc., (appellant) for the reasonable value of services rendered in caring for the turkeys in the amount of $250.00 is contrary to the evidence and law."

We do not agree to either contention. The great preponderance of the evidence, we think, supports the chancellor's findings and decree.

Mr. Lipari testified that he and his wife made an agreement with appellant, North Arkansas Milling Company, Inc., to the effect that the company would furnish him with day-old turkey poults to care for and raise until they were eight weeks old; that all Lipari was to do was to furnish his labor and care for the turkeys until they were eight weeks old; that the company agreed to furnish and deliver all the necessary feed and to pay 20¢ per head for Lipari's labor in caring for them. He admitted that he (Lipari) and his wife signed a chattel mortgage which, he testified, appellant company represented was just to guarantee "that the turkeys would be here when we want them and the mortgage is really on the turkeys." Lipari further testified that appellant company had not paid him anything for brooding the turkeys and that they brooded 4,713 head until eight weeks old, for which appellant owed him twenty cents (20¢) per head. He further testified: "Q. How many days after these turkeys were 8 weeks old did you care for them? A. We took care of them up until October 28, or sometime along there, when they took them out to market. * * * THE COURT: It is in evidence that the turkeys came in on May the 6th, and any con-

tract would begin at that time, and continue until the turkeys were disposed of on October 28. * * * Q. What would you say is the reasonable value of your services for taking care of these turkeys until they were taken away, including the use of your tractor and fuel: A. I just figured that it was worth $10.00 a day for the use of the tractor and labor and fuel. I told him that. I am not a guy who likes to override the other man, but that I felt like I ought to have $10.00 per day for the use of myself and my tractor." Mr. Menard Beard assisted Lipari in caring for these turkeys.

Mr. Jack Stewart, president of appellant company, testified: "Question: Did you go out to their (the Lipari's) place and pick up the waterers and feeders? Answer: I did not. Question: Did you have one of the men from the North Arkansas Milling Company do that? Answer: Well, he was working for the company. Question: Did he pick up these items? Answer: Yes. * * * Question: Did you talk to him [Mr. Beard] about taking care of the turkeys on the Lipari property? Answer: Yes. Question: Did you discuss what the salary arrangements would be? Answer: Vaguely. Question: What was said about that? Answer: I was the 'go-between' Lipari and Mr. Beard, because they were wanting somebody to help them grow the birds and feed them, but as far as the money involved, I don't remember. Question: Where were you when you talked with him? Answer: In my office."

Mr. Beard testified: "Question: Did you ever hear Mr. Stewart make any statement about whose turkeys they were? Answer: He said they were his turkeys. Question: Did he tell you that? Answer: Yes. We were out by the brooder house. Question: Why did he tell you that? Answer: He was talking to Mr. Lipari, and he was telling them about it."

While the testimony is somewhat conflicting, however, as indicated, we have concluded that the findings and decree are not against the preponderance thereof. The chancellor evidently believed appellees' testimony.

In the recent case of *Brown* v. *Bridges,* 227 Ark. 1006, 304 S. W. 2d 939, we said: "The chancellor saw and heard appellee testify, had ample opportunity to observe his appearance on the witness stand, and was in a position to best determine whether the witness was telling the truth. This was a finding of fact and we have held that we will not reverse a chancellor's decree unless his findings are against the weight of the evidence. *Lupton* v. *Lupton,* 1946, 210 Ark. 140, 194 S. W. 2d 686."

On appellees' cross-appeal they say: "If an agent or employee is compelled to pay a debt which should be paid by his principal, the agent is subrogated to rights of the creditor. The prayer for 'all other relief to which they are entitled' would require the Equity Court to recognize the cross appellants' right to subrogation as against their principal where the principal is a party to the suit." Before appellees can claim subrogation to the rights of their principal, appellant, they must first show that they have paid a debt or obligation of their principal which they did not do. "Before the surety can claim the right to the benefit of any of the securities, he must first pay the entire debt of the principal for the payment of which the securities were given. As is said in the case of *Bank of Fayetteville* v. *Lorwein,* 76 Ark. 245: 'The right of subrogation can not be enforced until the whole debt is paid, and until the creditor be wholly satisfied, there ought to and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim,' " *Barton* v. *Matthews,* 141 Ark. 262.

Affirmed, both on direct and cross-appeal.

PRICE *v.* MABREY.

5-2088 333 S. W. 2d 724

Opinion delivered April 4, 1960.

Phil Loh, Charles H. Eddy, for appellant.

N. J. Henley, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a suit for damages because of alleged misrepresentations. Appellant Price[1] was the plaintiff, and appellee Mabrey was the defendant; and from a decree in his favor for only $700.00, Price has appealed, claiming the damages to be inadequate. There is no cross appeal.

Price was a school teacher in Florida and desired to purchase Arkansas lands for an investment. The Mabrey tract was located; and when Price inspected it he found Keeling was cutting timber and operating a mill on the land, because of a timber deed from Mabrey. The timber deed was not of record, and Price inquired

[1] Mrs. Price was a co-purchaser with her husband, and also a party plaintiff and party appellant; but we refer to Price in the singular, since he acted for his wife. Equity jurisdiction—not questioned by defendant—was invoked because Price desired the amount of his damages to be credited on his future payments due on his sales contract.

of Mabrey as to the terms and provisions of the timber deed. Based on Mabrey's definite representations as to the timber deed, Price agreed to purchase the land; and the sales contract, dated August 15, 1955, contained this language, which gives rise to the present litigation:

"It is agreed and understood by all parties that there is a timber deed on said lands that will terminate within four years and in case saw mill is removed from said lands at any time, timber deed will become void. It is also understood that no timber is to be sold unless it is taken through saw mill on said property."

Price returned to Arkansas in the summer of 1956 and found that the Keeling mill, that had been on the land in August 1955, had ceased operations; that after Keeling had cut all the timber he wanted to process at his mill, he had sold the remaining oak and gum timber on the land to Crow for $700.00, and had sold the remaining pine timber on the land to Whillock for $1,000.00. These parties (Crow and Whillock) were still in the process of cutting their purchased timber from the land in the summer of 1956. They claimed that they had purchased from Keeling; and he claimed that he had a right—under the terms of his timber deed from Mabrey—to make such sales, regardless of his mill having been removed from the land. He had such right under the timber deed.

Price then filed the present suit against Mabrey for damages, claiming that Mabrey had misrepresented to him the provisions in the unrecorded timber deed from Mabrey to Keeling. In the trial, the said timber deed was introduced in evidence. It was dated October 16, 1954; and by its terms Mabrey sold to Keeling, "all the merchantable sawmill timber from the land". It also stated that Keeling, "shall cut and remove said timber within a period of four years from date hereof, and shall be entitled to all of that time within which to cut and remove said timber"; and the deed further provided, "At time mill is removed from said land and *work has ceased,* the timber deed will be returned" to Mabrey. (Emphasis supplied.)

Thus it is apparent that the timber deed covered all merchantable timber, with four years to cut and remove the same; and it was not until the mill had been removed from the land and all "*work has ceased*" that the timber deed could be terminated short of the four year period. The contract that Mabrey executed to Price stated definitely, as previously copied, that, "in case saw mill is removed from said land at any time, timber deed will become void"; and also, it said that "no timber is to be sold unless it is taken through saw mill on said property". Price testified as to the materiality of this last quoted representation:

"I was told that the timber there had been sold to an operator who was to have his mill set up on the property, and that when he moved the mill off the property and discontinued operation on that land, all remaining timber on the property would belong to whomsoever owned the property at the time the mill was moved. This was an important point to me, because I inquired whether or not he would be able to turn around after he had satisfied his wishes with the timber and sawed all he wanted, and sub-contract it, to someone else, because this might go on for several years until the expiration of the Timber Deed. I was told that this was not possible under the Timber Deed, and when and if he decided to quit cutting, anything left on the land would be mine if I bought the property."

The very eventuality, that Price tried to guard against in his sales contract, came about, and clearly emphasizes the difference of language between the timber deed and the sales contract. It is clear that Mabrey misrepresented to Price the provisions of the unrecorded timber deed, and that such material misrepresentation resulted in damage to Price. In short, Price made a case entitling him to damages. See *Yeates* v. *Pryor,* 11 Ark. 58; *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; and *Sullenberger* v. *O'Lee,* 209 Ark. 798, 192 S. W. 2d 543. As aforesaid, trial in the Chancery Court resulted in a decree for Price for $700.00; and Price brings this appeal, claiming that the amount awarded

him by the Chancery Court is too small. There is no cross appeal by Mabrey.

It was established that Keeling ceased operating his mill on the land and sold the remaining uncut timber to Crow and Whillock; that Crow cut and removed the oak and gum timber; and that Whillock put his own mill on the land and cut and processed the pine timber. The learned Chancellor thought the placing of the Whillock mill on the land fulfilled the provision in the sales contract which recited, "no timber is to be sold unless it is taken through saw mill on said property"; and, so, the learned Chancellor rendered judgment for Price for $700.00, being the amount that Keeling received from Crow, but refused to award Price any damages for the pine timber that Whillock cut. Viewing all the testimony, and the language used, and the situation existing between the parties, we think the evidence clearly shows that the language in the Mabrey-Price contract referred to the Keeling mill then on the land, and that Mabrey represented to Price that when Keeling ceased cutting timber from the land and processing it at his mill on the land, then the timber deed would be ended. Viewing it in this light, we are clearly of the opinion that Price is entitled to recover damages for the timber that Whillock cut from the land.

We come, then, to the more difficult question, and that is, the amount of the damages. The burden was on Price to prove his damages. In *Burbridge* v. *Bradley Lbr. Co.,* 218 Ark. 897, 239 S. W. 2d 285, we reviewed at length many of the cases of this Court on determining the value of timber cut and removed from the land; and we cannot say that Price established his damages in accordance with the Burbridge case. Crow testified that he cut 80,000 feet of oak timber and 14,000 feet of gum timber, and possibly some additional timber. But Crow stated that he received for the timber that he cut 7¢ per foot delivered in Pierce City, Missouri. From Crow's testimony there is no way of telling what this timber was worth at the stump. Whillock testified that he cut 150,000 feet of pine timber and that the

price varied from $15.00 to $20.00 per thousand; but he did not say whether such value was at the stump or after it was processed. These were the only two witnesses on the value of the timber, except Keeling's testimony, which we will subsequently mention.

The case of *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546, was a case of damages for false representations in a land purchase contract; and, in discussing the measure of damages that the purchaser of the land might recover for the misrepresentation, this Court quoted from the earlier case of *Goodwin* v. *Robinson,* 30 Ark. 540, as to the damages:

"'. . . or he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, *and in this event the measure of the damages would be the difference between the real value of the property, in its true condition, and the price at which he purchased it;* or, to avoid a circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agreed to pay.'"

Under the above quotation,[2] Price's measure of damage was the difference between the "real value of the property" if the timber had not been sold by Keeling, and the value of the property with the timber, sold by Keeling, cut and removed. Keeling testified that he sold the oak and gum timber to Crow for $700.00, and the pine timber to Whillock for $1,000.00; and as near as we can see from this record, that is the only testimony that might go to satisfy the rule stated in *Matlock* v. *Reppy, supra.*

The learned Chancellor had this to say about the difficulty of determining the damages from the evidence: "The evidence as to the value of this particular timber in the stump which was cut and removed by Crow is

[2] In 1 Ark. Law Review 310, there is a case note entitled: "Measure of damages for defrauded vendor in actions of deceit", which suggests the uncertainty in awarding damages in such cases.

not very well established by the record; however, as the sale price to Crow was $700.00, the Court finds this to be the amount of damages suffered by plaintiffs for breach of the contract. . . ." Following the same line of reasoning, we conclude that the damages for the Whillock pine timber should be fixed at $1,000.00; and this, along with the $700.00 allowed for the Crow timber, makes a total of $1,700.00 that Price should recover, instead of the $700.00 allowed by the Chancery Court. The decree, therefore, is reversed, and the cause remanded, with directions to enter a decree for the appellants for the additional amount of $1,000.00 involving the pine timber sold to Whillock.

BROWN *v.* LEWIS.

5-2077 334 S. W. 2d 225

Opinion delivered April 4, 1960.

[Rehearing denied May 9, 1960]

John F. Gibson, for appellant.

William H. Drew, for appellee.

GEORGE ROSE SMITH, J. This is a proceeding under the statute to vacate a default decree after the term, for unavoidable casualty. Ark. Stats. 1947, § 29-506. The defendants, who had filed an answer in the case, assert unavoidable casualty in that their attorney, Mr. Gibson, did not know that the case was set for trial on the day that the default decree was rendered. The chancellor concluded that no unavoidable casualty had been shown and therefore refused to vacate the decree.

In the original case the plaintiff, represented by Mr. Drew, filed suit to quiet her title to sixty acres of land. The regular chancellor, Judge Merritt, announced his disqualification, and Mr. W. K. Grubbs, Sr., was elected special chancellor. As of April 5, 1959, the special chancellor overruled Mr. Gibson's demurrer to the complaint and granted the defendants ten days for further pleading.

The special chancellor and the two attorneys met in the courtroom on April 23. Mr. Drew asked for a default judgment, as the defendants had not filed a pleading within the time allowed. This request was denied for the reason that Mr. Gibson had not received a copy of the order overruling his demurrer, and he was granted until April 25 to file his answer, which was to be a general denial. The answer was later filed within this additional time.

After the special chancellor denied Mr. Drew's request for a default judgment the three men discussed the selection of a date for trial. Both Mr. Grubbs and Mr. Drew understood that May 18 was definitely agreed upon as the trial date. Later that day, April 23, Mr. Grubbs prepared an order reflecting the court's action and reciting that the case was to be tried on May 18, but Mr. Gibson did not receive a copy of that order. On May 18 Mr. Drew appeared in court with his client and some twenty witnesses, but Mr. Gibson and his clients did not appear. The decree recites that after waiting

four hours for the defendants to appear the special chancellor heard the case upon the plaintiff's evidence and found the issues in her favor.

At the hearing upon the complaint to vacate the decree Mr. Grubbs and Mr. Drew testified as we have indicated, that on April 23 they and Mr. Gibson selected May 18 as the day for trial, and the presiding chancellor, Judge Launius, so found. Mr. Gibson does not question the good faith of Mr. Grubbs and Mr. Drew in the matter; he simply states that he did not understand that any date for trial was definitely selected on April 23. Upon this basis it is argued that there was actually a misunderstanding between counsel, which constitutes an unavoidable casualty. *Baskin* v. *Aetna Life Ins. Co.,* 190 Ark. 448, 79 S. W. 2d 724.

If the record contained nothing except the testimony that we have mentioned we might well be in a position to reconcile the statements of these three honorable members of the bar by concluding that a misunderstanding occurred. Unfortunately there is an insurmountable obstacle in the way of such a disposition of the case.

After the filing of the motion to vacate the decree the plaintiff served a request that the following facts, among others, be admitted by the defendants: "That at the hearing of April 23, 1959, the Special Chancellor, the Hon. W. K. Grubbs, Sr.; solicitor for the defendants, W. G. Brown and Vivian Brown, the Hon. John F. Gibson; and solicitor for plaintiff, Elza Lewis, William H. Drew, all checked their calendars and found that this cause would be tried May 18, 1959." To this request the defendants filed an unverified response stating that they were not present on April 23 and "cannot truthfully admit or deny" the requested admission of fact.

The statute, so far as it is relevant here, is explicit in providing that a request for an admission is deemed admitted unless the party to whom the request is directed files a sworn statement either denying the matter or setting forth in detail the reasons why he cannot truthfully admit or deny the matter. Ark. Stats., § 28-358.

In *White River Limestone Products Co.* v. *Mo.-Pac. R. Co.*, 228 Ark. 697, 310 S. W. 2d 3, we considered a situation identical to the present one and held that an unverified response does not comply with the statute and hence amounts to an admission of the request. It follows that in the case at bar the appellee is entitled to insist, as she does, that the agreed setting of the case stands as an admitted fact. Thus it is beyond our authority to make a contrary finding.

The appellants' remaining arguments do not establish a valid ground for reversal. It is contended that the chancery court was not legally in session on May 18, because Judge Merritt had entered an order recessing court until May 25. But this order did not really conflict with the special chancellor's order setting the trial for May 18, and in any event the statute now provides that the chancery court is always in session, that two or more chancery courts of the same circuit may be concurrently in session, and that an order fixing the time and place when the court will be in session does not preclude the court from transacting business at other times and places. Ark. Stats., § 22-408.1.

It is also contended that the special chancellor was without power to set the case for trial until after the issues had been joined by the filing of the defendants' answer. Act 70 of 1957, Ark. Stats., § 27-1719; and Act 244 of 1957, regulating the practice in this particular chancery circuit. We do not find in either act any language suggesting that the parties and the court cannot agree upon a trial date before the filing of the answer or that a trial held pursuant to such an agreement is a nullity.

Affirmed.

HOLT, ROBINSON, and JOHNSON, JJ., dissent.

J. SEABORN HOLT, Associate Justice, dissenting. As I read the evidence in this case, I am convinced that, on trial *de novo* here, the preponderance of the testimony supports appellants' contention and I would reverse the decree with directions to set aside the default decree for what was, I

think, in effect, an unavoidable casualty. A more complete synopsis of the testimony is to the following effect: Mr. Brown, one of the appellants, on the day the decree for default was rendered against him and his wife, was ready, willing and able to defend had he known that court was to be held on that day. His wife, Mrs. Brown, co-appellant and appellant here, testified in corroboration of her husband, that on the day the default decree was rendered against her, she was ready, willing and able to defend had she known that court was to be held on that day. The attorney for the Browns, Mr. Gibson, testified that he did not appear and defend because it was his impression and understanding that the case would not be heard until the court reconvened in regular session on May 25, 1959, and further that he was under the definite impression that no agreement had been reached between himself, the special chancellor, Mr. Grubbs, who rendered the default decree, and opposing counsel, Mr. Drew, as to a date for trial of the case. The special chancellor, Mr. Grubbs, who presided at the hearing at which the default decree was rendered, testified that on April 23, 1959, there was a discussion of fixing the date for the trial of the issues in this case: "That date was fixed at May 18, 1959. This date was first fixed between Mr. Drew and Mr. Gibson. I asked them to agree on a date for trial. That date was agreeable to me. This date was fixed the morning of the 23rd (April 1959). I am sure that Mr. Gibson and yourself (Mr. Drew) and myself agreed on the date May 18, 1959 . . . I did not specifically instruct that a copy of the decree be sent to you. I have no knowledge whether you received a copy or not. I did not ask the sheriff to call you on that day. I did not have any knowledge that you had known of the actual entry of the Order on April 23, 1959 . . . Mr. Gibson mentioned several dates when he had various things scheduled. *But I remember the 18th day was the only day proposed unless it was the Monday and for some reason that Monday was turned down. I don't remember why. The 18th was on Tuesday. After looking at my calendar May 18th is on Monday.* It was my recollection that there was some reason or another that we couldn't hear it

on Monday. That is my memory. It didn't take very long to agree upon a date. I remember it was just a Monday that we couldn't agree upon. There is no doubt in my mind as to the agreement of May 18, 1959." [Emphasis ours].

Mr. Drew, attorney for appellee, Elza Lewis, testified that: "On April 23, 1959, Mr. Gibson and Mr. Grubbs and myself met here with reference to a motion that I had filed for a default judgment . . . We discussed various dates. We finally agreed upon the 18th of May. Mr. Grubbs checked his calendar and found that there were no conflicts for the 18th of May and the case was ordered to be tried on that date by him . . . We tried one phase of the Marques case and immediately after Mr. Gibson, myself and Mr. Grubbs heard the motion for default judgment. It seems to me that we heard the Marques case until about lunch time and I believe Mr. Gibson left around noon."

The record further reflects that counsel for both sides had just finished part of a long and involved contested divorce case when the purported agreement was reached. It was shortly before noon and both parties were anxious to get away when the impromptu meeting was called. It further appears that the regular chancellor (Merritt) had adjourned court until May 25, 1959. All of which, it seems to me, would clearly show that a misunderstanding as to the trial date occurred between the parties. It further appears that the only positive testimony as to the date agreed upon as *Monday,* May 18, 1959, was that of opposing counsel who took the default judgment.

The majority, in their opinion, candidly admit that the evidence is sufficient to show a misunderstanding between the parties but go further and say that this court is bound by an "insurmountable obstacle in the way of such a disposition of the case." This "insurmountable obstacle" being the unsworn answer to a request for admissions and in support, they rely on 228 Ark. 697, 310 S. W. 2d 3, the case of *White River Limestone Products Co.* v. *Mo.-Pac. Rd. Co.,* which held that response unsworn to amounts to an admission of the request. A reading of the decision in the above case shows that the court quoted from and relied

upon several federal court cases which stated the federal procedure, and that our procedure is substantially the same as that of the federal courts. In *Ark.-Tenn. Distributing Corp.* v. *Breidt et al.,* 110 Fed. Supp. 644, we find this language: "It must be taken into account that Harry Breidt denied having been served the request for admission. The answers to the requests were signed by Charles Handler and sworn to by Jacob Breidt only. It is true that failure to deny is tantamount to an admission, but it is equally true under this rule as under the others, that technical considerations will not be allowed to prevail to the detriment of substantial justice. Barron and Holtzoff, *Federal Practice and Procedure,* Vol. 2, Section 837."

It seems to me that simple and substantial justice requires that these appellants be not denied the right to a trial of their lawsuit because of a clear mix up and misunderstanding as to the trial date when even the trial judge, Mr. Grubbs, was himself so confused that he didn't know if the 18th was on a Monday or Tuesday, and that the 18th was the only day proposed; that he remembered there was some reason that the case couldn't be tried on a Monday which was, in fact, the 18th. Nor do I agree that appellants should be bound by the highly technical requirement of their failure to verify the response set out in the majority opinion. As pointed out by the federal court above: "Technical considerations will not be allowed to prevail to the detriment of substantial justice."

I would reverse.

PARK *v.* MCCLEMENS, EXCR.

5-2055 334 S. W. 2d 709

Opinion delivered April 4, 1960.

[Rehearing denied May 23, 1960]

Robert M. Lowe, Paul Jones, for appellant.

Smith & Sanderson, for appellee.

PAUL WARD, Associate Justice. This litigation is concerned with the ownership of several bank accounts. Appellant, as the survivor, claimed title to four bank accounts upon the death of her aunt on the ground that they were joint accounts. The trial court held against her contention, hence this appeal. The facts which are somewhat involved but not materially in dispute are substantially as hereinafter set forth.

Mrs. Janie Witten who owned and managed a modest business in Texarkana for many years died testate July 31, 1958, and the appellee, John William McClemens, was appointed the executor of her estate. Prior to her death, on April 24, 1957, Mrs. Witten executed a will in which she left part of her estate to another niece,

Ida Jo McClemens who is at this time a student in school. During several years Mrs. Witten had deposited funds from time to time in two separate banks in Texarkana, which funds are the subject of this litigation. At the time of her death there were these accounts: In the State National Bank there was Savings Account No. 4619 in the amount of $2,259.63 and a checking account in the amount of $2,639.15. In the Texarkana National Bank there was Savings Account No. 4931 in the amount of $2,159.59 and a checking account in the amount of $1,533.90. All the above mentioned funds were placed in the banks by Mrs. Witten and were there held in her name until about the 8th day of August of 1957 when she and appellant signed signature cards which were delivered to the banks. Thereafter the banks placed appellant's name on each account record along with the name of Mrs. Witten which had been there all along. It is, of course, the contention of appellant in this litigation that the effect of placing her name on the above accounts constituted her a joint owner with the right of survivorship.

The record shows that appellant had been living with Mrs. Witten for several months at the time of her death and, apparently believing that the subject funds belonged to her, she withdrew all of them on or about August 2, 1958. The record further reflects, however, that when it became apparent that a dispute over the funds was in the offing she and her attorney, with a commendable spirit of fairness and cooperation, replaced the funds in a bank pending legal determination of the rightful ownership.

This litigation was begun by appellee in Probate Court by agreement with and the cooperation of appellant in order to have the ownership of the funds established. On appeal no questions were raised regarding jurisdiction of the Probate Court. In view of the fact that both parties agreed to submit their differences to the Probate Court we think that Court could take and retain jurisdiction under Ark. Stats. § 62-2409 and

Hartman v. *Hartman, Admr.,* 228 Ark. 692, 309 S. W. 2d 737.

Only two issues are raised by appellant: The competency of certain evidence and the effect of the signature cards.

Dead Man's Statute. As will more fully appear later it was recognized early in the trial that the question of Mrs. Witten's intentions regarding the disposition of her bank deposits might be material, so for that and other reasons appellant was called to testify in her own behalf. At the outset appellee objected to any testimony relative to conversations or transactions which appellant had with the deceased. The pertinency of the objection, based on the Arkansas Constitution, Schedule, Section 2, was conceded by appellant. However, appellant contended and now contends that appellee waived all objections by taking the deposition of appellant. In support of this appellant relies on our opinion in *Smith, Administratrix* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776. That opinion was rendered January 7, 1952 and was based on Ark. Stats. § 28-401. The following year the Legislature passed Act 335, commonly known as the "Discovery Statute". Section 1 of that Act now appears as Ark. Stats. § 28-348. Subdivision (f) of the said section in part states: "A party shall not be deemed to make a person his own witness for any purpose by taking his deposition". It is contended by appellee that, since appellant's deposition was never introduced into evidence and never used by appellee, appellee did not waive his right to object to appellant's testimony regarding conversations and transactions with the deceased. We do not, however, at this time, pass upon this particular question since it is not necessary to do so. The record shows that when the trial court sustained appellee's objection to the proffered testimony appellee did not place in the record a statement of what appellant would say if allowed to testify. Not having done so appellant is in no position now to ask for a reversal. See *Lincoln Reserve Life Insurance Company* v. *Morgan,* 126 Ark. 615, 191 S. W. 236; *Ward*

v. *Fort Smith Light & Traction Company,* 123 Ark. 548, 185 S. W. 1085; *Wallace* v. *Riales,* 218 Ark. 70, 234 S. W. 2d 199; and *Lynch* v. *Garnes,* 227 Ark. 767, 301 S. W. 2d 739.

Joint Accounts. Appellant ably and strenuously contends that the joint signature cards signed by her and the deceased (and delivered to the bank) operated to create joint accounts and that the proceeds of the accounts go to her as the survivor. To support that contention appellant points particularly to the decision of this Court in *Pye* v. *Higgason,* 210 Ark. 347, 195 S. W. 2d 632. The opinion in that case deals with a joint bank account and construes the meaning of Pope's Digest, Section 727a, (the same as Ark. Stats. § 67-521). This section, in all portions material here, reads:

"*When a deposit shall have been made by a person in the name of such depositor and another person* and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the person so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them; *and such payment* and the receipt or acquittance of the one to whom such payment is made *shall be a valid and sufficient release and discharge to said bank . . .*" (Emphasis Supplied).

Appellee takes the position here, and the trial court held, that Ark. Stats. § 67-521 should be considered together with the testimony, facts and circumstances disclosed by the record in a case of this kind to arrive at the intent of the depositor. Although, we must admit, the *Pye* case, *supra,* is susceptible of the interpretation placed on it by appellant yet we think the weight of our decisions supports the view of appellee and the trial court. We shall now examine some of these cases.

In *Black* v. *Black,* 199 Ark. 609, 135 S. W. 2d 837, this Court had occasion to consider a "joint account" as affected by § 727a of Pope's Digest (now Ark. Stats. § 67-521). There the Court gave the money to the widow (the survivor) but only because they were husband and wife and not because of the effect of the statute. Among other things the Court said:

"While we think and hold that the widow has title to the bank deposit as surviving tenant by the entirety we do not ascribe her title to this section of the statute. It will be observed that the application of this statute is not limited to deposits by husband and wife, but applies to joint deposits of any two persons, and was, we think, passed for the *protection of the bank* in which the deposit was made. It permits the bank to pay out the deposit in accordance with the *apparent intent* of the depositors, and protects the bank in doing so; . . . *The statute effects no investiture of title as between the depositors themselves* but only relieves the bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved". (Emphasis Supplied).

This Court again discusses Ark. Stats. § 67-521 in connection with a joint account in *Powell* v. *Powell,* 222 Ark. 918, 263 S. W. 2d 708, and there weighed the evidence bearing on intent. At one place the Court said: "Collateral facts tending to show *intent* are these: (Setting out in detail those facts)". Again it was said: "There is abundant evidence that either before or shortly after the last will was destroyed by Powell he stated that his *intentions* were to have all of the children share in the estate". (Emphasis Supplied). In *Vincent, Administratrix* v. *Vincent,* 224 Ark. 449, 274 S. W. 2d 772, this Court once more approved the introduction of testimony to show the *intent* of a depositor in creating a joint account. It was there said: "Here there is an affirmative finding that Vincent knew what he was doing; that he executed the card for the

purpose of creating the joint tenancy, with survivorship, and if his purpose had been otherwise there was ample opportunity to express a contrary view, or pursue a different course". In *Tesch* v. *Miller,* 227 Ark. 74, 296 S. W. 2d 392, a joint bank account was created with right of survivorship. The trial court held, under Ark. Stats. § 67-521, the money passed to the survivor. On appeal this Court (at Page 77 of the Arkansas Reports) quoted at great length from the testimony to show the *intent* of the depositor.

Referring back to § 67-521, heretofore copied, the first two lines appear to indicate a situation where a depositor creates a joint account with someone else and not to a situation where a depositor places money in a bank in his own name and later permits the name of another be added to the account. We believe this difference is significant from practical standpoint. In the first instance there can be less doubt as to the intent of the depositor than there is in the latter instance. We think that it is a matter of common knowledge that most people have confidence in the officers of a bank and that few people take the time to read the "fine print" written on the back of a signature card. In the case under consideration it would have indeed been difficult for the deceased to have read and understood the exceedingly "fine print" on the back of the cards she signed. The record shows that she did not at any time go to the bank or talk with any of the officers of the bank but merely signed the cards that were presented to her. We mention these things because we think they are the basis for the reason why the Court should look into the intent of the signers of a signature card.

As intimated above we think it is significant here that the joint account was not originally created as such. This also seems to be the view expressed in our former decisions. In the *Powell* case, *supra,* the Court in this connection said: "Here the deposit was not originally *made* by Powell in his and another's name, but assuming, without deciding, that unrestricted directions to the

bank to permit designated persons to check against the balance and to take the remainder following the depositor's death meet the statutory requirements . . ." In *Harbour* v. *Harbour*, 207 Ark. 551, 181 S. W. 2d 805, the Court among other things said: "The Arkansas statute on 'joint accounts' is § 727a of Pope's Digest, and it is predicated on the fact that *the deposit shall be made* 'in the name of such depositor and other person' ". (Emphasis Supplied).

Applying the "intent" rule to the case under consideration we think the trial court must be affirmed. It would unduly lengthen this opinion to set out in detail all the testimony bearing on the intent of Mrs. Witten. Suffice to point out the following. [a] Mrs. Witten had previously executed a will by which she left this property to her younger niece, Ida Jo; [b] She explained why she wanted Ida Jo to have the money—the reason was that Ida Jo was still in school and needed help; [c] She had promised Ida Jo's father (now deceased) that she would look after and take care of Ida Jo; and [d] The lack of any showing that Mrs. Witten read or understood the very small print on the back of the signature cards, or ever gave any directions to any employees of the banks. In view of all of these things we cannot say that the Chancellor's finding that Mrs. Witten did not intend to give the bank accounts to appellant is against the weight of the testimony. We point out also that in any event (and regardless of the intention of Mrs. Witten) the Chancellor's finding must be affirmed in regard to the $2,159.59 Savings Account No. 4931 in the Texarkana National Bank, because there is no language on the signature card creating a joint account with the right of survivorship.

It follows from what we have stated above that the decree of the trial court must be, and it is hereby, affirmed.

Affirmed.

ROBINSON, MCFADDIN, GEORGE ROSE SMITH, JJ., dissent.

MITCHELL *v.* MITCHELL.

5-2086 333 S. W. 2d 741

Opinion delivered April 4, 1960.

[redacted]

Herrn Northcutt, for appellant.

Murphy & Arnold, Oscar Ellis, for appellee.

PAUL WARD, Associate Justice. This litigation is an effort on the part of appellants (heirs of N. W. Mitchell) to cancel a deed which N. W. (Nathe) Mitchell executed to his son, conveying 160 acres of land in Fulton County, Arkansas. The trial court refused to cancel the deed and appellants prosecute this appeal.

N. W. Mitchell had lived for many years on his 160-acre farm in Fulton County, where, apparently, his oldest son Vergal Mitchell (by his first wife) was born and reared to manhood. After the death of his first wife Mitchell married again and of that union a son, Frank Mitchell, was born—his last wife having died in 1951. It also appears that Vergal Mitchell left Arkansas, married and established a home in Earlsboro, Oklahoma, and that sometime thereafter his half brother, Frank Mitchell, became a resident of Michigan. After Nathe Mitchell's wife died in June of 1951 it appears that he decided to deed his farm to his son, Vergal Mitchell, on condition that his son take care of him the remainder of his life. The deed was executed on March 12, 1952, and soon thereafter Nathe Mitchell went to

live with his son, Vergal, in Oklahoma where he resided for a total of some ten to fifteen months. However, between the time that Nathe Mitchell went to Vergal's home in Oklahoma and the time of his death in January of 1954 he made numerous trips back to his old homestead in Fulton County.

The Complaint was filed by appellant, Frank Mitchell and three other people who apparently were all of the heirs (except Vergal Mitchell) of N. W. Mitchell, against the defendant Vergal C. Mitchell (the son of N. W. Mitchell by his first wife). In substance the Complaint states: On the 12th day of March 1952 N. W. Mitchell by Warranty Deed conveyed to the defendant, Vergal Mitchell, the subject lands in Fulton County; the consideration for said deed was "that the defendant should provide care for the deceased for the remainder of his life, that the defendant was to furnish food, and medical and doctor's care also for that time"; that defendant failed to comply with the consideration expressed in the deed (a copy being attached); that at the time of the execution of the deed "the defendant exercised considerable influence and had the trust of said N. W. Mitchell and occupied a favorable position in his confidence"; that at the time of the execution of the deed the said N. W. Mitchell was of such advanced age, mentally and physically impaired, that he was incapable of transacting business and executing the deed; and that the said N. W. Mitchell was subjected to duress, force and threat by the defendant. The prayer was that the deed be cancelled and that the defendant be required to account for all rents derived from the land. After several motions and other pleadings were filed and disposed of the defendant filed a general denial.

After the pleadings were made up Vergal C. Mitchell died and on motion of appellants the widow and children of Vergal Mitchell were substituted as defendants and are the appellees in this appeal.

Appellants in their Designation of the Record and Points to be Relied Upon on this appeal included this

statement: "Plaintiffs (appellants) are relying upon the following point: 'that the defendant, Vergal Mitchell, deceased, failed to comply to the consideration expressed in the deed' ". Appellants, in urging this Court to reverse the trial court rely upon two points which as we understand them are as follows: (1) That the deed was fraudulently procured by Vergal Mitchell, and, (2) Vergal Mitchell did not discharge the obligations imposed upon him by the deed.

Before discussing the testimony it is first in order to determine just what issues are presented by this appeal.

Appellees' contention, as we understand it, is that appellants (as the heirs of N. W. Mitchell) cannot maintain this action on the basis that Vergal Mitchell did not live up to his implied promise to take care of N. W. Mitchell during his lifetime. In support of this contention they rely upon a statement made by this Court in *Cannon* v. *Owens,* 224 Ark. 614, 275 S. W. 2d 445. This is the statement: "It is true when a promise of future support is made in good faith, the cause of action for its breach is personal to the promisee and cannot be asserted by his heirs", citing *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98 and *Jeffery* v. *Patton,* 182 Ark. 449, 31 S. W. 2d 738. This contention must fail in this case, however, because the deed in question is not based upon a promise by the Grantee (Vergal Mitchell) to support the Grantor during his lifetime, but the duty to support N. W. Mitchell during his lifetime is a condition upon which the deed was executed. The deed in question is a regular Warranty Deed. The Grantor was N. W. Mitchell, a single man, and the consideration was $1.00 and other considerations. The Grantee was Vergal C. Mitchell. After the description of the land there appears the following: "This deed is made on the condition that the GRANTEE herein is to provide and care for the GRANTOR herein during the remainder of his life, furnishing food, clothing, medical and doctor's care". In the *Cannon* case, *supra,* the opinion states: "That the appellants were named as remaindermen in return for

their *promise* to support Mrs. Vannatter for the rest of her life . . ." (Emphasis Supplied). It appears, therefore, in the *Cannon* case the deed was based on a promise and not a condition. In the *Priest* case, *supra,* there is this statement: "If their father had made the grant in *consideration* of his own support, he could, upon a proper showing, have had the deed cancelled for a failure of such consideration; and if it had been made on such *condition,* he or they, his *heirs,* upon the condition broken, could have set it aside, but the grantor did not think it necessary to convey the property upon condition . . ." (Emphasis Supplied). To the same effect is the holding in the *Jeffery* case, *supra,* which is clearly shown by the following statement in the opinion: "If the consideration for the deeds was an undertaking on the part of the grantees to support and maintain the grantor, their father, for the remainder of his life and there was a failure on their part to comply with the undertaking, the grantor himself could have sued at law for the amount of the consideration after it became due, or treated the contract as void and brought suit in equity to cancel and set it aside for failure of consideration. If the conveyances had been made on such *conditions,* he or his heirs upon the condition broken could have set it aside". (Emphasis Supplied). We agree, therefore, with appellants that they (as heirs of N. W. Mitchell) would have a right to set the deed aside upon showing that the conditions of the deed were not complied with. We point out also, as is conceded by appellees, that appellants would have a right to set the deed aside upon showing that it was procured by fraud on the part of Vergal Mitchell, and, further, that any failure on the part of Vergal Mitchell to comply with the conditions of the deed might be considered as some evidence of fraud. See the opinion in the *Cannon* case, *supra.*

The appellants alleged in their petition, as heretofore pointed out, that Vergal Mitchell secured the deed from his father by the exercise of undue influence at a time when his father was mentally and physically

impaired. We will not discuss that ground for reversal separately because there is little if any evidence to support it and also because appellants appear to have waived it in their argument.

After a hearing upon the testimony produced by both sides the Trial Judge found that the preponderance of the evidence shows that Vergal Mitchell did not practice any fraud upon his father in the procurement of the deed and also that the preponderance of the evidence shows that there was no failure of consideration. Our analysis of the testimony as hereafter summarized leads us to agree with the findings of the Chancellor.

N. W. Mitchell's children all moved away and left him and he lived alone after the death of his second wife in 1951. In 1926 Vergal went to Earlsboro, Oklahoma, where he and his family resided until his death, and his half brother, Frank Mitchell, became a resident of Michigan. Some four months after the death of his second wife N. W. Mitchell (sometimes referred to as "Nathe") was taken by Vergal to his home in Oklahoma where he remained until some time in February of 1952 when he returned home. At that time Nathe was approximately 82 years of age. There were approximately 25 acres of land in cultivation on the farm which was probably worth $3,000.00 or $4,000.00. On or about March 11th Vergal, being informed that his father wanted to return to Earlsboro, came to Arkansas to get him. On the 12th day of March Nathe told his nephew that he was going to make Vergal a deed to the old home place, stating that he had rather live on the old home place but he could not ask Vergal to quit his job and come to Arkansas. Nathe also stated "It looks like there's not anybody else going to take care of me from now on . . ." Pursuant to that decision Nathe had his nephew to take Vergal and himself to Salem for the purpose of making the deed, which was drawn up and executed in the office of one Orval Benton, an abstracter and former County Treasurer and State Representative of Fulton County. Mr. Oscar Ellis, a long time friend and often an attorney for Nathe, was present and dic-

tated much of the language that was used in the deed. After the deed was executed and recorded the same day all parties returned to Nathe's home place and within a few days thereafter Vergal took his father to his home in Earlsboro, Oklahoma. From the day of the execution of the deed until Nathe's death in January of 1954 Nathe actually spent approximately two-thirds of his time with Vergal in his home at Earlsboro, Oklahoma. Several times Nathe would make trips back to the old home place, stay a while and then return to Earlsboro. On each of these occasions he was transported both ways by Vergal at Vergal's expense. Not only is there no intimation in the record that Vergal or his family in any way mistreated his father but the uncontradicted testimony is that Nathe was well pleased with the treatment he had received. He once stated that they treated him too good. There is nothing in the record to show Vergal and his family were not ready and willing to keep Nathe in their home at all times and to look after him in a proper manner. There is no showing that any of Nathe's relatives did anything for him in a material way except what was done by his son, Vergal.

The only one of the appellants to testify was Frank Mitchell, the half brother of Vergal Mitchell. In substance he stated that on one or more occasions his father paid his way back to the old home place and on one occasion his father stated that Vergal was "sassing" him and that he did not want to live with Vergal but wanted to live at the old home place and that it was costing him too much to live at Vergal's house. However, the testimony of the other witnesses and the statements made by Nathe himself do not corroborate Frank Mitchell's testimony.

There is nothing in the record which indicates in any way that Vergal Mitchell practiced any fraud upon his father in the procurement of the deed. On the whole we are unable to say that the findings of the Chancellor

in favor of appellees are against the weight of the evidence.

Affirmed.

McFaddin, J., concurs.

Johnson, J., dissents.

City of Little Rock *v.* Moreland.

5-1997 334 S. W. 2d 229

Opinion delivered April 4, 1960.

[Rehearing denied May 9, 1960]

Spitzberg, Bonner, Mitchell & Hays, for appellant.

John W. Bailey and *Moses, McClellan, Arnold, Owen & McDermott; By: Wayne W. Owen,* for appellee.

Sam Robinson, Associate Justice. In building a reservoir in connection with the city water supply system, the City of Little Rock acquired 15,000 acres of land west of the City. Of the property sought to be condemned, 1,300 acres belonged to the appellees, hereinafter referred to as the Morelands. To acquire the 1,300 acres the City filed condemnation proceedings. Upon a trial of the issues the City was allowed to condemn only 1,165.1 acres of the Moreland property, for which the owners were given judgment in the sum of $211,425,

which amounts to about $181 per acre. Both sides have appealed. The City contends that the amount of the judgment is excessive and that the entire 1,300 acres is needed for the reservoir. The Morelands contend that the amount of the judgment is not sufficient to pay full value for the land; that the property is worth at least $775,000 and, further, that the City does not need for the reservoir the 134 acres it seeks in addition to the 1,165.1 which the trial court held the City could take. On appeal there are three issues. First, the correct value of the land taken. Second, the date that should be considered in fixing the valuation. Third, the question of whether the City should be allowed to condemn the entire 1,300 acres, that is, the 134 acres in addition to the 1,165.1 allowed by the trial court.

Before any suit was filed, the parties entered into an agreement that, pending negotiations regarding the value of the land, the City could take possession of the property up to an elevation of 290 feet above sea level. It was further agreed that the City would file condemnation proceedings within thirty days after the time the Morelands might notify the City to file suit. The parties were unable to agree on the price, and the Morelands notified the City to commence the action within thirty days, as agreed upon. The City failed, however, to file the suit within the prescribed time, and the Morelands filed suit in the circuit court for damages. The City answered and cross complained, asking for condemnation of the 1,300 acres. The case was transferred to chancery court. Upon a trial there, the City was allowed to take only 1,165.1 acres and the Morelands were given judgment for $211,425. The above mentioned agreement between the parties whereby the City was given permission to take the land up to the 290 foot elevation, pending negotiations, contained a provision that in determining the valuation of the land such value should be the market value as of September 16, 1956.

The Moreland family has owned the property involved for many years, the present owners having inherited it. Prior to the time the City decided to con-

struct a reservoir on the property, the Morelands had suspected that the lands contained some kind of minerals or earth that might be of exceptional value. After the suit was filed, the Morelands obtained the services of a geologist and began a systematic examination of the land, including the subsoil, to a depth of about 45 feet in places. As the result of such tests, it was determined that a large part of the property consisted of what is known as bloating clay, which has considerable more value than ordinary dirt. The clay is used in making light-weight aggregate, which in turn is used in manufacturing concrete blocks and other concrete products.

The City contends that even assuming the bloating clay has an exceptional value, such value should not be considered in arriving at the value of the land because on September 16, 1956, the time fixed for the valuation, it had not been definitely established that the land contained bloating clay. The City points out that this Court has held many times that the date of the taking is the date to be considered in determining the value of the land. Actually, the land had just as much value at the time of the taking as it has had at any time since that date. Nothing has changed to give it any different valuation. True, facts have been developed since the taking that show the land's true value. But the value was there at the time of the taking, and the facts were fully developed before any valuation was agreed upon and before any court fixed such valuation. It would be a harsh rule to say that the State, or some subdivision thereof, or some private corporation, could take private property containing a deposit of diamonds and pay therefor the price of land having very little value because at the very moment of the taking it was not known that the diamonds were there. This problem has been before the courts three times. In each instance it was held, and we think correctly so, that the property owner could recover the actual value of the land. *City of Los Angeles* v. *Pomeroy,* 124 Cal. 597, 57 Pac. 585; *Tyson Creek Railroad Co.* v. *Empire Mill Co.,* 31 Idaho 580, 174 Pac. 1004; In re *Board of Water Supply,* 205 N. Y. S. 237.

For its next point the City contends that the land has a market value from a low of $43,831 to a high of $55,250, and the fact that the land contains bloating clay gives it no added value whatever. On the other hand, the Morelands contend that the bloating clay makes the property worth over a million dollars. Both sides have tried this case in a most able manner and it is hard to see how either side could have done anything that was not done in developing its side of the case. The record and exhibits are voluminous; it would be wholly impractical and would extend this opinion to an unreasonable length to here abstract all the evidence. The Morelands produced evidence to the effect that the land contains bloating clay, which makes it worth somewhere between $775,000 and $1,735,320. The City produced direct and circumstantial evidence to the effect that the clay adds no value to the land.

The evidence is rather conclusive that bloating clay is highly desirable in the manufacture of light-weight aggregate. The evidence produced by the Morelands shows that there is no plant in Pulaski County producing lightweight aggregate; that the material sells for $4.50 per ton at a plant at Memphis and the same price at Baton Rouge, Louisiana; that the freight on the material from those points to Little Rock just about doubles that price; it sells for $8.00 at Little Rock. And the evidence further tends to prove that it would be entirely practical and economical to build a plant in Pulaski County to use the Moreland clay in the manufacture of light-weight aggregate. On the other hand, the City produced evidence to the effect that a large part of the Moreland land is covered with scrub timber, which would have to be cleared; that lime concretions are found in the deposit to an average thickness of 11 feet; that all of the clay below the lime concretion zone is below the water table in a river bottom, with a large watershed upstream; that beneath the clay deposit the soil is such that it permits free movement of underground water; that the deposit is subject to periodic flooding by the Arkansas River: that Pulaski County contains enormous reserves of plastic clays, some of which have bloating qualities;

and that the Moreland clay is 20 to 25 miles from Little Rock. The City argues that these asserted facts render the Moreland bloating clay worthless as such, and, further, that by mixing coal with other plastic clays and then firing the mixture at a very high degree of heat such clays will bloat. But, on the other hand, it does not appear that the fact that part of the Moreland property overflows occasionally will seriously interfere with obtaining the clay. And, moreover, concrete blocks made of light-weight aggregate from the Moreland clay were manufactured and introduced in evidence. They show no signs of being affected by lime. There is evidence that there are deposits of the clay on Palarm Creek and White Oak Bayou in Pulaski County, but it is not shown whether such deposits are available for the manufacture of light-weight aggregate. According to the undisputed evidence, light-weight aggregate is used extensively in the building business. But the City argues that the available market in Pulaski County would not justify the development of the Moreland clay. There is, however, evidence to the contrary. Moreover, it does not appear that Little Rock would be the only available market for light-weight aggregate produced in Pulaski County. If the material produced in Baton Rouge and Memphis can be sold in Little Rock, the inference is that the same material produced here could be sold at a distance from this locality. There is certainly no evidence to the contrary.

With regard to other bloating clay that may be found in the county, it will be recalled that the Morelands were allowed about $181 per acre for their land. According to the undisputed evidence, bloating clay is a sedimentary deposit found in alluvial lands. Usually alluvial lands are the best farm lands, and there is no substantial evidence in the record that alluvial lands in Pulaski County that might contain the sedimentary deposit known as bloating clay can be purchased for as little as $181 per acre. It is a matter of common knowledge that much of the alluvial land in this State made by deposits from the Arkansas and Mississippi Rivers sells for a much higher price. All in all, we cannot say

the amount of the judgment is contrary to a preponderance of the evidence.

Next we come to the question of whether the City should be allowed to condemn the 134 acres in addition to the 1,165.1 acres allowed by the chancery court. We think the City has a right to condemn the entire 1,300 acres. The Morelands contend that the 134 acres in question are not absolutely necessary in establishing the reservoir and that according to such cases as *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58, the land must be absolutely necessary to the project before condemnation will be decreed. Here the preponderance of the evidence proves that the City needs this 134 acres for three reasons: First, it will enable the City to run straight lines in establishing the boundary of the property; this will greatly facilitate the identification of the boundary line and the legal description. Second, if the boundary follows a contour line it would require the services of an engineer to tell if anyone were trespassing. Third, it is very important to maintain sanitary conditions in the watershed of the reservoir insofar as it is possible to do so. All the 1,300 acres are in the watershed except about 9 acres that are required to square up some corners.

In the circumstances we believe it can fairly be said that it is absolutely necessary for the City to have the entire 1,300 acres. Of course, the value of the 134 acres was not included in the judgment rendered. There is no bloating clay under the 134 acres and according to the preponderance of the evidence this particular 134 acres is worth $4,725. The decree of the chancery court must be amended to permit the City to condemn the 134 acres in addition to the 1,165.1, and the amount of the judgment must be increased by the sum of $4,725, making a total judgment of $216,150. As modified the decree is affirmed.

George Rose Smith, J., dissenting. The situation in this case is rather like that considered in *Hoy* v. *Kansas Turnpike Authority,* 184 Kan. 70, 334 P. 2d 315. That was an eminent domain proceeding involving land that con-

tained extensive deposits of stone suitable for commercial use. The court observed, however, that the eastern third of the state was underlaid with rock, and in view of this fact the opinion stressed the point that the abstract value of the stone was not to be considered independently and without regard to its effect upon the market value of the land. In the language of the court: "While the owner should be given by way of compensation for his land its fair market value for any use for which it has a commercial value in the immediate present or which may reasonably be anticipated in the near future, the uses which may be considered *must be so reasonably probable as to have an effect on the present market value of the land.*"

In the case at bar the greater part of the Morelands' proof was directed toward showing (a) that their land contains deposits of commercially usable bloating clay and (b) the extent of those deposits. This presents the basic factual situation of the *Hoy* case, that the land contains a mineral for which there is a market. The Morelands had the burden of carrying their proof one step farther, by showing to what extent the market value of their land was enhanced by the presence of the clay. It is on this point that I think the weight of the evidence to be decidedly in favor of the appellant.

On this issue the testimony offered by the landowners lacks persuasiveness. Their principal witnesses were geologists. These men were qualified to test the clay and determine its bloating characteristics, but they had no real knowledge of matters that would be considered by a prospective purchaser of the Moreland deposits, such as the cost of building a light-weight aggregate plant, fuel costs. transportation costs, the actual demand for lightweight aggregate in the Little Rock area, etc. Some of these witnesses valued the Moreland clay at more than a million dollars; but their estimates were naked figures, conjured up without supporting reasons, and might equally well have been either multiplied or divided by ten.

The city met the issue squarely and introduced testimony that I find convincing. Among its witnesses were men with practical experience in the business of making

lightweight aggregate material and in the construction of plants for that purpose. The witness Willson, for example, is an engineering officer for Texas Industries, Inc., which has plants in eight states and is the world's largest producer of one type of lightweight aggregate. Willson was intimately familiar with the problems involved in constructing and operating such plants; he had actually designed and assisted in the construction of three of them. He and other equally well qualified witnesses, all wholly disinterested, had made a careful survey of the many factors affecting the market value of the appellees' deposits of bloating clay. It was their informed opinion, supported by cogent reasons based upon practical knowledge and experience in the industry, that the existence of the clay did not substantially increase the market value of the Moreland lands.

The testimony is too extensive to be detailed, but one point established by the city may be mentioned. According to the undisputed testimony of Willson and other witnesses there are two methods of producing lightweight aggregate. In one, bloating clay is subjected to extreme heat, which causes the clay to expand and become a light, porous material. In the other, pulverized coal is first mixed with a non-bloating plastic clay. The coal is then burned away, leaving a light, porous material. The final product of the two methods is exactly the same. Neither process has any particular advantage over the other; in fact, Texas Industries, Inc., uses one process at some of its plants and the other process at other plants.

Although the known deposits of bloating clay in Arkansas are few there is an abundance of plastic clay suitable for the production of lightweight aggregate. Indeed, this plastic clay is about as common as the stone in the *Hoy* case. I find no reason to doubt the conclusion of the city's expert witnesses, that a company erecting a lightweight aggregate plant in the Little Rock area would not pay an inflated price for the Moreland bloating clay when unlimited quantities of the equally satisfactory plastic clay could be obtained for the price of the land valued for agricultural purposes. This is a chancery case, and in my

opinion the award is contrary to the preponderance of the evidence. I therefore dissent.

SIESTA CAFE *v.* STATE.

5-2069 333 S. W. 2d 722

Opinion delivered April 4, 1960.

C. Floyd Huff, Jr., for appellant.

Bruce Bennett, Atty. General, By: *Clyde Calliotte,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. This is a civil action brought by the Prosecuting Attorney to have the appellant's place of business declared to be a public nuisance. Ark. Stats. (1947) § 34-101 *et seq.* The trial court found the place to be a nuisance and entered an order directing that it be closed until further orders of that court and that appellant be restrained and enjoined from such further operation of said place or the maintenance of the nuisances found to exist; and such judgment is challenged by this appeal.

The establishment in question, known as the "Siesta Cafe", is situated on the Arkadelphia Highway approximately six miles from Hot Springs in a thickly populated area near Lake Hamilton, and consists of a beer tavern, dance hall, motel comprised of 3 or 4 cabins, and adjoining living quarters occupied by appellant and her husband. It is shown that disturbances of the peace occurred in said place, that gambling was carried on, that frequent illegal sales of intoxicating liquor were made, that illegal sales of beer to minors were made, and that patrons were solicited by female employees or habitues who proposed to engage in prostitution. The place was closed under a temporary order on the 10th day of March 1959. No further action was taken upon the matter until the 8th day of June 1959 when appellant filed a petition requesting a hearing and praying that the court set aside its order padlocking the establishment; and that appellant be allowed to reopen and conduct her business in a lawful and peaceful manner. Insofar as the record shows, no action was had upon this petition. The establishment remained padlocked in the meantime. On the 2nd day of September, appellant, through other counsel, filed an additional motion requesting a hearing be held on the petition filed on June 8th. Hearing was had on September 9th and at the conclusion thereof the court entered an order making the temporary injunction permanent, and further denied to appellant the right to use the property for any purpose and ordered that the premises be kept under padlock for an indefinite period of time. From such order comes this appeal.

Appellant urges that the trial court erred: (1) in stating that the appellant had the burden of introducing evidence in order to overcome the previous temporary injunction; and (2) in allowing the introduction into evidence of the criminal record of the husband of the appellant.

As to the first point, when the appellant refused to go forward with any proof, the State thereupon proceeded to introduce an abundance of testimony disclos-

ing the illegal acts set out above, so the statement of the court did not harm the appellant. Section 34-102 confers jurisdiction of this case upon Chancery and Circuit Courts and Section 34-105 applies Chancery rules of procedure; and this is true whether the action is before the Chancellor or Circuit Judge. It follows, therefore, that since the court did hear the evidence under Chancery rules, and since the State did offer ample proof to support the order of the court, whatever error the court might have made as to the burden of proof was harmless. *Alston* v. *State,* 216 Ark. 604, 226 S. W. 2d 988.

As to the admissibility of the criminal record of the husband of the appellant: the Circuit Judge admitted this record because appellant's husband, D. C. Peterson, had joined with his wife in the Motion for Hearing, and because there was evidence that he also assisted in the operation of the cafe and exercised other acts of ownership. See: Section 34-119. Even assuming it was inadmissible in the form and manner indicated in this record, there was an abundance of other substantial testimony presented on behalf of the State to sustain the findings of the court, and this being treated as a chancery case we will exclude such testimony found to be incompetent. There remains an abundance of evidence to sustain the trial court's finding as to the acts of nuisance. *Walsh* v. *Fairhead, Executrix,* 215 Ark. 218, 219 S. W. 2d 941 (1949).

The third point urged by appellant is that the court erred in its final order by denying appellant the right to operate her cafe premises in a legitimate and lawful manner and by further ordering that her place of business be kept padlocked for an indefinite period of time. After a careful review of the record, we conclude that the court's order is too broad. The statute contemplates that the initial order shall merely abate the nuisance. Ark. Stats. § 34-117. The more severe course of closing the establishment for a year is authorized only in a contempt proceedings for a violation of the final injunctive order. Ark. Stats. § 34-118; *Futrell* v. *State,* 207

Ark. 452, 181 S. W. 2d 680; *State ex rel Attorney General* v. *Williams,* 222 Ark. 966, 264 S. W. 2d 417; *Lawson* v. *State,* 226 Ark. 170, 288 S. W. 2d 585. Therefore, the order will be modified in accordance with the *Williams* case to enjoin appellants from using the property or permitting it to be used as a public nuisance.

Affirmed as modified.

[redacted]